

Mobile advertising and messaging: litigation under the TCPA

What was considered an inexpensive marketing campaign is quickly becoming an expensive piece of 'dough' for Papa John's. The company faced substantial litigation recently for allegedly sending out unsolicited text messages advertising its products to consumers in violation of the federal Telephone Consumer Protection Act ('TCPA').

Papa John's recently settled a class action suit in the Western District of Washington state for \$16.5 million. In fact, the company could have seen its exposure from the estimated 220,000-member class action reach over \$250 million. However, it is likely that Papa John's will incur further litigation expenses, as there are still several other suits pending, including a case in Virginia.

Background

Over the past few years, companies seeking to reach the estimated 326 million users of US mobile phones have adopted text message campaigns, marketing a variety of promotional deals and coupons along the way. Other companies have utilised text messages to remind consumers about upcoming appointments and service visits. While the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, was originally enacted to protect consumers from automated telemarketing via phone and fax, the TCPA includes a specific provision banning (with certain exceptions) any type of automated call to mobile phones, even for non-commercial or informational purposes.

Additionally, by categorising text messages as 'calls,' several courts and the Federal Communications Commission (FCC) have read the use of automated text message marketing into the statute. Thus, this 1991-era statute has broad application to today's mobile commerce marketplace.

Moreover, the TCPA provides for \$500 in damages for each violation, which can be 'trebled' if a court deems the actions 'willful.' Since damages are provided for every message sent to each consumer, exposure can multiply very quickly. Because there are statutory damages, a recipient does not have to prove individual damages.

Whereas for many years the TCPA lawsuits focused on fax advertising and telemarketing, now there are dozens of TCPA text messaging cases.

The use of mass text message marketing has dramatically increased in recent years and it is easy to see why - text marketing is cheap, direct, and gets a customer's attention. But while most customers simply view it as an annoyance, others have filed suit, seeing the potential exposure from class actions skyrocket. As a result, plaintiffs' attorneys have been busy filing numerous TCPA suits related to mass text message marketing campaigns. In fact, over the last few years, similar cases have been filed against companies like NASCAR, Jiffy Lube, and the Buffalo Bills football team.

TCPA exceptions

There are a number of important exceptions that advertisers should be aware of in order to remain compliant with the TCPA. The biggest of which is whether the consumer has given the advertiser the proper consent necessary to send the text messages out. Currently, the TCPA only requires 'prior express consent' from the customer for calls (which includes text messages) to mobile phones, but is silent on what actually constitutes prior express consent. For instance, the courts have differed in their analyses of 1) whether merely providing a phone number to a business, without more, constitutes prior written consent, and 2) whether prior written consent should be gauged by the individual intent and circumstances when the customer provides a phone number.

Upcoming changes to consent requirements

Effective in October, the FCC will require companies to receive a

consumer's prior express written consent in order to send out automated text message advertisements. According to the FCC, a consumer's written consent must be signed and show that the consumer 1) received 'clear and conspicuous disclosure' that he or she will receive automated text messages, and 2) agrees to receive such messages at the phone number designated by the consumer. Furthermore, the written agreement cannot be made as a condition of purchasing a good or service. If a dispute about the consent arises, the advertiser has the burden to prove that it gave the consumer clear and conspicuous disclosure and that the consumer unambiguously consented to receive the text messages. It should be noted that while this ruling does not include purely informational text messages, such as crime alerts, service appointment confirmations, or school closing notifications, prior oral consent must still be given for mobile phones (however no consent is needed for wired residential lines). Of course, should an organisation wish to obtain written consent for an informational text message that is perfectly acceptable and (as a matter of compliance policy) would provide back-up evidence to support the consent.

The FCC has further concluded that 'written' consent from a customer can be obtained through a variety of methods, including email, online form, text message, telephone keypress, or a voice recording, in compliance with the federal 'E-Sign' law. Allowing these forms of written consent to be obtained electronically will not only facilitate the written consent requirement, but also encourage efficiency by greatly minimising the costs on businesses of acquiring and maintaining written

consent.

In addition, the FCC recently made a declaratory ruling that companies may send a one-time text message confirming a customer's opt-out request without violating the TCPA. This ruling was made in response to a request by a company (SoundBite Communications, Inc.) that, like many others, faced substantial litigation over similar opt-out confirmation messages. While many recent FCC rulings have not been seen as business-friendly, this common sense approach prevents a rash of potentially large class action suits. Moreover, this declaratory ruling is also consumer friendly, as these confirmations provide an important role by informing the consumer that the opt-out request was received and their request has been processed. Importantly, the company's message may only confirm the opt-out and cannot contain any further marketing information (or attempt to persuade the consumer to reconsider his or her opt-out). A federal court in California recently dismissed a case against the company RedBox based upon the FCC's interpretation of TCPA liability for opt-out texts and other supporting case law.

Recent developments

The potential exposure in cases like Papa John's has made the plaintiff's bar very busy pursuing similar TCPA claims. For example, the footwear company Steve Madden, Ltd. also recently settled a class action suit for up to \$10 million, based on claims that it sent out unsolicited text messages advertising various products and events to over 200,000 consumers. With claims like this, Steve Madden faced over \$100 million in exposure, a verdict that would have likely bankrupted the company.

While companies facing TCPA

suits must first fight the underlying claims by the plaintiff asserting liability for the unsolicited text messages, they are also often forced to battle for coverage by their insurers. Since many insurance policies preclude coverage for willful violations of penal statutes, defendants litigating TCPA claims could be left paying damages themselves.

Fortunately for defendants, the Illinois Supreme Court recently held that TCPA damages are in fact remedial and, therefore, insurable. On the other hand, other courts, including a Missouri Court of Appeals and the Colorado Supreme Court, have previously determined that TCPA damages are instead punitive in nature. Ultimately, coverage for these claims varies on a state-by-state basis.

Implications

While the Illinois Supreme Court's recent decision serves as a victory for companies defending against TCPA suits, individual coverage decisions still depend upon the specific language contained within the insurance contract. Advertisers thinking of using text message marketing should first consult their corporate liability insurance policy, including the choice of law provision.

Companies must also make sure that they receive the necessary consent from their customers before engaging in such marketing campaigns. Advertisers should be diligent in monitoring how they collect their customers' mobile and other phone numbers, what consent is provided, and how the marketing is actually conducted. Furthermore, customer consent records should be maintained for at least four years, which is the federal 'catch-all' statute of limitations used to bring a private TCPA claim. And of course,

companies should make sure that they accept and implement opt-out requests. An opt-out request would ordinarily 'cancel' the prior consent.

Given the rise in class actions and the potential exposure resulting from large-scale text message marketing campaigns, advertisers should be vigilant to make sure they comply with the TCPA. Considering the ever-changing environment for TCPA claims, companies engaging in mass text message marketing campaigns should carefully evaluate the risks and their own individual marketing plans.

Michelle W. Cohen Member and Certified Information Privacy Professional, US

Ifrah PLLC

Jacob Hamburger Summer Intern
Ifrah PLLC

JD Candidate, George Mason University
School of Law, May 2015

michelle@ifrahlaw.com
