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Mobile Marketing And The TCPA

Law360, New York (April 08, 2010) -- As any parent already knows, text messaging is an enormously popular mode of communication and is rapidly becoming more pervasive every day. In 2008, cell phone subscribers sent over a trillion text messages worldwide and, on average, 357 texts were sent compared to 204 phone calls per cellular phone subscriber on a monthly basis.

Fueled by rapid market adoption, coupled with the benefits of presenting custom-tailored services and offerings directly to consumers, companies have begun to implement mobile marketing campaigns with increasing frequency.

Those initial efforts are bearing fruit; recent studies indicate that consumers will read a text or short message service (SMS) 94 percent of the time and may respond to such a message as much as 23 percent of the time — as compared to a 1-3 percent response rate for more conventional marketing methods like direct mail, radio and television advertising. Moreover, interest in marketing via mobile devices will continue to increase as consumers across all demographics become more adept at using mobile technology.

Because the law often lags behind emerging technologies, mobile marketing has been a largely unregulated arena — although that appears to be changing. Congress enacted The Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq., in 1991, well before the advent of text messaging. The TCPA was primarily designed to prohibit automated voice calls from telemarketers (so-called robocalls).

One provision of the TCPA specifically addresses marketing calls to cellular phones, providing that it is unlawful for any person to make any call using any automatic telephone dialing system to any telephone number assigned to a cellular telephone service (or any service for which the called party is charged for the call). The TCPA provides for damages of \$500 per violation or \$1,500 per violation if the defendant is shown to have willfully violated the statute.

Two federal courts have recently ruled that unsolicited text message ads may be actionable under this provision of the TCPA. In *Satterfield v. Simon & Schuster Inc.*, 569 F.3d 946 (9th Cir. 2009),

the Ninth Circuit ruled that unsolicited text messages sent to mobile phones by a retailer may constitute a "call" in violation of the TCPA. In so doing, the Satterfield court noted that the TCPA does not explicitly define the term call; rather, the TCPA defers to the interpretation provided by the Federal Communications Commission (the agency charged with interpreting TCPA).

According to its regulations, the FCC considers both voice calls and text calls to fall under the act. In finding that plaintiff had stated a claim for relief, the Satterfield court also considered the congressional purpose behind the TCPA; specifically, curbing the invasion of privacy from unsolicited telemarketing calls and concluded that prohibiting the transmission of unsolicited text messages furthers those governmental interests.[1]

In addition to the threshold question of the applicability of the TCPA to text messages, the Satterfield decision is important because it provides guidance on how courts will apply the prior express consent exemption to TCPA liability.

Under the TCPA, calls made (including texts) "with the prior express consent of the called party" are exempt and therefore permissible. In Satterfield, Simon & Shuster outsourced its promotional campaign for Stephen King's novel "Cell" to a mobile marketing company (Ipsh!) which obtained plaintiff's cell phone number from Mobile Information Access Company who, in turn, received her number when she became a registered user of Nextones.com in order to receive a free ring tone. The court noted that while plaintiff indicated that she would like to receive promotions from Nextones brands and affiliates, she had not consented to receipt of Simon & Shuster's promotional text message. Therefore, the text message was not exempt from TCPA liability.

Another recent decision, this time by a federal district judge in Chicago, further demonstrates that courts construe exemptions to TCPA liability narrowly. In *Abbas v. Selling Source LLC*, Judge Joan Gottschall thoroughly examined the purpose and intent of the TCPA and came to the same conclusion as the Satterfield court, that the TCPA prohibited the transmission of unsolicited text messages. Case No. 09-cv-3413, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009).

In her decision, Judge Gottschall rejected the defendant's arguments that plaintiff had not stated a claim because he was not charged for the unsolicited text message received and that the equipment used to send the subject text was not an "automated dialing system" (ATDS), as required by the TCPA.

In denying defendant's motion to dismiss the complaint, Judge Gottschall concluded that the fact that plaintiff was not charged for the text (due to his unlimited plan) was of no consequence because the TCPA was concerned with privacy issues in addition to cost-shifting, and that the complaint need only allege that the ATDS in question had the capacity to store numbers and

automatically dial them, not that such capacity was actually utilized in texting plaintiff.

Perhaps not surprisingly, these decisions have led to a spike in the number of class actions filed against retailers for utilizing mobile marketing campaigns. In recent months, putative class action lawsuits have been filed against several prominent companies, including Taco Bell (suit filed in Los Angeles over texts advertising "Nachos Bell Grande"), The Gap (suit filed in San Francisco over texts promoting a holiday sale at Old Navy), Burger King (suit filed in Miami over texts advertising its "Steakhouse Burger") and McDonalds (suit filed in Chicago over texts advertising "Monopoly" game promotion).

Faced with the prospect of class damages of between \$500 and \$1,500 per text, companies are often forced — should their attempt to get the suit thrown out prove unsuccessful — to settle. Furthermore, the Timberland Company recently settled an unsolicited text message class action lawsuit by creating a \$7 million settlement fund whereby claimants were paid \$150 for each offending text.[2]

Even more recently, attorneys for Simon & Schuster reached a settlement with plaintiffs in the Satterfield case. The deal calls for the creation of a \$10 million settlement fund whereby each claimant will be entitled to \$175 per text received or a pro rata share of the fund if the number of claimants exhausts the fund. Plaintiffs' lawyers will receive \$2.725 million (from the fund) for their service as class counsel and Simon & Schuster also agreed to pay \$250,000 as a cy pres award to certain unspecified organizations to be approved by the court.

Although mobile marketing should be an integral part of any effective marketing campaign, companies must be knowledgeable about the legal obstacles in this newly regulated area. First, content distributors and marketers need to be aware that courts take a narrow view of any consumer opt-in with respect to mobile marketing.

Unlike other aspects of the TCPA, no specific requirements exist for what kind of consent marketers must obtain to call a wireless device. Nonetheless, the burden of demonstrating consent unquestionably falls on marketers.

Marketers should be able to demonstrate that the consumer or business specifically consented to receive calls from the particular marketer at a certain number. Although obtaining written consent is the best option, taped oral consent may be another option.

In order to avoid TCPA liability for mobile marketing, solicitations must be closely related to the offers, content and future communications that a consumer elects to receive and the party sending those communications must have the authorization to do so.

Unlike other anti-spam laws, there is no existing business relationship exemption from liability for mobile marketers. Unless express consent can be established, then the consent exemption can not be relied upon.

Second, as with the requirement of express consent, the ATDS exemption to the TCPA will be construed narrowly in that if the complaint merely alleges that the defendant had the capacity to automatically store and dial numbers that will likely be sufficient for the case to proceed to costly discovery and class certification proceedings.

Mobile marketing is an incredibly effective way to reach consumers. Companies can achieve fantastic response rates and enjoy a solid return on investment from such campaigns, but they must be careful not neglect necessary steps to obtain consumers' prior consent to receive promotional texts.

In order to avoid the imposition of liability under the TCPA (not to mention the other burdens and expenses of facing a class action lawsuit), companies should thoroughly examine their mobile marketing campaigns and pay particular attention to obtaining users' consent to receive their promotional text messages.

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] In addition to the potential costs and annoyances attendant with uninvited text messages, those messages are often a source for "phishing attacks" by which scammers send fake messages that appear to come from a legitimate source, such as a bank or other financial institution, in order to attempt to deceive cellular phone users into revealing personal data.

[2] Although beyond the scope of this article, plaintiffs' lawyers have begun to file class action lawsuits on behalf of persons who received autodialed and prerecorded telephone advertisements on their mobile phones. For instance, a lawsuit was recently filed in the Northern District of Illinois alleging violations of the TCPA for persons who received a pre-recorded voice message advertising Papa John's "VIP" pizza special. *Martin v. PPP, Inc. & Fidelity Comm. Corp.*, Case No. 1:10-cv-140 (N.D. Ill. Jan. 11, 2010). In addition to damages of between \$500 and \$1,500 per call, plaintiff seeks an injunction permanently preventing defendants from making calls to cell phone using pre-recorded messages.