The Ninth Circuit Holds That Text Messages Are Subject to a Telemarketing Law

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The US Court of Appeals for the Ninth Circuit recently reversed a district court decision involving an advertising campaign in which Simon & Schuster sent text messages to consumers' mobile phones. A key issue in the case is whether a text message campaign can be subject to provisions of the Telephone Consumer Protection Act (the TCPA) that regulate "calls" made using an "automatic dialing telephone system." The Ninth Circuit remanded the case so that the district court could develop more facts. Thus, it is not clear whether Simon & Schuster's specific campaign was subject to the TCPA. It is clear, however, that the TCPA can apply to text message campaigns in general, depending, in part, on what technology is used to send the messages. Mobile marketers need to pay close attention to the Ninth Circuit's decision and tailor their campaigns accordingly.

The TCPA, "Calls," and "Automatic Telephone Dialing Systems"

The TCPA was enacted in 1991 amidst public frustration over various practices related to the telemarketing industry's use of equipment, often referred to as "auto-dialers," that could automatically and rapidly dial telephone numbers in order to allow telemarketers to make more sales calls. Accordingly, a key provision of the TCPA applies to "calls" that are made using an "automatic dialing telephone system." Specifically, 47 U.S.C. § 227(b)(1)(A) states that it shall be unlawful for any person:

> to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

An "automatic telephone dialing system" (or ATDS) is defined as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator, and (B) to dial such numbers."[1] Congress delegated authority to the Federal Communications Commission (FCC) to promulgate regulations to implement the TCPA's requirements, and the FCC's regulations contain similar language.[2]

Both the TCPA and the FCC's regulations make numerous references to "telephone calls," "telephone lines," "automatic telephone dialing systems," and other similar terms that invoke images of telemarketers calling consumers and talking to them over the phone. Notably, though, neither the TCPA nor the FCC's regulations make any references to a Short Message Service (SMS), text messages, or similar technology. Indeed, these technologies did not become common until many years after the TCPA was passed.

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Simon & Schuster's Marketing Campaign and District Court Decision

In December 2004, Laci Satterfield visited *www.nextones.com* to download a free ring tone for the mobile phone used by her son, who was a minor. In order to receive the ring tone, Satterfield had to complete a registration form and become a Nextones member. In addition to requesting certain personal information, the form included a check box that appeared next to the following disclosure: "Yes! I would like to receive promotions from Nextones affiliates and brands. Please note, that by declining you may not be eligible for our FREE content. By checking Submit, you agree that you have read and agreed to the Terms and Conditions." The Terms and Conditions stated that members agreed that Nextones and its affiliates might use a member's mobile phone number in connection with any text message offering. Satterfield checked the box adjacent to the "Yes!," clicked on the submit button, and subsequently downloaded the ring tone.

Shortly after midnight on January 18, 2006, Satterfield's son received a text message on his phone stating: "The next call you take may be your last . . . Join the Stephen King VIP Mobile Club at www.cellthebook.com. RplySTOP2OptOut. PwdbyNexton." The text message, which reportedly frightened Satterfield's son, was sent by Simon & Schuster as part of a promotional campaign for the Steven King novel *Cell*. Simon & Schuster had outsourced the promotional campaign to ipsh!net Inc. To implement the campaign, ipsh!net obtained a list of 100,000 phone numbers from Nextones' agent, imported the list into a database, entered information for the messages into the database, and then sent the file to mBlox, Inc., an aggregator. mBlox handled the actual transmission of the text messages to the wireless carriers.

After receiving the text message, Satterfield filed a class action suit alleging that Simon & Schuster had violated the TCPA by using an ATDS to send unsolicited text messages to her mobile phone and to the cell phones of other class members. Simon & Schuster moved for summary judgment, arguing that the equipment used to send the messages was not an ATDS, that Satterfield had not received a "call" within the meaning of the TCPA, and that Satterfield had consented to receive the text message. The district court granted summary judgment, holding that Simon & Schuster and ipsh!net had not used an ATDS and that Satterfield had consented to receiving the text message.[3] The district court did not rule on Simon & Schuster's argument that a text message does not constitute a "call" under the TCPA.

On the ATDS issue, Simon & Schuster had argued that it did not store numbers using a random or sequential number generator; instead, the numbers were input manually. The court agreed with Simon & Schuster that the equipment was, therefore, not an ATDS. On the consent issue, there was a dispute as to whether Satterfield had agreed to receive the text message from Simon & Schuster. Although Satterfield had checked a box stating that she agreed to receive messages from "Nextones affiliates and brands," Satterfield argued that Simon & Schuster was neither a Nextones affiliate nor a Nextones brand. The court, however, disagreed, noting that the text message included the term "PwdbyNextone"—an abbreviation for "Powered by Nextone"—which identified the message with a Nextones brand. Accordingly, the court determined that Satterfield had consented to receive the message. Satterfield appealed the decision.

Ninth Circuit Opinion

On Friday, June 19, 2009, the Ninth Circuit reversed the district court's decision and remanded the case for further proceedings.[4] Although the final outcome of the case has yet to be decided, the Ninth Circuit made three important determinations. First, the court determined that just because Simon & Schuster input the numbers in the equipment used to send the text messages does not mean that the equipment cannot be an ATDS. Second, the text message was a "call" within the meaning of the TCPA. Third, the court found that Satterfield had not consented to receive messages from Simon & Schuster because Simon & Schuster is not an affiliate or brand of Nextones.

What Constitutes an ATDS

The Ninth Circuit determined that the district court had erred in holding that there was no genuine and disputed issue of material fact as to whether the equipment that Simon & Schuster used was an ATDS. The district court had focused its analysis on whether the equipment used by Simon & Schuster "stored, produced, or called" numbers using a random or sequential number generator. With this focus, the district court held that "the equipment here does not store, produce or call randomly or sequentially generated telephone numbers, the court grants summary judgment in the Defendants' favor: the equipment at issue is not an automatic telephone dialing system under the TCPA." The Ninth Circuit, however, found that the district court had ignored a key word in the TCPA's definition of what constitutes an ATDS.

> When evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the *capacity* "to store or produce telephone numbers to be called, using a random or sequential number generator." Accordingly, a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.

Because the district court had not focused on whether the equipment used by Simon & Schuster had the requisite capacity, the Ninth Circuit reviewed the evidence in the record to determine whether there was a genuine issue of material fact on this point. The court determined that there was. Satterfield's expert explained how the equipment used by Simon & Schuster worked, but he never specifically declared whether the equipment had the requisite capacity. On the other hand, the president of the company responsible for the actual transmission of the text messages testified that the system used was not capable of sending messages to telephone numbers not fed to the system, nor was it capable of generating random or sequential telephone numbers. Given the uncertainty about the capabilities of the equipment used to send the messages, the Ninth Circuit remanded to the district court to determine whether the equipment had the capacity to store or produce telephone numbers to be called using a random or sequential number generator.

A Text Message Can Be a Call Under the TCPA

The district court did not address Simon & Schuster's argument that sending a text message did not fall within the TCPA because a text message is not a "call" within the meaning

of the TCPA. The Ninth Circuit, however, considered this argument and concluded that a text message can, indeed, constitute a "call" within the meaning of the TCPA.

As noted, the TCPA makes it unlawful "to make any call" using an ATDS without the prior express consent of the called party. Although the TCPA does not define the word "call" and although the TCPA does not include any references to SMS text messages, the FCC had previously determined that a text message can, indeed, constitute a call. For example, in a 2003 order, the FCC wrote:

> We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged." *This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls*, provided the call is made to a telephone number assigned to such service.[5]

Moreover, in the Notice of Proposed Rulemaking of the CAN SPAM Act, the FCC stated "that the TCPA and Commission rules that specifically prohibit using automatic telephone dialing systems to call wireless numbers already apply to any type of call, including both voice and text calls."[6] Thus, the agency to which Congress had delegated authority to implement the TCPA determined that the law was broad enough to cover a technology that was not generally in use when the law had been passed. The Ninth Circuit noted that this interpretation would have the force of law and was, therefore, entitled to deference (1) if the word "call" is not defined by the TCPA and (2) if the FCC's interpretation of the statute was reasonable.

The Ninth Circuit found that the TCPA was silent as to whether a text message can constitute a "call." In addition, the court found that the FCC's interpretation was reasonable.

> The FCC's interpretation of 47 U.S.C. § 227(b)(1)(A) is consistent with the dictionary's definition of call in that it is defined as "to communicate with or try to get into communication with a person by telephone." It is undisputed that text messaging is a form of communication used primarily between telephones. The FCC's interpretation is also consistent with the purpose of the TCPA—to protect the privacy interests of telephone subscribers. Further, nothing in the record indicates that such an interpretation is "arbitrary, capricious, or manifestly contrary to the statute."

Because the FCC's interpretation of the TCPA was reasonable, the Ninth Circuit accorded it deference to hold that a text message is a "call" within the TCPA. Accordingly, when Simon & Schuster sent text message to Satterfield, the company ad placed a call to her.

What Constitutes Express Consent

Under the TCPA, it is not unlawful to make a call using an ADTS if the call is "made with the prior express consent of the called party." Simon & Schuster had argued, and the district

court had agreed, that Satterfield had provided her express consent when she clicked on a box next to the following disclosure: "Yes! I would like to receive promotions from Nextones affiliates and brands." The Ninth Circuit, however, found that the district court had erred because Satterfield had not expressly consented to receive messages from Simon & Schuster.

Satterfield only consented to receive promotional material from Nextones or Nextones' "affiliates" and "brands." The Ninth Circuit noted that the term "affiliate" carries its own, independent legal significance. The term "affiliate" refers to a "corporation that is related to another corporation by shareholdings or other means of control . . . ." Moreover, Webster's Third New International Dictionary defines "affiliate" as "a company effectively controlled by another or associated with others under common ownership or control." Nextones neither owns nor controls Simon & Schuster, nor can Nextones be considered a Simon & Schuster subsidiary. Therefore, the Ninth Circuit determined that Simon & Schuster was not a Nextones' affiliate.

The Ninth Circuit also found that the district court had erred in granting summary judgment based on Satterfield's consent to receive promotional materials by Nextones' "brands." The district court found there was "no dispute of fact that the promotional text message at issue was identified with a Nextones brand." The district court's conclusion, however, was based solely on the phrase "PwdbyNexton" in the text message. The Ninth Circuit did not agree with the district court's rationale. "Under this logic, any company sending a text message could simply include 'PwdbyNexton' and it would be considered a 'brand' of Nextones." Again, the Ninth Circuit looked to Webster's Dictionary and found that the term "brand" is defined as "a class of goods identified as being the product of a single firm or manufacturer." Because the message was a product of Simon & Schuster, not Nextones, Simon & Schuster is not a Nextones' brand. Thus, the court found that Satterfield's consent to receive promotional material by Nextones and its affiliates and brands could not be read as consenting to the receipt of Simon & Schuster's promotional material. Accordingly, the district court had erred in granting summary judgment.

What This Means for Mobile Marketers

Over the past few years, consumers have demonstrated a greater willingness to interact with companies on their mobile devices. However, consumers are only willing to interact with companies on their own terms, and they do not want to receive text messages that they have not requested. If a consumer gets a text message that the consumer did not want, that consumer is likely to complain. Moreover, those complaints are likely to lead to lawsuits or regulatory actions. In recent years, many companies have paid high prices—up to $7 million—for failing to get adequate consent in mobile promotions. Those types of challenges are likely to continue, so companies need to make sure that they comply with relevant laws.

The key lesson for mobile marketers in this case is that they should not send text messages to any consumer unless that consumer has provided express consent to receive the messages. Unfortunately, the Ninth Circuit's decision casts some doubt on whether a company can safely rely on an opt-in list provided by a third party for that consent. Moreover, sending messages to third-party lists may run counter to the Mobile Marketing Association's US Consumer Best Practice Guidelines for Cross-Carrier Mobile Content Programs. Although the

Guidelines do not have the force of law, many mobile marketers are contractually bound to comply with the Guidelines.

When seeking consent from consumers, it is important to make sure that a consumer understands the terms to which he or she is being asked to agree. Therefore, it is important to clearly disclose what types of messages a consumer can expect to receive and, with as much specificity as possible, which company will send the messages. The more precise the language surrounding the opt-in is, the less likely consumers are to be surprised when they get a text message and, therefore, the less likely they are to complain. As the Ninth Circuit decision and other recent cases demonstrates, marketers have little to gain and a lot to lose from sending messages that consumers did not expect.

Notes

[1] 47 U.S.C. § 227(a)(1).
[2] *See* 47 C.F.R. § 64.1200, *et seq*.
[3] *See* Satterfield v. Simon & Schuster, No. C 06-2893 CW, 2007 U.S. Dist. LEXIS 46325 (N.D. Cal. June 26, 2007).
[4] *See* Satterfield v. Simon & Schuster, 569 F.3d 946, 951 (9th Cir. 2009).
[5] FCC Order 03-153 ¶ 165 (emphasis added).
[6] 19 F.C.C. Rcd. 15927, 15933 (FCC Aug. 12, 2004).