

Text Message Class Action Dismissed: 5 Minor Texts Don't Convey Standing

APRIL 20, 2020

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Text messages are becoming an ever-increasing way for companies to communicate with their customers. However, if text message campaigns are not crafted properly, companies can run afoul of the Telephone Consumer Protection Act ("TCPA"), which regulates text message marketing and the types of consent necessary to obtain from consumers. The TCPA's requirements can get technical, particularly when advertisements are involved. As a quick (and overly simplified) crash course, companies must have prior express written consent from call recipients before sending messages that contain advertisements. Failure to comply with these requirements can allow a consumer to recover up to \$1,500 per text message from companies that fail to comply.

A lot of times, courts will allow consumers to prosecute these claims even for mere technical violations, allowing plaintiffs to generally claim they were "injured" through vague damages like inconvenience or depleted battery life. Fortunately, some courts are starting to grow skeptical of such claims, as illustrated recently in the case of *Eldridge v. Pet Supermarket, Inc.*, No. 18-22531, 2020 U.S. Dist. LEXIS 56222 (S.D. Fla. March 9, 2020).

In *Eldridge*, the plaintiff visited a Pet Supermarket store to purchase items for his dog. During the visit, he learned about a raffle for a yearlong supply of free pet food, and entered the raffle by texting the word "PETS" to "650-47." Pet Supermarket sent him two responsive text messages, confirming his entry into the raffle and instructing him he could reply "STOP" to opt-out of message. Pet Supermarket then sent five additional advertising messages to the plaintiff over three months.

Rather than replying "STOP," the plaintiff sued Pet Supermarket, alleging that the text messages violated the TCPA because he never gave prior express written consent. (Note: prior express written consent under the TCPA contains specific disclosures and requirements beyond simply being in writing.) The plaintiff alleged generalized "damages" of inconvenience, wasted time, and depleted battery life from the message. But the court wasn't buying it.

In dismissing the complaint, the court broke the text messages down into categories. First, the court held that the first two text messages were exempt from the TCPA. Specifically, because the messages merely confirmed the plaintiff's entry into the raffle and contained opt-out instructions, they were not telemarketing or advertisements. Easy and obvious result on those.

With the remaining five messages, the court held that the messages were subject to the TCPA, and the heightened prior express written consent requirements, because they contained advertisements. But the court found that even if Pet Supermarket had committed technical violations of the TCPA, the plaintiff didn't suffer any actual damage. Specifically, the court held that receiving five messages over three months, and the 30 seconds the plaintiff claimed to have "wasted" reading them, were

not real harms, particularly when the plaintiff could have simply responded “STOP” to opt-out of the messages.

The court also found that a claim for damage by “depletion of [the plaintiff’s] phone battery” was simply too vague and conclusory, particularly when the plaintiff did not actually know if that allegation was true. As a result, the court dismissed the putative class action. Defense win!

Hopefully, more courts will start to follow the lead of cases like Eldridge. But companies must be wary-while Pet Supermarket was able to avoid the cost and expense of defending a class action, many other Circuits and courts do allow spurious TCPA claims to proceed based on vague claims of annoyance and “depleted battery life.” In crafting any text message campaign, companies must give careful consideration to the issue of who is being called, the dialing system used, the purpose of the message, and (if applicable) the type of consent necessary, relative to the TCPA’s requirements to ensure compliance.

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