CLIENT ALERTS & INSIGHTS

Text Message Marketing: QuoteWizard (Partially) Stuck with TCPA Class Action

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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.

Critically, when a text message introduces an advertisement, the sender must obtain the prior express written consent of the call recipient, including making certain mandatory disclosures in getting that written consent. 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, and these damages can become staggering when lawsuits are filed as class actions.

Further, while the TCPA has different consent requirements for informational or transactional text messages versus advertisements, this line is not always clear to courts, as evidenced by the recent decision in *Mantha v. QuoteWizard.com, LLC*, No. 19-12235, 2020 U.S. Dist. LEXIS 45481 (D. Mass. March 16, 2020).

QuoteWizard is a website that allows consumers to enter their information to receive quotes for auto and other insurance products. QuoteWizard sent two text messages to Joseph Mantha, stating:

"Hey, it's Amanda following up. When's a good day for us to talk Joe? You requested a quote on auto insurance. Message me if you're still interested!"

"Hi this is Amanda! Are you looking for an accurate estimate, Joe? We can review your options together. Call me when you're free, it won't take long!"

In response, the plaintiff, Joseph (Joe?), sued QuoteWizard for alleged violations of the TCPA, and sought to represent other similar consumers in a class action. The plaintiff alleged that QuoteWizard violated the TCPA in two ways. First, by calling him without his prior express written consent using an "automatic telephone dialing system," and second by sending two solicitations to him, even though his telephone number is on the National Do-Not-Call Registry. QuoteWizard moved to dismiss the complaint, arguing that the plaintiff did not plead adequate facts to suggest the use of an ATDS and that the messages were not solicitations, but merely informational.

First, the good out of *Mantha*. The court held that general allegations that a message was sent with a long code and allegations regarding "mass texting services" is not enough to plausibly allege the use of an ATDS. That result particularly makes sense here, given that the messages were not impersonal or generic, but were specifically addressed to "Joe" and "following up" on the fact he "requested a quote for auto insurance." The court didn't take any position on the hotly contest issue

of what functionality dialing equipment must have to constitute an ATDS, but did, at the very least, hold the plaintiff to a meaningful pleading standing. So, Count I dismissed!

Unfortunately, the court missed the mark on Count II, and concluded that the plaintiff had adequately alleged that the messages were solicitations. In reaching this conclusion, the court looked back to a 2003 FCC order, which found that messages sent "for the purpose of encouraging the purchase of goods and services and therefore fall within the statutory definition of telephone solicitation."

However, the court missed that a few years after that FCC order, in 2006, the FCC further made a distinction between messages that constitute advertisements versus *transactional* messages, and clarified that messages "whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements." (While the FCC was specifically addressing faxes in that 2006 Order, courts have routinely applied the same analysis to telephone calls and text messages.)

In fact, in 2006 the FCC even noted that "bids in response to specific solicitations would not be covered by the rules, as such communications are presumably to facilitate a commercial transaction that the recipient has agreed to enter into by soliciting the bids." That seems to fit the text messages here perfectly-they were specifically addressed to Joe, and were "following up" on the fact he "requested a quote for auto insurance."

Now, in some fairness to the court, the plaintiff did allege that he never requested a quote for auto insurance. To that end, it's important to keep in mind that the court's decision was merely at the pleading stage and not a decision on the merits-given the specific nature of the text messages, it seems likely that there is more to this story than the one-sided portrayal by plaintiff that will come out as litigation proceeds.

Regardless, *Mantha* illustrates just how tricky ferreting through TCPA regulations and FCC orders can be, and how it is imperative for businesses to use best practices in obtaining prior express written consent for text messages for contacting consumers, regardless of the intended purpose of the campaign and the platform used for making context.

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