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# Mobile Marketing Class Actions 2.0: Novel TCPA Claims

Law360, New York (August 08, 2012, 1:27 PM ET) -- Never let it be said that plaintiffs' lawyers are not an enterprising lot. The old adage that you can't get blood from a stone continues to apply, but not evidently to plaintiffs' lawyers. They continue to push the envelope and attempt to transform minor, everyday inconveniences into multimillion-dollar class actions.

Despite the fact that the Telephone Consumer Protection Act — a law passed in 1991 to curb abusive telemarketing practices (e.g., robocalling) — does not address many recent technological advances, including mobile (SMS) marketing via text messaging, hundreds of class actions have been filed by plaintiffs who allege receipt of unsolicited commercial text messages. And, their efforts are paying off; many TCPA text cases have resulted in multimillion-dollar settlements based on nothing more than an individual's alleged receipt of a single, one-time text message to which the plaintiffs contend they did not expressly consent (or, at least, that they don't remember consenting).

It is mind-numbingly frustrating to companies to face federal class action lawsuits based on violations of a law — the TCPA — that was judicially (not congressionally) expanded to apply to texts and whose drafters never intended it to be enforced via class actions (most drafters recognized that such violations were really "small claims stuff" and best left to the states). See 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (Comments of Sen. Hollings). Lest there be any doubt that these cases are primarily lawyer-driven, the opt-in rate for class settlements of TCPA claims (the percentage of class members that elect to participate in the resulting settlement) hovers in the low single digits.

As we are now three years removed from the Ninth Circuit Court of Appeals' seminal decision in Satterfield v. Simon & Schuster, 569 F.3d 946 (9th Cir. 2009), which ruled that a text was a call and therefore actionable under the TCPA, most companies understand what it takes to run a legally compliant mobile campaign — clear and conspicuous disclosure (which is complicated by small screens) and affirmative consent.

However, as with basic SMS texts in 2009, courts are again presented with novel claims based on technological advancements. These "second generation" TCPA text-message claims involve what's known as "friend forwarder" text messaging. Friend forwarder is a viral form of marketing that encourages subscribers (those who have already opted into a company's mobile campaign) to forward the promotional text to their friends, family and acquaintances. The opted-in friend will then receive a text stating that his or her friend thought he or she might be interested in receiving similar materials. At times, the person forwarding the cellphone number (the initial subscriber) may receive coupons or other promotional material. At least one federal class action has been filed on behalf of the "friends" who were forwarded texts.

All is not lost. Despite plaintiffs' contention, the TCPA is not a purely strict liability law.

There are potentially meritorious defenses, including that the texts were not sent utilizing an automated telephone dialing system (ATDS) as is required to state a claim under the TCPA, and that Federal Communications Commission regulations provide an exemption for messages sent to family, friends and acquaintances.

Getting out of a case on the early side can nonetheless be difficult; courts have held — in denying motions to dismiss for (the now more traditional) TCPA claims — that plaintiffs' mere allegation that the texts were sent via a mechanism that had the "capacity" to store and randomly dial or generate numbers — is sufficient to state a claim. With the keys to the discovery kingdom now firmly in hand, well-intentioned companies are often forced to settle, given the costs of litigation and the specter of six- and seven-figure damage awards ($1,500 per can add up fast).

The dawn of these friend-forwarder lawsuits have significant implications for any company operating on a national scale, particularly franchisors that may be named in such lawsuits despite no involvement. Often, friend-forwarder ad campaigns are operated regionally without the knowledge, involvement or approval of the franchisor. The mobile marketing companies implementing these campaigns tout their relationships with well-known national brands even though the campaigns are very much run on a localized level.

Plaintiffs are not that discerning and are happy to name the perceived deeper pocket and let the franchisor prove a negative, namely, that it had no involvement. (Plaintiffs' lawyers assert that even if the franchisor had no involvement in the campaign, it still reaped some nonquantifiable benefits and thus it is a proper party to the suit.) Moreover, the degree to which the brand exercised control (if any) over the franchisee(s) is often a fact question to be resolved after many months of costly and disruptive discovery. This past May (after a year of litigation), Domino's was finally allowed to exit a TCPA class action because the trial court eventually ruled that the franchisees' violations of the TCPA could not be imputed to Domino's. Anderson v. Domino's Pizza Inc., No. 2:11-cv-902 (W.D. Wash. May 15, 2012).

Somewhat similar to friend-forwarding, "group texting," which enables users to sign up friends and family to receive noncommercial text messages for purposes of communicating and staying in touch, has also been the subject of lawsuits. These cases raise questions about the meaning of "prior express consent" under the TCPA, which the statute does not define.

Accordingly, companies that are at the forefront of group-texting have petitioned the FCC for a declaratory ruling clarifying the meaning of prior express consent. It is not known when (or if) the FCC will issue such a ruling. Meanwhile, the litigation goes on as many judges have refused to stay the lawsuits reasoning that they are as equally as equipped as the FCC to determine such complex regulatory issues as the meaning of prior express consent and ATDS.

In a move that may have pushed the envelope too far, several companies have been faced with "confirmatory" text class actions that allege that receipt of a text message confirming a former subscriber's request to opt out is an unsolicited text message violative of the TCPA and entitle the plaintiff and the putative class to statutory damages of, at least, $500 each.

Although one judge (to date) has decided that a singular, one-off text message is not the kind of en masse solicitation that TPCA was designed to regulate, others have not. Cf. Ibey v. Taco Bell Corp., No. 12-cv-0583, (S.D. Cal. June 18, 2012) (granting motion to dismiss based on single, confirmatory text), with Ryabyshchuk v. Citibank (South Dakota) N.A., No. 11-cv-1236 (S.D. Cal. Nov. 28, 2011) (denying motion to dismiss based on single, confirmatory text).

Finally, last month the FCC released new rules and regulations clarifying certain consent requirements for calls to cell phones. Specifically, the FCC now requires prior express written

consent for all autodialed and prerecorded telemarketing calls to wireless cell numbers, which includes text messages and robocalls. As for nontelemarketing texts and robocalls, the FCC still requires that oral or written consent is required if the texts and robocalls are made to a wireless cellphone. Putative class actions are filed daily for alleged noncompliance with the FCC regulations.

The song remains much the same. Going forward, companies must be vigilant in utilizing any technological developments, such as friend-forwarding or group messaging. Consent continues to be the mantra for mobile marketing under the TCPA. It is imperative that companies be able to document (or, at a minimum, evidence) consent. Many companies are turning to explicit disclaimers and requiring consumers to affirmatively state their consent during calls to the companies.

In a darned-if-you-do, darned-if-you-don't twist, plaintiffs' lawyers then turn around and sue (again, on a class action basis) for alleged illegal call recording. In order to avoid becoming tomorrow's target, companies are encouraged to consider carefully each and every aspect of their well-intentioned campaigns, including the agencies (and other service providers) they retain to implement them.

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