
Ninth Circuit Ruling Leads to Spike in Class Actions Over Text Messages from Retailers

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In Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009), the Ninth Circuit held that unsolicited text messages to mobile phones sent by a retailer may constitute a “call” in violation of the Telephone Consumer Protection Act (the “TCPA”). This decision has sparked an increase in consumer class actions filed against retailers who send advertisements to consumers by text message.

The TCPA makes it unlawful “to make any call” using an automatic telephone dialing system (“ATDS”) to, among other things, a mobile telephone or pager. 47 U.S.C. Section 227(b)(1)(A). Congress enacted the TCPA in 1991, before text messaging was available, and intended it to prohibit automated voice calls from telemarketers to mobile phones. The U.S. Court of Appeals for the Ninth Circuit, in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), extended this consumer protection to text calls made using ATDSs.

The Satterfield Decision

Plaintiff Laci Satterfield received a text message from Simon & Schuster advertising its publication of a novel by Stephen King. She filed suit under the TCPA against Simon & Schuster and ipsh!, the mobile marketing company to whom Simon & Schuster outsourced its promotional campaign, for their transmission of this unsolicited text message to her and other class members’ cell phones. The Northern District of California granted summary judgment in favor of Simon & Schuster and ipsh!.

On appeal, the Ninth Circuit reversed. It noted that the TCPA does not define “call.” The court therefore looked to how the Federal Communications Commission (the federal agency charged with interpreting the statute) defined “call.” The FCC considers both voice calls and text calls, including, for example, short message service calls, to be within the meaning of “to make any call” under the TCPA. The court also looked at the purpose of the TCPA, noting that Congress enacted it in response to consumer complaints about the invasion of privacy from telemarketing calls. Because prohibiting the transmission of unsolicited text messages furthers this purpose of protecting privacy interests, the Ninth Circuit held that the FCC’s interpretation was reasonable and entitled to deference.

In addition, the *Satterfield* court held that the plaintiff had not consented to receive the text message from Simon & Schuster. Under the TCPA, calls “made with the prior express consent of the called party” are exempt. 47 U.S.C. § 227(b)(1)(B). ipsh! had obtained the 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. When she registered, she checked that she “would like to receive promotions from Nextones affiliates and brands.” The Ninth Circuit held that because Simon & Schuster was not affiliated with Nextones, the plaintiff did not consent to receipt of Simon & Schuster’s promotional text message and the retailer was thus not exempt from liability under the TCPA.

Since the Ninth Circuit’s decision, there has been a significant increase in class action lawsuit filings against retailers over text messages. If any retailer is found in violation of the TCPA, each class member would be eligible to receive \$500.00 in statutory damages for each violation, with the availability of treble damages for willful and knowing violations. For larger retailers found to be in violation, such an award could create tens of millions of dollars in exposure.

Many retailers are increasing their advertising to mobile telephone users. They have used a variety of methods to obtain the users’ consent to receive their promotional text messages in an effort to avoid the imposition of liability under the TCPA.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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