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Here We Come A-Revoking: Professional Plaintiffs Target Text Messaging

By Michael P. Daly, Meredith C. Slawe and John S. Yi

There is something magical about shopping during the holidays. Those who favor the bustle of malls will enjoy elaborate window displays and the familiar sights and sounds of the season. And those who favor shopping while snug in their beds will use websites and apps to have gifts wrapped and shipped to their homes or convenient brick-and-mortar locations.

But lurking among those happy holiday shoppers is a small but growing number of professional plaintiffs with visions of dollar signs dancing in their heads. Hunting for lawsuits rather than bargains, they will concoct claims under the Telephone Consumer Protection Act ("TCPA") by enrolling in text message programs and then purporting to revoke that consent in ways that are deliberately designed to evade systems that recognize and register legitimate attempts to opt out. In doing so, these modern day Grinches threaten not only the retailers who are exposed to potentially massive aggregate liability, but also the consumers who have come to rely on their text message programs for information about sales, promotions, and other benefits.

The Plaintiffs' Playbook

The TCPA does not address whether and how a consumer may revoke consent to automated communications, and until recently the FCC required only that callers give consumers a direct opt-out mechanism such as replying "STOP" for text messages. But in July of 2015, a sharply divided (and subsequently reconstituted) FCC found that consent can be revoked through "any reasonable method" that, based on "the totality of the facts and circumstances," expresses "a desire not to receive further messages." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7996 & n.233 (2015). In his dissent from that ruling—which is now being reviewed by the D.C. Circuit—current Chairman Ajit Pai predicted that allowing consent to be revoked through "any reasonable method" would "make abuse of the TCPA much, much easier." *Id.* at 8073.

Chairman Pai was right. Professional plaintiffs and their counsel have targeted text message programs and manufactured claims predicated on alleged revocation requests. These claims are transparent "gotcha" situations: they enroll in such programs and then artfully reply to texts with everything other than "STOP." In other words, they consent to receive text messages and then pretend to revoke that consent in ways that they know will not be effective.

Many retailers have received demand letters from such plaintiffs, and some have settled to avoid the expense of disproving such claims in court. But others have chosen to fight these bogus claims—and their efforts have resulted in a number of recent rulings that will hopefully curb this particular species of TCPA abuse.

Unilateral Revocation and Bilateral Contracts

Reyes v. Lincoln Automotive Financial Services

Earlier this year, the Second Circuit affirmed a district court's ruling that the TCPA does not permit a consumer to revoke consent to be called when that consent was initially given as part of a contract between the consumer and a business. In *Reyes v. Lincoln Automotive Financial Services*, the plaintiff leased an automobile from the defendant, and agreed, as a condition of the lease agreement, to receive automated telephone calls from the defendant. 861 F.3d 51 (2d Cir. 2017). After the plaintiff defaulted on his lease payments, the defendant began placing automated calls to the plaintiff and continued to do so after the plaintiff allegedly revoked his consent to receive them.

Against this backdrop, the plaintiff filed a complaint in the Eastern District of New York alleging violations of the TCPA and seeking $720,000 in damages. The trial court ruled in favor of the defendant primarily on the grounds that the plaintiff failed to prove that he had revoked his consent.

On appeal, the Second Circuit agreed with the trial court's decision, but on different grounds. The Second Circuit considered whether the TCPA allows "a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract." The court found that it does not, and since the plaintiff had provided his consent to be called as an express provision of his lease agreement with the defendant, that consent could not be unilaterally revoked. The court acknowledged

that consent clauses in consumer contracts might render "revocation impossible in many instances," but any related public policy considerations should be for Congress to resolve.

Unreasonable Revocations of Consent

Epps v. The Gap, Inc.

A number of courts have also held that if a consumer does revoke consent, that revocation must be reasonable. Earlier this year, for example, the Central District of California dismissed a putative class action with prejudice upon finding that the transmission of verbose text messages was an unreasonable method of revoking consent. *Epps v. The Gap, Inc., et al.*, No. 17-3424 (C.D. Cal. June 27, 2017).

Jalen Epps, a professional TCPA plaintiff, alleged that she subscribed to receive text messages from the Gap, but when she attempted to opt out of receiving text messages a few weeks later by texting the Gap, she was unable to do so. The plaintiff alleged that she had properly revoked consent by sending a series of text messages such as "I would like for you to please discontinue any further messages or updates, thank you very much" and "I'm simply asking for you to unsubscribe my number from these services." What the plaintiff did not do, which would have ended the text messages, was simply respond with "STOP." In granting Gap's motion to dismiss (notably with prejudice), the court found the plaintiff's argument that the FCC has prohibited callers from limiting the means by which a consumer may revoke consent to be unpersuasive, because under the totality of the circumstances, the plaintiff's chosen method of revocation was "entirely unreasonable."

Epps v. Earth Fare Inc.

The Central District issued a similar decision in *Epps v. Earth Fare Inc.*, No. 16-8221, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017), appeal docketed, No. 17-55413 (9th Cir. Mar. 28, 2017). The district court found as a matter of law that the plaintiff's purported revocation was not "reasonable" and dismissed the action with prejudice. Despite being prompted to text "STOP" if she wished to revoke her consent, the plaintiff in this case responded instead with long sentences such as "I would appreciate [it] if we discontinue any further texts" or "Thank you but I would like the text messages to stop can we make this happen." The defendant successfully argued that her responses had been deliberately designed to frustrate its automated system for recognizing revocations of consent.

The district court stated that "[t]he totality of the plausibly alleged facts, even when viewed in Plaintiff's favor, militate against finding that Plaintiff's revocation method was reasonable. Without explanation, Plaintiff ignored Defendant's clear instruction to stop the messages. Furthermore, although Plaintiff is correct that Defendant 'may not abridge [Plaintiff's] right to revoke consent using any reasonable method,' and 'may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations,' Plaintiff has not plausibly alleged any such burden here. In fact, heeding Defendant's opt-out instruction would not have plausibly been more burdensome on Plaintiff than sending verbose requests to terminate the messages. In sum, Plaintiff has not plausibly alleged that her revocation was effective."

Viggiano v. Kohl's Department Stores, Inc.

The District of New Jersey recently followed suit and dismissed a putative class action with prejudice after finding that the plaintiff's method of revoking consent made it difficult or impossible for the defendant to honor her request.

Similar to the facts in *Gap* and *Earth Fare*, plaintiff Amy Viggiano alleged that she initially consented to receive text messages from Kohl's, but later revoked her consent by replying to automated text messages with a variety of messages such as "I've changed my mind and don't want to receive these anymore" and "I don't want these messages anymore. This is your last warning!" Inexplicably, the plaintiff continued to send these verbose text messages despite the fact that she received replies to each text message instructing her to text "STOP" to opt out of receiving subsequent text messages. In addition, the terms and conditions the plaintiff agreed to when consenting to receive text messages from Kohl's listed five single-word commands that the plaintiff could text to stop receiving future text messages.

In dismissing the action with prejudice, the district court looked to the totality of the facts and circumstances and determined that the use of sentence-long messages to revoke consent after agreeing and being reminded to use single-word commands was unreasonable.

The Takeaway

We all eagerly await the outcome of the appeal from the FCC's "any reasonable method" ruling. Although the appeal was argued over 14 months ago, it now seems unlikely that the D.C. Circuit will issue its decision this year. Until it does, these recent rulings reveal that businesses should consider including consent provisions in their customer-facing contracts, and should scrutinize the substance of purported revocations in deciding how to respond to demand letters.

Primary Contacts

Michael P. Daly
Partner
Philadelphia
(215) 988-2604
michael.daly@dbr.com

Meredith C. Slawe
Partner
Philadelphia
(215) 988-3347
meredith.slawe@dbr.com

John S. Yi
Associate
Philadelphia
(215) 988-2553
john.yi@dbr.com