A Broad Approach To Opt-Out Texts

Law360, (February 11, 2019)

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Businesses that communicate with consumers by text message continue to face significant litigation risk under the Telephone Consumer Protection Act. Subject to limited exceptions, the TCPA prohibits sending texts to a consumer using an automatic telephone dialing system absent the consumer's prior express consent — with marketing texts requiring "prior express written consent."[1] And consumers that have consented to automated texts are entitled to revoke their consent.[2] Thus, businesses must effectively track consumers' consent, as well as any revocation requests.[3]

More than 3,800 TCPA actions were filed last year.[4] With uncapped statutory damages from $500 up to $1,500 per call or text, TCPA lawsuits can impose considerable financial damage. For example, just last week, a proposed class of cellphone users who allegedly received sports text updates containing sales promotions without their express written consent moved to approve a $2.5 million settlement with a sports network and two automakers.[5] Further, the Ninth Circuit's decision in Marks v. Crunch San Diego LLC — which the defendant recently petitioned to have reviewed by the U.S. Supreme Court — potentially rendered every smartphone a prohibited ATDS, placing even manually made texts at risk for liability.[6] It is thus increasingly challenging for businesses to implement TCPA-compliant campaigns and defend their texting practices.

Businesses should not only implement robust protocols for obtaining consent, they should also deploy broad measures for identifying attempted revocation. Practically, this means that a texting platform should recognize as many "reasonable" methods of revocation as possible and, to the extent feasible, various "[un]reasonable" methods. Because the ideal litigation outcome is not winning the lawsuit but avoiding it altogether, a proactive approach is warranted, and businesses should consider implementing texting opt-protocols that best accomplish this aim.

Consumers have a right to revoke consent using reasonable methods.

The Federal Communications Commission ruled in 2015 that "[c]onsumers have a right to revoke consent, using any reasonable method including orally or in writing."[7] Therefore, at any time, "consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages."[8] "[C]allers may not infringe on that ability by designating an exclusive means to revoke," and thus, "the consumer is not limited to using only a revocation method that the caller has established as one that it will accept."[9]

To determine whether a consumer's revocation request is "reasonable," the FCC "look[s] to the totality of the facts and circumstances surrounding that specific situation."[10] Two relevant factors are (1) "whether the consumer had a reasonable expectation that he or she could effectively communicate [the] request for revocation to the caller in that

circumstance"; and (2) "whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens." The FCC "caution[ed] that callers may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations."[11] Additionally, the FCC reaffirmed that callers — and not consumers — bear the burden of demonstrating consent for messages even in the context of revocation.[12]

Courts undertake a fact-intensive, context-specific inquiry in analyzing whether a consumer's attempted revocation was effective. It's consumer-friendly.

In ACA International v. FCC, the U.S. Court of Appeals for the D.C. Circuit concluded that the FCC's adoption of the "any-reasonable-means standard" instead of "standardized revocation procedures" was permissible.[13] The court stated that if consumers are afforded "clearly-defined and easy-to-use opt-out methods ... any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable."[14]

The few district courts that have addressed the issue have refused to allow TCPA actions where the consumer plainly disregarded the business's express opt-out instructions and instead attempted to opt out using idiosyncratic language.[15] In particular, these courts emphasized that plaintiffs who respond to text messages that include the clear directive "Reply STOP to cancel" or similar language with verbose language instead of "STOP," do not use a reasonable method to revoke consent. These holdings are consistent with the FCC's current rules. The challenge for businesses then is proving that an attempted revocation was unreasonable under the circumstances and the litigation costs associated with doing so.

To the extent feasible, texting systems should recognize both "reasonable" and potentially "[un]reasonable" revocation attempts.

While businesses cannot fully insulate themselves from TCPA litigation for their texts, they can take measures that will mitigate this risk significantly — especially with regard to processing consumers' attempted opt-outs. The following measures will help to facilitate a successful, cost-effective outcome in the event a business is sued for allegedly failing to honor an opt-out request.

Disclose opt-out instructions with consent disclosures.

Mitigating risk associated with revocation of consent begins with appropriately structuring a texting opt-in protocol. A business must obtain and document the appropriate level of consent for its automated texts — with the consumer's prior express written consent required for marketing texts.[16] To obtain such written consent, the business must provide the consumer "a clear and conspicuous disclosure" that the consumer is agreeing to autodialed marketing texts from the business and that consent is not a condition of purchase.[17] The consumer must then provide his or her affirmative assent through a traditional written agreement or through an email, website form, text message, telephone keypress, or voice recording.[18] These same methods, while not necessarily required, may also be used to obtain a consumer's consent for informational messages.

To mitigate risk related to revocation, the written or audio consent disclosures should also inform the consumer that he or she can reply “STOP” to any text to opt out of future texts. A business should also consider designating an email address and phone number, which a consumer could utilize to revoke consent. For example, where the business obtains consent through an email, website form, or text message, the business could include in the consent disclosures a hyperlink to the company’s terms and conditions. Those terms and conditions would inform the consumer of the ways to opt out through text, email or phone call.

Include opt-out disclosures with each text.

Every text after the consumer consents should disclose to the consumer how he or she may opt out of future messages, such as “Txt STOP to end.” Should the consumer disregard the opt-out instruction and attempt to opt out using other language, the business can point to the recurring instruction to bolster its argument that the consumer’s attempted opt-out was unreasonable and, thus, ineffective.

Recognize the mobile industry-accepted variations of “STOP.”

Because FCC precedent prohibits designating an exclusive means of revocation, a texting campaign should recognize opt-out words and phrases other than “STOP.” Guidance from the mobile industry recommends that, at a minimum, the texting program automatically opt out the consumer should the words "stop," "end," quit," "cancel" or "unsubscribe" appear anywhere in a text response: Specifically, “[s]ubsequent text, punctuation, capitalization, or some combination thereof must not interfere with opt-out keyword functionality.”[19] Therefore, texting “STOP!” or “PLEASE STOP” instead of merely “STOP” should also terminate further texts.

While this industry guidance is not binding on courts, it is consistent with a consumer’s right to use “any reasonable means” to revoke consent. As one court recognized, “it seems possible that a consumer could, under the totality of the circumstances, text back a non-compliant text message in an attempt at revocation that was, despite that non-compliance, reasonable.”[20] Where the issue of reasonableness is a close one, it likely will be decided by a jury. Businesses can guard against this costly process — and increase the likelihood of success at the motions stage — by ensuring their texting systems recognize a myriad of opt-out requests.

Recognize a wide range of opt-out requests.

Based on FCC precedent and the limited (but favorable) case law, there is a good likelihood that a business would ultimately prevail in litigation where it utilized reasonable opt-out protocols and the consumer refused to follow them. Yet, the best outcome is to avoid the lawsuit in the first instance and the attendant costs of litigation. A business, therefore, should utilize a texting platform that recognizes a broad range of opt-out requests — even those that may not be “reasonable.”

For instance, if each text directs the consumer to “Reply STOP to cancel” and the consumer responds with “TCPA Violation” or “Im contacting my attorney,” such attempted revocations may be deemed unreasonable by a trier of fact. However, by not recognizing the keywords “TCPA” or “attorney,” the company will continue texting a probable litigant. With the

proliferation of TCPA lawsuits by "serial" plaintiffs, this is not an infrequent occurrence. A company thus would be better served by monitoring all reply communication for certain terms and immediately removing any potentially problematic consumer numbers from the texting campaign.

There are other, arguably more reasonable, circumstances where the consumer clearly intends to opt out of texts but nonetheless does not follow the company's opt-out instructions. This may arise where the business unknowingly texts a reassigned number and the new subscriber responds, "Wrong number." Or a consumer could attempt to opt out using a term similar to the five keywords above, such as "block," "delete" or "remove." Alternatively, the consumer could intend to reply "STOP" but inadvertently mistype the request, replying "ATOP," "SROP," etc. It is also not improbable that a Spanish-speaking consumer could seek to opt out using a Spanish term for "Stop," such as "Pare."

These examples, though clearly not exhaustive, illustrate that a company seeking to prevent — not just prevail in — TCPA litigation should develop and implement a robust opt-out regime. Customer service representatives also need to be trained to recognize potential opt-out verbiage like "don't ever call me again" and remove those consumers from any campaigns.

While it is not clear how a court would ultimately rule on the reasonableness of the above examples, the FCC requires courts to consider "whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens." The fact that modern texting platforms could, with reasonable efforts, be configured to process innumerable opt-out requests increases the risk that a court would find a business liable where its platform failed to recognize a broad spectrum of opt-outs.

Obtain contractual protection.

Because businesses may be vicariously liable for text messages sent on their behalf, businesses should ensure that their texting vendors have in place robust opt-out protocols. Businesses — with the assistance of counsel — should proactively work with their vendors to adapt the texting protocols to the business's needs and risk tolerance. Further, businesses should also include in their messaging contracts representations and warranties concerning the vendor's consent and revocation processes, as well as indemnification language should the vendor fail to implement those processes.

Conclusion

Last May, the FCC issued a public notice in response to the D.C. Circuit's ACA International decision. Among other important TCPA issues, the FCC sought comment on "what opt-out method would be clearly defined and sufficiently easy to use for unwanted calls?" For texts specifically, the FCC asked "would a response of 'stop' or similar keywords be sufficiently easy to use and clearly defined?" Unless and until the FCC resolves these consent revocation issues, businesses should take a thoughtful and broad approach to the consumer revocation requests.

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[1] See 47 U.S.C. § 227(b)(1)(A)(iii); In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 8017 ¶ 107 (2015) ("2015 FCC Order"); 47 C.F.R. § 64.1200(a)(2).

[2] ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 709 (D.C. Cir. 2018).

[3] 2015 FCC Order, 30 F.C.C. Rcd. at 7996 ¶ 64.

[4] https://webrecon.com/webrecon-stats-for-dec-2018-2018-ends-with-a-whimper/

[5] Gonzalez v. TCR Sports Broadcasting Holding LLP et al., Case No. 1:18-cv-20048 (S.D. Fla.).

[6] 904 F.3d 1041 (9th Cir. 2018), pet. for cert. pending (filed Jan. 28, 2019) (arguing that the Ninth Circuit's definition of an ATDS conflicts with the plain text of the TCPA and is erroneous).

[7] 2015 FCC Order, 30 F.C.C. Rcd. at 7996 ¶ 64.

[8] Id. at ¶ 63.

[9] Id.; id. at 7999 ¶ 70.

[10] Id. at ¶ 64 n.233.

[11] Id.

[12] Id. at 7999 ¶ 70.

[13] 885 F.3d at 709–10.

[14] Id. at 710.

[15] Rando v. Edible Arrangements International, LLC, 2018 WL 1523858 (D. N.J. Mar. 28, 2018); Viggiano v. Kohl's Dept. Stores, Inc., 2017 WL 5668000 (D. N.J. Nov. 27, 2017); Epps v. Earth Fare, Inc., CV 16-08221, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017).

[16] 47 C.F.R. § 64.1200(a)(2).

[17] 47 C.F.R. § 64.1200(f)(8).

[18] In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, 1844 ¶ 34 (2012).

[19] See, e.g., CTIA Short Code Monitoring Program, Short Code Monitoring Handbook Version 1.7 (March 27, 2017).

[20] Rando, 2018 WL 1523858, at *7.