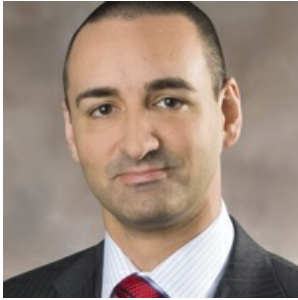


COLUMNS

## Common sense rules in LA Lakers text message lawsuit

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By **Gonzalo E. Mon**

Most marketers know that they are legally required to get permission from consumers before sending them text messages.

Despite this, the number of lawsuits involving (allegedly) unsolicited text messages has been growing steadily in recent years, as has the cost of settling these suits.

For example, last year, Jiffy Lube settled a suit over a text message campaign for \$47 million. Those settlement amounts have attracted the attention of class action lawyers, who often see these cases as a path to easy money.

The key law in this area is the Telephone Consumer Protection Act.

By the text

Among other things, the TCPA generally makes it unlawful to make a "call" to a mobile phone using an "automatic telephone dialing system" unless the caller has "the prior express consent of the called party."

Although the law was enacted in 1991, before SMS technology, courts have held that the term "call" encompasses text messages, and that the equipment used to send those messages can constitute an automatic telephone dialing system.

The first cases in this area involved practices that were clearly unlawful, such as sending text messages to people who had not signed up.

Recently, though, companies have been getting sued even by consumers who did sign up.

For example, some companies have gotten sued for sending a few more messages than they had originally advertised.

And some companies have gotten sued over the confirmation messages they sent to consumers who opted out.

The argument in these cases is that these "extra" messages were sent without consent.

Many of these cases are brought by plaintiffs' attorneys who are looking to force companies into paying money in a settlement.

That places companies in a difficult position even when they have not done anything wrong because a settlement may be more appealing than dealing with the uncertain fate and costs associated with a lawsuit.

Some companies, however, will fight.

Fortunately, many courts in recent cases have taken a common sense approach and dismissed nuisance suits. The

latest beneficiary of this approach is the Los Angeles Lakers.

No slam dunk

During a Lakers game last year, the team invited fans to text a message for a chance to have it appear on the scoreboard.

A fan texted a message, and received the following confirmation from the Lakers in return: "Thnx! Txt as many times as u like. Not all msgs go on screen. Txt ALERTS for Lakers News alerts Msg&Data Rates May Apply. Txt STOP to quit. Txt INFO for info."

Shortly thereafter, the plaintiff filed a lawsuit against the Lakers arguing that the team had sent that message without consent in violation of the TCPA.

Applying a "common sense" reading of the TCPA, a California court determined that, by sending his original message, the plaintiff "expressly consented" to receiving a confirmatory text message from the Lakers.

Indeed, the court noted that when the plaintiff sought to display his message on the scoreboard, "it is difficult to imagine how he could have been certain that the Lakers received his message without a confirmative response."

Accordingly, the court granted the Laker's motion to dismiss the case.

THIS CASE IS good news for mobile marketers, and it comes on the heels of over positive developments.

For example, a few months ago, the FCC determined that the confirmation messages that companies send to consumers who opt out do not violate the TCPA.

There are still a number of legal risks associated with text message campaigns and it is still critical to get consent but these developments suggests that companies now have a better shot at prevailing in these types of nuisance suits.

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