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One Florida Firm is Targeting Ecommerce Brands With TCPA Class Actions Claiming That Promotional Text Messages Sent Outside of 8am-9pm Are Illegal. The Industry is Fighting Back, and Here's What You Should Do if You're Hit With One of These Lawsuits.

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In 2024, a single firm in Florida started targeting social media users with an ad campaign claiming that any promotional text message sent outside the hours of 8am and 9pm violates the Telephone Consumer Protection Act. This ad campaign claims that "marketing texts between 9pm-8am are worth money! Lots of money…" The campaign appears to have been effective—to date, this single firm has targeted more than 100 Ecommerce brands across the country with putative TCPA class actions.

The plaintiffs theorize in these cases that any text messages sent outside the hours of 8am and 9pm violate the TCPA's "quiet hour" rules under 47 C.F.R. § 64.1200(c)(1). Those rules prohibit sending "telephone solicitations" to numbers registered on the National Do Not Call registry outside the hours of 8am and 9pm (the "Quiet Hour" rules). But plaintiff's theory quickly falls apart when taking a closer look at the meaning of the term "telephone solicitation". That term is defined at 47 C.F.R. § 64.1200(f)(15) and specifically excludes text messages sent with the prior express invitation or permission of the person who is texted. So, text messages sent with a valid opt-in are not considered "telephone solicitations", which ought to mean that those messages are not subject to the Quiet Hour rules.

It should be as simple as that, but the plaintiffs in these cases seem to think that a consumer must specifically consent to receive text messages outside the hours of 8am and 9pm. There is nothing contained within the applicable regulations, or the Federal Communication Commission's pronouncements concerning those regulations, which would support this theory. To the contrary, the FCC said this when originally enacting the Quiet Hour rules in 1995:

> Calls made before 8 a.m. and 9 p.m. (local time at the called party's location) do not violate our rules if they are made with such prior express invitation or permission of the resident. If a resident withdraws express consent, any further solicitations to that resident by or on behalf of the same person or entity will be subject to our rules on telephone solicitations barring calls before 8 a.m. or after 9 p.m.

This is not to say that companies should be blasting consumers with texts after 9pm, or before 8am. But there are practical realities that make it impossible for companies to make sure that every single text they send is received between the hours of 8am and 9pm local time where any given cell phone is located. This is because cell phones are *mobile* devices—meaning that there is no readily available, cost-effective, or reliable way to tell the geographic location of a cell phone at any given time a text message is sent to that phone.

This reality is reflected by the FCC's common-sense decision in 2003 not to extend the Quiet Hour rules to consented calls or texts to cell phones:

> [C]onsumers who want to block unwanted calls during certain times will now have the option of placing their telephone numbers on the national do-not-call registry. They will have the additional option of giving express verifiable authorization to only those companies they wish to hear from. The Commission declines at this time to require companies to adhere to consumers' calling preferences, including "acceptable" calling times. We believe that the costs of monitoring calling times for individual consumers could be substantial for many companies, particularly small businesses.

Ultimately if a consumer no longer wishes to receive text messages from a company, all they need to do is text these four letters: STOP. That's common sense. Filing a putative class action seems like a ridiculous response when messages may be stopped with the most minimal effort by the recipient. But, as the Florida firm's ad campaign suggests—it's all about the money ("Lots of money…").

If this new development in the TCPA landscape troubles you, it should. Most Ecommerce brands have spent time and money to ensure they are running compliant SMS campaigns, with valid opt-ins. And defending these lawsuits takes time and resources away from Ecommerce brands that are better spent on things like running their business, and paying their employees.

The industry, however, is not taking this one lying down. The Ecommerce Innovation Alliance ("EIA")—a trade association "dedicated to bringing the ecommerce industry together to advocate for common sense policies that strengthen the ecommerce ecosystem while protecting consumer's privacy"—filed a petition for declaratory ruling on March 3, 2025 with the FCC. This petition asks, among other things, for the FCC to issue a declaratory ruling "to confirm that individuals who provide prior express written consent to receive text messages cannot claim damages under the TCPA for messages received outside the hours of 8 a.m. to 9 p.m." The EIA's efforts to shut down this lawfare campaign against the Ecommerce industry are laudable.

The EIA's petition has found support with former FCC commissioner Michael O'Rielly, who issued the following statement:

> The Commission, continuing in the early days of Chairman Carr's leadership, has done an admirable job fighting against illegal calls and texts, and here it can provide real value by affirming that the TCPA must not become a weapon for opportunistic litigators trying to profit

off completely legal texts. The current state of affairs, where companies must choose between potentially crushing damages under the TCPA or cease providing valuable communications specifically requested by consumers, contravenes the best reading of Congress's work and intent for the statute not to interfere with normal, expected, and desired communications that consumers have expressly consented to received. I applaud the EIA for leading the effort to stop this abuse.

This seems like a no-brainer for the FCC. But, until this petition is decided, Ecommerce brands are left to deal with these lawsuits. Some may feel the urge to cave and pay money to get these cases to go away. But for those who don't want to take that route, there are options.

First, it makes all the sense in the world for every single one of these cases to be paused until the FCC has an opportunity to rule on the EIA's petition. Defendants in these cases may therefore consider filing a motion to stay litigation pending a decision on the petition.

Second, assuming the defendant has a valid opt-in, then this issue should be put before the court at the earliest possible stage of the case. Early dispositive motions, or the bifurcation of discovery or issues, are all options defendants may consider. After all, the plaintiff's entire case centers on this very issue, meaning that defendants have a persuasive pitch to make to courts to decide the issue of consent first before proceeding into expensive and time-consuming class discovery.

Third, Ecommerce brands should consider lending their voice to the EIA's petition. They will have the opportunity to do so once the FCC asks for public comment on the EIA's petition.

All too often, these sorts of lawfare campaigns against legitimate businesses are allowed to run amok, collectively draining millions of dollars from Ecommerce companies that are better spent elsewhere. And the sad truth of the matter is that it is often times less expensive to just "pay these people to go away." However, through a more unified approach, and with the efforts of trade associations such as the EIA, this one particular species of lawsuit will hopefully meet an early demise. Until then, if you've been targeted with one of these lawsuits, you can reach out to the author of this article.

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