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"Text-a-marketers" Take Heed – Unsolicited Texts Same as "Calls" Under Federal Statute

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The Telephone Consumer Protection Act ("TCPA") is one of the primary protections consumers have against telemarketers. And now, as a result of a recent ruling by the 9th Circuit Court of Appeals, consumers will also receive protection under the TCPA for unsolicited text messages. This decision will likely have wide-ranging impacts as text messages have been increasingly used by marketers to reach consumers. The ruling came in a class-action against Simon & Schuster. Laci Satterfield, the class representative, claimed that an unsolicited text message sent by Simon & Schuster to her son's cell phone, which promoted the Stephen King novel, appropriately entitled Cell, violated the TCPA, which prohibits individuals from making calls using any automatic telephone dialing system ("ATDS"). Back in <2004, Satterfield signed up for a free ringtone from Nextones.com, at the request of her six-year old son. In order to receive the ringtone, Satterfield had to click through many sign-in pages and consent to a general terms of use agreement, and ultimately opted-in to receive promotions from Nextones and its "affiliates" and "brands" (next to the opt-in box was a "warning" that the free ringtone may not be available if the user did not opt in to such promotions). However, Satterfield claimed she did not believe she was consenting to receive text messages by agreeing to receive promotions from Nextones or its affiliates. A year later, Satterfield received a text message from Simon & Schuster, advertising its publication of Stephen King's novel. The District Court, without ruling on whether a text message constitutes a "call" under the TCPA, initially granted summary judgment for Simon & Schuster, holding that it had not used an ATDS and that Satterfield had consented to the message. On appeal, the Court of Appeals reversed and remanded the District Court's decision in a three part holding which concluded that (1) there was a genuine issue of material fact as to whether the system used by defendants constituted an ATDS, (2) text messages fall within the scope of TCPA's regulation of "calls" and (3) Satterfield had not provided express consent to receive the promotional text messages. The primary focus of the Court's decision was the one issue the District Court did not address, namely, whether a text message constitutes a call under the TCPA. The Ninth Circuit first noted that TCPA was designed to "regulate the use of an ATDS to communicate or try to get in communication with any person by telephone." The purpose was to protect the privacy of individuals from the invasion posed by an ATDS. The FCC had previously stated that text messages did fall within the purview of the TCPA's wording "to make any call." Since the FCC inclusion of text messages was a

reasonably included within a regulation of telephone communication, and was not contrary to the purpose of the statute, the Court deferred to the FCC's decision (as well as examined the broadest dictionary definition of the word "call"). The Court also held that Satterfield had not expressly consented to receive the text message when she consented to receive promotions from Nextone affiliates and brands. The Court noted that express consent must be "clearly and unmistakably stated," which it found was not the case here, given that Satterfield agreed to receive promotions from Nextones, not Simon & Schuster. The Court determined that Simon & Schuster was not an "affiliate" of Nextones, since Nextones neither owned nor controlled Simon & Schuster, and did not consider them a subsidiary. Given that text messages fell within the TCPA and Satterfield had not consented to the text, the case was remanded for consideration whether the equipment used by Simon & Schuster had the requisite capacity to be considered an ATDS. While this ruling is not a final determination of this issue, and the battle in court will continue, it raises quite a few interesting issues and questions to navigate. Notably, this ruling will have a significant impact on any business that plans to run a promotional campaign via text messaging – such entities must ensure that any such promotion will be compliant with all applicable laws and regulations, including the consistently evolving standards that favor consumer protection and privacy. In addition, Simon & Schuster's exposure is noteworthy. While the Court ruled that Simon & Schuster could not take advantage of Nextone's defense based on "consent", it may still be liable as the source of the text, sent via Nextone's marketing partner, which was also named as a defendant. The lesson for entities like Simon & Schuster seems to be that they must take heed when entering into similar types of arrangements to ensure that agreements with marketing companies include the appropriate protections (e.g., representations and warranties, indemnity obligations, etc.) to avoid financial exposure. The ever-evolving interpretation of existing statutory and regulatory schemes makes such prudence vital, especially when launching initiatives involving new technologies or existing technologies in a new way. We will keep an eye on the progress of this and similar cases to keep our clients informed and protected.

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