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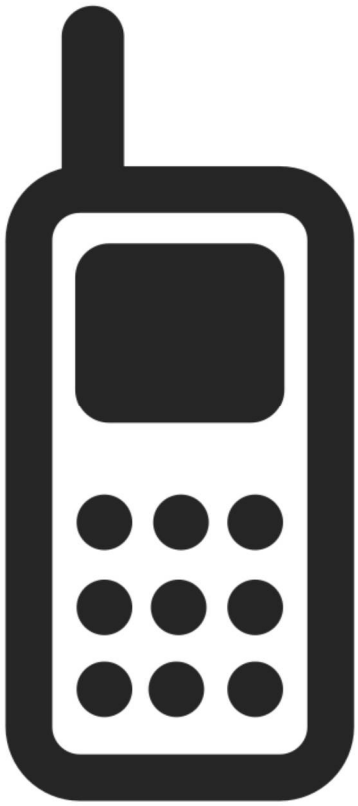

"STOP" by Any Other Name…Combatting Unreasonable Revocation

By William J. Akins

When the FCC declared that parties could revoke consent under the TCPA by "any reasonable method," many saw this as a gift to professional TCPA plaintiffs – time has shown that they were right. After all, reasonable minds can differ over what is "reasonable."

The FCC tried to erect parameters, stating "we will look to the totality of the facts and circumstances surrounding that specific situation, including, for example, whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance[.]" But because the contours of reasonableness are traditionally left for the fact-finder, revocation-of-consent lawsuits go on. That is, unless courts decide to intervene to declare that "reasonable" has its limits, and those limits do not allow gaming the system.

Currently before the Ninth Circuit Court of Appeals is a February 2017 decision from the U.S. District Court for the Central District of California, *Epps v. Earth Fare, Inc*. Ms. Epps claimed that she reasonably revoked consent to receive texts from Earth Fare. She revoked, she claimed, but not in the specific way that Earth Fare wanted, which was to type "STOP." Believing that the FCC gave her the right to any "reasonable" revocation, Ms. Epps expressed revocation in a conversational sense: "I would appreciate if we discontinue any further texts," and "Thank you but I would like the text messages to stop can we make this happen." Not surprisingly, Ms. Epps happened to be a plaintiff in other similar TCPA suits, a fact that the court took judicial notice of.

The district court did not condone this manipulation, finding that Ms. Epps purposefully ignored the ease with which she could have revoked consent by typing, "STOP." In the court's view, her method and her expectation were not "reasonable." As another basis for dismissal, the court also concluded that Ms. Epps had not properly pleaded the use of an automated telephone

The **Telephone Consumer Protection Act of 1991** imposes significant obligations on all businesses that contact consumers by mobile phone, text or fax.

In this issue:

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"STOP" by Any Other Name...Combatting Unreasonable Revocation (cont.)

dialing system. The court dismissed her twice-faulted case, and Ms. Epps appealed. Companies engaged in text communications with their customers are optimistic that the court of appeals will agree with the district court's sound reasoning.

The issue was tested again in New Jersey federal court, *Viggiano v. Kohls Department Stores*. Kohls allowed its text recipients to revoke consent by typing a range of verbs: STOP, CANCEL, quit, unsubscribe, and END. Yet, Ms. Viggiano likewise tried the conversational approach: "I've changed my mind and don't want to receive these anymore," "Please do not send any further messages," and "I don't want these messages anymore. This is your last warning!" Citing the Epps opinion, the New Jersey court elected to decide whether it was "reasonable" for Ms. Viggiano to ignore one-word commands in favor of sentences (notably, those sentences conveniently omit the particular command words). Like the Epps court, the New Jersey court concluded that Ms. Viggiano's approach "def[ied] both the FCC's rulings and common sense." This case also met an early demise, but was not appealed.

***The point*: Courts will scrutinize whether the plaintiff's methods and expectations for revocation were reasonable. Challenge the plaintiff's revocation method early in the lawsuit, as some courts are more willing than others to decide that question at the initial dismissal stage.**

The Real Privacy Violators: Spoofing Callers

By William J. Akins

The TCPA was intended to combat invasion of privacy, but privacy invaders have significantly changed since the act was passed in 1991.

Today's real violators are rarely businesses that blast-fax advertisements or telemarketers who robocall sequential or random cell phone numbers. All too frequently, modern autodialed calls utilize "spoofing": the calling number has a nearby area code but actually originates from another number, often from somewhere abroad.

Typically, spoofed calls are autodialed and begin with a pre-recorded introduction offering something of value to entice the called party to proceed, like a chance to win a free vacation. If the called party stays on the line, the recording ends and a live person joins to read from a script asking for personal or financial details. The Treasury Department estimates that $54 million has been lost on such scams since October 2013.

The Senate recently passed the Spoofing Prevention Act of 2017, aimed at extending the Truth in Caller ID Act of 2009 (47 U.S.C. § 227(e), 47 C.F.R. § 64.1604), which does not apply to callers outside of the U.S. The act adopted an earlier version passed by the House.

***The point*: The TCPA is too often invoked to punish well-meaning companies under the guise of invasion of privacy. New legislation is aimed at reining in the most egregious violators.**