

Here's my number, so text me maybe

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In our increasingly cellphone-dependent world, most consumers are familiar with the feeling of relief that comes from receiving an appointment reminder for an otherwise forgotten appointment, a delay notification for a flight before one leaves for the airport, or an automated payment notification for a bill that might otherwise have gone unpaid. To the average consumer who has grown accustomed to such conveniences, it would seem like poor and outdated customer service for a business not to provide such notifications. Yet businesses that provide such notifications by text message often find themselves facing millions of dollars in liability— not from customers who have asked not to be contacted by phone — but instead from the very customers who provided their cellphone number as their preferred method of contact.

The statute imposing such liability, the Telephone Consumer Protection Act was passed in response to the “pervasive” use of telemarketing in the early 1990s. Based on the legislative finding that “many consumers are outraged over the proliferation of intrusive, nuisance calls,” Congress imposed strict limitations on the conditions in which businesses can contact an individual by phone. Congress simultaneously imposed severe penalties on any business that violates these restrictions: Negligent violations of any TCPA restriction carry a statutory penalty of \$500 per call, while damages for willful violations are trebled to a staggering \$1,500 per call or message.

Like so many statutes with significant statutory penalties — and a corresponding potential to generate significant attorney fees — the TCPA has now been used to assert claims on behalf of a wide variety of plaintiffs beyond those the statute was originally designed to protect. Following the 2009 case of *Satterfield v. Simon & Schuster*, 569 F.3d 946, in which the 9th U.S. Circuit Court of Appeals concluded that text messages are the same as calls under the TCPA, the act in effect prohibits the sending of any text

messages without the “prior express consent” of the recipient. On the basis of this “prior express consent” requirement, plaintiffs who voluntarily provided their phone numbers to businesses have subsequently filed suit against those businesses on the basis of receiving a single text message. Even when — as is often the case — that text message provides that the customer will only be contacted again if they choose to opt in to text message services, the sending business faces a claim for damages in the amount of \$1,500 per text.

Fortunately, recent decisions demonstrate an increasing trend among federal courts not to find TCPA liability in cases where the plaintiff voluntarily provided their cellphone number to the defendant business. Heeding the instruction of the 9th Circuit that courts should approach the question of TCPA liability “with a measure of common sense,” *Chestboro v. Best Buy Stores*, 697 F.3d 1230, 1234 (9th Cir. 2012), courts have increasingly concluded that text messages sent to voluntarily provided numbers are simply not the types of intrusive, nuisance calls that the TCPA was intended to deter.

One recent case out of the Central District of California aptly demonstrates the logic of this common sense approach. In *Emanuel v. Los Angeles Lakers* (2013), a fan at the Staples Center voluntarily sent a text message to a number provided on a display screen so that his message (“I love you Facey. Happy Date Night”) would be displayed on the screen. The Lakers sent the fan a single text message back confirming receipt of his message. On the basis of this text message, the fan brought suit on behalf of all persons who received similar response texts from the Lakers, claiming that the sending of a text to the Lakers did not constitute consent to receive a response. The court granted the Lakers’ motion to dismiss, reasoning that “by sending his original message, Plaintiff expressly consented to receiving a confirmatory text from the Lakers.” The court went on to say that “to hold otherwise would contradict the overwhelming weight

of social practice: that is, distributing one's number is an invitation to be called."

The court utilized similar reasoning to reach the same conclusion in the case of *Shaya v. Sabre Inc.* (C.D. Cal. 2014). There the plaintiff input her cellular telephone number into the "contact information" page of the Hawaiian Airlines webpage while booking airline tickets. Three weeks before her scheduled flight the plaintiff was sent a single text message on behalf of the airline asking if she would like to receive text message notifications about her flight status. Shaya never responded to the text and was never texted again by the airline, but subsequently sought relief on behalf of herself and a class under the TCPA. The court granted summary judgment to defendant on the ground that plaintiff had effectively consented to be contacted by phone at the number she provided. In so doing, the court relied on a rulemaking action by the FCC, which concluded that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instruction to the contrary." Since the plaintiff provided no such contrary instruction, common sense compelled the conclusion that plaintiff had in fact consented to be contacted.

This trend in the case law should be welcomed by both businesses and consumers. Appropriately used text messages can provide valuable services to consumers: Appointment reminders, flight status updates, and automatic payment notifications are just a few examples of text messages that consumers frequently seek to receive. Moreover, the TCPA contains a number of provisions that effectively prevent such messages from becoming burdensome to consumers, such as the requirement of a prominent opt-out provision. In light of these protections, treating the provision of a cellphone number as consent to receive text messages allows for convenient communication without diminishing the ability of consumers to limit or eliminate unwanted texts.

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