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District court rejects serial TCPA plaintiff's "call to action," "opts-out" of class action, and provides helpful roadmap for text message compliance

By Dan Deane

The Telephone Consumer Protection Act (TCPA) remains a favorite vehicle for class action lawyers and opportunistic plaintiffs seeking a big pay day. Uncapped statutory damages of up to $1,500 per call or text can potentially result in eight or even nine figure damages awards. But federal courts are beginning to wise up to the fact that many plaintiffs and class actions lawyers are simply seeking a quick and easy pay day and are not truly serving any broader public interest against nuisance telemarketing calls. A recent decision by the U.S. District Court for the Eastern District of Louisiana in *Reese v. Marketron Broadcast Solutions, Inc.*, 2018 WL 2117241 (E.D.L.A. May 8, 2018), is illustrative of a trend toward rigorous scrutiny of the allegations of a TCPA complaint and away from giving plaintiffs the benefit of the doubt.

The plaintiff, Renee Reese, is a serial TCPA plaintiff. In the span of a few weeks in 2017, she filed three TCPA lawsuits in the Eastern District of Louisiana, each seeking millions in damages on behalf of a class. In the *Marketron* case, Reese alleged she received unwanted text messages from Marketron after entering a contest to win free tickets to a Tinashe concert. Reese heard an ad on the radio inviting her to text "joyride" to an SMS short code owned by Marketron. She did so and Marketron sent her a text confirming her contest entry. The Marketron text also provided Reese with a link to buy Tinshe tickets and gave her the option to sign up for more chances to win free tickets by replying "POWER."

Reese played along, texting "POWER" in response. Marketron then sent a second text stating:

> Marketron Mobile Alerts on 68255: Reply Y to consent to rcv mktg msgs from POWER. 5 msgs/mo. Reply STOP=stop, HELP=help. Msg&DataRatesMayApply. Consent not required to buy goods/svcs.

Once again, Reese played along, replying "Y." She then received several additional texts from Marketron over the course of the following 19 months. Some of those texts included opt-out instructions, but many did not. Tellingly, Reese did not elect to opt-out until five days after she filed her class action lawsuit.

After preliminary skirmishing, including an unsuccessful attempt to litigate her federal claims in state court, Reese's claims boiled down to two theories. First, she argued that Marketron's first text message violated the TCPA because it included advertising or telemarketing without obtaining her prior express written consent. Second, she argued that many of Marketron's later messages violated the TCPA because they did not include explicit opt-out instructions. Even applying the plaintiff-friendly standard of review for motions to dismiss, the District Court flatly rejected both theories.

The District Court first rejected Reese's contention that Marketron's first text constituted advertising or telemarketing. The Court cited to the FCC's guidance on "confirmatory" texts, which states that "a one-time text message sent immediately after a consumer's request for the text does not violate the TCPA and our rules." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2015 Declaratory Ruling), 30 FCC Rcd. 7961, 8015 (2015). The FCC had specifically endorsed the "call-to-action" model employed by Marketron: "a consumer might see an advertisement or another form of call-to-action display and respond by texting 'discount' to the retailer, who replies by texting a coupon to the consumer." *Id*. The retailer's reply message is not telemarketing because the consumer "requests and expects to receive the on-demand text message promptly in response." *Id*. Thus, such confirmatory response texts are permissible so long as it: "(1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information." *Id*. at 8016.

The Court was not bothered by the fact that the confirmatory text included a link to buy tickets. The Court stated that it could not be construed as "advertising the commercial availability . . . of [a] service" because Reese already knew about the availability of tickets to the concert (i.e., she had already heard the radio ad) and the text "related solely to the concert for which plaintiff desired free tickets and did not encourage the purchase of tickets for any other concert." *Reese*, 2018 WL 2117241, at *5.As further support for its ruling, the Court also concluded that Reese provided prior express consent to receive Marketron's first text when she sent her initial "joyride" text. The Court held that when Reese "sent her initial text message to enter the contest for free concert tickets, she invited a one-time confirmatory response containing information related to that concert." *Id*. at *6.

Reese did not fare any better on her opt-out theory. The Court cited the relevant FCC rule, 47 C.F.R. § 64.1200(b)(3), which requires that:

> In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line [or to other defined lines, including wireless lines], provide an automated, interactive voice and/or key press-activated opt-out mechanism for the called person to make a do-not-call request . . . [at the begining of the message] . . .

The Court noted that Reese had not alleged that she received an "artificial or prerecorded voice telephone message" from Marketron. Rather, she alleged that Marketron's text messages did not include opt-out instructions. But, the Court recognized, the FCC opt-out rule does not apply to text messages, which are governed by a different set of TCPA rules that apply to autodialers. Those rules do not require opt-out directions.

The Court's pragmatic, common-sense approach to its analysis of this case is illustrative of a growing trend in litigation. Courts seem to be showing less sympathy (and patience) for the crocodile tears of serial TCPA plaintiffs. In the past, courts might have been more inclined to

favorably construe a TCPA plaintiff's complaint in a manner that would avoid an early dismissal. For example, a more sympathetic court might have concluded that Reese's allegation that the first text constituted telemarketing because it included a link for purchase of concert tickets was sufficient to survive a motion to dismiss. But courts today seem less inclined to give plaintiffs the benefit of the doubt, particularly when the profit motives of the plaintiffs and their lawyers are so obvious.

One final, but important, footnote. Although this District Court found that opt-out instructions are not required for text messages, businesses that send text messages to consumers are well advised to stick with their prior practice of including the "Reply STOP" instruction in text messages. For one thing, this issue has not been litigated in other federal courts in published decisions that we have seen. While the ruling seems correct, it is far from established law.

More importantly, providing consumers with an easy opt-out mechanism protects the business from another form of frequent TCPA litigator—the deceptive "opt-out" evader. Under FCC rules, a consumer may revoke previously provided consent "at any time and through any reasonable means" including orally or in writing. *2015 Declaratory Ruling*, 30 FCC Rcd. at 7989-90. The D.C. Circuit re-affirmed this rule earlier this year in *ACA International v. FCC*, 885 F.3d 687, 709-10 (D.C. Cir. 2018). Some opportunistic TCPA plaintiffs have seized on the vagueness of this standard to attempt a stealthy revocation of consent in hopes that the business's automated system will not recognize the opt-out. Such plaintiffs will often send lengthy opt-out texts that say everything but the magic word, "STOP" (e.g., "please take me off your contact list," and "I want to confirm that I have been removed off your contacts").

In *Rando v. Edible Arrangements Int'l, LLC*, 2018 WL 1523858 (D.N.J. Mar. 28, 2018), another practical-minded District Court rejected such a strategy. Because the retailer had provided an easy and immediate process to stop the messages ("Reply STOP"), the Court concluded that plaintiff's long narrative opt-out responses were not reasonable. The D.C. Circuit has also suggested that this is the correct approach for analyzing opt-outs when it stated: "[i]f recipients are afforded [clearly-defined and easy-to-use-opt-out methods], any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might be seen as unreasonable." *ACA International*, 885 F.3d at 709-10. In summary, it remains best practice to provide text recipients with an easy way to opt-out.

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