

## **TCPA UPDATE: Failed Merger Leads to Failed TCPA Claim Against Both Sender & Service Provider**

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On February 22, 2016, the U.S. District Judge Joan H. Lefkow of the Northern District of Illinois granted defendants' motion for summary judgment dismissing plaintiff's claims based on violations of the Telephone Consumer Protection Act (TCPA). In *Payton v. Kale Realty, LLC*, Case No. 13 C 8002 (N.D. Ill.), Plaintiff voluntarily provided Defendant Kale, a real-estate company, with his personal cellphone number when he was in discussions with Kale about a possible merger with his business. Two years after the merger discussions terminated, Kale sent a text to Payton's personal cell via a third-party communication service provider, VoiceShot, that contained the following: "Kale Realty named 2013 Top 100 Places to Work by Tribune - We pay 100% on sales - Reply or visit <http://joinkale.com> to learn more." In doing this, Kale provided VoiceShot with Payton's cell number, the content, and the date on which it was to be sent.

As a result of receiving the text, Payton filed a lawsuit against both Kale and VoiceShot alleging that they violated the TCPA. The TCPA prohibits the use of an automatic telephone dialing system to send a communication to a cell phone without prior express consent from the recipient. Further, if the communication is for commercial advertising or telemarketing purposes, then it may not be sent without prior written consent. However, this prohibition does not apply to "common carriers," unless the common carrier is highly involved with or has actual notice of a third-party's use of their services in contravention of the TCPA. Both Kale and VoiceShot moved for summary judgment.

### **Mobile Phone Number in Contact Information of Email Sender Constituted Prior Express Consent**

The district court granted Kale's motion for summary judgment, finding that Kale had prior express consent from Payton to send the text, and that it did not need written consent because the text did not constitute a commercial advertisement or telemarketing. The court determined that Kale had prior express consent from Payton because Payton knowingly included his cellphone number in emails he sent to Kale during the merger discussions and did not instruct Kale to refrain from contacting him via his cellphone. The court did note, though, that this consent is limited to communications related to the purpose for which the cellphone number was originally given. Since Kale's text pertained to establishing a business relationship via an employment opportunity, the court found that this was related to Payton's original purpose for giving the number which was to establish a business relationship via a merger. Finally, the court noted that it was irrelevant that two years had elapsed

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since Payton had given Kale his number because prior consent does not expire under the TCPA.

### **Text Not Deemed Advertising or Telemarketing Because No Solicitation of Sale/Purchase of Goods or Services**

The court rejected Payton's argument that the text constituted an advertisement or telemarketing, mandating prior written consent instead of express consent. It found that it was not an advertisement because the content of the text did not reference the sale of goods or services. It also found that it did not constitute telemarketing because the purpose of the text was not to encourage the recipient to purchase anything from Kale, but rather to apprise Payton of an employment opportunity.

### **Service Provider Qualified for Common Carrier Exemption Due to Level(Lack) of Involvement**

The district court granted VoiceShot's motion for summary judgment, finding that VoiceShot does qualify for the common carrier exemption from liability. The court noted that to qualify as a common carrier under the TCPA two factors must be satisfied: (1) the telecommunication service must "hold[] itself out to serve indifferently all potential users," and (2) it must allow "customers to transmit intelligence of their own design and choosing." The court found both factors satisfied by VoiceShot because (1) VoiceShot held itself out to serve all potential users via a publicly available website, and (2) VoiceShot's customer, not VoiceShot itself, dictates both the content and recipient of the messages that are sent. Further, the court found that VoiceShot was neither highly involved with nor had actual notice of any illicit use of its services. The court found that VoiceShot was not highly involved because it did not control the initiation of the message; it was the customer that affirmatively selected when and to whom the message was sent.

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