

Ninth Circuit Court Finds Plaintiff-Initiated Text Communication Does Not Constitute Express Written Consent

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The Eastern District of **California** recently denied a motion to dismiss for failure to state a claim, despite the plaintiff having voluntarily initiated the text exchange at issue and having ignored immediately received opt-out notices. ***Larson v. Harman Mgmt. Corp.***, No. 16-0219, 2016 U.S. Dist. LEXIS 149267 (E.D. Cal. Oct. 27, 2016).

In *Larson*, the plaintiff heard about defendants' promotional campaign for a free A&W Papa Burger Single through word of mouth. On November 12, 2014, he texted the word "BURGER" to a phone number licensed and operated by defendants in response to the promotional campaign. Plaintiff immediately received the following message:

You have joined A&W Mobile Alerts. Up to 30 messages per month. Text HELP for help. Text STOP to cancel. Message and data rates may apply.

This first text message received by the plaintiff was not alleged to be a TCPA violation, nor could it be. In the July 2015 Order, the FCC addressed so-called "call-to-action" texts such as the foregoing, and ruled that this type of one-time text message sent immediately after a consumer's request does not violate the TCPA. The FCC reasoned that this type of responsive text is not "telemarketing," but rather "fulfillment of the consumer's request to receive the text," and that a call-to-action text does not run afoul of the TCPA 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." *In re Rules & Regs. Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 8015-16 (2015) ("July 2015 Order").

Plaintiff alleged, however, that the defendants stored his telephone number and through February 2016, without his prior consent, sent additional automated text messages regarding other food items that were not related to the initial promotion or "BURGER" text.

The FCC revised its position as it relates to telemarketing calls in 2012, ruling that if a call utilizing auto-dialer or prerecorded technology “includes or introduces any advertisement or constitutes telemarketing,” then prior express written consent from the telephone subscriber is required. *In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1838-44 (2012) (“2012 TCPA Order”); 47 C.F.R. § 64.1200(a)(2). The FCC regulations thus define prior express written consent as a written agreement that includes “clear and conspicuous disclosure informing the person signing that by executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice.” *2012 TCPA Order*, 27 FCC Rcd. at 1855. In July 2015, the FCC reiterated that to be compliant with the prior express written consent requirement, the consent must meet the definitional requirements of “prior express written consent” as set forth in the FCC’s 2012 Order. *July 2015 Order*, 30 FCC Rcd. at 8012-14.

In the July 2015 Order, the FCC specifically addressed the intersection between call-to-action texts and the prior express written consent requirement for telemarketing texts:

We note that some businesses include, in their call-to-action displays for on-demand texting programs, the small amount of wording necessary to make the disclosures required by the Commission’s rules concerning prior express written consent for autodialed or prerecorded telemarketing calls. See, e.g., <http://www1.macys.com/shop/couponsdeals> (visited Feb. 10, 2015) (disclosures under “get texts details”: “By texting COUPON from my mobile number, I agree to receive marketing text messages generated by an automated dialer from Macy’s to this number. I understand that consent is not required to make a purchase.”). Our ruling today allows businesses to voluntarily provide these simple disclosures to consumers in a call-to-action before sending a single on-demand text in response to a consumer’s request. If the business sends more than a single text as a response to the consumer, however, our rules require prior express written consent with the specified disclosures.

Id. at 8016 n.363.

Thus, based upon the FCC’s guidance, the *Larson* Court was confronted with a two-prong inquiry: (1) whether the text messages received after the initial “BURGER” text constituted telemarketing or an advertisement, and if so, (2) whether the initial text message constitutes the necessary prior express written consent.

Defendants argued that after initiating contact with defendants by texting “BURGER,” the plaintiff received an immediate text message response informing him how to opt-out of receiving the text messages, and that the opt-out language provided clear instructions that the plaintiff could terminate further contact by simply texting back “STOP” if he did not want to receive further messages. As defendants urged in their briefing, plaintiff was not only informed of the consequences of sending the opening text message, but also given instructions on how to opt-out if he did not want to receive any additional texts. Instead, he did nothing.

The Court disagreed. The Court first addressed the threshold question of whether the texts were “telemarketing,” and found that: “[t]hese messages plausibly appear to both advertise the availability of and encourage the purchase of particular goods.” *Larson*, 2016 U.S. Dist. LEXIS 149267, at *10. The Court then found that the prior express written consent requirement was not satisfied because,

apart from the text messages being “in writing,” the “BURGER” message neither clearly authorized defendants to deliver additional messages using an ATDS, nor included plaintiff’s signature.

This final finding regarding the purported lack of a signature, however, is arguably incorrect and mingles the analysis of whether the necessary disclosures were made and whether a signature was provided. As the Court in *Larson* acknowledged, when the FCC modified its regulations to require prior express written consent for telemarketing messages, it stated that “consent obtained in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.” *2012 TCPA Order*, 27 FCC. Rcd. at 1844.

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