

TCPA & Consumer Calling

Monthly TCPA Digest

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This edition of our *Monthly TCPA Digest* focuses on following opt-out instructions and potential ramifications when a plaintiff fails to properly or reasonably do so. Rulings from U.S. District Courts in New Jersey and California dismissed cases brought by plaintiffs who sent wordy opt-out text messages instead of following the defendants' straightforward opt-out mechanisms.

If you have suggestions for topics you'd like us to feature in this newsletter, or any questions about the content in this issue, please feel free to reach out to an attorney on Mintz Levin's [TCPA and Consumer Calling Practice team](#).

Failing to Follow Opt-Out Instructions: One's Revocation Must Be Reasonable

BY [ANNE-MARIE DAO](#)

Kohl's Department Stores Inc. was recently successful in obtaining dismissal of a Telephone Consumer Protection Act (TCPA) Class Action Complaint filed against it by Amy Viggiano. The reason? Because Ms. Viggiano failed to properly opt-out of receiving text messages.

In her Complaint, Ms. Viggiano admits that she did originally consent to receive text messages from Kohl's. However, she later attempted to withdraw her consent by replying to the text messages from Kohl's with a slew of purported opt-out messages, including: "(1) I've changed my mind and don't want to receive these anymore; (2) Please do not send any further messages; and (3) I don't want these messages anymore. This is your last warning!" *Viggiano v. Kohl's Dep't Stores, Inc.*, 2017 U.S. Dist. LEXIS 193999, at *2 (D.N.J. Nov. 27, 2017). Ms. Viggiano also alleges in her Complaint that Kohl's continued to send Ms. Viggiano text messages indicating that the only way she could properly opt out of receiving text messages from Kohl's is to text "STOP" to Kohl's. *Id.* Ms. Viggiano failed to do so, and filed suit against Kohl's in early January. The question to be considered, since Ms. Viggiano admits to consenting to receive text messages, and Kohl's does not deny it used an ATDS to send text messages, is whether Ms. Viggiano "has pled facts that support a finding she revoked consent in a reasonable manner such that [the] continued texts violated the TCPA." *Id.* at *6-7.

Kohl's argued that she did not reasonably revoke consent. Kohl's Mobile Sales Alert Program ensures that people who text any of the following will stop receiving text messages from Kohl's: STOP, CANCEL, QUIT, UNSUBSCRIBE, END. *Id.* at *7. Ms. Viggiano sent long wordy text

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messages to which she received the following automated reply: “Sorry we don’t understand the request! Text SAVE to join mobile alerts . . . Reply HELP for help, STOP to cancel.” *Id.* at *8. Still, Ms. Viggiano did not text “STOP” and alleged in her Complaint that her manner of revocation is consistent with the FCC’s rulings. *Id.* The District Court disagreed. The Court stated that Ms. Viggiano could not plausibly assert that she effectively communicated her revocation of consent. “Indeed, the only reasonable expectation Plaintiff could have had is the opposite—her request for revocation would not be successful... To the contrary, the facts in the Complaint suggest Plaintiff herself adopted a method of opting out that made it difficult or impossible for Defendant to honor her request.”

The Court referred to a Central District of California case, decided in February of 2017, with “nearly identical facts.” In *Epps v. Earth Fare, Inc.*, Defendant Earth Fare, Inc. was successful in moving to dismiss the TCPA Complaint against it because the Plaintiff failed to effectively revoke consent. Here, too, Plaintiff failed to comply with Defendant’s direct opt-out mechanism. Over the course of two months, Plaintiff alleged that she revoked consent to receive text messages from Defendant by sending the following text messages: “(1) I would appreciate [it] if we discontinue any further texts; (2) Thank you but I would like the text messages to stop can we make this happen; (3) I’m simply asking for texts to stop. I would appreciate that. Thanks; (4) As I requested earlier I asked that the text would stop, I would greatly appreciate it. Thank you; and (5) I’m simply asking for texts to stop. I would appreciate that. Thanks.” *Epps v. Earth Fare, Inc.*, 2017 U.S. Dist. LEXIS 63439, at *13 (C.D. Cal. Feb. 27, 2017). The Central District of California dismissed Plaintiff’s claims without leave to amend, stating that “heeding Defendant’s opt-out instruction would not have plausibly been more burdensome on Plaintiff than sending verbose requests to terminate the messages. In sum, Plaintiff has not plausibly alleged that her revocation was effective.” *Id.* at *14.

These two cases indicate a trend that Courts will take hard lines with Plaintiff subscribers where there are clear instructions on how they can opt-out of receiving further text messages, and they fail to follow those instructions.

About Our TCPA & Consumer Calling Practice

In an economy where timely and effective communication with both current and prospective customers is vital to the success of nearly every business, modern technology, such as autodialers, recorded and artificial voice messages, text messaging, and e-mail provide companies the ability to reach large numbers of people with increasingly smaller up-front costs. But, companies cannot afford to overlook the hidden costs of using these mass communication methods if the many regulations that govern their use are not carefully followed.

Companies have been hit with class action lawsuits under the Telephone Consumer Protection Act (TCPA) for tens or even hundreds of millions of dollars. Mintz Levin’s multidisciplinary team work tirelessly to help our clients understand the ever-changing legal landscape and to develop workable and successful solutions. TCPA rules can apply to certain non-sales calls, such as a recorded call to employees about a new work schedule or a text to customers about a new billing



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system. We advise on how to set up calling campaigns that meet state and federal requirements as well as how the Federal Communications Commission and the Federal Trade Commission apply their rules on calling, faxing, and texting. Given the uncertainties surrounding the TCPA as a result of the FCC's extensive and confusing rulings, we work with clients across many industries, health care, retail, communications and financial services, on matters relating to the following issues:

Compliance: Our TCPA team routinely advises companies on compliance with federal and state sales and marketing requirements. We also know what type of consumer consent is needed for each type of call and how specific consents must be worded. We know when and how to apply a do-not-call list and when and how an opt-out provision must be afforded.

Consumer class action defense: We've been called upon to handle TCPA class actions across all industries and in federal courts across the nation. Our seasoned litigators know the serial plaintiffs and counsel well and are unfazed by their schemes. Fortunately for our clients, our team has succeeded in winning at the motion stage or earlier in the vast majority of TCPA matters we have defended. That is what truly sets us apart. And if a case must go to trial, we have the experience and strength to follow it to the end.

Insurance coverage disputes: We know the arguments insurers use to deny coverage in TCPA suits because we've defended against them. More important, we have a long track record of convincing carriers to fund the defense of these actions and, in some cases, to pay significant portions of settlements. Our goal is to help secure insurance protection and to see to it that carriers make good on their coverage obligations when a claim arises.



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