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REPLY "STOP" to OPT-OUT:

Recent Court Decisions Provide Guidance to Defeat Telephone Consumer Protection Act Claims Based on Reasonableness of Revocation of Consent to Receive Text Messages

By Robert M. Linn and Ingrid A. Bohme[1]

The United States District Court for the District of New Jersey recently ruled that a plaintiff's expansive text messages stating her desire to stop receiving text messages from the defendant did not constitute a reasonable revocation of her consent to be contacted, resulting in the court's granting a motion to dismiss the putative Telephone Consumer Protection Act ("TCPA") class action. In *Viggiano v. Kohl's Department Stores Inc.*, No. 17-0243, 2017 WL 5668000 (D.N.J. Nov. 27, 2017), the plaintiff claimed that Kohl's had violated the statute by sending her (and others similarly situated) text messages after they had purported to revoke their consent to be contacted in that fashion. The *Viggiano* decision apparently turned on whether the plaintiff could ignore the opt-out instructions requiring specific single word commands in favor of conveying the same sentiment in her own words. The court ruled that because the Plaintiff's consent had never been effectively revoked, the defendant retailer's actions did not violate the statute.

In her complaint, Viggiano alleged that, although she had previously enrolled in Kohl's text message program, she later revoked her consent to receive those texts. Because the TCPA makes it unlawful to text a cellphone using an automatic telephone dialing system ("ATDS") in the absence of the recipient's consent or an emergency purpose, Viggiano sought statutory damages from Kohl's for each text message sent after she had purportedly revoked her consent.

The 2015 Omnibus Rules and Regulations of the Federal Communications Commission state that consent may be revoked by a reasonable oral or written method and that the caller cannot infringe on the recipient's ability to opt-out by designating an exclusive means of revocation. The New Jersey District Court focused on whether Viggiano's attempted revocation was *reasonable*. Specifically, Kohl's terms for its customer sales alert text message program stated that once enrolled, an individual could text several different words including STOP, CANCEL, QUIT, UNSUBSCRIBE, or END to Kohl's and that, upon so doing, the consumer would receive a text confirming the success of the opt-out.

Rather than texting any of those single-word commands to Kohl's, the plaintiff sent lengthy messages to the automated system. For example, despite Kohl's having provided the plaintiff with the "magic words," Viggiano allegedly sent the following messages to Kohl's:

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- "I've changed my mind and don't want to receive these anymore."
- "Please do not send any further messages."
- "I've had enough! I have told you to stop multiple times that I don't want these messages anymore. This is your last warning."

None of those messages had an "open sesame" effect—in response to Viggiano's messages, the Kohl's system responded, "we don't understand.... Reply STOP to cancel." Instead of texting that single word instruction, the plaintiff filed her lawsuit.

In its motion to dismiss, Kohl's took the position that Viggiano was not reasonable to think that responding to an automated system through any means other than those designated commands would be successful. The New Jersey District Court agreed that Plaintiff had no reasonable expectation that her attempted revocation of consent was effectively communicated. Moreover, the court held that the plaintiff had not pleaded that the opt-out system employed by Kohl's made it difficult or impossible for her to revoke consent. As such, the plaintiff failed to state a claim under Rule 12(b)(6) that Kohl's had contacted her improperly after she had revoked consent to be texted. In a memorandum opinion, the court dismissed the complaint in its entirety, including its class action allegations.

The issues in *Viggiano* mirrored arguments in two recent lawsuits in the U.S. District Court for the Central District of California, which were filed by the same attorney who had represented the plaintiff in *Viggiano*. *See Epps v. Earth Fare, Inc.*, No. 16–8221, 2017 WL 1424637, at *6 (C.D. Cal. Feb. 27, 2017) (plaintiff did not allege effective revocation of consent by sending verbose text messages rather than using defendant's simple opt-out command word); *Epps v. Gap Inc.*, No. 17-3424-MWF (C.D. Cal. June 27, 2017) (unpublished minute decision) (plaintiff failed to allege reasonable revocation of consent where she sent lengthy text messages rather than the word "Stop"). Both of those lawsuits were dismissed on similar grounds during the pleadings stage where the courts determined that the opt-out systems of the defendants were not impermissibly burdensome.

The analyses performed by the courts in the *Epps* and *Viggiano* decisions provide helpful guidance to businesses facing TCPA texting claims where the propriety of the company's opt-out program is in question. Because revocation of consent can be a fact-intensive inquiry, swift dismissal on a Rule 12(b)(6) motion will not always be possible. Nonetheless, these cases underscore the importance of companies implementing and strictly adhering to a reasonable opt-out procedure for ATDS-sent text messages as a means of defending themselves against TCPA claims.

If you have any questions about any of the above information, or wish to discuss a particular matter, please feel free to speak with Mr. Linn, Ms. Bohme or any other member of our Litigation Practice by calling us at 412-297-4900 or visiting https://www.cohenlaw.com/practices/litigation. To receive future news alerts, please send an e-mail to bulletins@cohenlaw.com.