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Two recent cases, one a Federal Trade Commission ("FTC") matter and the other a civil class action, highlight the increased risks faced by companies engaging in text messaging campaigns.

The FTC recently entered into a stipulated permanent injunction in its first enforcement action against an alleged text message "spammer," Phillip A. Flora ("Flora"). The FTC's resolution of its action against Flora preceded the filing of a joint motion for preliminary approval of a separate matter, *Gutierrez v. Barclays Group,* a class action brought in the Southern District of California. In the *Barclays Group* matter, the defendant agreed to a settlement fund exceeding $8 million to resolve claims alleging a violation of the Telephone Consumer Protection Act ("TCPA") related to text messaging. The Barclay's proposed settlement fund exceeds the amount of settlement of another text messaging class action, which was brought against The Timberland Company in 2008, and which resolved allegations of TCPA violations brought by a nationwide class. The *Timberland* matter, filed in the Northern District of Illinois, ultimately reached a resolution that included a settlement fund of $7 million.

## *FTC v. Phillip A. Flora*

The stipulated permanent injunction was the result of the FTC's complaint against Flora, which was filed on February 22, 2011. The complaint alleged violations of Section 5(a) of the FTC Act, which makes unlawful "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce…."[1] The complaint also alleged violations of the CAN-SPAM Act, which regulates commercial email messages.[2] According to the FTC, Flora sent at least 5 million unauthorized and unsolicited text messages to mobile phones for the primary purpose of promoting products and services—mainly loan modification programs and debt relief services. In the complaint, the FTC noted that many recipients of text message spam have wireless service plans that require them to pay a fixed fee for each text message received or have wireless service plans that allow a fixed, limited number of text messages per month with additional text messages billed on a per-message basis. According to the FTC, Flora's spam text messages caused annoyance, frustration, and a sense of harassment caused, in part, by the audible notification alerting the recipient to the spam text message in the late-night or early-morning hours or while at work or school.

The FTC also alleged that Flora would collect the cell phone numbers of those who responded to the unsolicited text messages, including those that asked Flora not to send further messages, and then sold those cell phone numbers to third parties. With respect to commercial emails, the FTC alleged that Flora sent unsolicited commercial email to consumers' computers in order to market and sell his products and services. Specifically, Flora advertised databases of debt leads, loan modification leads, data about homeowners and their mortgages, and other marketing data. According to the FTC, many of Flora's emails failed to include notification to recipients of their ability to decline to receive further email messages from Flora. The emails also failed to include a valid physical postal address of the sender. Both of these elements are required by the CAN-SPAM Act.

A violation of Section 5(a) of the FTC Act was also premised on Flora's maintenance of a website at loanmod-gov.net. The FTC alleged that the website was deceptive in that it appeared to be operated by or affiliated with a government entity, which is a material consideration for a consumer seeking mortgage loan modification services.

The stipulation was entered as a final order by the United States District Court for the Central District of California in August 2011. The stipulated permanent injunction included a provision for the payment by Flora of $58,946.90 as disgorgement, with $32,000.00 of the payment due within 10 days of the entry of the Order and the remainder of the payment due only if the FTC determines that

Flora misrepresented his financial condition during the negotiation of the stipulation. The stipulation permanently enjoins Flora from sending unsolicited text messages, making misrepresentations in any advertising, and violating the CAN-SPAM Act. The stipulation also imposes on Flora certain compliance monitoring and reporting for a period of five years and certain recordkeeping for a period of eight years.

## *Gutierrez v. Barclays Group*

The FTC's pursuit of text message spammers adds to the existing risk legitimate advertisers face in the form of civil actions filed against companies that utilize text messaging in their communications. In a recent civil action, the parties in *Gutierrez v. Barclays Group,* Case No. 10-cv-01012-DMS (BGS) (S.D. Cal.), recently filed a joint motion for preliminary approval of class action settlement. The underlying class action complaint sought to certify a nationwide class of approximately 66,100 individuals who received a text message confirming their request to no longer receive further text messages. The complaint alleges negligent and willful violations of the TCPA, which has been found to apply to the sending of text messages. Even though the confirming text message was apparently sent shortly after the consumers' request not to receive further text messages, and the TCPA affords a defendant a 30-day window to honor such a request, defendant lost a summary judgment motion on the issue of "prior express consent."

The proposed class action settlement fund includes $125 multiplied by the number of class members at the time of final judgment, but not to exceed $8,262,500. Each class member would share, *pro rata,* from the settlement fund after attorneys' fees and costs are deducted. If the settlement is preliminarily approved, class counsel will seek an award of attorneys' fees and costs not to exceed $1,580,000.

## Strategic considerations

There are very few laws specifically directed to text messaging. Actions in this area have been based largely on laws enacted before the prevalent use of text messaging. The Flora case represents the FTC's willingness and ability to use its Section 5 powers to bring enforcement actions against companies that engage in commercial text messaging. The *Barclays Group* case illustrates the risks of class actions based on TCPA claims. In view of the increased attention that the FTC and plaintiffs' attorneys are giving to commercial text messaging, any company that relies on this technology to promote its products or services should assess whether its communication practices comply with the laws. The attorneys listed on this *Client Alert* are available to discuss the regulations governing text message advertising as well as other information pertaining to advertising, privacy, and the FTC.

**NOTES**

1 15 U.S.C. § 45(a)(1)

2 15 U.S.C. §§ 7701-7713

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