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The TCPA Can Make Good Things Bad

February 21, 2018 | Michael A. Goodman

The Telephone Consumer Protection Act has the power to ruin whatever it touches, even something as beloved as ice cream. Its consent requirements are divorced from reality, and its penalty structure means that any violation can become an existential threat. A recent decision from a federal district court in California is one more example of the disconnect between the harm the TCPA protects against and the pain the TCPA inflicts on defendants. Don't let the quaint setting for this case - an ice cream shop - fool you. The court's opinion shows how the TCPA's overly aggressive consent standard and private right of action have created perverse incentives for plaintiffs to find alleged TCPA violations in the most pleasant scenarios.

Imagine a warm, sunny afternoon in Northern California. Melanie San Pedro-Salcedo decided to get some ice cream at her local Haagen-Dazs store. She was so looking forward to her treat that she accepted the cashier's offer to join Haagen-Dazs's rewards program, which would allow her to receive discounts on future scoops, shakes, and sundaes. She provided the cashier with her cell phone number as part of that conversation. Later that same day, Haagen-Dazs texted Melanie at the phone number she had provided to the cashier. The text read: "Thank you for joining Haagen-Dazs Rewards! Download our app here."

The Haagen-Dazs text apparently outraged Melanie because, in response, she filed a putative class action complaint alleging violations of the TCPA. Moreover, she claimed that Haagen-Dazs's violations were willful or knowing, meaning that each recipient of the ice cream text should receive $1,500.

For San Pedro-Salcedo to prevail, she would need to prove that Haagen-Dazs's text included an advertisement or constituted telemarketing and was delivered using an autodialer. The TCPA defines an "advertisement" as material that advertises the commercial availability or quality of any product, goods, or services. The TCPA defines "telemarketing" as the initiation of a message encouraging the purchase of goods or services. San Pedro-Salcedo argued that the Haagen-Dazs text was an advertisement because it advertised the commercial availability of the company's app.

In response, Haagen-Dazs asserted that the text was not an advertisement because it did not encourage recipients to buy anything. Haagen-Dazs offered several other court decisions to support its position. Those decisions held that text messages sent to complete registration in a retailer's rewards program were not advertisements or

telemarketing. The court found that the text messages in those other cases were materially different from Haagen-Dazs's text. Unlike the other texts, in Haagen-Dazs's case, the registration process was already complete when the text was sent: "Thank you for joining Haagen-Dazs Rewards!" That difference led the court to conclude that San Pedro-Salcedo did not need to download the app to register for the rewards program, meaning that the text was arguably an advertisement for the commercial availability of the app.

The court denied Haagen-Dazs's motion to dismiss the complaint for failure to state a valid claim. The court has not yet made a final determination as to whether the text satisfied the TCPA's definitions of "advertisement" or "telemarketing." If the court finds that the message was an advertisement or telemarketing and that Haagen-Dazs used an autodialer to send the message, then the TCPA would require the company to have "prior express written consent" to send it. If the message was not an advertisement or telemarketing, then the TCPA would require "prior express consent." San Pedro-Salcedo's oral exchange with the cashier did not satisfy the requirements for "prior express written consent": it lacked two required disclosures and San Pedro-Salcedo's signature. (The exchange should be considered valid "prior express consent" if the text was not an advertisement or telemarketing.)

The outcome of this case will hinge on whether the Haagen-Dazs text message advertised the commercial availability of a product. One of the leading cases on this point is *Chesbro v. Best Buy Stores, L.P.*, where the Ninth Circuit Court of Appeals asserted that this issue must be approached "with a measure of common sense." Beware courts wielding common sense. The *Chesbro* court found that phone calls encouraging rewards program members to use credits before they expired were telemarketing. It would be risky for Haagen-Dazs to count on the court's common sense to reject San Pedro-Salcedo's complaint. Even if Haagen-Dazs ultimately prevails, the court's denial of the company's motion to dismiss means more time and money spent arguing that a "thank you" text does not merit a $1,500 per message penalty rather than using those resources more productively.

And all of this began with a sunny day, a scoop of ice cream, and a text message thanking a customer for her business.

San Pedro-Salcedo v. Haagen-Dazs Shoppe Co., 2017 U.S. Dist. LEXIS 168532 (N.D. Cal. October 17, 2017).

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