



## COURT DISMISSES TCPA CASE FOR CONSUMER'S FAILURE TO PROPERLY REVOKE CONSENT

A New Jersey district court has dismissed a Telephone Consumer Protection Act ("TCPA") case holding that a consumer did not effectively revoke her initial consent to receive text messages from a department store because she did not follow the defendant's opt-out instructions. *Viggiano v. Kohl's Department Stores, Inc.*, No. 17-0243 (D.N.J. Nov. 27, 2017).

The consumer consented to receive automated commercial text messages from the department store, but later attempted to withdraw her consent by replying to the automated texts with the following messages:

- (i) "I've changed my mind and don't want to receive these texts anymore";
- (ii) "Please do not send any further messages."; and
- (iii) "I don't want these messages anymore. This is your last warning!"

The department store sent automated texts in reply that indicated the consumer's message was not understood, each of which noted that the only way the consumer could opt-out of the texts would be to reply "STOP." Further, in the governing Terms and Conditions, the department store explicitly provided instructions and a list of single-word commands that a consumer could text to stop receiving future text messages.

The court noted the Federal Communications Commission ("FCC") requires that callers give consumers a direct opt-out mechanism such as a key-activated opt-out mechanism for live calls. The opt-out method must be reasonable to allow consumers to respond to any unwanted calls to prevent future calls. The FCC has also ruled that when assessing whether any particular means of revocation used by a consumer was reasonable, the agency will look to the totality of the facts and circumstances surrounding that specific situation, including whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance.

The consumer argued she revoked consent in a manner consistent with the FCC's ruling that consumers have a right to revoke consent, using any reasonable method including orally or in writing, but the court found that the consumer failed to plead a claim

for a TCPA violation, noting that the consumer could not plausibly assert she had a reasonable expectation that she could effectively communicate her request for revocation to the department store by ignoring the single-word command instructions. Additionally, the court stated the facts in the complaint suggest the consumer adopted a method of opting out that made it difficult or impossible for the department store to honor.

The court took note of a Central District of California case, *Epps v. Earth Fare, Inc.*, No. 16-8221 (C.D. Cal. Feb. 27, 2017), in which the *Epps* court dismissed the plaintiff's TCPA claim because (i) heeding the defendant's opt-out instruction would not have plausibly been more burdensome on the plaintiff than sending verbose requests to terminate the messages and (ii) the plaintiff failed to allege the defendant made it difficult or impossible to effect revocation.

These cases should provide some relief to businesses who send automated text messages with an opt-out reply option. Nonetheless, businesses should be sensitive consent and revocation concerns and take reasonable steps to enable consumers to easily opt-out of unwanted communications.

Please contact us with questions or to discuss consumer consent and revocation policies and procedures.

✧ *Mike Tomkies and Lindsay Valentine*

Darrell L. Dreher  
ddreher@dtlaw.com

Elizabeth L. Anstaett  
eanstaett@dtlaw.com

Emily C. Cellier  
ecellier@dtlaw.com

Susan L. Ostrander  
sostrander@dtlaw.com

2750 HUNTINGTON CENTER  
41 S. HIGH STREET  
COLUMBUS, OHIO 43215  
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600  
WWW.DTLAW.COM

To see previously sent ALERTS, visit our website at [www.dtlaw.com](http://www.dtlaw.com)

To decline future ALERTS, please contact us at [ALERTS@DLTAW.COM](mailto:ALERTS@DLTAW.COM). This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.

Michael C. Tomkies  
mtomkies@dtlaw.com

Susan M. Seaman  
sseaman@dtlaw.com

Lindsay P. Valentine  
lvalentine@dtlaw.com

Judith M. Scheiderer  
jscheiderer@dtlaw.com

Robin R. De Leo  
robin@deher-la.com