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New favorite target for TCPA claims: apps

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Social media apps have recently become a favorite target of the plaintiffs' bar for claims under the Telephone Consumer Protection Act. The TCPA was enacted in 1991 to combat telemarketing robo-calls to land lines. As technology developed, the statute's prohibitions were extended to the use of robo-texting, most commonly used in connection with mass marketing campaigns. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, 18 FCC Rcd. 14014 (2003); see also *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

Now, with the proliferation of social media apps that allow users to invite their friends and family members to connect with them, the plaintiffs' bar has been bringing claims against app providers with increasing frequency on the ground that invitational text messages sent by apps violate the TCPA. The reason the TCPA is so attractive to the plaintiffs' bar — and dangerous for app providers — is because the statute authorizes the award of \$500 in statutory damages per violation and treble damages for intentional violations.

The Federal Communications Commission and various courts have determined, however, that an app provider cannot be held liable under the TCPA where the app requires the user to select whom they wish to send an invitation to, only sends text messages to contacts specifically selected by the user, and only after the user has affirmatively clicked another button in order to cause the text message to be sent. Indeed, even if an app automatically selects a user's contacts to receive an invitation, this action will not violate the TCPA as long as the user can choose not to send these contacts an invitation by de-selecting them.

In 2015, the FCC examined the apps operated by Glide and TextMe.

See In the Matter of Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015). The Glide app automatically spammed a user's contacts with text messages even though the user had not selected any of her contacts to receive the invitations. The FCC determined the Glide app violated the TCPA because the "app user plays no discernible role in deciding whether to send the invitational text messages, to whom to send them, or what to say in them." By contrast, the TextMe app enabled users to send invitational text messages to contacts in their address book after tapping a button that read "invite your friends," choosing whether to "invite all their friends or [] individually select contacts," and choosing to send the invite by selecting another button. The FCC found TextMe not liable under the TCPA because "the app user and not TextMe is the maker of the invitational text message." Numerous courts have adopted and applied this same reasoning in litigation.

Most recently, a California federal court considered an app operated by Life360, which allows users to communicate with and view the location of friends and family who have also downloaded the app and joined the user's circle. *See Cour v. Life360, Inc.*, 3:16-cv-00805-THE (N.D. Cal. July 28, 2016). Once a user has created an account, she is asked to indicate whether she gives the app permission to access her list of contacts in her smartphone's address book. If the user provides access, the app immediately displays a list of "recommended" contacts whom Life360 believes the user is most likely to want to invite. The user also has the option of scrolling through her entire address book and selecting to whom else she wishes to send an invitation. At the top of this screen, the text "Add Member" appears, and obvious checkmarks appear next to each contact that the user has selected to send an invitation to. The "Invite" button at the bottom of the screen also indicates the total number of contacts selected and a user must press the "Invite" button for the invitations to be

sent. The court found that Life360 did not violate the TCPA because Life360 users choose which of their contacts should receive an invitation and then affirmatively press an "Invite" button before invitations are sent. The court reached this conclusion even though the user was not expressly told that his or her contacts would receive a text message.

Another court dismissed a TCPA claim against Shopkick for its shopping app, which offers customers rewards for walking into participating stores, also because users must choose to whom, if anyone, from their phone's contact list to have invitational text messages sent. *See Huricks et al. v. Shopkick, Inc.*, 3:2014-cv-02464-MMC (N.D. Cal. Aug. 24, 2015). The court found that the "generic and commercial" nature of the text invitations at issue — which "provide[d] a link to the Shopkick website accompanied by the phrase 'Check it out'" — was immaterial and irrelevant to its holding that the Shopkick app only sends invitations at the user's affirmative direction.

WhisperText similarly prevailed in a lawsuit against its social networking app Whisper, which allows users to anonymously share photos and messages. *See McKenna v. WhisperText*, 5:14-cv-00424- PSG 5 (N.D. Cal. Sept. 9, 2015). When new users download Whisper, they are given the opportunity to anonymously invite their contacts to download the app as well, although invitees receive an impersonal, unsolicited text message from a ten-digit phone number registered to WhisperText. Here again, a court found that because human intervention caused the invitations to be sent, and not a platform that harvested and sent out text messages on its own, WhisperText had not violated the TCPA.

Practical Tips for App Providers

The foregoing decisions suggest a growing consensus among the federal courts that an app provider cannot be held liable under the TCPA where an app user is required to actively select the contacts to whom they wish to send an invitation to and only after affirmatively



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pressing another button — such as an "Invite" button — in order to cause the invitations to be sent. These decisions also suggest that providing a list of recommended contacts that have been automatically selected to receive an invitation will not violate the TCPA as long as the user can choose not to send these contacts an invitation. While the law in this area is still in a state of relative infancy, app providers should consider implementing the following procedures to minimize their risk of liability:

- Ensure your app does not automatically text a user's contacts immediately upon download without any user involvement.
- Require users to affirmatively grant access to their contacts.
- Require users to affirmatively select whom they wish to send invitations to by clicking on their names.
- Require users, after they have selected to whom they wish to send invitations, to affirmatively press another button — e.g., an "Invite" button — in order for invitations to be sent.

Finally, while the "Invite" button does not necessarily have to indicate that the invitation will be sent by text message, providing a clear indication to the user that the invitation will be sent by text will increase the likelihood that your app is not deemed the "maker" of the resulting text.

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