

Litigating Mobile Marketing Claims

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Text messaging, mobile content, and other mobile device applications, coupled with the immense marketing opportunities associated with those technologies, comprise a rapidly growing business area. Interactive marketing is now a \$24 billion a year industry, and some analysts are projecting growth to \$80 billion or more by 2011.¹ The popularity of the iPhone and other advanced mobile devices has opened up myriad new channels for advertisers, marketers, and content providers. A recent survey indicates that 65 percent of advertisers plan to develop mobile applications in 2010,² and the advent of 4G technology will continue to expand data and video content possibilities.³ Of course, with increased utilization of text messaging technology comes increased legal risk for companies engaged in mobile marketing. Companies of all kinds are faced with a growing number of class action lawsuits asserting claims ranging from violation of the Telephone Consumer Protection Act (TCPA)⁴ to common law torts and state consumer protection laws. These risks apply not only to wireless carriers, aggregators, mobile content providers, and affiliate marketers that operate exclusively in the mobile marketing space, but also to traditional media outlets and other companies taking advantage of new mobile technologies.

The potential for mobile marketing liability is often overlooked because there are very few reported decisions associated with these claims. However, the new litigation opportunities presented by the rapid and often unorganized growth of the mobile marketing industry have not been lost on plaintiffs'

attorneys. Many of the plaintiffs' firms involved in more traditional junk fax litigation under the TCPA have begun targeting mobile marketing, in some cases asserting TCPA claims reminiscent of the junk fax claims and in other cases asserting state statutory and common law claims often asserted in junk fax cases. Over the past three years there has been an explosion of these mobile marketing cases—at least 125 have been filed nationwide. The newly developed mobile marketing plaintiffs' bar is using many of the organizational and mass action tactics employed so effectively by the junk fax bar: sharing form complaints and discovery and creating websites, such as <http://www.classactionconnect.com>, to solicit alliances and new claims.

In a general sense, two primary types of claims are associated with mobile marketing: text message spam cases and unauthorized charge cases. In a typical text message spam case, the plaintiffs allege that they received one or more unauthorized text messages. Based on these text messages, the plaintiff brings a lawsuit on behalf of themselves and putative class members who have received similar text messages. These complaints often assert a count for violation of the TCPA, arguing that a text message is a "call" under the autodialer provision of the TCPA.⁵ In a typical unauthorized charge case, the plaintiffs allege that their mobile phone bills were charged for text messages or other premium mobile content (such as ringtones, games, wallpapers, daily stock tips, and sports scores) that they did not authorize. The complaints typically assert claims for, *inter alia*, unjust enrichment, tortious interference, trespass to chattels, and violation of state consumer fraud statutes. This article will address both types of cases, as well as possible defenses.

Jurisdiction

As an initial matter, it is important for counsel to consider the proper jurisdiction for mobile marketing claims. Mobile marketing claims are typically

filed in state courts, which are often considered to be friendlier to TCPA claims and other class actions.⁶ Under the TCPA, the standard for whether a state-filed TCPA action can be removed to federal court varies by circuit. All but one of the circuits that have evaluated the issue held that district courts lack federal question jurisdiction over TCPA claims.⁷ But in the Seventh Circuit, which has been a hotbed for TCPA junk fax claims, TCPA claims are removable on federal question grounds.⁸ All circuits that have addressed the issue have acknowledged that TCPA claims are removable under the Class Action Fairness Act (CAFA),⁹ but the Seventh Circuit currently stands alone in its recognition of federal question jurisdiction for TCPA claims. Thus, beyond the Seventh Circuit, TCPA cases can likely be removed only where the statutory damages to a single plaintiff are sufficient to reach the amount in controversy threshold for diversity jurisdiction¹⁰ or in class actions removable under CAFA.

The standard for removal in the unauthorized charge cases typically turns on whether the case meets the requirements of CAFA. CAFA grants federal courts jurisdiction over class actions in which (1) the class of plaintiffs is 100 or greater, (2) minimal diversity exists, and (3) the amount in controversy exceeds \$5 million.¹¹ In these cases, the primary issue is the amount in controversy. The plaintiffs typically claim that the defendant cannot prove that the amount in controversy exceeds \$5 million. Many federal courts have granted motions to remand on this basis.¹² However, remand can be defeated in these cases if enough amount-in-controversy evidence is presented to the court under the relevant standard.¹³

Text Message Spam TCPA Claims

Since the Ninth Circuit's June 2009 decision in *Satterfield v. Simon & Schuster*¹⁴ (*Satterfield II*), holding that the TCPA applies to text messages, plaintiffs have filed an increasing number of putative class action lawsuits against

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businesses and agencies that use mobile marketing as part of their advertising and sales campaigns. Several of these cases have been resolved in expensive class action settlements. For example, the Northern District of California recently granted preliminary approval to a settlement in *Satterfield II* that will create a settlement fund of \$10 million and award of attorney fees in the amount of \$2.725 million.¹⁵ To successfully assert a TCPA claim related to text messaging, the plaintiffs must prove (1) a “call” was made, (2) using an “automatic telephone dialing system” or an artificial or prerecorded voice, (3) the number called was assigned to a cellular telephone service, and (4) the “call” was not made with the “prior express consent” of the receiving party.¹⁶ An *automatic telephone dialing system* is defined as equipment with the capacity to store or produce numbers to be called, using a random number generator, and to dial such numbers.¹⁷ Although the term *call* is not defined, and the statute makes no specific reference to text messaging, class action plaintiffs have identified mobile marketing content as “unsolicited commercial text calls to potential customers using an automatic telephone dialing system and/or using an artificial and prerecorded message.”¹⁸ This interpretation has been accepted by the Ninth Circuit in *Satterfield II*, the Northern District of Illinois in *Abbas v. Selling Source*¹⁹ and *Lozano v. Twentieth Century Fox Film Corp.*,²⁰ and an Arizona state court in *Joffe v. Acacia Mortgage Corp.*²¹

Text messaging TCPA claims have been used to target not only mobile marketing companies, but also larger corporations that use their services. A prime example is *Weinstein v. AIR-IT2ME*,²² a text messaging TCPA class action brought against outdoor apparel retailer Timberland and its mobile marketing partners. The plaintiffs alleged that Timberland sent unsolicited text message advertisements to plaintiffs’ cell phones, subjecting them to “the aggravation that necessarily accompanies unsolicited wireless spam” as well as the cost of text messaging. The only cause of action raised by the plaintiffs was violation of the TCPA. The plaintiffs alleged that these “text calls” had been made with an automatic telephone dialing system, thereby bringing them within the scope of the TCPA, and that

Timberland had not obtained the consent of the recipients.

A similar claim was filed in November 2008 against McDonald’s.²³ In *Cooley v. McDonald’s*, the plaintiffs allege that McDonald’s marketed its 2008 Monopoly promotion by sending unauthorized text message advertisements without prior express invitation or permission from the account holders.²⁴ The plaintiffs specifically assert that the TCPA “prohibits automated, unsolicited voice and text calls to cell phones.” The *Cooley* case was eventually voluntarily dismissed. The plaintiffs in *Cooley* and *Weinstein* are by no means alone. In addition to the decisions discussed below, plaintiffs’ attorneys have filed a number of similar cases nationwide.²⁵

Because the statutory language of the TCPA does not clearly apply to text messages, several issues are unique to text message cases: (1) whether the plaintiff must allege that he was charged for the text message he received, (2) whether a system’s mere capacity to autodial numbers is sufficient to allege an automated telephone dialing system, (3) whether a text message is a “call” within the meaning of the TCPA, (4) whether the application of the TCPA to text messages would violate the First Amendment, and (5) whether the application of the TCPA to text messages would render the statute void for vagueness under the Due Process Clause. Six cases nationwide have addressed one or more of these issues: *Satterfield II*, *Abbas*, *Lozano*, *Joffe*, *Satterfield v. Simon & Schuster, Inc.*²⁶ (*Satterfield I*), and *Pollock v. Island Arbitration & Mediation, Inc.*²⁷ Of these cases, only the *Abbas* decision addressed all five issues.

Charge

In *Abbas*, the court held that a charge was not a necessary element of a claim under the TCPA.²⁸ This conclusion is significant because it appears to be the first nationwide squarely addressing the issue. The *Abbas* ruling was echoed a few months later in *Lozano*: “The Court [] finds that the plain language of the TCPA does not require Plaintiff to allege that he was charged for the relevant call at issue in order to state a claim pursuant to § 227.”²⁹

However, these rulings are contrary to the only FCC authority on point, which says a charge is required.³⁰ The

Abbas court’s opinion on the “charge” issue rejects deference to the FCC and rests almost completely on a technical amendment that was passed in 1992 without explanation by Congress. That amendment allowed the FCC to exempt calls to telephone numbers assigned to cellular services that are not charged to the called party.³¹ “If uncharged calls were already exempted from the requirements of the TCPA, as the FCC’s 1992 Order and Selling Source maintain, the later congressional amendment would be wholly superfluous, as no FCC ‘rule or order’ would be necessary to exempt such calls from the statute’s purview.”³²

That amendment has never been interpreted by the FCC and has never been interpreted by any other court. The language cited by the court in *Abbas* is a technical amendment, which federal courts have shown an unwillingness to apply in a manner that would undermine substantive policy determinations.³³

Autodialer

The courts that have addressed this issue have split on whether an allegation of mere capacity to autodial is sufficient to state a cause of action under the TCPA for text messaging. In *Satterfield II*, *Abbas*, and *Lozano*, the courts focused on the presence of the word *capacity* in the statute. The Ninth Circuit held that “[w]hen evaluating the issue of whether equipment is an ATDS, the statute’s clear language mandates that the focus must be on whether the equipment has the *capacity* ‘to store or produce telephone numbers to be called, using a random or sequential number generator.’”³⁴ Under these holdings, the equipment need not actually store, produce, or call randomly or sequentially generated telephone numbers.³⁵

The courts in *Satterfield I* and *Pollock*, however, focused on the use of the autodialer capacity. The *Pollock* court found that “[s]ince the plaintiff did not establish that the defendant used a dialing system which randomly or sequentially generated telephone numbers, the plaintiff cannot establish that the defendant placed a call to a cellular telephone using an automatic telephone dialing system pursuant to 47 U.S.C. § 227(b)(1)(A)(iii).”³⁶ This appears consistent with the FCC’s interpretation that the TCPA applies only when the equipment in question is

actually used to autodial. For instance, the FCC stated in 1992 that “the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (i.e., *dialed* using a random or sequential number generator). . . .”³⁷

Call

All courts that have addressed this issue have determined that a text message is a call within the meaning of the TCPA. The Ninth Circuit deferred to the FCC,³⁸ noting that “the FCC’s interpretation of the TCPA is reasonable,” and therefore holds that a text message is a call within the TCPA.³⁹ On the other hand, the court in *Abbas* found that the term *call* under the TCPA “might encompass an SMS message” despite holding that the term is not defined by the TCPA, that the term is ambiguous, and that FCC interpretations of the term are entitled to no deference.⁴⁰ In *Joffe*, the court determined that a text message is a call because it is an attempt to communicate by phone.⁴¹

Abbas is the only decision to address whether the TCPA may be void for vagueness.

These interpretations arguably broaden the scope of the TCPA to include any form of communication between digital devices, no matter how far removed those technologies are from the original conceptions of Congress in passing the TCPA in 1991 and no matter how little the communications have to do with analog telephony. Arguably, the same logic applied by the courts and FCC would have the TCPA apply to e-mails transmitted between phones, i.e., iPhones, BlackBerrys, and similar devices.

The issue of whether the term *call* includes text messages may be settled by determining whether the term was meant to describe a specific activity or a category of activities. In *Abbas*, the defendant reasoned by analogy from Justice Holmes’ logic in *McBoyle v. United States*,⁴² in which the U.S.

Supreme Court reversed the Tenth Circuit and found that reference to “motor vehicle” in the National Motor Vehicle Theft Act did not encompass airplanes. The defendant argued that as the term *motor vehicle* did not conjure up the notion of an airplane in the 1930s, the term *call* did not conjure up the notion of a text message in 1991, or even to this day. In that sense, the defendant argued that the term *call* was referring to a specific activity.

But the Northern District of Illinois, citing *Squillacote v. United States*,⁴³ rejected this interpretation. In *Squillacote*, the Seventh Circuit made an off-handed reference to “media” encompassing “television” and “motor cars” encompassing “Volkswagens.” The court relied on this guidance to hold that “the nonexistence of SMS messages when the TCPA was enacted does not preclude the application of the latter to the former.”⁴⁴ These analogies arguably are not equivalent. In today’s lexicon, there would be little doubt that television is a type of medium and Volkswagen is a type of motor car. However, a text message is not clearly a type of call. *McBoyle* may provide the better analogy because it is equally unclear whether an airplane would fall in the motor vehicle category.

First Amendment

Although many courts have addressed First Amendment challenges to the TCPA in the fax spam context, *Abbas*, *Lozano*, and *Joffe* are the only opinions to address a First Amendment challenge to the TCPA autodialer provision’s application to text messages. The distinction between the fax spam provision of the TCPA and the autodialer provision is important because the fax spam provision applies only to commercial speech, whereas the autodialer provision covers both commercial and noncommercial speech.⁴⁵ In *Abbas*, *Lozano*, and *Joffe*, the courts held that the TCPA, as applied to text messages, was a valid content-neutral time, place, and manner restriction on speech because

1. the TCPA’s application to text messages served a significant government interest in limiting the nuisance and invasion of privacy caused by telemarketing,
2. the TCPA’s application to text messages was narrowly tailored

to achieve this goal because the interest would be achieved less effectively absent the regulation, and

3. the TCPA’s application to text messages left open ample alternative channels for telemarketing.⁴⁶

As to the first prong of the time, place, and manner test (significant government interest), Congress has never articulated an interest in application of § 227(b)(1)(A)(iii) to text messages.⁴⁷ Of course, the congressional history preceding the TCPA and its amendments contains absolutely no reference to text messages. Nor does the TCPA itself contain any reference to text messages.⁴⁸ The court in *Abbas* relied solely on a vague privacy interest to hold that text messages, whether commercial or not and no matter where received, sufficiently implicate that interest.⁴⁹ Such invocation of a vague interest without evidence showing the interest is indeed served by a specific regulation does not satisfy the first prong.⁵⁰ The court in *Joffe* went a step further, holding that the ubiquity of cell phones in American life somehow heightens the privacy interest underlying the TCPA.⁵¹ This theory is based on the premise that “[w]hile junk mail may be thrown away unopened, and television commercials turned off, the telephone demands to be answered.”⁵² This shows a fundamental misunderstanding of how text messages work. Text messages can be received without disrupting a cell phone’s ability to send and receive calls, and they can be ignored or deleted unopened.

The courts’ rulings on the narrow tailoring prong also seem to ignore the differences between the TCPA’s prohibition on unsolicited faxes and its prohibition on calls using an automated telephone dialing system. Because the autodialer provision covers both commercial and noncommercial speech, application of the TCPA to text messages would restrict not only commercial text messages, but also any core First Amendment speech sent by a system with the mere capacity to dial numbers in a random or sequential order. The courts have not addressed this commercial versus noncommercial distinction. In fact, the court in *Lozano* proceeded under the test for commercial speech: “Courts analyze restrictions on *commercial speech* using the four part test

set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁵³

With respect to the third prong (alternative means), the *Abbas* court's reasoning actually highlights the problem with finding that mere capacity to autodial is sufficient to state a claim. The court's analysis refers to "[a]utomated dialers seeking to avoid the strictures of the TCPA,"⁵⁴ but the court's decision actually targets anyone using a system with the mere capacity to autodial, no matter whether that capacity is in fact used. That is why the court's interpretation of the TCPA does not leave open sufficient alternative channels of communication; it essentially constrains mass text messaging as a form of communication altogether (whether commercial or not and regardless of whether an autodialer is in fact used to transmit). Moreover, just as forcing a handbill purveyor to engage in person-to-person or mail solicitation is constitutionally infirm,⁵⁵ so is forcing a mass text message sender to engage in other "live methods of communication," as suggested by the court.

Due Process

The court in *Abbas* is also the only court to address whether the TCPA, as applied to text messages, may be void for vagueness. The court found that its interpretation of the statute, including text messages in the definition of *call* and requiring mere capacity to autodial, derives from a straightforward reading of the statute.⁵⁶ But with regard to the autodialer interpretation, *Satterfield I* and *Pollock* came to different conclusions regarding the meaning of the statute on this point.⁵⁷ Moreover, from a due process notice standpoint, the first decision to find that mere capacity to autodial was sufficient was not published until 2009 (*Satterfield II*). Up until 2009, the only case law on point (*Satterfield I* and *Pollock*) found actual use was required to establish a TCPA violation.

As to the "call" question and due process, the *Abbas* court found that FCC interpretations and a single 2005 Arizona appellate court decision (*Joffe*) should have provided sufficient notice to avoid a due process challenge.⁵⁸ However, the court earlier in its opinion found that the FCC interpretations were entitled to no deference and acknowledged that the term *call* in the TCPA

is ambiguous.⁵⁹ Additionally, federal courts have held that only extrinsic evidence that narrows the meaning of a statute (rather than broadening it) should be considered under the void for vagueness doctrine.⁶⁰ The court in *Abbas* did not address this argument.

Unauthorized Charge Claims

The large class action settlements that have arisen from unauthorized charge cases should pose concerns for businesses involved in mobile marketing and their insurance carriers. In 2010 alone, courts have approved class action settlements with funds of \$36 million and \$12.25 million.⁶¹ However, none of these cases has ever been tried. In fact, these cases are rarely litigated to conclusion, and it appears that only one court nationwide has certified a text message class in the face of opposition.⁶² Although there have been some preliminary rulings, the plaintiffs in these cases often withdraw in the face of case dispositive motions.⁶³ Many of the legal theories discussed below therefore remain untested in the context of unauthorized charges. In unauthorized charge cases, plaintiffs typically assert causes of action under one or more of the following theories: (1) unjust enrichment, (2) tortious interference, (3) trespass to chattels, (4) violation of consumer fraud statutes, (5) violation of the Computer Fraud and Abuse Act (CFAA),⁶⁴ and (6) breach of contract. Such claims have been brought against mobile content providers, wireless carriers, aggregators (which manage billing between cell phone carriers and content providers), affiliate marketers (entities that engage in Web advertising related to mobile content), copyright licensors, and social networking websites that offer mobile services. Although the elements of these claims vary by state, many of the concepts are often the same.

Unjust Enrichment

To prove unjust enrichment, a plaintiff must generally show (1) enrichment by the defendant, (2) to the detriment of the plaintiff, and (3) defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.⁶⁵ In these cases, the plaintiffs argue that companies associated with mobile content have turned a profit (either directly or indirectly) by charging

the plaintiffs for unsolicited content. As an initial matter, it should be noted that unjust enrichment is not an independent cause of action in many jurisdictions.⁶⁶

Even when unjust enrichment is a valid, independent cause of action, it may be barred as a matter of law. For example, under California law, a quasi-contract claim cannot be brought when the subject matter of the claim is governed by a contract.⁶⁷ This rule applies not only in direct contractual situations, but also when a contract governs the subject matter of the suit between a party to the contract and a third party.⁶⁸ Also, a person who acts pursuant to a duty to one party is not entitled to recover under a theory of unjust enrichment for incidental benefits conferred on a third party.⁶⁹

In a typical unauthorized charge case, the basis for the plaintiff's claim is a purportedly unauthorized charge that appeared on his or her wireless telephone bill. That bill is governed by the contract between the consumer and the wireless carrier. Moreover, the money allegedly received by a defendant involved in mobile marketing would have been paid by the plaintiff pursuant to his or her contractual duty to pay the wireless bill. Thus, claims for unjust enrichment are arguably barred by the consumer carrier contract and the corresponding duties.

Tortious Interference

When these claims are brought against aggregators, affiliate marketers, or content providers, the plaintiffs allege that these entities interfered with the contract between the plaintiffs and their carriers. To prove tortious interference, the plaintiffs generally must show (1) the existence of a contract, (2) the defendant's knowledge of the contract, (3) the defendant's intentional and unjustified interference with the contractual relationship, (4) the defendant caused a subsequent breach of contract by a third party, and (5) damage to the plaintiffs.⁷⁰ Claims for tortious interference are often susceptible to defenses based on pleading deficiencies and the voluntary payment document, both of which are discussed in greater detail below.

Trespass to Chattels

To state a claim for trespass to chattels, the plaintiff typically must establish "(1) the defendants' unauthorized

or wrongful assumption of control, dominion or ownership of the plaintiff's property; (2) the plaintiff's right in the property; (3) the plaintiff's right to immediate possession; and (4) the plaintiff's demand for possession."⁷¹ In unauthorized charge cases, the plaintiffs allege that the defendant content providers, by delivering content to their phones or causing content to be delivered to their phones, assume control of the plaintiffs' phones, thereby depriving them of their unfettered rights of possession. However, courts that have considered trespass to chattels claims in the context of electronic communications have held that

electronic communication that neither damages the recipient computer system nor impairs its functioning . . . does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself. . . . Merely alleging that the unwanted content sent by [defendants] "occupied" a portion of the cell phone's memory . . . is insufficient.⁷²

Consumer Protection Statutes

Unfair or deceptive trade practices laws vary significantly by state, but the plaintiffs typically rely on the same facts to bring these claims. In each case, the plaintiffs allege that the defendants falsely claim that the plaintiffs authorized charges for mobile content services or that the defendants' advertisements, consent mechanisms, or both related to mobile content were somehow misleading or deceptive. One motivation for plaintiffs to bring these claims is that, unlike other causes of action, these state laws usually allow recovery of attorney fees. The mobile marketing plaintiffs' bar has brought consumer fraud claims under both California's Unfair Competition Law (UCL)⁷³ and the Illinois Consumer Fraud and Deceptive Business Practices Act.⁷⁴ The California law bars unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." In contrast, the Illinois law has three elements: (1) a deceptive act or practice by the

defendant, (2) the defendant's intent that plaintiff rely on the deception, and (3) the deception occurred in the course of conduct involving trade/commerce.⁷⁵ Claims also have been brought under California's Consumer Legal Remedies Act (CLRA),⁷⁶ which has four elements: (1) defendant engaged in unfair or deceptive acts as defined by the statute, (2) in a transaction intended to result or which results in the sale or lease of goods or services to any consumer, (3) the consumer relied on the deceptive acts, and (4) the consumer was damaged.

The best defensive strategy in these cases is typically a detailed analysis of these elements because the complaints often fail to adequately plead the requisite elements under the relevant consumer protection statutes, particularly given that many of the statutes sound in fraud, mandating a heightened pleading standard under Rule 9(b) of the Federal Rules of Civil Procedure or similar state rules. For example, in *Feinberg v. Azoogles Ads US, Inc.*,⁷⁷ the plaintiffs alleged, inter alia, violation of the CLRA. But the complaint arguably failed to allege the elements of such a claim. Rather than alleging specific actions committed by defendant Azoogles, the complaint criticized the industry as a whole, complaining about the behavior of companies "such as Azoogles" without actually identifying any alleged acts committed by Azoogles. Although the CLRA requires that the allegedly false or misleading statements at issue occur in a consumer transaction, the plaintiff failed to allege a transaction with Azoogles and failed to allege that any false or misleading statements were made to a consumer.

Similarly, the plaintiffs in *Feinberg* failed to allege with the requisite specificity any conduct that was an "unlawful, unfair or fraudulent business act" under the UCL. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, the California Supreme Court required that "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."⁷⁸ The *Cel-Tech* decision initially was limited to actions by competitors for anticompetitive practices, but courts have subsequently applied the same standards to consumer cases.⁷⁹ But the

plaintiffs in *Feinberg* did not assert sufficient facts to meet this standard. Azoogles therefore moved to dismiss on these and other grounds.

Another example is *Walker v. Thumbplay*, where the plaintiffs asserted a cause of action under the Illinois Consumer Fraud and Deceptive Business Practices Act.⁸⁰ Once again, the plaintiffs did not allege that defendant Thumbplay engaged in any specific fraudulent behavior. The court, in dismissing the complaint, held that to state a claim under the state's consumer fraud act, the plaintiffs needed to allege "the who, what, when, where, why and how: the first paragraph of any newspaper story."⁸¹

Computer Fraud and Abuse Act

To bring a civil action under the CFAA, a plaintiff must show that, inter alia, a violator "knowingly" and "intentionally" accessed a computer without authorization and either obtained information from the device or damaged the device.⁸² The plaintiffs in unauthorized charge cases argue that a content provider's act of transmitting unauthorized content to their cell phones constitutes knowing and intentional access that damages those devices. However, at least one court has rejected this argument. In an unauthorized charge case in Minnesota, a federal court dismissed a CFAA claim.⁸³

In sum, the Court concludes that [plaintiff] has failed to state a claim under the CFAA because she has failed, at a minimum, to sufficiently allege that [defendant] obtained information from her cell phone in violation of the CFAA or that [defendant] intended to damage her cell phone by sending text messages to those that were not current subscribers, or that any pecuniary loss [plaintiff] might have suffered was a result of [defendant] having violated the CFAA by either of those actions.⁸⁴

Breach of Contract

When lawsuits are filed against wireless carriers, the plaintiffs often argue that the contract between subscribers and the carrier was breached when the plaintiffs were charged for unsolicited content. To prove this claim, the plaintiffs generally must show (1) the existence of a valid contract, (2) the

plaintiffs complied with the contract, (3) the defendant failed to perform the contract, and (4) the plaintiffs suffered damages as a result.⁸⁵ Typical breach of contract defenses, such as performance, immaterial breach, laches, unclean hands, and voluntary payment, apply in these cases, although the outcome will likely turn on the facts associated with the contract.

Other Defenses

Beyond the claim specific defenses outlined above, several defenses are available in mobile marketing cases that may apply to multiple claims, namely (1) inadequate pleading under *Twombly/Iqbal*,⁸⁶ (2) voluntary payment doctrine, (3) CAN-SPAM Act preemption, (4) Communications Decency Act (CDA) § 230 immunity, and (5) passive conduit/common carrier defenses. There also may be standing arguments related to the citizenship of the plaintiffs, the defendants, or both.⁸⁷

Inadequate Pleading

One of the potential benefits of removal is the application of federal pleading standards. Recent Supreme Court case law interpreting Rule 8(a)(2) clarifies that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁸⁸ Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”⁸⁹ Because the mobile marketing plaintiffs’ bar typically repurposes the same complaints and allegations time and again, this is often a difficult standard for the plaintiffs to meet. Courts have held that legal conclusions are not entitled to any assumption of truth and are inadequate to provide the defendant with fair notice of what the claim is and the grounds upon which it rests.⁹⁰ “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”⁹¹

Additionally, when the plaintiffs’ claims are grounded in fraud, “a party must state with particularity the circumstances constituting fraud or mistake.”⁹² Federal courts have held that this heightened pleading requirement may apply even when the statutory claims asserted by the plaintiff do not

require a showing of fraud.⁹³ When a plaintiff alleges a unified course of fraudulent conduct and relies on that conduct as the basis for the claim, “the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).”⁹⁴ Even if a plaintiff alleges some fraudulent and some nonfraudulent conduct, or if fraud is not an essential element of the claim, all averments of fraud must be pleaded with particularity.⁹⁵

The formula complaints utilized by the mobile marketing plaintiffs’ bar often fall short of the Rule 8 pleading standard under *Twombly/Iqbal*, much less the heightened Rule 9 standard. Attorneys defending these claims should force the plaintiffs to provide factual support for the conclusory allegations that typically comprise these complaints. Particularly important is the named plaintiff’s identifying information. Customer records in the mobile content industry typically are maintained based on customers’ cell phone numbers.⁹⁶ “Without the cell phone [number], . . . Defendants cannot determine whether Plaintiff is a valid customer and cannot frame a response.”⁹⁷ In *Coren*, the court held that although Rule 8 requires only a short and plain statement of the claim, it still requires the identification of the plaintiff, which in a case like this includes the plaintiff’s cell phone number.⁹⁸ The plaintiff should not be allowed to stand on a complaint that is nothing more than an “unadorned, the defendant unlawfully harmed me accusation,” which is precisely the type of pleading that the Supreme Court has held to be inadequate under Rule 8.⁹⁹

Voluntary Payment Doctrine

Many states have adopted the voluntary payment doctrine or some similar rule that would mandate dismissal of plaintiffs’ claim if they voluntarily paid the amount in question. When money is voluntarily paid with full knowledge of the facts, it may only be recovered “where paid under circumstances of fraud, misrepresentation, and threats amounting to a duress which prevents the free exercise of the will.”¹⁰⁰ Courts have applied the voluntary payment doctrine to dismiss claims for unjust enrichment, breach of contract, and

violation of state consumer fraud statutes related to telephone bills.¹⁰¹

Under the voluntary payment doctrine, plaintiffs can seek to recover voluntary payments only if they can establish that the payments were made as a result of duress, coercion, or compulsion. Courts have defined duress in this context to include instances

where, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, he may recover it.¹⁰²

Moreover, “[t]he voluntary payment doctrine imposes upon a person who disputes the appropriateness of a bill the obligation to assert the challenge either before or contemporaneously with making payment.”¹⁰³

One of the potential benefits of removal is the application of federal pleading standards.

Mobile marketing plaintiffs may argue that they were compelled to make the payments by fear that their wireless carriers would discontinue their cellular telephone service. But “telephone service, particularly cellular service, is not a necessity, and therefore termination of such service (with or without penalty) cannot form the basis of a duress claim.”¹⁰⁴ In *Dreyfus v. Ameritech Mobile Communications, Inc.*, the plaintiffs challenged certain “interconnect” charges placed on their wireless bills, but the court relied on the voluntary payment doctrine in rejecting their breach of contract claims.¹⁰⁵ The court determined that the payments were not made under fraud or duress because

plaintiff . . . has not alleged a lack of access to landline phones at her work or anywhere else. Indeed, that would

be a difficult argument to formulate as reasonable alternatives to cellular phone service unquestionably exist, whether at plaintiff's place of business, her home, or a payphone.¹⁰⁶

CAN-SPAM Act Preemption

Another possible defense is preemption of state law claims under the CAN-SPAM Act.¹⁰⁷ Although the Act is typically known for its application to e-mail, the statute specifically addresses text messages. The statute gives the FCC the power to regulate mobile service commercial messages (MSCMs), defined as "a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service . . . in connection with such service."¹⁰⁸ The FCC's text marketing regulations, promulgated in 2003 under the CAN-SPAM Act, impose limitations on when marketers

Another possible defense is preemption of state law claims under the CAN-SPAM Act.

can send MSCMs to wireless subscribers but also note that the Act covers text messages only in a limited way. According to the FCC, a commercial message is an MSCM and thus subject to the FCC regulations only "if it is sent or directed to any address containing a reference, whether or not displayed, to an Internet domain listed on the FCC's wireless domain names list."¹⁰⁹ In other words, the FCC found that text messages sent solely to phone numbers without connection to a domain name, i.e., e-mail addresses, are not covered by the CAN-SPAM Act.

The Arizona court in *Joffe* discussed the FCC interpretation, and it appears to be the only published decision addressing application of the CAN-SPAM Act to text messaging. As part of the court's TCPA decision in *Joffe*, it looked at whether the FCC's decision to regulate text messaging as part of the CAN-SPAM Act precluded application of the TCPA.¹¹⁰ In deciding that

the CAN-SPAM Act and TCPA could have "dual applicability," the court acknowledged that "the FCC has decided to include Internet-to-phone SMS messages as messages covered by § 14 of the CAN-SPAM Act because they are initially directed to an address that contains an Internet domain reference."¹¹¹

Although the position laid out by the FCC and the court in *Joffe* is a colorable interpretation of the Act's application to text messages, the legislative history indicates that Congress may have intended for the CAN-SPAM Act to apply to alleged text message spam generally (regardless of whether the alleged spam was directed to an e-mail address). In December 2003, Congressman Ed Markey of Massachusetts explained the policy behind the text messaging amendment:

[I]n order to safeguard consumer privacy in a way that reflects the more intrusive nature of wireless spam to the user than spam is on a desktop computer . . . the bill tasks the FCC with tackling this issue now, before it overwhelms users and network operators alike.¹¹²

He further noted that "the same rules that are applicable to commercial e-mail messages sent to personal computers will clearly also apply to those sent to wireless devices."¹¹³ Under this explanation of the statute, the FCC's limited application of the CAN-SPAM Act to text messages could be an impermissible interpretation of the statute.¹¹⁴ Questions regarding the applicability of the CAN-SPAM Act to the various types of mobile marketing messages are likely to be resolved in the near future by the courts, Congress, and/or the FCC.

CDA § 230 Immunity

The plaintiffs' bar also has focused on social networking sites such as MySpace or Facebook that offer users the opportunity to receive text message updates. For example, users may opt to receive text messages every time their online profiles are updated or when other users communicate with them through the social network interface. But if users either change their cell phone numbers or provide the site with incorrect information, text messages may be sent to individuals

who did not request them.¹¹⁵ In *Crisswell v. MySpace, Inc.*,¹¹⁶ plaintiffs, who allegedly had received unsolicited text messages through MySpace Mobile, sought class certification, alleging that MySpace (1) tortiously interfered with plaintiffs' cell phone contracts, (2) received unjust enrichment for text messaging fees, (3) trespassed on plaintiffs' chattels by gaining access to their wireless handsets without permission, (4) invaded plaintiffs' privacy, (5) tampered with plaintiffs' computers in violation of Illinois state law, and (6) violated the Illinois consumer fraud statute. MySpace removed the case based on CAFA and complete preemption under the CAN-SPAM Act and moved to dismiss based on, inter alia, CDA § 230 immunity.

Although *Crisswell* was dismissed before MySpace's motion to dismiss, it illustrates a unique argument available to defendants that transmit third-party content via the Internet. The CDA bars claims against "interactive computer services" that stem from content created by third parties: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹¹⁷ Prior cases have established that social networking sites such as MySpace and Facebook are "interactive computer services,"¹¹⁸ and these defendants argue that they serve merely as conduits when converting online content to text message form. The content of the text message is created by a social networking user, not the site. This analysis applies equally to other websites that allow users to communicate with other users, particularly as mainstream sites adopt social network style interaction to increase the amount of time and frequency with which users visit their sites. The online retailer eBay, for example, allows users to post content and offers mobile services for its users.

CDA § 230 immunity has been applied broadly to many different kinds of claims in which the defendant is being treated as a "publisher."¹¹⁹ An unsettled issue, however, is whether mobile marketing lawsuits seek to treat websites as the "publisher" where content is originated by a third party but transmitted by the websites to mobile phones after conversion by the websites of the content into a mobile phone

readable format. Plaintiffs may argue that the act of sending a third-party post via text message removes the websites with mobile transmission capabilities from CDA § 230 protection because the transmittal requires a more active step than passively allowing users to post content on a website. But with respect to e-mail, which arguably is analogous to text messages for purposes of CDA § 230 consideration, courts have held that content in e-mails sent by websites falls within immunity.¹²⁰ This application seems consistent with a typical understanding of the term *publish*, which necessarily entails some form of distribution to a third party. There do not appear to be any published decisions squarely addressing CDA § 230 immunity and text messages, but decisions on this issue are likely forthcoming.

Passive Conduit/Common Carrier

Even if CDA § 230 does not apply, some defendants could argue for an expansion of the passive conduit doctrine that often protects phone companies, the U.S. Postal Service, and other common carriers from liability. Although it does not appear that this issue has been raised in any mobile marketing cases to date, it may, for example, be a viable argument for wireless carriers or websites that do not create the mobile content at issue. A common carrier is defined in the Federal Communications Act as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act.”¹²¹ In exchange for some regulation, these entities are generally not responsible for the improper use of their services by third parties. Courts have long held that “there is no ‘conduit liability’ in the absence of fault.”¹²² This has been established in relation to countless forms of media from book sellers to computerized libraries.¹²³ The FCC’s fax broadcaster regulation extended common carrier protection to companies that merely transmit faxes without a “high degree of involvement” or “actual notice,”¹²⁴ and CDA § 230 codified immunity to interactive computer services for content created by third-party users.

Just as USPS would not be liable for the delivery of junk mail or the phone

company would not be liable for a telemarketer’s call, the courts may decide that when a wireless carrier or website serves as a mere conduit for text messages, it should not be liable. In analyzing CDA § 230 immunity, at least one federal circuit has already analogized social networking sites to common carriers such as FedEx or UPS, which “do not read the documents inside packages and do not make or publish any of the customers’ material.”¹²⁵

Conclusion

The vast array of mobile marketing cases that have been filed in recent years show that the plaintiffs’ bar is focused on this rapidly developing, lucrative field. To minimize the risks associated with mobile marketing and effectively defend these cases when they are filed, it is important for defense attorneys, insurers, advertisers, and mobile marketing entities to have a familiarity with these cases and the corresponding defenses. As with the TCPA junk fax bar, the mobile marketing plaintiffs’ bar has proven adept at forming alliances to share strategy and form pleadings. To efficiently and effectively defend these cases, it would be wise for the media defense bar to follow suit. ■

Endnotes

1. Center for Digital Democracy, *Protecting Privacy, Promoting Consumer Rights and Ensuring Corporate Accountability*, available at <http://www.democraticmedia.org> (last visited Mar. 26, 2010).
2. QUATTRO WIRELESS & DM2PRO, STATE OF THE INDUSTRY: APPS (Dec. 2009), available at http://www.quattrowireless.com/images/uploads/State_of_the_Industry_APPS.pdf.
3. Dan Butcher, *Sprint CEO at CTIA: 4G Is Tipping Point for Mobile Video*, MOBILE MARKETER (Mar. 25, 2010), available at <http://www.mobilemarketer.com/cms/news/carrier-networks/5779.html>.
4. Telephone Consumer Protection Act, 47 U.S.C. § 227.
5. *Id.* § 227(a)(1)(A)–(B).
6. Chad R. Bowman, *Litigating Facsimile Advertising*, 26:1 COMM’NS LAW. 1, 19 (Nov. 2008).
7. *Murphy v. Lanier*, 204 F.3d 911, 912 (9th Cir. 2000); *Foxhall Realty Law Offices, Inc. v. Telecomm’ns Premium Servs., Ltd.*, 156 F.3d 432, 436–37 (2d Cir. 1998); *ErieNet v. Velocity Net, Inc.*, 156 F.3d 513, 517–18 (3d Cir. 1998); *Nicholson v.*

Hooters of Augusta, Inc., 136 F.3d 1287, 1289 (11th Cir. 1998); *Chair King, Inc. v. Hous. Cellular Corp.*, 131 F.3d 503, 510 (5th Cir. 1997); *Int’l Sci. & Tech. Inst., Inc. v. Inacom Commc’ns, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997).

8. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450–51 (7th Cir. 2005).
9. Class Action Fairness Act, 28 U.S.C. § 1332(d). *See, e.g., Brill*, 427 F.3d at 449; *Gene & Gene LLC v. BioPay LLC*, 2008 WL 3511766, at *3 (5th Cir. Aug. 14, 2008); *U.S. Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1116–18 (10th Cir. 2007); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 343 (2d Cir. 2006).
10. 28 U.S.C. § 1332(d).
11. *Id.*
12. *See, e.g., Guerrero v. Mobilefunster*, 2009 WL 195918 (N.D. Cal. Jan. 26, 2009); *Coren v. Mobile Entm’t, Inc.*, 2009 WL 764883, at *2 (N.D. Cal. Mar. 19, 2009); *Fiddler v. AT&T Mobility, LLC*, 2008 WL 2130436, at *2 (N.D. Ill. May 20, 2008).
13. *See, e.g., Docket Entry 41, Feinberg v. AzooglesAds US, Inc., et al.*, No. 09-cv-02314 (N.D. Cal. filed May 26, 2009) (denying remand when defendant presented evidence of settlement values in similar cases, settlement offers in the instant case, attorney fee awards in similar cases, the costs of injunctive relief, and the defendant’s mobile marketing revenues).
14. 569 F.3d 946 (9th Cir. 2009) (*Satterfield II*).
15. *See Docket Entry 119, Satterfield v. Simon & Schuster*, No. 06-cv-02893 (N.D. Cal. filed Apr. 28, 2006); *see also Docket Entry 89, Weinstein v. AIRIT2ME, et al.*, No. 06-cv-0484 (N.D. Ill. 2006) (settlement fund of \$7 million with \$1.75 million in attorney fees).
16. 47 U.S.C. § 227(b); 47 C.F.R. § 64.1200(a)(1).
17. 47 U.S.C. § 227(a).
18. Complaint at ¶ 25, *Weinstein*, No. 06-cv-0484 (N.D. Ill. 2006).
19. 2009 WL 4884471, at *7 (N.D. Ill. Dec. 14, 2009).
20. Docket Entry 40, at 15, *Lozano v. Twentieth Century Fox Film Corp. et al.*, No. 09-cv-06344 (N.D. Ill. filed Oct. 9, 2009). This decision was announced March 23, 2010, and was unpublished at the time this article was submitted.
21. 121 P.3d 831, 835–36 (Ariz. Ct. App. 2005).
22. No. 06-cv-0484 (N.D. Ill. 2006).
23. *Cooley v. McDonald’s*, No. 08-cv-06746 (N.D. Ill. 2008).
24. *Id.*

25. See, e.g., *Espinal v. Burger King*, No. 09-cv-20982 (S.D. Fla. filed Apr. 14, 2009); *Lerner v. The Gap*, No. 09-cv-04897 (N.D. Cal. filed Oct. 15, 2009); *Kazemi v. Payless Shoesource, Inc., et al.*, No. 09-cv-5142 (N.D. Cal. filed Oct. 29, 2009).

26. 2007 WL 1839807 (N.D. Cal. June 26, 2007) (*Satterfield I*), *rev'd*, *Satterfield II*, 569 F.3d 946 (9th Cir. 2009).

27. 869 N.Y.S.2d 740 (Long Beach, N.Y. City Ct. 2008).

28. *Abbas v. Selling Source*, 2009 WL 4884471, at *3 (N.D. Ill. Dec. 14, 2009) (“[T]he court finds that the TCPA does not require that a party called via a number assigned to a cellular telephone service must

be charged for the call to make that call actionable.”).

29. Docket Entry 40, at 17, *Lozano v. Twentieth Century Fox Film Corp. et al.*, No. 09-cv-06344 (N.D. Ill. filed Oct. 9, 2009).

30. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C.R. 8752, 8775 (Oct. 16, 1992) [hereinafter 1992 Report and Order] (“[W]e conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged.”); *In re Rules and Regulations Implementing the*

Telephone Consumer Protection Act of 1991, Report and Order, 18 F.C.C.R. 14014, 14115 (July 3, 2003) [hereinafter 2003 Report and Order].

31. *Abbas*, 2009 WL 4884471, at *3.

32. *Id.*

33. See *United States v. Elec. Data Sys. Fed. Corp.*, 857 F.2d 1444, 1447 (Fed. Cir. 1988) (“[W]e are loath to give a technical amendment substantive effect that would undermine the Postal Service’s independence that ‘was a part of Congress’ general design that the Postal Service ‘be run more like a business than had its predecessor, the Post Office Department.’”) (emphasis added); *Drax v. Ashcroft*, 178 F. Supp. 2d 296,

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308 (E.D.N.Y. 2001) (“Technical Amendments are by nature non-substantive.”).

34. *Satterfield II*, 569 F.3d 946, 951 (9th Cir. 2009) (emphasis in original).

35. *Id.*

36. *Pollock v. Island Arbitration & Mediation, Inc.*, 869 N.Y.S.2d 740, 745 (Fed. Cir. 1988).

37. 1992 Report and Order, *supra* note 26, at 8773 (emphasis added).

38. The FCC has stated that the TCPA applies to “both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls. . . .” 2003 Report and Order, *supra* note 26, at 14115.

39. *Satterfield II*, 569 F.3d at 954. *See also* Docket Entry 40, at 9–10, *Lozano v. Twentieth Century Fox Film Corp. et al.*, No. 09-cv-06344 (N.D. Ill. filed Oct. 9, 2009) (giving “limited” deference to the FCC but determining that the FCC’s interpretation is reasonable in light of the language of the statute and its purpose).

40. *Abbas v. Selling Source*, 2009 WL 4884471, at *4–7 (N.D. Ill. Dec. 14, 2009).

41. *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831, 838 (Ariz. Ct. App. 2005). *See also* Docket Entry 40, at 12, *Lozano*, No. 09-cv-06344 (N.D. Ill. filed Oct. 9, 2009) (“Although text messaging was not available in 1991, the statutory language does not limit the word ‘call’ to oral communications via telephone.”).

42. 283 U.S. 25, 26 (1931).

43. 739 F.2d 1208 (7th Cir. 1984).

44. *Abbas*, 2009 WL 4884471, at *5.

45. *See* 47 U.S.C. § 227(b)(1)(A), (C).

46. *Abbas*, 2009 WL 4884471, at *7–8; Docket Entry 40, at 18–21, *Lozano*, No. 09-cv-06344 (N.D. Ill. filed Oct. 9, 2009); *Joffe*, 121 P.3d at 841–42.

47. *See Horina v. City of Granite City, Illinois*, 538 F.3d 624, 633 (7th Cir. 2008) (holding that government failed to present evidence satisfying first prong); *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1555–56 (7th Cir. 1986) (overturning nighttime solicitation ban because city failed to present objective evidence tying nighttime solicitation to city’s interest in preventing crime).

48. 47 U.S.C. § 227.

49. *Abbas*, 2009 WL 4884471, at *7–8.

50. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002) (invalidating ban on solicitation outside hockey arena where city failed to offer substantive evidence tying ban to fraud and disruption of traffic).

51. *Joffe v. Acacia Mortgage Corp.*, 121

P.3d 831, 842 (Ariz. Ct. App. 2005).

52. *Id.*

53. Docket Entry 40, at 18, *Lozano v. Twentieth Century Fox Film Corp. et al.*, No. 09-cv-06344 (N.D. Ill. filed Oct. 9, 2009) (citing 447 U.S. 557, 566 (1980) (emphasis added)).

54. *Abbas v. Selling Source*, 2009 WL 4884471, at *8 (N.D. Ill. Dec. 14, 2009).

55. *Horina v. City of Granite City, Illinois*, 538 F.3d 624, 635–36 (7th Cir. 2008).

56. *Abbas*, 2009 WL 4884471, at *9.

57. *Satterfield I*, 2007 WL 1839807, at *6 (N.D. Cal. June 26, 2007) (“The Court concludes that the plain language of the statute does not allow the Court to divorce ‘to store’ from the ‘random or sequential number generator,’ as Plaintiff suggests. Rather, the phrase ‘random or sequential number generator’ modifies ‘store,’ ‘produce’ and ‘called.’”); *Pollock v. Island Arbitration & Mediation, Inc.*, 869 N.Y.S.2d 740, 745 (Long Beach, N.Y. City Ct. 2008) (“Since the plaintiff did not establish that the defendant used a dialing system which randomly or sequentially generated telephone numbers, the plaintiff cannot establish that the defendant placed a call to a cellular telephone using an automatic telephone dialing system pursuant to [the TCPA].”).

58. *Abbas*, 2009 WL 4884471, at *9.

59. *Id.* at *5–6.

60. *Gov’t Suppliers Consol. Servs., Inc. v. Bayh*, 133 F.R.D. 531, 540 (1990).

61. *Paluzzi v. mBlox et al.*, No. 07-CH-37213 (Cook County, Ill.); *Parone v. m-Qube et al.*, Case No. 08-CH-15834 (Cook County, Ill.). *See also Gray v. Mobile Messenger Americas, Inc.*, No. 08-cv-61089 (S.D. Fla.); *Valdez v. Sprint Nextel Corp.*, No. 06-cv-7587 (N.D. Cal.); *VanDyke v. Media Breakaway LLC*, No. 08-cv-22131 (S.D. Fla.); *Sims v. Celco P’ship*, No. 07-cv-1510 (N.D. Cal.); *McFerren v. AT&T Mobility*, No. 08-cv-151322 (Fulton County, Ga.).

62. The court in *Allen et al. v. New Motion, Inc.*, No. BC386596 (Los Angeles County, Cal.), certified the plaintiff’s proposed class of “[a]ll persons throughout the United States who, from March 3, 2004 through the present, (1) subscribed to Bid4Prizes online; (2) were billed for a Bid4Prizes subscription by their cellular telephone carrier and paid for such service; and (3) who have not voluntarily submitted a bid with Bid4Prizes. Persons who received a full refund or who subscribed directly through the Bid4Prizes website are NOT included.” In an unpublished opinion,

the court held that the common issue of the consent mechanism dominated the individual details of each consumer experience and noted that a class action was the only logical way to deal with individual charges of only \$9.99 per month. However, defendants in these cases have a strong argument that class certification is inappropriate because of the predominance of individual facts. Elements of state law could vary for nationwide class actions, and each putative class member could be subject to unique defenses that bar their claims in whole or in part. Even if the class representative has a strong claim, other class members could be subject to the defenses of laches, waiver, estoppel, voluntary payment, release, or the statute of limitations. Many putative class members are not charged for text messages or waived their claims by soliciting these text messages. The contract between each individual and his wireless carrier is different, so a wireless carrier dispute arguably cannot be settled as a class action. These are just a few of the potential grounds to attack commonality and typicality under Fed. R. Civ. P. 23 and its state law equivalents.

63. *See, e.g.*, Docket entry 47, *Feinberg v. Azoogles Ads US, Inc., et al.*, No. 09-cv-02314 (N.D. Cal. filed May 26, 2009); Docket Entry 24, *Crisswell v. MySpace, Inc.*, No. 08-cv-01578 (N.D. Ill. Mar. 18, 2008). In both cases, the plaintiffs voluntarily dismissed after the defendants filed extensive dismissal motions.

64. Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

65. *Decaro v. M. Felix, Inc.*, 864 N.E.2d 890, 897 (Ill. App. Ct. 2007); *see also Peterson v. Celco P’ship*, 80 Cal. Rptr. 3d 316, 323 (Ct. App. 2008) (“The elements of an unjust enrichment claim are the ‘receipt of a benefit and [the] unjust retention of the benefit at the expense of another.’”).

66. *See, e.g.*, *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, 703 (W.D. Pa. 2009) (noting that “the Restatement of Torts does not recognize unjust enrichment as an independent cause of action”); *In re NVIDIA GPU Litig.*, 2009 WL 4020104, at *12 (N.D. Cal. 2009) (“[U]njust enrichment is a theory of recovery, not an independent legal claim. . . . The Court finds that as a matter of law, Plaintiffs’ claims for unjust enrichment and money had and received are not cognizable.”).

67. *See Cal. Med. Ass’n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172 (2001) (“[A]s a matter of law, a quasi-contract action for unjust enrichment does not lie where, as here, express

binding agreements exist and define the parties' rights.”).

68. *Id.* at 172–74.

69. *Id.* at 174 (“[Plaintiffs’] quasi-contract claim must also fail because under the circumstances alleged here, any benefit conferred upon defendants by [plaintiffs] was simply an incident to [plaintiffs’] performance of their own obligations. . .”).

70. *Poulos v. Lutheran Soc. Servs. of Illinois, Inc.*, 728 N.E.2d 547, 557 (Ill. App. Ct. 2000); *see also* *Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 530 (Cal. 1998).

71. *Antonelli v. Sherrow*, 2005 WL 2338813 (N.D. Ill. 2005).

72. *Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003). The court in *Albrecht v. VeriSign, et al.* applied this same logic to the transmission of content to cell phones. No. 08-cv-121736 (Cal. Super. Ct.) (unpublished opinion).

73. CAL. BUS. & PROF. CODE § 17200 (2008).

74. 815 ILL. COMP. STAT. 505/2 (1973).

75. *Id.*

76. CAL. CIV. CODE §§ 1770 & 1780.

77. No. 09-cv-02314 (N.D. Cal. filed May 26, 2009).

78. 973 P.2d 527, 544 (Cal. 1999).

79. *See, e.g.*, *Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 854 (Ct. App. 2002).

80. No. 08-cv-4468 (N.D. Ill.).

81. Docket Entry 145, *Walker*, No. 08-cv-4468 (N.D. Ill.) (unpublished).

82. 18 U.S.C. § 1030.

83. *Czech v. Wall St. on Demand*, 2009 WL 4729881, at *17 (D. Minn. Dec. 8, 2009).

84. *Id.* at *16.

85. *See, e.g.*, *Zirp-Burnham, LLC v. E. Terrell Assocs., Inc.*, 826 N.E.2d 430, 439 (Ill. App. Ct. 2008); *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 395 (Ct. App. 1990).

86. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

87. For example, in the *Feinberg* case, the plaintiff was a Pennsylvania resident who brought a class action lawsuit in California against Azoogole, a Delaware corporation headquartered in New York. *Feinberg v. AzoogoleAds Us, Inc., et al.*, No. 09-cv-02314 (N.D. Cal. filed May 26, 2009). The complaint asserted causes of action under various California consumer protection statutes even though the out-of-state defendant arguably lacked standing to assert California causes of action against a

foreign corporation. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (1999) (“Legislature did not intend the statutes of this state to have force or operation beyond the boundaries of the state.”).

88. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 544).

89. *Id.* at 1950.

90. *See Abbas v. Selling Source*, 2009 WL 4884471, at *2 (N.D. Ill. Dec. 14, 2009).

91. *Iqbal*, 129 S. Ct. at 1950 (quoting FED. R. CIV. P. 8(a)(2)).

92. FED. R. CIV. P. 9(b).

93. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103 (9th Cir. 2003).

94. *Id.* at 1103–04.

95. *Id.* at 1104–05.

96. *Coren v. Mobile Entm’t, Inc.*, 2009 WL 264744, at *1 (N.D. Cal. Feb. 4, 2009).

97. *Id.*

98. *Id.*

99. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

100. *Lipman, Wolfe & Co. v. Phoenix Assurance Co.*, 258 F. 544, 546 (9th Cir. 1919).

101. *See Riensche v. Cingular Wireless LLC*, 2007 WL 3407137, at *1 (W.D. Wash. Nov. 9, 2007) (applying the voluntary payment doctrine to claims for unjust enrichment and breach of contract), *rev’d on other grounds*, 320 F. App’x 646 (9th Cir. 2009); *Dreyfus v. Ameritech Mobile Comm’ns, Inc.*, 700 N.E.2d 162, 938 (Ill. App. Ct. 1998) (applying voluntary payment doctrine to state consumer fraud claims).

102. *W. Gulf Oil v. Title Ins. & Trust Co.*, 206 P.2d 643, 648 (Cal. Ct. App. 1949).

103. *Riensche*, 2007 WL 3407137, at *5.

104. *Id.* at *8; *see also Dreyfus*, 700 N.E.2d at 167 (“[C]ellular phone service is not a necessity and, therefore, plaintiff [] cannot establish that payments were made under compulsion or duress.”).

105. *Dreyfus*, 700 N.E.2d at 163–65.

106. *Id.* at 167.

107. *See* 15 U.S.C. § 7707(b)(1) (“This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a state that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.”). If the state law does not regulate falsity or deception or if the claim does not sufficiently allege falsity or deception, the state law cause of action may be preempted. In arguing preemption, defense counsel

should be mindful of the CAN-SPAM Act savings clause. *See* 15 U.S.C. § 7707(b)(2) (“This chapter shall not be construed to preempt the applicability of . . . State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or . . . other State laws to the extent that those laws relate to acts of fraud or computer crime.”). CAN-SPAM Act preemption is important because the Act provides a private right of action in court only to an interactive computer service, *see* 15 U.S.C. § 7706(g)(1), which is not the typical mobile marketing class action plaintiff.

108. 15 U.S.C. § 7712.

109. 47 C.F.R. § 64.3100(c)(7) (emphasis added).

110. *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831, 840 (Ariz. Ct. App. 2005).

111. *Id.* at 841.

112. 149 CONG. REC. H12854-08 (daily ed. Dec. 8, 2003) (statement of Rep. Markey).

113. *Id.* (emphasis added).

114. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

115. *See, e.g.*, *Abrams v. Facebook*, No. 07-cv-05378 (N.D. Cal. 2007) (alleging class action claims for (1) violation of California’s Computer Crime Law, (2) violation of California’s Unfair Competition Law, (3) unjust enrichment, and (4) trespass to chattels).

116. No. 08-cv-01578 (N.D. Ill. 2008).

117. 47 U.S.C. § 230(c)(1).

118. *See Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007) (“[I]t is clear that MySpace meets the statutory definition of [an interactive computer service].”); Chicago Lawyers’ Comm. for Civ. Rights Under Law, *Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (holding that online classified website Craigslist is protected by the CDA).

119. Note, however, that the CDA specifically excludes four claim categories from § 230 immunity: (1) federal criminal statutes, (2) intellectual property law, (3) state law “that is consistent with this section,” and (4) the Electronic Communications Privacy Act of 1986. 47 U.S.C. § 230(e)(1)–(4). Beyond those exclusions, courts have granted immunity broadly. *See Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452–53 (E.D.N.Y. 2004) (holding that § 230 bars a claim for tortious interference);

Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 539 (E.D. Va. 2003) (holding that § 230 bars *any* claims not specifically excluded under the CDA); Whitney Info. Network, Inc. v. Verio, Inc., 2006 WL 66724, at *2–3 (M.D. Fla. Jan. 11, 2006) (holding that § 230 bars tortious interference claims).

120. *See* Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003) (applying CDA § 230 immunity to e-mail); Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F. Supp. 2d 1037 (N.D. Cal. 2004) (holding that sender of bulk commercial e-mail was entitled to CDA § 230 immunity); Doe v. Bates, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (holding that CDA § 230 applied to website hosting e-group that shared illicit images,

engaged in discussions, and planned events related to child pornography); Eckert v. Microsoft Corp., 2007 WL 496692 (E.D. Mich. Feb. 13, 2007) (applying CDA immunity to e-mail on Internet message boards).

121. 47 U.S.C. § 153.

122. *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 930 (E.D. Wash. 1992).

123. *See id.* at 932 (holding CBS affiliates that aired an allegedly defamatory television show were not liable); *Dworkin v. Hustler Magazine Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986) (holding book sellers were not liable for allegedly defamatory information in publications they sold); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139–40 (S.D.N.Y. 1991) (holding computerized data library not

responsible for passing on libelous statements absent fault).

124. “The Commission’s rulings clearly indicate that a fax broadcaster’s exemption from liability is based on the type of activities it undertakes, and only exists ‘[i]n the absence of a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions.’” FCC Rules and Regulations, 68 Fed. Reg. 44,144 (July 25, 2003) (to be codified at 47 C.F.R. pt. 64, 68); *see also* Junk Fax Prevention Act, Pub. L. No. 109-21, §§ 2(a)–(g), 3, 119 Stat. 359, 362 (2005).

125. *Chicago Lawyers’ Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

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