

## Payless Shoes Settles Text Message Class Action Lawsuit

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Payless recently settled claims that it violated the Telephone Consumer Protection Act by allegedly sending thousands of text message ads using automatic dialers without obtaining consent. According to the complaint, while the consumers had voluntarily provided their cell phone numbers to Payless at the point of purchase, they had not given “express prior consent” for those numbers to be used to receive text messages. The complaint was filed in October 2009 in California, and while Payless argued that it had not used an automatic dialer to send the messages, and that it had obtained consent (because by giving their phone numbers, the parties had “in effect given their invitation or permission to be called”), the parties nevertheless reached a settlement after mediation. Payless has agreed to provide each class member with a \$25 gift certificate, with a settlement pool of \$5 million (and if the class redemption is under \$5 million, Payless will make a *cy pres* contribution for the unredeemed balance). Payless also agreed to pay \$1.25 million to plaintiffs’ counsel. These payments are instead of the potential statutory damages, had plaintiffs been successful, calculated by some to be \$4 billion (\$500 per violation, with a potential class of 8 million consumers). In addition, Payless has agreed not to use numbers it obtained prior to October 2010 (the date when it implemented a “double opt-in” process for getting consent to send text ads) and to maintain a “Do Not Call” list of people who have opted out of getting text message and not to send (or permit its vendors to send) texts to those numbers. Payless will also train its employees about how to comply with the laws surrounding the sending of text messages.

**TIP: This case suggests that it is dangerous to rely on mere provision of cell phone numbers as evidence of consent. Instead, companies who wish to send text messages using automatic dialing systems should obtain clear express consent before sending such messages.**

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