S T A T E O F N E W Y O R K

5192

2009-2010 Regular Sessions

I N A S S E M B L Y

February 11, 2009

Introduced by M. of A. BRODSKY -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the business corporation law and the general business law, in relation to prohibiting the transmission of certain text messages to cellular telephones or pagers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The business corporation law is amended by adding a new section 521 to read as follows:

S 521. APPLICABILITY OF THE GENERAL BUSINESS LAW TO BUSINESS CORPORATIONS THAT MAINTAIN DATA.

EVERY BUSINESS CORPORATION ORGANIZED UNDER THIS CHAPTER AND EVERY FOREIGN CORPORATION (INCLUDING EVERY FOREIGN PROFESSIONAL SERVICE CORPORATION) QUALIFIED TO DO BUSINESS IN THIS STATE PURSUANT TO THIS CHAPTER IS SUBJECT TO SECTION THREE HUNDRED NINETY-D OF THE GENERAL BUSINESS LAW.

S 2. The general business law is amended by adding a new section 390-d to read as follows:

S 390-D. UNSOLICITED TEXT MESSAGES. 1. EXCEPT AS PROVIDED IN SUBDIVISION TWO OF THIS SECTION, NO PERSON OR ENTITY CONDUCTING BUSINESS IN THIS STATE SHALL TRANSMIT OR CAUSE TO BE TRANSMITTED A TEXT MESSAGE ADVERTISEMENT TO A CELLULAR TELEPHONE OR PAGER EQUIPPED WITH SHORT MESSAGE CAPABILITY OR ANY SIMILAR CAPABILITY ALLOWING THE TRANSMISSION OF TEXT MESSAGES. A TEXT MESSAGE ADVERTISEMENT IS A MESSAGE, THE PRINCIPAL PURPOSE OF WHICH IS TO PROMOTE THE SALE OF GOODS OR SERVICES TO THE RECIPIENT, CONSISTING OF ADVERTISING MATERIAL FOR THE LEASE, SALE, RENTAL, GIFT OFFER, OR OTHER DISPOSITION OF ANY REALTY, GOODS, SERVICES, OR EXTENSION OF CREDIT.

2. THIS SECTION SHALL NOT APPLY TO TEXT MESSAGES TRANSMITTED AT THE DIRECTION OF A PERSON OR ENTITY OFFERING CELLULAR TELEPHONE OR PAGER SERVICE, OR BY A BUSINESS OR AFFILIATES OF THAT BUSINESS, THAT HAS AN

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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EXISTING RELATIONSHIP WITH THE SUBSCRIBER, BUT ONLY IF THE SUBSCRIBER HAS PROVIDED CONSENT TO THE PERSON OR ENTITY OFFERING CELLULAR TELEPHONE OR PAGER SERVICE OR BUSINESS WITH WHICH HE OR SHE HAS THAT RELATIONSHIP TO RECEIVE TEXT MESSAGES FROM THAT BUSINESS OR AFFILIATES OF THAT BUSINESS. "AFFILIATE" MEANS ANY COMPANY THAT CONTROLS, IS CONTROLLED BY, OR IS UNDER COMMON CONTROL WITH, ANOTHER COMPANY. A SPECIFIC, SEPARATE CONSENT MUST BE GIVEN FOR EACH INDIVIDUAL PERSON OR ENTITY, BUSINESS, OR AFFILIATE.

3. WHENEVER THERE SHALL BE A VIOLATION OF THIS SECTION, AN APPLICATION MAY BE MADE BY THE ATTORNEY GENERAL IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO A COURT OR JUSTICE HAVING JURISDICTION TO ISSUE AN INJUNCTION, AND UPON NOTICE TO THE DEFENDANT OF NOT LESS THAN FIVE DAYS, TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH VIOLATION; AND IF IT SHALL APPEAR TO THE SATISFACTION OF THE COURT OR JUSTICE, THAT THE DEFENDANT HAS, IN FACT, VIOLATED THIS SECTION AN INJUNCTION MAY BE ISSUED BY SUCH COURT OR JUSTICE ENJOINING AND RESTRAINING ANY FURTHER VIOLATION, WITHOUT REQUIRING PROOF THAT ANY PERSON HAS, IN FACT, BEEN INJURED OR DAMAGED THEREBY. IN ANY SUCH PROCEEDING, THE COURT MAY MAKE ALLOWANCES TO THE ATTORNEY GENERAL AS PROVIDED IN PARAGRAPH SIX OF SUBDIVISION (A) OF SECTION EIGHTY-THREE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES, AND DIRECT RESTITUTION. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF A SUBDIVISION OF THIS SECTION HAS OCCURRED, THE COURT MAY IMPOSE A CIVIL PENALTY OF NOT MORE THAN TWO THOUSAND DOLLARS PER CALL, UP TO A TOTAL OF NOT MORE THAN TWENTY THOUSAND DOLLARS, FOR CALLS PLACED IN VIOLATION OF SUCH SUBDIVISIONS WITHIN A CONTINUOUS SEVENTY-TWO HOUR PERIOD. IN CONNECTION WITH ANY SUCH PROPOSED APPLICATION, THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF THE RELEVANT FACTS AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES.

4. IN ADDITION TO THE RIGHT OF ACTION GRANTED TO THE ATTORNEY GENERAL PURSUANT TO THIS SECTION, ANY PERSON WHO HAS RECEIVED A TEXT MESSAGE IN VIOLATION OF SUBDIVISION ONE OF THIS SECTION MAY BRING AN ACTION IN HIS OR HER OWN NAME TO ENJOIN SUCH UNLAWFUL ACT OR PRACTICE, AN ACTION TO RECOVER HIS OR HER ACTUAL DAMAGES OR FIFTY DOLLARS, WHICHEVER IS GREATER, OR BOTH SUCH ACTIONS. THE COURT MAY, IN ITS DISCRETION, INCREASE THE AWARD OF DAMAGES TO AN AMOUNT NOT TO EXCEED THREE TIMES THE ACTUAL DAMAGES UP TO ONE THOUSAND DOLLARS, IF THE COURT FINDS THE DEFENDANT WILLFULLY OR KNOWINGLY VIOLATED SUCH SUBDIVISION. THE COURT MAY AWARD REASONABLE ATTORNEY'S FEES TO A PREVAILING PLAINTIFF.

S 3. This act shall take effect on the ninetieth day after it shall have become a law.