

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:

1 Section 1. The business corporation law is amended by adding a new
2 section 521 to read as follows:
3 S 521. APPLICABILITY OF THE GENERAL BUSINESS LAW TO BUSINESS CORPO-
4 RATIONS THAT MAINTAIN DATA.
5 EVERY BUSINESS CORPORATION ORGANIZED UNDER THIS CHAPTER AND EVERY
6 FOREIGN CORPORATION (INCLUDING EVERY FOREIGN PROFESSIONAL SERVICE CORPO-
7 RATION) QUALIFIED TO DO BUSINESS IN THIS STATE PURSUANT TO THIS CHAPTER
8 IS SUBJECT TO SECTION THREE HUNDRED NINETY-D OF THE GENERAL BUSINESS
9 LAW.
10 S 2. The general business law is amended by adding a new section 390-d
11 to read as follows:
12 S 390-D. UNSOLICITED TEXT MESSAGES. 1. EXCEPT AS PROVIDED IN SUBDI-
13 VISION TWO OF THIS SECTION, NO PERSON OR ENTITY CONDUCTING BUSINESS IN
14 THIS STATE SHALL TRANSMIT OR CAUSE TO BE TRANSMITTED A TEXT MESSAGE
15 ADVERTISEMENT TO A CELLULAR TELEPHONE OR PAGER EQUIPPED WITH SHORT
16 MESSAGE CAPABILITY OR ANY SIMILAR CAPABILITY ALLOWING THE TRANSMISSION
17 OF TEXT MESSAGES. A TEXT MESSAGE ADVERTISEMENT IS A MESSAGE, THE PRINCI-
18 PAL PURPOSE OF WHICH IS TO PROMOTE THE SALE OF GOODS OR SERVICES TO THE
19 RECIPIENT, CONSISTING OF ADVERTISING MATERIAL FOR THE LEASE, SALE,
20 RENTAL, GIFT OFFER, OR OTHER DISPOSITION OF ANY REALTY, GOODS, SERVICES,
21 OR EXTENSION OF CREDIT.
22 2. THIS SECTION SHALL NOT APPLY TO TEXT MESSAGES TRANSMITTED AT THE
23 DIRECTION OF A PERSON OR ENTITY OFFERING CELLULAR TELEPHONE OR PAGER
24 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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1 EXISTING RELATIONSHIP WITH THE SUBSCRIBER, BUT ONLY IF THE SUBSCRIBER
2 HAS PROVIDED CONSENT TO THE PERSON OR ENTITY OFFERING CELLULAR TELEPHONE
3 OR PAGER SERVICE OR BUSINESS WITH WHICH HE OR SHE HAS THAT RELATIONSHIP
4 TO RECEIVE TEXT MESSAGES FROM THAT BUSINESS OR AFFILIATES OF THAT BUSI-
5 NESS. "AFFILIATE" MEANS ANY COMPANY THAT CONTROLS, IS CONTROLLED BY, OR
6 IS UNDER COMMON CONTROL WITH, ANOTHER COMPANY. A SPECIFIC, SEPARATE
7 CONSENT MUST BE GIVEN FOR EACH INDIVIDUAL PERSON OR ENTITY, BUSINESS, OR
8 AFFILIATE.

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

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

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