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Telephone Subscribers' Rights and Remedies for Dropped Calls and Undelivered Text Messages: The Legal Perspective.¹

1. Introduction

In telephony, dropped calls may be due to the service providers' fault, local environment constraints, and cell phone problems. On the part of the service provider, dropped calls might result from inadequate radio coverage either in the downlink or uplink connection capacity of the provider. The radio coverage of a telecommunications company is the geographical location where the station communicates or receives signals. Radio station coverage depends on certain factors, such as the topography of the area, buildings, technology, radio frequency and the connectivity of the subscriber. Some radio frequencies penetrate better than others and provide better signals, and effective and efficient radio stations, *inter alia*, are a function of a taller antenna masts, higher power transmissions, and better quality antennas.

In mobile telephony, uplink and downlink are different in frequency transmissions. Uplink means the transmission of frequencies or signals from a mobile cell phone to a Base Station while downlink is the transmission of frequency or signals from a Base Station to a mobile cell phone. Dropped calls may occur as a result of low frequencies or signals transmission in the uplink or downlink or an external interruption in the communications between the Base Station and the mobile device.

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A Base Station communicates with cell phones in order to place a phone call. The cell phone automatically connects to the nearest tower when a call attempt is made and continues to communicate with that tower as long as it remains the closest one within range. If the person making the phone call is on the move, i.e., travelling, walking, or driving, then, the call will likely move out of the range of the closest tower and a handoff will automatically occur to move the call to the new closest tower.

In the above scenario, the handoff will occur without a problem, but occasionally, there will be a complication and the call may be dropped during the handoff. This complication could be due to extreme cell traffic on either one of the towers, glitches in the backend software, power outages and encounters with a “dead zone”. A “dead zone” in the telecoms industry means an area with no reception available from the Base Station.²

On the other hand, the local environment in which we live also contributes to the incidence of dropped calls. The type of construction materials used in our houses or offices contribute to bad reception.³ The cell phone itself may be the cause of dropped calls. A cell phone with a damaged antenna, will likely experience poor cell phone reception, data loss and frequent dropped calls. A cell phone with a low battery will likely have a high degree of dropped calls. A sub-standard cell phone may experience difficulties in connecting or communicating with the cell tower to continue or sustain a phone conversation. The dropped calls may be as a result of the inability of the cell phone antenna to connect or communicate with the cell towers for an effective phone call.⁴

2. Undelivered text messages

Several reasons account for undelivered text messages. These reasons include; when the cell phone is turned off, or within a dead zone area, is damaged and unable to connect or communicate with a cell tower, or is out of range of a cell tower. A text message will not be delivered if the recipient number is invalid or does not exist, or if the telecoms operators’ filters are applied due to local

2 Jeff, “Causes of dropped calls and how to fix them”, 26 October 2012, <http://www.ubersignal.com/blog/causes-of-dropped-calls-and-how-to-fix-them> accessed 19 February 2018.

3 *Ibid*

4 *Ibid*

regulations,⁵ or if the telephone line has been de-activated due to improper registration or documentation etc. When a text message is sent or initiated, the telephone service provider holds the text message until it is able to connect with the recipient cell phone number to deliver the text message. If the text message remains undelivered for a certain amount of time, depending on the time limit of the service provider, the text message will be abandoned and undelivered. In both dropped calls and undelivered text messages discussed above, the subscriber tacitly confers a benefit on the telecoms service provider, i.e., the expenditure of money in that the service provider deducts the airtime or call credit of the subscriber for the entire time when the call was dropped or as a result of the text message remaining undelivered. The maker of a phone call intends to communicate or connect with the call recipient and the value or benefit conferred on the telecoms service provider is the utilisation of the caller's airtime or call credit. If the subscriber's airtime or call credit is deducted by the telecoms service provider without a reciprocal benefit conferred on the subscriber as a result of dropped calls or undelivered text messages, the subscriber is thereby short changed in the process. The above scenario is tantamount to a failed consideration in the law of contract. Since the relationship between a subscriber and a telecoms service provider is contractual, the principles of the law of contract with respect to failed consideration apply with equal force.

3. Failure of consideration by a telecommunication service provider

In the law of contract, a failure of consideration means that a state of affairs contemplated as the basis for payment has failed to materialise, or if it did exist, has failed to sustain itself.⁶ It means therefore that a failure can occur if a telecoms service provider fails to perform its own side of the bargain to sustain a continued connection or communication of the subscriber calls or to deliver the subscriber's text message to the recipient. Consideration, when used in the relationship between a telecoms service provider and its subscriber, refers to the condition which formed the basis of the subscriber's transfer of benefit or value to the telecoms service provider. It is only when the condition (the continued

5 Edwin Carvalho, "SMS 101: Why Messages Fail to Deliver", 23 September 2015, <https://www.nexmo.com/blog/2015/09/23/sms-101-why-messages-fail-to-deliver/>, accessed 19 February 2018.

6 Prof. Festus Emiri, *The Law of Restitution in Nigeria*, Malthouse Press, Nigeria, 2012.

connection with the recipient of the call) fails, that there is a failure of consideration (an inability or failure to deliver the text message) on the part of the telecoms service operator.

A party who has paid money to another for a consideration that has totally failed under a contract is entitled to claim the money back from the other party.⁷ In the same vein, a subscriber, whose airtime or call credit has been deducted by the telecoms service provider for dropped calls for the entire seconds or minutes which never added value or benefit to the subscriber, is entitled to a refund of the exact or equivalent airtime or call credit deducted from him. It is the present practice that, once a text message is composed and sent, the value or cost of the text message is automatically removed or deducted from the subscriber's available airtime or call credit, irrespective of whether the text message is delivered or not. The telecoms service provider usually notifies the subscriber of the undelivered text message. In this scenario, the subscriber is entitled to a refund of the value or cost of the undelivered text message due to a total failure of consideration on the part of the telecoms service operator to deliver the text message.⁸

The subscriber should not bear the financial burden of dropped calls and undelivered text messages, considering that the contract between the telecoms service provider and the subscriber is essentially a contract of adhesion that had not been negotiated, and in which the parties did not have equal bargaining powers. The telecoms service provider dictates the terms of the contract, therefore, the contractual relationship should be construed more in favour of the subscriber under the principle of *contra proferentem*.

When a call is dropped or a text message is not delivered and the telecoms service provider deducts the subscriber's available airtime or call credit, the subscriber automatically suffers a financial loss and the telecoms service provider is conferred with a financial benefit. Therefore, when a telecoms service provider fails to execute or carry out the instructions of the subscriber by failing

7 Nwaolisah v. Nwabufoh (2011) NWLR (Pt. 1268) 600 at 633, paras C–D, per Adekeye, J.S.C. (as he then was) and at p. 640, para A, per Rhodes-Vivour, J.S.C.

8 By the nature of the contract between the subscriber and the service provider it is implied that, once the subscriber has available airtime or call credit to sustain the transaction, the service provider will execute the subscriber's instruction by delivering the text message to the recipient. If the text message as initiated cannot be delivered, the service provider should not be allowed to unjustly enrich itself to the detriment of the subscriber.

to deliver the text message, the service provider unjustly enriches itself and should refund to the subscriber the deducted airtime or call credit.

4. Unsolicited Calls and Text Messages: A Threat to Right to Privacy?

The right to privacy is sacrosanct and Constitutional.⁹ The right to privacy is simply the right to be left alone¹⁰ and implied therein is the right not to be unreasonably and unjustifiably disturbed. The right to privacy includes the right to a quiet enjoyment or use of one's telephone line. In **Anene v. Airtel Nigeria Limited**,¹¹ the court held thus:

With respect to the reliefs sought, there is no gainsaying the fact that the Plaintiff having undeniably purchased the Defendant's telephone number . . . a contractual relationship exists between them with an *implied covenant or duty on the part of the Defendant to allow him to enjoy the quiet and undisturbed use of the same*. (Emphasis added.)

A telephone subscriber has a right to decide the kind of information to receive and his privacy should not be unjustifiably disturbed or intruded upon by service providers or telemarketers *vide* unsolicited calls and/or text messages. Unsolicited calls and/or messages constitute an unreasonable intrusion or invasion of one's privacy. Thus, according to Warren and Brandeis:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be left alone' . . . Numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'.¹²

The enjoyment of right to privacy is pivotal and fundamental in every society. Every individual should be able to enjoy some solitude, walk down the street, sit down to unwind, take a nap, chat with friends and family or take a trip, without

⁹ Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

¹⁰ Warren and Brandeis, "The Right to Privacy", *Harvard Law Review*, Vol. IV, No. 5, 15 December 1890.

¹¹ (Unreported) Suit No FCT/HC/CV/545/2015, delivered 2 November 2016 by the Hon. Justice Jude Okeke, High Court of the Federal Capital Territory, Abuja.

¹² *Ibid* (note 10).

being hassled or hounded by unsolicited calls and/or text messages by service providers or telemarketers.

In modern days, one's privacy has become more essential and the invasion of it, subjects one to mental pain and distress.¹³ Unsolicited calls and/or text messages, apparently harmless, when widely and persistently circulated¹⁴ at odd hours and at resting time or periods, are potent for disturbance and nuisance and therefore constitute a breach of right to privacy. Considering the ways and means by which the right to privacy is invaded through unsolicited calls and/or text messages, the injury inflicted is, therefore, painful and anguishing to the human mind. In **Anene v. Airtel Nigeria Limited (supra)**¹⁵, the court held as follows:

By the unsolicited messages sent by the Defendant via its aforesaid telephone numbers to the Plaintiff's said telephone line as shown in Exhibits B, B1 to B35, the Defendant is in violation of its duty to allow the Plaintiff a quiet and undisturbed use of the phone line. [. . .] I consider it a violation of both the Plaintiff's right to his privacy and telegraphic communication as well as a breach of the Defendant's implied duty to allow the Plaintiff quiet and undisturbed usage of the telephone line.

Unsolicited calls and/or text messages do not only constitute a violation of the right to privacy but are a threat to telegraphic communications as guaranteed and protected under the 1999 Constitution.¹⁶ It is implied in every service provider/subscriber contractual relationship that a subscriber shall have quiet enjoyment in the use of his telephone line, therefore, unreasonable and unjustifiable unsolicited calls and/or text messages constitute a violation of the contractual relationship and are a breach of the subscriber's right to quiet enjoyment and use.¹⁷

13 Ibid (note 10).

14 Ibid (note 10)

15 (Unreported) Suit No FCT/HC/CV/545/2015, delivered 2 November 2016 by the Hon. Justice Jude Okeke, High Court of the Federal Capital Territory, Abuja

16 Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

17 *Anene v. Airtel (supra)* (Unreported) Suit No FCT/HC/CV/545/2015.

5. **Prohibition of unsolicited calls under the NCC Consumer Code¹⁸ of Practice Regulations, 2007**

Under the Nigerian Communications Commission Consumer Code of Practice Regulations, 2007 (“the 2007 Regulations”), a service provider shall not engage in unsolicited calls, unless it discloses:

- a. At the beginning of the communication, the identity of the operator or other person(s) on whose behalf the operator is making the unsolicited calls;
- b. The precise or exact purpose of the communication;
- c. During the communication, the full price of any product or service that is the subject of the communication;
- d. The person receiving the communication shall have an absolute right to cancel the agreement for purchase, lease or other supply of any product or service within 7 days of the communication, by calling a specified telephone number (without any charge, and that the operator shall specifically identify such during the communication) unless the product or service has by that time been supplied to and used by the person receiving the communication.¹⁹

A comprehensive reading of regulation 20 of the 2007 Regulations, in context, indicates that the 2007 Regulations do not totally prohibit telephone service providers from making unsolicited calls and/or sending text messages to their subscribers. The 2007 Regulations only lay down the conditions precedent, or guidelines, that a service provider must fulfil prior to engaging in unsolicited calls and/or text messages. The 2007 Regulations allow unsolicited calls once the service provider complies with the laid down conditions. It is, however, the writers’ opinion that unsolicited calls and/or text messages constitute “call nuisance” due to their timing and frequency, and are a breach of right to privacy. The 2007 Regulations provide that:

18 A code of practice is a practical guide or set of regulations issued by an official or a professional body to regulate conduct within a particular industry or profession. A code of practice helps industry players to comply with ethical standards.

19 Regulation 20(a), (b) and (c), Consumer Code of Practice Regulations, 2007. This Regulation came into force on 1 August 2007.

Licensees shall also conduct telemarketing in accordance with any 'call' or 'do not call' preferences recorded by the Consumer, at the time of entering into a contract for services or after, and in accordance with any other rules or guidelines issued by the Commission or any other competent authority.²⁰

Sequel to the above provision, a service provider may make unsolicited calls and/or send text messages to a telephone subscriber, if the subscriber indicates at the time of the contract for services, possibly at the point of purchase of the SIM card, that unsolicited calls and/or text messages may be made or sent to his telephone line. In this circumstance, any "do call" preference recorded in the subscriber's telephone line negates any claim to violation or infringement of any right to privacy, in the event that solicitation calls and text messages are made or sent to the subscriber's telephone line by the service provider pursuant to the "do call" preference recorded on his telephone line.

Thus, the 2007 Regulations only prohibits unsolicited calls or text messages, if a telephone subscriber records a "do not call" preference against his telephone line at the time of entering into a contract for service, or thereafter. If a service provider, despite a "do not call" preference recorded against a subscriber's telephone line, makes or sends unsolicited calls and/or text messages to the line, the right to privacy of the subscriber is infringed upon and the subscriber may sue for damages. The subscriber may also sue for damages for breach of contract if there is an active "do not call" preference recorded against the telephone line.

The "call" or "do not call" preferences in the 2007 Regulations is equivalent to the provisions of the United States' Telephone Consumer Protection Act of 1991²¹ ("the 1991 TCPA"). The 1991 TCPA restricts telephone marketing or solicitation. It prohibits telemarketers from making or sending unsolicited calls and/or text messages on certain conditions. If a service provider makes an unsolicited call and/or sends text messages to a subscriber despite a "do not call" preference, then the subscriber may sue for damages or obtain an injunction

20 Regulation 20(c), *ibid*.

21 Telephone Consumer Protection Act of 1991, Pub. Law No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.

against the telemarketer for a breach of contract or an infringement of his right to privacy.²²

Under the 1991 TCPA, it is unlawful for any service provider, despite a “do not call” preference, to make any unsolicited call and/or to send text messages using an automatic telephone dialling system or an artificial or pre-recorded voice to:

- a. Any telephone line;
- b. The telephone line of any guest room or patient room of a hospital, health care facility, elderly home or similar establishment;
- c. Any cellular telephone service, specialised mobile radio service, other radio common carrier, or any service for which the call party is charged for the call;
- d. Initiate any telephone call to any residential telephone line using an artificial or pre-recorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes; or
- e. Uses any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine, etc.²³

A “do not call” preference recorded against a telephone line²⁴ constitutes an implied enforceable contract between the service provider and the subscriber or owner of the telephone line against which the “do not call” preference is recorded. An implied contract between a service provider and its subscriber is binding and enforceable.²⁵

22 O.B. Oregbemhe, “Consumers Protection in Advertised Promotions and Unsolicited Commercial Calls and Text Message in Nigeria”, *Business Law Review, Nigerian Journal of Business and Corporate Law*, Vol. 2, No. 4, December 2011, Hybrid Consult, Lagos, p. 11.

23 Section 227, Telephone Consumer Protection Act of 1991, Pub. Law No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227; See, *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) *cert. denied*, 515 U.S. 1161 (1995) and, *Destination Ventures Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995)

24 A “do not call” preference in accordance with the Regulation 20(2) of the Consumer Code of Practice Regulations 2007.

25 (Unreported) Suit No FCT/HC/CV/545/2015, delivered 2 November 2016 by the Hon. Justice Jude Okeke, High Court of the Federal Capital Territory, Abuja.

6. **Prohibition of unsolicited calls and/or text messages under the Telephone Consumer Protection Bill, 2013**

The Telephone Consumer Protection Bill 2013²⁶ (“TCPB 2013”) prohibits any service provider from making unsolicited calls or posting advertisements to any called party in Nigeria.²⁷ The TCPB 2013, if passed into law, will protect telephone subscribers or consumers of telecommunications products and services from the activities of telemarketers. The TCPB 2013 provides both civil and criminal sanctions for the making or sending of unsolicited calls and/or text messages.²⁸ The TCPB 2013 seeks to curb the “nuisance nature” of unsolicited calls and/or text messages and to protect the individual right to privacy and quiet enjoyment or use of a telephone line in Nigeria.

The TCPB 2013 provides that no telephone service provider shall call any residential²⁹ telephone line using an artificial or pre-recorded voice to deliver messages or text messages without the prior express consent of the called party, unless such calls or text messages are made before 8am and after 9pm.³⁰ Expressed in the proviso to section 2 of the TCPB 2013 is the fact that, even if a called party, subscriber, consumer or the owner of a residential telephone line, consents that solicitation calls and/or text messages be made or sent to his telephone line, then such solicitation calls and/or text messages must be made before 8am and after 9pm. If, in violation of section 2 of the TCPB 2013, a service provider makes solicitation calls and/or sends text messages to a called party, subscriber, consumer or an owner of a residential telephone line between the hours of 8am and 9pm, then the service provider may be sued for so doing. Granted that a called party, subscriber, consumer or an owner of a residential telephone line may consent to receiving solicitation calls and/or text messages

26 The Bill was sponsored by Honourable Abiodun Abudu-Balogun who represents Ijebu North, Ijebu East and Ogun Waterside Federal Constituency at the House of Representatives. The Bill was introduced into the House on 16 January 2013 and has advanced to Committee stage.

27 Section 1, Telephone Consumer Protection Bill, 2013. Section 3 thereof exempted the service provider from liability where the call does not include a solicitation to purchase goods and services, or where the consumer has provided prior express consent to a solicitation to purchase goods and services.

28 Sections 9, 10 and 11, *ibid.*

29 The use of the phrase “residential telephone line” in the Bill has the effect of excluding unsolicited calls and/or text messages to telephone lines in public places, such as hospitals, guest houses, hotels, schools, and health care facilities, etc. We suggest that the Bill is too narrow in its application and is not comprehensive in scope. It should be expanded to apply to telephone lines in public places, as users or subscribers of such public telephone lines also require the quiet enjoyment of their telephone lines.

30 Section 2, Telephone Consumer Protection Bill, 2013.

in accordance with the TCPB 2013,³¹ if solicitation calls and/or text messages are made or delivered between the hours of 8am and 9pm in violation of the “before 8am and after 9pm principle”, such otherwise lawful solicitation calls and/or text messages automatically become unlawful and unsolicited calls and/or text messages. In the above instances, the called party, subscriber, consumer or the owner of the residential telephone line to which the “now unlawful” solicitation calls and/or text messages are made or delivered, may sue for damages for breach of right to privacy under the law.³²

The fact that, otherwise lawful, solicitation calls and/or text messages are made or delivered between the hours of 8am and 9pm, (i.e. outside the statutorily allowed period), makes the solicitation unlawful. For a service provider to avoid incurring liability for damages for otherwise lawful solicitations to a called party, subscriber, consumer or owner of residential telephone line who had consented to receiving solicitation calls and/or text messages, the service provider must comply strictly with the “before 8am and after 9pm principle”. Once the service provider fails to comply with the statutorily imposed time frame, its immunity against liability for damages is broken.

If the Bill is passed into law, it will mean that for a service provider to make an unsolicited call and/or text message to a residential telephone line, the express consent or authority of the owner of the telephone line must first be sought and obtained. If unsolicited calls and/or text messages are made to a residential telephone line without the express consent and authority of a called party, subscriber or owner of the telephone line being first sought and obtained, then any called party, subscriber, consumer or owner of the residential telephone line who is aggrieved by such unsolicited calls and/or text messages may sue for damages³³

When any called party, subscriber, consumer or owner of a residential telephone line receives unsolicited calls and/or text messages and wishes to stop further unsolicited calls and/or messages forthwith, he may request to be placed on “DO-NOT call Register List” which shall commence at the expiration of 30

31 Section 2, *ibid*

32 If the NTCBP 2013 is eventually passed into law by the National Assembly.

33 Section 9, *ibid*. The action may be brought before a Federal High Court, State High Court or High Court of the Federal Capital Territory, Abuja, for redress.

days after the last call or solicitation.³⁴ Once a request of a called party, subscriber, consumer, or owner of a residential telephone line to be placed on the “DO-NOT call Register List” is approved and registered, any subsequent unsolicited calls and/or text messages become unlawful and a breach of contract. A “DO-NOT call” request which is approved and registered constitutes a binding and enforceable contract between a service provider and a called party, subscriber, consumer or the owner of the registered residential telephone line.

The TCPB 2013 prohibits and bans online telemarketing³⁵ except with the prior consent or application of the called party, subscriber, consumer or the owner of the telephone line.³⁶ If online telemarketing occurs without the consent, permission or authorisation of the called party, subscriber, consumer or the owner of the telephone line first being had or obtained on his application, the service provider or telemarketer³⁷ may be sued for damages for unsolicited calls and text messages.³⁸

As a condition precedent, telemarketing organisations are required to display their telephone numbers, names or the telephone number and name of the companies for which they are marketing or making the solicitation for goods and services.³⁹ Any service provider that calls or sends text messages to any called party, or its subscriber, in violation of the TCPB 2013, commits an offence and shall be liable to a fine of ₦5 million, provided that the called party proves the unsolicited call and/or text message for the provision of goods and services.⁴⁰

In comparison, the protection against unsolicited calls and/or text messages offered by the 1991 (United States) TCPA is wider in scope than that offered by the (Nigeria) TCPB 2013. The TCPB 2013 only offers protection against unsolicited calls and/or text messages to residential telephone lines while the 1991 TCPA extends protection against unsolicited calls to the following telephone lines:

- a. Any telephone line;

34 Section 6, *ibid.*

35 “Telemarketing” means marketing conducted over telephone and includes text messages.

36 Section 4, *ibid.*

37 A “telemarketer” means the operator of a telemarketing business, including the Telephone Service Providers.

38 Section 4, *ibid.*

39 Section 5, *ibid.*

40 Section 11, *ibid.*

- b. The telephone line of any guest room or patient room of a hospital, health care facility, elderly home or similar establishment;
- c. Any cellular telephone service, specialised mobile radio service or other radio common carrier, or any service for which the call party is charged for the call;
- d. Any residential telephone line unless the call is initiated for emergency purposes; and
- e. Any telephone facsimile machine, etc.⁴¹

The TCPB 2013 does not offer protection against unsolicited calls and/or text messages in accordance with international best practices in relation to unsolicited calls and/or text messages. The TCPB 2013 contains adequate provisions/safeguards in the area of offering protection against unsolicited calls and/or text messages in the era of digital and technological intrusion into privacy. An unsolicited call or text message to the telephone of any guest room or patient room of a hospital, health care facility, elderly home or similar establishment, is more disturbing than those made or delivered to a residential telephone line. A patient in the hospital room, or a guest in a guest room, deserves more quiet time and requires protection against unsolicited calls and text messages. In conclusion, we advocate that service providers should always refund or credit subscribers with the value of the airtime deducted from their available air time whenever a text message is undelivered, or a call is dropped due to the service provider's fault as the service provider cannot profit from its own wrong. Whilst the proposed bill seeks in part to rectify the gap in the 2007 regulations, we recommend a further adjustment to the TCPB 2013 Bill in line with international best practices in terms of scope and application as outlined above.

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41 Section 227, *ibid.*