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The TCPA: What You Need to Know to Empower Efficient and Effective Telephonic Communications

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Disclaimer

Nothing in this presentation is intended to provide legal advice. In addition, nothing is intended to provide legal conclusions about how the FCC's language should be interpreted, nor have we sought to apply decisions to specific entities or specific circumstances.

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Presentation Objectives

- Discuss the TCPA’s key requirements
- Provide additional details about the 2015 FCC TCPA decision
- Discuss the Electronic Signatures in Global and National Commerce (“E-SIGN”) Act
- Offer strategies to protect against class action lawsuits and regulatory enforcement actions
- Address your questions

PREVIEW OF KEY THINGS TO KNOW

- **Healthcare is on the FCC's radar:** Potential class-action liability when using autodialers to leave certain types of messages, without patient consent
- **Bottom Line**
- Autodialed or prerecorded/artificial non-marketing calls to wireless numbers (and emergency lines, patient lines, etc.) require "prior express consent" unless it is an emergency
- Autodialed or prerecorded/artificial marketing calls to wireless numbers (and emergency lines, patient lines, etc.) require "prior express written consent"
- Prerecorded/artificial marketing calls to residential landlines (and emergency lines, patient lines, etc.) require "prior express written consent"
- **Obtaining patients' prior express consent at time of admission**

Overview of the TCPA

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- Congress enacted the TCPA in 1991 specifically to curb aggressive telemarketing practices:
 - Using automatic dialing equipment to make unsolicited calls to random or sequential telephone numbers
 - Calling sequential telephone numbers in a way that ties up a block of telephone numbers and creates public safety risks
 - Concerns about telemarketers shifting calling costs to wireless consumers

Overview of the TCPA (cont'd)

- Imposes a number of restrictions on telemarketing calls, faxes, and other outbound communications.
 - Some restrictions apply to non-telemarketing calls
 - Implemented by the Federal Communications Commission (“FCC”)
- Do Not Call Registry requirements are separate.

Overview of the TCPA (cont'd)

Two increasingly problematic provisions:

1) No autodialed or prerecorded or artificial voice calls to wireless telephone numbers, absent an emergency or “prior express consent.”

- Applies regardless of content (e.g., includes collection and servicing calls)
- The FCC and some courts have determined that this applies to text or short message service (“SMS”) messages
- Additional FCC “written consent” rules apply to telemarketing calls

Overview of the TCPA (cont'd)

2) No prerecorded or artificial voice calls to residential telephone numbers without “prior express *written* consent.”

- Exceptions:
 - Not a solicitation or telemarketing
 - Not made for a commercial purpose
 - Emergency calls
 - By or on behalf of a tax-exempt nonprofit organization
 - Healthcare calls subject to HIPAA

Overview of the TCPA (cont'd)

- The TCPA defines an autodialer (“automatic telephone dialing system”) as “equipment which has the capacity—
 - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - (B) to dial such numbers.”
- The application of this definition remains a key unsettled issue in today’s TCPA landscape.

Overview of the TCPA (cont'd)

TCPA Violations Can Be Costly

- Minimum statutory damages of \$500 *per call*.
- Statutory damages of \$1,500 *per call* for knowing or willful violations.
- **Class actions** allowed, with no cap on damages or *de minimis* exception:
 - 1,000 calls = at least \$500,000, potentially \$1.5 million
- Lawsuits are targeting a variety of industries.

July 2015 FCC Omnibus Declaratory Ruling

Overview of the FCC Declaratory Ruling

- Autodialers
- Maker of a Call
- Consent of the Called Party
- Free to End User Calls

Note: these are the most relevant issues from the decision; the FCC also addressed other issues

Autodialers – Covered Equipment

- Covers dialing equipment with *capacity* to store or produce telephone numbers, and to dial random or sequential numbers
 - Commission refused to exempt equipment that lacks the “present ability” to dial randomly or sequentially
 - Equipment is covered “even if it is not presently used for such purposes”
- Predictive dialers satisfy the TCPA definition of “autodialer”
- Does not distinguish between calls made by dialing equipment whether it is designed to be paired with or operate independently of predictive software packages and a database of numbers

Autodialers – Broad Definition

- Declined to determine comprehensively each type of equipment that falls within the definition of “autodialer”
- Must be more than a “theoretical potential that the equipment could be modified” through the additional software (*e.g.*, rotary phone)
- Calls for case-by-case determination of dialing equipment

Autodialers – Division of Ownership and Other Issues

- Callers cannot avoid obtaining consent for autodialed calls by dividing ownership of dialing equipment among multiple entities
 - Two entities with separate storage and dialing equipment effectuate a call “if the net result of such voluntary combination enables the equipment to have the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such calls”

Maker of a Call - Basic Approach

- FCC looks at totality of circumstances to determine who took necessary steps to physically place the call or was so involved in placing the call as to be deemed to initiated it

Consent of Called Party – Revoking Consent

- A called party may revoke consent at any time through any reasonable means
 - May revoke consent either orally or in writing
 - Reasonable opt-out methods include a consumer-initiated call or at an in-store bill payment location
 - Callers may not abridge consumer’s right to revoke consent

Consent of Called Party – Reassigned Wireless Numbers

- Definition of “Called Party”
 - Either the current subscriber or customary user of the phone may give prior express consent
- Rejected “intended party” interpretation

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Consent of Called Party – Reassigned Wireless Numbers

- Callers are not prohibited from calling a reassigned numbers one time after the reassignment, as an opportunity to obtain knowledge about the reassignment.
 - For all subsequent calls, the caller is liable
- Caller bears burden of showing he or she had a reasonable belief and no knowledge of reassignment
 - No obligation for recipients to notify callers that a number has been reassigned, to answer calls, or to opt-out

Consent of Called Party – Reassigned Wireless Numbers

Methods companies may use to learn about reassigned numbers (NOT a safe harbor):

- Accessing databases with consumer numbers
- Contracting with consumers to inform them about reassignment
- Interactive opt-out mechanism in all artificial/prerecorded calls
- Recording and tracking wrong number reports from outbound calls and new phone numbers from incoming calls
- Sending emails asking for updated contact information
- Recognizing “triple-tones” that identify disconnected numbers
- Establishing policies to determine if a number has been reassigned when no response to a “two-way” call
- Enabling consumers to update contact information in response to texts

Free to End User Calls – Exemption for Healthcare Treatment Calls

Exempts calls for which there is exigency and that have a healthcare purpose:

- Appointment and exam confirmations and reminders
- Wellness checkups
- Hospital pre-registration instructions
- Pre-operative instructions
- Lab results
- Post-discharge follow-up intended to prevent readmission
- Prescription notifications
- Home healthcare instructions

Calls are not exempt if they include:

- Telemarketing, solicitation, or advertising content
- Accounting, billing, debt collection, or other financial content

The recipient cannot be charged when the voice call or text message was made or sent to a wireless number

Text Messages as Calls

- SMS text messages are subject to the same consumer-protections as voice calls
- Internet-to-phone text messaging technology falls within the definition autodialer
- Addressing a message to a domain name using a consumer's wireless number or entering a message on a web portal that will be sent to the consumer's wireless number are considered a means of dialing
- Consumer consent is required for text messages sent from text messaging apps that enable entities to send messages to text-capable numbers

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Free to End User Calls – Exemption for Healthcare Treatment Calls

Exempted healthcare treatment calls must satisfy the following other conditions:

- HIPAA privacy rules control the content of the informational message if applicable
- Must be sent only to the wireless number provided by the patient;
- Must state the name and contact information of the healthcare provider (for voice calls, disclosures need to be made at the beginning of the call)
- Must be strictly limited to the exempt purposes
- Must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages
- May initiate only one message (whether by voice call or text message) per day, up to a maximum of three combined messages per week
- Must offer recipients an easy means of opting out of future calls and honor any opt-out request immediately

On the Horizon

On the Horizon – FCC

- Anthem Petition
- Clarification (Anthem, WellCare, and America's Health Insurance Plans)
- Federal debts rulemaking
- Clarifications for calls by or on behalf of the Government

Pending Cases

1. D.C. Circuit Appeal of July FCC Decision
2. Spokeo, Inc. v. Robins
 - Most TCPA cases: plaintiff suffers no concrete harm; only asserts statutory damages per call
 - Question in Spokeo: whether a plaintiff who suffers no concrete harm has standing to file a lawsuit based on a bare violation of a federal statute
 - FCRA case, but could have broad implications for similar laws like TCPA and FDCPA
 - Current law is split across the country
 - Decision expected by Spring 2016

The Electronic Signatures in Global and National Commerce ("E-SIGN") Act

Electronic Transactions: E-Sign

- E-SIGN recognizes the validity of electronic records and electronic signatures for transactions in or affecting interstate or foreign commerce.
 - Covers almost all transactions.
- Electronic records are documents “created, generated, sent, communicate, received or stored by electronic means.”
 - PDFs, E-mails, SMS Messages, Oral Recordings, Web Pages, Word Documents, Etc.
- Electronic signatures are sounds, symbols, or processes attached or logically associated with records and executed by a person with the intent to sign.
 - Reply “Yes”, Check Boxes, Click to Agree, Recording of Assent, Etc.
- E-SIGN establishes a voluntary framework for electronic transactions.

Electronic Transactions: State Law

- E-SIGN preempts inconsistent state laws unless they codify the Uniform Electronic Transactions Act (UETA).
 - All but 47 states have adopted UETA. In Illinois, New York, and Washington, E-SIGN applies.
- UETA requires consent for electronic contracting. But consent may be established by conduct.
 - Consumer willingness to request services or place orders online would demonstrate consent.
- Like E-SIGN, UETA supports the validity of electronic records and electronic signatures.

Electronic Transactions: The Wrinkle

- E-SIGN and UETA allow you to use electronic records and signatures where contracts or signatures must be “in writing.”
- And you don’t need consent.

BUT IF **FEDERAL LAW** REQUIRES THAT CONSUMERS
RECEIVE INFORMATION IN WRITING,

YOU HAVE TO OBTAIN CONSUMER CONSENT.

Electronic Transactions: The Wrinkle (cont’d)

- Affirmative consent after providing certain clear and conspicuous disclosures.
 - E.g., right or option to receive paper copies; right to withdraw consent; hardware and software requirements
- Consumer must consent, or confirm consent, in a way that reasonably demonstrates the consumer’s ability to access information.
 - E.g., sending an email with a confirmation link
- And last:

YOU CAN’T USE ORAL RECORDINGS FOR “IN WRITING”
DISCLOSURES

Protecting Your Organization

Protecting Your Organization


- **Obtaining patients' prior express consent at time of admission can significantly limit your exposure to TCPA liability.**
- Determine how or if residential and cell phone numbers and associated appropriate disclosures and consent are delineated on admissions forms.
- Incorporate appropriate disclosures and patient consent language into admission forms and patient-facing materials (e.g., payment plans and agreements).
- Regularly scrub numbers provided by patients to avoid instances of calling unintended recipients as phone numbers are frequently reassigned.
- Take notice and record (including communicating with applicable third-party providers) if patients revoke previously provided consent.


Protecting Your Organization (cont'd)


- **Assessing your existing data**
 - What consent can you demonstrate?
 - Who has consent??
- **Reviewing intake and account forms, calling scripts, and other consent channels**
 - Are the disclosures adequate?
 - Are the telephone number types specified?
 - Is your privacy policy sufficient?
- **Analyzing the available opt-out mechanisms**
- **Reviewing calling policies and manuals**
- **Preparing training modules for employees**

Protecting Your Organization (cont'd)

- Analyzing vendor agreements for TCPA compliance and adequate protection (including vicarious liability issues)
- Assessing call monitoring and recording compliance issues
- Evaluating management of customer number changes
- Ensuring adequate record retention
- Obtaining insurance
- Maintaining attorney-client privilege where possible
- Monitoring TCPA litigation developments and pending FCC proceedings for filings and decisions of interest
- Aggressively and intelligently defending against TCPA lawsuits









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- Partner in the global communications group at Hogan Lovells, where he focuses on consumer protection and new technologies
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- Advises clients on a variety of consumer protection matters, including federal and state data privacy and security issues, the regulation of mobile technologies, E-SIGN, and other communications issues

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