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Avoiding the Costly "Robo No-No"

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The Telephone Consumer Protection Act ("TCPA") was enacted to protect consumers from intrusive robocalls, but Congress probably did not foresee that it would result in a windfall for plaintiff's lawyers. Virtually every industry that provides goods or services to consumers has faced TCPA class actions, from sports franchises[1] to oil change service companies.[2] Thus, it should come as no surprise that the health care industry has had its share of TCPA class actions. For example, Walgreens recently agreed to an $11 million settlement of TCPA class action litigation relating to its prescription reminders.[3]

In general, the TCPA makes it unlawful for a person to call the cellular telephone number of any other person using an automated telephone dialing system without the recipient's prior express consent.[4] The term "call" includes both voice and text messages.[5] The TCPA provides for a private right of action and statutory damages of $500 per violation, and up to $1,500 per violation for willful or knowing violations.[6] Plaintiffs can recover even if they have suffered no actual damages.
One key issue in the TCPA litigation is whether the consumer has given express consent to automated calls and texts. The vast majority of cases to address the issue have held that a telephone customer who provides her number to another party consents to receive calls or texts from that party.[7] On July 10, 2015, the FCC released a Declaratory Ruling and Order ("FCC July 2015 Order") which suggests there is not a specific method by which a caller must obtain prior express consent, only that the consent must be express and not implied or presumed. Although defendants cannot be held directly liable for violations of the TCPA if they have had no involvement in placing the calls, in some instances they may be held vicariously liable for a third-party's actions.[8]

A second key issue is whether express consent was given to the defendant or to some other party. In *Hines v. CMRE Financial Services, Inc.*, Hines sought treatment at the Town & Country Hospital in Tampa, Florida ("Hospital").[9] Prior to admission, Hines provided his cellular telephone number to the Hospital. The Town & Country Emergency Physicians, LLC ("TCEP"), who were under contract with the Hospital, provided emergency services to Hines. TCEP billed Hines for the services provided, but when Hines did not pay his bill TCEP obtained Hines's telephone number from the Hospital and retained a third-party, CMRE, to collect the debt. In the course of its debt-collection efforts, CMRE placed 153 automated calls to Hines's cellular telephone. The U.S. District Court for the Southern District of Florida held that although Hines provided his telephone number to the Hospital upon admission, he did not give "prior express consent" to receive debt-collection calls on behalf of TCEP, a third-party creditor.

A third key issue is the scope of the consent. Express consent is limited in scope to the purpose for which it was originally granted. The TCPA does not require that calls be made for the exact purpose for which the number was supplied, but only that the call bears some relation to the product or service for which the number was provided.[10] However, the scope of a consumer's consent depends on its context and the purpose for which it is given.[11] Consent for one purpose does not equate to consent for all purposes.[12]

The FCC's July 2015 Order addresses a number of issues raised by health care providers:

1. **Is consent required for health care calls?** Prior express consent is not required for autodialed, prerecorded voice, or artificial voice calls to a residential line for a health care purpose, but prior express consent is required for such calls or texts to a cellular phone. Calls for telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content require prior express written consent.
2. **What is a health care call?** Calls which have a health care treatment purpose include appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up to prevent readmission, prescription notifications, and home health care instructions.
3. **What constitutes consent in the health care context?** According to the FCC, the provision of a phone number to a health care provider constitutes prior express consent for health care calls subject to HIPAA by HIPAA-covered entities and business associates acting on their behalf, as long as the calls are within the scope of the consent given, and there has been no instruction to stop.
4. **What if the consumer is unable to give consent?** The FCC noted that if a party is not able to consent because of medical incapacity, prior express consent to make health care calls subject to HIPAA may be obtained from a third party. A caller may make health care calls subject to HIPAA during that period of incapacity, but the prior express consent provided by the third party is no longer valid once the period of incapacity ends. A caller seeking to make health care calls subject to HIPAA to a patient who is no longer incapacitated must obtain the prior express consent of the called party.
5. **What if the consumer is not charged for the call?** An exemption to the consent requirement applies to automated calls and texts to wireless numbers for health care purposes only if the call is not charged to the recipient, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages) and the health care provider complies with the following conditions:
    a. voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the patient;

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b. voice calls and text messages must state the name and contact information of the health care provider (for voice calls, these disclosures would need to be made at the beginning of the call);
c. voice calls and text messages are strictly limited to health care purposes; must not be for telemarketing, solicitation, or advertising purposes, or include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules;
d. voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;
e. a health care provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific health care provider;
f. a health care provider must offer recipients within each message an easy means to opt out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future health care calls, text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,
g. a health care provider must honor the opt-out requests immediately.

6. **What about reassigned numbers?** Callers are liable for automated calls and texts to reassigned wireless numbers when the current subscriber to or customary user of the number has not consented, subject to a limited, one-call exception for cases in which the caller does not have actual or constructive knowledge of the reassignment;
7. **Can a consumer revoke consent?** Consumers may revoke consent at any time and through any "reasonable means."

The FCC's July 2015 Order did not put an end to the matter, however. Shortly thereafter, the FCC issued a correction stating "the rule applies per call and that . . . telemarketers should not rely on a consumer's written consent obtained before the current rule took effect if that consent does not satisfy the current rule." Then on August 28, 2015, the FCC issued another declaratory ruling to "make clear that a type of fax advertisement –an efax, a document sent as a conventional fax then converted to and delivered to a consumer as an electronic mail attachment is also covered under the TCPA."

The reaction from interested parties has been swift. A number of petitions have been consolidated before the U.S. Court of Appeals for the District of Columbia Circuit. The petitioners challenge the definition of an autodialer, the "one-call" exception for reassigned calls, the definition of the "called party" as the recipient rather than the intended recipient, and the distinction that auto-dialed health care calls to cellular telephone lines require express consent, but those to residential lines do not.

Although there is still confusion about the TCPA, one thing is clear. To avoid committing a "Robo No-No" and the costly TCPA liability that can result, health care providers should update their intake forms and establish clear policies and procedures for obtaining and documenting express consent to contact a patient's cellular telephone. Such procedures can be very important to establish a defense, because the burden to prove compliance with the TCPA lies with the calling party.[13]

1 Emanuel v. Los Angeles Lakers, Inc., 2013 U.S. Dist. LEXIS 58842 (C.D. Cal. Apr. 18, 2013) (dismissing the plaintiff's TCPA claim where he voluntarily sent a text to the defendant seeking to display the contents of that message on the scoreboard).
2 In re Jiffy Lube Int'l, Inc., 847 F. Supp. 2d 1253, 1259 (S.D. Cal. 2012).
3 Kolinek v. Walgreen Co., Case No. 13-cv-04806 (N.D. Ill.).
4 47 U.S.C. § 227(b)(1)(A)(iii).
5 Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. Cal. 2009).
6 47 U.S.C. § 227(b)(3).
7 Reardon v. Uber Techs., Inc., 2015 U.S. Dist. LEXIS 94183 (N.D. Cal. July 19, 2015) (holding that a plaintiff who provided her phone number as part of the application process consented to receive Uber's texts about becoming an Uber driver).
8 Thomas v. Taco Bell Corp., 679 (9th Cir. Cal. 2014). See also, In re Jiffy Lube Int'l, Inc., 847 F. Supp. 2d 1253, 1256 (S.D. Cal. 2012) (noting that at least one previous Ninth Circuit case implicitly accepted that an entity can be held liable under the TCPA even if it hired another entity to send the messages).
9 2014 U.S. Dist. LEXIS 3017 (S.D. Fla. Jan. 10, 2014).
10 Hudson v. Sharp Healthcare, 2014 U.S. Dist. LEXIS 87184 (S.D. Cal. June 25, 2014) (Summary judgment granted for defendant and consent for hospital collection calls established where plaintiff voluntarily provided cellular phone number upon admission and initialed next to the cellular telephone number on the form).
11 Kolinek v. Walgreen Co., 2014 U.S. Dist. LEXIS 91554 (N.D. Ill. July 7, 2014).
12 Id.
13 Patten v. Vertical Fitness Group, LLC, 22 F. Supp. 3d 1069, 1073 (S.D. Cal. 2014).

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