

Healthcare Patient Outreach & the Telephone Consumer Protection Act

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What is the Telephone Consumer Protection Act, 47 U.S.C. § 227?

- Passed by Congress in 1991
- FCC promulgated the Telephone Consumer Protection Act ("TCPA") Rules to implement the Act
- The Act prohibits prerecorded calls, and calls or text messages made with automatic dialing equipment to cell phones, or to any service for which the called party is charged for the call (such as VoIP), without prior express consent unless the calls/messages are for an emergency purpose
- The Act prohibits prerecorded message telemarketing calls without prior express written consent unless the call delivers a health care message made by, or on behalf of, a covered entity or its business associate, or a nonprofit organization
- Requires an interactive opt-out to be included on telemarketing message calls
- Includes do-not-call requirements, both Federal list and internal company list
- Mandates calling hour restrictions, disclosure requirements, and abandoned call provisions
- Sets forth strict requirements for unsolicited fax advertisements

FCC 2015 Declaratory Ruling

The 2015 Ruling addressed several petitions such as, but not limited to, revocation of consent, wireless number reassignment and text messages as calls. The full summary of the ruling is available upon request. The most significant ruling from the FCC affecting healthcare is the clarification on consent from a patient.

Clarification on Consent

For healthcare providers, the FCC clarified the provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associate acting on its behalf if the covered entity and business associate are making calls within the scope of the consent given. This means the call must be closely related to the purpose for which the telephone number was originally provided.

Potential Penalties under the TCPA

- The TCPA contains a private right of action
- Consumers may sue for up to \$500 per violation (per call/message)
- This amount may be tripled if the violation is shown to be willful or intentional
- This private right of action creates large class action risk
- The FCC can also impose civil monetary penalties in an enforcement action of up to \$16,000 per violation (per call/message)

How Do I know if a Number is a Cell Phone?

Two lists exist to help companies identify numbers as cell phone numbers:

- Neustar Wireless Ported Numbers – comprised of a list of numbers ported from wirelines to wireless
- DMA Wireless Block Identifier – comprised of carrier cell phone prefixes

How Do We Obtain Prior Express Consent?

- The required prior express consent can be oral; however, proof of consent lies with the message sender.
- To maintain records of consent, consider:
 - Recording of oral consent
 - Written consent
 - Online consent
- The consent should be clear about the purpose; e.g., sending prerecorded or text messages for appointment reminders to the person's cell phone and designating the number to which it applies.

Recent Case Law—Consent

- *Mais v. Gulf Coast Collection Bureau*, 768 F.3d 1110 (11th Cir. 2014): Plaintiff's wife provided his cell phone number to the hospital upon admission. A radiology service provided later called to collect a debt for services provided during the hospital stay. The lower court held there was no express consent because the number was provided to the hospital, not the radiology service. The Eleventh Circuit reversed concluding there was prior express consent, in accordance with the FCC's 2008 Ruling, because the wife provided the patient's cell phone number and agreed to the hospital's privacy practices, which included releasing health information for billing to the radiology service.
- *Hudson v. Sharp Healthcare*, 2014 U.S. Dist. LEXIS 87184 (S.D. Cal. 2014): The Plaintiff provided her cell phone number in connection with treatment she and her minor child received. Plaintiff executed an attestation document verifying her cell phone number. The paperwork included an agreement of responsibility for payment for services. Defendant called Plaintiff's cell phone number to collect payment. Plaintiff sued claiming she did not provide prior express consent to be called for debt collection, only for following up on test results and providing her with medical information. The court found the calls were directly related to the product or service for which the number was provided and, therefore, were made with the appropriate prior express consent.
- *Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265 (11th Cir. 2014): Defendant called Plaintiff's cell phone number in an attempt to collect a debt of a former customer. The former customer's cell phone number had been reassigned to Plaintiff. The Court found the "called party" under the TCPA to be the subscriber to the cell phone service or user of the cell phone called, not the intended recipient. The Court did comment the fact the call to the Plaintiff may not have been willful and intentional because it was intended for another party could be considered in assessing damages.

This case is much like *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).

Recent Case Law—Charged for the Call

- *Lynn v. Monarch Recovery Management*, 2014 U.S. App. LEXIS 18858 (4th Cir. 2014): Defendant debt collector placed calls using automatic dialing equipment to Plaintiff's residential line which had been converted to a Voice over Internet Protocol ("VoIP") service. Plaintiff was charged for incoming calls and sued Defendant because Plaintiff had not provided prior express consent to be called. The Court agreed with the Plaintiff holding that the TCPA's plain language with respect to the call-charged provision encompasses Defendant's calls to the Plaintiff.

Recent Case Law—Automatic Dialing Equipment

- *Santos v. Millward Brown, Inc.*, 2014 U.S. Dist. LEXIS 88711 (S.D. Fla. 2014): There was a question as to whether Defendant used automatic dialing equipment to contact Plaintiff. The court found, "To state a claim under the TCPA, Plaintiff need only to allege that Defendant used an autodialer." The court also stated, "circumstantial allegations of autodialing are sufficient to withstand a motion to dismiss."
- *Marks v. Crunch San Diego, LLC*, 2014 U.S. Dist. LEXIS 152923 (S.D. Cal. 2014): The TCPA defines automatic telephone dialing system ("ATDS") to include equipment with the capacity to store or produce telephone numbers to be called using a random or sequential number generator. The court found the FCC does not have the statutory authority to change the TCPA's definition of an ATDS, referring to the FCC's 2003 interpretation that all predictive dialers are ATDS. The court found the platform Defendant used to send text messages did not have the present capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial those numbers and, thus, was not an ATDS.

Recent TCPA Settlements

- Bank of the West - \$3.3 Million for prerecorded message debt collection calls to cell phones without prior express consent.
- Best Buy - \$4.5 Million for prerecorded message calls regarding its reward program.
- Buffalo Bills - \$3 Million for text messages sent above the number agreed to by the consumers.
- Los Angeles Clippers – Class members can receive either two tickets to a home game or one ticket plus a \$20 credit for merchandise.
- Career Planning Co. - \$2.6 Million for unsolicited fax advertisements that did not include an opt-out mechanism.
- Capital One and three account receivable management companies - \$75.5 Million for debt collection calls to cell phones without prior express consent.
- Chase Bank - \$34 Million for prerecorded calls and text messages sent to cell phones without prior express consent.
- Bank of America - \$32 Million for prerecorded message calls sent to cell phones without prior express consent.
- USCB, Inc. - \$2.75 Million for prerecorded message debt collection calls sent to cell phones without prior express consent.
- AT&T Mobility - \$45 Million for prerecorded message calls to cell phones without prior express consent.
- Interline Brands, Inc. - \$40 Million for unsolicited fax advertisements.
- Kaiser Permanente - \$5.35 Million for prerecorded message calls to former customers.
- Burger King - \$8.5 Million for unsolicited fax advertisements.

Possible Technology Solutions?

- Neustar has a service which allows a check of a cell phone to verify the subscriber. One limitation of this service is that the subscriber may not always be the cell phone user. For example, the cell phone account is listed under the head of household, but the cell phone user is a spouse or child.
- VoIP Identification – to our knowledge, there is currently no technical way to determine if a line has been converted to a VoIP service.

What Do I Do From Here?

- Make sure you work with your counsel to create a method to obtain prior express consent in a compliant form that can be retained.
- Create a process to communicate and honor revocations of consent.
- Ensure processes for sending text or prerecorded messages, or calls made using dialing equipment are compliant.
- If using a vendor, vet their processes carefully and address liability in the contract.
- Have your counsel monitor TCPA issues
 - FCC developments
 - Case law
 - Settlements