



RECENT DEVELOPMENTS REGARDING TCPA

ACC Winter Meeting

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PRACTICES

What is the Telephone Consumer Protection Act (TCPA)?

- The TCPA (*Telephone Consumer Protection Act*) is a federal statute (47 U.S.C. § 227) which was enacted in 1991 to safeguard consumer privacy. In a nutshell it is a federal statute that regulates telemarketing calls, text messages, fax communications and the use of automated dialing systems. It is primarily aimed at protecting consumers from unwanted and unsolicited marketing calls and messages, while also promoting privacy and security in communication.
 - It shall be unlawful to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B).
- While the Federal Communications Commission (FCC), Federal Trade Commission (FTC), and state attorneys general also have enforcement powers, the Telephone Consumer Protection Act (TCPA) is primarily enforced through its private right of action, allowing individuals to bring suit under the law.
 - The original intent was for this right to be enforced in small claims court. In the early years of TCPA litigation, many federal circuit courts told plaintiffs there was no jurisdiction to hear the cases in federal court. However, in the 21st century, that attitude toward enforcing TCPA litigation through small claims courts has been weakened and, as a result, more individual lawsuits are being filed for large dollar amounts in federal courts, especially in the form of class actions.

What is the Telephone Consumer Protection Act (TCPA)?

- Making telemarketing calls or sending text messages to consumers without their prior express consent violates the TCPA. Consent must be clear and voluntary and can be given in writing or orally. However, it is important to note that consent may be revoked at any time.
- Initiating prerecorded voice calls to consumers without their prior consent is a violation. The TCPA is a strict liability statute with uncapped statutory damages and per-violation penalties typically being \$500-per-violation but can be trebled to \$1,500-per-violation for any knowing or willful violations.

Practical Consequences

The Effect of TCPA on Businesses

TCPA compliance is a challenge for many businesses. This is especially true for those businesses that rely on telemarketing or SMS-based marketing campaigns. Key impacts may include:

- **Increased Lawsuits:** As will be seen later, TCPA lawsuits have continued to increase year over year. Indeed, many businesses are involved in multi-million-dollar settlements for TCPA violations each month.
- **Reputational Risk:** Violating privacy rights of consumers can damage a company's reputation. Failing to adhere to TCPA guidelines can expose businesses to legal risks and also result in loss of customer trust and loyalty.
- **Operational Costs:** Maintaining TCPA compliance, while necessary, can increase operational costs. Businesses should invest in proper tools to maintain TCPA compliance. Software for items like scrub call lists against the DNC registry, to manage consent and opt-out mechanisms can be expensive. However, investing in these tools is almost always less costly than the payment of potential fines and damages which may result from non-compliance with the TCPA.

Facebook v. Duguid

On April 1, 2021, the Supreme Court issued a decision in *Facebook v. Duguid*, which resolved a long-standing circuit split on the definition of an ATDS.

- The Court concluded that merely having the capacity to store numbers and dial them automatically is not enough to make a device qualify as an ATDS.
- Instead, a device must have the capacity to either (1) store a telephone number using a random or sequential number generator or (2) produce a telephone number using a random or sequential number generator.

After Duguid many thought the number of TCPA lawsuits would diminish. They were right – initially.

- 2023 saw an 11.3 % increase in TCPA filings from 2022.
- 2024 saw a 4.4% increase in filings from 2023.
- Most of these filings involve challenging the definition of an ATDS and/or alleging a violation of the TCPA by using a pre-recorded voice message without plaintiff's consent.

Second Circuit Decision in *Soliman v. Subway*

- Plaintiff's reliance on footnote 7 from *Facebook v. Duguid* was rejected.
- At issue in *Soliman* were marketing texts sent to the plaintiff using what plaintiff characterized as an "SMS blaster" – a dialing platform that used software code to generate and assign index numbers to telephone numbers already in a database. The platform then allegedly used a campaign algorithm to select particular indexed telephone numbers from the database and "blast" messages en masse to mobile phone users.
- Aligns with Third, Eighth, and Ninth Circuits on ATDS definition.
- Also confirmed that text messages are not pre-recorded voice calls under TCPA.

Other Notable 2024 TCPA Decisions

- No liability for recruiting messages – C.D. of California held - Communications for recruitment do not qualify as “solicitations” under the TCPA because they are not intended to sell goods or services.
- No personal liability – E.D. of Pennsylvania held – an owner of a company cannot be personally liable for TCPA violation. Relied on Third Circuit precedent which indicates corporate officers are not personally liable under the TCPA.

Chevron Doctrine Overturned

- On June 28, 2024, the Supreme Court issued its eagerly anticipated rulings in *Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce* and explicitly overruled the doctrine of “Chevron deference,” creating the opportunity for a new wave of challenges to federal administrative activity.
- It didn’t take long for the Loper Bright decision to impact the TCPA world. On January 24, 2025 the 11th Circuit in *Insurance Marketing Coalition Limited v. FCC*, vacated two TCPA consent requirements that the FCC added in a December 2023 Report and Order.
 - The first provision, intended to curb what the FCC viewed as lead generator abuses, added the requirement that a called party’s consent for such calls is limited to one identified seller at a time, referred to as the “one-to-one consent” restriction. The second provision required that the consent provided for a call or message “must be logically and topically associated with the interaction that prompted the consent.” These rules were slated to go into effect Monday, January 27.

FCC Issues New Revocation Rules

- Under the new rules, text message senders must honor revocation requests in a timely manner made through seven specific keywords (stop, quit, end, revoke, opt out, cancel, and unsubscribe).
- Text message senders must also treat, based on “totality of the circumstances” analysis, other “reasonable” natural language text-backs by consumers as consent revocations.
- The order also provided that callers and senders may not mandate an exclusive means of consent revocation that precludes the use of other methods.
- Rules will become effective on April 11, 2025.

Another Supreme Court Decision

- *MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., v MCKESSON CORPORATION and MCKESSON TECHNOLOGIES, INC.*
 - After the case had been pending for six years, and shortly after a class was certified, the FCC issued an order construing the TCPA to exclude an “online fax service” from the definition of “telephone facsimile machine.”
 - Based on this ruling the class was decertified and the Ninth Circuit upheld this decision indicating it was bound by the FCC order.
- The federal circuits are split as to whether FCC orders bind district courts. The Fourth Circuit in *Carlton & Harris Chiropractic Inc. v. PDR Network, LLC* held that FCC orders interpreting the TCPA fall outside the scope of the Hobbs Act and, accordingly, are not binding on district courts (as opposed to legislative rules, which are binding). The Second, Third, and Eighth Circuits have taken a similar position.
- The Seventh Circuit has held that its district courts are not bound by FCC rules, regardless of whether the rule is an interpretive or final rule.
- Finally, as seen above, the Ninth Circuit takes the view that district courts are bound by both interpretive and final rules issued by the FCC.

Best Practices

1. Review Compliance Policies

A company's legal and compliance teams should regularly review the latest TCPA rules and any changes which could affect its business. Utilizing legal experts or consultants who specialize in the TCPA is a good way to ensure up to date compliance.

2. Consent Management

It is recommended that a company use an advanced customer relationship management system which is able to track and store records of consumer consent. A company should document consent so it is readily available in the event of litigation or an inquiry from a regulator.

3. DNC Scrubbing

It is recommended a company automate its process of scrubbing its call lists against the National Do Not Call Registry. Doing so should reduce the risk of accidental non-compliance.

4. Opt-Out Mechanisms

It is recommended a company have user-friendly opt-out options in every communication. A company should process these requests in real time. Automated systems which instantly update your contact database can help a company avoid accidental violations.

Best Practices

5. Training

It is imperative that all employees who are involved in customer communications, marketing, and compliance partake in TCPA training on a continual basis. Such training will ensure employees understand the importance of compliance and know how to handle consumer inquiries related to consent and opting out.

For businesses engaged in telemarketing, SMS marketing, and other forms of direct communication with a consumer, TCPA compliance is critical. Due to growing consumer expectations around privacy and technological advances, companies need to ensure they are obtaining clear consent, adhering to DNC rules, and providing seamless opt-out mechanisms. Regular training can ensure employees stay updated on TCPA regulations which mitigates legal risks.

As seen, the cost of non-compliance with the TCPA can be severe. Accordingly, investing in the right tools and training to stay compliant with the TCPA is essential.

Trump 2.0

- TCPA enjoys Bipartisan support so it may not be as affected by the new administration as other federal statutes.
- While the CFPB, among other federal agencies, is under fire and things will certainly be different under McKernan versus Chopra we should not expect similar changes to the enforcement of the TCPA.
- McLaughlin case.
 - Depending on which way the Court rules, this could lead to greater litigation under the TCPA as the FCC would no longer be able to rely on its regulatory “crutch” to interpret what exactly the TCPA means.
 - “Mini-TCPAs” – Like Florida statutes – TCPA does not preempt state laws.

QUESTIONS?

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