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Telemarketing, texts, and the TCPA: An update on corporate liability

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When the Telephone Consumer Protection Act (TCPA) was originally enacted, it was intended as a consumer protection statute. Unfortunately, as the years have passed, the law has become a litigation nightmare and legal minefield for companies that use telephones or text messaging for marketing purposes. The U.S. Supreme Court recently decided a case that will reduce the risk of litigation for companies that communicate with customers with an automatic telephone dialing system. This article will review the Supreme Court case and discuss its implications.

The TCPA's history

In 1991, US Congress passed the TCPA due in part to abusive practices by telemarketers that were considered an invasion of privacy. The TCPA requires companies to obtain prior, express consent from call recipients before making (1) telemarketing calls to residential phones using an artificial or prerecorded voice or (2) any nonemergency calls using an automatic telephone dialing systems (autodialer) or an artificial or prerecorded voice (robocall) to a wireless phone number.^[1] If a call to a wireless phone “introduces an advertisement” or “constitutes telemarketing,” then such prior consent must be in writing.^[2]

The US Federal Communications Commission (FCC) was charged with promulgating regulations to enforce the TCPA.^[3] Although text messages are not addressed by the statute, the FCC has interpreted the TCPA to cover them.^[4] Text messages sent to cell phones using an autodialer are prohibited under the TCPA unless made with the “prior express consent of the called party.”^[5] Certain exceptions apply that are immaterial here.^[6]

Although the drafters of the TCPA were well-meaning, the law spawned a massive wave of lawsuits against businesses in every industry, including health insurance plans and pharmaceutical companies. The reason for the flood of litigation is simple—the TCPA contains many ambiguous provisions that invite lawsuits. Additionally, violating the TCPA is expensive, with a minimum penalty of \$500 *per text message*, and treble damages of \$1,500 *per violation* for those who “willfully or knowingly” violate the TCPA.^[7] For example, in recent years, Sirius XM Radio settled a TCPA lawsuit for \$32.4 million,^[8] and Wells Fargo agreed to a \$18 million settlement.^[9]

One significant area of TCPA litigation involves the use of autodialers by companies to dial random or sequential blocks of telephone numbers automatically. The impact of autodialers on business and the public can be significant; due to the sequential way they dial phone numbers, autodialers can tie up all the lines of a company with sequentially numbered phone lines. Autodialers are also a particular threat to public safety since they can occupy all the lines of public emergency services, such as hospitals or law enforcement. The TCPA defines an autodialer 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.”^[10]

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