Call Me, Maybe: The TCPA's Impact on Technology Used for Consumer Communications

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The widespread adoption of mobile technology has enabled businesses to better connect with potential and existing customers and increase customer engagement. But, as Spiderman's Uncle Ben warned us, with greater power comes greater responsibility. In the consumer marketing and engagement arena, that responsibility largely arises from the Telephone Consumer Protection Act of 1991 (TCPA) 47 U.S.C. ¿ 227 *et seq.,* and regulations promulgated by the Federal Communications Commission (FCC), 47 C.F.R. ¿ 64.1200 *et seq.* There have been recent developments in TCPA law that you and your clients with consumer-facing businesses will want to know about.

The TCPA is a federal consumer privacy statute that regulates, among other things, the technology used to place outbound calls and text messages. Importantly, it has created an attractive private right of action for alleged violations. Under the TCPA, a plaintiff is entitled to $500 per violation (if negligent) or $1,500 (if willful or knowing). Given the steep, uncapped statutory penalties, the TCPA has created a cottage industry for plaintiffs' lawyers, and TCPA class actions continue to be filed at an alarming rate.

The TCPA broadly prohibits certain prerecorded voice messages to landlines, as well as prerecorded voice messages, autodialed calls, and text messages to mobile phones without consent. In its omnibus July 10, 2015, TCPA declaratory ruling and order, the FCC purported to "clarify" certain aspects of the TCPA, but this resulted in confusing, conflicting rules. *See* TCPA Declaratory Ruling and Order, 30 FCC Rcd. 7961 (July 10, 2015). There are three keys areas of the July 2015 ruling that affect the technology companies use: (1) the definition of "autodialer"; (2) revocation of consent; and (3) liability for reassigned numbers. These issues are currently on appeal before the D.C. Circuit based on the position that the FCC overstepped its boundaries in its interpretation of the TCPA, but for now, the July 2015 ruling remains the law of the land.

First, the TCPA defines an "automatic telephone dialing system" (also known as an "autodialer") as equipment that has the "capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers." 47 U.S.C. ¿ 227(a) (1). The definition of an autodialer is important because a call being placed with an autodialer is one element of a TCPA claim. In its July 2015 ruling, the FCC denied industry petitions seeking clarification that "capacity" means the present ability to autodial and limiting the autodialer definition to exclude situations where human intervention is involved in dialing.

Instead, the FCC ruled that "capacity" includes both the present and *potential* capacity of autodialing. The FCC's expansive interpretation of capacity encompasses current features "that can be activated or de-activated" and features "that can be added to the equipment's overall functionality through software changes or updates." Basically, a software-based dialer with no coding or current features that enable it to operate as an autodialer may still be an autodialer simply because the software could be recoded to operate as an autodialer, even if there's no intent to do so. The FCC gave a lone example of equipment that would not a treated as an autodialer: a rotary phone. Given that rotary phones have not been in use much for several decades, this does not provide much of a safe harbor.

As for whether human intervention disqualifies dialing equipment from being treated as an autodialer, the FCC agreed that it may but stated that the level of human intervention needed must be determined on a case-by-case basis. In other words, the courts will need to decide the issue. Since the July 2015 ruling, courts have generally held that where human intervention is needed to place a call, such as through the click of a button, the system does not qualify as an autodialer under the TCPA. *See, e.g., Strauss v. CBE*

Grp., Inc., 2016 U.S. Dist. LEXIS 45085 (S.D. Fla. Mar. 28, 2016); *Wattie-Bey v. Modern Recovery Sols.,* 2016 U.S. Dist. LEXIS 31765 (M.D. Pa. Mar. 10, 2016); *Pozo v. Stellar Recovery Collection Agency, Inc.,* No. 8:15-cv-929-T-AEP (M.D. Fla. Sept. 2, 2016); *Luna v. Shac, LLC,* 122 F. Supp. 3d 936 (N.D. Cal. 2015); *McKenna v. WhisperText,* 2015 U.S. Dist. LEXIS 12100 (N.D. Cal. Jan. 30, 2015). The practical approach taken by courts could signal greater judicial skepticism of these claims. But these determinations occur through litigation, so a company has to endure litigation costs to obtain a helpful ruling.

How to be Proactive

What can be done to proactively address this issue? It's impractical for companies to switch out their dialing systems to avocado green rotary phones. Companies, however, can take a look at the technology that they (and their vendors) employ to determine whether the technology triggers the TCPA and what can be done to avoid the system being treated as an autodialer.

Second, another technological quandary caused by the July 2015 ruling is the FCC's decision that a consumer may revoke previously given consent "at any time" by any "reasonable means." For revocation to be effective, the consumer must "clearly express" a desire not to receive future calls. The FCC provided three examples: through a response to a business- initiated call, or at an in-store bill payment location.

Seems simple right? Not so much. A key element of the FCC's ruling on revocation is that it seems to prohibit a company from limiting a consumer's ability to revoke consent by designating an exclusive means of revocation. This could have far-reaching ramification. Text message marketing typically contains a specific instruction on how to opt out, such as "reply STOP to stop." The systems are almost always automated and are programmed to recognize the "stop" command (and similar phrases) to remove that recipient from the distribution list. A consumer could text "leave me alone" or "cease contacting me, please" or something else the program would not recognize, claim he or she revoked consent prompt the system in order to receive a significant number of text messages, and then bring a TCPA suit. In fact, recent TCPA claimants are making these exact claims, including claims by plaintiffs who signed up for a text message program only to respond to the automated system the same day that they have changed their minds. While courts have not yet considered what is "reasonable" revocation for text messaging, it is hoped that courts will provide companies some leeway in the mechanisms used to manage revocation requests, including those provided in a company's terms and conditions.

As technology continues to advance, savvy software developers might fine-tune their programs to recognize a slew of nontraditional opt-out commands or flag such commands for human review. Another option may be to simply remove any consumer who responds to the automated system with anything other than STOP or HELP. After all, what reason would a consumer have to respond to the automated system other than to make a stop or help request?

Finally, the July 2015 ruling also imposes liability on companies for calling a mobile number that has been reassigned, even if the former subscriber consented to be called. The ruling provides a one-call "safe harbor"—after the one call to a reassigned phone number, the company is liable under the TCPA if consent was not obtained from the new subscriber, even if the one call does not provide notice that the number has been reassigned (e.g., the call goes directly to voicemail and the voicemail does not contain a consumer name). The FCC determined that the single call, in and of itself, is sufficient to constitute "constructive notice." In other words, attempts count. The FCC's solution for businesses: Employ "new or better safeguards" or, better yet, sue the prior subscriber for not notifying you that the phone number had changed. These impractical and ambiguous guidelines are unhelpful, but there are helpful market solutions. For example, companies can leverage available databases that attempt to identify the current subscriber as well as technology that recognizes triple tones and disconnects, which may be indicative of reassignment. Combine this with company policies that work to update contact information when connecting with customers, and you can minimize the risks of liability for reassigned telephone numbers.

For companies of all sizes and across all industries, customer communication is an essential part of business. While these communications are typically expected and desired, that does not shield even the most well-intentioned companies from the explosion of TCPA litigation seen over the past several years. Good compliance is a critical first step in warding off litigation, and some of that starts with technology. Here are some practical steps companies can take to leverage technology in their favor in this ever-changing world of the TCPA:

- **Obtain electronic consent.** Consent is golden under the TCPA and can make or break a case. "Prior express written consent" is required for autodialed or prerecorded *marketing* calls to cell phones and prerecorded *marketing* calls to landlines (the TCPA's consent requirements do not apply to autodialed calls to landlines). But "written" does not mean pen and paper. Rather, written consent can be obtained through interactive voice response (IVR), email, an online webform, voice recording with the proper scripting, or even a text message.

- **Put on your tech hat.** Unless the D.C. Circuit completely reverses the FCC's autodialer ruling, human intervention will continue to be important. Companies should bolster human intervention elements in the dialing process. Technological consultants are also available to evaluate a company's current dialing configuration under the TCPA's regulations.

- **Offer an IVR opt-out**. Consider providing an opt-out option on IVR calls and ensure than all requests are immediately honored.

- **Scrub it**. The TCPA's consent requirements do not apply to autodialed calls to landlines. But landline numbers are sometimes ported to wireless, and consumers frequently provide cell phone numbers as "home" numbers. There are various vendors that can inexpensively scrub calling lists and determine whether the numbers provided are landline or mobile. (These vendors can also scrub calling lists of numbers of federal and state Do Not Call registries.) If your company is making business-to-business automated calls (prerecorded voice messages or autodialed calls), consider scrubbing out your mobile numbers unless you have valid consent under the TCPA. Unfortunately, there is no express exemption for automated business-to-business calls to mobile phones.

- **Beware of reassigned numbers**. Employ market solutions that attempt to verify a telephone number's current subscriber while bolstering your compliance plan through policies and procedures designed to keep your customer contact information from becoming stale.

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