

TCPA Violations: Risk Avoidance Strategies for Healthcare Entities and Providers

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In response to the upward trend in litigation, healthcare organizations and providers may wish to consider certain proactive measures to avoid liability and potentially catastrophic penalties.

Hospitals and healthcare organizations confront significant challenges on a daily basis as they seek to comply with the industry's ever evolving body of state and federal regulations. The latest compliance demand to present regulatory-based risk exposures came in July 2015 when the Federal Communications Commission (FCC) issued a Declaratory Ruling and Order ("2015 Ruling") to clarify select requirements under the Telephone Consumer Protection Act ("TCPA").

The TCPA essentially prohibits telephone calls and text messages to residential and wireless numbers using an automatic dialing system or a pre-recorded message when the recipient has not granted prior express consent.¹ The 2015 Ruling creates a clear exception for certain healthcare communications, but imposes seven conditions on entities and providers in order to qualify for the exemption.²

This Chubb Advisory provides a brief overview of the TCPA, examines the implications of the 2015 Ruling for the healthcare industry, and underscores the meteoric rise in claims related to TCPA violations. It concludes by suggesting risk mitigation measures designed to improve compliance with the 2015 Ruling's parameters and restraints.

TCPA Background

The TCPA was enacted in 1992 to combat unsolicited telemarketing calls and faxes. The regulations prohibit the use of automatic dialing systems, prerecorded voice messages, and fax machines to make calls without the recipient's prior consent. The requirements apply to both telemarketing and non-telemarketing calls. Subsequent to the TCPA's enactment, the following chief rulings and regulatory updates have transpired:

- In 2003, the FCC and Federal Trade Commission created the do-not-call registry to prohibit telemarketing calls to registered phone numbers unless an established business relationship exists with the recipient or prior express consent is given.
- In 2012, the FCC clarified that "prior express consent" must be in writing for telemarketing calls, and also created certain limited exemptions for healthcare messages that are subject to HIPAA, such as health screening and immunization reminders, medical supply renewal requests, and generic drug migration recommendations.
- In 2013, the TCPA was amended to expressly include calls placed to both residential and wireless phone numbers. In addition, the former "established business relationship" exemption was eliminated.

2015 Ruling and Implications

The 2015 Ruling was issued in response to numerous FCC petitions from healthcare and business entities that sought to clarify certain requirements and ambiguities under the TCPA. The ruling has wide-reaching implications for any entity that utilizes wireless phone numbers for contacting consumers. The most relevant provisions to healthcare organizations and providers are described below.

Text messages are considered calls under the TCPA. The FCC affirmed earlier provisions that text messages and Internet-to-phone messages are subject to the regulations.³

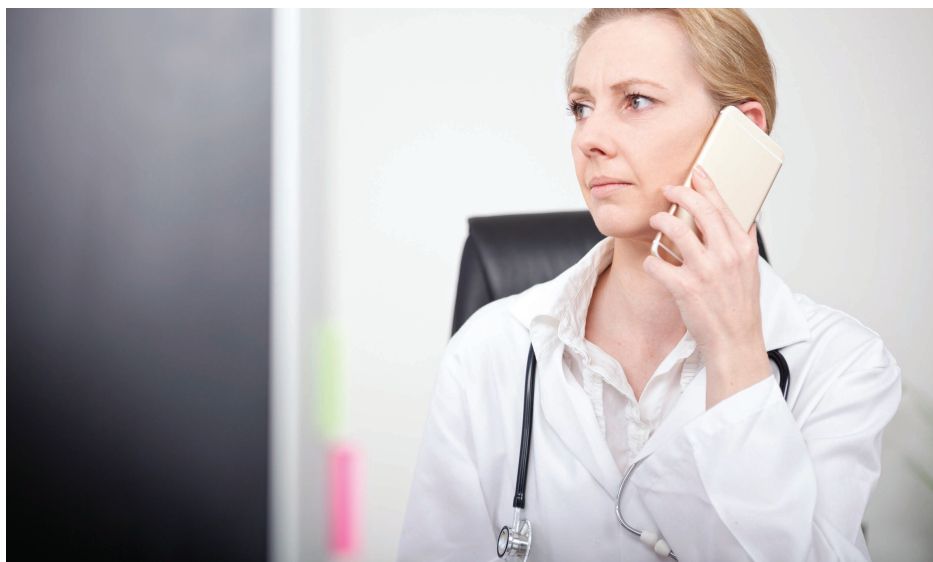
Automatic dialing systems are broadly interpreted. Per the 2015 Ruling, an "autodialer" includes equipment with the present ability or potential capacity to store or produce telephone numbers

using a random or sequential number generator. Essentially any equipment that permits dialing at greater speed and volume is deemed to be an autodialer. Of note, the involvement of a human operator does not necessarily exempt the equipment from the automatic category.

Liability attaches to reassigned wireless numbers after the first call. The TCPA requires the consent of the current wireless subscriber rather than the intended recipient of the call. Therefore, in the event a wireless number has been reassigned to a new subscriber and a healthcare entity or provider unknowingly calls the number, a safe-harbor exists for the first call only. Thereafter, the caller should be aware that the number has been reassigned.

Consent requirements are clarified. The provision of a phone number by a patient to a healthcare provider constitutes prior express consent under the TCPA.⁴ However, the FCC narrowly applies the consent provision to healthcare messages only, and emphasizes that topics germane to HIPAA's definition of healthcare are within the intended scope of permitted telecommunications.⁵ In addition, the ruling establishes that third parties can provide consent for a patient who is mentally incapacitated. Lastly, patients have the right to revoke consent in any reasonable manner, and entities and providers cannot limit the timing or method of revocation.

Certain healthcare calls to wireless numbers are exempt. Calls that are exigent and/or made for a healthcare treatment purpose are exempt from the TCPA's prior express consent requirement. This exemption is limited to calls made by covered entities and their business associates (as defined by HIPAA) which relate to:



- appointment and exam confirmations and reminders
 - wellness check-ups
 - hospital pre-registration instructions
 - pre-operative instructions
 - lab results
 - post-discharge follow-up
 - drug prescription notifications
 - home healthcare instructions
- Exempt calls must satisfy seven conditions.** While the limited exemption allows calls to be placed outside of the permitted scope of consent, entities and providers must adhere to the following restraints to qualify for the exemption.⁶
- The voice call or text message must be sent to the wireless phone number that the patient provides. With respect to text messages, the patient cannot be charged, nor can the text be counted against the limits of a wireless telephone plan.
 - The name and contact information of the healthcare provider or organization must be stated at the outset of a voice call or prominently noted within a text message.
 - The voice call or text message must comply with HIPAA privacy rules and cannot include telemarketing, solicitation, or advertising content, nor can it pertain to accounting, debt collection, or other financial information.
 - The message must be concise, e.g., one minute or less for voice calls and 160 characters or less for text messages.
 - Healthcare providers are limited to one voice call or text message a day, up to a maximum of three combined calls/messages per week per provider.
 - Recipients must be offered an easy "opt-out" option within each message, e.g., a press-activated mechanism or a toll-free number for voice calls, and replying "STOP" for text messages.
 - All opt-out requests must be honored immediately.

Potential Consequences and Strategies

The TCPA provides for strict liability and statutory damages of up to \$500 per call or message, and up to \$1,500 per knowing or willful violation.⁷ Because there is no maximum cap on damages, aggregate exposure in class action lawsuits can be potentially significant. In fact, class basis settlements have reached multi-million dollar proportions, including the following recent actions:

Kolinek v. Walgreens Co. (N.D. Ill. 2015), involving automated prescription refill reminders to cell phones, which settled for \$11 million.⁸

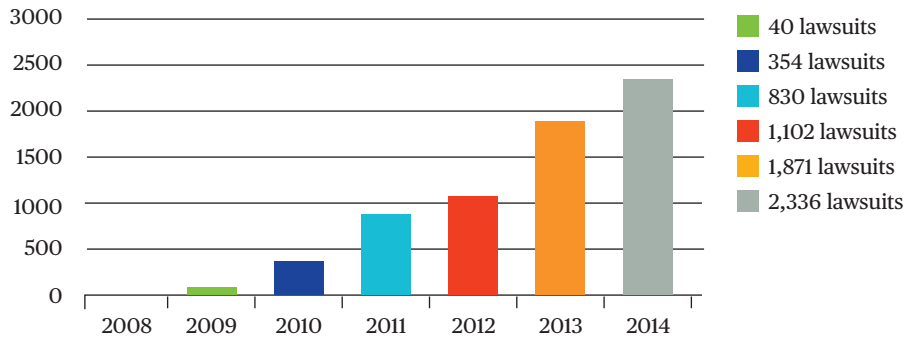
Lees v. Anthem Insurance Cos., Inc. (E.D. Mo. 2015), involving autodialed calls to cell phones placed by a healthcare vendor, which settled for upwards of \$6.25 million.⁹

Ferencz v. International Clinic Consultants, LLC (Wash. Sup. Ct. 2014), involving unsolicited text message advertisements that promoted services for a men’s health clinic, which settled for \$3.5 million.¹⁰

Moreover, the number of lawsuits filed under the TCPA is rising at an alarming rate, as depicted in Figure 1, accounting for a 70% increase from 2012 to 2013.

In response to the upward trend in litigation, healthcare organizations and providers may wish to consider certain proactive measures to avoid liability and potentially catastrophic penalties. Enhancing an organization’s strategic position starts with a risk analysis of existing telecommunication practices and system functions that are subject to the TCPA. The analysis aims to define all telecommunication methods utilized by the healthcare entity, its providers, and third party vendors to communicate with patients, including but not limited to:

Figure 1 - TCPA Lawsuit Filing Trends



Source: Lunsford, P. “FDCPA Lawsuits Decline for Third Straight Year, But TCPA Suits Up 25%,” posted on January 23, 2015, insideARM.com. (<http://www.insidearm.com/daily/fdcpa-lawsuits-decline-for-third-straight-year-but-tcpa-suits-up-25/>)

- automated calling equipment
- predictive dialers
- artificial or prerecorded voices
- text messaging
- fax advertising
- telemarketing practices

In addition, the scope of the analysis should encompass an assessment of current safeguards, such as the seven conditions delineated above, in order to sufficiently gauge the existing state of compliance with regulatory requirements. When necessary, couple the analysis with an audit of vendors and third party administrators, whose actions are subject to the TCPA, in order to ensure that their practices and safeguards remain compliant as well.

Organizational leaders are urged to thoroughly review and confirm that all consent and HIPAA-related documents contain the requisite provisions to secure a patient’s prior express consent to all non-exempt autodialed calls. Records of patient consent should be meticulously preserved, as well as all instances of

consent revocation, do-not-call requests, or reassigned numbers. When a patient’s consent status changes, swift action is required to immediately terminate any call that is both unconsented and subject to the TCPA.

A formal and written protocol that delineates the phone number collection process is another effective safeguard for reinforcing staff expectations. The protocol must ensure that wireless and residential numbers are easily distinguished in both patient care and business records. With respect to placed calls, a written or electronic log should track which phone numbers are manually dialed and which are autodialed.

Optimally, hospital leadership must work closely with legal counsel to ensure that all telemarketing messages, fax advertisements, and other marketing activities comply with the privacy safeguards articulated in HIPAA, the FCC regulations, and the TCPA. Annual staff training, jointly presented by legal counsel and risk management, is an additional measure to help maintain compliance levels regarding relevant updates and/or clarifications to the TCPA and associated FCC regulations.

The value and importance of TCPA compliance cannot be overstated. The 2015 Ruling provides much-needed clarification for healthcare entities and providers regarding telecommunication practices. The information and references imparted in this advisory can serve as a starting point for organizations seeking to not only comply with the TCPA and related telecommunication regulations, but also to maintain the highest standards and continued compliance with HIPAA and other privacy laws. In addition to implementing risk strategies that actively target potential TCPA violations, healthcare entities should consider consulting a knowledgeable insurance professional regarding insurance coverage that may be available to help mitigate significant losses.

The following resources offer additional information:

Andersen, R. "TCPA Consent - 5 Questions Healthcare Providers Are Asking," posted November 5, 2015. Available at <http://hub.ontariosystems.com/tcpa-consent-5-questions-healthcare-providers-are-asking>.

Forsheit, T. "'Don't Call Us, We'll Call You.'" The FCC's Latest TCPA Ruling Imposes Even More Restrictions on Telemarketing Calls and Texts," posted July 16, 2015. Available at <http://www.jdsupra.com/legalnews/don-t-call-us-we-ll-call-you-the-fcc-s-99737/>.

Wagner, P. "Recent FCC Ruling on the TCPA Has Important Implications for Health Care Companies," *National Law Review*, posted July 22, 2015. Available at <http://www.natlawreview.com/article/recent-fcc-ruling-tcpa-has-important-implications-health-care-companies>.

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Endnotes

1. Telephone Consumer Protection Act, 47 U.S.C. Sec. 227, at <http://transition.fcc.gov/cgb/policy/TCPA-Rules.pdf>.
2. TCPA Omnibus Declaratory Ruling and Order, July 10, 2015, at <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>.

3. However, a one-time text sent in response to a request for information does not violate the TCPA or the FCC's rules, provided it: (1) is requested by the recipient; (2) is a one-time only message sent immediately in response to a specific request; and (3) contains only the information requested by the recipient with no other marketing or advertising information. Declaratory Ruling and Order, Sec.19.
4. The 2015 Ruling does not define "provider," but references the American Association of Healthcare Administrative Management's definition of traditional providers, including hospitals, emergency and ambulatory care centers, medical physicians, and other healthcare professionals. Of note, the ruling does not expressly include health plans, pharmacies, or third-party administrators.
5. The HIPAA Privacy Rule defines "health care" at 45 C.F.R. Sec. 160.103, at <https://www.gpo.gov/fdsys/pkg/CFR-2007-title45-vol1/pdf/CFR-2007-title45-vol1-sec160-103.pdf>.
6. TCPA Omnibus Declaratory Ruling and Order.
7. See 47 U.S.C. Sec. 227 (b) (3).
8. *Kolinek v. Walgreen Co.*, case number 1:13-cv-04806, in the U.S. District Court for the Northern District of Illinois.
9. *Lees v. Anthem Insurance Cos.*, case number 4:13-cv-1411 SNLJ, in the U.S. District Court for the Eastern District of Missouri.
10. Reported at <http://www.classactionsnews.com/settlements/international-clinic-consultants-tcpa-class-action-settlement>.

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