


Telephone Consumer Protection Act
Litigation Trends and Steps to Keep You Out of the Courtroom

 Warner Norcross + Judd LLP

Brian D. Wassom
Partner | bwassom@wnj.com
Southfield | T +1 248.794.6200 | F +1 248.603.9076
Macomb | T +1 248.794.6200 | F +1 248.603.9076


Katherine L. Pullen
Partner | kpullen@wnj.com
Southfield | T +1 248.794.5076 | F +1 248.603.9076


Adam T. Ratliff
Associate | aratliff@wnj.com
Southfield | T +1 248.794.5154 | F +1 248.603.9154

 Warner Norcross + Judd LLP

What is the TCPA?

- ▶ Federal statute: 47 U.S.C. § 227, 47 C.F.R. § 64.1200
- ▶ Passed in 1991 to implement “restrictions on use of telephone equipment”
- ▶ Regulates phone calls, faxes, and text messages



 Warner Norcross + Judd LLP



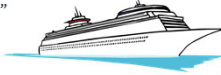
Why should I care about the TCPA?


- ▶ Private cause of action
- ▶ Broad application and strict liability
- ▶ Potential for individual liability
- ▶ Class Action 
- ▶ Statutory damages = 

 Warner Norcross + Judd LLP

Why should I care about the TCPA? huge settlements


- ▶ Uber 2017 = \$20 million (*pending*)
- ▶ Bank of America 2014 = \$32 million
- ▶ Capital One 2015 = \$75 million
- ▶ Caribbean Cruise Lines 2017 = \$76 million

"You've won a free cruise!" 

 Warner Norcross + Judd LLP

What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

 Warner Norcross + Judd LLP



What communications should I worry about?

1. Calls made to consumers using **ATDS** or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

what's this?

What is an ATDS? *statute*

- ▶ The term "automatic telephone dialing system" means 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.
- ▶ Unlawful to use ATDS to call *cell phones*



What is an ATDS? *FCC*

- ▶ *Broadly interpreted*
- ▶ Present v. Potential Capacity
 - ▶ In 2015, the FCC ruled that the TCPA's definition of an ADTS includes systems that have the **potential** capacity to automatically dial.
 - ▶ Appeal pending...
 - ▶ *ACA International v. FCC* (D.C. Cir.)



What is an ATDS? *the courts*

- ▶ Present v. Potential Capacity
 - ▶ **Present Capacity:** At least one court has rejected the FCC Ruling. *Dominguez v. Yahoo!, Inc.*, (E.D. Pa. 2017)
 - ▶ Most courts are staying cases that present this issue
- ▶ Level of human intervention is key
 - ▶ **Yes ATDS:** System that automatically calls but then immediately transfers to a live human. *Manuel v. NRA Group, LLC*, (M.D.Pa. 2016)
 - ▶ **Not ATDS:** Manually initiated calls then transferred to an automated transfer system. *Strauss v. CBE Group, Inc.*, (S.D. Fla. 2016)

Warner Norcross + Judd LLP

What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

Warner Norcross + Judd LLP

What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

what's this?

Warner Norcross + Judd LLP



Consent *a maze of regulations*

| | Residential Landline | | Cell Phones | |
|-------------------------|-------------------------------|---------------|-------------------------------|-----------------------|
| | Marketing | Non-Marketing | Marketing | Non-Marketing |
| ATDS Calls or Texts | Check Do Not Call lists | ✓ | Prior express written consent | Prior express consent |
| Non-ATDS Calls or Texts | Check Do Not Call lists | ✓ | Check Do Not Call lists | ✓ |
| Prerecorded Voice | Prior express written consent | ✓ | Prior express written consent | Prior express consent |

Warner Norcross + Judd LLP

Consent
What is the purpose of the contact?

Warner Norcross + Judd LLP

Consent *a maze of regulations*

| | Residential Landline | | Cell Phones | |
|-------------------------|-------------------------------|---------------|-------------------------------|-----------------------|
| | Marketing | Non-Marketing | Marketing | Non-Marketing |
| ATDS Calls or Texts | Check Do Not Call lists | ✓ | Prior express written consent | Prior express consent |
| Non-ATDS Calls or Texts | Check Do Not Call lists | ✓ | Check Do Not Call lists | ✓ |
| Prerecorded Voice | Prior express written consent | ✓ | Prior express written consent | Prior express consent |

Warner Norcross + Judd LLP



Consent *telemarketing or advertisement?*

- ▶ Telemarketing or Advertisement
 - ▶ Sale need not occur during the call for the call to qualify
 - ▶ Dual-purpose calls (both a solicitation and non-solicitation purpose)
 - ▶ Motivated by desire to achieve future sale
- ▶ A lot of gray area and litigation here
 - ▶ *Smith v. Blue Shield of California Life & Health Ins. Co.*, 228 F. Supp. 3d 1056 (C.D. Cal. Jan. 13, 2017)
 - ▶ *Flores v. Access Ins. Co.*, No. 215CV02883CASAGR, 2017 WL 986516 (C.D. Cal. Mar. 13, 2017)



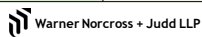
Consent

What level of consent is needed?



Consent *a maze of regulations*

| | Residential Landline | | Cell Phones | |
|-------------------------|-------------------------------|---------------|-------------------------------|-----------------------|
| | Marketing | Non-Marketing | Marketing | Non-Marketing |
| ATDS Calls or Texts | Check Do Not Call lists | ✓ | Prior express written consent | Prior express consent |
| Non-ATDS Calls or Texts | Check Do Not Call lists | ✓ | Check Do Not Call lists | ✓ |
| Prerecorded Voice | Prior express written consent | ✓ | Prior express written consent | Prior express consent |





Consent *prior express consent*

- ▶ Providing cell phone number = consent to receive calls and texts for purposes related to the underlying transaction

Consent *a maze of regulations*

| | Residential Landline | | Cell Phones | |
|-------------------------|-------------------------------|---------------|-------------------------------|-----------------------|
| | Marketing | Non-Marketing | Marketing | Non-Marketing |
| ATDS Calls or Texts | Check Do Not Call lists | ✓ | Prior express written consent | Prior express consent |
| Non-ATDS Calls or Texts | Check Do Not Call lists | ✓ | Check Do Not Call lists | ✓ |
| Prerecorded Voice | Prior express written consent | ✓ | Prior express written consent | Prior express consent |

Consent *prior express written consent*

- ▶ Written agreement
- ▶ Contains a signature (can be electronic)
- ▶ Clear authorization for use of an ATDS or artificial or prerecorded voice to deliver ads or telemarketing information
- ▶ Identifies telephone number
- ▶ Clear and conspicuous disclosures:
 - ▶ Agreeing to autodialed telemarketing calls
 - ▶ Consent is not required and isn't a condition of purchase





Consent *can be revoked*

- ▶ FCC in 2015: Consent can be revoked through “any reasonable method” that, based on the “totality of the facts and circumstances expresses a desire not to receive further messages”
 - ▶ Appeal pending – *ACA Int'l v. FCC*
- ▶ Lots of litigation and case law regarding what revocation must look like
- ▶ Can be *partially revoked*



Warner Norcross + Judd LLP

Consent *reassigned numbers*

- ▶ FCC: Liability for calls to reassigned numbers even if the sender did not know that a service provider reassigned the intended recipient's phone number
 - ▶ Appeal pending – who is the “called party”?
 - ▶ *ACA Int'l v. FCC*
- ▶ More than 37 million numbers are reassigned every year
- ▶ 1 call “safe harbor”

Warner Norcross + Judd LLP

What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

Warner Norcross + Judd LLP



What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

these too??



Texts

- ▶ TCPA originally meant for calls and faxes (passed in 1991)
- ▶ But now, also applies to text messages: A text message is a "call" subject to the provisions of the Telephone Consumer Protection Act (TCPA). *Campbell-Ewald Co. v. Gomez*, (U.S. 2016).
- ▶ Same consent requirements as a call
- ▶ Beware of computer or cloud-based programs that automatically send text messages following a transaction or other event. *Wick v. Twilio Inc.*, (W.D. Wash. July 12, 2017).



Faxes

- ▶ TCPA along with the Junk Fax Protection Act of 2005 address fax advertising
- ▶ Need prior express consent to send a marketing fax
- ▶ Opt-out option required for unsolicited faxes
- ▶ Exception for an established business relationship





What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

Warner Norcross + Judd LLP

What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

what are these?

Warner Norcross + Judd LLP

Consent a maze of regulations

| | Residential Landline | | Cell Phones | |
|-------------------------|-------------------------------|---------------|-------------------------------|-----------------------|
| | Marketing | Non-Marketing | Marketing | Non-Marketing |
| ATDS Calls or Texts | Check Do Not Call lists | ✓ | Prior express written consent | Prior express consent |
| Non-ATDS Calls or Texts | Check Do Not Call lists | ✓ | Check Do Not Call lists | ✓ |
| Prerecorded Voice | Prior express written consent | ✓ | Prior express written consent | Prior express consent |

Warner Norcross + Judd LLP



“Do Not Call” Lists

- ▶ Solicitors are required to comply with the national “do not call” registry
- ▶ Must check every 31 days
- ▶ To call someone on the “do not call” list, solicitor must have either prior express written consent, or an established business relationship
 - ▶ Voluntary communication related to a purchase or transaction executed within the prior 18 months; OR
 - ▶ Inquiry or application regarding products or services within the last three months;
 - ▶ AND relationship has not been terminated
- ▶ ALSO, must maintain an internal “do not call” list, which honors requests not to call for at least 5 years



TCPA Exceptions

When can I use an ATDS or prerecorded voice?




TCPA Exceptions

- ▶ Requisite consent (cell + residential)
- ▶ Emergency purposes (cell + residential)
- ▶ Non-telemarketing (residential)
- ▶ Commercial purpose but not telemarketing or advertisement (residential)
- ▶ Made by or on behalf of a tax-exempt entity (residential)
- ▶ Delivers a healthcare message, by or on behalf of a “covered entity” or its “business associate,” as defined by HIPAA (cell + residential)





Prevention Steps
How do I avoid TCPA liability?




Prevention Steps

- ▶ Get the requisite consent
- ▶ Monitor your third-party vendors
- ▶ Insurance



Prevention Steps: Consent

- ▶ Comply with federal regulations
- ▶ Maintain, enforce, and monitor clear procedures and policies regarding consent
 - ▶ How to get consent
 - ▶ What to do when a customer might be intending to revoke consent
 - ▶ Keep customer information up-to-date
- ▶ Provide easy automated opt-out mechanisms
- ▶ Maintain and enforce internal “do not call” list





Prevention Steps: Monitor your third-party vendors

- ▶ When using third-party vendors, address TCPA concerns up-front
- ▶ Relevant vendors to consider are customer-facing vendors as well as “lead-generating” vendors
 - ▶ Mixed authority on the extent of vicarious liability - the key question is whether there is an agency relationship
- ▶ Require TCPA compliance from vendors
- ▶ Include indemnity for TCPA violations
- ▶ Require vendors to carry liability insurance covering TCPA violations



Prevention Steps: Insure Yourself

- ▶ In addition to requiring vendors to carry TCPA insurance, make sure you do too!
- ▶ Insurance companies are often inserting a standard exclusion for TCPA violations, make sure to check for this



Bonus Prevention Step: Keep in Mind Other Laws

- ▶ Don't forget about other federal and state laws
 - ▶ Fair Debt Collection Practices Act
 - ▶ Consumer Protection Acts (MCPA)
 - ▶ Fair Credit Reporting Act
 - ▶ Truth in Lending Act
 - ▶ Other state laws



Questions?

 Warner Norcross + Judd LLP

Brian Wassom
bwassom@wnj.com | (248) 784-5039

Katie Pullen
kpullen@wnj.com | (248) 784-5078

Adam Ratliff
aratliff@wnj.com | (248) 784-5154
