

# Telephone Consumer Protection Act

Litigation Trends and Steps to Keep You  
Out of the Courtroom



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# 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



# Why should I care about the TCPA?

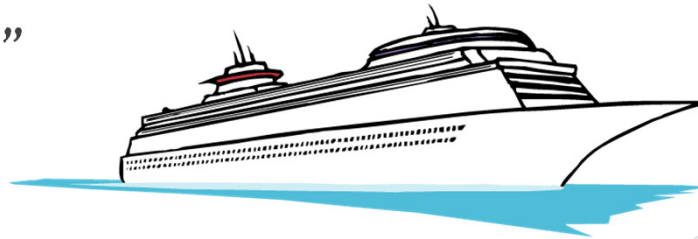
- ▶ Private cause of action
- ▶ Broad application and strict liability
- ▶ Potential for individual liability



# 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!”*



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# 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



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*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)



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# 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 <b>written</b> consent	Prior express consent
Non-ATDS Calls or Texts	Check Do Not Call lists	✓	Check Do Not Call lists	✓
Prerecorded Voice	Prior express <b>written</b> consent	✓	Prior express <b>written</b> consent	Prior express consent

# Consent

*What is the purpose of the contact?*



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# 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?*



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# Consent *prior express consent*

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

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# 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*



## 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”

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*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



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*what are these ?*



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# “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?*



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# 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?*



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# Prevention Steps

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



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# 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



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# Questions?



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