



## TELEMARKETING: FCC ORDER COMPOUNDS RISK FOR CUSTOMER CALLS

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U.S. businesses continue to face an onslaught of class action litigation arising out of phone calls to their customers. Over a three year period, companies have agreed to pay in excess of \$200,000,000 to settle lawsuits brought under the federal Telephone Consumer Protection Act (TCPA). These TCPA lawsuits have not typically involved companies involved in deceptive or fraudulent practices. Rather, the TCPA lawsuits have targeted pharmacies notifying patients that prescriptions are ready, banks alerting customers to account information, and similar legitimate business conduct.

The TCPA sets forth a complex labyrinth of requirements applicable to telephone calls and text messages. These requirements are more demanding for telemarketing calls, meaning calls that concern the commercial availability of goods or services or calls that encourage the purchase of goods or services. Subject to limited exceptions, auto-dialed and prerecorded telemarketing calls to cell phones are prohibited unless the caller has received the prior written approval of the called party to make the call. Prerecorded telemarketing calls to residential lines are similarly prohibited unless prior written approval is obtained, with limited exceptions.

Companies hit with the onslaught of TCPA litigation have typically conducted business in good faith compliance with TCPA requirements. Nonetheless, lawsuits have attacked unknowing and accidental violations. For example, ABC Pharmacy may have on file Jane Doe's consent to make calls to Jane's phone number. Jane subsequently moves and her phone number is reassigned to Johnny Rotten. ABC Pharmacy attempts to contact Jane at the phone number on file to provide a prerecorded refill reminder. ABC Pharmacy instead reaches Johnny. Johnny files suit under the TCPA against ABC Pharmacy for unauthorized, prerecorded calls.

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Because of the proliferation of TCPA lawsuits, business groups sought relief from the FCC and filed numerous petitions requesting reasonable guidelines to govern telemarketing calls. Unfortunately, on July 10, 2015, the FCC released a Declaratory Ruling and Order (FCC 15-72) that set forth *unrealistic* standards and created heightened business exposure to litigation.

- **Good Faith Not Good Enough for Reassigned Numbers:** There is no pragmatic way for companies to learn of reassigned numbers. Businesses sought relief from the FCC for unintentional violations involving reassigned numbers. The FCC's response was a one-call exception for reassigned numbers. Any subsequent call constitutes a violation. The FCC's exception only works if the called party answers the call and chooses to make the caller aware that he or she is not the intended party. In other words, liability will persist if the call goes unanswered (which is often the case when a call is unexpected) or if the call reaches a generic voicemail greeting.
- **Unless it's a Rotary Phone, it's an Auto-dialer:** The use of auto-dialers can create liability under the TCPA. An auto-dialer is reasonably understood to be equipment that is used to dial random or sequential numbers. Unfortunately, the FCC Order states that any dialing equipment *that has the capability*, if so programmed, to dial random or sequential numbers is considered an auto-dialer, *even if* it is not in fact programmed or used for random or sequential number dialing. The FCC gave just one example of a dialing system that would not qualify as an auto-dialer: a rotary telephone.
- **"Cheeseburger, Fries, and One Revocation of Consent:"** Businesses are required to offer reasonable methods for customers to revoke consent to receive telemarketing calls. What is now deemed reasonable is not reasonable. Under the FCC Order, businesses may not limit the manner in which revocation may occur. Rather, it is up to the customer to decide how to revoke consent. This potentially allows a customer to revoke consent by advising a store clerk of revocation at the check-out line, with the company liable if it fails to timely honor such revocation. The following comments made in a dissent to the FCC Order are insightful:

*"[H]ow could any retail business possibly comply? Would they have to record and review every single conversation between customers and employees? Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary "I'm not lovin' it," and put the onus on the company?"*

- **The Doctor Can Call...If He Knows Your Calling Plan Details:** The FCC stated that healthcare calls such as appointment reminders and prescription notifications serve an important public purpose. Unfortunately, a new FCC exception would protect these calls only if numerous standards are met, including a prohibition on any call that is charged to the patient or counted against the patient's plan limit on minutes. It is unclear how a patient's calling plan details would be known to the healthcare provider.
- **Risk to Banks that Provide Fraud Alerts:** The FCC stated a desire to provide protection for financial-related calls concerning fraud and identity theft, data security breaches, and money transfers. However, similar to healthcare calls, the new FCC exception would not protect any call that is charged to the customer or counted against the customer's plan limit on minutes.



The FCC Order is currently subject to multiple court challenges. For more information, please contact John Darrow at 312/840-7003 or [jdarrow@burkelaw.com](mailto:jdarrow@burkelaw.com)