

Update on TCPA Requirements for Text Messages and Best Practices

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Agenda

- Background on the Telephone Consumer Protection Act
- Past TCPA Orders by the FCC
- July 2015 FCC Order – An Expansion of the TCPA
- TCPA Text Message Litigation Trends
- Key Take-Aways and Best Practices
- Questions



The Telephone Consumer Protection Act: What Is It, and Why Should I Care?





The Telephone Consumer Protection Act

- The Telephone Consumer Protection Act (“TCPA”) regulates telemarketing and the use of automated telephone equipment for voice calls, faxes, and text messages.
- The TCPA provides for a private right of action and colossal statutory damages, making it a favorite of class-action plaintiffs: damages start at \$500 and rise up to \$1,500 *per recipient* for *each text message* sent.
- Consent is required for nearly all text messages. And for *commercial* text messages, “prior express *written* consent” is required.
 - There is *no exception* for a pre-existing business relationship.
 - Consent may be revoked.
 - Consent does not pass with a phone number that is reassigned.
- Certain types of non-commercial text messages may be permissible under limited TCPA exceptions, but reliance on exceptions can be risky.



The FCC's Key TCPA Orders

The Federal Communications Commission has implemented the provisions of the TCPA in a number of administrative orders.

- 1992 TCPA Order: Initial rules adopted implementing the TCPA
- 1995 TCPA Order: Clarified rules with respect to debt collection calls, established business relationship, and fax service providers
- 2003 TCPA Order: Established National Do-Not-Call Registry, determined that predictive dialers fall within the autodialer definition
- 2012 TCPA Order: Made significant changes to consent requirement and eliminated “established business relationship” exemption
- 2015 TCPA Order: Omnibus order addressing (among other things) autodialer and consent requirements and modern text message technologies





Spotlight: 2012 Order and Consent Requirement

- The 2012 TCPA Order amended the TCPA's consent rule – one of the most important and heavily litigated issues in TCPA litigation.
- Different levels of consent depending on whether the call is for “telemarketing” or non-telemarketing purposes.
- Telemarketing calls/texts: “prior express written consent” required.
 - A caller needs prior express written consent to use an autodialer to deliver a telemarketing call or text to a wireless (mobile) phone.
 - “Telemarketing” includes any call/text that includes an advertisement or encourages the purchase or use of goods or services.
- Non-telemarketing calls/texts: “prior express consent” required.
 - Includes purely “informational” texts, such as those delivering messages about school closings or package deliveries.
- One-year implementation period: rules became effective in October 2013.



Spotlight: 2012 Order and Consent Requirement

- The 2012 Order brought necessary clarity on the nature of the consent required to deliver telemarketing messages.
- Prior Express Written Consent
 - Bears the signature of the person to be called (electronic signatures suffice)
 - Authorizes the delivery of autodialed *marketing* calls or text messages, or prerecorded *telemarketing* calls
 - Includes the phone number to which the individual authorizes such delivery
 - Discloses that the individual is not required to agree to such calls and/or messages as a condition of a purchase of property, goods, or services
- The FCC's order encourages conspicuous, detailed customer disclosures.



2015 FCC Declaratory Ruling and Order: Key Holdings and Implications

FCC 2015 TCPA Declaratory Ruling and Order

“I am beyond incredibly disappointed in the outcome today. It will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors”

FCC Commissioner Michael O’Rielly

FCC 2015 TCPA Declaratory Ruling and Order

- Omnibus ruling resolved a backlog of nearly two dozen pending petitions for clarification.
- Like the 2012 TCPA Order, billed as “strengthening consumer protections” against telemarketing calls/texts.
- The Order focuses on the following areas:
 - Confirming that text messages are “calls” under the TCPA
 - Definition of “automatic telephone dialing system” (ATDS) or “autodialer”
 - Establishing and revoking consent
 - Reassigned telephone numbers
 - Internet-to-phone messaging
 - Limited exceptions for certain “pro consumer” messages
 - Call-blocking technology



2015 FCC Order: Autodialer Definition

The Order resolved petitions seeking clarity on the definition of an “automatic telephone dialing system” or “autodialer.”

- The TCPA defines an autodialer as equipment that has the **capacity** to “store or produce numbers . . . using a random or sequential number generator” and “to dial such numbers.”
- Recurring disagreement as to whether “capacity” refers to current or potential capacity.
- **FCC Ruling** – “Potential capacity” controls:



- The Order states that “the capacity of an autodialer is not limited to its current configuration but also **includes potential functionalities**”
- The Order appears to acknowledge that most modern-day smartphones would fall within the FCC’s broad interpretation



2015 FCC Order: Reassigned Numbers

The Order rejected petitions seeking broad exceptions for text messages sent to reassigned phone numbers.

- One of the most difficult issues that companies face with respect to the TCPA.
- The FCC has acknowledged that there is no comprehensive database or other guaranteed way for callers to identify reassigned mobile numbers.
- **FCC Ruling** – A “one-call” safe harbor:
 - Consent does not pass with a mobile phone number that is reassigned.
 - “One-call” exception: no TCPA liability for first call to reassigned number.
 - Any calls afterward are subject to TCPA liability, even if the caller does not receive actual notice of the reassigned number.
 - The ruling places the burden squarely on the caller to discover reassigned numbers and cease text messages.



2015 FCC Order: Revocation of Consent

The Order clarified how consumers can revoke their prior express consent.

- The TCPA itself is silent on whether consent, once provided, can be revoked.
- Courts were previously split on the significance of that silence, including whether consent could be revoked at all.
- **FCC Ruling** – Consumers may revoke consent through any “reasonable means.”
 - Rejected petitions arguing that companies should be able to designate the specific way that a consumer must revoke consent.
 - “Reasonable means” would include, “among other possibilities”:
 - (1) consumer-initiated calls, (2) requests made in response to a call/text, and (3) oral requests at an in-store bill payment location.
 - Some argue that the standard provides unclear guidance to businesses.





2015 FCC Order: Other Rules for Text Messages

- **SMS Messages Are “Calls”** – The FCC reaffirmed its position that text messages are subject to the same consumer protections under the TCPA as voice calls.
- **Internet-to-Phone Text Messages** – The FCC clarified that such messages are the functional equivalent of SMS text messages and can require consent per the TCPA.
 - Internet-to-phone text messages originate as e-mails and are sent to an e-mail address in the form of the recipient’s wireless telephone number and the carrier’s domain name.
 - Significant clarification, because some had believed these messages were subject to only the CAN-SPAM Act, and not the TCPA.
- **One-Time “Call-to-Action” Texts** – The FCC clarified that one-time messages sent in response to consumer texts requesting information do not violate the TCPA.



2015 FCC Order: Dissenting Opinions

There were two dissents to the Declaratory Ruling and Order that were highly critical of certain aspects of the ruling.

- **On “Potential Capacity”** – The ruling “transforms the TCPA . . . into an unpredictable shotgun blast covering virtually all communications devices.”
- **On Revocation of Consent** – “Congress did not address” this issue in the TCPA and “the FCC should not presume to act in its stead.”
- **On Reassigned Numbers** – The one-time exception offers “fake relief” because it “expects callers to divine from mere silence the current status of a telephone number” and enables “consumers acting in bad faith to entrap legitimate companies.”



2015 FCC Order: Appeals

- The Declaratory Ruling and Order is subject to appeal.
- As expected, several petitions for review were filed.
- The most controversial aspects of the Order have been challenged:
 - The acceptance of “potential capacity” over “present capacity” in defining an autodialer.
 - The limited exception for reassigned numbers.
 - The ability to revoke consent “by any reasonable means.”
- The appeals have been consolidated and assigned to the D.C. Circuit.





TCPA Text Message Litigation Trends: Past and Present



Text Message Litigation Under the TCPA

The proliferation of smart phones and mobile messaging technology has led to growth in TCPA class-action litigation based on unlawful text messages.

- Litigation is likely to grow following the FCC's 2015 Order.
- Claims based on unsolicited text messages are often ideal for class-action treatment:
 - Uniform messages sent to numerous recipients via a common technology.
 - Text message creates a record that is easily maintained and produced.
- Potential for huge statutory damages.
- A successful class certification motion creates settlement pressure.





Text Message Litigation Under the TCPA

Plaintiffs have challenged many different forms and categories of text messages under the TCPA:

- Commercial text messages without consumer consent.
 - Given widespread awareness of the TCPA, it is increasingly rare to see commercial text “blasts” to random telephone numbers.
- Text messages that exceed the scope of consent provided.
- “Confirmatory” text messages acknowledging consumer opt-out.
- “Informational” text messages sent for the consumer’s benefit.
- Internet-to-phone text message conversions.
- Smart phone applications with SMS technology.
- **The Takeaway** – Assume that **any** SMS-based communication with a consumer cell phone may be subject to TCPA scrutiny.



Text Message Litigation Trends: Consent

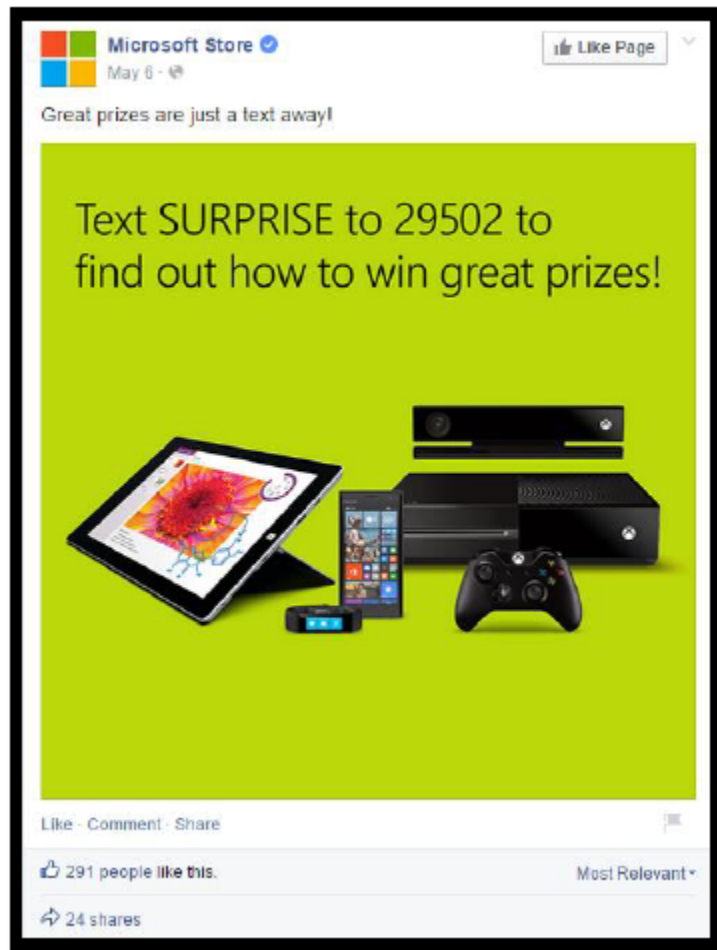
The question of consent remains one of the most heavily litigated TCPA issues.

- Express written consent is required prior to sending any marketing text message to a consumer mobile phone via autodialer technology.
- Frequent litigation concerning both *whether* consent was obtained and the *scope* of consent.
- Consent need not last forever – numerous lawsuits are based on revoked consent.





Text Message Litigation Trends: Consent



Pietzak v. Microsoft – Key Allegations:

- Microsoft solicits mobile phone numbers from potential customers using “deceptive postings” on various social media websites.
- Sending a text message automatically enrolls the number in a multi-text message advertising program.
- The “bait-and-switch” marketing program “lures customers to provide their phone number for a limited purpose” and then “transmits multiple unconsented-to text message advertisements.”



Text Message Litigation Trends: Consent

The complaint contrasts these programs with others in which Microsoft offered different disclosures.

Let's get you
signed up for texts.

You'll get 5% off your
next purchase online
or in-store.



The latest news, events and offers
sent right to your phone!

Complete the form below for the **latest news, events and special offers**, delivered right to your phone! As a sign up bonus, you'll get a promo code for 5% off at the Microsoft Store – Online or In-store. Sign up today!

First Name	Last Name
<input type="text"/>	<input type="text"/>
ZIP/Postal Code	Mobile Phone Number
<input type="text"/>	<input type="text"/>

☐ I am 16 years old or older.

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Text Message Litigation Trends: Opt-Outs

For years, courts have battled with the question of how a consumer may revoke consent.

- Following the 2015 Order, it is now clear that consent may be revoked by any “reasonable means.” What does that mean?
- Continued litigation over opt-out requests via text:
 - What phrases must be recognized? MMA Guidelines suggest, at a minimum, STOP, END, CANCEL, UNSUBSCRIBE, and QUIT.
 - Should a company confirm an opt-out via text message?
- Some examples:
 - *Pietzak v. Microsoft* (C.D. Cal. 2015) – Secondary theory alleging that Microsoft failed to adhere to requests to stop sending messages.
 - *Legg v. Voice Media Group* (S.D. Fla. 2014) – Plaintiff allegedly texted “STOP,” and again texted “STOP ALL,” but promotional messages continued.



Text Message Litigation Trends: Human Intervention

- The TCPA's prohibitions apply only to a person or entity that “makes” or “initiates” a text message.
- A frequently litigated issue is the extent to which the TCPA applies to providers of mobile text messaging platforms.
 - Raises question of whether a platform that enables or allows delivery of text messages qualifies as an ATDS.
- Some cases have held that when a text messaging platform requires human intervention to initiate messages, the platform is not an ATDS.
 - *Derby v. AOL*, 15-cv-00452 (N.D. Cal. Jun. 1, 2015): Service that allows transmission of web-based AOL instant messages as texts not an ATDS because messages must be created by AOL users.
 - *McKenna v. WhisperText*, No. 5:14-cv-00424 (N.D. Cal. Jan. 30, 2015): Service that allows users to send SMS text invites to cell phone contacts not an ATDS because app sends invitations only at the user's affirmative direction.
 - *Glauser v. GroupMe*, No. 11-2584 (N.D. Cal. Feb. 4, 2015): “Group texting” service was not an ATDS because users created groups of recipients.



TCPA Litigation Trends: Recycled Numbers

A key question raised in recent TCPA litigation is whether “consent” survives when a cell phone number is reassigned to a new consumer.

- An illustrative case: *Nunes v. Twitter*, No. 14-cv-02843 (N.D. Cal. 2014):
 - Twitter allows users to sign up to receive 140 character “tweets” from accounts they follow through various means, including via SMS text message.
 - A prior owner of plaintiff’s cell phone number signed up to receive SMS alerts. It was clear that Twitter had consent from the prior user, and there was no allegation that Twitter knew of the reassignment.
 - The plaintiff obtained the “recycled” phone number and filed suit when she received tweets via text message from accounts the prior user followed.
 - The court denied Twitter’s motion to dismiss, finding that the complaint alleged lack of consent even if Twitter was unaware of the reassignment.
- Recycled number class actions are likely to continue increasing despite the new “one-call” safe harbor endorsed by the FCC.



TCPA Litigation Trends: Vicarious Liability

What happens when a third-party marketer sends an unauthorized text message on behalf of another company?

- Issues of vicarious liability can arise when a company hires a third-party marketer to advertise its products.
- Litigation turns on the amount of control a company maintains.
- *Thomas v. Taco Bell Corp.* (9th Cir. 2014):
 - Association of Taco Bell store operators hired a third-party marketer to send unsolicited text messages.
 - Taco Bell parent corporation authorized campaign, but did not choose content.
 - **Held:** No TCPA liability because Taco Bell did not control the manner and means of the text message campaign conducted by the association.
 - Note that the association of store operators and third-party marketer were not named as defendants.
- The FCC's July 2015 Order did not address third-party liability issues.

TCPA Litigation Trends: Offers of Judgment

TCPA class actions are center stage in the procedural battle concerning attempts to “pick-off” class representatives.

- Can a defendant’s offer of complete relief (full damages to the individual plaintiff) moot a TCPA class action?
- Tempting strategy in TCPA cases, where individual statutory damages pale in comparison to class-wide damages.
- Some courts have rejected pick-off attempts in TCPA lawsuits:
 - *Chapman v. First Index* (7th Cir. Aug. 2015): Defendant made an offer of judgment of \$3002 to settle allegations of two unauthorized text messages (slightly higher than potential damages for the two alleged violations).
 - *Gomez v. Campbell Ewald* (9th Cir. 2014): Defendant made an offer of \$1503 to resolve claim of one unauthorized text message.
- **Guidance is coming:** The Supreme Court has granted certiorari and will hear arguments in the *Gomez* case this fall.





Next Steps: Where Do We Go From Here?





2015 FCC Order: Key Take-Aways

- Calls to reign in and limit the TCPA in key respects have not been answered.
 - The FCC has signaled that its rules are designed primarily to protect consumers and “empower” them to avoid unwanted calls and texts.
- The “autodialer” (or ATDS) definition now likely encompasses most modern dialing technologies.
 - **But** only if the technology is used to “initiate” or “make” a call.
- “Reassigned number” litigation is here to stay.
 - Companies may need to seek new solutions to combat uncertainty.
- Major rulings regarding class certification issues will have a significant impact on TCPA litigation.



Best Practices in an Expanded TCPA World

Do:

- Make consent disclosures clear, conspicuous, accurate, and detailed.
- Maintain complete and accurate records of consumer consent for at least four years after sending text messages.
- Have in place procedures to process opt-out requests in any manner, including via text, phone call, email, or web form.
- Require third-party vendors/partners to comply with the TCPA.

Do Not:

- Assume that you are not using an autodialer – it is the *capacity* to generate and call numbers that matters.
- Assume that consent remains “current” – be wary of consent obtained years ago, and take steps to identify recycled numbers.
- Place unnecessary restrictions on the scope of consent – get the consent you need to send the number and type of messages you may wish to send in the future.



Any Questions?





Thank You and Contact Information

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