Navigating TCPA Compliance Today: What Healthcare Organizations Need to Know

DEREK KEARL, PARTNER

Holland & Hart

Presenter



Derek Kearl

jdkearl@hollandhart.com | 801.799.5857

www.linkedin.com/in/derekkearl

www.hhhealthlawblog.com

Holland & Hart

Disclaimer

This presentation is designed to provide general information on pertinent legal topics. The information is provided for educational purposes only. Statements made or information included do not constitute legal or financial advice, nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author.

The information contained in this presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this presentation might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.

Agenda

- Overview of the TCPA
- TCPA Litigation and Enforcement Trends
- Recent Legal Developments
- Healthcare Exemptions
- Best Practices to Minimize TCPA Risk

Overview of the TCPA



- Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA" or the "Act")
  - The TCPA was enacted by Congress to combat aggressive telemarketing and fax advertising practices believed to invade consumer privacy.
  - The TCPA also regulates the use of automated equipment to deliver *non-telemarketing* calls or text messages to mobile phones without prior express consent.
  - Congress empowered the Federal Communications Commission ("FCC") to interpret the TCPA through rules, regulations, and declaratory rulings. *See, e.g.,* 47 C.F.R. § 64.1200.

TCPA Enforcement

- The TCPA and the FCC's implementing regulations
  - Make it unlawful to use an **"automatic telephone dialing system"** ("ATDS" or "autodialer") or **artificial or prerecorded voice** to deliver calls or text messages to cell phones without the prior express consent of the recipient
    - Telemarketing/Advertising calls require **prior express *written* consent**
    - Non-telemarketing/Informational calls require **prior express consent**
  - Prohibit **telephone solicitations** to numbers on the national do-not-call registry
  - Prohibit telemarketing/advertising calls using an artificial or prerecorded voice to residential lines without **prior express written consent**
  - Forbid the use of fax machines to send unsolicited advertisements unless certain criteria are met
  - Contain other related restrictions, including time of day restrictions.

TCPA Enforcement

The single biggest risk for businesses is private litigation



The TCPA creates a private right of action whereby private plaintiffs may obtain statutory damages of $500 *per call* or actual damages, whichever is greater, and up to $1,500 *per call* for willful or knowing violations



Example: If a company sent 10,000 text messages, at $500 per text, the company faces $5 million in potential damages and up to $15 million if conduct is found to be willful



No cap on statutory damages



Plaintiffs can also seek injunctive relief



Fertile ground for class actions

TCPA Enforcement

Significant recent TCPA class action settlements include



$9.95M



$28M



$20M



$29.5M



$21.9M

Holland & Hart

TCPA Enforcement

TCPA class action settlements in the healthcare industry

Optum Rx®

$1.86M

Connect America

$4M

adapthealth

$6M

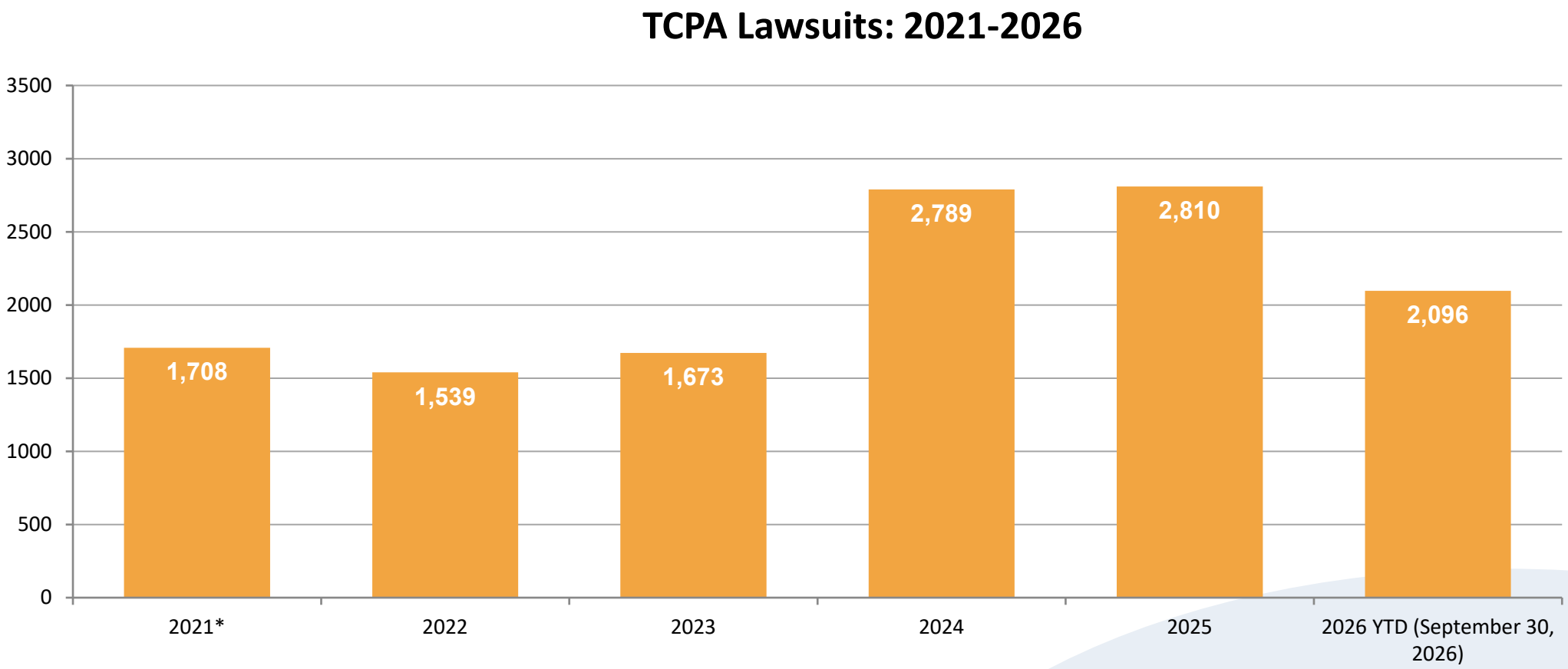
United Healthcare

$2.5M

CHOICEHEALTH
It's Your Health, It's Your Choice.

$7M

TCPA Trends

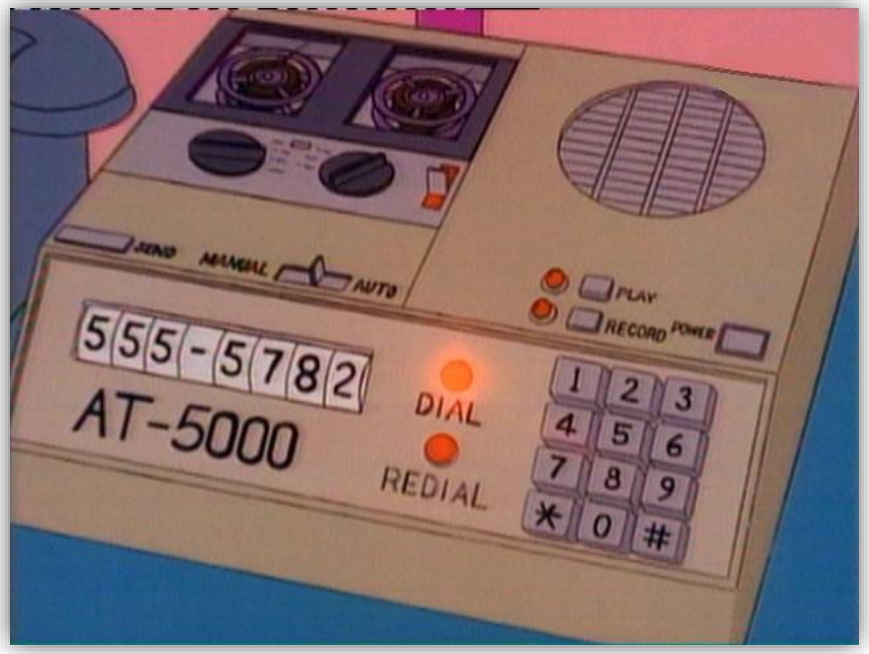


**Facebook v. Duguid* Decision, April 2021

Source: https://webrecon.com/litigation-statistics (last accessed November 9, 2026).

What is an ATDS?

- The TCPA defines an ATDS as "equipment which has the *capacity* (1) to store or produce telephone numbers to be called, using a random or sequential number generator; and (2) to dial such numbers"
- This hotly contested question created a circuit split the *Facebook* decision resolved.



Holland & Hart

What is artificial/prerecorded voice?

- Not expressly defined by the TCPA itself.
- Understood to include AI-generated voices
- In a 2024 Declaratory Ruling, the FCC expressly stated that a caller is using a "prerecorded voice" if a call is facilitated by automated or AI technologies.
- Includes Interactive Voice Response (IVR), Ringless Voicemail, and other technologies.



Prior Express Consent

Consent is king

The level of consent required is determined by the content of the message

Informational calls require prior express consent

- FCC considers such calls "expected and desired by consumers"
- Includes calls on behalf of tax-exempt non-profits, political messages, airline notifications, survey/research calls, fraud alerts, payment reminders, and school notifications
- Providing a cell phone number (orally or in writing) is considered consent for informational or transactional messages
- Must be closely related to purpose for which consent was given

Prior Express Consent

Telemarketing/Advertising calls require "prior express written consent"

- Defined as "an agreement in writing, bearing the signature of the person called, that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or pre-recorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered."

Written agreements must clearly and conspicuously disclose that

- The agreement authorizes the caller to deliver telemarketing calls using an ATDS or an artificial or prerecorded voice; and
- The person is not required to sign or enter into the agreement as a condition of purchasing any products, goods, or services

The agreement must include the consumer's wireless number and his or her signature

Facebook, Inc. v. Duguid (2021)



- **Background:** Facebook sent automated login-alert texts to Noah Duguid, who had no Facebook account (likely a recycled number). He sued under the TCPA, alleging Facebook used an autodialer.
- **The Question:** Does an "automatic telephone dialing system" include any equipment that can store and automatically dial numbers?
- **Key Holding:** No. A unanimous Supreme Court adopted a narrow definition: the equipment must use a random or sequential number generator. 141 S. Ct. 1163 (2021).
  - Reversed the Ninth Circuit's broad store-and-dial rule and resolved a circuit split.

The Court's Statutory Interpretation



- **The text:** ***"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."***
- **Modifier applies to both verbs:** "using a random or sequential number generator" qualifies both "store" and "produce."
- **Punctuation:** The comma separating the modifier signals Congress intended it to apply equally to both antecedents.
- **Holding:** "In all cases, whether storing or producing a number to be called, the equipment in question must use a random or sequential number generator."

Statutory Context & Key Takeaways



- **Purpose:** The prohibitions "target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity."
- **Scalpel, not chainsaw:** *A store-and-dial reading "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel."*
- **Avoiding absurd results:** The broad reading would cover virtually all modern cell phones, making owners liable for speed dialing or automated text replies.
- **Takeaway:** Targeted messages to stored numbers, sent without a random or sequential number generator, do not implicate the TCPA's autodialer provisions.

Facebook, Inc. v. Duguid

Key Takeaways



Broad definition rejected in favor of the "narrow statutory design" Congress employed to target certain calls.



Systems that send automated messages/calls from a preexisting list or database of stored numbers, like that used by Facebook, are not autodialers and do not violate this section of the TCPA.



The *Facebook* decision expressly **DOES NOT AFFECT** the TCPA's other provisions



Calls using "artificial or prerecorded voice" to cell phones or solicitation calls/text messages to individuals whose numbers are on the national Do-Not-Call registry are still in play.

Post-*Facebook* Landscape

- **Shift in Focus**
  - Increase in lawsuits focused on the TCPA's other provisions
    - Artificial/Prerecorded Voice
    - Telephone Solicitations to numbers on the National Do-Not-Call Registry
  - Decrease in autodialer-related lawsuits

Post-*Facebook* Landscape

- **Beware of the "Mini-TCPAs"**
  - Florida
    - Broad autodialer definition which includes any "automated system for the selection or dialing of telephone numbers or the playing of a recorded message."
    - Dozens of cases filed there
    - Recent notice and opportunity to cure amendment
  - Maryland
    - Nearly identical to Florida's autodialer provision pre-amendment
    - 3 call/text limit over 24-hour period
    - Strict prohibition on use of any caller ID to block identity and number of caller
  - Oklahoma
    - Nearly identical to Florida's provision, pre-amendment

Post-*Facebook* Landscape

- Texas
  - September 1, 2025 – expanded "telephone solicitation" definition to include text messages
  - Expanded scope of companies having to register as telemarketers
  - Direct private right of action
  - In November 2025, Texas AG issued an opinion clarifying that companies engaging in consent-based text messaging are **NOT** subject to registration requirements
- Pennsylvania
  - October 18, 2026
  - Broadened statute to apply to text messages, voicemails, ringless voicemails
  - No calls or messages on Sundays or outside the hours of 9:00 a.m.-7:00 p.m.
- Washington
  - Broad autodialer provision
  - Liability for those who "assist in the transmission" of solicitations

National Do-Not-Call (DNC) restrictions



NATIONAL
DO NOT CALL
REGISTRY

The TCPA allows a private right of action for "a person who has received **more than one telephone call within any 12-month period** by or on behalf of the same entity" in violation of the regulations provided under this subsection. 47 U.S.C. § 227(c)(5).

The TCPA prohibits "any person or entity from initiating any **telephone solicitation**" to residential or wireless telephone numbers of any individual "who has registered his or her telephone number on the national do-not-call registry." 47 CFR 64.1200(c)(2),(e).

National Do-Not-Call (DNC) restrictions



- "**Telephone Solicitation**"
  1. "[T]he initiation of a telephone call or message for the purpose of encouraging the purchase . . . of . . . property, goods, or services."
  2. It does NOT include a call or message:
     1. To any person with that person's ***prior express consent***
     2. To any person "with whom the caller has an ***established business relationship***"; or
     3. By or on behalf of a tax-exempt nonprofit organization

Holland & Hart

National Do-Not-Call (DNC) restrictions



NATIONAL DO NOT CALL REGISTRY

"Established Business Relationship"

"A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential [and cellular] subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity **within the eighteen (18) months immediately preceding the date of the telephone call** or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity **within the three months immediately preceding the date of the call**, which relationship has not been previously terminated by either party."

A person's do-not-call request terminates the EBR "even if the [person] continues to do business with the seller."

EBR with a particular entity does NOT extend to affiliated entities "unless the [person] would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate."

National Do-Not-Call (DNC) restrictions



- Other DNC-related Exemptions
  - A caller will not be liable if it can demonstrate:
    - The violation was in error AND it has:
      - **Written procedures** to comply with DNC rules
      - **Training of personnel** in procedures established pursuant to DNC Rules
      - **Internal DNC List**
      - **Access to the National DNC Database**

Loper Bright Enters. v. Raimondo (2024)

- **Background:** A 2020 National Marine Fisheries Service rule under the Magnuson-Stevens Act required Atlantic herring vessels to pay for at-sea observers when federal funding was unavailable—up to $710 per day, cutting annual returns by up to 20%.
- **The Challenge:** Family fishing businesses (Loper Bright; Relentless) sued, arguing the Act does not authorize NMFS to make fishermen pay for observers.
- **Below:** The D.C. Circuit and the First Circuit upheld the rule by deferring to NMFS under *Chevron*.
- **The Question:** Should *Chevron U.S.A. v. NRDC* (1984) be overruled or clarified? 603 U.S. 369 (2024).

The Decision & Key Holdings



- **Holding:** *Chevron* and its doctrine giving deference to agency decisions are overruled. The Administrative Procedure Act requires courts to exercise independent judgment in deciding whether an agency acted within its statutory authority. The *Chevron* doctrine is incompatible with the APA because it required courts to afford binding deference to agency statutory interpretations instead of exercising independent judgment.
- **Courts Decide Questions of Law:** Reviewing courts must decide all relevant questions of law and interpret constitutional and statutory provisions.
- **No Ambiguity-Based Deference:** Courts may not defer to an agency's legal interpretation simply because a statute is ambiguous.
- **Independent Judicial Judgment:** Courts must independently determine the meaning of statutory provisions and whether an agency acted within its statutory authority.

The Vote & Key Takeaways



- **Agency Interpretations May Still Inform Courts:** Courts may consider the experience and informed judgment reflected in agency interpretations, while retaining responsibility for deciding the statute's meaning.
- **Prior *Chevron*-Based Holdings Remain Subject to Stare Decisis:** Prior cases upheld under *Chevron* keep statutory stare decisis effect. Judgments vacated and remanded.
- **Vote:** 6–3.
- **Takeaways:** Courts—not agencies—now decide what ambiguous statutes mean, using their own independent judgment.
  - Agency interpretations remain persuasive but are no longer binding.
  - Expect more challenges to agency rules, though prior decisions upheld under *Chevron* remain good law.

McLaughlin Chiropractic v. McKesson (2025)



- **Background:** A McKesson subsidiary sent unsolicited fax ads without opt-out notices in 2009–2010. McLaughlin filed a TCPA class action in 2014, covering traditional and online-fax recipients.
- **FCC Order:** In 2019, the FCC's *AmeriFactors* order ruled that an online fax service is not a "telephone facsimile machine."
- **Below:** Treating the order as binding under the Hobbs Act, the court granted McKesson summary judgment on online-fax claims and decertified the class—leaving 12 faxes and $6,000. The Ninth Circuit affirmed.
- **The Question: <u>Are district courts in TCPA enforcement proceedings bound by the FCC's interpretation?</u>**

The Decision & Key Holdings

- **Holding:** No. The Hobbs Act does not bind district courts in enforcement proceedings to an agency's statutory interpretation; courts apply ordinary interpretive principles in interpreting statutes, giving "appropriate respect" to the agency (citing *Loper Bright*).
- **Vote:** 6–3.
- **Takeaway:** With *Loper Bright*, courts—not agencies—have the final word on statutory meaning, even in private TCPA litigation. 606 U.S. 146 (2025).

TCPA Landscape Post-*Loper Bright* and *McLaughlin*

- **Courts are interpreting the TCPA based on the statute's text rather than deferring to longstanding FCC guidance.**
- **Courts are narrowing the scope of TCPA, holding that text messages are <u>not</u> "telephone calls" under Section 227(c)(5)**
  - Seventh Circuit (covering Illinois, Indiana, Wisconsin)- *Steidinger v. Blackstone Med. Servs* (7th Cir. July 14, 2026).
  - Florida federal district courts.
  - **<u>But</u>**, other courts continue to deem Section 227(c)(5) to apply to text messages and telephone calls (*e.g.*, courts in the 9th Circuit) or there are splits in opinions in the same jurisdictions (*e.g.*, S.D. Tex. and W.D. Tex).

Trending Cases

- **Valid Caller ID**
  - The TCPA requires any "person or entity that engages in telemarketing" to "transmit caller identification information." 47 C.F.R. § 64.1601(e).
  - Caller ID information "must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer."
  - **Exception:** Provide (1) the name of the calling party and (2) the calling party's customer service telephone number.
  - The telephone number must permit any individual to make a do-not-call request during regular business hours.

Trending Cases

- **Split of Authority on Caller ID Cases**
  - Some cases state there is no private right of action under the TCPA for violations of this provision:
    - E.D. Mich., Michigan Ct. App., D. Maryland, D. Oregon, S.D. Cal., E.D.N.Y.
  - Others cases support a private right of action under the TCPA:
    - E.D. Pa., E.D. Mich., D. Mass., E.D. Texas, D. Oregon.

Trending Cases



- **Violation of Quiet-Hours Restrictions**
  - "No person or entity shall initiate any telephone solicitation to: Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (**local time at the called party's location**)."
  - Be careful – Mini-TCPAs are often stricter (no solicitation calls before 8 a.m. or after 8 p.m.)
  - Avoid Sundays and Legal Holidays

Health Care-Specific Exemptions

Apply to TCPA's artificial/prerecorded voice and autodialer provisions		
Health Care Treatment Exemption	**The Health Care Rule**	**Health Care Messages to Residential Lines**

Health Care Treatment Exemption

This exemption does NOT cover:

- **Calls related to accounting, billing, debt-collection, or other financial content**
- **Calls that include telemarketing, solicitation, or advertising content**

Health Care Treatment Exemption

Additional conditions to qualify for this exemption:

Call or text message must be sent only to the mobile number provided by the patient.	Patient cannot be charged or have call or text counted against the limits of mobile plan.	Name and contact information of healthcare provider must be stated at the beginning of the call or included in the text message.	The message must be concise • One minute or less for calls. • 160 characters or less for text messages.	Call limits • Only one call or text message per day. • No more than three calls or text messages per week.	Opt-out • Each message must offer recipients an easy way to opt out of future messages. • Voice-activated or key press-activated mechanism or toll-free number for calls. • Replying "STOP" for text messages. • All opt-out requests must be honored immediately.	Must comply with the HIPAA privacy rules.

Other Health Care Exemptions

- Calls and texts to mobile phones using an autodialer, or an artificial or prerecorded message, that deliver a health care message from a HIPAA-covered entity or its business associate
- These types of calls are still subject to TCPA liability, but only require prior express consent rather than prior express ***written*** consent. 47 C.F.R. § 64.1200(a)(2)
- Such consent is often shown by the call recipient providing his or her mobile number at the time of treatment

The Health Care Rule



The Health Care Rule

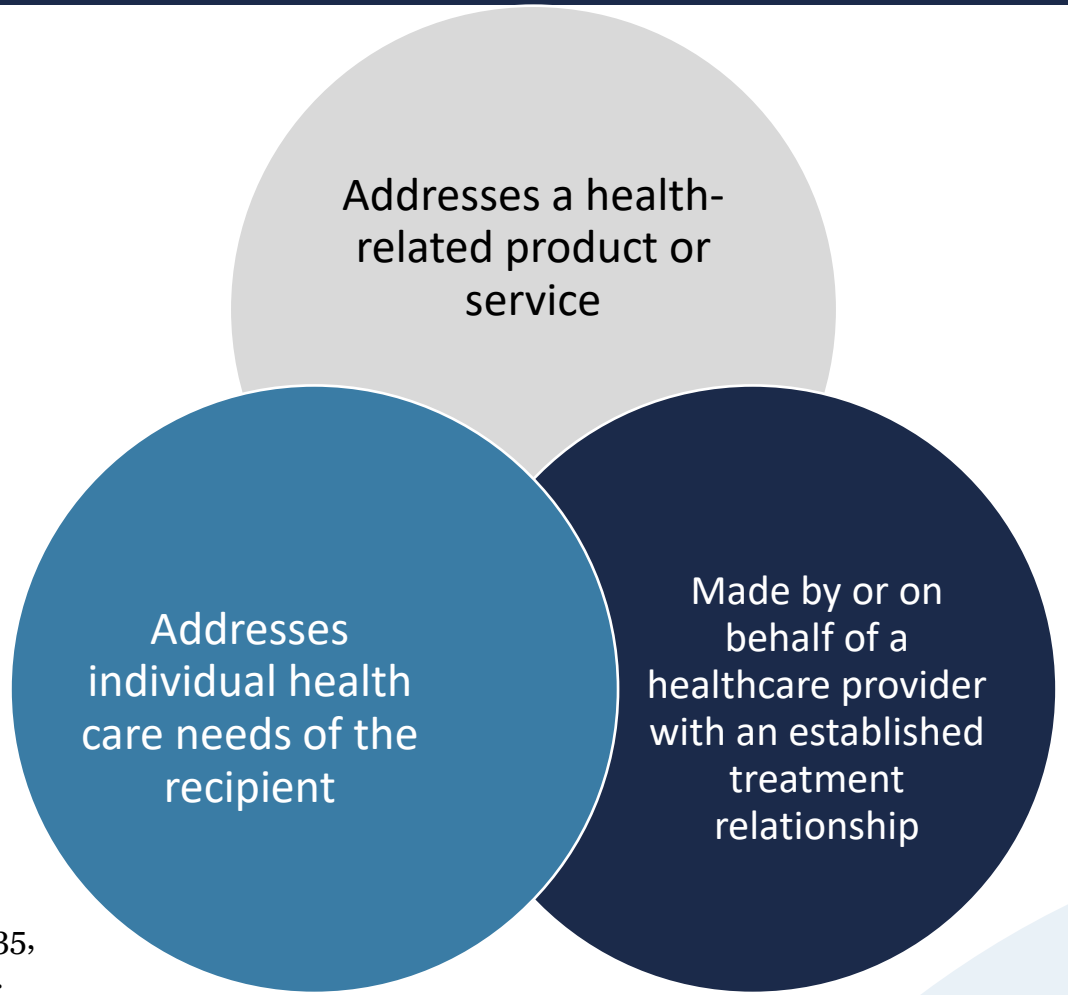


- What is a "**health care message**"?
  - For a call or text message to constitute a healthcare message, it must "deliver a health care message" as that term is defined under HIPAA
  - HIPAA defines "health care" as "care, services, or supplies related to the health of an individual"
  - It includes, but is not limited to:
    1. Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
    2. Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

The Health Care Rule

What is a

"health care message"?



Zani v. Rite Aid Headquarters Corp., 246 F.Supp.3d 835, 843 (S.D.N.Y. 2017), *aff'd*, 725 Fed. Appx. 41,43 (2d Cir. 2018).

Other Health Care Exemptions



- Calls to residential landlines that deliver a health care message from a HIPAA-covered entity or its business associate are completely exempt
- These types of calls can be made without the consent of the called party

Health Care Messages to Residential Landlines



Emergency Purposes Exemption



- Exemption to Prerecorded/Autodialer Provisions
  - The TCPA expressly exempts calls:
    - "Made for Emergency Purposes"
    - "Emergency purposes" defined to mean "calls made necessary in any situation affecting the health and safety of consumers."
    - The "emergency purposes" exception is intended for "instances [that] pose significant risks to public health and safety, and [where] the use of prerecorded message calls could speed the dissemination of information regarding . . . potentially hazardous conditions to the public."
    - COVID-19 Declaratory Ruling
    - **Very Limited Exemption**

Examples

Zani v. Rite Aid Headquarters Corp. 246 F. Supp. 3d 835 (S.D.N.Y. 2017), *aff'd* 725 Fed. Appx. 41 (2d Cir. 2018)

- Plaintiff filed a class action lawsuit against Rite Aid asserting that Rite Aid's prerecorded call made to his mobile phone regarding flu shots available at Rite Aid pharmacies violated the TCPA.
- In Sept. 2013, Plaintiff received a prescription at Rite Aid, and provided his mobile number.
- In Oct. 2013, he received a flu shot from Rite Aid.
- Nearly a year later, he received a prerecorded flu shot reminder call alerting him to the availability of flu shots for the 2014 season at Rite Aid pharmacies.

Examples

The U.S. District Court for the Southern District of New York held that the prerecorded call:

Was a healthcare message

Qualified for the Health Care Rule, and

Was therefore exempt from the prior express written consent requirement under the TCPA

Holland & Hart

Examples

The Second Circuit Court of Appeals agreed.
Key factors to the decision:

Zani provided his mobile number when he visited in 2013

The prerecorded flu shot reminder call was a healthcare message made by or on behalf of a HIPAA-covered entity and falls within the Health Care Rule exemption

Rite Aid's message was exempt from the written consent requirement of the TCPA and Zani provided appropriate prior consent when he provided his mobile number to Rite Aid



Holland & Hart

Examples

But see: *Coleman v. Rite Aid of Georgia*, Inc., 284 F. Supp. 3d 1343, 1344 (N.D. Ga. 2018)



- Coleman received pre-recorded automated voice messages from Rite Aid regarding prescription medications on his mobile phone
- Calls were directed to someone else
- Coleman requested that they stop, but continued to receive them
- Because he did not provide any consent, the Health Care Rule did not apply
- Court held that the Healthcare Treatment Exemption did not apply
  - No opt-out mechanism; Coleman's opt-out request was not honored

New Revocation of Consent Rules



- **Revoking Consent**
  - A consumer's revocation of consent to promotional messages still operates to revoke consent to all such messages, including calls and texts.
  - But callers may now interpret consumer revocation requests as to informational calls to *only* apply to the specific category of informational call that prompted the revocation.
  - Callers may now designate an exclusive means of consent revocation, but must clearly and conspicuously disclose one of three methods:
    - Automated voice or keypress protocols.
    - The use of specified words in response to a text (Reply STOP to stop).
    - The use of a website or phone number for processing opt-out requests.

Revocation of Consent Rules



- **Post-Revocation Communications**
  - May send a one-time post-revocation text message confirming the consumer's revocation request
    - Merely confirms opt-out request and does not include any marketing or promotional information
  - May include a request for clarification on the scope of the opt-out in situations where consumer consented to multiple types of text messages

Best Practices For Minimizing TCPA (and Mini-TCPA) Liability

DO

- Develop and implement TCPA compliance program
- Obtain express written consent prior to initiating or sending promotional calls or texts to consumers
- Provide one or more opt-out mechanisms
- Create procedures for tracking revocation of consent, do-not-call requests, and incorrect/reassigned numbers
- Require all third-party vendors or marketing partners to be TCPA compliant
- Review/categorize messages sent
- Be careful to keep “informational” messages content-neutral
- Make consent forms clear, conspicuous, and user-friendly
- Retain consent records

Best Practices For Minimizing TCPA (and Mini-TCPA) Liability

DON'T

- Assume that consent received in the past remains valid
- Place unnecessary restrictions on the scope of consent
- Assume that there is no violation because you are not using an ATDS
- Assume that you are safe from TCPA liability by using a third-party marketer or vendor

Thank you – questions or comments?



DEREK KEARL
jdkearl@hollandhart.com
www.linkedin.com/in/derekkearl
801.799.5857

Holland & Hart



Thank you!

Holland & Hart