



The business of relationships.™

# The Telephone Consumer Protection Act

---

Recent Developments in Litigation, Regulation and  
Insurance Coverage

June 13, 2013

# Presenters



**Henry Pietrkowski**

Partner

Chicago

+1 312 207 3904

[hpietrkowski@reedsmith.com](mailto:hpietrkowski@reedsmith.com)



**Judith L. Harris**

Partner

Washington, D.C.

+1 202 414 9276

[jlharris@reedsmith.com](mailto:jlharris@reedsmith.com)



**Timothy P. Law**

Partner

Philadelphia

+1 215 241 1262

[tlaw@reedsmith.com](mailto:tlaw@reedsmith.com)

“The Telephone Consumer Protection Act Teleseminar” by Reed Smith is to keep others informed of developments in the law. It is not intended to provide legal advice to be used in a specific fact situation; the contents are for informational purposes only.

“Reed Smith” refers to Reed Smith LLP and related entities. © Reed Smith LLP 2013.

# Telephone Consumer Protection Act (“TCPA”)

## 47 U.S.C. § 227

- Federal statute enacted by Congress over 20 years ago
- To protect consumers from unwanted telephone calls and faxes
- Implemented and interpreted by the Federal Communications Commission (FCC)
- Enforced by the FCC, state Attorneys General, and private litigants
- Cottage industry of class action lawsuits

## Major Prohibitions

- Autodialed and prerecorded calls/text messages to cell phones
- Autodialed and prerecorded calls to leave messages at residential phone numbers
- Unsolicited fax advertisements
- Calls made to residential numbers on the “do not call” list

## Cannot make autodialer or prerecorded calls to cell phones – 227(b)(1)(A)

- Make any “call”
  - Includes text messages
  - Does not matter what the content is
- Using an “automatic telephone dialing system” or “an artificial or prerecorded voice”
- Without the “prior express consent of the called party”
- To call a “cellular telephone service”

## Cannot send unsolicited fax advertisements – 227(b)(1)(C)

- Use a telephone facsimile machine, computer or other device
- To send an *unsolicited advertisement* to a telephone facsimile machine
  - “Unsolicited advertisement” means “any material advertising the *commercial availability or quality of any property, goods, or services* which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”
  - Depends on the content of the fax
- Exception for “established business relationships” under certain strict conditions
  - Requires specific opt-out language

## Cannot call residential numbers on the national “do not call” list – 227(c)(5)

- Only applies to *residential subscribers*, not business subscribers
- Only applies if there is *more than one* such call within a 12-month period
- Also must honor company-specific “do not call” requests

## Private cause of action – 227(c)(3) & (c)(5)

- \$500 per violation (*i.e.*, per call, text message or fax)
- Strict liability statute
  - Lack of knowledge or intent is *not* a defense
  - For do-not-call violations only, defendant can avoid liability if it “has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations”
- Can be increased up to \$1,500 for a “willful” or “knowing” violation in court’s discretion
  - Intent to violate the statute generally is not required



# Defenses

- Prior express consent
- No vicarious liability
- Not an “automatic telephone dialing system”
- Constitutional defenses

## Consent Defense

- Autodialed calls – “other than a call . . . made with the prior express consent of the called party”
- Prerecorded calls to residences – “without the prior express consent of the called party”
- Unsolicited fax advertisements – “without that person’s prior express invitation or permission”
- *Lesson*: Get the person’s consent!

## Consent Defense – Text Messages

- Recent cases: voluntarily providing a cell phone number is itself consent to receive texts
- Potential limits to this concept
  - Must the text relate to the reason for which the cell phone number was provided?
  - Must the text come from the company that obtained the number, not an affiliate?

## Consent Defense – Debt Collection Calls

- FCC ruling: debtor's voluntary provision of cell phone number on a credit application is prior express consent to receive debt collection calls
- Potential limits to this concept
  - Phone number must be provided in connection with transaction at issue
  - One court recently criticized FCC's ruling as going beyond plain language of the statute – providing a phone number is only *implied* consent, *not* “prior express consent”
  - But most federal district courts do not second guess the FCC's orders – only the federal courts of appeal can determine the validity of an FCC order under the Hobbs Act

## Consent Defense – Revocation of Consent

- Courts split on whether, once a debtor consents, that consent can be revoked under the TCPA
- Three basic views
  - Consent never can be revoked
  - Consent can be revoked in writing, but not orally (similar to FDCPA)
  - Consent can be revoked orally or in writing

## Consent Defense – Class Certification

- Even if the *named plaintiff* did not consent, still can defeat class certification by showing that some *absent class members* did consent
  - Individual factual issues of consent *predominate* over common issues
  - Individual factual issues of consent make a case *unmanageable*
  - Individual factual issues of consent render the named plaintiff's claim *atypical*
- Depends on the facts of each case

# Vicarious Liability Defense

- Federal common law of agency applies
- Independent contractors: Company must *direct* or *control* the *manner* and *means* by which the calls were made or faxes were sent
- Employees: Depends on scope of employment
  - Even prohibited acts may be within the scope of employment
  - May depend on whether the employer knew about the employee's actions

## “Automatic Telephone Dialing System” (ATDS) Defense

- TCPA defines an “automatic telephone dialing system” as “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.”
- FCC determined that *predictive dialers* that use *stored lists of numbers* fall within this definition
  - Must autodialer still have the “capacity” to generate *random or sequential* numbers?
- Must the autodialer have the *present* capacity to generate random or sequential numbers?
  - If “future” capacity, can any computer or smartphone be an ATDS simply by downloading a software program?



## Third-party Claims

- List provider
- Broadcaster
- Third-party marketing company
- Insurance company



# Regulatory Enforcement

---

The View From D.C.

## TCPA Now Generating Greater Interest – and More Confusion – Than Ever (and Not Just in the Courts!)

- Increased business need to reach large numbers of consumers for informational and other purposes, such as debt collection
- Companies turning to evolving technologies
- Regulators can't keep up, leaving muddle of ambiguity
  - Complicating compliance efforts
  - Leading to exploitation by zealous plaintiffs' bar

## Other Factors Driving Attention

- Consumers are increasingly reachable only via wireless devices, more heavily regulated under the TCPA
- Robocalls can now be placed from anywhere, virtually for free, using VoIP

## What We're Up Against

- Along with FTC's Telephone Sales Rule ("TSR"), TCPA is wildly popular with consumers
- Congress knows it; the FCC knows it
- And the numbers prove it
  - TCPA-related complaints constitute by far the majority of all consumer complaints to the FCC
  - FCC's 5/9/13 Report of 4th Q 2012 Inquiries and Informal Complaints:
    - 36,230 out of 38,428 wireline complaints (94%)
    - 23,965 out of 30,090 wireless complaints (80%)



## The Result

- Increased enforcement by the FCC
- Revised regulations, creating greater compliance burdens
- Hesitation to clarify ambiguities at the risk of displeasing Congress and consumers

## FCC Enforcement Process

- Agency sends “citation of the violation charged” pursuant to 47 USC 503(b)(5), generally in response to consumer complaints
- Recipient has opportunity to rebut charges
- After any adverse finding:
  - FCC publishes Citation and Order (fair game for class action lawyers!)
  - Future violations can result in monetary forfeitures, not only for new violations, but for earlier violations covered by citation

## Increased Enforcement

- Maximum forfeiture currently \$16,000 per violation
- FCC now imposing maximum forfeitures in egregious cases
  - 5/3/2013 - \$978,500 forfeiture against Patrick Keane/the Street Map Company for willful, repeated violations of Section 227(b)(C) and Section 64.1200 (a)(4) of FCC's rules for delivering 100 unsolicited ads to 90 consumer fax machines
  - 3/15/2013 - 2 Citations and Orders, to Democratic Dialing and to Dialing Services, LLC (also all owners, principals, officers) for making millions of auto-dialed calls to wireless phones (and for leaving prerecorded/artificial voice messages) w/o prior authorization and w/o providing required identifying information; FCC opined: any future enforcement action based on just first 300 of the cited violations would result in potential forfeiture of \$4,800,000



## Greater Compliance Burdens: 2/15/2012 Report and Order

- Where possible, synchronized TCPA and TSR rules
- Eliminated “established business relationship” exemption to rule that telemarketing robocalls to residential wireline phones can occur only with prior express consent from consumers
- Requires that all prerecorded telemarketing messages include an automated, interactive “opt-out” mechanism (eff. 1/14/13)

## New Obligations – FCC's 2/12/2012 Report and Order

- Alters process for measuring call abandonment rates (effective 11/15/2012)
  - TCPA limits telemarketers to a 3% call abandonment rate (“dead air calls”) when using predictive dialers
  - Order modifies FCC’s rule to require that assessment of call abandonment rate occur during single calling campaign, over 30 day period
    - If campaign exceeds 30 days, rate to be calculated for each subsequent 30 day period (or portion thereof) during calling campaign
    - Single marketing campaign defined as offer of the same good or service for the same seller (even if different wording in scripts)

## And the Big One!

- Effective 10/16/13, telemarketers must obtain prior express written consent from consumers before calling their wireline or wireless phones with prerecorded telemarketing messages and before using an autodialer to call or text their wireless numbers with telemarketing messages

## Still to Come!

- TCPA bans autodialed calls to public safety phones w/o emergency purpose or prior express consent
- Compliance difficult; problems increasing, sometimes dramatic
- Congress – acted in 2012 Middle Class Tax Relief and Job Creation Act; FCC rules -10/2012
- Agency will create, and those making robocalls will have to check, a Do-Not-Call Registry of Public Safety Answering Point (“PSAP”) phone numbers
- Monetary penalties between \$10,000 and \$100,00 for each autodialed call to registered number; higher penalties for dissemination of registered numbers (\$100,000 to \$1 million per episode)
- 5/13/2013 – Small Entity Compliance Guide summarizing new rules; stating some operational details remain to be resolved; public notice to be issued with rules’ effective date once registry is operational. **STAY TUNED!**

## Today's Hot Topics

### Plenty of Questions; Just No Answers

- Perhaps as many as a dozen requests for declaratory rulings await resolution by the FCC
  - Virtually all have been filed by, or on behalf of, businesses seeking interpretations of ambiguous aspects of TCPA
  - Many have been at issue for at least several years
  - Most involve questions that have generated litigation, often class actions
  - Yet the FCC appears unwilling, due to TCPA's popularity, high volume of complaints, to provide any advice that might be seen as "anti-consumer"

# Unless the Commission is on really safe ground

- **SoundBite Communications, Inc.**
  - 11/26/2012 - FCC agreed that single confirming text message sent immediately after a “do not text” request does not violate TCPA
  - Issue had generated numerous class actions against major companies and was starting to result in large settlements
  - Confirming texts had been adopted as “best practice” in guidelines of Mobile Marketing Association
  - Politically powerful entities weighed in
  - Most important – consumer group supported practice as in public interest

## Or its back is up against the wall!

- **DISH Network et al**

- 3 related petitions filed in early 2011, resulting from judicial primary jurisdiction referrals, involving litigation stayed pending FCC rulings
- All questioned whether TCPA's prerecorded message and do-not-call provisions create seller liability for unlawful marketing calls made by others on seller's behalf
- 5/9/2013 -FCC found sellers may be vicariously liable under federal common law agency principles for violations of sections 227(b),(c) by telemarketers who initiate calls to market sellers' products or services

# Primarily, though, Important Questions Await Decisions that Never Come

- Small sample of pending requests
  - Automatic Telephone Dialing System (“ATDS”) – Is it this? Is it THIS?
    - **Communication Innovators** – asks FCC to clarify that predictive dialers not used for telemarketing purposes and without the current ability to generate and dial random or sequential numbers are not ATDS’s
  - Prerecorded Messages
    - **CallAssistant, LLC** – asks FCC to clarify relevance of prerecorded message rules to company’s use of operator supervised prerecorded call segments that enable calling agents to interact with the called party by using the agent’s own voice or by pressing button to substitute appropriate audio recording response



## Plenty of Questions; Just No Answers

- Consent – What to Get, How Get it, Who to Get it from!
  - **Paul D. S. Edward** – asks FCC whether creditor may place autodialed or prerecorded message calls to telephone number associated with wireless service, if number when initially provided was landline
  - **Cargo Airline Association** – asks Agency whether package delivery companies can rely on sender representations that intended package recipients consented to receiving autodialed/prerecorded calls to wireless numbers for notification purposes regarding package shipments

## So What's A Person To Do?

- Try always to obtain prior express written consent to reach out to a debtor, customer or potential customer at the time a debt is created, a relationship is established, an inquiry is made, at any of the phone numbers provided
- Clearly state exactly what it is that the customer is consenting to; anything other than unambiguous language could impact your ability to rely on such consent as an affirmative defense in any subsequent litigation
- Indicate up front that “by providing any telephone number for contact purposes, you are confirming that the telephone number you are providing belongs to you and not to a family member or other third party”
- For debt collection purposes, use a disclosure such as, “by signing here and disclosing your mobile telephone number, you are agreeing that we or our agents or contractors can call you on that number using an automatic telephone dialer and/or that we or our agents or contractors can leave a prerecorded and/or text message on that number”

## So What's A Person To Do? (cont'd)

- If you want to use contact information for marketing purposes, include disclosure that “by signing here you are also consenting to receive pre-recorded or automated voice marketing messages on your residential telephone unless that number appears on the national, or our company-specific, ‘Do Not Call’ list”
- Once you get prior express written consent to clearly articulated disclosure(s), make sure you keep good, admissible records of how, when, and from whom you received the consent
- Although it's far from a guarantee of protection, consider leaving your debt collection to an independent contractor, and making certain to include specific language in a written agreement with that contractor that it, and it alone, is responsible for complying with all state and federal laws and regulations, including, but not limited to, the TCPA and the FTC's Fair Debt Collection Practices Act
- Adopt internal rules designed to mitigate consumer frustration, such as procedures insuring that requests to cease calling are respected and that consumers are not unduly bombarded with high number of unwelcome interruptions in given period or at inconvenient times
- Monitor compliance with those rules on regular basis. **We have never seen a situation where a single call, or even a couple of calls, has resulted in a lawsuit or a complaint to the FCC, even if the call or calls were in violation of some provision of the TCPA.**



# Insurance for TCPA Liabilities

---

# Insurance for TCPA Liabilities

- Commercial General Liability (CGL) Insurance
  - Coverage A: Property Damage Liability
  - Coverage B: Advertising and Personal Liability
- Directors & Officers Liability (D&O) Insurance
- Other Insurance Products

## CGL – Coverage A Property Damage Liability

- The “loss of use” of property, even if it is not physically damaged, normally falls within the insurance policy’s definition of “property damage”
- Legislative history shows that in addition to privacy concerns TCPA was enacted to remedy the loss of the recipients' paper and ink, as well as loss of use of fax machines. Testimony cited in Eighth Circuit decision (*Missouri ex rel. Nixon v. American Blast Fax*) – unsolicited fax advertisements could shift more than one hundred dollars per year in advertising costs to the recipient.
- Property Damage must be caused by Occurrence. Question is whether property damage was expected or intended by sender.



## CGL – Coverage B Advertising and Personal Liability

- Covers Invasions of Privacy
- “Oral or written publication, in any manner, of material that violates a person’s right of privacy” (the “Publication Language”)
- “Making known to any person or organization covered material that violates a person’s right to privacy” (the “Making Known Language”)

# TCPA

## Violation of Privacy Rights

- Key Purpose of TCPA is to protect privacy:
  - To protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers



## Privacy: Secrecy and Seclusion

- Insurance Companies argue that TCPA protects against violations of right to seclusion, while policy covers only violations of right to secrecy
- “Making Known” v. “Publication” Language
- Publication Language – covers violations of privacy right to seclusion
  - *Valley Forge Insurance Company v. Swiderski Electronics, Inc.* (Illinois Supreme Court 2006)
  - Rejects *American States Ins. Co v. Capital Associates of Jackson Co. Inc.* (Seventh Circuit 2004)

## Publication: Content and Mode

- Insurance Companies argue that the *content* of the material must violate right of privacy
- Policyholders argue that either the content or the *method* of publication of the material can constitute a violation of a person's right to privacy

# Statutory Damages Compensation or Punishment?

- Policies often exclude “civil penalties, fines or assessments,” violations of “penal” statutes, and “punitive damages”
- Statutory damages of \$500 per violation compensate victims and encourage enforcement by private parties. Actual damages may be small or difficult to prove
- TCPA is not a penal statute and statutory damages are not civil penalties, fines or assessments (Illinois Supreme Ct. 2013)
  - Treble damages for willful violations may also be covered. A “willful” violation involves a conscious and deliberate act that violated the statute, irrespective of any intent to violate the law; thus, a willful or knowing violation of the TCPA is different from an intentionally malicious act that could give rise to punitive damages
  - Colorado Quirk: TCPA damages of \$500 per violation constitute a “penalty” that cannot be assigned

## TCPA Exclusions

- Most CGL policies now specifically exclude TCPA claims
- The absence of an explicit exclusion indicates an intent to insure
- If claims beyond the TCPA are asserted, the insurance company may have a duty to defend the entire suit – even if there is a TCPA exclusion

## Directors and Officers Coverage

- Claims-Made Coverage
- Covers claims for wrongful acts of directors and officers; may cover organization for wrongful acts. Entity coverage may be limited to securities claims.
- May exclude advertising and personal injury offenses
- Typically does not contain TCPA exclusion

## Umbrella Insurance

- May provide broader coverage than primary policy
- Obligation to “drop down” to provide primary coverage when broader than primary
- Usually contains TCPA exclusion but not always

## Time, Topic, Tower

- **Time** – TCPA class actions can allege injury over multiple policy periods. Check the insurance policies for all relevant periods
- **Topic** – Check different types of insurance policies – CGL, D&O, and other specialized insurance, like cyber-liability
- **Tower** – Look at all of the policies in the tower of coverage at issue, including umbrella and excess policies

# Questions?



**Henry Pietrkowski**

Partner

Chicago

+1 312 207 3904

[hpietrkowski@reedsmith.com](mailto:hpietrkowski@reedsmith.com)



**Judith L. Harris**

Partner

Washington, D.C.

+1 202 414 9276

[jlharris@reedsmith.com](mailto:jlharris@reedsmith.com)



**Timothy P. Law**

Partner

Philadelphia

+1 215 241 1262

[tlaw@reedsmith.com](mailto:tlaw@reedsmith.com)

“The Telephone Consumer Protection Act Teleseminar” by Reed Smith is to keep others informed of developments in the law. It is not intended to provide legal advice to be used in a specific fact situation; the contents are for informational purposes only.

“Reed Smith” refers to Reed Smith LLP and related entities. © Reed Smith LLP 2013.