

Should You Send That Text?

What You Need to Know About the TCPA When Sending Marketing Text Messages

By Shawn Libman



Here's a common scenario that most businesses encounter. A consumer contacts your business to inquire about services. The consumer provides a cell phone number as part of this inquiry. Can your business now market to this person directly with a text message to their cell phone? It may be just a simple text, but a small mistake can be very costly for your business.

The Telephone Consumer Protection Act of 1991¹ (TCPA) was enacted in 1991 to protect consumers from the harassment of telemarketers. Over the years, the law has evolved to include marketing faxes and text messages. The law was born out of the rise of Automatic Telephone Dialing Systems (also known as "Autodialers") and robocallers. TCPA gives consumers a basis to file a lawsuit and receive statutory damages for unsolicited calls, faxes and text messages.

In the last few years there has been a sharp rise in individual and Class Action TCPA lawsuits just for sending text messages. Courts have interpreted a text message to a cell phone to be a "call" within the meaning of TCPA.² Consumers who receive unsolicited text messages have teamed up with law firms across the United States to pursue these lawsuits. The consumer is not required to give any pre-filing notice of the imminent lawsuit. They are also not required to first request that the text messages be stopped. If the consumer receives a text message without prior express consent, there is a potential TCPA violation claim if the consumer can prove it was done with an Autodialer.

It is no surprise that there is a rise in these lawsuits. The violations can cost anywhere from \$500 to \$1,500 per text, per claimant. For example, if a business sent 10 text messages to one consumer, there is a potential statutory fine of \$5,000 to a single consumer if they can prove a TCPA violation. These fines can skyrocket if there are Class Action claims.

¹ Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227

² Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 269 n. 2 (3d Cir.2013).

If the consumer can prove the TCPA violation was done "willfully or knowingly," then the fine can go up to \$1,500 per text, per claimant. The TCPA statute allows the Court to determine whether the business acted "willfully or knowingly" when deciding the amount of statutory damage. Some factors the Courts have considered are the length of time the text messages were sent (continuous over the course of many years) or continuing sending text messages even after a TCPA lawsuit was filed. Some Courts have refused to award the full \$1,500 per text after considering the financial status of the business and whether a large judgment would put the business in financial ruin.

Class Action settlements may award a reduced amount below \$500 to each Class Member. For example, the JP Morgan class action settlement³ resulted in Class Members being awarded between \$5 and \$101, with many Class Members reporting receiving checks in the amount of \$45.74. In the Bloomingdales settlement⁴, Class Members were allowed to choose between receiving a \$25 check or a \$50 voucher. The Lead Plaintiff in that case also received a separate award of \$10,000. In the Alarm.com settlement⁵, the estimated payment to each Class Member was \$95 to \$143.

Individual TCPA claims do not provide for recovery of attorneys' fees, but Class Action settlements often include a portion of the common fund being allocated for attorneys' fees. Law firms that take these cases are banking on multiple texts to a large class to recover their fees.

Small businesses run the risk of losing everything over just a few seemingly innocuous text messages. Large companies have seen multi-million-dollar Class Action set-

³ Barrow, et al. v. JP Morgan Chase Bank NA, Case No. 1:16-cv-03577, in the U.S. District Court for the Northern District of Georgia

⁴ Ashkenazi v. Bloomingdale's Inc., et al., Case No. 3:15-cv-02705, in the U.S. District Court for the District of New Jersey

⁵ Abante Rooter and Plumbing Inc., et al. v. Alarm.com Inc., et al., Case No. 4:15-cv-06314, in the U.S. District Court for the Northern District of California

lements over TCPA violations.⁶ Therefore, businesses must know the requirements of the Act and create a marketing plan to avoid a TCPA violation.

Consider these factors to determine whether you are subjecting your business to potential TCPA violations.

Is the device your business uses to send the text message considered an Autodialer?

The device a business uses to send a text message is an important factor when considering whether a business has violated TCPA. Only text messages sent *using an Autodialer* violate the TCPA. TCPA defines an “automatic telephone dialing system” (or an Autodialer) 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.”⁷

In 2018 the FCC, via the Consumer and Governmental Affairs Bureau, requested public comment on several TCPA issues, including the interpretation of an “automatic telephone dialing system.”⁸ This was in direct response to the case of *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), where the Washington DC Circuit Court of Appeals rejected the FCC’s interpretation of an Autodialer as being “utterly unreasonable.” The decision focused on the question of what kind of technology is considered an Autodialer? The Court wondered whether an expanded definition could potentially turn every smart phone into an Autodialer. As of the date of this article being published, the FCC has not yet issued a final rule. This is an area of law businesses must monitor if they are concerned they are using an Autodialer.

Some Courts have started reconsidering prior rulings based on the *ACA International* decision. Most recently, in *Johnson v. Yahoo!, Inc.*, No. 14-2028 (N.D. Ill. 2018), the Court granted a Motion for Reconsideration resulting in Summary Judgment being entered for the Defendant. The Court held that the *ACA International* decision changed the definition of an Autodialer, which gave the Court grounds for reversing its prior decision. The Court stated that an automatic telephone dialing system (“ATDS”) is not a device that sends messages from a “curated list

⁶ Some examples of large TCPA class action payouts are the Steve Madden \$10 million settlement, Western Union \$8.5 million settlement, Dominos Pizza \$10 million settlement, Papa Johns \$16.335 million settlement, Alarm.com \$28 million settlement, Ubers \$3.99 million settlement, American Eagle \$14.5 million settlement among many others.

⁷ Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(a)(1)

⁸ Public Notice DA 18-493

developed without random or sequential number generation capacity.”

In the meantime, Courts across the United States are conflicted on what is considered an Autodialer. The conflicting case law both expands and retracts what falls within the definition. The United States Court for the Ninth Circuit⁹ has an expansive view of an Autodialer, holding that it “includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.”¹⁰ The Eleventh Circuit has held that if the device needs “human intervention” then it is not considered an Autodialer.¹¹ When evaluating a TCPA claim, determining how the text message is sent is a critical part of building the defense.

The Supreme Court may weigh in on this issue soon. The case of *PDR Network LLC v. Carlton & Harris Chiropractic Inc.*, Docket No. 17-1705, is scheduled for oral argument in March 25, 2019. That decision may determine whether the district court has to accept the FCC legal interpretation of TCPA pursuant to the Hobbs Act. This could potentially unify the courts on how to interpret various provisions of TCPA.

If your client has received a TCPA lawsuit, the first step is check the case law in your jurisdiction. If your court has a narrow interpretation of what is considered an Autodialer, you may have a very strong defense and grounds for summary judgment.

Do you have express consent to send the text?

On October 16, 2013, the FCC changed the TCPA consent requirements. Businesses are now required to obtain prior express consent to send telemarketing calls, which includes text messages. The law is clear—the express consent must be unambiguous. The business must give the consumer a “clear and conspicuous disclosure” informing the consumer that they will receive telemarketing messages, including auto-dialer and/or pre-recorded messages. The consent cannot include the condition of purchasing anything. Lastly, the consumer must voluntarily provide the phone number to the business as opposed to it being auto-populated from another source. The consent must include either a physical signature (on a document) or an electronic signature. If an online form is used, ask the consumer to click a box to

⁹ *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018)

¹⁰ *Adams v. Ocwen Loan Servicing, LLC*, No. 18-81028-CIV, 2018 WL 6488062, at *3 (S.D. Fla. Oct. 26, 2018) citing *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018).

¹¹ *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F.Supp.3d 1262, 1265-66 (S.D. Fla. 2018).

acknowledge specifically that they are providing express consent to receive text messages, so their consent does not get confused with the agreement to other general terms of use.

Make sure the express consent specifically requires the consumer to agree to receive “advertisements or telemarketing message using an automatic telephone dialing system or an artificial prerecorded voice.” The business should text only the specific phone number provided by the consumer that is accompanied by the express consent. It is not enough for the consent to simply agree to general marketing. The express consent must agree to receive text messages. It is not enough for a consumer to give their cell phone number without the express consent. Also, a business needs to explain to the consumer how to opt-out of text messaging at any time.

The business should keep records of the consent provided by the consumer in case a lawsuit is filed. Create a standard form that requires the consumer to sign or initial the agreement where they give express consent. Train all employees who participate in marketing efforts on the express consent requirements so they don’t mistakenly send text messages to the wrong consumers.

Have you given the text recipient a way to opt-out of future texts?

The business needs to give the text recipients a way to opt-out of receiving texts. Consumers must be allowed to opt-out via text, orally or otherwise in writing. Often, marketing texts are followed by language informing the recipient to text “STOP” to discontinue receiving text messages. This is one method businesses provide to allow the consumer to discontinue receiving text messages. As soon as the business learns that the consumer has opted out, the business must immediately cease all text communications going forward. Continuing to text after receiving an opt out could increase potential fines under TCPA. A business should take all precautions and steps necessary to properly manage a do not call/text list to avoid violations of TCPA.

Does your business fall under one of the other exceptions to TCPA?

If your text messages have no marketing angle and are simply informative, you may fall within the exception of TCPA. Limited exceptions have been given to health care

providers¹², schools¹³, cell phone carriers and some debt collectors¹⁴. A 2018 California case granted summary judgment for a defendant when the texts sent from a hotel booking website were considered “transactional” rather than “advertising” or “telemarketing.”¹⁵

For example, schools can use an application to text parents and students to remind them of upcoming events. Be warned, these are very narrow exceptions to TCPA. If the school uses that same application to inform parents and students about an upcoming bake sale, they may potentially violate TCPA. Once a marketing angle is involved in the text, the text may lose its exemption.

What Can a Business Do to Protect Itself?

If your client is looking to you for advice on how to send a text message, the answer may not be so easy because the definition of an Autodialer is still in flux. This could be particularly problematic if the business has a large database of phone numbers and doesn’t have express consent from all consumers. They may need a system for sending mass text messages due to the volume of clients. Consider the following:

- Urge your client to get express consent to send a text, because that is the easiest defense.
- If express consent isn’t an option, use a device that can arguably not be considered an Autodialer.
- Use only a curated list of phone numbers obtained directly from clients (not obtained from other sources) and insert a “human intervention” element when sending the texts.

A business may consider hiring a reputable company that helps manage text message marketing. However, they should be careful not to fall victim to a scam where they are promised to increase their client base overnight. Those marketing scams could potentially create significant exposure by using randomly generated phone number databases that are possibly in violation of TCPA. Your client should limit their marketing efforts to those consumers who provide express consent. They should also consider negotiating into a marketing service contract a requirement

¹² In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 8031-8032, 2015 WL 4387780 at *49-50

¹³ Blackboard/Edison TCPA Declaratory Ruling, 31 FCC Rcd 9054 (11)

¹⁴ 47 U.S.C. § 227(b)(1)(A)(iii)

¹⁵ Phan v. Agoda Co. Pte. Ltd., No. 16-CV-07243-BLF, 2018 WL 6591800 (N.D. Cal. Dec. 13, 2018)

for defense and indemnification in case there are claims for TCPA violations that arise out of that marketing.

Be warned, lawsuits are being filed without knowing whether an Autodialer is being used. In those cases, your client may still have to take on the expense of fighting a baseless lawsuit, with potential Class Action claims. They will need to be prepared to incur the expense of written discovery, depositions and Summary Judgment to prove they weren't using an Autodialer. In some of those cases, it may be better to protect the client and avoid disclosure of the client database (and a list of potential new Plaintiffs to opposing counsel) by resolving the case for a minimal cost of defense. There is a potential to get these cases resolved early and quickly at a minimal cost to the client if you have a reasonable opposing counsel.

Insurance Coverage?

Companies may think they are protected under their insurance policies because a TCPA violation could be considered an "advertising injury." However, many insurance policies specifically exclude TCPA violations from coverage. If one insurance policy excludes coverage, you may also want to consider the company's Errors and Omissions Policy. Also, some courts have held that TCPA exclusions are unenforceable.¹⁶

Issues for Franchisors/Franchisees

One potential issue for franchisors/franchisees to be aware of is the sharing of a client database. The franchisor may

¹⁶ See *Cincinnati Insurance Co. v. Chapman*, 2016 IL App (1st) 150919, ¶ 1, 403 Ill. Dec. 887, 889, 55 N.E.3d 74, 76 (May 23, 2016).

have obtained the cell phone number when a potential customer signs up for information online. The franchisor may have obtained general "marketing" consent but did not obtain express consent to receive text messages. The franchisee should make sure they take the extra step to obtain that express consent before sending any texts to those customers. A franchisee may not be familiar with this area of law. Many are not financially able to absorb the cost of this type of lawsuit. Franchisors should ensure that they are informing their franchisees by providing them with guidance and warnings concerning TCPA. If the franchisor has not obtained prior express consent for text messaging, they should inform the franchisee that an extra step is needed before those texts are sent to customers.

Conclusion

Businesses and lawyers should all be aware of this area of law. We have seen small businesses get blindsided by a lawsuit and learn an expensive lesson on marketing. Many large companies across the United States have also seen multimillion dollar settlements and verdicts for failing to get express consent to calls or texts. Educate yourself and your clients now and avoid exposure in the future.

Shawn Libman is a partner at law firm of Bowman and Brooke, LLP, in Miami, Florida. She earned her JD from the University of Miami in 2004 and is admitted to practice law before the State and Federal Courts of Florida. She handles a variety of personal injury and commercial litigation cases for retail and hospitality clients.