

TCPA Compliance and Litigation Trends: Is It Advertising?

Justin O. Kay, Drinker Biddle & Reath LLP

www.TCPAblog.com

I. Pertinent Regulations:

Cell Phones:

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

...

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

...

(2) Initiate, or cause to be initiated, **any telephone call** that includes or introduces an **advertisement** or constitutes **telemarketing**, using an **automatic telephone dialing system** or an **artificial or prerecorded voice**, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made **with the prior express written consent of the called party** or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

47 C.F.R. § 64.1200(a)(1)-(2) (effective October 16, 2013) (emphasis added).

Residential Land Lines:

(a) No person or entity may:

...

(3) Initiate any telephone call to any residential line using an **artificial or prerecorded voice** to deliver a message **without the prior express written consent of the called party**, unless [exceptions];

47 C.F.R. § 64.1200(a)(3) (effective October 16, 2013) (emphasis added).

Fax Machines:

(a) No person or entity may:

...

(3) Use a telephone facsimile machine, computer, or other device to send an **unsolicited advertisement** to a telephone facsimile machine, unless [exceptions]-

47 C.F.R. § 64.1200(a)(4) (effective October 16, 2013) (emphasis added).

II. Definitions:

Advertisement:

The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

47 C.F.R. § 64.1200(f)(1).

Telemarketing:

The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

47 C.F.R. § 64.1200(f)(12).

Telephone Solicitation:

The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

- (i) To any person with that person's prior express invitation or permission;
- (ii) To any person with whom the caller has an established business relationship;
or
- (iii) By or on behalf of a tax-exempt nonprofit organization.

47 C.F.R. § 64.1200(f)(14).

Unsolicited Advertisement:

The term 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.

47 C.F.R. § 64.1200(f)(15).

III. FCC Guidance:

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, FCC 92-443, Released October 16, 1992

¶36. “In addition, we tentatively concluded that debt collection calls are exempt from the TCPA’s prohibitions against prerecorded message calls because they are commercial calls which do not convey an unsolicited advertisement and do not adversely affect residential subscriber rights.”

¶41. “Some commenters urge the Commission to expressly exempt specific categories of additional organizations such as market research or polling organizations. We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.”

Note 85. “We emphasize that telephone solicitations as defined in our rules can never be classified as “emergencies.””

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 02-250, September 18, 2002

¶30. “Therefore, the Commission determined that calls conducting research, market surveys, political polling, or similar activities which do not involve solicitation as defined by the rules are exempt from the prohibition on prerecorded messages.”

¶31. “Such calls arguably have a dual purpose, as in the case when a business calls to inquire about a customer’s satisfaction with a product or service already purchased, but is nevertheless motivated in part by the desire to ultimately sell additional goods or services.”

Note 117. “Among the examples of calls that do not include the transmission of any unsolicited advertisement, the Commission cited calls from a business that wishes to advise its employees of a late opening time due to weather; or calls from a nationwide organization that wishes to remind members of an upcoming meeting or change in schedule; or calls from a catalogue or delivery company to confirm the arrival, shipment, or delivery date of a product to a customer.”

**In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,
CG Docket No. 02-278, FCC 03-153, July 3, 2003.**

¶49. “We also decline to establish an exemption for calls made to set “face-to-face” appointments per se. We conclude that such calls are made for the purpose of encouraging the purchase of goods and services and therefore fall within the statutory definition of telephone solicitation.”

¶128. “We reaffirm the determination that calls made by a for-profit telemarketer hired to solicit the purchase of goods or services or donations on behalf of a tax-exempt nonprofit organization are exempted from the rules on telephone solicitation. If, however, a for-profit organization is delivering its own commercial message as part of a telemarketing campaign (i.e., encouraging the purchase or rental of, or investment in, property, goods, or services), even if accompanied by a donation to a charitable organization or referral to a tax-exempt nonprofit organization, that call is not by or on behalf of a tax-exempt nonprofit organization. Similarly, a seller that calls to advertise a product and states that a portion of the proceeds will go to a charitable cause or to help find missing children must still comply with the TCPA rules on commercial calls.”

Note 414. “We again reiterate that calls that do not fall within the definition of “telephone solicitation” as defined in section 227(a)(3) will not be precluded by the national do-no-call list. These may include calls regarding surveys, market research, and calls involving political and religious discourse.”

Note 459. “Among the examples of calls that do not include the transmission of any unsolicited advertisement, the Commission cited calls from a business that wishes to advise its employees of a late opening time due to weather; or calls from a nationwide organization that wishes to remind members of an upcoming meeting or change in schedule, or calls from a catalogue or delivery company to confirm the arrival, shipment, or delivery date of a product to a customer. We reiterate that such calls also would typically be covered by the exemption for an established business relationship.”

¶138. “One company explained that it uses prerecorded message to notify its customers about delinquent bills or changes in service, and to simultaneously inform them of alternative services and products. Another commenter described messages sent by a mortgage broker alerting homeowners to lower interest rates and offering refinancing options.”

¶140. “The TCPA’s definition does not require a sale to be made during the call in order for the message to be considered an advertisement. Offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute “advertising the commercial availability or quality of any property, goods, or services.”

¶141. “We agree with those commenters who suggest that application of the prerecorded message rule should turn, not on the caller’s characterization of the call, but on the purpose of the message.”

¶142. “The so-called “dual purpose” calls described in the record – calls from mortgage brokers to their clients notifying them of lower interest rate, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers – would, in most instances, constitute “unsolicited advertisements,” regardless of the customer service element to the call. The Commission explained in the 2002 Notice that such messages may inquire about a customer’s satisfaction with a product already purchased, but are motivated in part by the desire to ultimately sell additional goods or services. If the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement. Similarly, a message that seeks people to help sell or market a business’ products, constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property, goods, or services, during or after the call. Purporting to obtain consent during the call, such as requesting that a consumer “press 1” to receive further information, does not constitute the prior consent necessary to deliver the message in the first place, as the request to “press 1” is part of the telemarketing call.”

Note 477. “Therefore, a prerecorded message that contains language describing a new product, a vacation destination, or a company that will be in “your area” to perform home repairs, and asks the consumer to call a toll-free number to “learn more,” is an “unsolicited advertisement” under the TCPA if sent without the called party’s express invitation or permission. However, as long as the message is limited to identification information only, such as name and telephone number, it will not be considered an “unsolicited advertisement” under our rules.”

¶145. “We conclude that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that “does not include the transmission of any unsolicited advertisement” and under the amended rules as a “commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation. The Commission reiterates, however, that messages that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are “advertisements” as defined by the TCPA.”

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 06-42, Released April 6, 2006

¶ 43. “We clarify that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a

request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA.”

¶ 49. “We agree with those petitioners who argue that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the TCPA’s facsimile advertising rules. For example, a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, is not an advertisement of the commercial availability of such items. Similarly, messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, subscription, membership, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender’s product or service, is not an advertisement. Communications sent to facilitate a loan transaction, such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate) and other similar documents are not advertisements when their purpose is to complete the financial transaction. A travel itinerary for a trip a customer has agreed to take or is in the process of negotiating is not an unsolicited advertisement. Similarly, a contract to be signed and returned by the agent or traveler that is for the purpose of closing a travel deal is not an advertisement for purposes of the prohibition. A communication from a trade show organizer to an exhibitor regarding the show and her appearance will not be considered an unsolicited advertisement, provided the exhibitor has already agreed to appear. We also conclude that a mortgage rate sheet sent to a broker or other intermediary or a price list sent from a wholesaler to a distributor (e.g., food wholesaler to a grocery store) for the purpose of communicating the terms on which a transaction has already occurred are not advertisements.”

¶ 50. “In order for such messages to fall outside the definition of “unsolicited advertisement,” they must relate specifically to existing accounts and ongoing transactions. Thus, applications and materials regarding educational opportunities and conferences sent to persons who are not yet participating or enrolled in such programs are unsolicited advertisements and require the recipient’s permission or the existence of an established business relationship before faxing the recipient such information. Similarly, a rate sheet on financial products transmitted to a *potential* borrower or *potential* brokers would not be considered merely “transactional” in nature and would require the sender to either have an established business relationship with the recipient or first obtain express permission from the recipient.”

¶ 53. “By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules.”

Note 180. Commercial facsimile messages that advertise the commercial availability or quality of property, goods, or services, but purport to be “price

sheets” or “rate sheets” in order to evade the TCPA rules, are nevertheless unsolicited advertisements, if not sent for the purpose of facilitating, completing, or confirming an ongoing transaction.

¶51. In response to arguments that a de minimis amount of advertising information should not convert a communication into an “unsolicited advertisement,” we conclude that a reference to a commercial entity does not by itself make a message a commercial message. For example, a company logo or business slogan found on an account statement would not convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient.

¶52. We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA’s definition. In many instances, “free” seminars serve as a pretext to advertise commercial products and services. Similarly, “free” publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the “quality of any property, goods, or services.” Therefore, facsimile communications regarding such free goods and services, if not purely “transactional,” would require the sender to obtain the recipient’s permission beforehand, in the absence of an EBR.

Note 187. In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a bona fide “informational communication.” In determining whether the advertisement is to a bona fide “informational communication,” the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, i.e., to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or “transactional” messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization’s monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender.

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 07-232, Released January 4, 2008

¶4. “In the 1992 TCPA Order, the Commission concluded that an express exemption for debt collection calls to residences was unnecessary as such calls

fall within the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement and for established business relationships.”

¶11. “However, we agree with ACA and other commenters that calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing.”

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 12-21, Released February 15, 2012

¶3. “None of our actions change requirements for prerecorded messages that are non-telemarketing, informational calls, such as calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings.”

¶6. “The Commission further determined that an autodialed or prerecorded all that consists of a free offer, coupled with offers of goods or services for sale, constitutes an advertisement and is prohibited, unless otherwise exempted.”

¶9. “Because the Commission determined that debt collection calls are not telemarketing calls, it concluded that a specific exemption for debt collection calls was not warranted.”

¶17. “The Commission stated in the 2010 TCPA NPRM that its proposals would not affect the regulatory treatment of prerecorded messages calls that are not covered by the TCPA rules at issue here, such as calls by or on behalf of tax-exempt non-profit organizations; calls for political purposes, including political polling calls and other calls made by politicians or political calling campaigns; and calls made for other noncommercial purposes, including those that deliver purely “informational” messages – for example, prerecorded calls that notify recipients of a workplace or school closing. In addition, the Commission stated that because the TCPA’s restrictions on prerecorded messages do not apply to calls initiated for emergency purposes the proposed changes would not affect messages sent to consumers to alert them to emergency situations, including, for example, emergency messages permitted by the WARN Act and/or the Commercial Mobile Alert System (CMA).”

¶30. “The Commission asserted that in evaluating dual-purpose calls, it would determine whether the call includes an advertisement. The Commission provided that if the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement.”

¶31. “We believe that the intent of calls made pursuant to the Recovery Act, when the call is made by the consumer’s loan servicer, is to fulfill a statutory requirement rather than offer a service for sale. Similarly, the Commission, in analyzing telephone solicitation, states that the application of the prerecorded

message rule should turn, not on the caller's characterization of the call, but on the purpose of the message. In this instance, we find that the home loan modification and refinance calls placed pursuant to the Recovery Act generally are not solicitation calls and do not include or introduce an unsolicited advertisement, when those calls are made by the consumer's loan servicer, because the primary motivation of the calling party is to comply with that statute's outreach requirements."

¶57. "The HIPAA statute strives to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, and to simplify the administration of health insurance, among other purposes. With limited exceptions, HIPAA requires an individual's written authorization before his or her protected health information can be used or disclosed for marketing purposes. In view of the privacy protections afforded under HIPAA, we exempt from our consent, identification, time-of-day, opt-out, and abandoned call requirements all prerecorded health care-related calls to residential lines that are subject to HIPAA."

¶59. "First, the FTC found that delivery of health care-related prerecorded calls subject to HIPAA is already regulated extensively at the federal level. Second, it found that coverage of such calls by the TSR could frustrate the Congressional intent embodied in HIPAA, as well as other federal statutes governing health care-related programs. Third, the FTC found that the number of health care providers who might call a patient is inherently quite limited – as is the scope of the resulting potential privacy infringement – in sharp contrast to the virtually limitless number of businesses potentially conducting commercial telemarketing campaigns. Fourth, the FTC found that there is no incentive, and no likely medical basis, for providers who place health care-related prerecorded calls to attempt to boost sales through an ever-increasing frequency or volume of calls. Fifth, the FTC concluded that the existing record did not show that "the reasonable consumer" would consider prerecorded health care calls coercive or abusive. Finally, FTC enforcement experience did not suggest that health care-related calls have been the focus of the type of privacy abuses the exemption was intended to remedy."

¶60. "For the reasons discussed herein and consistent with the FTC's action, we exempt from our consent, identification, time-of-day, opt-out, and abandoned call requirements applicable to prerecorded calls all health care-related calls to residential lines subject to HIPAA. Therefore, pursuant to Section 227(b)(2)(B) of the Act, which allows the Commission to establish an exemption for specified prerecorded calls that are commercial in nature if such calls will not adversely affect consumer privacy rights and do not include an unsolicited advertisement, we find that prerecorded calls to residential lines that are subject to HIPAA should be exempted from the consent, identification, time-of-day, opt-out, and abandoned call requirements under our TCPA rules. Furthermore, we agree with

commenters that assert these calls serve a public interest purpose: to ensure continued consumer access to health care-related information.”

¶61. “As has the FTC, we find that HIPAA’s existing protections, which we describe below, already safeguard consumer privacy, and we therefore do not need to subject these calls to our consent, identification, opt-out, and abandoned call rules. Unless the covered entity secures the individual’s written authorization, HIPAA allows marketing only if the communication imparts information about a product or service that is included in a health care benefits plan offered by the covered entity, gives information concerning treatment, or describes goods or services for case management or care coordination.”

¶62. “A second commenter opposes a HIPAA exemption but misjudges the effect of an exemption, not acknowledging that without an exemption, calls permitted by HIPAA would be prohibited by our existing rules.”

¶63. “In the FTC’s TSR proceeding, concern was raised, in relevant part, whether immunization reminders, health screening reminders, medical supply renewal requests, and generic drug migration recommendations would constitute inducements to purchase goods or services. In our proceeding, one commenter argues that a call “pushing” flu vaccines would be illegal under the TCPA. With respect to the privacy concerns that the TCPA was intended to protect, we believe that prerecorded health care-related calls to residential lines, when subject to a HIPAA, do not treat heavily upon the consumer privacy interests because these calls are placed by the consumer’s health care provider to the consumer and concern the consumers’ health. Under the second prong of the TCPA exemption provision, which requires that such calls not include an unsolicited advertisement, *we find the calls at issue here are intended to communicate health care-related information rather than to offer property, goods, or services and conclude that such calls are not unsolicited advertisements.”

Note 187. “For example, without reaching the merits, a prerecorded, health care-related call notifying a family that a student reaching the age of majority on a parental policy will lose coverage and then offering continuation coverage may be considered an unsolicited advertisement under the TCPA. This communication is not considered “marketing” under HIPAA and would be allowed.”

Note 195. “Because these health care-related calls’ intent and purpose concern consumers’ health, not the purchase of a good or service, as required by the definition of advertisement, we believe that these calls are not advertisements. For these same reasons, we believe that these calls are not telephone solicitations.”

In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 14-33, Released March 27, 2014

¶1. “At the same time, our goal is to make sure the TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms TCPA was designed to prevent. We clarify that text-based social networks may send administrative texts confirming consumers’ interest in joining such groups without violating the TCPA because, when consumers give express consent to participate in the group, they are the types of expected and desired communications TCPA was not designed to prohibit, even when that consent is conveyed to the text-based social network by an intermediary.”

IV. Case Law

ARCare v. IMS Health, Inc., 2016 U.S. Dist. LEXIS 125262, No. 2:16cv00080 (E.D. Ark. Sept. 15, 2016):

Healthcare Data Solutions (HDS) works with pharmacies and prescribers to ensure the confidential exchange and confirmation of patient information. We want to verify that your fax number is compliant and secure to protect patient's information and allow pharmacies to verify prescriber information regarding prescription refill requests. Thank you for your time.

Id. at *2 (granting motion to dismiss claims that fax was unsolicited advertisement).

Alleman v. Yellowbook, 2013 U.S. Dist. LEXIS 127212 (S.D. Ill. Sep. 6, 2013):

Hi this is Yellowbook calling to verify that you received your Yellowbook phone directory. If you have not received the new directory or you'd like to request additional books, please contact Yellowbook at 1-888-492-8721 to speak to one of our customer service representatives-again that number is 1-888-492-8721. Thank you for your time. Good bye.

Id. at *2 (granting motion to dismiss claims that prerecorded call to residential land line was advertising or telemarketing).

Bank v. Uber Tech, Inc., 2015 U.S. Dist. 166302, No. 15cv4858 (E.D.N.Y. Dec. 11, 2015), aff'd 2016 U.S. App. LEXIS 18641 (Oct. 18, 2016).

Hi. It's Molly with Uber, and we need your help. Uber ended the days when you couldn't get a ride home because cabs didn't want to leave Manhattan. Now Mayor de Blasio is trying to bring the bad old days back because his millionaire taxi donors are telling him to. But why on earth would your Council Member ever consider voting for something like this? They should stand up for you, not take orders from the mayor. Your Council Member is sponsoring this bill, and we need your voice. Please call your council member, and tell them to take their names off Mayor de Blasio's anti-Uber bill. Because you, and all New Yorkers, deserve reliable transportation. Paid for by Uber 212 257-1745.

.....

Hi. It's Derrick with Uber, and we need your help. Uber ended the days when New Yorkers had to worry about being able to find a reliable ride home; but now, Mayor de Blasio [*3] wants to cap the number of drivers that can partner with us, ending Uber as you know it, just because his millionaire taxi donors are telling him to.

The Daily News has called de Blasio's cap on Uber quote disingenuous and a bad deal for New Yorkers. Please call your council member and tell them to oppose the anti-Uber bill, because they should look out for you, not for the mayor's rich donors. Paid for by Uber 212 257-1745

Id. *2-3 (granting defendant's motion to dismiss claims that prerecorded calls to residential land line were advertising or telemarketing).

***Smith v. Blue Shield of Cal. Life & Health Ins. Co.*, 2017 U.S. Dist. LEXIS 5620, No. 16cv00108 (C.D. Cal. Jan. 13, 2017):**

This is an important message from Blue Shield of California. It's time to review your 2016 health plan options and see what's new. Earlier this month, we mailed you information about your 2016 plan and benefit changes. It compares your current health plan to other options from Blue Shield. You can also find out more online at blueshieldca.com. If you have not received your information packet in the mail, or if you have any questions, please call the number on the back of your member ID card.

Id. at *5 (granting defendant's motion for summary judgment that prerecorded call to cell phone was not telemarketing).

***Carlton & Harris Chiropractic, Inc. v. PDR Dist., LLC*, 2016 U.S. Dist. LEXIS 135310, No. 3:15-14887 (S.D. W. Va. Sep. 30, 2016)**

According to the Complaint, PDR sent a single fax to Plaintiff's office. The fax, which is attached to the Complaint, offers the recipient a free "Physicians' Desk Reference eBook." The fax describes the reference book as containing the "[s]ame trusted, FDA-approved full prescribing information." The fax also provides a website which the recipient can visit to download the book, a customer service email and phone number, and a prominent picture of an electronic device with the cover of the book displayed. Plaintiff contends that this single fax is an unsolicited advertisement and its transmission is in violation of the TCPA. PDR's

Id. *2-3 (granting defendant's motion to dismiss claims that fax was an advertisement).

***Wick v. Twilio, Inc.*, 2016 U.S. Dist. LEXIS 151482, No. 16cv914 (W.D. Wash. Nov. 1, 2016)**

Noah, Your order at Crevalor is incomplete and about to expire. Complete your order by visiting <http://hlth.co/xDoXEZ>.

Id. at * 3 (granting motion to dismiss claim that text was telemarketing).

FORMULARY NOTIFICATION

The health plans of many of your patients have adopted the **Rx Selections™** or **Preferred Prescriptions®** Formulary, both of which are maintained by Medco. We would like to notify you of the plan-preferred medications within the lipid-lowering class.

When appropriate, please consider prescribing plan-preferred drugs, which may help lower medication costs for your patients.

Plan-Preferred Lipid-Lowering Agents

- lovastatin
- pravastatin
- simvastatin
- Advicor®** (Abbott Labs)
- Altoprev®** (Shionogi Pharma)
- Crestor®** (AstraZeneca)
- Lipitor®** (Pfizer)
- Vytorin®** (Merck/Schering)

For a comprehensive list of all plan-preferred medications, call 1 800 211-1456 and request a copy of Medco's standard formularies. You can also view the formularies online by visiting www.medcohealth.com. Click the "Physicians" link and then the "Formulary" link.

As always, you make the final decision about which medications are right for your patients. Thank you for your attention to this important matter.

medco®

Medco and Preferred Prescriptions are registered trademarks and Rx Selections is a trademark of Medco Health Solutions, Inc. © 2010 Medco Health Solutions, Inc. All rights reserved.

Medco manages the prescription drug benefit for the employers or health plans of many of your patients.

FORMULARY UPDATE

The health plans of many of your patients have adopted the Rx Selections™ or Preferred Prescriptions® Formulary, both of which are maintained by Medco.

The brand-name medication *Levaquin*® is the only plan-preferred respiratory fluoroquinolone on the above-mentioned Medco standard formularies.

When appropriate, please consider prescribing plan-preferred drugs, which may help lower medication costs for patients.

Nonpreferred brand respiratory fluoroquinolone	Plan-preferred brand respiratory fluoroquinolone
<i>Avelox</i> ®	<i>Levaquin</i> (Pricara, a division of Ortho-McNeil-Janssen Pharmaceuticals, Inc.)

For a comprehensive list of all plan-preferred medications, call 1 800 211-1456 and request a copy of Medco's standard formularies. You can also view the formularies online by visiting www.medcohealth.com. Click the "Physicians" link and then the "Formulary" link.

As always, you make the final decision about which medications are right for your patients. Thank you for your attention to this important matter.

Medco and Preferred Prescriptions are registered trademarks and Rx Selections is a trademark of Medco Health Solutions, Inc.
© 2010 Medco Health Solutions, Inc. All rights reserved

Medco manages the prescription drug benefit for the employers and health plans of many of your patients.

Id. at App'x (granting defendant's motion to dismiss that faxes were not advertisements).

Chesbro v. Best Buy Stores, L.P., 705 F.3d 913 (9th Cir. Aug. 2012)

Hello, this is Andrea from Best Buy Reward Zone calling for (Recipient's first and last name) to remind you that your Reward Certificates are about to expire.

(Certificate amount) dollars in Reward Certificates were mailed to you on (Mail date) and they will expire if not used by (Expiration Date). If you do not have your reward certificates, you can re-print them online at myrewardzone.com. Thank you for shopping at Best Buy.

....

This is a very important message regarding the Best Buy Reward Zone program. We're making some changes to increase the security of the program and be more environmentally friendly. Please listen to the entire message and then go to MyRewardZone.com for details and to update your membership. The following changes take effect October 31st, 2009: First, to help reduce paper use, reward certificates will only be available by logging onto MyRewardZone.com. Second, reward certificates will no longer be transferable. Lastly, for the following three conditions, points will be cashed out to the \$5 level and the remaining points will be forfeited: You will need to provide an e-mail address at MyRewardZone.com. Members who haven't provided an e-mail address will no longer be eligible to participate in the program. Reward Zone is becoming an annual program, which means that points no longer roll over from year-to-year[.] You will need to make 1 purchase every 12 months to remain in the Program[.] For full details and to make sure you're ready for these changes, go to MyRewardZone.com. If you would like to hear this message again, press 9. Thank you for your time -- and for being a valued Reward Zone program member.

Id. at 916-17 (reversing grant of summary judgment to defendant that prerecorded calls to residential land line were not telemarketing).

Golan v. Veritas Entertainment, LLC, 788 F.3d 814 (8th Cir. June 8, 2015)

Liberty. This is a public survey call. We may call back later

....

Hello, this is Governor Mike Huckabee, with a 45-second survey. Do you believe in American freedom and liberty? . . . Would you, like me, Mike Huckabee, like to see Hollywood respect and promote traditional American values? I am an enthusiastic supporter of a new movie called Last Ounce of Courage. It is a film about faith, freedom, and taking a stand for American values. May I tell you more about why I recommend that you . . . see the movie Last Ounce of Courage? (Please note that only "yes" responses go to [the next segment of the script].) Thank you for your interest. Last Ounce of Courage opens in theaters on Friday, September 14, [2012]. Last Ounce of Courage will inspire you and your loved ones to celebrate our nation and the sacrifices made to protect our liberties. It is a great story about taking a stand for religious freedom. The film is a timely reminder of all that is worth defending in our nation. Experience the Last Ounce of Courage trailer and see audience reactions at www.lastouncethemovie.com, that's last ounce the movie dot com. Would you like to hear this information again? (Please note that only "yes" responses [repeat this segment of the script and] all other responses go to [the next segment of the script].) Thank you for

your answers so far. I have just [one] more question[] for demographic purposes. Do you own a smart phone?

Id. at 817 (reversing grant of motion to dismiss based on finding that first prerecorded message to residential land line was not an advertisement or telemarketing).

Holtzman v. Turza, 728 F.3d 682 (7th Cir. 2013)

Deliver to: Ira Holtzman

The "Daily Plan-It™"

GREGORY P. TURZA, JD

Volume 9, Issue 22

11/1/2007

You *Can* Take it With You: Tips for A Mobile Office

Computers have become such a part of the corporate world, it would be almost impossible to find an organization without one. These days, with people working from home and while traveling, laptops are outselling their larger and bulkier desktop brethren. Most executives have both, although many are using their laptops as their primary computers, thanks to their portability. Here are some practical tips for getting the most out of your laptop, whether you're at the office, at home, or on the road.

Buying tips

The portable computer is now available at very affordable prices, with low-end models beginning at around \$500. The more expensive models are on a par with desktops as far as speed and storage are concerned. When purchasing a laptop, pay attention to the following:

- Stick to name brand manufacturers. Customer support will be more reliable.
- If you plan to use it a lot on the go, find one that's under 5 lbs.
- Look for a model with a spill-resistant keyboard and a shock resistant hard drive.
- Purchase an extended warranty, generally for three years. Even if you have just one problem, it will pay for itself.
- Make sure that the screen is not too small for your eyes, and that the keyboard fits comfortably under your fingertips.
- If you plan to use it at the office and on the go, set up a "docking station" at your desk which would include a keyboard, mouse, and monitor.

Printing on the go

If you're on the go and need to print important documents, it's not always convenient to find a Kinko's. Purchase a small travel printer which can easily fit in your computer bag. Both Hewlett

Packard and Canon have a variety of models that are less than 5 lbs and sell for under \$250.00

Protecting your stuff

Whether you're stationary or on the road, you need to back up your stuff. Purchase a USB flash drive, which is the size of a thumb, and you'll be able to back up and print from any computer.

Take measures to protect your unit from theft. Carry it in an inconspicuous case, and never leave it unattended, even for a moment. All information should be protected with a secure password. If you're using it in a hotel room, hide it before you leave. And always back up your data.

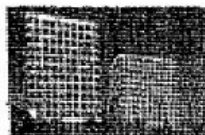
Thanks to these measures, you can now take your work anywhere you go. Just don't forget to take some time off, or you may burn out.

ESTATE PLANNING
POST MORTEM ADMINISTRATION
BUSINESS SUCCESSION PLANNING



Gregory P. Turza

ATTORNEY & COUNSELOR AT LAW



Concourse Plaza
4711 Golf Road
Suite 550
Skokie, Illinois 60076

Telephone: (847) 674-0200
Facsimile: (847) 674-9115
gary@myestateplan.net
www.myestateplan.net

© 2007 GREGORY P. TURZA, JD, Phone: 847-674-0200. All rights reserved.
No portion of this newsletter may be reprinted in any way without prior express written consent.

Id. at 686 (affirming grant of summary judgment to plaintiff that fax was an advertisement).

Larson v. Harman Mgmt Corp., 2016 U.S. Dist. LEXIS 149267, No. 1:16cv00219 (E.D. Cal. Oct. 27, 2016)

A&W: Gobble Up! First 5,000 will receive Reg. Sized Chili Cheese Fries for 99cents! Limit1.Delete@reg.Exp11/30 Valid@particip. A&Ws in UT,CA,CO,WA
TextSTOPtoEnd

....

A&W: Float into A&W for a 99 cent Reg. Sized Root Beer Float! Limit 1. Delete@reg. Exp 6/17. Valid@particip. A&Ws in UT,CA,CO,WA.
TextSTOPtoEnd

Id. *3 (denying defendant's motion to dismiss, in part, because texts were plausibly telemarketing).

Meyer v. Bebe Stores, Inc., 2015 U.S. Dist. LEXIS 12060, No. 14cv267 (N.D. Cal. Feb. 2, 2015).

From: 423-23 bebe: Get on the list! Reply YES to confirm opt-in. 10% OFF reg-price in-store/online. Restrictions apply. 2msg/mo, w/latest offers. Msg&data rates may apply.

Id. at *3 (denying defendant's motion to dismiss, in part, because text was plausibly telemarketing).

Central District of California Holds That Insurance Renewal Notifications Are Not Telemarketing Under the TCPA

Posted on [January 24, 2017](#) by [Justin O. Kay](#)



The Central District of California recently [granted summary judgment](#) to a health insurer after finding that a pre-recorded message delivered to the insured's cell phone reminding her to review her health plan options for the coming year was not telemarketing. *Smith v. Blue Shield of Cal. Life & Health Ins. Co.*, No. 16cv108 (C.D. Cal. Jan. 13, 2017), ECF No. 73.

In *Smith*, the plaintiff completed an application for health insurance through California's Affordable Care Act Healthcare Marketplace, Covered California. As part of that application process, Plaintiff provided her cell phone number as "the best number at which to contact her." As required by law, the insurance was set to automatically renew for 2016, and in 2015, Blue Shield attempted to contact Smith by sending written materials to her mailing address (as also required by law) to inform her of the changes to her plan and provide her with alternatives. Plaintiff's materials, however, were returned to Blue Shield as undeliverable. As with other insureds whose materials were returned, Blue Shield followed up with a pre-recorded message stating in relevant part: "This is an important message from Blue Shield of California. It's time to review your 2016 health plan options and see what's new. Earlier this month, we mailed you information about your 2016 plan and benefit changes. It compares your current health plan to other options from Blue Shield. You can also find out more online at blueshieldca.com. If you have not received your information packet in the mail, or if you have any questions, please call the number on the back of your member ID card." Plaintiff received the call on December 3, 2015; on December 6, 2015, she completed an application for a different insurance plan for the 2016 year.

After six months of discovery, Blue Shield moved for summary judgment, arguing that (i) its call was purely informational and therefore plaintiff provided the necessary consent when she provided her phone number; (ii) no consent was required in any event because the calls were health-care related and therefore fit within the broad "emergency purposes" exception for calls "made necessary in any situation affecting the health and safety of consumers" (an argument we pioneered in *Kolinek v. Walgreen Co.*, 13cv4806 (N.D. Ill. filed July 3, 2013) and have written about extensively ([here](#), for example)); and (iii) Plaintiff lacked standing under *Spokeo* because she had not suffered a concrete and particularized injury. See Motion for Summary Judgment, *Smith v. Blue Shield of Cal. Life & Health Ins. Co.*, No. 16cv108 (C.D. Cal. filed Aug. 26, 2016), ECF No. 40. Plaintiff filed her opposition in mid-December, arguing that (i) she had established standing under Article III; (ii) the "emergency purpose" exception did not apply because the calls were neither "necessary" nor addressed an "emergency," but rather were planned by Blue Shield's marketing team; and (iii) there was a triable issue of fact regarding whether the calls were "telemarketing" (and therefore required "prior express written consent") and a reasonable jury could

conclude that the calls were telemarketing because they were made pursuant to a client retention strategy executed by the marketing team and directed recipients to visit the Blue Shield website. See Opposition to Motion for Summary Judgment, *Smith v. Blue Shield of Cal. Life & Health Ins. Co.*, No. 16cv108 (C.D. Cal. filed Dec. 12, 2016), ECF No. 61.

One month later, the court ruled, granting Defendant's motion. The court first rejected Blue Shield's argument that the plaintiff had failed to allege concrete and particularized harm, finding that "Plaintiff alleges a concrete and particularized injury by laying out the elements of a TCPA violation" and "alleg[ing] that her privacy was invaded." Slip Op. at 12. To reach that conclusion, the court invoked pre-*Spokeo* reasoning from the Ninth Circuit in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) regarding the purpose of the TCPA—to prevent the invasion of privacy—and adopted the post-*Spokeo* reasoning of a recent decision from the Northern District of Illinois that "[u]nlike the statute at issue in *Spokeo* . . . the TCPA section at issue does not require the adoption of procedures to decrease *congressionally-identified* risks. . . . It directly forbids activities that *by their nature* infringe the privacy-related interests that Congress sought to protect by enacting the TCPA." Slip Op. at 9 (quoting *A.D. v. Credit One Bank, N.A.*, No. 14 C 10106, 2016 WL 4417077, at *6-7 (N.D. Ill. Aug. 19, 2016)). In so doing, the court rejected the reasoning in the *Romero* line of cases we previously highlighted [here](#), agreeing with other courts that have criticized *Romero* and its progeny for "ignor[ing] the existence of intangible harms that have been recognized in the legislative history and in the case law" and employing a "rather draconian analysis" under which "a plaintiff would find it almost impossible to allege a harm as a result of these robocalls." Slip Op. at 11 (quoting *LaVigne v. First Cmty. Bancshares, Inc.*, No. 1:15-CV-00934-WJ-LF, 2016 WL 6305992, at *6 (D.N.M. Oct. 19, 2016)).

After addressing the standing issue, the court turned to the issue of consent, and found that "[s]imply stated, the text of Blue Shield's telephone call is informational" because it "notified recipients that they should have received information about changes to their insurance plan, encouraged them to seek out information about their plan by examining the information packet and visiting Blue Shield's website, and directed them to call the member service number (as opposed to the sales department) to resolve any questions or issues." Slip Op. at 17. The court found support for its reading based on the similarities and differences between Blue Shield's message and messages in other cases where the nature of the call was at issue, and because its reading was consistent with the Health Insurance Portability and Accountability Act ("HIPAA") definition of marketing, which expressly excluded the calls at issue. Slip Op. at 17-19.

The court rejected the plaintiff's arguments that directing call recipients to Blue Shield's website (where, plaintiff argued, users could engage in commerce) transformed the calls into telemarketing because the website to which call recipients were directed was a renewal tool that permitted users to compare plans, but if they "wanted to switch plans or purchase a plan [they] would have to access a different portion of the website." Slip Op. at 19. According to the court, "[t]he mere fact that parts of Blue Shield's website contains the capability of allowing consumers to engage in commerce does not transform any message including its homepage into telemarketing or advertising." *Id.* at 19-20.

The court also rejected the plaintiff's arguments that "various contextual facts make the call telemarketing or advertising" (such as that it was conceptualized by the marketing department to retain customers, or that earlier drafts of the pre-recorded message contained statements regarding customer retention), focusing instead on the content of the call itself, which was "devoid of marketing content." Slip Op. at 20-21. The court reasoned that "[i]f

the Court accepted Plaintiff's argument, nearly all innocuous, customer-friendly and informative gestures would be needlessly transformed into telemarketing and advertising." *Id.* at 21. Utilizing "a measure of common sense," the court held that "[i]t makes no sense to the Court that a single call tracking Blue Shield's mandatory communications regarding insurance enrollment and renewal would expose Blue Shield to millions of dollars of liability under the TCPA." Because it disposed of the case on the issue of consent, the court expressly declined to address Blue Shield's argument that the call was exempt from the TCPA pursuant to the emergency purposes exception.

Entities in the healthcare industry looking to communicate with patients/consumers should take note of this decision, but should also be aware of the ways plaintiff's counsel will look to distinguish it. First, there was no dispute here regarding the scope of the plaintiff's consent—the only issue was whether the message was telemarketing that required "prior express written consent." Second, the court repeatedly noted that the message was to an existing customer about renewal. Third, the communication at issue was in furtherance of a mandatory requirement—alerting a customer to changes in their coverage. Fourth, the court's final statement noting that the dispute focused on a "single call" leaves the door open for the argument that the result might have been different if Blue Shield had made many such calls to the plaintiff.

This entry was posted in [Consent](#), [Emergency Purpose Exception](#), [Healthcare](#), [Prior Express Consent](#), [Standing](#), [Summary Judgment](#), [Telemarketing](#) by [Justin O. Kay](#). Bookmark the [permalink](#) [<http://tcpablog.com/central-district-california-holds-insurance-renewal-notifications-not-telemarketing-tcpa/>].

Court Finds Plaintiff-Initiated Text Communication Does Not Constitute Express Written Consent

Posted on [November 30, 2016](#) by [Justin O. Kay](#) and [William A. Wright](#)



The Eastern District of California recently denied a motion to dismiss for failure to state a claim, despite the plaintiff having voluntarily initiated the text exchange at issue and having ignored immediately received opt-out notices. [Larson v. Harman Mgmt. Corp., No. 16-0219, 2016 U.S. Dist. LEXIS 149267 \(E.D. Cal. Oct. 27, 2016\)](#).

In *Larson*, the plaintiff heard about defendants' promotional campaign for a free A&W Papa Burger Single through word of mouth. On November 12, 2014, he texted the word "BURGER" to a phone number licensed and operated by defendants in response to the promotional campaign. Plaintiff immediately received the following message:

You have joined A&W Mobile Alerts. Up to 30 messages per month. Text HELP for help. Text STOP to cancel. Message and data rates may apply.

This first text message received by the plaintiff was not alleged to be a TCPA violation, nor could it be. In the July 2015 Order, the FCC addressed so-called "call-to-action" texts such as the foregoing, and ruled that this type of one-time text message sent immediately after a consumer's request does not violate the TCPA. The FCC reasoned that this type of responsive text is not "telemarketing," but rather "fulfillment of the consumer's request to receive the text," and that a call-to-action text does not run afoul of the TCPA so long as it "(1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information." *In re Rules & Regs. Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 8015-16 (2015) ("*July 2015 Order*").

Plaintiff alleged, however, that the defendants stored his telephone number and through February 2016, without his prior consent, sent additional automated text messages regarding other food items that were not related to the initial promotion or "BURGER" text.

As we have extensively covered on this blog (see, e.g., [here](#) and [here](#)), the FCC revised its position as it relates to telemarketing calls in 2012, ruling that if a call utilizing auto-dialer or prerecorded technology "includes or introduces any advertisement or constitutes telemarketing," then prior express written consent from the telephone subscriber is required. *In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1838-44 (2012) ("*2012 TCPA Order*"); 47 C.F.R. § 64.1200(a)(2). The FCC regulations thus define prior express written consent as a written agreement that includes "clear and conspicuous disclosure informing the person signing that by executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory

telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice.” *2012 TCPA Order*, 27 FCC Rcd. at 1855. In July 2015, the FCC reiterated that to be compliant with the prior express written consent requirement, the consent must meet the definitional requirements of “prior express written consent” as set forth in the FCC’s 2012 Order. *July 2015 Order*, 30 FCC Rcd. at 8012-14.

In the July 2015 Order, the FCC specifically addressed the intersection between call-to-action texts and the prior express written consent requirement for telemarketing texts:

We note that some businesses include, in their call-to-action displays for on-demand texting programs, the small amount of wording necessary to make the disclosures required by the Commission’s rules concerning prior express written consent for autodialed or prerecorded telemarketing calls. See, e.g., <http://www1.macys.com/shop/couponsdeals> (visited Feb. 10, 2015) (disclosures under “get texts details”: “By texting COUPON from my mobile number, I agree to receive marketing text messages generated by an automated dialer from Macy’s to this number. I understand that consent is not required to make a purchase.”). Our ruling today allows businesses to voluntarily provide these simple disclosures to consumers in a call-to-action before sending a single on-demand text in response to a consumer’s request. If the business sends more than a single text as a response to the consumer, however, our rules require prior express written consent with the specified disclosures.

Id. at 8016 n.363.

Thus, based upon the FCC’s guidance, the *Larson* Court was confronted with a two-prong inquiry: (1) whether the text messages received after the initial “BURGER” text constituted telemarketing or an advertisement, and if so, (2) whether the initial text message constitutes the necessary prior express written consent.

Defendants argued that after initiating contact with defendants by texting “BURGER,” the plaintiff received an immediate text message response informing him how to opt-out of receiving the text messages, and that the opt-out language provided clear instructions that the plaintiff could terminate further contact by simply texting back “STOP” if he did not want to receive further messages. As defendants urged in their briefing, plaintiff was not only informed of the consequences of sending the opening text message, but also given instructions on how to opt-out if he did not want to receive any additional texts. Instead, he did nothing.

The Court disagreed. The Court first addressed the threshold question of whether the texts were “telemarketing,” and found that: “[t]hese messages plausibly appear to both advertise the availability of and encourage the purchase of particular goods.” *Larson*, 2016 U.S. Dist. LEXIS 149267, at *10. The Court then found that the prior express written consent requirement was not satisfied because, apart from the text messages being “in writing,” the “BURGER” message neither clearly authorized defendants to deliver additional messages using an ATDS, nor included plaintiff’s signature.

This final finding regarding the purported lack of a signature, however, is arguably incorrect and mingles the analysis of whether the necessary disclosures were made and whether a signature was provided. As the Court in *Larson* acknowledged, when the FCC modified its regulations to require prior express written consent for telemarketing messages, it stated that “consent obtained in compliance with the E-SIGN Act will satisfy the

requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording." *2012 TCPA Order*, 27 FCC. Rcd. at 1844.

This entry was posted in [General](#) by [Justin O. Kay](#). Bookmark the [permalink \[http://tcpablog.com/court-finds-plaintiff-initiated-text-communication-not-constitute-express-written-consent/\]](http://tcpablog.com/court-finds-plaintiff-initiated-text-communication-not-constitute-express-written-consent/) .