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Dazed and Confused: The TCPA's Health Care-Related Call Exemption

BY DAVID S. ALMEIDA AND MARK S. EISEN

In early 2012, Robert Kolinek received an automated call on his cell phone from Walgreens reminding him to refill an eligible prescription. Despite the fact that even the plaintiff's lawyers ultimately acknowledged that these calls "arguably benefited the called parties by providing time-sensitive medical notifications,"[1] Kolinek filed a class action lawsuit[2] alleging that the calls violated a federal statute known as the Telephone Consumer Protection Act (TCPA).[3] Some three years later, that call resulted in an $11 million settlement.[4]

Kolinek is a prime example of an alarming trend in the health care world–putative class action lawsuits seeking millions of dollars for, at most, technical violations of the TCPA based on a jaundiced reading of the statute. In the last year alone, some of the nation's most prominent pharmacies, medical technology companies, health plans and health care providers have faced TCPA class action lawsuits for phone calls and text messages concerning prescription refills, health plan updates, health management programs, and the like.

The TCPA–while simple in its original purpose to stem automated telemarketing–has ballooned into an enormously complex statute, consisting of myriad regulations that predicate liability on the nature of the call, the caller, the device being called, and the type of consent obtained (among other things). Amid the complexity, the TCPA regulations exempt various types of calls from liability, chief among which are health care-related calls.

While plaintiffs' counsel look to take advantage of statutory technicalities, the health care field should be cognizant of the precise scope and contours of the health care-related call exemption. As detailed below, it is necessary to be cognizant of the nuances, limitations, and pitfalls in the health care-related call exemption–namely if and when consent is required, the distinctions between cellular and residential numbers, the scope of consent obtained (when consent is required), and issues surrounding changes in subscriber to the number being contacted.

I. A Brief TCPA Primer.

The TCPA was passed in 1991 to combat the growing nuisance of *en masse* telemarketing calls conducted through autodialing machines that dialed randomly or sequentially generated sets of numbers.[5] Congress almost certainly did not have beneficial and desirable health care-related communications in mind when passing the TCPA. The problem, however, is that, as enacted, the TCPA did not specifically exclude health care-related calls.

In relevant part, the TCPA prohibits two types of calls to two different types of numbers: (a) prerecorded or autodialed calls and text messages to cell phones, and (b) prerecorded calls to residential landlines.[6] The TCPA provides for a private right of action and statu-

[1] *Kolinek v. Walgreen Co.*, No. 13-cv-04806, DE 93-1 at 3 (N.D. Ill.).
[2] *Id.*, DE 1 ¶ 18 (N.D. Ill.).
[3] 47 U.S.C. § 227, et seq.
[4] *Kolinek*, No. 13-cv-04806, DEs 91, 93-1.

David Almeida is a partner in Sheppard Mullin's Chicago office, and specializes in defending all manner of consumer class actions, including data privacy, TCPA, consumer fraud and false labeling.
Mark Eisen is an associate in Sheppard Mullin's Chicago office, and focuses on defending companies against consumer class actions, including TCPA and consumer fraud.

[5] *See, e.g.*, H.R. Rep. 102-317, 9 (enacting the TCPA to help "free [consumers] from intrusive telemarketing practices"); S. Rep. 102-178, 1 ("The use of automated equipment to engage in telemarketing is generating an increasing number of consumer complaints").
[6] 47 U.S.C. § 227(a)-(b).

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tory damages of $500 per violation, and up to $1,500 per violation if found to be willful or knowing.[7]

II. The FCC Exempts Certain Health Care-Related Calls.

The TCPA empowers the Federal Communications Commission (FCC) to promulgate regulations concerning the TCPA.[8] The most significant of these regulations insofar as health care-related calls are concerned were issued in 2012, and went into effect Oct. 16, 2013.[9]

The 2013 regulations had two primary effects. First, the FCC required prior express *written* consent for telemarketing calls to cell phones and landlines.[10] Second, the FCC provided certain exemptions from the written consent requirement, including for calls that deliver a health care-related message. The devil with the health care-related call exemption, however, is in the details.

As a brief preface, in 2008, the Federal Trade Commission (FTC)–which has rulemaking jurisdiction over the Telephone Consumer Fraud and Abuse Prevention Act, a separate law targeting abusive telemarketing practices–exempted ''prerecorded healthcare messages'' to *all* types of phones from its outbound call restrictions.[11] The FTC's outbound call regulations, known as the Telemarketing Sales Rule, are certainly worthy of attention, but because private parties can only sue for actual damages exceeding $50,000, private actions are rare and class actions are virtually inconceivable.[12]

In an effort to bring its rules in line with the FTC's, in its 2012 final order and regulations, the FCC ''exempt[ed] from TCPA requirements prerecorded calls to *residential* lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996.''[13]

Though the FCC did not specifically address health care-related calls to cell phones in its 2012 final order, it adopted a health care-related call regulation with regard to cell phones (detailed further below).[14]

III. The Health Care-Related Call Exemption–What to Watch Out For.

Despite its simplicity, the health care-related call exemption is extremely limited in practice and contains many pitfalls. HIPAA covered entities should be acutely aware of those limitations and pitfalls, which are detailed below.

A. The Reach of the Health Care-Related Call Exemption.

First, the FCC's 2012 final order spoke only of the health care-related call exemption as it applies to residential landlines. The regulations issued with the 2012 final order, however, either by intention or inartful drafting, also exempt health care-related calls to cell phones from the TCPA's consent requirements.

As it relates to cell phones, the FCC promulgated the following regulation:

> No person or entity may . . . 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 [cell phones], 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.***[15]

There is currently at least one petition before the FCC seeking clarification on the scope of this regulation, which has already caused substantial confusion.[16]

At bottom, the issue is whether the FCC intended to exempt health care-related calls to cell phones from consent requirements altogether, or whether it intended to only exempt health care-related calls from the prior express *written* consent requirement. Until this issue is fleshed out by the FCC–which has indicated that it only intended to exempt health care-related calls to cell phones from prior express *written* consent[17]—it is wise to comport with the latter.

B. The Residential v. Cell Phone Distinction.

The TCPA, for reasons that are no longer relevant 25 years after its passage, draws a distinction between residential and cell phone numbers. The FCC, particularly through the health care-related call regulations, has continued this distinction. (Arguably, this is because the TCPA provides the FCC broader rulemaking authority with respect to residential numbers, but that is a topic for another day).[18]

This distinction, however, lends itself to one fundamental problem–people frequently port their numbers from residential to cell. That is, consumers often transfer their residential numbers to their cell and eliminate their landlines entirely. While it may have at one time been possible to determine whether a particular phone number was residential or mobile, it is simply no longer possible to do so in a reliable fashion.

The health care-related call exemption–if in fact residential numbers are treated differently than cell phones–is thus of little practical benefit. In other words, conducting a call campaign based on internal records of residential numbers is a risky proposition. In all likeli-

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[7] 47 U.S.C. § 227(b)(3). In other words, no actual damages need be suffered to bring a lawsuit, which has turned the TCPA into a boon for the plaintiffs' class action bar and one of the most opportunistic types of consumer litigation.

[8] *See* 47 U.S.C. § 227(b)(2).

[9] *See* In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, 1831 (2012) [hereinafter ''2012 final order''].

[10] *See* 47 C.F.R. § 64.1200(f)(8).

[11] 16 C.F.R. § 310.4(b)(v)(D).

[12] *See* 15 U.S.C. § 6104(a).

[13] 2012 Final Order, 27 F.C.C. Rcd. at 1831 (emphasis added); *see also* 47 C.F.R. § 64.1200(a)(3)(V).

[14] 47 C.F.R. § 64.1200(a)(2).

[15] 47 C.F.R. § 64.1200(a)(2).

[16] *See, e.g.*, Comments of Rite Aid to the American Association of Healthcare Administrative Management Petition for Expedited Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls, available at http://apps.fcc.gov/ecfs/document/view?id=60001014220 (last visited April 1, 2015).

[17] *See* Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling & Exemption from Am. Ass'n of Healthcare Admin. Mgmt., 29 F.C.C. Rcd. 15267 at *1 n.7 (2014).

[18] *See* 47 U.S.C. § 227(b)(1)(B)-(C).

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hood, many of those numbers are no longer residential. This is, of course, in addition to the fact that many list their cell phone number as their residential number because they only have a cell phone.

C. Scope of Consent.

Assuming, for the sake of argument that health care-related calls to cell phones require some form of consent, and assuming even that consent has been obtained, a pitfall remains–the scope of consent.

Case-in-point, *Kolinek v. Walgreen Co.*[19] In *Kolinek*, the Plaintiff admitted that he provided his phone number to a Walgreens pharmacist, but allegedly for the sole purpose of identity verification.[20] In early 2012, the plaintiff received automated calls from Walgreens reminding him to refill his prescription.[21] These calls formed the basis of his complaint. In evaluating whether the plaintiff consented, the court determined that ''the scope of a consumer's consent depends on its context and the purpose for which it is given. Consent for one purpose does not equate to consent for all purposes.''[22] In so holding, the court went on to determine that providing a number for verification purposes ''does not amount to consent to automated calls reminding him to refill his prescription.''[23]

The court's holding in this regard proved crucial. On March 26, 2014, preliminary approval papers in support of a class action settlement were filed, marking *Kolinek* as one of the first (if not the first) prescription refill class actions to settle on a class basis.[24] The settlement creates an $11 million nonreversionary fund.[25] It can be surmised that once the court ruled as to consent, the size of the class–which involved 9.2 million individuals (and almost certainly many multiples of that number in text messages sent)[26]–was a key driver to settlement, as it usually is in TCPA class actions.

The scope of consent is thus a very important, if not costly issue, and health care entities should be in the practice of obtaining, and memorializing, a very broad consent.[27]

D. Reassigned Numbers.

Assuming again, for the sake of argument, that health care-related calls to cell phones require some form of consent, and even broad consent has been obtained, another pitfall remains–reassigned numbers.

No matter the scope of consent obtained from a consumer, that consent is generally held to be limited in application to the individual that gave it.[28] It is estimated that millions of phone numbers are reassigned annually (*i.e.*, because a subscriber stopped paying their bill) to new subscribers.[29] While the original subscriber may have consented to receive prescription refill reminders, the new subscriber remains free to sue. An increasing number of TCPA suits are brought by subscribers to these so-called recycled numbers.

There are presently at least three petitions before the FCC seeking to clarify that consent carries over to new subscribers, but until the FCC acts, it is safest to assume the consent does not carry over. Fortunately, there are a number of companies that can scrub call lists for recently reassigned numbers and subscriber changes. Before engaging in any kind of call campaign, it is highly recommended to scrub for subscriber changes.

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In short, the health care-related call exemption is rife with nuance, which has in turn sparked much confusion across the health care industry. Much of this confusion is due to the inartful drafting of the exemption as it pertains to cell phones, and the fact that the TCPA does not adapt to modern realities (*i.e.*, the prevalence of wireless relative to wireline numbers and number porting). Before covered entities call or text customers–even calls and texts as innocuous and beneficial as prescription refill reminders–it is important to take into account the health care-related call exemption's limits and pitfalls.

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[19] No. 13-cv-4806 (N.D. Ill.).

[20] *Id.*, 2014 WL 3056813, at *1 (N.D. Ill. July 7, 2014).

[21] *Id.*

[22] *Id.* at *4.

[23] *Id.*

[24] No. 13-cv-4806, DEs 91, 93-1.

[25] *Id.*, DE 93-1 at 1.

[26] *Id.* at 12.

[27] Even assuming consent was required for health care-related calls to cell phones, such consent could be obtained orally rather than in writing. *See* fn. 17, *supra*. While the FCC has not detailed any specific requirements for oral consent, it has set forth its ''gold standard'' written consent requirements. *See* 47 C.F.R. § 64.1200(f)(8).

[28] *See, e.g.*, *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012) (''We conclude that ''called party'' in § 227(b)(1) means the person subscribing to the called number at the time the call is made'').

[29] *See* Alyssa Abkowitz, Wrong Number? Blame Companies' Recycling, Wall Street Journal (Dec. 1, 2011) (last visited April 1, 2015) (estimating 37 million phone numbers, as of Dec. 1, 2011, were being recycled annually, which was up 16 percent from 2007).