EVERSHEDS SUTHERLAND

6th Annual TCPA Year-in-Review

Redial: 2019 TCPA Year-in-Review

Analysis of critical issues and trends in TCPA compliance and litigation

Contents

Introduction

Eversheds Sutherland is pleased to present our 6th annual TCPA year-in-review report highlighting key TCPA issues and trends.

Did you know?

6 billion

Estimated number of **text messages sent daily** in the US.

100,000

Number of **cell phone numbers** that are **reassigned each day**, according to the FCC.

3,000+

More than **3,000 TCPA lawsuits filed in 2019**.

Eversheds Sutherland industry knowledge and focus

Few industries are immune from TCPA liability. In 2019, the insurance, financial services, energy and health sectors were uniquely affected by TCPA litigation. REDIAL analyzes key legal issues affecting these and other industries.

Eversheds Sutherland tracks daily all TCPA cases filed across the country. This allows us to spot trends and keep our clients focused and informed. We understand the law and our clients' businesses, allowing us to design compliance and risk management programs uniquely suited to our clients' specific needs and to spot issues before they result in litigation. When litigation is filed, Eversheds Sutherland's TCPA team has the depth of experience necessary to efficiently and effectively resolve cases and, when necessary, defend its clients' interests in court.

Why Eversheds Sutherland?

Strength in representing leading companies worldwide

Strength in knowing our clients' businesses

Strength in advising and counseling our clients on TCPA compliance

Strength as trial lawyers in efficiently and effectively representing our clients in class actions filed in state and federal courts across the country

Deference or preference – Supreme Court to address agency authority in context of TCPA litigation

Are courts bound by Federal Communications Commission (FCC) rulings and orders in deciding Telephone Consumer Protection Act (TCPA) cases? The United States Supreme Court has agreed to take on a case raising this very issue. On November 13, 2018, the Supreme Court granted certiorari in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, Case No. 17-1705 (styled in the US Court of Appeals for the Fourth Circuit as *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018)) to address whether the Hobbs Act requires federal district courts to defer to the FCC's legal interpretation of the TCPA.

The Hobbs Act grants the federal courts of appeal, with the exception of the United States Court of Appeals for the Federal Circuit, exclusive jurisdiction to set aside, suspend or rule on the validity of orders, rules and regulations issued by certain federal agencies, including final orders issued by the FCC. 28 U.S.C. § 2342. In light of the act's exclusive grant of jurisdiction to federal appellate courts, the debate has centered on whether federal district courts, in deciding private litigation, must forego what is known as the *Chevron* analysis and instead follow FCC guidance interpreting the TCPA.

Should the Supreme Court find that the Hobbs Act does not require district courts to adhere to FCC guidance, TCPA private litigants would be free to make arguments against FCC rulings and orders in private cases. This would upend the rules that currently apply to most TCPA litigation, where most courts strictly apply the FCC's rules.

United States Supreme Court to Address Application of the Hobbs Act

As happens so often in TCPA cases, *PDR Network* began with one fax. In December 2013, PDR Network, LLC (PDR), sent a fax offering a free eBook version of a medical reference book to Carlton & Harris, a chiropractic office. Following the adage that no good deed goes unpunished, Carlton & Harris sued, alleging that PDR violated the TCPA, which prohibits the use of facsimile communications to send unsolicited advertisements. 47 U.S.C. § 227(b)(1)(C).

The TCPA defines an unsolicited advertisement, in part, as "any material advertising the commercial availability or quality of any property, goods, or services" sent without the recipient's consent. *Id*. at § 227(a)(5). An FCC rule adopted in 2006 further expounds upon the definition by including "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars." 21 FCC Rcd. 3787, 3814 ¶ 52 (2006).

Applying the traditional *Chevron* standard, the district court found that because the language of the TCPA is clear, it did not need to afford "substantial deference" to FCC guidance and interpretation of the statute. Importantly for the district court, neither party in the litigation challenged the validity of the 2006 FCC rule, and thus did not trigger the Hobbs Act's provision that exclusively reserves jurisdiction to federal appellate courts for challenges regarding the validity of agency orders.

The district court, in relying upon the TCPA's text, read the statutory definition to require that the fax have a "commercial aim." The district court found that PDR's fax was not an unsolicited advertisement because the medical reference book was free, and thus PDR did not "hope to make a profit" by offering the book. The district court further held that even if the 2006 FCC rule were operative, PDR's fax would not constitute an unsolicited advertisement because it did not promote a good in a commercial manner.

In November 2018 the Supreme Court agreed to answer the question of whether federal district courts must follow FCC rulings and orders when deciding TCPA cases.

On appeal, a 2-1 Fourth Circuit panel vacated the district court's ruling and remanded the case to the district court, holding that the Hobbs Act set forth a "jurisdictional command" to the district court to apply the FCC's interpretation of the TCPA. The Fourth Circuit held that the Hobbs Act prevented the district court from ever applying *Chevron* by effectively "strip[ping] jurisdiction from the district court[]" to engage in the *Chevron* analysis. As a result, the Fourth Circuit held that the district court acted beyond the scope of its authority as set forth in the Hobbs Act by not deferring to the FCC's interpretation.

The Fourth Circuit, in applying the 2006 FCC rule, held that even the promotion of free goods and services constitutes an unsolicited advertisement. The fact that PDR's medical reference book was free did not, therefore, shield PDR from liability.

In its petition for certiorari, PDR asserted that should the Fourth Circuit's application of the Hobbs Act stand, its ruling would effectively place federal agencies above the judiciary by restricting courts' charge and duty to interpret the law. As suggested by PDR, this case involves one of the most fundamental aspects of American jurisprudence – the balance of powers and the respective roles among the Executive, Congress and the Judiciary in determining who has the power to determine what the law is and how it should be defined. Notably, the Supreme Court will not address the question of whether faxes that promote free goods and services are *per se* advertisements under the 2006 FCC rule.

Conclusion

PDR Network presents a number of compelling issues, including whether district courts are free to engage in the *Chevron* analysis, thus looking only to FCC guidance if the TCPA is ambiguous or whether the Hobbs Act requires that they automatically look to the FCC to interpret the TCPA. In the ever-evolving landscape of TCPA litigation and the interplay between the statutory text and the FCC's regulatory guidance, the Supreme Court's decision in *PDR Network* may provide TCPA litigants with clearer precedent and much sought-after answers. The Supreme Court's ruling, in either limiting or expanding the weight of FCC orders, will likely play a significant role in TCPA jurisprudence and the ability of litigants to both maintain and defend TCPA claims.

Deference or preference – looking ahead at the impact of the US Supreme Court's indecision on questions of agency authority

The Telephone Consumer Protection Act (TCPA) is one of the most frequently litigated statutes, spurring individual, and more often, national class action litigation. The pace at which new TCPA suits are filed is not slowing, with news of high-dollar settlements announced almost daily. But the nearly 30-year old TCPA is often criticized as outdated and ill-equipped to deal with the issues facing the modern telecommunications industry and the manner in which corporations, large and small, utilize technology. Congress is currently considering legislation with bills introduced in both the House of Representatives and Senate to combat autodialed communications to consumers, but those efforts are of no help to parties and courts involved in pending TCPA litigation.[1]

In the absence of statutory reform, courts facing questions regarding the TCPA or novel telecommunications issues often turn to the Federal Communications Commission (FCC) for guidance. Reliance on the FCC can present a unique set of questions, however, as the FCC, unlike Congress, is a federal agency that is tasked with *enforcing* the TCPA; it does not have legislative powers to amend the TCPA. Regardless of whether (or when) Congress amends the TCPA, the FCC will continue to play a prominent role in defining the TCPA, and thus impacting compliance and litigation strategies and outcomes. The US Supreme Court in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019), was presented with the opportunity to opine on whether courts must defer to the FCC in TCPA litigation. Although the Supreme Court punted on the issue, leaving it up to the Fourth Circuit to address on remand the FCC deference question, there are lessons to be learned from the Court's opinion.

The triggering event in *PDR Network* was a single fax message sent from PDR Network, LLC (PDR) offering a free medical reference book to a chiropractor, who initiated litigation against PDR, alleging that the fax constituted an unsolicited advertisement in violation of the TCPA.

The District Court for the Southern District of West Virginia was tasked with determining whether the fax was an "unsolicited advertisement" defined by the TCPA, in part, as "any material advertising the commercial availability or quality of any property, goods, or services" sent without the recipient's consent.[2] In a 2006 Rule issued 15 years after the TCPA was enacted, the FCC included "facsimile messages that promote goods or services even at no cost" in its own definition.[3]

The US Supreme Court in *PDR Network* declined to answer whether courts must defer to FCC guidance in TCPA litigation pursuant to the Hobbs Act, a federal statute that gives the federal courts of appeal exclusive jurisdiction to set aside certain federal agencies' orders. The Supreme Court has remanded this question back to the Fourth Circuit, thereby allowing litigants to continue to raise arguments both for and against FCC guidance in private cases until the Fourth Circuit rules on the issue.

1 The Stopping Bad Robocalls Act (H.R. 3375) was introduced in the House of Representatives in June 2019 and passed in the House in July 2019. The Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act (S. 151) was introduced in the Senate in January 2019 and passed in the Senate in May 2019. The TRACED Act was signed into law by President Trump on December 30, 2019.
2 47 U.S.C. § 227(a)(5).
3 21 FCC Rcd. 3787, 3814 ¶ 52 (2006).

The district court declined to give deference to the 2006 FCC Rule, holding that the TCPA's language regarding unsolicited advertisements was sufficiently clear without the FCC's guidance. Applying what it considered to be the plain meaning of the statute, the district court found that the fax did not constitute an unsolicited advertisement under the TCPA because the medical reference book was free.

On appeal, a 2-1 Fourth Circuit panel disagreed and held that the Hobbs Act, a federal statute that grants the federal courts of appeal exclusive jurisdiction to set aside certain federal agencies' orders, required the district court to apply the 2006 FCC Rule. Deferring to the FCC Rule, the Fourth Circuit held that the fax constituted an unsolicited advertisement despite offering a free good or service.

PDR filed a petition for certiorari before the US Supreme Court, which the Court granted in November 2018.

In June 2019, the Supreme Court vacated and remanded the Fourth Circuit's ruling, holding that the question of deference was not properly before it because the appellate court did not address two essential questions.

First, the Fourth Circuit did not consider whether the FCC Rule is a legislative or interpretive rule. If the FCC Rule is an interpretative rule, rather than a legislative rule having the "force and effect of law," the Court suggested that it may not even be binding on district courts, which may not need to follow it.

Second, the Fourth Circuit did not consider whether PDR had a sufficient opportunity to seek judicial review of the FCC Rule. In the Court's view, if PDR did not have an adequate opportunity to challenge the FCC Rule due to the Hobbs Act's requirement that certain agency orders be challenged within 60 days after the order has been entered, PDR may have a private right to do so under the Administrative Procedure Act.

Both Justices Kavanaugh and Thomas concurred in the Court's unanimous decision. Justice Kavanaugh, joined by Justices Alito, Thomas, and Gorsuch, joined in the decision but would have answered the ultimate deference question to find that the Hobbs Act does not require courts to give absolute deference to the FCC. Justice Thomas issued a separate concurrence but raised a concern that the Hobbs Act could conflict with courts' fundamental role to "say what the law is" under *Marbury v. Madison* should courts be precluded from reviewing federal agency orders.

At first glance, the Supreme Court's punt back to the Fourth Circuit may appear to be a run-of-the-mill remand. Despite the lack of a decision from the Supreme Court, however, *PDR Network* remains an important case and one to continue to watch due to the oversized role the FCC plays in TCPA litigation.

For example, individuals and businesses alike routinely petition the FCC on statutory clarification matters. The FCC does not seem to be slowing down on proposing new rules and regulations, with its Chairman, Ajit Pai, proposing new rules in July 2019 to ban autodialed calls originating outside the US.[4] Throughout the rulemaking process, the FCC seeks comments from the public and industry, such as regarding highly-anticipated guidance on the automatic telephone dialing system (ATDS) definition as well as call blocking safe harbors. The comment period provides the public with the valuable opportunity to communicate with the FCC and present the FCC with its positions. As a result, should deference to the FCC be strengthened under the Fourth Circuit's interpretation of the Hobbs Act, the FCC's role, as well as the comment period, may become even more critical as industry groups attempt to get a hold of the FCC's ear.

Conclusion

Although the Supreme Court's decision in *PDR Network* did not result in a definitive ruling, the Supreme Court's avoidance of the ultimate issue regarding the interplay between the Hobbs Act and FCC rulings could present TCPA litigants with continued opportunities to make arguments for and against FCC guidance in private cases. Further, with at least a plurality of justices already willing to curb deference under the Hobbs Act, it is likely this issue will come before the Supreme Court again. In the meantime, the Fourth Circuit will likely also consider the weight of FCC guidance more directly on remand in *PDR Network* and will thus have the opportunity to present some added clarity within this space. And even if Congress passes additional legislation aimed at updating the TCPA or addressing the modern issues that FCC guidance has grappled with, the FCC will remain a crucial actor in shaping the TCPA landscape.

4 The FCC adopted proposed rules banning foreign robocalls on August 1, 2019.

TCPA best practices—Top five do-not-call list (DNC) compliance tips

Meeting the requirements of federal and state Do-Not-Call laws (DNC) is a key component of telemarketing compliance. The National Do-Not-Call Registry is a national database that permits consumers to register their telephone numbers to prevent unsolicited calls from telemarketers and others. The DNC rules generally prohibit companies from placing telemarketing calls to consumers whose numbers are listed in the National DNC Registry, subject to certain exceptions. In addition, consumers may elect to be added to a company's internal, company-specific DNC list.

How do companies effectively monitor the National DNC Registry to ensure compliance and avoid litigation under the Telephone Consumer Protection Act (TCPA) and related state laws? This legal alert discusses five key tips for implementing and maintaining an effective DNC compliance policy.

1. DNC Compliance Requires Checking *Both* Federal and State Registries

Federal regulations require that companies engaged in telemarketing scrub their calling lists and databases to avoid calling numbers listed on the National DNC Registry. While many states have adopted the National DNC Registry as their official statewide registry, 12 states, including Colorado, Florida, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming continue to implement separate state registries. Residents in these states may register their telephone numbers on their state's DNC list, and companies must abide by state DNC rules in addition to federal rules. A handful of states permit a consumer to file a private lawsuit for state law violations of the DNC rules, similar to TCPA litigation under federal law.

As a result, companies seeking to implement an effective DNC compliance policy must ensure that their employees and third-party vendors check their call lists against all applicable DNC databases before placing calls to consumers.

2. Put It In Writing: A Company-Specific DNC List Requires a DNC Compliance Policy, Implementation and Tracking of Opt-Outs

Under the TCPA, companies may not make telemarketing calls to consumers who have requested not to receive calls made by or on behalf of specific companies. Companies must, therefore, maintain company-specific DNC lists. Companies may not make telemarketing calls (or have third-parties make calls on their behalf) unless, and until, they have implemented procedures to maintain their internal DNC list. Stated differently, companies must honor requests to stop calling, and maintain procedures for doing so.

TCPA rules articulate minimum standards for company-specific DNC compliance, including:

- A written policy. Companies or third-party vendors engaged in telemarketing should have a written policy, available on demand, for maintaining a company-specific DNC list;
- Recording DNC requests. If a company making a call for telemarketing purposes (or on whose behalf the call is made) receives a request from a consumer not to receive calls from that company, the company should record the request and place the subscriber's name, if provided, and telephone number on the company-specific DNC list;
- Honor DNC requests promptly. The consumer's DNC request must be honored within a reasonable time, but no later than thirty (30) days from the date of the request;
- Affiliated person or entities. The consumer's DNC request applies to affiliated entities, if the consumer reasonably would expect them to be included, given the identification of the caller and the product or service being advertised;

- Training of personnel. Personnel participating in telemarketing must be informed and trained in the existence and use of the company-specific DNC list;
- Confidentiality. A consumer's DNC request may not be shared with any third-party, other than the entity on whose behalf a telemarketing call is made or its affiliate, without the consumer's prior express consent; and
- Maintenance of DNC Lists. Under federal law, a company-specific DNC request must be honored for five years from the time the request is made (state laws vary).[1]

3. Know the Limits of the Established Business Relationship Exception

Federal DNC regulations provide an exception for calls to current consumers or those who have recently requested information from a company. Companies may call a consumer listed on the National DNC Registry when, the seller or telemarketer "can demonstrate that the seller has an *established business relationship* (EBR) with such person, and that person has not stated he or she does not wish to receive outbound telephone calls."[2] Under DNC rules, a company has an established business relationship with a consumer if: (a) the consumer has entered into a transaction with the seller within the previous 18 months, or (b) the consumer inquired about the seller's goods/services within the previous three months.

State DNC rules can vary, however, on the scope of the EBR exception. Although many state laws are harmonized with federal laws, certain states have imposed EBR rules that are more restrictive than the federal rules. There are generally two areas of divergence between the state and federal EBR rules. First, some states implement an EBR exception that extends for a shorter amount of time than the 18-month period provided under the federal rule (generally 12 months). Second, some states implement a more restrictive EBR definition that does not permit communication based solely on a consumer inquiry.

4. Maintain DNC Compliance Policies and Procedures to Avoid Litigation Risks

DNC violations can create significant litigation risk under the TCPA. Class action lawsuits are common, and with statutory damages of $500 per call (and up to $1,500 per call for willful violations), exposure can escalate rapidly into the millions of dollars. In one notable (and extreme) series of cases, courts have entered judgments for more than $300 million against a company for systemic DNC compliance failures. The wave of litigation is likely to continue.

One key mitigation strategy for DNC is to qualify for the "safe harbor" provision for bona fide errors. FCC rules permit companies to avoid liability for inadvertent calls to numbers on the National DNC Registry, provided each company has certain procedures in place. In order to invoke the TCPA's safe harbor provision, companies must demonstrate that, as part of the seller's or telemarketer's routine business practice, they have:

- Established and implemented written procedures;
- Conducted employee training;
- Maintained and recorded a list of telephone numbers the seller or charitable organization may not contact;
- Established a process to prevent telemarketing to any telephone number on the National DNC Registry;
- Checked call lists against a version of the National DNC Registry obtained within the past month;
- Maintained records documenting this process;
- Monitored and enforced compliance with the procedures; and
- Purchased the National DNC Registry without participating in an arrangement to share costs of access.[3]

This safe harbor provision, although limited to calls made as a result of *bona fide* error, underscores the need for companies to implement a comprehensive DNC compliance policy.

Adhering to the requirements of both state and federal Do-Not-Call laws (DNC) is a crucial component of TCPA compliance. In implementing and maintaining an effective DNC compliance policy, it is important to keep in mind that DNC compliance is in addition to autodialer compliance, which separately requires companies to obtain the requisite levels of consent prior to autodialing or sending prerecorded messages or blast texting campaigns.

1 47 C.F.R. § 64.1200(d).
2 16 C.F.R. § 310.4(b)(iii)(B)(2).
3 47 C.F.R. § 64.1200(c)(2).

5. Keep it Straight: DNC Compliance is in *Addition* to TCPA Autodialer Compliance

One common misconception is that compliance with DNC rules alone is sufficient to avoid TCPA liability. The DNC compliance is only half the battle. The TCPA requires that companies obtain consent – written or express – prior to autodialing, sending prerecorded messages, or blast texting. These requirements are separate and distinct from, and in addition to, DNC requirements.

For instance, companies may not make autodialed telemarketing calls to consumers, even after checking the National DNC Registry, unless the consumer has provided signed written consent to receive autodialed calls. Similarly, companies calling consumers under the EBR exception (consumers with whom the company has recently done business) are permitted to make *manual* calls under DNC rules, but cannot make *autodialed* calls without prior express written consent. TCPA regulation is a multilayered set of requirements; therefore, an effective compliance program must consider both DNC and autodialer rules.

Conclusion

DNC compliance is an important part of any telephone marketing campaign. With the ongoing wave of lawsuits alleging DNC violations, companies will need to maintain a focus on its compliance efforts to mitigate their potential risks under the TCPA.

Four common risks in text message programs . . . and how to avoid them

Although the Telephone Consumer Protection Act (TCPA) may be most commonly known for its prohibitions on robocalls, text messages also fall within the TCPA's broad scope. Given the outsize risk of class action TCPA litigation arising from text messaging, it is important to understand the requirements for maintaining a texting program that is compliant with the TCPA, Federal Communications Commission (FCC) regulations, and industry standards. This legal alert discusses four common risks that companies can face when using text messaging to communicate with their customers, and offers commentary on these challenging issues.

Risk One: Failing to Employ Sufficient Opt-In Mechanisms

The TCPA requires that companies obtain the appropriate level of consent for automated communications, including text messages.[1] For texts, best practices include: (1) requiring consumers to provide consent by affirmatively opting-in to receive text messages; and (2) using a "double opt-in" procedure if the consumer initially agrees to receive text messages in a manner other than via a text from his or her phone, such as by completing an online form or verbally agreeing to join the campaign. These practices are consistent with industry compliance standards.

Scenario One: A utility company sends one text to a customer as a kickoff to its text campaign by notifying the customer that he is subscribed to the company's outage alerts. This scenario is modeled off of *Grant v. Commonwealth Edison Co.*, Case No. 1:13-cv-08310, in the Northern District of Illinois. Although the company argued that the customer provided his "prior express consent" to receive the text regarding outage alerts because it was part of an informational safety program, the company ultimately agreed to establish a multimillion-dollar settlement fund.

Scenario Two: A store clerk asks a customer if she would like to enroll in the company's rewards program. The customer verbally agrees and receives a text thanking her for enrolling in the program and prompting her to download the company's app. This scenario is based off of the class action case, *San Pedro-Salcedo v. Haagen-Dazs Shoppe Co.*, Case No. 5:17-cv-03504-EJD, currently pending in the Northern District of California. The court denied the company's motion to dismiss in holding that the text, by prompting the customer to download the app, arguably advertised the app. A motion to certify the class was filed and a hearing was held in June 2019.[2]

Eversheds Sutherland Commentary: Consistent with industry standards, it is important to employ opt-in or "double opt-in" to obtain consent from consumers who enroll in text campaigns.

> For companies that communicate with customers and potential customers through text messaging, text campaigns can present ongoing risks of liability. Understanding and avoiding the common risks associated with texting programs is a critical component of mitigating exposure under the TCPA.

Risk Two: Relying Solely on Indirect Consent

Perhaps a more complicated and not so readily apparent issue involves consent that has been conveyed by a third party rather than by the consumer directly. The FCC has held that a consumer's consent can be "obtained through and conveyed

1 *Compare* 47 C.F.R. § 64.1200(a)(1), *with* 47 C.F.R. § 64.1200(a)(2).
2 Update: The Court, without hearing oral argument, denied the plaintiff's motion to certify the class in December 2019. The parties have since settled.

by an intermediary," but the intermediary cannot consent on the consumer's behalf.[3]

Scenario One: In seeking medical treatment, a patient provides his girlfriend's cell phone number during the intake process. The patient was allowed to use his girlfriend's cell phone for emergency purposes with his girlfriend's permission and may have additionally used her cell phone number in other circumstances as well. The girlfriend subsequently received autodialed calls to collect money owed by the patient for his medical treatment. This scenario is modeled off of the case, *Jackson v. PMAB, LLC*, 2017 WL 4316096 (D. N.J. Sept. 28, 2017). The court in *Jackson* denied the plaintiff's motion for summary judgment by holding that a genuine issue of material fact existed as to whether the girlfriend, as the call recipient, gave her express consent to the patient to provide her cell phone number for communications related to his medical treatment. Although *Jackson* suggests that this inquiry is based on the particular facts at issue in each case, companies risk TCPA liability when they fail to obtain the direct consent of the call or text recipient.

Scenario Two: A group messaging company requires only that the individual who creates the group message consents to receive future texts. Modeled after a 2014 Order, the FCC held that the group messaging platform could be liable under the TCPA if its users who create the group messages do not receive the prior express consent of the other group members. The FCC encouraged text platforms to "ensure that [text message] group organizers do in fact obtain the requisite consent."[4]

Eversheds Sutherland Commentary: Appreciate the distinctions between relaying the consent of the text message recipient and providing consent on behalf of the text message recipient. This is a case-by-case analysis and likely one that may not be readily inferred based on the parties' relationship alone. Furthermore, complying with opt-in requirements, and providing easy-to-follow instructions to unsubscribe from text messages, are important considerations to limit exposure in complex situations such as these.

Risk Three: Misunderstanding the Emergency Exception

The TCPA provides an express exception from the consent requirement for communications that are made for "emergency purposes."[5] FCC regulations define "emergency purposes" as "situation[s] affecting the health and safety of consumers."[6]

Scenario: A parent provides his or her cell phone number to a school as a contact. The school does not disclose the types of messages the parent may receive, and subsequently sends the parent automated texts regarding a weather-related closure, an upcoming parent-teacher conference, and a non-school, community event taking place at the school. In a 2016 Order, the FCC clarified that schools may rely on the TCPA's emergency exception to send automated texts for limited purposes regarding weather-related closures, threats or health risks, and unexcused absences.[7] Therefore, according to the FCC, the first text would fall within the emergency exception. Importantly, the FCC held that automated non-emergency, school-related texts still require the recipient's prior express consent, which is generally satisfied when students or parents provide their phone numbers as a school contact. In the FCC's view, texts regarding parent-teacher conferences are closely related to the school's educational mission, and consent to receive such messages is likely satisfied by virtue of the parent providing his or her number to the school. On the other hand, the FCC found that texts regarding non-school events are not closely related to the school, and therefore consent is not similarly satisfied when the parent provides his or her number to the school.

Eversheds Sutherland Commentary: While the FCC has recognized the emergency exception in limited circumstances, a text campaign can ensure compliance by adhering to federal rules and industry standards even where such an exception might arguably apply.

Risk Four: Giving Mixed Signals Regarding Program Costs

FCC regulations require that a consumer's prior express written consent be part of a "clear and conspicuous disclosure . . . ."[8] Companies may face this risk if their disclosures lack clear language or otherwise do not comply with industry guidance.

Scenario: A company's call-to-action program, which encourages consumers to text a keyword or phrase to join the program or to receive a discount or promotion code, does not charge consumers to join or be eligible to receive the promotion. The company's disclosure tells consumers that it is free to participate. Industry guidance requires that such text campaigns disclose that message and data rates may apply.

3 *See* 29 F.C.C. Rcd. 3442, 3444, 3447 ¶¶ 6-7, 14 (2014).
4 29 F.C.C. Rcd. 3442, 3447 ¶ 13 (2014).
5 47 U.S.C. § 227(b)(1)(A).
6 47 C.F.R. § 64.1200(f)(4).
7 31 F.C.C. Rcd. 9054, 9061 ¶ 17 (2016).
8 47 C.F.R. § 64.1200(f)(8)(i).

Therefore, companies cannot misinform consumers about the costs associated with their programs by implying that they are free even though consumers may still incur charges associated with standard message and data rates.

Eversheds Sutherland Commentary: Use of confusing or misleading language in marketing disclosures encompasses a broader risk if companies do not adhere to industry guidance on how costs and other aspects of the campaign are communicated to consumers.

Conclusion

While text campaigns can be an efficient and cost-effective means of advertising and growing a customer base, they present ongoing risks of liability. Avoiding the common risks associated with texting programs is one critical component of mitigating exposure and potential liability under the TCPA. For companies that communicate through automated calls and text messages, it is important to have a robust compliance program and to understand what the business intends to communicate to the call and text recipients. There is often a gray area between a message that does not violate the TCPA and one that does violate the TCPA. Understanding and addressing the distinctions, including those described above, can mean the difference in avoiding costly litigation, including class action complaints.

Eversheds Sutherland Observation: Common risks associated with text campaigns include failing to employ sufficient opt-in mechanisms to receive texts, relying solely on recipients' indirect consent, misunderstanding the FCC's emergency exception from the consent requirement, and using confusing or misleading language in marketing disclosures.

Who's calling the Hoosiers? Indiana amends its telephone solicitations law

Insurance companies that do business in Indiana may be concerned that they are now required to register as a telephone solicitor with the Indiana Attorney General's Office as a result of legislation that went into effect in that state on July 1st. Shortly before this legislation became effective, the Data Privacy and Identity Theft Unit of the Consumer Protection Division of the Office of Attorney General Curtis Hill sent a general communication to all purchasers of the Indiana Do Not Call list, including licensed insurance companies, informing recipients of the amendment and urging recipients to consult with private counsel with regard to the "application of the law to your situation."

This alert discusses the amendments to the Indiana Telephone Solicitations law that became effective July 1, requiring prior registration by sellers making solicitations over the telephone in Indiana, and whether that requirement should apply to insurers.

Indiana Telephone Solicitations Law

Indiana amended the Telephone Solicitations law, Ind. Code § 24-5-12-0.1 *et seq.*, effective July 1, 2019, to require that any "seller" making a "solicitation" in Indiana must first register with the Attorney General's Office and pay the applicable registration fee. The Indiana Telephone Solicitations law broadly defines a "seller" as "a person who, personally, through salespersons, or through the use of an automated dialing and answering device, makes a solicitation." Ind. Code § 24-5-12-8. A "solicitation" is defined as "a telephone conversation or attempted telephone conversation in which the seller offers, or attempts to offer, an item to another person in exchange for money or other consideration." *See* Ind. Code § 24-5-12-9. There are no express exemptions to the registration requirement in the Indiana Telephone Solicitations law.

Indiana Telephone Solicitation of Consumers Law

Although the Telephone Solicitations Law does not allow for any exemptions in its application, this statute has a companion statute within the same title (Title 24 Trade Regulation), the Indiana Telephone Solicitation of Consumers law, Ind. Code § 24-4.7-1-1 *et seq*. Section 1(5) of the Indiana Telephone Solicitation of Consumers law provides that the statute does not apply to a "telephone call made by an individual licensed under Ind. Code § 27-1-15.6 [Insurance Producers] or Ind. Code § 27-1-15.8 [Surplus Lines Producers] when the individual is soliciting an application for insurance or negotiating a policy of insurance on behalf of an insurer (as defined in Ind. Code § 27-1-2-3),"[1] thereby expressly exempting insurers from the application of the Indiana Telephone Solicitation of Consumers law. *See* Ind. Code § 24-4.7-1-1(5).

The Telephone Solicitations Law and the Telephone Solicitation of Consumers Law: How they Work Together

The Telephone Solicitations law and the Telephone Solicitation of Consumers law are intended to complement each other and work together to effectuate the intent of the Indiana legislature to protect the citizens of the state and should be interpreted accordingly. For example, Section 23(a) of the Telephone Solicitations law provides that a seller who fails to comply with any provision of Chapter 12 (Telephone Solicitations) or Article 4.7 (Telephone Solicitations of Consumers) commits a deceptive act under the Telephone Solicitations law that is subject to penalties. In instances, such as here, where an insurance company is expressly exempt from complying with the provisions of the Telephone Solicitation of Consumers law,

1 Ind. Code § 27-1-2-3 defines "insurer" as "a company, firm, partnership, association, order, society or system making any kind or kinds of insurance and shall include associations operating as Lloyds, reciprocal or inter-insurers, or individual underwriters." Ind. Code § 27-1-2-3(x).

Indiana amended its Telephone Solicitations Law, effective July 1, 2019, requiring that "sellers" making a "solicitation" in the state comply with registration and payment requirements under the Indiana Attorney General's Office. Although the law does not provide any express exemptions to registration, its companion statute, the Indiana Telephone Solicitation of Consumers Law, expressly exempts insurers from registration. The Indiana Attorney General's Office has since issued guidance confirming that the exemptions under the Telephone Solicitation of Consumers Law, such as those for insurance solicitors, apply to the Telephone Solicitations Law.

in order for the legislature's intent in exempting insurers to be effective, the same definitions and exemptions must apply to both the Telephone Solicitations and the Telephone Solicitation of Consumers laws.

Furthermore, Indiana Regulation 11 Ind. Admin. Code § 1-1-1, which applies to the Telephone Solicitations law, provides that "The definitions set forth at IC 24-4.7-2, as supplemented in this rule, apply throughout this article and 11 IAC 2." Accordingly, the definitions of Art. 4.7 (the Telephone Solicitation of Consumers law) are to be used in the Telephone Solicitations law as well as the Telephone Solicitation of Consumers law. Therefore, since insurance companies are exempt from the definitions included in the Indiana Telephone Solicitation of Consumers law, insurance companies should also be exempt from the definitions provided in the Telephone Solicitation law, including the definition of "seller" and "solicitation," and thus exempt from the registration and fee requirements of the Telephone Solicitations law.

Why Insurance Companies Should Be Exempt

Exemption of insurance companies from both the Telephone Solicitations law and the Telephone Solicitation of Consumers law, as well as express exemption from other statutes such as the Deceptive Consumer Sales statute (*see* Ind. Code § 24-5-0.5-3), is appropriate because such companies are highly regulated by the State of Indiana, and are already subject to intense supervision by the Indiana Department of Insurance and the provisions of the Indiana Insurance Code, Ind. Code § 27-1-1-1 *et seq*.[2] The Indiana Insurance Code contains many provisions intended to protect consumers and gives the Indiana Department of Insurance the authority to oversee the consumer contacts of insurers authorized to conduct the business of insurance in Indiana, such as the Unfair Competition and Unfair or Deceptive Acts and Practices Act, Ind. Code § 27-4-1-1 *et seq*. Furthermore, insurance contracts such as policies of life insurance are not contracts that can be entered into during the course of a telephone conversation; insurers must underwrite and price each policy based on the individual's age, gender, health history and other factors, which is a detailed and sometimes lengthy process. Insurers who engage in customer outreach by telephone are not, and could not, seek to bind consumers to contracts over the telephone; rather, they are generally hoping to develop interest in the company's products and encourage consumers to meet with an agent to obtain more detailed information or submit an application.

Conclusion

We believe that the registration requirement imposed by the Telephone Solicitations law was not intended to reach insurance companies authorized to conduct the business of insurance in Indiana, as such companies are expressly exempt from the application of the companion law, the Telephone Solicitation of Consumers law, and because such companies are already subject to extensive regulation by the State of Indiana. We understand that certain industry groups have engaged in extensive conversations with the Attorney General's Office regarding the application of this requirement to insurance companies, and that official legal guidance from that office is forthcoming, as well as a further amendment to the Telephone Solicitations law that would clarify the intended scope of the change that went into effect on July 1st.

2 For example, insurance companies are already required to provide many of the protections included in the Telephone Solicitations law to their existing and potential customers. Similar to the protection in the Telephone Solicitations law that gives a purchaser the right to void a sale within 90 days of the date of the contract if a seller fails to deliver an item ordered within four weeks (*see* Ind. Code § 24-5-12-19), the Insurance Code provides that life insurers must give customers a "free look" period during which a customer can void the policy and receive a full refund of all money paid by the policyholder (*see* Ind. Code § 27-1-12-43). In addition, similar to the provision in the Telephone Solicitations law requiring sellers to submit an unexecuted copy of all contracts that may be offered in the transaction being solicited (*see* Ind. Code § 24-5-12-12(9)), the Insurance Code requires that all "contracts" (policy forms) offered by insurers must be filed in advance of sale with the Indiana Department of Insurance.

Who's calling the Hoosiers? Indiana's amended telephone solicitations law unlikely to apply to broker-dealers and investment advisers

On September 24, 2019, in response to a request for clarification by certain industry groups, the Indiana Attorney General's Office issued a Memorandum of Legal Guidance (the "MLG") confirming that the amendments to the Indiana Telephone Solicitations law, Ind. Code § 24-5-12-0.1 *et seq.*, will be interpreted in conjunction with its companion statute, the Indiana Telephone Solicitation of Consumers law, Ind. Code § 24-4.7-1-1 *et seq.*, and that the exemptions enumerated in that statute would be considered exemptions from the Telephone Solicitations law.

In our alert "Who's Calling the Hoosiers?" we discussed the amendment to the Indiana Telephone Solicitations law, effective July 1, 2019, which required that any "seller" making a "solicitation" in Indiana must first register with the Attorney General's Office and pay the applicable registration fee. "Seller" is broadly defined as "a person who, personally, through salespersons, or through the use of an automated dialing and answering device, makes a solicitation." Ind. Code § 24-5-12-8. A "solicitation" is defined as "a telephone conversation or attempted telephone conversation in which the seller offers, or attempts to offer, an item to another person in exchange for money or other consideration." *See* Ind. Code § 24-5-12-9. We noted that there were no express exemptions to the registration requirement in the Indiana Telephone Solicitations law; however, the companion statute, the Indiana Telephone Solicitation of Consumers law, exempts insurance solicitors and other financial institutions and persons licensed in Indiana. The Indiana Attorney General agreed that Chapter 12 Telephone Solicitations and Article 4.7 Telephone Solicitations of Consumers should, as argued by the insurance industry, be read together, and that the exemptions in Article 4.7 should also apply to Chapter 12, thus exempting individuals soliciting an application for insurance or negotiating a policy of insurance on behalf of an insurer from the registration requirement.

In issuing the MLG, the Attorney General acknowledged that although further legislative action "may be necessary in defining the mutual relationship" between the Telephone Solicitor Act and the Telephone Solicitation of Consumers statute, entities that are exempt from the Telephone Solicitation of Consumers statute are exempt from the registration requirement under Chapter 12.

> The Indiana Attorney General's Office has issued guidance confirming that the exemptions under the Indiana Telephone Solicitations of Consumers Law, such as those for insurance solicitors and other financial institutions, should apply to the Telephone Solicitations Law.

The question of whether broker-dealers and investment advisers will also be exempted from the Telephone Solicitations law was not addressed in the MLG; however, we note that the Attorney General based its opinion that entities exempt from the provisions of the Telephone Solicitation of Consumers statute should be exempt from the registration requirement under the Telephone Solicitations Act in part on the rationale that exemption for "certain licensed entities" is appropriate because "such licensed entities are already highly regulated by the State of Indiana, and are already subject to administrative rules and oversight by various Indiana Departments and licensing authorities."

Like insurance producers, broker-dealers and investment advisers are already highly regulated by the State of Indiana. Accordingly, we believe that although there is no express exemption for broker-dealers or investment advisers from either the Telephone Solicitations Act or the Telephone

Solicitation of Consumers statute, requiring broker-dealers and investment advisers to register separately with the Attorney General's Office and to file materials used for solicitation is unnecessary because broker-dealers and investment advisers are already subject to regulation and registration with the Indiana Securities Division or the U.S. Securities and Exchange Commission and FINRA, and arguably, requiring broker-dealers and investment advisers to register separately under the Telephone Solicitations law goes beyond the intention of the legislators in enacting the amendments to the Telephone Solicitations law. As a result, we believe that the Indiana Attorney General's Office may grant relief to broker-dealers and investment advisers from the application of the registration requirement similar to the relief being offered to other financial services firms.

Eversheds Sutherland Observation: Although guidance from the Indiana Attorney General's Office does not address whether broker-dealers and investment advisers are exempt from the state's registration requirement applying to "sellers" making "solicitations," we believe that requiring broker-dealers and investment advisers to register with the Attorney General's Office is unnecessary because they are already subject to regulation and registration with the Indiana Securities Division or the SEC and FINRA. Accordingly, we believe that the Indiana Attorney General's Office may grant a similar exemption to broker-dealers and investment advisers.

One and done? Courts split over whether a single text message is actionable

Does receipt of a single unsolicited text message amount to an "injury in fact" sufficient to establish Article III standing to bring a Telephone Consumer Protection Act (TCPA) lawsuit? The Eleventh Circuit says, "no." *Salcedo v. Hanna*, 2019 WL4050424 (11th Cir. Aug. 28, 2019). This is significant because over the past few years, an increasing number of TCPA class actions have been filed in federal courts in Florida, which is part of the Eleventh Circuit. Those courts are now bound to apply the standing rule articulated in *Salcedo*.[1]

In *Salcedo*, the court reversed the decision of the Florida district court finding that the plaintiff had standing to bring a TCPA claim, and remanded the case with instructions to dismiss the complaint. The court focused on the plaintiff's conclusory allegations that receipt of a single text message wasted his time, made his cell phone unavailable for other pursuits and constituted an invasion of his privacy. Setting up a split among the circuits on the standing issue, the Eleventh Circuit concluded that the plaintiff's allegations, reflecting nothing more than a momentary annoyance, did not generate the harm necessary to bring a claim in federal court.

Salcedo conflicts with the Ninth Circuit's 2017 decision in *Van Patten v. Vertical Fitness*,[2] holding that the receipt of two unsolicited text messages constituted an injury in fact and thus established Article III standing. The circuit split touches on an area in TCPA law that warrants further clarification, i.e., delineating the types of harm and the degree of harm required to establish standing to bring a TCPA claim. Unlike cell phone technology extant in 1991 when the TCPA was enacted, which was primitive compared to today's technology, cell phones today provide users with the unbridled ability to multitask. A user can receive multiple text messages instantaneously while listening to a podcast and reading real-time news updates. *Salcedo* forces parties and district courts within the Eleventh Circuit to ask the questions: what is the harm in receiving a single text message? What about two text messages? Is there a harm? What about other forms of electronic communication?

Until the standard is clarified, a plaintiff's ability to maintain a TCPA claim in federal court based on a single unsolicited text message may depend on the federal circuit in which the case is filed. The *Salcedo* decision presents challenges for plaintiffs to bring TCPA claims and class actions in the Eleventh Circuit based on their receipt of a single text message. In the meantime, plaintiffs may bring TCPA claims and class actions related to text messaging in circuits perceived to be more plaintiff-friendly that do not apply the *Salcedo* standard or reasoning necessary to establish Article III standing.

The Eleventh Circuit in *Salcedo* found that the receipt of a single unsolicited text message does not give rise to an injury in fact to confer Article III standing to bring a TCPA lawsuit. The Eleventh Circuit's decision represents a circuit split with the Ninth Circuit in *Van Patten* in which the Ninth Circuit held in 2017 that the receipt of two unsolicited text messages were sufficient to establish standing.

1 *Salcedo* is not the first case to reject a plaintiff's standing by applying a *de minimis* impact standard. In *Smith v. Aitima Medical Equipment, Inc.*, the court concluded that the plaintiff did not suffer a concrete injury sufficient to establish standing to bring a TCPA claim based on receipt of one telephone call from the defendant where the alleged damages consisted of electrical charges incurred in connection with the receipt of the call. As in *Salcedo*, the court applied a *de minimis* impact standard to find that plaintiff's alleged injury from receipt of the one call (like one text message) was insufficient to confer Article III standing. *Smith v. Aitima Medical Equipment, Inc.*, Civ. No. 16-339 AB DTB * 6 (C.D. Cal. July 29, 2016); *but see Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (holding that receipt of two text messages was sufficient to confer standing).

2 *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017)

Salcedo v. Hanna[3]

In *Salcedo v. Hanna*, John Salcedo received a single unsolicited text message from his former attorney offering a discount on future services. Perhaps reflecting not the best relationship between the attorney and his former client, Salcedo filed a putative class action against the attorney for alleged violations of the TCPA. Salcedo alleged that the text message caused him "to waste his time answering or otherwise addressing the message," which made him and his phone "unavailable for otherwise legitimate pursuits," all of which, he claimed, "resulted in an invasion of Plaintiff's privacy and right to enjoy the full utility of his cellular device."

The attorney moved to dismiss, arguing that Salcedo lacked standing and failed to state an actionable claim. The district court denied the motion but permitted interlocutory appeal, and the appeals court reversed, holding that Salcedo's allegations were insufficient to establish standing.

The Eleventh Circuit first examined the legislative history of the TCPA. The court noted that Congress enacted the TCPA to deal with the nuisance and invasion of privacy experienced in receiving unwanted calls on residential landlines. The court, therefore, held that receipt of one text message was "qualitatively different" from the types of harm Congress was concerned about when it enacted the TCPA, which primarily dealt with "privacy within the sanctity of the home."[4] Cell phones are used everywhere, not just at home. Cell phones' ringers can be turned off, and the phones can be used for texting, calling, or other functions even while texts are being received.

The court then reviewed its precedent and found Salcedo's allegations to be different from those asserted in the Eleventh Circuit's *Palm Beach v. Sarris*[5] case and other "junk fax" cases. In those cases, the plaintiffs established injury in fact by asserting that an unwanted fax needlessly tied up the recipient's fax line and created unwanted costs by using the recipient's paper, toner and ink. Salcedo made no such allegation. The court found that Salcedo's allegations related to loss of time and unavailability failed because of the capabilities of a modern cell phone, which enables the device to receive text messages instantaneously and does not consume the device entirely like a traditional fax machine processing an unwanted fax.[6]

Finally, the court rejected Salcedo's arguments that his alleged harm satisfied the standing requirement of Article III under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which generally holds that plaintiffs must allege an individualized injury to support Article III standing and not merely rely on allegations of naked statutory violations. In *Spokeo*, the Supreme Court instructed courts to look for "a close relationship to a traditionally redressable harm," to support Article III standing, which broadly includes causes of action for invasion of privacy, intrusion upon seclusion, nuisance, conversion and trespass to chattel. The court reviewed each cause of action and found that Salcedo's allegation of harm stemming from his receipt of a single text message fell short of establishing a concrete injury. The court held that the receipt of one unsolicited text message did not establish standing, and that a "brief, inconsequential annoyance" was not tantamount to an actual injury.

The court in *Salcedo* acknowledged that the Ninth Circuit's decision in *Van Patten* reached the opposite conclusion, finding that receipt of two text messages may create injury in fact necessary to establish Article III standing. The court found the Ninth Circuit's decision to be unpersuasive and incomplete because it failed to perform a qualitative assessment of the plaintiff's alleged harm in the context of text messaging to support Article III standing.

Impact for TCPA Class Actions

The circuit split between the Eleventh and Ninth Circuits presents immediate implications for TCPA claims, including those asserted as putative class actions, in the Eleventh Circuit. District Courts in the Eleventh Circuit that are bound to follow the *de minimis* damages standard articulated in *Salcedo* must now scrutinize plaintiffs' allegations on an individual, case-by-case basis, and those alleging one (or a small number) of texts will have an uphill battle establishing Article III standing.

Eversheds Sutherland Observation: The Eleventh Circuit's *Salcedo* decision in August 2019 and the Ninth Circuit's *Van Patten* decision in 2017 result in a circuit split on the issue of standing in connection with the receipt of an unsolicited text message. Until the standard on Article III standing within this context is clarified, a plaintiff's ability to bring and maintain a TCPA claim in federal court based on an unsolicited text may turn on the federal circuit in which the plaintiff files the case.

3 *Salcedo v. Hanna et al.*, 2019 WL4050424 (11th Cir. Aug. 28, 2019)
4 Text messaging did not exist in 1991. The court equated texting with calling, which is discussed in the legislative history.
5 *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015).
6 The *Sarris* case considered a fax sent to a traditional fax machine, but arguably the *Salcedo* reasoning–finding no standing–would be more applicable to an e-fax sent to and received by a computer, where there is no use of toner, ink, or paper and the receipt of a fax does not inhibit receipt of other incoming communications.

Nobody knows what an autodialer is under the Telephone Consumer Protection Act – and that's a problem

More than a year has passed since the Federal Communications Commission (FCC) ended its supplemental comment period aimed at providing guidance on the definition of an "automatic telephone dialing system" (ATDS or autodialer) under the Telephone Consumer Protection Act (TCPA). What constitutes an ATDS—and therefore, what types of telecommunications devices may be subject to the TCPA—has been at the heart of *thousands* of lawsuits filed over the past few years. In the absence of meaningful guidance from the FCC, courts and litigants have focused on different factors and provided conflicting answers to this crucial question. Ultimately, this lack of guidance has left everyone guessing as to which devices meet the statutory definition of an ATDS, and even under what circumstances. In light of the TCPA's statutory damages provision that allows for $500 per violation (and treble damages for reckless or intentional violations), plus attorneys' fees with no cap on damages, this lack of clarity is particularly concerning in the context of potential class action liability.

What is an autodialer? A review of the text of the TCPA

The TCPA defines an ATDS 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."[1] At first blush, this statutory definition seems clear enough, but the TCPA was passed nearly thirty years ago and, unsurprisingly, does not adequately address contemporary issues presented by current and emerging telecommunications technology. This incongruity poses a challenge for companies trying to comply with the TCPA as they attempt to bridge the noticeable void left by the TCPA's antiquated guidance.

The FCC, DC Circuit, and Ninth Circuit weigh in

In 2015, the FCC tried to fill this gap by largely expanding the ATDS definition to include devices with the mere capability or "capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers," even if the device is not actually used as an ATDS.[2]

But then, in 2018 in *ACA International v. FCC*, the DC Circuit rejected the FCC's broad definition as beyond the scope of Congressional intent and leading to a potentially "eye-popping sweep" of the statute under which every smartphone could conceivably qualify as an ATDS.[3] The DC Circuit also found the 2015 Order to be inherently contradictory; on one hand, the FCC indicated that a device must be able to generate random or sequential numbers that the device can then dial, but, on the other hand, also suggested that a device need only dial from a set list of numbers to constitute an ATDS.[4] As time would tell, the FCC would not be alone in providing an awkward interpretation of the two-pronged ATDS definition.

Later in 2018, the Ninth Circuit moved back toward the FCC's definition—and perhaps further—in the widely cited *Marks v. Crunch San Diego, LLC*. In *Marks*, the Ninth Circuit found the ATDS statutory definition to be "ambiguous on its face" and looked to the context and structure of the TCPA, as well as the Congressional intent behind the TCPA, "to regulate devices that make automatic calls." Under *Marks*, a device that "has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number

1 47 U.S.C. § 227(a)(1).
2 30 F.C.C. Rcd. 7961, 7978 ¶ 24 (2015) [hereinafter 2015 Order].
3 *See ACA Int'l v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018).
4 *See id.* at 702-03.

generator—and to dial such numbers automatically (even if the system must be turned on or triggered by a person)," constitutes an ATDS.[5] Although this interpretation appears similar to the TCPA's language, *Marks* goes in another direction as it significantly expands the statutory definition to cover devices that can automatically dial stored numbers, rather than merely devices that can call numbers produced by random or sequential generation.

Several courts that have considered this issue since *Marks* have taken an approach more faithful to the text of the statute, generally requiring satisfaction of both prongs of the TCPA's statutory definition: (1) the act of storing or producing numbers by using a random or sequential generator; and (2) the act of dialing those numbers.

Other courts try to make sense of the issue

Storing or producing numbers

Several courts have looked more heavily to the first prong of the statutory definition, namely whether the device at issue has the "capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator."[6] A device's "capacity" continues to play a large role in the analysis, and courts have attempted to apply the TCPA's text to the various aspects of the device at issue, engaging in arguably a more factually based analysis.

For example, in September 2019, a District of Rhode Island magistrate judge's recommendation stated that the defendant's texting system was not an ATDS because it lacked "the capacity to generate numbers to be called randomly or sequentially without human intervention."[7] Instead, the texting system required human intervention in uploading and storing numbers, selecting the numbers to be called, typing the message to recipients, and selecting a delivery time, all of which demonstrated that the system did not qualify as an ATDS. In support of its recommendation, the magistrate judge relied on two decisions from the Eastern District of New York and the Southern District of Florida. The courts in those decisions analyzed the same texting system and similarly held that the system was not an ATDS.[8]

Despite developments in case law following the FCC's 2015 Order expanding the definition of an "automatic telephone dialing system" (autodialer or ATDS) under the TCPA based on a device's mere capability or capacity to store or produce numbers using a random or sequential generator and to dial such numbers, there remains a general lack of clarity as to what constitutes an ATDS. While we await highly anticipated guidance from the FCC on this issue, courts have attempted to apply and adhere to the statutory text of the TCPA, although this has presented challenges for both courts and litigants due to the statute's antiquated language and standards.

Additionally, in October 2019, the District of Maryland in *Drake v. Synchrony Bank* highlighted a plaintiff's failure to allege that a "random or sequential number generator" was used to place the purported calls the plaintiff received.[9] Although the District of Maryland stayed the decision in *Drake* pending a Fourth Circuit decision in another TCPA matter, the court's focus on random or sequential generation arguably suggests that use of such technology is a necessary component for a device to constitute an ATDS.

The Northern District of Texas visited this issue in July 2019 and again in September 2019. First, in *Adams v. Safe Home Security Inc.*, the court interpreted the TCPA to require that a "device have the current capacity to store or produce randomly or sequentially generated numbers—not that the calls in question are actually related to that function."[10] The *Adams* court, disagreeing with *Marks*, held that the TCPA does not prohibit predictive dialers that automatically dial any stored numbers; rather, the court looked to whether devices can store or produce numbers that are randomly or sequentially generated. Similarly, in *Reed v. Quicken Loans, Inc.*, the magistrate judge's recommendation stated that the plaintiff failed to allege that the text messages and phone calls he received were sent using a device that randomly or sequentially generated his phone number.[11] Again, *how* the numbers were produced was an important aspect in both cases.

5 *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018).
6 47 U.S.C. § 227(a)(1).
7 Case No. 18-00590-WES, 2019 WL 4757995, at *3 (D. R.I. Sept. 30, 2019).
8 *Id.* at *2-3 (following *Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476 (E.D.N.Y. 2019) (on appeal to the Second Circuit) and *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262 (S.D. Fla. 2018) (class action settlement pending)).
9 *Drake v. Synchrony Bank*, Case No. CCB-19-2134, 2019 WL 5390961, at *1 (D. Md. Oct. 17, 2019). The District of Maryland stayed the case pending the Fourth Circuit's decision in *Snow*, Case No. 19-1724. *Snow* is on appeal from the Eastern District of North Carolina in which the district court dismissed a complaint as insufficient due to the complaint's failure to allege that the plaintiff received text messages from "equipment that stores or produces numbers to be called 'using a random or sequential number generator.'" *See* Case No. 5:18-cv-511-FL, 2019 WL 2500407, at *4 (E.D.N.C. June 14, 2019) (emphasis in original).
10 *See Adams v. Safe Home Sec. Inc.*, Case No. 3:18-cv-03098-M, 2019 WL 3428776, at *4 (N.D. Tex. July 30, 2019).
11 *See Reed v. Quicken Loans, Inc.*, Case No. 3:18-cv-3377-K, 2019 WL 4545010, at *2 (N.D. Tex. Sept. 3, 2019). The district court judge accepted the magistrate's recommendation (2019 WL 4538079) and granted the defendant's motion to dismiss without prejudice with leave for the plaintiff to amend the complaint. The plaintiff has since filed an amended complaint, and in response, the defendant moved to dismiss the complaint for failure to state a claim on October 25, 2019, which is pending decision from the court.

Lastly, the Middle District of Florida held in September 2019 that devices must have "the capacity to generate random or sequential numbers" in order to qualify as an ATDS.[12] In so holding, the court declined to consider the Congressional intent behind the TCPA, instead finding that the natural reading of the statute requires devices to "possess the capacity (1) to store telephone numbers using a random or sequential number generator or (2) to produce telephone numbers using a random or sequential number generator." The ability to dial automatically, without more, was not enough for a device to qualify as an ATDS under the statute. Notably, in this court's view, callers may face liability if they use a device that has the *capacity* to generate random or sequential numbers, even if the caller does not rely on the device's ability to do so when placing calls.[13]

Dialing

Other courts have more heavily analyzed the second prong of the statutory definition, namely whether the device has the capacity to dial automatically.

In October 2019, the Central District of California held that a dialing platform that required an agent to click a dialog box to initiate a phone call is not an ATDS.[14] The court applied *Marks* and held that even though the dialing platform could store a list of numbers to be called, such aspect of the device was not alone sufficient to constitute an ATDS because the device "must be capable of automatic dialing." The court held that because the system required human intervention to initiate the calls, it did not constitute an ATDS. Although the court looked to *Marks*' expanded ATDS definition, the court ultimately reached the same conclusion as other courts that have more closely adhered to the TCPA's language by requiring a device to be capable of automatic dialing.

In September 2019, the Sixth Circuit in *Gary v. TrueBlue, Inc.*[15] affirmed the Eastern District of Michigan's decision granting summary judgment in favor of the defendant. The Eastern District of Michigan had held that the plaintiff failed to show that the defendant's device could randomly or sequentially dial or text.[16]

Also in September 2019, the Southern District of Florida held that to constitute an ATDS, a device "must have the capacity to store or produce telephone numbers to be called using a random or sequential number generator *and* to dial the stored numbers."[17] In that case, the plaintiff alleged that the defendant contacted her using an ATDS, in part, because the defendant's representative told her that the defendant used an automatic dialer to place the call. The court relied on the TCPA's statutory definition of ATDS, requiring capacity to store or produce numbers using random or sequential number generation and to dial stored numbers, and found that the representative's statement did not create a genuine issue of material fact sufficient to defeat summary judgment on the ATDS issue.

Conclusion

Lack of clarity or meaningful guidance on the definition of ATDS continues despite the developments in case law since the FCC's 2015 Order. In September 2019 in *Pine v. A Place for Mom, Inc.*, a court in the Western District of Washington echoed the sentiment of many companies that have tried to navigate the TCPA's autodialer definition. In refusing to approve a class action settlement that included "automated telephone dialing system" in the proposed class definition, the court found that the definition referred to an ATDS, "a disputed term of art" between the parties, and therefore "lack[ed] . . . clarity."[18]

As we await the FCC's highly anticipated ATDS guidance, recent case law demonstrates an effort by the courts to work within the statutory text of the TCPA in defining what devices—and more importantly what aspects of devices—trigger the TCPA's ATDS definition. Until the FCC issues more formal guidance and clarifies the issue, litigants will continue to look to the courts to provide a standard governing the scope and definition of ATDS, resulting in diverging findings across jurisdictions and a lack of national clarity on this issue. That clarification may come soon enough: in October 2019, a petition for certiorari to the US Supreme Court was filed in another TCPA matter, challenging a Ninth Circuit ATDS decision. Perhaps the Supreme Court will weigh in and fill the gap left by the FCC's abdication of its responsibility to issue meaningful guidance on this critical issue.

12 *See* Case No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552, at *4 (M.D. Fla. Sept. 24, 2019).
13 *See id.*
14 Case No. 2:18-cv-06489-ODW (MAAx), 2019 WL 5064840, at *5 (C.D. Cal. Oct. 9, 2019).
15 *See Gary v. TrueBlue, Inc.*, Case No. 18-2281, 2019 WL 5251261 (6th Cir. Sept. 5, 2019).
16 *Gary v. TrueBlue, Inc.*, 346 F. Supp. 3d 1040, 1046 (E.D. Mich. 2018).
17 *See* Case No. 18-cv-62058, 2019 WL 4536998, at *4 (S.D. Fla. Sept. 19, 2019) (emphasis in original).
18 *Pine v. A Place for Mom, Inc.*, Case No. 2:17-cv-01826 (W.D. Wash. Sept. 25, 2019).

TCPA Industry Focus: Top Four (and one half) TCPA Issues for Insurance Companies

Insurance companies continue to be drawn into litigation involving the Telephone Consumer Protection Act (TCPA), with dozens of major insurance companies named as Defendants in TCPA class actions over the past few years, often at significant cost. Any insurance company that communicates with its insureds, potential customers, job applicants, and others by phone, text or fax using an automated telephone dialing system—or that has independent or semi-independent agents engaging in such automated communications—faces potential litigation exposure in this area. This legal alert discusses four TCPA issues that should be on every insurance company's radar screen.

Vicarious Liability

Insurers or their agents may employ third-party vendors to market their insurance products and services. For insurers that sell through independent agents, the agents themselves may be considered third parties. As a result, TCPA lawsuits against insurers often raise vicarious liability issues, where a carrier is being sued based on communications initiated by a third party. For example, there have been a series of cases filed against life insurance companies arising from fax advertisements sent by insurance agents or vendors who employ third-party fax broadcasters, typically marketing inexpensive term life insurance. These cases have resulted in a number of costly (seven digits) class action settlements, with several cases still pending. More recently, there has been a trend of class actions against insurance companies (and their agents) based on alleged robocalls placed by third-party lead generators.

Under the TCPA, it is unlawful "to initiate" certain phone calls (including text messages) and "to send" unsolicited fax advertisements. This small difference in the language of the TCPA has led some courts to apply different legal standards for third-party liability depending on the medium. For phone calls and texts, courts apply a vicarious liability standard based on common law agency principles, consistent with the FCC's declaratory ruling in *In re Dish Network*, 28 FCC Rcd. 6574 (2012). Under this standard, an insurer could be liable if they actually approved the calls or texts, the party initiating the calls or texts had apparent authority from the insurer, or the insurer ratified the sending of the calls or texts. The standard directs the court to assess the relationship between parties, and whether approval was granted before or after the fact. For faxes, however, courts have disagreed about whether to apply a traditional agency standard, the same standard applied to calls and texts outlined above, or a different, more stringent standard for third-party liability, resulting in a circuit split that has yet to be resolved.

Some plaintiffs have argued that, for faxing, a company could potentially be liable for faxes sent on its behalf regardless of whether the company approved transmittal. Thus, TCPA liability often hinges on the type of communication a third-party uses when communicating with a customer or applicant on behalf of an insurer. Insurance companies should therefore be mindful of what types of calling campaigns are being made on their behalf, and by whom. The *purpose* of the campaigns can also create uncertainty in the TCPA context, as discussed next.

What is Marketing?

Whether a call or message violates the TCPA can often turn on whether the call or message meets the definition of "telemarketing" under the Act, because marketing calls are more strictly regulated under the TCPA than non-marketing or informational calls. Under FCC regulations, "telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods,

Insurance companies face potential litigation exposure under the TCPA through conduct such as communication through phone, text, or fax using an automatic telephone dialing system or through the use of independent or semi-independent agents that participate in such automated communications. Insurance companies should be aware of various issues arising under the TCPA involving vicarious liability, the definition of "telemarketing," as well as federal, state, and company-specific do not call restrictions, the FCC's reassigned number database, and the narrow health care exemption recognized by the FCC.

or services, which is transmitted to any person." 47 CFR § 64.1200(f)(12) (emphasis added). The regulations, however, do not provide comprehensive guidance, and thus creates an area of uncertainty for calls that do not clearly fit within the FCC's definition or serve multiple purposes. Specifically, over the past few years insurers have faced a number of suits alleging violations of the TCPA stemming from communications targeting policy renewal, coverage changes, and agent recruiting calls.

Generally, calls that are purely informational (i.e., fraud alerts, account balance updates, etc.) are not considered telemarketing. The risk arises from what are known as dual purpose messages or calls, meaning calls that have both an informational and marketing purpose In most instances, calls that provide information *and* solicit customers are considered telemarketing under the TCPA. These types of calls may include lower rate offers, or calls providing information on new or additional products for the purpose of encouraging a purchase. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14098–99 (July 3, 2003). Courts have generally held that recruiting calls are not considered telemarketing, unless, in addition to encouraging a recipient to work for the company, they also solicit them to purchase, rent or invest in products or services. Given the potential risk and exposure that can result from calls or messages that serve both marketing and other purposes, it is important to analyze whether the calls or messages constitute "telemarketing," and generally err on the side of caution in favor of adhering to the more rigorous regulatory requirements for marketing under the TCPA.

Do Not Call

Federal and State DNC Registries:
Federal regulations require that companies engaged in telemarketing scrub their calling lists and databases to avoid calling numbers listed on the National Do Not Call ("DNC") Registry; many state laws have similar DNC prohibitions. A number of class actions have been filed against insurers alleging federal DNC violations that have resulted in significant settlements, while other insurers have been subjected to penalties for violations of state DNC regulations. Over the last few years, for instance, the Missouri attorney general has levied a number of penalties for violation of the state DNC regulations, including a settlement in excess of $500,000 with an insurer for repeated calls to individuals on Missouri's state DNC registry. While many states have adopted the National DNC Registry as their official statewide registry, 12 states including Colorado, Florida, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming continue to implement separate state registries. A handful of states also permit a consumer to file a private lawsuit for state law violations of the DNC rules, similar to TCPA litigation under federal law.

An established business relationship ("EBR") exception exists for calls to numbers on the federal DNC registry, and the FCC has provided specific guidance to insurance companies and agents on the scope of this EBR exception. Under the FCC guidance, an insurance company's EBR applies during term of a customer's in-force insurance policy and for the 18 months following termination of the policy. 2005 FCC Order, 20 F.C.C. Rcd. 3788 (2005). An insurance agent/rep may rely on the company's EBR to make calls on behalf of the company to market the company's products. Independent of the insurer's EBR, an insurance agent or broker has its own EBR. *Id.* at 3798-3799. The agent's EBR, however, only extends for 18 months following the last purchase or transaction involving a policy or contract, and the FCC has expressly stated that the EBR does not extend over the term of the customer's policy. *Id.* A petition is currently pending before the FCC seeking to extend the EBR for insurance agents to include the policy term. *Life Insurance Direct Marketing Association et al.*, petition 061818 (filed June 18, 2018).

Company-Specific DNC Registries:
In addition to requiring companies abide by the federal DNC registry, federal regulations also require that companies maintain company specific DNC lists comprised of those individuals who have asked the company not to contact them. Unlike the federal registry, however, company specific DNC requests only need to be maintained and honored for a specific period of time. FCC regulations impose a minimum five-year retention period for honoring company-specific

DNC requests, though, as discussed below, some state laws mandate longer periods. 47 C.F.R. § 64.1200(d)(6).

Some states have also established their own company specific DNC requirements that mimic or expand on the federal regulations. For example, Arizona, Delaware and Virginia impose retention periods longer than federal law. Moreover, some states like Alaska, Michigan and Missouri provide a private cause of action and statutory damages for calls made to individuals on company specific DNC lists during the applicable retention period. The statutory damages recoverable under these regulations would be separate and in addition to any damages that a call recipient could recover for violation of the federal company specific DNC regulations.

More generally, an effective DNC compliance policy requires that callers scrub their call lists against all applicable DNC databases, maintain and abide by company specific DNC lists, and understand the scope and extent of EBRs, before placing calls to consumers.

Reassigned Cell Phone Numbers

On December 12, 2018, the FCC unanimously adopted the creation of a reassigned number database that is intended to allow callers to determine if telephone numbers on their calling lists have been disconnected and made eligible for reassignment. If a number has been reassigned, that number can be purged from a company's call lists, thereby minimizing the number of calls to consumers who did not provide consent. Reassigned numbers are of particular concern to insurance companies as insurers frequently have long-term relationships with their customers. The database may prove to be a valuable resource, particularly if infrequent direct contact with a customer means the insurer may not always maintain up-to-date contact information.

Participation in the database will be voluntary but, to encourage use of the database, the FCC is providing callers with a safe harbor from liability for any calls made to reassigned numbers due to a database error. Callers will have the burden to prove that they checked the most recent and up-to-date database. Companies seeking to limit their risk will need to ensure that review of the database and scrubbing of appropriate numbers are integrated into their TCPA compliance procedures.

Health Care Exemption

Finally, the FCC has recognized a very narrow exemption to the TCPA for certain types of health care calls. The FCC's guidance on this exemption, however, has not provided clarity on when and to what extent the exemption applies to health insurers. Per the FCC's 2015 Order calls to wireless numbers calls "by or on behalf of the 'covered entity' as well as its 'business associates'" as defined in the Health Insurance Portability and Accountability Act (HIPAA) privacy rules, "for which there is exigency and that have a healthcare treatment purpose" are exempted from the TCPA. The exemption does not cover calls "that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content."

The ambiguity in the FCC's order has led several health insurers to petition the FCC for clarification on non-telemarketing healthcare calls. Specifically, the petitioning insurers have asked the FCC to issue a declaratory ruling and/or clarify two items: (1) that the provision of a phone number to a "covered entity" or "business associate" (as those terms are defined under HIPAA) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations; and (2) that the term "healthcare provider" in 2015 Order encompasses "HIPAA covered entities and business associates" like insurers. A ruling from the FCC on these issues will hopefully clarify for insurers the scope of the exemption and its application to their contact with insureds.

Conclusion

The TCPA presents an ongoing risk and compliance challenge for insurers that communicate directly or indirectly (through agents or other third parties) with consumers through automated calls, text messages or faxes. A strong TCPA compliance program remains essential to help insurers avoid and mitigate exposure in TCPA lawsuits. A robust compliance program is a living thing, and should be updated and reviewed regularly to remain in step with the frequently evolving TCPA landscape.

Eversheds Sutherland Practice Point: Insurers should take care to have a strong TCPA compliance program that is responsive to changes in the evolving TCPA landscape as a way to help avoid and mitigate litigation exposure under the TCPA.

Direct Marketing Dangers – Why Cannabis Industry Participants Should Undergo a TCPA/ADA Compliance Checkup

As the cannabis industry continues to expand, attacks have begun on direct marketing (text, call, etc.) campaigns undertaken by cannabis-related businesses. Cannabis advertising is heavily regulated, so many cannabis companies rely on direct marketing to consumers—often in the form of text messaging. But technology has outpaced the federal statutes regulating telemarketing, leaving marketers uncertain as to what is and is not permitted under existing laws. This uncertainty potentially leaves consumer-facing cannabis companies open to attack by resourceful plaintiff's attorneys claiming violations of the Telephone Consumer Protection Act (TCPA) and the Americans with Disabilities Act (ADA). This article briefly examines the potential liability under the TCPA and ADA and explains why cannabis-related businesses should consider whether their telemarketing efforts and online presence comply with the TCPA and ADA.

The TCPA was enacted in 1991 to combat a rising tide of invasive and unwanted telemarketing calls and faxes. 47 U.S.C. § 227. The Act limits the use of automatic dialing systems, prerecorded voice messages and fax machines and has been expanded to cover calls to cell phones and text messaging, neither of which were prevalent when the statute was enacted. It was intended generally to restrict automated or prerecorded (robo) calls unless the receiving party consents to receive the call or when the call is made for emergency purposes. *Id.* The FCC has clarified that SMS text messages are subject to the same consumer protections under the TCPA as voice calls. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

The TCPA distinguishes between marketing and non-marketing calls, requiring different types of consent based on the purpose of the communication. A marketing call includes an advertisement or other communication intended to encourage a purchase or the like. Although payment reminders, confirmations, informational messages and service calls are not considered telemarketing, if a dual-purpose call includes a marketing intent, the call is treated as a marketing call.

Marketers can ensure TCPA compliance by obtaining appropriate consent from the called party. For non-marketing calls or texts to a cell phone, implied consent is sufficient under the TCPA. Implied consent recognizes that if a customer provides their cell phone number, then they expect to be called or texted at that number. For marketing calls, the TCPA requires "written consent." "Written consent" does not necessarily mean "in writing"; "written consent" could include verbal consent on a recorded line or otherwise captured by electronic means. The FCC has clarified that consumers may revoke TCPA consent at any time through any reasonable means.

The TCPA imposes strict liability based on the party who actually receives the call, not the intended recipient. This feature of the Act causes a trap for the unwary. Even if a company has express consent from the intended recipient, if the phone number provided to the company is inaccurate and the called party differs from the intended recipient, then the call violates the TCPA despite the fact that the intended recipient gave consent. The Act's strict liability is particularly problematic with respect to reassigned cell phone numbers. The FCC estimates that as many as 100,000 cell phone numbers are reassigned every day, and each reassigned number represents a possible TCPA violation for marketers.

Unsurprisingly, TCPA litigation, and class actions, in particular, has skyrocketed in recent years as plaintiff's attorneys realized the statute's potency. TCPA litigation abounds because the Act allows damages of $500 for each violation and $1,500 if the conduct is deemed willful. Because there is no cap on

damages, the potential liability in these cases can be enormous. Continued uncertainty regarding the statute and how it applies to modern technology—including the basic definition of an "autodialer"—has also fueled TCPA litigation.

The Americans with Disabilities Act, a wide-ranging civil rights law intended to protect against discrimination based on disability, was enacted in 1990. Title III of the ADA prohibits discrimination "on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." 42 U.S.C. § 12182(a). Public accommodations include private establishments such as restaurants, hotels, theaters, and stadiums—areas that the ADA was originally intended to address. Like the TCPA, technology has outpaced the regulatory regime of the ADA and clear guidance on how the ADA applies in the internet age, specifically as it relates to web site accessibility, is lacking.

With the growth of the cannabis industry also comes increased risk of exposure under the TCPA in relation to direct cannabis marketing and advertising campaigns. Cannabis industry participants and related businesses should review their direct marketing procedures for TCPA compliance purposes.

Websites and other technological spaces, which did not exist as we now know them when the ADA was first enacted, have been interpreted to be places of public accommodation under certain circumstances. Hundreds of class actions lawsuits have been filed alleging violations of the ADA based on companies' large and small alleged failure to maintain ADA compliant websites that are accessible to the blind and visually impaired. Unfortunately, neither the Department of Justice, the agency responsible for enforcing the ADA, nor the federal courts have illuminated a consistent standard for determining ADA liability in online spaces. The Ninth and Eleventh Circuits have provided that a website is a place of public accommodation only where there is a nexus between the website and the service of a physical place of public accommodation. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Haynes v. Dunkin' Donuts LLC et al.*, No. 18-10373 (11th Cir. 2018). Under this standard, online-only businesses such as eBay or Facebook would not be considered places of public accommodation, but a website that allows ordering goods for in-store pickup would likely have a sufficient nexus to physical stores to be subject to the ADA. Courts within the First, Second, and Seventh Circuits have adopted a more expansive understanding and provided that a place of public accommodation may include a website without a nexus to a physical store. *See e.g., Doe v. Mutual of Omaha*, 179 F.3d 557, 558 (7th Cir. 2001); *Carparts Distribution Ctr., Inc. v. Automotive Wholesalers*, 37 F.3d 12, 19-20 (1st Cir. 1994); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017).

The ADA permits litigants to pursue injunctive relief and attorney's fees and costs; it does not include compensatory damages or civil penalties similar to the TCPA. 42 U.S.C. § 12188. Although the ADA does not provide a mechanism for monetary damages, plaintiff's counsel often includes claims under a state mini-ADA or local human rights statute that allows recovery of monetary damages.

In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (ANPRM) clarifying that the ADA covers websites and indicating that further guidance would be forthcoming. A supplemental ANPRM was issued in 2016, but in December 2017, the DOJ rescinded both ANPRMs related to website accessibility under the ADA. These rules were expected to adopt Web Content Access Guide (WCAG) 2.0 guidelines as the formal technical standard necessary to achieve ADA website compliance and provide clarity on when a website is a place of public accommodation and plaintiff's attorneys have been emboldened in the absence of these clarifying rules.

With the rapid growth of legal cannabis sales, plaintiffs have begun to use the TCPA to target cannabis-related businesses. In June 2019, a group of plaintiffs filed a class action lawsuit in federal court against Baker Technologies and its parent company Tilt Holdings Inc. alleging violations of the TCPA and California's Unfair Competition Law. Tilt Holdings specializes in cannabis technology, and its subsidiary Baker Technologies provides customer relationship management services to retail stores, including online ordering, customer loyalty, messaging and analytics. Specifically, the lawsuit alleges that Baker collected cell phone numbers, provided them to its cannabis dispensary clients and facilitated telemarketing text messages to those mobile numbers without first obtaining the necessary consent. The defendants have promised a vigorous defense of the lawsuit and maintain that messages are only sent to customers who have voluntarily signed up to receive messages at dispensaries and that those customers may opt-out at any time—in full compliance with the TCPA. What will happen in this litigation remains to be seen.

When the TCPA was enacted, text messaging did not exist. Now, an estimated 6 billion text messages are sent daily. A

shop owner is able to clearly ascertain whether her physical store location is handicap-accessible as required by the ADA, but companies struggle with how to make their website ADA compliant in the absence of clear federal guidance on the issue. Because the regulatory regimes surrounding these statutes have remained stagnant in the face of remarkable technological growth, considerable uncertainty remains with respect to how these statutes apply to today's direct marketing technologies.

Administrative agencies generally responsible for enforcement of these statutes—the FCC and FTC with respect to the TCPA and the DOJ with respect to the ADA—have largely ceded enforcement responsibility to plaintiff's attorneys. With possible damages of up to $1,500 per unwanted call or text, the potential liability in a TCPA class action—and corresponding attorney fee award to class counsel—is tremendous. Enterprising plaintiff's attorneys look for violations wherever they can find them, and the blossoming cannabis industry may provide fertile hunting grounds.

In light of advertising restrictions, many cannabis companies prefer to communicate directly with customers, often collecting cell phone numbers in connection with loyalty and rewards programs, which are then used for direct marketing purposes. Given this prevalence of direct marketing to cell phones using SMS text messaging, we anticipate seeing an increase in TCPA cases against cannabis industry participants. Cannabis industry participants and related businesses should review their direct marketing procedures and ensure that they secure proper consent and comply with the TCPA. For example, industry participants should check the FCC's Do Not Call Registry and remove any numbers on that list from their call lists. Marketers also need to ensure that they respect any opt-out request received. Industry participants should also review their website configuration and attempt to ensure ADA compliance, particularly where the website allows for direct sales or allows a customer to make a purchase for in-store pickup.

Clarity in the areas of TCPA and ADA compliance is not likely any time soon, so it is imperative that cannabis-industry participants that market directly to consumers through messaging and/or websites take proactive steps to minimize the risk of unwanted legal actions.

Eversheds Sutherland Observation: Because direct marketing to cell phones using SMS text messaging is prevalent within the cannabis industry, we anticipate an increased amount of TCPA cases against cannabis-related businesses.

TCPA industry focus—Energy and utility industry

Over the last three years alone, energy, utility and solar companies have been targeted in numerous putative class actions alleging violations of the TCPA that resulted in several multimillion-dollar settlements totaling more than $20 million. The high value of these settlements illustrates how automated communications can also pose significant litigation risks that can be mitigated only through an understanding of the requirements of TCPA and a robust focus on compliance. Energy and utility providers often communicate with existing and prospective customers through automated communications for purposes of marketing, customer servicing, and collections—making companies operating in the energy and utility space potential targets of claims brought under the Telephone Consumer Protection Act (TCPA).

TCPA Background

Enacted in 1991 to protect consumers from receiving unsolicited telemarketing calls and faxes (and more recently text messages), the TCPA regulates and restricts the manner in which a business may advertise its products and services to consumers or otherwise communicate with its customers. Specifically, the TCPA prohibits the use of an "automated telephone dialing system" or an "artificial or prerecorded voice" to make calls to cell phones without obtaining the recipient's consent. Certain restrictions apply to telemarketing and non-telemarketing calls alike, including debt collection or informational calls. These same rules apply to energy and utility companies.

Class action risk under the TCPA can be considerable. Because the TCPA provides for statutory damages of $500 per violation (and up to $1,500 per willful violation) with no maximum cap on recovery, potential exposure in a TCPA class action can quickly escalate into the millions.

Energy, utility, and solar companies have been the source of numerous putative class action lawsuits under the TCPA over the last several years challenging both marketing and/or non-marketing communications and resulting in multimillion-dollar settlements. According to FCC guidance, utility companies may make automated calls and text messages to phone numbers provided by customers without violating the TCPA if the communications are regarding matters that are "closely related" to the utility service.

Federal Communications Commission (FCC) regulations interpreting and implementing the TCPA require consent for most automated telemarketing communications. Specifically, prior express written consent is required for autodialed or prerecorded telemarketing calls or texts to cell phones. These requirements also apply to prerecorded telemarketing calls to landlines, and there is no exception for calls to customers with whom the company has an established business relationship. For purposes of the regulations, the term "prior express written consent" means an agreement in writing, with a signature in some form that clearly authorizes the seller to make telemarketing calls or texts using an autodialer or a prerecorded voice. For non-marketing communications such as servicing and outage calls, the FCC issued guidance to utilities that specifies the standards for utilities to communicate with customers through automated means.

TCPA Class Actions Continue to Target Energy and Utility Companies

The TCPA continues to raise litigation and compliance challenges across the energy industry, with scores of lawsuits being filed against the industry each

year. These class action lawsuits have challenged both marketing calls and/or non-marketing calls, including servicing and collection calls, and have resulted in several high-dollar settlements. In the last several years, TCPA class actions against energy and solar providers have been settled for as much as $15 million.[1]

There appears to be no end in sight for these cases. In one recent example, a lawsuit against an electricity and natural gas provider alleges that the company placed unlawful autodialed calls and text messages for the purposes of collecting on delinquent utility bills.[2] The complaint alleges that the calls were misdirected to plaintiff and members of the class who were not customers of the company and as a result, had not provided "prior express consent" to receive calls or texts from the company.

In another example, a TCPA class action filed against a solar electric company in California alleges the company placed thousands of unsolicited telemarketing calls to consumers, many of whom had placed their numbers on the National Do Not Call Registry.[3] Both of these cases illustrate the types of TCPA litigation continuing to be filed against dozens of energy and utility companies under the TCPA.

FCC Guidance for the Energy Industry

The FCC has issued specific guidance clarifying that utility companies may make automated calls and texts to their customers concerning matters "closely related" to the utility service, without violating the TCPA, as long as the calls are made to the telephone number provided to the company by the customer.[4] The FCC reasoned that such communications do not violate the TCPA, because utility customers are deemed to have provided consent to receive these calls and texts when they gave their phone numbers to the utility company.

Per the FCC Order, calls "closely related" to utility service include calls that:

- warn about the likelihood that failure to make payment will result in service curtailment;
- warn about planned or unplanned service outages;
- warn about potential service interruptions due to severe weather conditions;
- provide updates about service outages or service restoration;
- ask for confirmation of service restoration;
- ask for information about lack of service;
- provide notification of meter work, tree trimming, or other field work that directly affects the customer's utility service;
- notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as age, low income or disability; or
- provide information about potential brown-outs due to heavy energy usage.

The FCC cautioned, however, that customers must be allowed to opt-out and that providers are responsible for maintaining proper records to prove customer consent and must maintain current, up-to-date records of customer contact information, especially cell phone numbers. The FCC also "strongly encourage[ed]" companies to make a disclosure to customers that by providing a phone number they are consenting to autodialer or prerecorded service calls.

The FCC's order, though providing some guidance to energy and utility companies seeking to comply with the TCPA, applies only to preexisting customers who have provided the company with their contact information. Automated texts or calls to non-customers, or communications to existing customers that are not "closely related" to their service, would still require additional consent from the consumer. For marketing calls, a utility would need to meet the heightened standard for "prior express written consent."

Conclusion

The TCPA challenges facing the energy/utility industry are expected to continue as companies seek to protect themselves from continuing risk of litigation. A strong TCPA compliance program is essential to help understand the type of communications permissible under the act and minimize potential liability.

Eversheds Sutherland Practice Point: As TCPA challenges relevant to the energy/utility industry are expected to continue, a robust compliance program is essential to both determine how companies within this industry may communicate with customers without possibly running afoul of the TCPA and to minimize potential liability.

1 *See, e.g., Lynn Slovin, et al. v. Sunrun Inc., et al.*, Case No. 4:15-cv-05340 (N.D. Ca. filed on Nov. 20, 2015) ($5.5 million); *Dobkin v. NRG Residential Solar Sols. LLC*, Case No. 3:15-cv-05089 (D.N.J. May 14, 2018), Dkt. No. 103 ($7 million settlement); *Albrecht v. Oasis Power LLC d/b/a Oasis Energy*, Case No. 1:18-cv-1061 (N.D. Ill. Sept. 24, 2019), Dkt. No. 69 ($7 million settlement); *Jose Albino Lucero Jr. v. SolarCity Corp.*, Case No. 3:15-cv-05107-RS (N.D. Ca. Sept 15, 2017), Dkt. No. 176 ($15 million settlement).
2 *Burk v. Direct Energy, LP*, Case No. 4:19-cv-00663 (S.D. Tx. Feb. 25, 2019)
3 *Hicke v. California Solar Electric Company*, Case No. 3:19-cv-00602-L-KSC (C.D. Ca. April 1,2019)
4 *In re Blackboard, Inc. Petition for Declaratory Ruling*, Dkt. 02-278, FCC 16-88 (August 4, 2016)

Hot issues for 2020

Companies in consumer-facing industries face a continued barrage of lawsuits under the Telephone Consumer Protection Act (TCPA). In 2019, TCPA lawsuits remained one of the most commonly filed type of class action in federal courts across the country. Congress and the Federal Communications Commission (FCC) continue to update TCPA rules and regulations in the areas of compliance and consumer protection. Looking to 2020, courts, including the United States Supreme Court, and the FCC will continue to grapple with, among other issues, the definition of autodialer, standards for revocation of consent, standing questions, and the constitutionality of the TCPA government-debt exception. We also await the anticipated launch of the reassigned cellular number database for scrubbing call lists and implementation of the recently passed Pallone-Thune TRACED Act to protect consumers from spoofing.

Six top issues for companies to keep an eye on in 2020

- What is an autodialer? Still seeking clarity (because no one knows)
- The standards for revocation of consent
- Implementation of the reassigned cellular number database and safe harbor
- The impact of new federal law: The Pallone-Thune TRACED Act
- When does a plaintiff have standing to file a TCPA claim?
- The United States Supreme Court weighs in on TCPA Issues.

1. What is an autodialer? Still seeking clarity (because no one knows)

Both courts and businesses continue to struggle with the foundational TCPA question of what constitutes an automatic telephone dialing system (ATDS or autodialer). In a 2015 Order, the FCC expanded the definition of an ATDS to encompass any equipment that has the capacity or potential capacity to dial numbers randomly or sequentially, even if the company does not use the device in that capacity or the device requires an upgrade to have those features. In early 2018, however, the FCC's definition was struck down by the D.C. Circuit Court of Appeals as arbitrary and capricious, and the FCC solicited comment so it could develop a new rule.

In 2018, the Ninth Circuit moved partly back toward the FCC's 2015 definition in finding that an ATDS can be a device with the capacity "to store numbers to be called" or "to produce numbers to be called, using a random or sequential number generator and to dial such numbers automatically" (even if the system must be turned on or triggered by a person).[1] Other courts have held that an ATDS must have the capacity to *generate* numbers, as required by the plain language of the statute.[2] Recently, the Eleventh Circuit took a different approach in its interpretation of Section 227(a)(1) in finding that an ATDS must: (1) use a random or sequential number generator either to store or produce telephone numbers; and (2) dial the numbers.[3] In other words, in the Eleventh Circuit, a device that simply stores and dials telephone numbers is not an ATDS.

The United States Supreme Court may weigh in on the issue in 2020 if it grants certiorari in *Facebook, Inc. v. Noah Duguid*, Case No. 19-511. One of the questions on appeal is whether the definition of an ATDS encompasses any device that can

1 *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018).
2 *See e.g., DeCapua v. Metro. Prop. and Cas. Ins. Co.*, Case No. 18-00590-WES, 2019 WL 4757995, at *3 (D. R.I. Sept. 30, 2019); *Adams v. Safe Home Sec. Inc.*, Case No. 3:18-cv-03098-M, 2019 WL 3428776, at *4 (N.D. Tex. July 30, 2019); *Reed v. Quicken Loans, Inc.*, Case No. 3:18-cv-3377-K, 2019 WL 4545010, at *2 (N.D. Tex. Sept. 3, 2019); *Denova v. Ocwen Loan Servicing*, Case No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552, at *4 (M.D. Fla. Sept. 24, 2019).
3 *Glasser v. Hilton Grand Vacations Co.*, LLC, Case No. 18-14499, 2020 WL 415811, at *7 (11th Cir. Jan. 27, 2020).

"store" and "automatically dial" telephone numbers, even if the device does not use a random or sequential number generator. In *Facebook*, the Ninth Circuit applied an expansive definition of an ATDS, which includes any device that can "store" and "automatically dial" telephone numbers, even if the device does not use a random or sequential number generator. The Ninth Circuit's holding arguably conflicts with the D.C. Circuit's 2018 decision.

The search for a clear definition of an ATDS under the TCPA continues but has heretofore been elusive. In October 2018, the FCC requested further comment as part of an effort to update its guidance on the definition of an ATDS, but has yet to revise the previous definition. The business community remains hopeful that the FCC or the courts, including the United States Supreme Court, will finally provide long-awaited clarity in 2020 that callers can rely on to understand when the TCPA applies.

2. The standards for revocation of consent

Although consent to be called is generally revocable under the TCPA, a number of federal courts have held that a recipient of an autodialed phone call may not revoke consent where consent was included as a term in an underlying contract between the recipient and the caller. These courts have followed the reasoning in *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017), in which the Second Circuit held that a consumer's consent is irrevocable when contractually agreed-upon. As a matter of "black-letter" contract law, courts adopting *Reyes* have held that consumers cannot unilaterally revoke such consent without the permission of the other contracting party.

The Third Circuit Court of Appeals and related lower courts[4] have diverged from the *Reyes* rationale by finding that consumers retain the ability to revoke consent. One such decision, for example, declined to adopt *Reyes* and instead held that allowing consumers to revoke consent, even if consent was agreed to by contract, "is in keeping with the remedial, consumer-protection purposes of the TCPA."[5]

Unsurprisingly, consumers' ability to revoke contractually provided consent remains unsettled. Including consent provisions in consumer contracts may be a viable means of limiting exposure to the TCPA, but the extent to which such provisions reduce TCPA exposure has created a split among the circuits, which has created uncertainty for litigants and remains an area of continued legal development.

3. Implementation of the reassigned cellular number database and safe harbor

The FCC's December 13, 2018, Second Report and Order unanimously adopted the creation of a reassigned cellular number database that will be a resource for callers to determine whether consumers reassigned a cellular telephone number. The rule also creates a potential safe harbor from TCPA liability. Until now, businesses have faced a potential liability trap based solely on routine, good-faith communications intended for their own customers who gave consent to be called where they placed calls to cell phone numbers no longer belonging to their customers, thus rendering the prior consent a nullity.

Companies that use the reassigned cellular number database will, theoretically, be able to determine if cellular numbers on their calling lists have been disconnected and made eligible for reassignment. Companies can then purge these numbers from their call lists, thereby decreasing the number of errant calls to consumers who are not the intended recipient. To further encourage the use of the database, the FCC is providing callers with a safe harbor from liability for calls made to reassigned cellular numbers due to a database error. Callers will have the burden to prove that they checked the most recent and up-to-date database.

The reassigned cellular number database was originally expected to be launched in late 2019, but the process has been delayed. On January 24, 2020, the FCC solicited comment on the North American Numbering Council (NANC)'s recommended Technical Requirements Document, which NANC submitted to the FCC for the commission's review on January 13, 2020. Initial comments on the technical requirements analysis are due on or before February 24, 2020.

4. The impact of new federal law: The Pallone-Thune TRACED Act

On December 4, 2019, in a renewed effort to combat robocalls, the House passed the bipartisan Pallone-Thune TRACED Act (the TRACED Act) by a vote of 417-3. On December 30, 2019, President Trump signed the TRACED Act into law. A crucial element of the TRACED Act is assigning new responsibilities and obligations to phone-service providers to identify calls correctly and shield their customers from unwanted calls.

4 *See Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. 2013); see also, *Zondlo v. Allied Interstate, LLC*, 290 F. Supp. 3d 296, 304 (M.D. Pa. 2018).
5 *Ammons v. Ally Fin., Inc.*, Case No. 3:17-cv-00505, 2018 WL 3134619, at *15 (M.D. Tenn. June 27, 2018).

The TRACED Act will require phone-service providers to implement a new caller-ID authentication program, which will enable providers to block unauthenticated calls. Providers must implement the caller-ID authentication program at no additional cost and/or fees to the customer. The authentication program is aimed at cutting down on the practice of "spoofing," where scammers trick consumers into thinking a call is coming from a specific area code or a legitimate place of business. The TRACED Act also gives the FCC new tools to increase its enforcement actions, including a longer statute of limitations and assessment of higher fines and penalties for offenders. Echoing Congress's concern to combat robocalls, several states—including Arkansas, California, New York, North Carolina, and Texas—recently passed new state legislation in 2019 to protect their residents from robocalls and spoofed calls.

It is unclear just how effective the TRACED Act will be in combating the surge of robocalls nationwide.

5. When does a plaintiff have standing to file a TCPA claim?

Does receipt of a single call or text constitute an "injury" sufficient for a plaintiff to file a TCPA lawsuit in federal court? Federal circuit courts reached differing conclusions in 2019, setting this up as a key issue to watch in 2020.

In one 2019 case involving text messaging, the Eleventh Circuit held that receipt of a single unsolicited text message did not amount to an "injury in fact" sufficient to establish Article III standing to bring a TCPA lawsuit.[6] In *Salcedo v. Hanna*, the Eleventh Circuit found that the plaintiff's allegations, reflecting nothing more than a momentary annoyance, did not generate the harm necessary to bring a claim in federal court. As a result, district courts in the Eleventh Circuit must scrutinize plaintiffs' allegations on an individual, case-by-case basis, and cases alleging one text (or a small number of texts) will have an uphill battle establishing Article III standing.

The *Salcedo* decision, however, is in tension with the Ninth Circuit's 2017 decision in *Van Patten v. Vertical Fitness*, which held that the receipt of two unsolicited text messages constituted an injury in fact and thus established Article III standing.[7] These cases touch on an area in TCPA law that warrants further clarification by the courts in 2020 *i.e.*, delineating the types of harm and the degree of harm required to establish standing to bring a TCPA claim. The standing question is also potentially significant at the class certification stage if the alleged class contains individuals who may lack standing. In *Cordoba v. DIRECTV, LLC*,[8] the Eleventh Circuit vacated class certification in a TCPA case where the class contained individuals that lacked standing.

In the *Cordoba* decision, the court initially opined that receiving two unwanted phone calls is an injury in fact, and that the named plaintiff, who had asked not to be called, had alleged an injury traceable to the defendant's alleged failure to maintain an internal do-not-call list. But for unnamed class members who had not requested to be added to a do-not-call list, the court held that these individuals had not sustained injuries "fairly traceable" to the defendant's challenged conduct and thus lacked Article III standing. As a result, standing created an individualized issue, which the district court had not considered. Accordingly, the appellate court vacated the decision granting class certification and remanded for the district court to consider whether the individualized issue of standing would predominate over common issues and therefore preclude class certification.

It remains to be seen whether, on remand, the *Cordoba* plaintiff can revise the proposed class definition sufficiently to support class certification. However that case resolves, this will be an issue to watch in other TCPA class actions.

6. The United States Supreme Court weighs in on TCPA issues

Petitions for certiorari seeking the United States Supreme Court's guidance on numerous TCPA issues continue to be filed. The Supreme Court's recent and upcoming review of several key TCPA issues in 2020 could potentially affect TCPA enforcement and compliance and even call into question the constitutionality of the TCPA.

i. Is the TCPA government-debt exception unconstitutional?
One issue that the United States Supreme Court is already scheduled to review is determining if the TCPA government-debt exception, permitting an entity to use an ATDS to collect debts guaranteed by the US government, is constitutional.

On January 10, 2020, the Supreme Court granted certiorari in *William P. Barr et al. v. American Association of Political Consultants et al.*, Case No. 19-631. In *Barr*, the Fourth Circuit held that the government-debt exception was

6 *Salcedo v. Hanna*, 2019 WL4050424 (11th Cir. Aug. 28, 2019).
7 *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).
8 *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019).

unconstitutional because it was a content-based restriction on speech in violation of the First Amendment. To provide a remedy, the appellate court held that the government-debt exception should be severed from the remainder of the TCPA, leaving the TCPA's basic automated-call restrictions in place. The question on appeal is whether the government-debt exception violates the First Amendment and whether the proper remedy for a constitutional violation is to sever the exception from the remainder of the TCPA.

If the Supreme Court rejects the Fourth Circuit's reasoning that severing the government-debt exception from the statute is a proper remedy, the Supreme Court may consider invalidating the TCPA in its entirety or possibly eliminating the prohibition against the use of the ATDS as an alternative remedy.

ii. Are courts bound by FCC rules?

In a 2019 case, the United States Supreme Court was asked to determine whether federal district courts are bound by FCC guidance in TCPA cases. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019). The question on appeal was whether the Hobbs Act—which grants exclusive jurisdiction to federal appellate courts to set aside, suspend, or rule on the validity of certain federal agency guidance—requires district courts to defer to FCC rulings and orders interpreting the TCPA.

On June 20, 2019, the Supreme Court vacated the Fourth Circuit's decision and remanded. The Supreme Court held that two preliminary questions needed to be addressed before the Court could consider whether district courts are bound by FCC interpretations under the Hobbs Act: (1) whether the 2006 FCC order[9] at issue is a legislative rule that has the force of law or whether it is an interpretive rule that advises on the agency's construction of the law but does not have the effect of law; and (2) whether PDR Network had a prior and adequate opportunity to seek judicial review of the order under the Hobbs Act petition.

In remanding the issue to the Fourth Circuit, the Supreme Court punted on the core question presented *i.e.*, whether district courts in private litigation are required to defer to the FCC under the Hobbs Act, or whether courts have authority to interpret and apply unambiguous statutory provisions that conflict with FCC rules. The Fourth Circuit's ruling on remand in 2020 may set this up for further high court review, and the question is also expected to arise in other cases in 2020 and beyond.

We expect TCPA cases to continue working their way to the Supreme Court, and as discussed earlier, we are awaiting the Supreme Court's decision on whether to take up the ATDS issue.

Conclusion

With the wave of TCPA litigation expected to continue in 2020, developments in these key areas will shape the TCPA landscape. Plaintiffs' lawyers will continue to target many different industries, and a strong TCPA compliance program is essential to help businesses of all kinds avoid TCPA lawsuits and potential exposure.

9 21 FCC Rcd. 3787, 3814 ¶ 52 (2006).

For further information

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The TCPA traffic light

	LANDLINE		CELL PHONE	
	MARKETING	NON-MARKETING	MARKETING	NON-MARKETING
AUTODIALED CALLS/TEXTS	DO NOT CALL LIST+		PRIOR EXPRESS WRITTEN CONSENT[1] *	PRIOR EXPRESS CONSENT[2]
PRERECORDED VOICE	PRIOR EXPRESS WRITTEN CONSENT *		PRIOR EXPRESS WRITTEN CONSENT *	PRIOR EXPRESS CONSENT
MANUALLY DIALED	DO NOT CALL LIST		DO NOT CALL LIST	
FAX	PRIOR EXPRESS PERMISSION OR ESTABLISHED BUSINESS RELATIONSHIP *			

[1] "Prior express written consent" requires a written agreement, signed by the consumer, that includes, among other things, the telephone number that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

[2] For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

+ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. ***This chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.***

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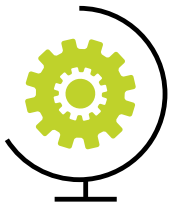

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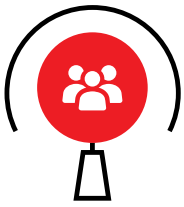

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