



## The TCPA & healthcare: FCC limits “house calls” to cellphones

The Federal Communications Commission (FCC) ruling this summer on the Telephone Consumer Protection Act (TCPA) had direct implications for many health care institutions – and recent case law continues to define the guidance with respect to health care related debt collection.

### Background

As explained in a previous Business Advocate post, the TCPA restricts telemarketing. It also prohibits calls and texts to cellphones using automatic dialing, messaging systems, or artificial or prerecorded voices – unless the call is made for emergency purposes or with prior express consent (written consent is often required and is always preferred).

Certain financial alerts or health care messages – such as fraud alerts or prescription refill reminders – are allowed without prior consent. However, consumers have the right to opt out from these permitted calls and texts at any time. The FCC also clarified that if a person is incapacitated, a third-party intermediary could provide prior express consent for health care calls, but only for the period of incapacity.

### TCPA and the health care industry

Specifically with respect to health care entities, the FCC clarified that “the provision of a phone number to a health care provider constitutes prior express consent for health care calls subject to [HIPAA] by a HIPAA-covered entity and business associates acting on its behalf . . . .” Prior express consent based on providing a phone number only applies to calls made “within the scope of the consent given.” The FCC made clear that this exemption only applies to health care message made for treatment purposes, not all messages by a provider. (For example, insurance coverage calls may not be subject to exemption.) This includes “appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative notifications, and home health care instructions.” The exemption also applies to HIPAA-related calls; excluding calls related to “telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content.” In such instances prior express consent must be obtained.

### Qualifying for prior express consent

To qualify for the prior express consent exemption, in addition to making sure that the consumer won’t be charged for receiving the text and the text won’t count against their plan limits, calls and texts must satisfy the following conditions:

- They must be sent only to the cellphone number provided by the patient.
- They must state the name and contact information of the health care provider (for voice calls, at the beginning of the call).
- They are strictly limited to emergencies and the call has a health care treatment purpose, and (1) cannot include any telemarketing, solicitation, or advertising; (2) cannot include accounting, billing, debt-collection, or other financial content; and, (3) must comply with HIPAA privacy rules
- They must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages.
- Health care providers may initiate only one voicemail or text message per day, up to a maximum of three voice calls or text messages combined per week from a specific health care provider.
- In each message health care providers must offer the recipient a means to opt out of future messages.
  - Voice calls that could be answered by a live person must include an automated, interactive voice and/or key press-activated opt-out mechanism allowing an opt-out request to be made before the call ends voice calls.
  - Calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future health care calls.
  - Text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages

- o The health care provider must honor the opt-out requests immediately

## Recent developments

Recent case law further defines the contours of this guidance with respect to health care related debt collection. In *Murphy v. DCI Biologicals Orlando, LLC*, 11th Cir., No. 14-10414 (8/20/15), the court found that the district court correctly refused to consider arguments regarding the validity of a prior FCC order that defined prior express consent and concluded that under the FCC's interpretation of prior express consent, by writing down his mobile phone number on DCI's new donor information sheet, the patient gave his prior express consent to receive auto dialed calls or text messages. Under similar circumstances, and on the day after *Murphy*, the 6th Circuit Court concluded that a debtor who provided his cellphone number to a creditor gave his prior express consent under the TCPA to be called on that number about the debt. In *Hill v. Homeward Residential, Inc.*, 6th Cir., No. 14-4168 (8/21/15), the court ruled that a debtor doesn't need to give consent to automated calls specifically, but that general consent to being called on a cellphone constitutes prior express consent.

## Take action

In short, while TCPA liability has expanded exponentially, health care providers have been provided protection not available to other industries. Multi-million dollar class actions and settlements, combined with unsettled law and guidance, mean the trend of new TCPA lawsuits will continue. And while case law indicates that the simple provision of a cellphone can sometimes constitute prior express consent, it is always better to obtain **prior written consent**. If you routinely contact patients or customers through their cellphones, you should engage a TCPA expert to ensure effective compliance and defend high exposure cases. Such counsel should be familiar with the nuances of:

- When written prior express consent is required
- The collection and use of phone numbers provided by consumers and how to ensure that an entity can distinguish between wireless and residential numbers
- Vicarious liability for the acts of third parties (marketers, collection agencies, etc.)
- Potential methods to make sure that their list of wireless numbers is current and up to date
- Specific contractual language to obtain "prior express consent" for calls that are not otherwise covered by the FCC Order's newly created exemptions.

The TCPA creates uncertainty and places the compliance burden on you. As with most areas, effective planning and strategy can go a long way to minimizing exposure and avoiding costly, and potentially company-killing, litigation.

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