

TCPA 2017: Key Issues and Proactive Steps for Contact Centers

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Now is not the time to take your eye off TCPA. It might be tempting to continue business as usual until the appeals courts makes a ruling. However, this approach is fraught with danger.

The transformational declaratory judgment order on the Telephone Consumer Protection Act (TCPA) entered on July 10, 2015 was met with immediate concern. Various telemarketing, financial and collection entities filed an appeal, effectively staying many cases until a ruling is made. Oral arguments on the appeal were made on October 19, 2016 and a ruling is expected in early 2017.

TCPA cases remain the second most common type of case filed in Federal courts (3710 cases in 2015, up 45% from 2014). These cases often involve significant costs and demonstrate the risks associated with non-compliance.

Five Key TCPA Issues Raised in Appeal

The petitioners in the appeal seek clarity on enforceability of five key issues.

1. **Capacity.** The order defines an autodialer as having the capacity to automatically generate and dial random and sequential numbers. At issue here is the definition of 'capacity'. The FCC originally interpreted this as current capability but now says it also includes potential capability. Petitioners consider this too vague. Until the courts rule on the appeal, a good course of action here is to ensure you have human intervention in your dialing processes. Be sure that you have consent for every number you autodial.

2. **Predictive Dialers.** Petitioners argue that predictive dialers are not autodialers. These dialers work from a pre-defined list. Petitioners contend that this excludes them from the autodialer category, because autodialers are defined to both automatically generate and dial random or sequential numbers.
Using a predictive dialer with a list of numbers that have given consent is the better path while waiting for a ruling.
3. **Called vs. intended party.** The order sets out a ‘one and done’ policy. The caller must determine whether the called party is the actual intended party after one call attempt. If the called party is not the intended party, then no additional calls can be placed. The burden is on the caller to determine if the called party is in fact the intended party even if there is no answer. The petitioners object to this because of the distinction between the called party and the intended party. The petitioners argue the burden is unrealistic to meet. There are about 100,000 phone numbers reassigned each day. Petitioners argue that if a call is placed in good faith to a wrong number, the ruling should not exclude additional attempts to reach the intended party. The FCC counters that there are tools available that can identify most of these changes, virtually eliminating the issue.
The one-and-out policy is arbitrary at best. Nevertheless, while waiting for a ruling do all you can to limit wrong number dials. Use a scrubbing tool every day, if needed, to limit your exposure.
4. **Revocation of consent.** The original order allows consumers to revoke consent to receive calls in any way they find reasonable. Petitioners say this places an undue burden on callers. For example, if a person checking out at the supermarket tells the cashier that they no longer want emails from the store, how does that verbal communication end up reaching everyone who might place a call to that consumer? The FCC argues that it is not the consumer’s problem. The petitioners counter-argue that it is in everyone’s interest for the process to be more formalized and standardized.
Until a ruling is made, do what you can to provide an easy method for consumers to revoke consent and for you to track. Be prepared as well to respond to revocation made in other ways, such as emails to customer service, verbal requests to an agent and so on.
5. **HIPAA-based Exemption.** HIPAA-protected communications were previously exempt from consent requirements. After the order was issued, however, healthcare providers became subject to its regulations. Petitioners argue that this ‘inadvertently chill[s] beneficial patient communications’. If a consumer revokes consent for communication from a drug store, for example, how does the pharmacy notify the consumer if there is a medical necessity? Rite-Aid joined the appeal, asking for an elevated standard for HIPAA.
In short, under the current rules set all HIPAA calls must have consent, whether they are informational or commercial. Until and unless the rules change, you are at risk if you use an autodialer and do not have appropriate consent for calls subject to both HIPAA and TCPA.

TCPA Procedural Decisions

Two important decisions have been rendered in the absence of a ruling on the omnibus appeal:

1. **Gomez.** An offer to a plaintiff does not moot a class action certification.

2. **Spokeo.** Plaintiff must show an injury in fact (in each alleged violation) comprised of:
 - a. Invasion of a legally protected interest
 - b. ‘Concrete and particularized’ injury – the injury must actually existAs a result of the Spokeo decision, a new line of defense has developed. In this early testing of the ruling, only a fraction of TCPA cases were dismissed due to lack of standing. Meaning you are not actually injured and therefore not in a position to file a claim. However, the majority of cases still advance due to the strict liability nature of the TCPA and the subsequent chilling effect if ruled to the contrary.

Proactive Steps for Contact Centers

1. **Avoid** co-mingling ATDS and Manual dial numbers at all costs. Invest in customer experience solutions that keep separate your ATDS and manual dialing. It is unlikely that the Circuit court will reverse a present capacity determination if you use a ‘flip a switch’ approach to move between ADTS and manual dialing. Make an effort to keep separate ATDS eligible interactions and make capital outlays that demonstrate a good faith effort at compliance.
2. **Create** simple language to gain consent. Make sure you have obtained the required type of consent, store that consent and importantly, track and make your agents aware of the status of consent (validity or revocation.)
3. **Treat** text messaging as a mobile call. The courts do, and that position is unlikely to change.
4. **Use** as much human intervention as possible in any platform. Be cautious of technology that alleges to be a manual dialer but ‘quacks’ like an ATDS—high abandon rates are a sure giveaway. Labeling technology as a ‘manual/safe’ dialer is not a defense if it acts as an ATDS.
5. **Create** and maintain a TCPA compliance manual. A demonstration of ‘good faith’ and a proactive posture in adherence to TCPA provisions will buttress a defense.
6. **Train** your agents in TCPA adherence and record proficiency. Agents are the front line of preventing TCPA violations.
7. **Maintain** a solid quality assurance program.
8. **Scrub** your call lists at least monthly for reassigned wireless numbers. Try to do so daily or even in real time, if feasible. It is noteworthy that the best databases can only scrub for 80% of wireless numbers. To assist in avoiding violations relating to the remaining 20%, scrubbing of frequent litigators is an important and affordable tool.
9. **Keep** records! Use technology to control pass-through calls and document what platform was employed to initiate each outbound call. Do not just keep records of consent and revocation, or cell versus landline calls.
10. **Foster** a close relationship with your vendors to promote compliance on current and future changes. It is vital to police your technology and lead-generation vendors. A defense of ‘My vendor told me we were compliant’ or ‘my vendor had a document from attorney X stating their solution is TCPA compliant’ will not immunize your organization against liability. Be vigilant and gather your own independent reviews.
11. **Hold** any third party agents to your standards. If they violate the TCPA, the called party will also pursue you, especially if you have deep pockets. Third party vicarious liability is massive.

12. **Know** the rules. You need to comply with a changing combination of federal, state and local regulations. For example, in most states you cannot call on holidays. Also, in five states (TX, AZ, NJ, WY, LA) you cannot call a mobile phone without consent whether using manual dial or ATDS.

The courts will likely rule on the appeal in early 2017 and any practical changes will likely go into effect in the summer. In the meantime, do your best to be compliant with the TCPA as is and be prepared to respond.