DENTONS DAVIS BROWN

Is it OK to Text My Customers?
Pitfalls and Opportunities Under the TCPA

Shannon M.H. Hasse
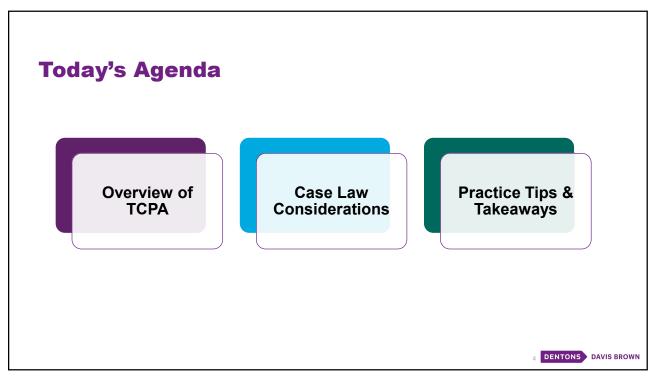
Grow | Protect | Operate | Finance

1

Shannon M.H. Hasse

Attorney

- Corporate/M&A
- Real Estate
- Data Privacy & Security

Dentons Davis Brown PC
Shannon.Hasse@dentons.com
515.288.2500

2

Disclaimer

No written or oral statement made by Dentons Davis Brown attorneys should be interpreted by the recipient as suggesting a need to obtain legal counsel from Dentons Davis Brown or any other firm, nor as suggesting a need to take legal action of any type or kind. Please do not attempt to solve individual legal problems based upon the general information provided in the course and scope of these materials or presentation as slight changes in fact situations may cause a material change in legal result.

3

Today's Agenda

| Overview of TCPA | Case Law Considerations | Practice Tips & Takeaways |

4

Overview of Telephone Consumer Protection Act (TCPA)

5

Why Do We Care?

- TCPA is one of the most frequently sued-under consumer protection statutes.

- TCPA cases continue to result in outsized damage awards/settlements because there is no cap.

- Types of litigation are shifting in light of recent case law – many unknowns.

6

Background of Regulations

Laws/Regulations	Enforcement Agency	Summary
Telephone Consumer Protection Act (TCPA) and FCC Implementing Rules	FCC	Restricts certain calls/messages made using artificial or pre-recorded voice to residential lines; certain calls/messages made using artificial or pre-recorded voice or an automatic telephone dialing system to wireless telephone numbers; and certain telemarketing calls.
2009 Truth in Caller ID Act (TICIDA)	FCC	Prohibits knowing transmission of misleading or inaccurate Caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value.
Do Not Call Implementation Act (DNCIA)	FTC, FCC	Authorizes FTC to collect fees for implementation/enforcement of Do Not Call Registry. Telemarketers must consult Registry before calling.
Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act) and Telemarketing Sales Rule	FTC	Prohibits deceptive and abusive telemarketing acts or practices.
Consumer Privacy Laws	Varies	Rules vary; May restrict use of consumer data and various communications with consumers.

TCPA Generally - 47 USC § 227

General Rule	Exceptions	Consent
▪ The TCPA restricts calls* using an ATDS "to any residential telephone line" and to "any telephone number assigned to a . . . cellular telephone service" without the prior express consent of the called party.	▪ Prior express consent; ▪ Emergency call/text; ▪ Collecting a government debt.	▪ If the text messages you send do not qualify under the exceptions, prior consent is required.

*Text messages are treated the same as voice calls under the TCPA

Key Concept: "Autodialer" or "ATDS"

▪ TCPA prohibits the use of certain automated dialing equipment to call or text wireless phone numbers without first obtaining consent.

▪ An automatic telephone dialing system (ATDS or autodialer) is defined as equipment which has the capacity to:

   a. store **or** produce telephone numbers to be called, <u>using a random or sequential number generator</u>; **and**

   b. to dial such numbers.

The Case That Changed Everything
Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021)

▪ SCOTUS drastically limited the reach of the TCPA by more narrowly defining ATDS.

▪ Equipment that can store & dial, but does NOT use random or sequential number generator to do so is NOT an ATDS
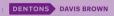
  ▪ Chainsaw vs. Scalpel approach

Key Concept: Stored Numbers vs. Randomly Generated

Stored Numbers

- Narrow definition of ATDS
- Many courts have found that sending a text message to a phone number stored in a company database does **not** constitute a TCPA violation because the technology used to send the text message does **not** qualify as an ATDS.
- Most notably, the U.S. Court of Appeals for the Ninth Circuit recently held that under the TCPA's plain text, an ATDS "must randomly or sequentially generate **telephone** numbers, not just any number."

Randomly Generated Numbers

- Broad definition of ATDS
- Even if a phone number is not randomly generated and already exists in the company's files, the use of a system that employs a random number generator to **merely determine the <u>order</u> in which to pick phone numbers from the existing list could qualify as an ATDS.**

11 DENTONS ▶ DAVIS BROWN

11

Recommended Approach - Iowa

United States Supreme Court
Facebook Inc. v. Duguid

- Use of a system to send automated text messages from <u>a preexisting list or database</u> of stored numbers is <u>not</u> an ATDS because it does not have the capacity to use a random or sequential number generator.
- Therefore, a device that can store and dial telephone numbers but does not use a random or sequential number generator is not an ATDS.

Eighth Circuit Court of Appeals
Beal v. Outfield Brew House, LLC

- Adopted the US Supreme Court's view of what qualifies as an ATDS.
- A device using a numerically-based randomizer to shuffle and select phone numbers from a database was not an ATDS.
- Rationale: The main concern of the TCPA is to prohibit a device from randomly dialing emergency lines or tying up sequentially numbered business lines. Therefore, a device that is only designed to text potential customers who have voluntarily given the business their phone number is not prohibited.

12 DENTONS ▶ DAVIS BROWN

12

Related Law in Iowa

- Iowa Code section 714.16(2)
  - Illegal to use or employ unfair practice, deception, fraud, etc. with the intent that others will rely on such misrepresentation in connection with the lease, sale, or advertisement of any merchandise, etc.

13

What if we do use an Autodialer?
Consent Requirements

Prior Express Consent

- Written or verbal

- Customer provided number & message related to reason number provided

Prior Express Written Consent

- Telemarketing or advertising

- Customer expressly authorizes receipt of such messages & cannot be a condition of purchase

14

Opt-Out Requirements & Revoking Consent

- **Majority Approach**: A message-recipient can revoke their consent to receive text messages.
- **Minority Approach**: Prior express consent may not be revoked.

- No defined opt-out requirement under TCPA – "reasonable"
- **Recommendation**: Prior FCC rulings indicate that callers should provide customers with a direct opt-out mechanism, such as a reply of 'STOP' for text messages.

Damages/Penalties for TCPA Violations

- The TCPA provides for statutory damages of **$500 per violation**— and up to **$1,500 for willful or knowing violations**.

- Consumers can sue for injunctive relief and actual monetary losses.

- No statutory limit on damages.

- Four-year statute of limitations

TCPA is Far From Dead

- Do Not Call List Litigation
- Ringless Voicemail Litigation
- Prerecorded Messages Litigation
- Increase of "Shakedown Artists"
- State-Level Statutes on the Rise

17

Case Law Comparison
Maker vs. Platform Provider

18

Who is the "Maker" of the Message?

YouMail	Glide	TextMe
- App is reactive in nature to user's selections. - YouMail has no control over content of message. - NOT message maker.	- App enables real-time communication through video messaging. - Glide's dialer facilitates the sending of invitational text messages automatically to user's contacts list. - Provided suggested language for messages. - YES, message maker.	- App provides access to text message and voice call services. - Users can invite contacts, however, requires a multi-step process in which users have to make a number of affirmative choices throughout the invite process. - NOT message maker.

19

Key Takeaways to Avoid "Maker" Status for Platform Providers

- Institute a multi-step process, like TextMe has done, that requires the <u>app user</u> (rather than your company) to determine where to send the message, to whom to send it to, and when that message is sent.

- Allow the app user to <u>modify</u> the message or add additional language to help further separate your company from the making of the message.

20

Practice Tips & Takeaways

21

Internal Process

Develop Internal TCPA Compliance Policy - Consult Legal Counsel

Educate Employees - Schedule Routine Compliance Training

Check insurance policies to determine if damages are insurable

Stay up-to-date on changes in federal law & state-level statutes

22

External Relations

Determine Company's Role (Direct or Through Vendor?)

Provide Required Disclosures/Obtain Consent

Provide Opt-Out

Check Do-Not-Call Registry

23

Vendor Agreement Considerations

Written Agreement – Vendor must comply with Applicable Law

Determine Responsibility to Obtain Consent

Shift Liability to Vendor

Indemnification for Third-Party Claims

24

Ask Yourself

▪Where/how did I get this number?

▪What is the content of the message?

▪What mechanism are we using to send the message(s)?

▪Did I check the National and Internal Do Not Call list?

▪Do I need to obtain consent?

▪Did I previously obtain consent? Is this message related to the reason I collected the customer's phone number?

▪Is a vendor sending this message on our behalf? Do we have an agreement with them?

25

Questions?

26

DENTONS ▸ **DAVIS BROWN**

Thank You

Shannon M.H. Hasse

<u>Shannon.Hasse@dentons.com</u>

515.288.2500

Grow | Protect | Operate | Finance

Dentons is the world's largest law firm, connecting talent to the world's challenges and opportunities in more than 75 countries. Dentons' legal and business solutions benefit from deep roots in our communities and award-winning advancements in client service, including Nextlaw, Dentons' innovation and strategic advisory services. Dentons' polycentric and purpose-driven approach, commitment to inclusion and diversity, and world-class talent challenge the status quo to advance client and community interests in the New Dynamic. www.dentons.com.