

TCPA for Cellular Carriers

Cellular carriers make the telecommunications system work but they can also be subject to telecom regulations.

Overview

Cellular telephone providers are indirectly involved in most Telephone Consumer Protection Act (TCPA) lawsuits, by virtue of being the provider of the medium over which violations are committed. However, cellular carriers can also find themselves being the subject of TCPA litigation.

Due to sales, marketing, and debt collection efforts, cell phone carriers can be subject to the same sorts of compliance risks as any other callers. And their essential role in telephone infrastructure does not exempt their marketing departments from these regulations.

Fun Fact

The first commercial cellular network was launched by Nippon Telegraph and Telephone in Japan in 1979.

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Telephone Consumer Protection Act

The TCPA is the bedrock of federal telemarketing regulations. It includes such provisions as calling time restrictions (8am - 9pm, recipient's local time) and identification requirements (the caller must provide their name, the name of the company on whose behalf they are calling, and a telephone number or address which can be used to contact them again).

Consent

The TCPA restricts the use of automatic telephone dialing systems (ATDS) to make marketing calls and texts to cell phones and other devices where the recipient might be charged for the call without written consent, and non-marketing autodialed calls without prior express consent. Additionally, the TCPA does not allow the use of an artificial or prerecorded voice to be used to call a residential landline or wireless number for marketing purposes without prior express written consent.

Did You Know?

The Supreme Court's decision in *Facebook v. Duguid* narrowed the scope of which dialing technologies fit the TCPA's ATDS restrictions but did not change the restrictions themselves.

DNC List

Marketers are required to suppress phone numbers on the National Do Not Call (DNC) Registry. Callers are also required to maintain an internal DNC list of consumers who asked not to be called or texted. Multiple states also have DNC list requirements, with 12 states maintaining their own, unique DNC lists.

Warning

In the months following SCOTUS's decision in *Facebook*, multiple plaintiffs filed TCPA class actions in which DNC violations appeared to be substituted for ATDS violations.

Exemptions

Cellular carriers are exempt from the TCPA's consent requirements for messages sent to their own customers as long as the customers are not charged for those messages.

Risks

The TCPA's primary avenue of enforcement is its private right of action, allowing plaintiffs to file TCPA lawsuits and class actions in state and federal courts. This litigation can be extremely expensive for defendants due to the fact that the law is a strict liability statute with per-violation penalties (up to $500-per violation, up to $1,500-per-willful-violation) and uncapped statutory damages.

Reassigned Numbers

Under the TCPA, consent is associated with the "called party" rather than the phone number. This means that, if a phone number is reassigned to a new user, whatever consent had previously been acquired to call the number is now invalid. Because of the law's status as a strict liability statute, any violations accidentally committed as a result of phone number reassignment are still penalized.

The Federal Communications Commission (FCC) created a reassigned number database (RND) in November of 2021. It offers the possibility of a safe harbor defense to callers who regularly scrub their numbers against the RND and end up mistakenly calling a number for which they no longer have consent due to number reassignment.

Of course, cellular providers face requirements on the other side of the administrative efforts at maintaining the RND. Namely, they must keep records of the numbers that they disconnect and reassign and provide that information to the FCC in a timely fashion.

Fun Fact

Approximately 100,000 phone numbers are reassigned every day, on average.

Risks (Cont'd)

Vicarious Liability
It is a common practice for cellular service providers to market their products and services through the use of independent sales forces and lead aggregator websites. While these can be great sources for obtaining fresh leads, they can also be a trap for TCPA litigation. Similarly, many cellular providers use third-party debt collection agents.

If these third-party agents violate the TCPA, the organizations that hire them or accept their leads can be found vicariously liable for any resulting damages. Examples of possible violations include the third-party agents calling consumers without the proper consent, making calls or texts using an automatic telephone dialing system or prerecorded voice, and not honoring opt-out requests.

When an organization doesn't supervise the strategies that lead generators and debt collectors use to conduct their campaigns, the risk of possible violations occurring can be enormous. TCPA violations incurred by independent agents and lead generators acting on behalf of a cellular provider will draw that cellular provider into any related lawsuits.

Definition

Vicarious liability is defined as an attachment of responsibility to a party for harm or damages caused by another party in a lawsuit or civil action.

Case Study
In 2016, a major cellular service provider settled a TCPA class action for $4 million. The case stemmed from robocall violations committed by a third-party debt collector.

Best Practices

Don't Call Known Litigators and Serial Plaintiffs
The easiest way to avoid a lawsuit is to not contact the people who are most likely to sue. TCPA litigators and professional plaintiffs infiltrate your data by filling forms on your lead generation websites and finding ways to get independent agents to contact them. The best defense is to remove these predatory individuals from all calling lists before reaching out.

Suppress Numbers Against the Do Not Call List
Telemarketers are required to suppress phone numbers on the National Do Not Call Registry. Some states have their own local DNC lists as well, in addition to the federal list.

Check for Reassigned Numbers
With approximately 100,000 mobile phone numbers reassigned by wireless carriers every day, it is absolutely essential to check your data for reassigned numbers. Phone numbers may change, but the risk of TCPA liability is inevitable.

Get a Third Party Compliance Provider
When you're in a high-risk category like providing cell service, it is not enough to just have legal counsel. It is critical to have a TCPA compliance provider on your side. You will save money, headaches and prevent brand damage.