

CORPORATE counsel

Select 'Print' in your browser menu to print this document.

Copyright 2010. ALM Media Properties, LLC. All rights reserved. *Corporate Counsel* Online

Page printed from: <http://www.corpcounsel.com>

[Back to Article](#)

Stay Off the Hook for TCPA Claims

Benjamin Stone
Corporate Counsel
October 01, 2010

Automatically dialing cell phones could land your company in court and cost you millions, with a growing number of cases alleging violations of the [Telephone Consumer Protection Act \(TCPA\)](#) ...

Many companies use different types of automatic dialers to call potential and actual customers, or hire vendors (e.g., call centers or collection agencies) using this equipment.

Also See: [FULL Expert Archive](#)

Calling hundreds, if not thousands, of numbers instantly, dialers are the only efficient way to connect with or leave messages for large numbers of potential or actual consumers. Because so many people no longer rely on home phones, many of these calls reach cell phones.

In response, there's been an outbreak of putative class actions nationwide against companies in different industries alleging that they (or their vendors) called the cell phones of thousands of people in violation of TCPA. Given the sheer number of calls and high penalties under the TCPA, the stakes are high in these cases.

Case in point: [Simon & Schuster](#) recently agreed to pay up to \$10 million to settle a putative class action by consumers who allegedly received text messages promoting a new Stephen King novel.

Thus, if your company uses any type of dialing hardware or software, or uses vendors that do, you should be aware of the provisions of the TCPA and strategies to prevent litigation.

The Evolution of TCPA

Enacted in 1991 to respond to complaints about abusive telemarketing industry practices, the TCPA prohibits a call to a cell phone using an "automatic telephone dialing system" or an artificial or pre-recorded voice "absent an emergency" or "prior written consent" of the called party.

Although an artificial or pre-recorded voice is self-explanatory, an "automatic telephone dialing system" is a legal term, defined by the statute as "equipment which has the capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers."

This definition, however, is not entirely clear and has yet to be interpreted by the courts. The use of the terms "equipment" and "capacity," for example, are broad terms and, because they are not defined by the TCPA, can be misinterpreted to include types of equipment that should not fall within the TCPA.

The FCC, which issues regulations interpreting the TCPA, has interpreted "automatic telephone dialing system" broadly. The FCC has ruled that a predictive dialer — which, in relevant part, stores pre-programmed numbers or receives them from a database — is an automatic telephone dialing system.

The FCC reasoned that the TCPA has to adjust to technological advancements and, from the perspective of cell phone users, the harm the TCPA was meant to address — the invasion of privacy from automated calls — was the same whether numbers were dialed randomly, sequentially, or from a database.

Since the TCPA was enacted, telemarketers and others have also begun using equipment that automatically sends text messages to consumers, as in the [Simon & Schuster](#) case. Following the FCC's expansive definition on the predictive dialer front, courts have held that text messages can fall within the TCPA if they are sent "using equipment with some automated capacity." See, e.g., [Abbas v. Selling Source LLC](#), (2009).

Potential Damages

Under the TCPA, a customer can sue for calls to a cell phone using an automatic telephone dialing system or artificial or pre-recorded voice and seek \$500 for each violation. Although no statute or regulation defines violation, it can be argued that every call is a violation, and since dialers make such a large number of calls, the damages can be significant.

Not only is there no cap on damages, but the TCPA states that if a company "willfully or knowingly violated" the law, the court can increase damages to \$1,500 a violation. In one case, a court found that a collection agency defendant willfully or knowingly violated the TCPA simply by calling the plaintiff on his cell phone using a pre-recorded voice, regardless of whether it knew it was violating the law. Sengenberger v. Credit Control Services, Inc. (2010).

Ways to Make the Right Call and Avoid TCPA Liability

With company's financial health on the line in these cases, there are specific steps that counsel can take inside and outside the courtroom.

The safest bet is to install cell phone scrubbing software to remove cell phone numbers from dialer databases. If your company is going to call cell phones using an automatic telephone dialing system, ensure the company received "prior express consent" to make the calls.

Some companies are beginning to do this at the point of sale, requesting that customers agree to receiving these calls when they buy the company's product or service.

In a ruling favorable to companies and their collection agencies, the FCC held that, if a consumer has voluntarily disclosed his or her cell phone number in a transaction, he or she has given prior express consent to the company and its collection agency to calls regarding debts for the transaction.

So if a consumer provides the phone number in an application or later gives it to a company employee as a contact number, no further prior express consent is required under the TCPA. But the FCC also held that calling from a cell phone is not consent under the TCPA.

Thus, companies that capture incoming phone numbers do not have consent to call those numbers using an automatic telephone dialing system or an artificial or pre-recorded voice.

If your company is going to rely on the consent defense, keep the records evidencing the consent since, under the law and FCC regulations, a company has the burden of establishing consent.

Also be aware of any law particular to your industry that might impact consent. A plaintiff in one TCPA putative class action that involves debt collection calls for unpaid medical bills is arguing that HIPAA barred the release of cell phone numbers by the medical provider to the defendant collection agency. According to that plaintiff, the agency did not have consent under the TCPA to leave pre-recorded messages on his cell phone even though he had voluntarily disclosed his cell phone number to his health care provider.

If there is uncertainty concerning whether equipment a company or its vendor is using is an automatic telephone dialing system, seek a legal opinion. Although the law is developing, an attorney working with knowledgeable IT staff can provide guidance on whether your company is facing potential liability under the TCPA.

Your company is also allowed by FCC regulations to file a petition with the FCC seeking a ruling that your company's use of the equipment does not violate the TCPA. The petition is relatively simple to file, particularly considering the costs and exposure of litigation, and a favorable ruling from the FCC can shield your company from liability.

And if your company uses vendors to provide dialing systems or to call potential or actual customers, request indemnification from the vendor for any consumer lawsuit alleging violations of the TCPA, or insist that the vendor obtain a ruling from the FCC that the equipment complies with the TCPA before allowing the equipment to be used.

The current wave of TCPA class action litigation is a clear signal that in-house counsel should investigate whether their companies are making calls or sending texts that could land them in court. Taking the above steps could help your company avoid making the wrong call on the TCPA.

Benjamin Stone, of the Seattle office of law firm [Cozen O'Connor](http://www.cozen.com), handles TCPA class actions nationwide, and defeated one of the first motions for class certification of a TCPA autodialer lawsuit for a major collection agency. Contact him at 206-373-7237 or bstone@cozen.com

Also See: [FULL Archive of CorpCounsel.com Expert Stories](#)

Also See: [Just Sign Here: Every Contract Is a Litigation Waiting to Happen](#)

Also See: [Avoiding the Ethical Minefield of Social Media: Do You Know Who Your Friends Are?](#)

Also See: [What GCs Need to Know After EU Court Limits Attorney-Client Privilege for In-House Counsel](#)

Also See: [So You Thought Dodd-Frank Was Just About Financial Industry Reform?](#)