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Are You TCPA Compliant?: Large Healthcare Provider Facing Class-Action Lawsuit For Telephone Consumer Protection Act Violations

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Last month, a large California healthcare provider Prospect Medical Group was sued in a class-action lawsuit alleging it violated the federal Telephone Consumer Protection Act (the “TCPA” or the “Act”) by using automated equipment to call a patient on her cell phone about a past-due medical bill without her prior express consent.

Enacted in 1991, the TCPA, with few exceptions, makes it unlawful for any person or entity to use an automatic telephone dialing system or an artificial or prerecorded voice message to call a wireless number or other service for which the recipient is charged for the call. Though originally intended to address telephone calls and faxes, the Act applies to text messages as well.

Businesses that violate the TCPA are subject to actions by private parties for actual monetary loss for such a violation or statutory damages of \$500 per call, whichever is greater. For willful or knowing violations of the Act, they may be liable for up to \$1,500 per call. Violators may also be subject to enforcement actions by state attorneys general and the Federal Communications Commission (the “FCC”), the agency empowered to enforce the TCPA.

The lawsuit against Prospect Medical Group is emblematic of the alarming rise of class-action lawsuits based on the TCPA since 2010 and serves as a stark reminder of which calls fall within the healthcare exemption to the TCPA and which do not.

On July 10, 2015, the FCC issued a Declaratory Order responding to numerous petitions lodged by businesses and healthcare groups seeking clarification of the TCPA and the breadth of its application. Through the Declaratory Order, the FCC confirmed a healthcare exemption for autodialed calls to wireless numbers, but restricted the exemption's scope to apply exclusively to those calls that have a “healthcare treatment purpose.” Such calls include “appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.” There are a number of additional requirements for each call to be exempt – which include the prescribed content and purpose of the calls – governed by HIPAA privacy rules, limits on amount of messages, and providing the recipient the option to opt-out of receiving further calls. The healthcare exemption applies to robocalls and text messages to wireless numbers *only if* they are not charged to the recipient, including not

being counted against any plan limits that apply to the recipient.

Calls from healthcare providers which do not fall outside the healthcare exemption are those that include billing, accounting, debt-collection or other financial content, or that include advertising or marketing content. In spite of requests for a broader exemption, the FCC determined that while “calls regarding billing and accounts may convey information, we cannot find that they warrant the same treatment as calls for healthcare treatment purposes. Timely delivery of these types of messages is not critical to a called party’s healthcare, and they therefore do not justify setting aside a consumer’s privacy interest in favor of an exemption for them.” These other calls can only be made under the TCPA if the patient provides prior express written consent.

Healthcare providers who contact patients via automated or prerecorded telephone calls or by text message would be wise to conform their current policies and procedures to the July 2015 Declaratory Order. As is evident by the Prospect Medical Group case, violations of the TCPA have become fertile ground for class-action lawsuits. Healthcare providers that ignore the requirements set forth in the Act as interpreted by the Declaratory Order do so at their own peril.

If you would like to discuss these issues further, or have questions about this alert, please contact us at jdkearl@hollandhart.com or kcstanger@hollandhart.com.