



# TCPA COMPLIANCE IN THE HEALTHCARE INDUSTRY: UNDERSTANDING AND MITIGATING RISKS

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## INTRODUCTION

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## AGENDA

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1. Overview of the TCPA
2. Litigation Trends
3. Recent Regulatory and Legal Developments
4. Healthcare Exemptions
5. Best Practices

## OVERVIEW OF THE TCPA

- Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA” or the “Act”)
  - The TCPA was enacted by Congress to combat aggressive telemarketing and fax advertising practices believed to invade consumer privacy.
  - The TCPA also regulates the use of automated equipment to deliver *non-telemarketing* calls or text messages to mobile phones without prior express consent.
  - Congress empowered the Federal Communications Commission (“FCC”) to interpret the TCPA through rules, regulations, and declaratory rulings. See, e.g., 47 C.F.R. § 64.1200.



## TCPA ENFORCEMENT

- The TCPA and the FCC's implementing regulations
  - Make it unlawful to use an “automatic telephone dialing system” (“ATDS” or “autodialer”) or artificial or prerecorded voice to deliver calls or text messages to cell phones without the prior express consent of the recipient
    - Telemarketing/Advertising calls require **prior express written consent**
    - Non-telemarketing/Informational calls require **prior express consent**
  - Prohibit telemarketing/advertising calls using an artificial or prerecorded voice to residential lines without **prior express consent**
  - Forbid the use of fax machines to send unsolicited advertisements unless certain criteria are met
  - Regulate telemarketing, including the do-not-call registry, time-of-day calling restrictions, company-specific do-not-call lists

## TCPA ENFORCEMENT

- The TCPA is enforced through the FCC, FTC, state attorneys general, and private plaintiffs

The single biggest risk for businesses is private litigation



The TCPA creates a private right of action whereby private plaintiffs may obtain statutory damages of \$500 *per call* or actual damages, whichever is greater, and up to \$1,500 *per call* for willful or knowing violations



Example: If a company sent 10,000 text messages, at \$500 per text, the company faces \$5 million in potential damages and up to \$15 million if conduct is found to be willful



No cap on statutory damages



Plaintiffs can also seek injunctive relief



Fertile ground for class actions

## TCPA ENFORCEMENT

- Significant recent TCPA class action settlements include



\$8.5M



\$45M



\$75.5M



\$35M



Bank of America

\$8.5M

## TCPA ENFORCEMENT

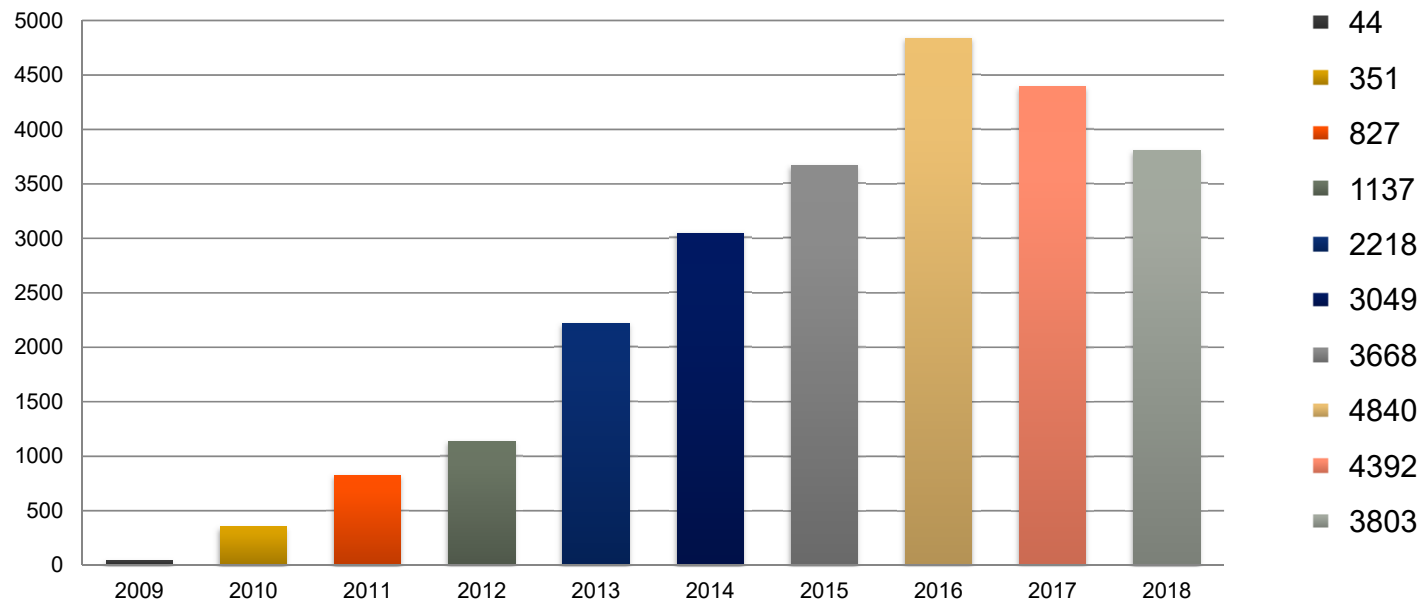
- TCPA class action settlements in the healthcare industry





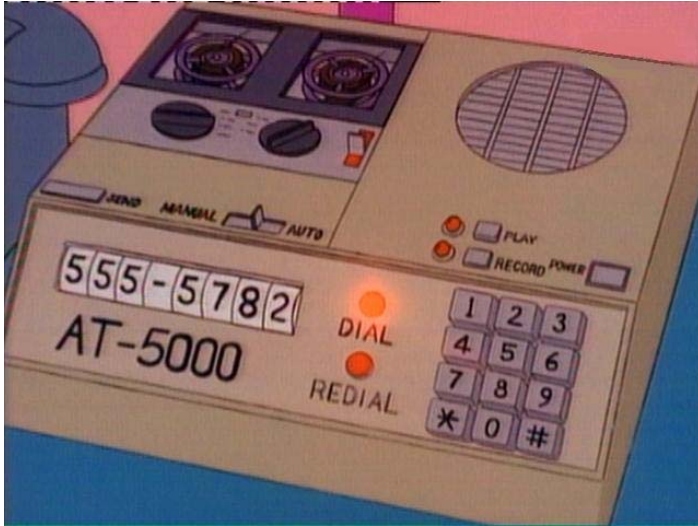
# TCPA ENFORCEMENT

## TCPA Litigation Filing Trends: 2009-2018



Source: <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/>  
<https://webrecon.com/webrecon-stats-for-dec-2018-2018-ends-with-a-whimper/> (last accessed January 28, 2019).

## WHAT IS AN ATDS?



- Broadly defined
- The TCPA defines an ATDS as “equipment which has the *capacity* (1) to store or produce telephone numbers to be called, using a random or sequential number generator; and (2) to dial such numbers”
- Hotly contested question
- Human intervention?

Consent  
is king

The level of consent required is determined by the content of the message

Informational calls require prior express consent

- FCC considers such calls “expected and desired by consumers”
- Includes calls on behalf of tax-exempt non-profits, political messages, airline notifications, survey/research calls, fraud alerts, payment reminders, and school notifications
- Providing a cell phone number (orally or in writing) is considered consent for informational or transactional messages
- Must be closely related to purpose for which consent was given

# PRIOR EXPRESS CONSENT

Telemarketing/Advertising calls require “*prior express written consent*”

- Defined as “an agreement in writing, bearing the signature of the person called, that *clearly authorizes* the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or pre-recorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered”

Written agreements must *clearly* and *conspicuously* disclose that

- The agreement authorizes the caller to deliver telemarketing calls using an ATDS or an artificial or prerecorded voice; and
- The person is not required to sign or enter into the agreement as a condition of purchasing any products, goods, or services

The agreement must include the consumer’s wireless number and his or her signature

## 2015 DECLARATORY RULING

- On July 10, 2015, in an attempt to address several important TCPA issues, the FCC issued an omnibus Declaratory Ruling and Order (“2015 Order”)
- The 2015 Order expanded the definition of “capacity”
  - Ruled that a system that is not presently being used as an ATDS nonetheless constitutes an ATDS for TCPA purposes if the system has the **potential** ability to store or produce telephone numbers, using a random or sequential number generator, and to call such numbers
  - In other words, the characterization of a system is not limited to its current configuration, but also takes into account its potential functionalities and future possibilities
  - Noted that whether a system is an ATDS is still a case-by-case determination



## 2015 DECLARATORY RULING

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- Who is the “called party” under the TCPA?
  - Certain calls that would otherwise be improper are permissible if made with “prior express consent of the *called party*”
  - Reassigned number problem
  - Intended recipient or successor subscriber?
- The 2015 Order
  - Concluded that the term “called party” should be defined as “the subscriber” – “the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user”
  - Rejected requests to construe a called party as the “intended recipient” of the call
  - Stated that calls to reassigned numbers violate the TCPA when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based
  - Limited safe harbor – one call, that’s all

## ACA INTERNATIONAL V. FCC

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Nine companies filed petitions with the U.S. Court of Appeals for the District of Columbia, seeking review of the 2015 Order



The petitions were consolidated into a single case:  
*ACA International v. Federal Communications Commission*



Petitioners challenged four aspects of the 2015 Order

1. What type of dialing equipment constitutes an autodialer under the TCPA
2. Whether placing a call to a number which has been reassigned violates the TCPA
3. How a party may revoke prior consent to receive autodialed calls; and
4. The scope of the FCC's exemption from the TCPA's consent requirements for certain healthcare-related calls

## ACA INTERNATIONAL V. FCC

- On March 16, 2018, the D.C. Circuit issued its long-anticipated opinion
- The Court
  1. Set aside the FCC’s “effort to clarify the types of calling equipment that fall within the TCPA’s restrictions”
  2. “[V]acated the agency’s approach to calls made to a phone number previously assigned to a person who had given consent but since reassigned to another (nonconsenting) person”
  3. Upheld the FCC’s approach to revocation of consent
  4. Affirmed the FCC’s exemption for time-sensitive healthcare calls





# ATDS

The Court struck down the 2015 Order's sweeping definition of an ATDS as unreasonably and impermissibly expansive. It found



The FCC's definition "eye-popping" in scope



The FCC's interpretation of capacity effectively rendered every smartphone an ATDS



The Order failed to offer meaningful guidance on whether equipment was subject to ATDS restrictions



Equipment cannot be defined as ATDS based on its future potential capacity to dial numbers

## REASSIGNED NUMBERS

The Court set aside the 2015 Order's entire treatment of reassigned numbers

The Court determined:

- One-call safe harbor for calls to reassigned numbers was arbitrary and capricious
- One-call safe harbor was inconsistent with the “reasonable reliance” standard the FCC adopted for evaluating consent elsewhere in the 2015 Order
- The FCC failed to explain why “a caller’s reasonable reliance on a previous subscriber’s consent necessarily cease[s] to be reasonable once there has been a single, post-reassignment call”
- It was permissible for the FCC to interpret “called party” to refer to the current subscriber, instead of “intended recipient”

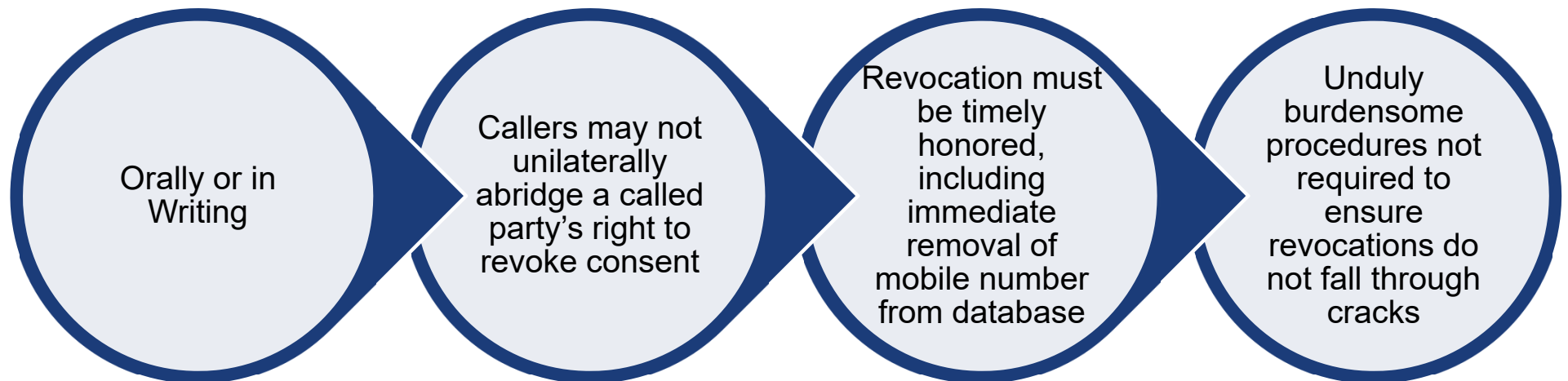
The Court acknowledged the practical effect concerning the reassignment of millions of wireless numbers annually

# REVOKING CONSENT

The Court upheld the 2015 Order on this issue:



A called party may revoke consent “at any time and through any reasonable means that clearly expresses a desire not to receive further messages.”



ACA decision left open the door for companies and consumers to contractually agree on procedures for revoking consent to call.

# EXIGENT HEALTHCARE TREATMENT EXEMPTION



The Court affirmed the FCC’s decision to exempt certain healthcare-related calls from the TCPA’s prior consent requirements

Under the 2015 Order, calls for which an exigency exists and that have a healthcare treatment purpose, are exempt from prior-consent requirements of the TCPA

- Appointments & exams
- Confirmations & reminders
- Wellness checkups
- Hospital pre-registration instructions
- Pre-operative instruction
- Lab results
- Post-discharge follow-up
- Prescription notifications
- Home healthcare instructions



## Exemption does NOT cover

- Calls related to accounting, billing, debt-collection, or other financial content
- Calls that include telemarketing, solicitation, or advertising content

## EXIGENT HEALTHCARE TREATMENT EXEMPTION

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- Additional conditions to qualify for this exemption:
  - Call or text message must be sent only to the mobile number provided by the patient.
  - Patient cannot be charged or have call or text counted against the limits of mobile plan.
  - Name and contact information of healthcare provider must be stated at the beginning of the call or included in the text message.
  - The message must be concise
    - One minute or less for calls.
    - 160 characters or less for text messages.
  - Call limits
    - Only one call or text message per day.
    - No more than three calls or text messages per week.
  - Opt-out
    - Each message must offer recipients an easy way to opt-out of future messages.
    - Voice-activated or key press-activated mechanism or toll-free number for calls.
    - Replying “STOP” for text messages.
    - All opt-out requests must be honored immediately.
  - Must comply with HIPAA privacy rules.

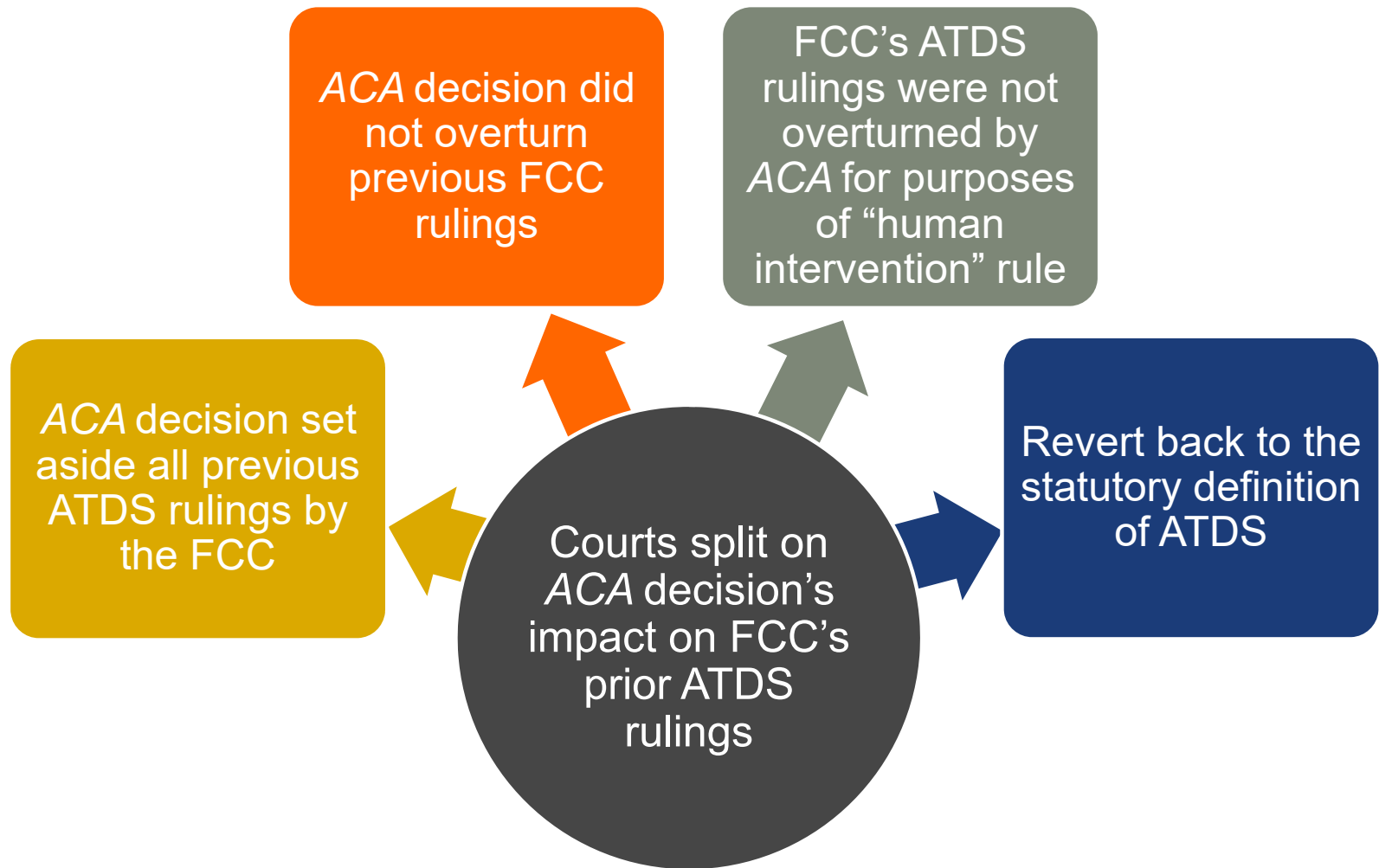
## TCPA LANDSCAPE POST-ACA INTERNATIONAL

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- The FCC goes back to the drawing board
- Public Notice – May-June 2018
  - Sought comment on the concerns expressed by the D.C. Circuit
    - Scope of ATDS
    - How to treat reassigned numbers
    - Standards for revoking consent
- Reassigned Number Database
  - Established on December 13, 2018
  - Safe Harbor
  - Supplements existing commercial solutions
  - Will be administered by a private company



# TCPA LANDSCAPE POST-ACA INTERNATIONAL



## OTHER HEALTHCARE EXEMPTIONS



- Calls to residential landlines that deliver a healthcare message from a HIPAA-covered entity or its business associate are completely exempt
- These types of calls can be made without the consent of the called party

Healthcare  
Messages to  
Residential Landlines





## OTHER HEALTHCARE EXEMPTIONS

- Calls and texts to mobile phones using an autodialer, or an artificial or prerecorded message, that deliver a **healthcare message** from a HIPAA-covered entity or its business associate
- These types of calls are still subject to TCPA liability, but only require **prior express consent** rather than **prior express written consent**. 47 C.F.R. § 64.1200(a)(2)
- Such consent is often shown by the call recipient providing his or her mobile number at the time of treatment

## The Healthcare Rule



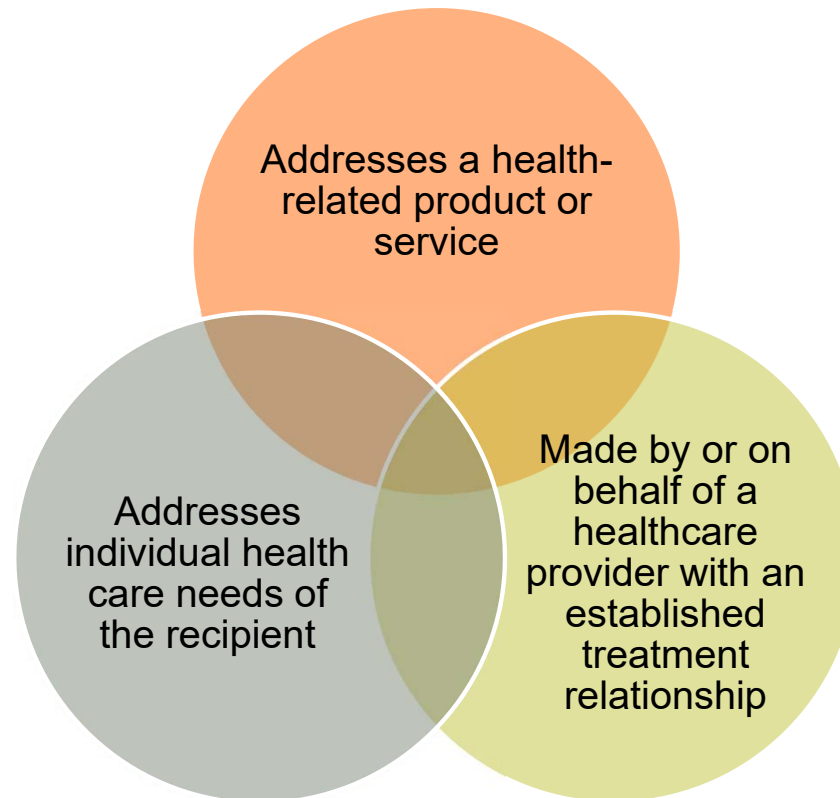
## THE HEALTHCARE RULE

- What is a “healthcare message”?
  - For a call or text message to constitute a healthcare message, it must “deliver a health care message” as that term is defined under HIPAA
  - HIPAA defines “health care” as “care, services, or supplies related to the health of an individual”
  - It includes, but is not limited to
    1. Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
    2. Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription



# THE HEALTHCARE RULE

What is a “healthcare message”?



*Zani v. Rite Aid Headquarters Corp.*, 246 F.Supp.3d 835, 843 (S.D.N.Y. 2017), *aff'd*, 725 Fed. Appx. 41,43 (2d Cir. 2018).

## EXAMPLES

- *Latner v. Mount Sinai Health System, Inc.*, 879 F.3d 52 (2d Cir. 2018)
  - Latner visited a Mt. Sinai facility, West Park Medical Group (“WPMG”) for a health examination in 2003
  - At the time, he filled out new patient forms, including signing a form containing his contact information and a patient notification granting Mt. Sinai consent to use his health information “for payment, treatment and hospital operations purposes”
  - In 2011, Mt. Sinai hired a third party to send messages on its behalf, including transmitting flu shot reminder texts for WPMG. Latner returned and declined any immunizations
  - September 19, 2014, Latner received the following text message from WPMG

“Its flu season again. Your PCP at WPMG is thinking of you! Please call us at 212-247-8100 to schedule an appointment for a flu shot. (212-247-8100, WPMG)”

- Latner sued Mt. Sinai and WPMG under the TCPA



# EXAMPLES

The U.S. District Court for the Southern District of New York held that the text message:



Was a healthcare message



Qualified for the Healthcare Rule, and



Was therefore exempt from the prior express written consent requirement under the TCPA



## EXAMPLES

The Second Circuit Court of Appeals agreed. Key factors to the decision:



Latner provided his mobile number when he visited in 2003



The privacy notices stated that WPMG could use his information “to recommend possible treatment alternatives or health-related benefits and services”



The flu shot reminder was a healthcare message made by or on behalf of a HIPAA-covered entity and Latner had provided prior express consent to receiving such messages



## EXAMPLES



*Zani v. Rite Aid Headquarters Corp.*, 246 F. Supp. 3d 835, 843 (S.D.N.Y. 2017), *aff'd*, 725 Fed. Appx. 41,43 (2d Cir. 2018).



*Bailey v. CVS Pharmacy, Inc.*, 2018 WL 3866701, at \*4 (D.N.J. Aug. 14, 2018)

***But see: Coleman v. Rite Aid of Georgia, Inc.*, 284 F. Supp. 3d 1343, 1344 (N.D. Ga. 2018)**

↓  
Coleman received pre-recorded automated voice messages from Rite Aid regarding prescription medications on his mobile phone

↓  
Calls were directed to someone else

↓  
Coleman requested that they stop, but he continued receiving them

↓  
Because he did not provide *any* consent, the Health Care Rule did not apply

↓  
Court held that the Exigent Healthcare Treatment Exemption did not apply

• No opt-out mechanism; Coleman's opt-out request was not honored

## BEST PRACTICES FOR MINIMIZING TCPA LIABILITY

### DO

- Develop and implement TCPA compliance program
- Obtain express written consent prior to initiating or sending telemarketing/advertising calls or texts to consumers
- Provide one or more opt-out mechanisms
- Require all third-party vendors or marketing partners to be TCPA compliant
- Review/categorize messages sent
- Be careful to keep “informational” messages content-neutral
- Make consent forms clear, conspicuous, and user-friendly
- Retain consent records
- Create procedures for tracking revocation of consent, do-not-call requests, and incorrect/reassigned numbers



## BEST PRACTICES FOR MINIMIZING TCPA LIABILITY

### DON'T

- Assume that consent received in the past remains valid
- Place unnecessary restrictions on the scope of consent
- Assume that a device is not an ATDS
- Assume that you are safe from TCPA liability by using a third-party marketer or vendor

## QUESTIONS OR COMMENTS?

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THANK YOU!

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