
To: Senior Attorneys
From: Associate
Date: December 14, 2018
Re: McKesson Prior Express Consent under the TCPA

I. Research Issues

- A) Under what circumstances, can a corporation go about using an Automatic Telephone Dialing System (ATDS) and prerecorded message to send unsolicited phone calls, text messages and faxes advertising the commercial sale of medical supplies or to collect debts owed in the N.D. and C.D. Ca. Districts while acting within the parameters of the TCPA?
- B) What options are available to a corporation in obtaining prior express consent to send those commercial advertisements?
- C) Under what conditions would that corporation be required to stop sending commercial advertisements or inquiring about debts owed using an ATDS and prerecorded message?
- D) How much liability, if any, will a company be responsible for when it uses a third party to advertise and collect debts using an ATDS and prerecorded messages on its behalf?

II. Short Answers

- A) Under the TCPA, unsolicited emails, faxes, text messages and phone calls are prohibited. In order to legally contact anyone using using an ATDS and prerecorded message the person must have provided prior express consent to be contacted.
- B) In order to obtain prior express consent the receiver must provide their contact information willingly in agreeance to be contacted and the message sent to that receiver must be in regard to the context of the message that the receiver agreed to receive. This consent must be obtained voluntarily and not create a contract of adhesion that imposes terms that are overly harsh, unduly oppressive, so one sided as to shock the conscience, or unfairly one sided. The method of obtaining this consent must not force, coerce, rush, bully, or trick the subject into submitting consent.

- C) In order for a corporation to be required to stop using an ATDS & prerecorded messages to send commercial advertisements or inquire about debts owed; the recipient must revoke prior express consent by clearly expressing his or her desire not to receive further calls or messages, this is in conjunction with common law rules which are applicable with the TCPA. Additionally, the recipient may also revoke full consent or partial consent; and the consent must be related to the transactional context in which it is given in relation to the circumstance.
- D) A corporation may use a third-party company to advertise or collect debts using an ATDS and pre-recorded message on its behalf. However, without proper prior consent given by the consumer and without guidelines on following the TCPA for the third-party corporation the liability could be placed on the original corporation which utilized the third-party source.

III. Facts

McKesson Corporation is medical supply company that engages in government contracts and creates and distributes medical supplies to the private sector. Recently, McKesson has decided that they would like to expand their sales into the Northern California markets. Their in-house legal council reached out to us via email, stating that McKesson would like to make sales to Northern California region based medical offices. McKesson hopes to start implementing this market expansion within their next fiscal year, starting on March 1st, 2019 and wishes to create an impactful presence in Northern California by the end of 2019.

The in-house counsel from McKesson Corporation is unfamiliar with the laws which govern Northern California. In her email, she included a statement expressing McKesson's desire to utilize an Automated Telephone Dialing System, otherwise known as an ATDS, to deliver pre-recorded messages to potential and future clients. The ATDS system would be used to utilize marketing strategies, through a third party marketing company, to expand their company into the Northern California markets. The ATDS and prerecorded messages would also be utilized in the event of collecting future debts for companies that neglect to pay for the products.

McKesson's in-house counsel has reached out, in advance, to seek advice how they may legally implement this strategy as they develop their expansion into the Northern California market. McKesson plans to utilize the marketing company Bellatrix, a Modesto, Ca. based marketing company, to aide in creating a client base in the region. They would like to know what parameters that Bellatrix must follow in their marketing strategy for McKesson, so that McKesson may best advise Bellatrix and limit any vicarious liability. Additionally, the in-house counsel would like to know the how much liability that McKesson might incur in the event of Bellatrix violating the TCPA. McKesson would like to know if they would be liable in a case if the third party company, Bellatrix, violated the TCPA, by acting outside of their contractual guidelines. Lastly, McKesson would like to know how to implement a strategy in collecting debts if any should occur, utilizing an ATDS and in conjunction with expressed content laws.

McKesson is finalizing their strategy into Northern Californian markets in the month of January 2019. The expansion is projected to lead to an increase of revenue and growth within the company. Once expansion begins McKesson hopes to build an increased influence over the Northern Californian medical supply markets. Thus, McKesson is interested in creating a marketing and debt collection strategy using an ATDS which will not violate the TCPA, while limiting the amount of liability it takes on if the act were to be violated.

IV. Discussion

In order to determine the best course of action for developing a marketing and debt collection strategy for McKesson, an exploration of the statute must take place. The exploration of the parameters of the TCPA, obtaining consent, revoking consent, and liability are all integral in forming the correct strategy so that the TCPA will not be violated and limiting McKesson's liability.

A. Parameters of the TCPA

First, in consideration of developing a strategy, the parameters of the Telephone Consumer Protection Act (TCPA) and the requirement of prior expressed consent must be explored. The TCPA is a federal statute enacted in 1991 designed to safeguard consumer privacy by outlining restrictions placed on "unsolicited automated telephone calls." This legislation restricts telemarketing communications via voice calls, SMS texts, and faxes which utilize

automated telephone dialing systems (ATDS) or prerecorded messages without before obtaining the prior express consent of the recipient. Nearly since its inception, the FCC interpreted consent as any “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” However, in 2017 the 9th Circuit narrowed that interpretation of consent in *Van Patten v. Vertical Fitness Group, LLC* by limiting the parameters of consent apply only to the transactional context surrounding the event that the phone number (or other contact information) was provided. This means that providing a phone number does not grant consent to be contacted for *any* reason, but rather, the call must pertain to the reason that the contact information was provided, ie. in the context of the transaction. In that context, when consent is given to be contacted, that consent may include consenting to be contacted by affiliates or contractors of the company for reasons regarding the consented subject matter, see *Mais v. Gulf Coast Collection Bureau, Inc.* In determining McKesson’s strategy the development of a strategy for prior expressed consent is only guaranteed for specific reasons for contact.

B. Obtaining Consent

Second, the method in which an entity obtains prior expressed consent is a major aspect of the implementation of the TCPA in California. This consent needs to be deemed as voluntary, following the Unconscionability Doctrine. McKesson should do its best to adhere to this doctrine in its creation of a consent platform. Their platform to consent must follow several guidelines in order to meet this criteria. The first and most important criteria, is for McKesson to create an easily accessible and prominent way to display this option to allow or revoke consent. This would be best done by either creating a simple way to do so over email, on their website, or by orally revoking consent over the phone.

Adding this provision combats the “undue burden” part of the Unconscionability Doctrine and effectively protects the entity from litigation from most TCPA cases, as seen in *Nazareth M. HAYSBERT, v. NAVIENT SOLUTIONS, INC.* A system set up to include a somewhat procedurally substantive undue burden on the user is able to negate this claim completely with the inclusion of an opt out option. However, to avoid confusion and possible litigation entirely, McKesson should take further measures to ensure it does not risk violating the

TCPA. In order do this, they must distance themselves completely from practices that pressure clients to enter into contracts that, “do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided” (*HAYSBERT, v. NAVIENT SOLUTIONS*). This means that clients should not feel like they are subjected to a take it or leave it type of deal regarding their consent. These transactions need to allow the client to receive something from consenting to this contract, either service, information, product, credit, ect. It is incredibly important that the method of obtaining this consent must not be through force, coercion, rushing, bullying, or trickery of the subject into submitting consent in regards to McKesson’s strategy development.

C. Revoking Consent

Third, to aid the development of this strategy it is crucial to understand the parameters established and required for a recipient to revoke a prior express consent. Once prior express consent has been granted by the recipient, in order to revoke said consent the recipient must “clearly express his or her desire not to receive further calls,” in relation to that specific transactional context on which it was originally provided in said circumstance as delineated in *Van Patten v. Vertical Fitness LLC, (2017)*. The FCC's rulings turn to whether the called party provided consent to be called concerning a specific topic and not necessarily on how the calling party received the number. This applies to revoking consent because consent is revoked not from the particular party but from the particular topic on which the consent was initially granted as outlined in *Mias v. Gulf Coast Collection Bureau, Inc. (2014)*. Thus, in relation to McKesson’s strategy, obtaining an individual's phone number indirectly may classify as prior express consent to call that individual in regards to the specific topic; however, if the recipient expressly revokes their consent, it must be in relation to the specific topic in which the consent was originally granted to McKesson.

D. Liability with Expressed Consent

Fourth, in order to assess McKesson’s concern on liability when utilizing a third-party service to advertise and collect debts we must turn to the TCPA regarding expressed consent. Essentially, the TCPA requires that a consumer must give consent in order to be contacted by a

company through telecommunication means. This legislation restricts telemarketing communications which encompasses phone calls, SMS text messages, and fax.

Evaluating prior cases involving the TCPA when a company violates the prior expressed consent of consumers, shows the liability that companies face. The clearest distinction is the case of *Satterfield v. Simon & Schuster*, where the plaintiff, Satterfield, alleged receiving an unsolicited text message from Simon & Schuster despite never agreeing to the terms and conditions to be contacted by the company or its affiliates. The defendant had utilized a third party source, a marketing company, which had access to another companies database of contact information for Nextones, a ringtone based company which Satterfield had agreed to. The court decreed a legal definition for an affiliate and brand of a company, which entails TCPA protection, as an affiliate or brand of a company is essentially stated as a contractual agreement or holding shares within a corporation. The court found that Nextones was not an affiliate of the defendant and that the defendant violated the TCPA although it was the third party company which essentially violated the TCPA.

The applicability of this case is as such: Simon & Schuster was found to have violated the TCPA in this lawsuit, the third party marketing company responsible for the text message and obtaining the database was not liable for the violation of the TCPA. We can attest that the court did not argue on whether the company was liable but rather on what constituted as an affiliate and when consent was granted by the consumer. We can justify that under the same circumstances that the McKesson Corporation may also become liable for a violation of the TCPA regarding marketing materials. However, what is up to review which may help in McKesson is applying a set of guidelines which are in order with the consent rules of the TCPA, which then may shift the liability of violations to a third-party company.

V. Conclusion and Recommendations

In order to use an Automatic Telephone Dialing System (ATDS) and prerecorded message to send unsolicited phone calls and faxes advertising the commercial sale of medical supplies or to collect debts owed in the N.D. and C.D. Ca. Districts, while acting within the parameters of the TCPA, a corporation must obtain prior express consent from each customer or receiver. Furthermore, the transactional context of obtaining the prior express consent must be

related to the subject of that automated message. This is best accomplished through opt-in online applications, contractual provisions, or other traceable means of obtaining prior express consent to receive calls for advertisements and debt collections.

It is crucial to ensure that when a recipient expressly revokes prior express consent regarding the specific topic on which it was originally granted, that McKesson cease all contact with the recipient regarding unsolicited advertising and telephone solicitation by way of ATDS or pre-recorded phone calls. This could be best achieved by automatically placing the phone number of the recipient that revoked their express consent on a “do not call” list and sharing that list internally and with Bellatrix and any other contracted company. Furthermore, that list should specify what topic the revocation of prior express consent relates to, in order to be able to distinguish if it’s a full revocation of consent or only a partial revocation of consent.

In the implementation of a consent platform (Email, phone, ect.) it is crucial to adhere to the Unconscionability Doctrine. California makes sure that all adhesive contracts rely on this level of commitment. I would advise McKesson to err on the side of caution and make sure to include clear areas to opt-out of consent, as well as make the application of consent clear and without any undue burdens placed upon their clients.

Furthermore, if the corporation intends to extend a broad range of promotional offers or other unanticipated messages, I recommend making the agreement under which the customer provides their contact information to cover a broad range of reasons that the receiver agrees to be contacted. I would not recommend contacting the customer using an ATDS or a prerecorded message for reasons other than those specified in the transactional context through which the receiver provides their contact information. If an ATDS or prerecorded message are deemed to be essential to the expansion of McKesson’s marketing strategy and/or debt collection processes, I recommend to the client to set out specific parameters for the third party to follow, as well as to form a contractual agreement on who would be liable if the third disregards either the contract, the TCPA, or any other law.