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The Future of Text Message Marketing

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As Americans increasingly rely on text messages to communicate on a daily basis, marketers have taken note, and text advertising and marketing is increasingly common. Indeed, text messages have a read rate of about 98%, and nearly 90% of text messages are read within three minutes. Moreover, text messages have a response rate of about 45%. These consumer engagement statistics are pushing marketers to favor text message marketing over more traditional methods, such as e-mail, digital banner advertising, and television.

Text marketing raises new risks and concerns for companies. The Telephone Consumer Protection Act ("TCPA") is a federal law that restricts companies from using an automatic telephone dialing system ("ATDS") to call or send marketing text messages to consumers who have not previously given their prior express written consent, and the penalties for noncompliance are substantial—up to $500 for each violation and up to $1,500 for each willful violation. Each time a business sends a text message to a consumer without prior express written consent is a "violation," and the penalties can rack up extremely quickly.

TCPA class action lawsuits have resulted in judgment and settlements in the tens of millions of dollars. Just in the last few months, retailer Rack Room Shoes agreed to pay $26 million and leasing company SmartPay agreed to pay $8.7 million, each to settle a class action lawsuit alleging that these companies sent unwanted text messages to consumers. In the SmartPay case, the plaintiffs alleged that the company continued to send text messages to consumers even after they had texted "STOP" in response to such messages.

Due to the large exposure associated with TCPA claims, many companies seek insurance coverage for such claims, and litigation regarding the scope of that coverage is ongoing. In a recent case, *Yahoo Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, the California Supreme Court will soon determine whether AIG insurer National Union Fire Insurance Co. of Pittsburgh has a duty to fund Yahoo's defense of several TCPA class action lawsuits. The salient issue is when insurers have a duty to defend TCPA claims under a commercial liability coverage policy covering a "personal injury," in a policy where "personal injury" is defined to include a violation of privacy rights.

Many TCPA lawsuits turn on whether the equipment used to call or send text messages to the plaintiff is an ATDS within the meaning of the statute, and unfortunately for marketers seeking certainty, this analysis is currently the subject of a circuit split. The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C § 227(a)(1). In 2015, the Federal Communications Commission (FCC) issued an omnibus Declaratory Ruling & Order[1] stating that any equipment that has the *potential* capacity for autodialing is an ATDS. Not surprisingly, the FCC Order's expansive interpretation of what constitutes an ATDS prompted a huge uptick in TCPA lawsuits.

1 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption; et al., 80 FR 61129 (10/09/2015).

Subsequently, the D.C. Circuit found that the FCC's definition of ATDS to encompass all equipment that has the *potential* capacity for autodialing is too broad, and there must be more than a theoretic *potential* that the equipment could be used as an autodialer.[2] Similarly, the Second and Third Circuits have both narrowly interpreted the definition, limiting an ATDS to a device that has the *present* capability to function as an autodialer.[3] These courts seem to recognize the inherent problem with a broad definition: that it turns any typical smartphone into an ATDS, because, with the download of autodialing software, it has the *potential* to call random or sequential phone numbers.

By contrast, the Ninth Circuit later followed the FCC, finding that the definition should be interpreted to cover any equipment that can "store" telephone numbers, regardless of whether the equipment uses a random or sequential number generator.[4] Given this split in authority, companies sending marketing text messages should be particularly cognizant of their jurisdiction's position and what types of devices would be considered an ATDS.

To manage these risks, marketers also continue to develop alternative means of reaching consumers directly that are not within the ambit of the TCPA – for example, sending only "on demand" or direct, "bespoke" text messages, using "over the top" (OTT) messaging programs, such as WhatsApp or Facebook Messenger, or through development of their own smartphone apps, communicating via push notifications.

However, given text messaging's reach, it continues to be enticing. If opting to engage in text message marketing campaigns, companies should have a robust consent collection and management program in place, confirming that express written consent is obtained and confirmed regularly, and that these records are kept for at least the TCPA statute of limitations.

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2 *ACA International v. FCC*, No. 15-1211 (D.C. Cir. Mar. 16, 2018).
3 *King v. Time Warner Cable Inc.*, No. 15-2474 (2d Cir. Jun. 29, 2018); *Dominguez v. Yahoo, Inc.*, No. 17-1243 (3d Cir. Jun. 26, 2018).
4 *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. Sept. 20, 2018).

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This alert was authored by Katherine Dennis Nye (312-827-1455, knye@nge.com) and Bari L. Nathan (312-269-8044, bnathan@nge.com).

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