

To the Point:

TCPA Clarity and Questions

Answers from insideCompliance



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accounts receivable management



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Contents

- About the Experts 4

- An Enhanced Training Tool 5

- The Current TCPA Landscape 6
 - Automatic Telephone Dialing Systems 6
 - What Constitutes Prior Express Consent? 7

- TCPA Law in Focus: *Nigro v. Mercantile Adjustment Bureau* 8
 - from the webinar: Agreeing with the District Court* 9

- TCPA Law in Focus: *Penn v. NRA Group* 10

- TCPA Law in Focus: *Hudson v. Sharp Healthcare* 11

- TCPA Law in Focus: *Thomas v. Taco Bell* 12

- TCPA Law in Focus: *Mais v. Gulf Coast Credit Bureau, Inc.* 13

- Vendor Compliance and the TCPA 14

- Q&A 15
 - Are HCIs (Human Contact Initiators) a safe alternative to autodialing? 15
 - Do you think there will be a revision of the definition of “automatic telephone dialing system”? 15
 - Any chance the TCPA will be expanded to allow cellphones to be called using a dialer for businesses with an established business relationship, sort of contacting existing customers with informational messages about their account. 16

About the Experts



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Mike Poncin, Moss & Barnett: Michael S. Poncin places significant emphasis on defending creditors, debt buyers, debt collectors, and attorneys in actions arising under Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act (FCRA), Telephone Consumer Protection Act (TCPA) and additional federal and state laws and regulations. He provides advice and counsel on litigation and compliance issues across the United States. Mike has secured scores of reported decisions in his clients' favor. His areas of practice also include contract law and defense of consumer law claims. Mike Poncin and his cohort, John Rossman, host a podcast called the Debt Connection Drill, which you can find on our site, insideARM.com.



Dusty Whitesell, LiveVox: Dusty Whitesell is an accomplished accounts receivable management executive with 20+ years' experience covering all aspects of outsourced creditor-servicing, specializing in contact center operations. Whitesell was most recently COO of Sentry Credit, a Seattle-based BPO, where he was responsible for driving contact strategies and operations across the entire organization. Prior to Sentry, Dusty held executive positions at Asset Management Outsourcing and Outsourcing Solutions Inc. Currently, Whitesell is the Chief Evangelist at LiveVox, where he is helping leverage his extensive industry and operations knowledge to direct the development and adoption of cloud solutions for BPO.

An Enhanced Training Tool

Our *To the Point* reports synthesize best-practice information from our webinar series, *insideCompliance*. As a companion to this report, you can watch the full video of the webinar here: [*insideCompliance: TCPA Questions and Clarity*](#). [hyperlink]

Additionally, we have included Certificates of Completion if your training department is interesting in using the webinar and this study-guide as a training tool for new hires, continuing education, or periodic in-services.

The Current TCPA Landscape

The TCPA, Telephone Consumer Protection Act, regulates the use of automatic telephone dialing systems, or auto-dialers, and prerecorded or artificial messages to contact consumers. Among other things, the statute regulates calls to cellphone numbers, using either an ADTS—an automatic telephone dialing system—or an artificial or prerecorded voice, unless the call is made for emergency purposes, or with the prior express consent of the called party.

The TCPA, unfortunately, does not define the phrase, “prior express consent,” but Congress delegated authority to the Federal Communications Commission, the FCC, to proscribe regulations that implement the TCPA’s provisions. Pursuant to this authority, the FCC has issued several orders and declaratory rulings addressing the meaning of prior express consent.

The TCPA also prohibits artificial or prerecorded voice calls to residential landlines absent consumer consent, but the FCC has exempted collection calls from this prohibition. Two areas of the TCPA that have given rise to a significant amount of litigation:

- 1) The type of equipment that qualifies as an automatic telephone dialing system.
- 2) What constitutes prior express consent.

Automatic Telephone Dialing Systems

The TCPA defines an ATDS very clearly as equipment which has the capacity to:

- 1) Store or produce telephone numbers to be called using a random or sequential number generator;
- 2) To dial such numbers.

We, of course, all understand exactly what that means, but nevertheless, the FCC and a number of courts have chimed in on the definition of an ATDS.

The FCC determined that a predictive dialer qualifies as an ATDS. The FCC described predictive dialers as equipment that dials numbers, and when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The FCC said that the hardware, when paired with certain software, has the capacity to store or produce numbers, and dial those numbers at random in sequential order, or from a database of numbers.

The FCC’s focus thus seems to be, and they expressly say in their order, on whether the equipment has the capacity to dial numbers without—this key term—without human intervention. The FCC reaffirmed this position, that predictive dialers are ATDSs in a later ruling, a 2008 declaratory ruling. The ACA International recently submitted a petition to the FCC for a declaratory ruling, however, that not all

predictive dialers are ATDSs. The ACA wants the FCC and court to focus on the nature of the equipment rather than its title.

Courts have also grappled with the term ATDS. Some courts hold that any equipment which has the capacity to act as an ATDS qualifies as such, regardless of how the equipment is actually used by the company. Other courts require the equipment to have the present capacity to be used in that fashion without modification. Given this difference in opinion and the fact that there are petitions pending before the FCC, a number of courts recently granted motions to stay TCPA cases pending further guidance from the FCC.

What Constitutes Prior Express Consent?

The FCC provided its initial opinion on what constitutes prior express consent in a 1992 report and order that was primarily concerned with telemarketing calls. In that report and order, the FCC determined that 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. So according to the FCC and its order, telemarketers would not violate the FCC rules by calling a number which was provided as one at which the called party wished to be reached.

The FCC addressed the prior expressed issue in the debt collection context in a 2008 declaratory. The FCC issued that ruling in response to a petition from ACA International requesting that the FCC clarify that the TCPA's prohibitions on autodial and prerecorded calls to cellphones did not apply to creditors and collectors making calls to collect debts.

The FCC determined in that regard that autodial and prerecorded message calls to wireless numbers provided by the call party in connection with an existing debt are made with a prior express consent of the called party, and are, therefore, permissible. Citing its 1992 order, the FCC concluded the provision of a cellphone number to a creditor, and used the example as part of a credit card application, reasonable evidence is, in the FCC's opinion, prior express consent by the cellphone subscriber to be contacted at that number regarding the debt.

The FCC went a step further and said that prior express consent also transfers to collectors placing calls on behalf of creditors. But the FCC seemingly backpedaled a little bit or grounded everybody a little bit by emphasizing in the declaratory ruling that prior express consent is deemed to be granted "only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed."

That last piece has given way to a significant amount of litigation that we've seen in our practice regarding specifically what qualifies as this transaction that resulted in the debt owed, specifically whether that is just the opening of the credit, or whether that includes the entire life cycle of the debt. And we'll discuss a few cases that touch on that momentarily.

TCPA Law in Focus: Nigro v. Mercantile Adjustment Bureau

One of the decisions or cases relevant to this topic of prior express consent is the Nigro v. Mercantile Adjustment Bureau case. The facts of that case are as follows.

In 2008, the plaintiff—Albert Nigro—had contacted National Grid to discontinue electrical service for the residence of his deceased mother-in-law. Nigro gave National Grid his name and his cellphone during the call, but said that it was given solely for the purpose of shutting off the electrical service at the apartment. National Grid hired Mercantile in 2010 to collect the balance that was owed on the terminated account. Mercantile utilized an automated dialing system to contact Nigro’s cellphone, they said 72 times. Nigro, thereafter, sued Mercantile, alleging that Mercantile had violated the TCPA by using an ATDS prerecorded voice to call him without his consent.

In response, Mercantile filed a motion for summary judgment, alleging that by voluntarily giving his cellphone number to National Grid, Nigro had expressly consented to receiving future communications regarding all aspects of the terminated National Grid account on the phone number that he had provided.

The district court bought the argument. It granted Mercantile’s motion, and in doing so, the district court rejected Nigro’s argument that he had only given limited consent to National Grid to call his cell number regarding termination of the electrical service, and that that was not the transaction that resulted in the debt owed. Rather, it was the purchase of the electrical service.

Relying on language in the FCC’s 1992 order and 2008 declaratory ruling, the court determined that Nigro’s provision of his cellphone number to National Grid was very globally an invitation or permission to be called at the number which he had given, absent instructions to the contrary. The district court found that there was prior express consent for Mercantile to call Nigro’s cellphone using an ATDS or artificial or prerecorded voice.

Nigro appealed the lower court’s decision to the Second Circuit Court of Appeals. In response, the Second Circuit requested that the FCC submit a letter brief on the prior express consent issue in the case, and the FCC did so. In its brief, somewhat surprisingly, the FCC determined that Nigro had not given prior express consent to receive debt collection calls on the terminated National Grid account.

The reasoning was as follows. The FCC determined that Nigro had given his cell number for the limited purpose of terminating the National Grid electrical service. According the FCC, the transaction that resulted in the debt owed was the purchase of electrical service by the now deceased mother-in-law. Of course, as the FCC had mentioned, Nigro gave his cell number to terminate service, and gave the number after the debt was incurred. So the FCC argued that Nigro had not provided the number in connection with the transaction that resulted in the debt owed.

from the webinar: Agreeing with the District Court

Dusty Whitesell

I'm going to chime in on that, Issa. You know, when I look at that, for what it's worth, I agree with the district court and not the appellate court on this one.

Issa Moe

You're not alone, I'm sure.

Dusty Whitesell

Yeah. When I call to have power turned on or power turned off, it seems to me to be a safe assumption to say that if I'm asking for the power to be turned on or off, I'm very likely taking responsibility for that particular account. Because in general, the person calling to turn it on or off would be taking responsibility. Otherwise, they wouldn't be turning it on or off. So it made very little sense to me.

And Issa, I think you even mentioned, it was quite surprising that that was overturned, and that that particular interpretation was given. But just my two cents.

Mike Poncin

And I think it's important to note, too, the Second Circuit hasn't shot down the district court decision. It's just the FCC's ruling, or the FCC's letter brief. And so the question is whether or not the Second Circuit will stick to it and abide by it, or whether or not they'll use their powers to say that they disagree with the FCC. But obviously, the FCC carries a big stick.

"I think that many of these cases are going to come back to call frequency. And not only the frequency of calls, but the customer service involved in that call. We know that that's what the financial institutions are looking for right now, is compliance and customer service and doing and saying the right thing on the phone. In this case you have to wonder just what set the plaintiff off.

-- Dusty Whitesell, LiveVox

TCPA Law in Focus: *Penn v. NRA Group*

In [*Penn v. Mercantile Adjustment Bureau*](#), the plaintiff had registered as a patient at Harbor Hospital, providing his cellphone number in the registration forms. When the plaintiff failed to pay the bill, the hospital referred the debt to NRA for collection. NRA called the plaintiff's cell number 32 times, using an auto dialer, and, not surprisingly, the plaintiff sued for TCPA violations. NRA moved for summary judgment.

The court granted the motion, finding that the plaintiff's provision of the cellphone number to Harbor Hospital, in conjunction with the patient registration in 2008, had constituted his prior express consent for the hospital or debt collector acting on behalf of the hospital to call him on his cellphone number for the purpose of collecting the debt that arose from that registration. And in granting the motion, the court refused the plaintiff's invitation to follow a district court decision in Florida, via the [*Mais*](#) decision. In that decision, the court had determined that the FCC's rulings weren't binding on district courts.

Hospitals and their collectors can seem to get a lot of leeway when it comes to this question of what constitutes prior express consent. In cases such as these, the courts generally do find that prior express consent is given when you, as the patient, provide your phone number on these registration forms.

TCPA Law in Focus: *Hudson v. Sharp Healthcare*

In [*Hudson v. Sharp Healthcare*](#), the plaintiff and her minor child received medical care at Sharp in September of 2012. While the child was covered, the plaintiff's healthcare coverage, unbeknownst to her, had lapsed. So during the admission process, the plaintiff had provided her cellphone number as the sole point of contact. She also signed paperwork that expressly consented to being contacted by the hospital if her account fell into arrears and there was an outstanding balance thereon.

The plaintiff, of course, fell behind on her payments, and Sharp used an auto dialer to contact her cellphone. The plaintiff filed a TCPA lawsuit in 2013 and Sharp filed a motion for summary judgment. Her argument in opposition of the summary judgment motion relied, again in part, on the *Mais* decision.

The *Hudson* court rejected the plaintiff's argument, determining that providing a cellphone number as a sole point of contact does, in fact, constitute prior express consent of the TCPA and the FCC's interpretations of the Act, even if an auto dialer is used to place the call. The court again noted that the *Mais* decision is viewed as an outlier and is not otherwise binding on courts outside of that district. In line with other courts, the *Hudson* court treated the FCC's orders in declaratory rulings as binding.

"I found two things interesting about the *Hudson* case. One: her contention that when she registered, her cellphone auto-filled on the registration form at the hospital. And she said she never really gave specific permission to use that cellphone. Now of course, that was proven to be somewhat false; she initialed next to the cellphone, and in fact, had signed the form saying that they could call her.

The other thing that I thought was interesting: call recordings ended up being rather critical, because she made a number of accusations. Yet each time the Court listened to the phone calls, they had determined that that many of the accusations simply weren't true.

Call recordings, many times, are considered important for CFPD reasons. And in this case, they were critical for the TCPA case."

-- Dusty Whitesell, LiveVox

TCPA Law in Focus: *Thomas v. Taco Bell*

It's relevant. We promise.

[In this case](#), Taco Bell Corp. was part of an advertising association. The association, with a dozen members, had retained an outside vendor to send marketing text messages related to a new Taco Bell product. The plaintiff then sued Taco Bell Corp. for texting her without consent, in violation of the TCPA.

The appellate court addressed the issue of vicarious liability under the TCPA. The court looked at a several theories; however, primarily, it viewed the case through the lens of the traditional Principle Agency Theory. The principal-agent problem or agency dilemma occurs when one person or entity (the "agent") is able to make decisions that impact, or on behalf of, another person or entity: the "principal". The dilemma exists because sometimes the agent is motivated to act in his own best interests rather than those of the principal. If there is a parent authority that is given by the creditor to this vendor, then you can find vicarious liability under those circumstances.

What complicates this case is that Taco Bell was part of an association, and it was the association who had retained the third party vendor. There was just no indication that Taco Bell was cloaking this vendor with apparent authority to act as its agent.

Additionally, the court looked at Ratification Theory. This concept that a creditor can be held vicariously liable for its vendors acts in contravention of the TCPA if it ratifies the conduct. Again, in this case, the court determined that because there was just no evidence of any sort of a principal agent relationship between Taco Bell and the vendor who had sent the text message, there was no basis to find vicarious liability on the ratification theory.

TCPA Law in Focus: *Mais v. Gulf Coast Credit Bureau, Inc.*

The judge in the [Mais case](#) had determined that a TCPA lawsuit was not a proceeding to set aside or annul an FCC ruling. As a result, the [Hobb's Act](#) didn't require the district court to blindly follow the FCC's declaratory ruling.

The court nonetheless went on to analyze the FCC's interpretation of prior express consent first, determining that the FCC's position seemed to be tantamount to implicit consent, namely, the providing of a cellphone is tantamount to prior express consent to receive calls on that cellphone number, auto dialed and prerecorded calls. The district court disagreed with that and said there was nothing express about that. That was rather implicit. So it rejected that theory.

And then, turning to the issue of vicarious liability, the court noted that the FCC had, in one of its rulings, stated that a creditor can be liable for calls made by its collectors. The *Mais* court rejected that as well. This suggests or implies that the creditor cannot, per se, be held responsible for its collector's calls because it's not making the calls, the collector is.

Nevertheless, the *Mais* court did analyze the vicarious liability, the traditional principal agent theory of liability, and determined in the *Mais* case that there was no basis to find a principal agent relationship between the creditor and the collector. So as a result, did not find that there was any vicarious liability.

Vicarious liability really started to hit in end of 2010 and 2011, and the ramifications were enormous.

Banks began taking steps to reduce vendor engagement, only placing with first-party agencies. They stopped placing at the tertiary quad level, and essentially cut their agencies in half.

Then the creditors became very aware of the certifications and security and compliance of their vendors. They would ask maybe 10 to 12 drop dead questions, and if you didn't answer those questions quite right, you were done.

The RFIs we had done in the past were nothing compared to the RFIs that we began to receive in the spring and summer of 2012. Creditors were not only holding their vendors to a much higher degree of accountability, but really digging in to the compliance piece."

-- Dusty Whitesell, LiveVox

Vendor Compliance and the TCPA

The big question anyone along the debt industry continuum has to ask is:

Does the consumer know, when giving out their number, that it may be used for other purposes, especially when the collection itself counts as ‘other purposes’?

The Consumer Financial Protection Bureau is interested in the protection of consumers. Language that is consumer-friendly and explanatory is considered a “best practice” by the Bureau. A consumer should be well aware when they’re signing those initial applications what that cellphone number could be used for in the future.

A number of creditors are beginning to add language to their applications that makes an explicit statement regarding the use of the cell numbers. This is not only consumer-friendly: it provides an extra measure of documentable protection to the collection agency, too.

Are HCIs (Human Contact Initiators) a safe alternative to autodialing?

Dusty Whitesell

HCI was built to be a TCPA risk mitigation tool. It has enabled the high level of productivity, agent level productivity.

Mike Poncin

Not to pooh-pooh any ideas. I love all the ingenious ideas that you see coming out there from vendors. Is there anything that is safe when it comes to the TCPA? That's a whole other question. The Renwood case that we prevailed on in Minnesota, an attorney in Maine told me, Mike, good luck getting that decision to stick. Until the FCC steps in -- or Congress or somebody -- to give us some help here, is there anything safe? I have to say no. Are there ideas that we may end up see working when you take them to trial and have the challenged? I think for sure.

So it comes down to innovative programming and ideas from folks like LiveVox, and then we just have to test them in court and see how safe they are.

The TCPA definition of “automatic telephone dialing system” means equipment that has the capacity to store or produce telephone numbers using random or sequential number generators. But we use a dialer with a list of existing customer phone numbers (not randomly generated) provided to us by the customer at account setup. Do you think there will be a revision of the definition of “automatic telephone dialing system”?

Mike Poncin

I'm going to say yes, but it's going to be a long ways out. There have been various cases moving to stay TCPA matters based upon the definition of an automatic dialing system. And a judge here in Minnesota refused to stay a case. There are no signs that TCPA reform is coming any time soon.

Issa Moe

I just think there are a number of prior rulings by the FCC that sort of make the test much easier to pass or in order to qualify as an ATDS. Namely, where the FCC said, an

ATDS is basically equipment that can store or produce numbers, and dial those numbers sequentially at random or from a database of numbers.

It will be interesting to see how the FCC reconciles any new decision that it would issue, new ruling it would issue on this definition of an ATDS with that prior language.

Any chance the TCPA will be expanded to allow cellphones to be called using a dialer for businesses with an established business relationship, sort of contacting existing customers with informational messages about their account.

Mike Poncin

In 2012, the FCC did away with this whole established business relationship, and this was in regards to telemarketers. So as long as you're not making phone calls with an advertisement included in it, you should be fine. It's a different definition of express consent.

In 2013, telemarketers had to essentially get written physical proof of the consent. They had to have physical consent. Since they did away with established business relationship for all intents and purposes, I doubt we're going to see them bring it back with all of the case law we've seen on meeting this express consent to call people on their cellphones.