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Concerns Grow that Telephone Consumer Protection Act May Frustrate Patient Engagement Goals



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The goals of health reform—often referred to as the Triple Aim— focus on improving patient experience, improving health care outcomes, and making health care less expensive.

One common strategy to pursue all of these goals is to develop and implement scalable and nimble patient engagement tools.

Patient engagement is not new. Doctors, hospitals, and other health care providers have long sought to involve patients in their care, and health plans recognize that care coordination and other patient engagement not only improve patient health but also contribute to lower costs.

What *is* new is an explosion of digital health tools with the promise of offering patient engagement in an automated, lower-cost way.

In a 2016 survey by the American Medical Association, physicians overwhelmingly saw the potential for digital health innovation to favorably affect patient care and patient engagement.

While digital patient engagement tools are still in their early adoption, physicians reported that they are motivated to use them in order to increase patient safety and adherence as well as to improve current ways of working.

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Despite the promise of digital health patient engagement tools, there is growing concern about an unexpected deterrent to the adoption of these tools from an unlikely source: the Telephone Consumer Protection Act.

The survey reveals a sense of enthusiasm among physicians for digital health tools, with broad-based opti-

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mism common among physicians of all age groups, practice settings and tenures.

While the level of enthusiasm exceeds current adoption rates, physicians expect to use more digital health tools in the near future.

Despite the promise of digital health patient engagement tools, there is growing concern about an unexpected deterrent to the adoption of these tools from an unlikely source: the Telephone Consumer Protection Act of 1991 (TCPA).

Although the TCPA was originally passed to curb abusive robocalls, the TCPA poses significant compliance challenges for digital health tools that use automated text messages and telephone calls.

TCPA compliance requires careful analysis of an overlapping set of statutory provisions, Federal Communications Commission (FCC) rulemaking, and court decisions.

Continued uncertainty about the application and requirements of the TCPA has limited the use of automated calling and texts in the health industry in light of the risk of substantial liability for improper calls.

In response to the threat of curbing meaningful progress on important public health and policy goals, Senate and House committees have held hearings on modernizing the TCPA.

The House Energy and Commerce Committee recently recognized that ''it is increasingly clear that the [TCPA] is outdated and in many cases, counterproductive'' and that the ''attempts to strengthen the TCPA rules have actually resulted in a decline in legitimate, informational calls that consumers want and need.''

Until the TCPA is modernized to reflect the digital world, the TCPA may continue to present obstacles for certain patient engagement tools. This article reviews the legal landscape of TCPA liability, and discusses what stakeholders need to understand before using digital health tools for patient outreach.

Why the TCPA Matters Congress passed the TCPA to address the nuisance of automated robocalls, and later amended the law to address junk faxes. Congress gave the FCC broad regulatory authority to interpret the TCPA.

The FCC has put this authority to use, and in recent years has dramatically expanded the reach of the TCPA through agency rulemaking.

For example, the FCC Declaratory Ruling and Order (FCC 15-72) increased the scope of the TCPA in several areas, including the definition of an automated telephone dialer systems (ATDS).

Despite its initial mandate of addressing robocalls, the TCPA also applies to many automated communications between health care providers and their patients, and between plans and their members.

The first challenge is that compliance with the TCPA is complicated by a diverse array of technical consent requirements. The TCPA and its implementing regulations present a complex list of consent requirements for different kinds of phone calls.

For example, most marketing calls placed to mobile phones using automated dialing technology typically require prior express written consent, the highest level of consent under the TCPA.

This means that a caller must first obtain prior express written consent to make the call, and such consent cannot be required in order for the call recipient to purchase a product or service.

Other calls require different levels of prior consent, based on the nature of the call, number called, and technology used to place the call.

To make things more complicated, the FCC has also created a number of content-based exceptions and modifications to the TCPA, largely based on its own evaluation of which calls are likely to serve or merely irritate consumers.

Likewise, under the TCPA, the burden is nearly always on the caller to prove that it obtained the requisite level of consent before making a call or sending a text.

The FCC has largely declined to recognize so-called ''good faith'' defenses, such as incorrect entry of a number in a database, and for the most part refused to provide a safe harbor with respect to calling incorrectly dialed numbers apart from the first call to such numbers after they change..

What this means for callers is that they largely remain responsible for the accuracy of the numbers they dial, including in the cases of number reassignment or incorrectly inputting or dialing a number.

TCPA violations can yield statutory damages of up to $1,500 per call or text message (See 42 U.S.C. § § 227(b)(3), 227(c)(5), 227(g)(2))—and these uncapped statutory damages can have catastrophic results for campaigns or outreach programs that involve hundreds of thousands or even millions of calls.

With several health care entities on the list of big-dollar TCPA settlements, it is clear that HIPAA covered entities cannot simply ignore the TCPA threat.

While regulators can enforce the TCPA directly, the most serious risk comes by way of private class actions. Recent settlements— including many involving tens of millions of dollars—leave no doubt as to the need to take the TCPA seriously.

And with several health care entities on the list of big-dollar TCPA settlements, it is clear that the Health Insurance Portability and Accountability Act (HIPAA) covered entities cannot simply ignore the TCPA threat.

What is also clear from these settlements is that navigating the TCPA rules is difficult, even for sophisticated companies, and that good faith—or mistakes of fact or law—is no defense.

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Given this strict liability legal landscape, it is no surprise that aggressive class action lawyers are recruiting clients to bring claims under the TCPA. Attorney advertising—including ads on Google and Facebook—is common.

Some plaintiffs' lawyers even offer free iPhone applications that log unwanted calls and automatically send the records to counsel to facilitate TCPA lawsuits.

TCPA Challenges for Patient Engagement Tools

Many professionals in the health care industry have come to share two misconceptions about the TCPA: first, that the TCPA only applies to marketing phone calls or text message ''spam,'' and second, that the TCPA does not apply to communications from HIPAA covered entities to their patients/health plan members.

These misconceptions can be costly mistakes for covered entities that have designed their patient engagement outreach program without including a TCPA compliance strategy.

Indeed, the TCPA presents a serious challenge for patient engagement tools. Although the FCC issued regulations in 2012 and again in 2015 to address the intersection of HIPAA and the TCPA, these regulations created nearly as many questions as they answered.

In 2012, the FCC issued an order creating an ''exemption'' for some health care-related calls to landlines that are subject to HIPAA: ''[W]e find that HIPAA's existing protections . . . already safeguard consumer privacy, and we therefore do not need to subject these calls to our consent, identification, opt-out, and abandoned call rules.''

The 2012 Order is helpful, but it is limited by its terms to calls to residential lines (*i.e.*, wirelines not wireless).

For instance, it does not address outreach programs that rely on text messages and will not offer a safe harbor to callers who call a mobile number.

In the age of so-called ''cord-cutting,'' many consumers eschew conventional phone lines, and rely on wireless phones alone.

Likewise, number porting and transfers can make it difficult to track which numbers are assigned to landlines and which are assigned to mobile phones.

In 2015, the FCC issued another order addressing the intersection of HIPAA and the TCPA, with the purported goal of making it easier for covered entity health care providers to obtain prior express consent for health care calls, and to deliver certain pro-consumer messages about time sensitive health care issues.

The FCC's 2015 Order responded to a petition from the American Association of Healthcare Administrative Management (AAHAM).

First, the FCC ''clarifi[ed] . . . that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.''

In many ways, this restates existing principles of TCPA law, and the FCC was careful to emphasize that the scope of the consent is a fact-specific question for each patient engagement.

The FCC did not, for example, address whether a patient's decision to list a number on a consent form or an invoice is sufficient documentation for the provider and its business associates to have authority to call the patient for all reasons and purposes.

In addition, this 2015 Order does not address health care providers that are not covered entities.

To be a covered entity health care provider, the provider must engage in standardized transactions with health insurers. Many providers do not submit charges to health insurance but rather provide their patients with documentation that the patients can elect to submit claims to their insurers in the hopes of securing partial coverage.

Similarly, this 2015 Order appears limited to covered entity providers; it does not discuss the application of the TCPA to covered entity health plans. Thus, a good deal of uncertainty remains.

The FCC also granted, subject to some significant conditions, AAHAM's request to establish a TCPA safe harbor for certain non-marketing health care related calls.

The FCC describes the safe harbor as an ''exemption'' from the prior express consent requirements. To fall within the safe harbor, a call must meet both substantive and technical requirements.

Substantively, the call must be both ''exigent'' and made for a ''healthcare treatment'' purpose.

The FCC noted that ''while we recognize the exigency and public interest in calls regarding post-discharge follow-up intended to prevent readmission, or prescription notifications, we fail to see the same exigency and public interest in calls regarding account communications and payment notifications, or Social Security disability eligibility.''

Accordingly, the safe harbor excludes ''any calls contained therein that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt collection, or other financial content.''

The utility of the safe harbor will significantly depend on how broadly or narrowly the FCC interprets its ''exigency'' and ''treatment'' requirements.

For example, it is unclear whether the reference to ''treatment'' is limited to ''treatment'' as defined in HIPAA, or whether it is intended to capture a broader set of activities relating to caring for patients and health insurance members.

Many of the digital health tools that assist health care providers and plans with HIPAA activities do so in connection with health care operations activities, and not for treatment (as defined in HIPAA).

The application of the safe harbor to such activities warrants clarity as it possible that the FCC did not intend the safe harbor to be limited to the scope of activities considered treatment under HIPAA but rather was intended to cover a broader array of activities that involve covered entity-individual outreach.

There are also strict technical requirements for the safe harbor. These requirements are outlined in detail in the FCC's 2015 Order.

For example, the call must ''state the name and contact information of the healthcare provider,'' must not exceed one minute (for voice calls) or 160 characters (for text messages), and must include an easy opt-out mechanism.

Perhaps most challengingly, the calls or texts must also be entirely free to the recipient, which means that

they cannot count against the recipient's minutes or messaging plan.

This requirement has created significant challenges for covered entities, as they scramble to find vendors with the requisite contracts in place to place truly ''free'' calls and texts.

The United States District Court for the Northern District of California had opportunity to consider some of these issues in a recent case.

In an October 11, 2016, decision (Case No. 16-cv-04419-JSC at Docket No. 74), the Court found that when the plaintiff provided her wireless number in connection with receiving a flu shot, she consented to receiving text messages and calls about future flu shots.

The Court also ruled that *even if* the plaintiff had not provided prior express consent, the calls in question had an exigent health care treatment purpose, and thus were exempt from the TCPA's consent requirements based on the FCC's 2015 Order.

This decision is good news for health care entities that use automated outreach solutions to communicate with patients.

The Court adopted a reasonable view of the scope of the FCC's 2015 Order and the import of the consent implied when someone submits his or her phone number to a health care provider.

There is an important limitation, however. As noted above, the safe harbor for calls to mobile numbers only applies to calls that are *free to the recipient*.

The plaintiff in this case had an *unlimited* text-and-talk cell phone plan. This means that—with respect to this Plaintiff—the calls were indeed ''free.''

Not all contacted parties may have such plans, and therefore the safe harbor in the 2015 Order may be less effective for TCPA defendants when the called party does not have an unlimited plan, or the caller does not take other steps—such as special contracts with telephone providers—to place free-to-recipient calls.

What's Next for Patient Engagement Tools?

As the prior discussion illustrates, the safe harbor is not a free pass from the TCPA's requirements and has proven to be unattainable for many companies because of the various requirements.

Therefore, covered entities and the business associates who work for them should not assume that compliance with HIPAA offers any security or defense against a successful claim under the TCPA.

Until such time that the TCPA, or its implementing regulations or guidance, is updated to reflect the importance of patient engagement tools and better balances the consumer protection aims of the TCPA with the public health aims of health reform, covered entities must take into account a number of important questions to address when designing patient outreach programs that involve text messages or telephone calls:

- ***What level of consent is required under the TCPA?*** The law involves a complex series of requirements, and the level of consent required varies by the type of call, kind of phone called, and the message in the call.

- ***How will you prove consent?*** Under the TCPA, the burden to prove consent is on the caller in most circumstances. Consent is of no value if you cannot prove that the called party gave consent. If the covered entity relies on the safe harbor to address the consent requirement, it must be able to prove that it meets both the substantive and technical requirements for the safe harbor.

- ***What will you do to ensure that vendors and other third-parties follow the rules?*** Contractual requirements and indemnification provisions are a good start. But remember that the TCPA can involve substantial claims. Will your vendor be solvent to back-up its indemnification obligations if a claim arises?

- ***How will you deal with the problem of recycled numbers?*** When users don't pay their bills or change phone numbers, the numbers are often re-assigned to new users. Callers do not have consent to place calls or texts to the new users.

- ***How will you respond to opt-out requests?*** Under the TCPA, consumers may revoke consent at any time and through any reasonable means. Ensure that all customer-facing employees know how to respond when a patient requests that you stop texting or calling.

Conclusion

Given the stakes, it is essential to consult with experienced data privacy counsel before starting any large-scale outreach campaign. The TCPA and its implementing regulations are complex, and case law in this field continues to evolve.

TCPA compliance is about managing risk, and experienced counsel can help identify risk and prescribe steps to mitigate the concerns that have led to large class action settlements in other cases. Patient outreach is important, but TCPA compliance is essential.

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