

THE TELEPHONE CONSUMER PROTECTION ACT AND COVID-19

Pamela A. Stone

JUNE 23, 2020

DSR is a health care law firm focusing on the legal needs of California health plans and health insurers.

www.dsrhealthlaw.com



While the Federal Communications Commission (“FCC”) has deemed many calls or text messages off-limits absent certain types of consent under the Telephone Consumer Protection Act (“TCPA”),¹ a recent FCC declaratory ruling exempts certain COVID-19 communications from certain senders.

The TCPA establishes various restrictions on the use of calls or text messages, particularly without consent. The FCC’s 2015 TCPA Omnibus Declaratory Ruling (“2015 Order”), which sought to clarify the TCPA as it applies to new technologies, has arguably impacted the abilities of health plans and health care providers to communicate with their members or patients. While the FCC recognized the importance of health care-related communications, the 2015 Order limited the scope of such communications to “health care providers” but only under certain circumstances. The FCC also imposed additional health care communication restrictions, barring certain forms of consent, such as the length of text messages, the type of phone that may be utilized to make certain calls (i.e., an “autodialer”), and that such communications must be free to the recipient.² The 2015 Order contains an exemption for communications made for “emergency purposes.”³ The FCC rules define “emergency purposes” to mean “calls made necessary in any situation affecting the health and safety of consumers.”⁴

For more information about this article contact:

Pamela A. Stone
Counsel
pstone@dsrhealthlaw.com

When COVID-19 became a pandemic and national emergency, the question arguably remained whether health care organizations would be subject to class action liability for communicating health related information during the COVID-19 pandemic. To silence any debate regarding whether the current COVID-19 pandemic qualifies as an emergency under this exemption, the FCC removed all doubt in late March 2020, issuing a Declaratory Ruling (DA 20-318). The Declaratory Ruling noted that the emergency purposes exception is intended for “instances [that] pose significant risks to public health and safety, and [where] the use of prerecorded message calls could speed the dissemination of information regarding . . . potentially hazardous conditions to the public.”⁵

The Declaratory Ruling relied on the facts that the federal government proclaimed that the COVID-19 pandemic constituted a national emergency in the United States, that many state governors declared states of emergency, and that a critical component of the United States’ efforts to contain COVID-19 is the ability of health care organizations to communicate effectively with the public.

On its own motion, the FCC issued its Declaratory Ruling which provided immediate emergency exemptions for government officials, health care providers, and state and local health officials, among others, to communicate information made necessary because of the COVID-19 pandemic so long as the information is directly related to the imminent health and safety risks arising out of the pandemic. The FCC deemed this type of health information related to COVID-19 vital, time-sensitive, and necessary for health and safety purposes. In so doing, the FCC limited the exemption based on the identity of the caller and the content of the call. The Declaratory Ruling emergency exemption would apply where: (1) the caller is a hospital, health care provider, state or local health official, or other government official as well as a person under the express direction of such an organization and acting on its behalf; (2) the content of the call must be solely informational and necessary because of the COVID-19 pandemic, and directly related to the imminent health or safety risk arising out of the COVID-19 pandemic.

The FCC gave examples of acceptable and exempt calls, and calls that did not constitute emergency purpose calls. It stated that, for instance, an informational call to update the public regarding measures to address the COVID-19 pandemic by a health care provider would be exempt. However, calls that contain advertising or telemarketing of services such as grocery delivery kits or home testing kits, for example, did not constitute calls made for an emergency purpose. The FCC also expressly noted that calls made to collect debt, even health care treatment related debt, are not calls made for an emergency purpose. It noted that these non-exempt calls required the express consent of the called party. While it is uncertain how long the COVID-19 pandemic will last, the FCC made it certain that the TCPA’s emergency exception applies.

¹ See 47 U.S.C. § 227.

² The 2015 Order was challenged in the United States Court of Appeals, District of Columbia Circuit in *ACA Int’l v. Federal Communications Commission*, 885 F.3d 687 (2018). “To be lawful, the Commission’s challenged actions must also satisfy the Administrative Procedure Act’s requirement that they not be arbitrary or capricious. Arbitrary-and-capricious review includes assuring that the agency ‘engaged in reasoned decisionmaking.’” *ACA Int’l*, 885 F.3d at 695 (citing and quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011)). The *ACA International* court found the 2015 Order arbitrary and capricious in that it could be read to include everyday smartphones as phones capable of autodialing calls. It remanded based on the unreasonableness of certain portions of the 2015 Order, leaving other provisions intact. However, the FCC has yet to issue new guidance on these points.

³ 47 U.S.C. § 227(b)(1)(A)-(B).

⁴ 47 C.F.R. § 64.1200(f)(4).

⁵ Declaratory Ruling at 2 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Red 8752, 8788 para. 51 (1992) (*1992 TCPA Order*)).



Pamela A. Stone, J.D., received her J.D. from the University of the Pacific, McGeorge School of Law and her bachelor's degree from the University of Florida. She is an attorney with DSR Health Law, a Sacramento firm representing California health plans, health insurers, and other health care payors in complicated litigation, transactional, and investigative matters.