

Court Provides Guidance on What Constitutes “Telemarketing” to Residential Phone Numbers

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In previous blog posts, we have emphasized how subtle the difference can be in [defining what constitutes “telemarketing” under the TCPA](#). This is especially the case where the messages at issue are part of a residential number (*i.e.*, landline) calling campaign, where callers are permitted to make non-consented-to calls “for commercial purposes,” so long as they “do not include the transmission of any unsolicited advertisement.” A great example of the fact-intensive analysis that courts must employ when determining whether landline-targeted calls constitute “telemarketing” can be found in a recent case out of the Northern District of Ohio, where the court determined that three different types of calls made by a healthcare provider to a residential line *did not* constitute telemarketing (and, consequently, that no TCPA liability was present).

In *Savett v. Anthem, Inc.*, No. 1:18-cv-274, 2019 WL 5696973 (N.D. Ohio Nov. 4, 2019), an individual who had been reassigned a residential phone number previously belonging to an Anthem subscriber filed suit against the healthcare provider for nine prerecorded calls he had mistakenly received. These calls fell into three categories: (1) calls seeking the email address of the Anthem subscriber; (2) calls concerning flu shots; and (3) calls regarding Anthem’s free telehealth services. Anthem asserted the calls at issue did not constitute telemarketing under the TCPA’s residential call provisions and that, consequently, it could not be held liable for the calls at issue.

“Telemarketing” Under the TCPA’s Residential Call Provisions

Before explaining the court’s analysis in *Savett*, it is important to point out that the processes for determining whether a call is “telemarketing” under the TCPA varies depending on whether the call is placed to a residential or mobile phone. Critically, for calls to residential lines, the FCC has exempted from TCPA liability calls “made for commercial purposes” so long as the call “does not include or introduce an advertisement or constitute telemarketing.” Consequently, commercial calls to residential lines will not face TCPA liability provided they do not: (1) “advertise the commercial availability or quality of any property, goods, or services;” or (2) “encourage[e] the purchase or rental of, or investment in, property goods, or services.”

In *Savett*, to assert its calls were not “telemarketing” under the TCPA’s residential call provisions, Anthem relied on its call scripts. And these scripts were critical to the court’s analysis, which it engaged in by comparing the language used in the calls at issue with a host of previously decided

TCPA cases.

Email Collection Calls

Two of the calls received by the plaintiff requested the email address of the Anthem subscriber who previously held the number at issue, and the court easily dispensed with these calls. As the court explained, numerous courts had found such email collection messages to fall outside the bounds of the TCPA's "telemarketing" definition, as the messages were purely "confirmatory" in nature, requesting information that would not be used to encourage the purchase of goods or services, but rather used in-house to properly communicate with the provider's subscribers regarding their healthcare policy.

Flu Shot & Telehealth Calls

Similar to the email collection calls, the court determined the flu shot and telehealth calls the plaintiff received were purely informational in nature, providing a list of facts regarding flu shot vaccinations and Anthem-provided telehealth services and the benefits derived therefrom. Granted, each of these types of calls did advertise what the court considered a "good" or "service." Critical, though, was the fact that the immunizations and telehealth services being advertised had already been paid for by the targeted subscriber and were an extension of the healthcare benefits that Anthem provided pursuant to a subscriber's pre-purchased healthcare plan. As the court explained, "Anthem sent the calls to encourage members to use their insurance benefits [for which] Anthem did not stand to gain monetarily." Consequently, the products being advertised were not "for purchase," and could thus be distinguished from other cases where the message at issue had promoted either the quality or availability of products that were explicitly or implicitly referenced in the call.

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Understanding when a call or message is considered "telemarketing" can be difficult and will generally require businesses to consider a variety of factors, including the types of telephone numbers to which the calls are being targeted and the specific products and services being referenced in the call. However, it is crucial for businesses to engage in this fact-intensive analysis and to consult with TCPA counsel, as any call's classification will affect the entity's TCPA liability and, by extension, its financial stability. This case provides guidance for making calls to residential lines and, in particular, for such calls being made by healthcare providers to provider subscribers, and can prove useful in navigating the maze of subtle distinctions that make up TCPA compliance.

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