

Insights

LEAD GEN AND THE TCPA: HOW TO PROTECT YOUR COMPANY FROM DOWNSTREAM BAD ACTORS

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Many businesses, including retailers, rely on inbound lead generators to identify prospective customers for telephone or text-based direct marketing campaigns. Sourcing inbound leads from a variety of providers allows firms to tap into market segments that might otherwise be unavailable to them and improve conversion rates on their marketing spend. But outsourcing lead gen to downstream providers also carries risk, as it is not uncommon for the original source of the lead to be several layers removed, making it difficult to verify the quality of the leads or to ensure that the proper consents were obtained. Given the daily deluge of class action lawsuits brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") by industrious plaintiff's lawyers, it is only a matter of time before your company comes into their crosshairs. How can you protect your company?

The TCPA prohibits calls or texts to a cellular telephone using an automated telephone dialing system ("ATDS") or prerecorded voice, or calls to a landline using a prerecorded voice, without the express consent of the called party (or contrary to a do-not-call listing). 47 U.S.C. § 227; 47 C.F.R. § 64.1200. Violators are subject to \$500 in statutory damages for each call or text, or \$1,500 for knowing violations, thus making TCPA class actions an irresistible enticement to the plaintiff's bar. Although liability under the TCPA generally falls upon the entity that generated the call or text, the courts have held that sellers can be vicariously liable for the actions of downstream actors even where the seller was not the party who placed the call or sent the text. There are several common lead gen scenarios where vicarious liability may come into play:

Scenario A: Live call transfers. A lead generator obtains an inbound lead and either calls the lead itself, or transfers the lead to an upstream lead aggregator who calls the lead. The lead is qualified and a hot transfer is made to the product seller or service provider ("seller") to close a sale.

Scenario B: Inbound text leads. A lead aggregator obtains leads from downstream generators, then uses a text campaign to direct consumers to its website or a partner website; the lead is qualified and sent to a seller URL to close the sale.

Scenario C: Inbound leads contacted by seller. A lead generator collects and qualifies a lead, or collects and transfers the lead upstream for qualification. The lead is then provided to the seller,

who calls or texts the lead.

What happens if the lead generator failed to obtain proper consents? Is the seller liable? The answer in all scenarios: it depends. In each case, the critical questions are whether the downstream actor who made the call was an agent of the seller or purported to be, and if so, whether there were sufficient red flags to justify a finding that the seller knew or should have known the lead was a bad lead. *See Kristensen v. Credit Payment Services*, 879 F.3d 1010 (9th Cir. 2018).

So, what can you do to protect yourself? First, ensure that your agreements with your lead aggregator partners include appropriate warranties and representations regarding TCPA compliance, a robust indemnity provision, a non-agency provision, and a right to audit. Second, conduct periodic audits of leads and take action, including termination of contracts or disqualification of downstream lead generators, if an audit reveals bad leads or an inadequate compliance program. Lastly, implement a TCPA training program for sales representatives and develop written TCPA compliance policies that are enforced by monitoring of calls.

TCPA lawsuits are not going away, and nothing you do is guaranteed to shield you from such suits. But the steps outlined above will significantly reduce the risk of being sued and if you are sued, you will be better positioned to mount a robust defense and limit the cost to your business.

RELATED CAPABILITIES

- Business & Commercial Disputes
- Data Privacy & Security
- Retail & Consumer Products
- Telephone Consumer Protection Act (TCPA)

MEET THE TEAM



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