

Emergency Text Messages Can Save Lives in a Pandemic Without Running Afoul of the TCPA

Communication is critical in an emergency. It can save lives, mitigate disasters, and, importantly, prevent the spread of disease.

When emergencies arise, the Federal Communications Commission (FCC) and the Federal Emergency Management Agency (FEMA) advise that phone calls may not connect due to “network congestion.” However, “[t]ext messages to other wireless devices may go through when your call may not, though there may be a delivery delay during times of network congestion.” The FCC/FEMA Tips for Communicating During an Emergency can be found [here](#).

The advantages of mass text communication are well known in marketing circles. Recipients are more likely to immediately view a text than answer a phone call or listen to a voice message. Thousands of texts can be sent instantly and at a relatively low cost.

There are regulatory risks for a mass text campaign, however. The Telephone Consumer Protection Act (TCPA) prohibits making any call using an “automatic telephone dialing system” (ATDS) or an artificial or prerecorded voice without the called party’s prior express consent (or prior express *written* consent for marketing messages, among other requirements). Text messages are treated as calls under the TCPA. Following the Ninth Circuit’s broad definition of an ATDS, several Courts have held that some mass text messaging platforms qualify as an ATDS, resulting in potential statutory damages of \$500 and up to \$1,500 per text message without the requisite consent.¹

Importantly, the TCPA’s restriction on using an ATDS or an artificial or prerecorded voice does not apply to calls made for an “emergency purpose.” The term “emergency purposes” means “calls made necessary in any situation affecting the health and safety of consumers.” 47 C.F.R. 64.1200(f)(4). “The legislative history of the TCPA indicates a congressional intent to interpret the term ‘emergency’ broadly rather than narrowly.” *In*

the Matter of the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 2736, 2738 (1992).

Whether the call is “necessary” in a situation affecting the health and safety of consumers “would depend on the content of the call, not just whether an emergency situation exists.” See *Greenley v. Laborers’ Int’l Union of N. Am.*, 271 F. Supp. 3d 1128, 1148 (D. Minn. 2017).

The emergency purpose exception has been recognized in several instances, including:

1. Messages warning consumers about salmonella-tainted beef they may have purchased. *Derrick v. Kroger Co.*, No. 3:19-cv-00106-AJB-MDD, 2019 U.S. Dist. LEXIS 135803 (S.D. Cal. Aug. 12, 2019).
2. Messages from schools to parents or guardians relating to “weather closures, incidents of threats and/or imminent danger to fire, dangerous persons, health risks (e.g., toxic spills), and unexcused absences.” *In re Blackboard, Inc. Petition for Expedited Declaratory Ruling*, 31 FCC Rcd 9054, 9062-9065, 2016 FCC LEXIS 2680, *29-40, 65 Comm. Reg. (P & F) 226 (F.C.C. August 4, 2016) (finding that “these types of calls fall within the emergency-purpose exception because they potentially affect the health and safety of students, faculty, and other school staff members.”).
3. Messages from utility companies regarding “[s]ervice outages and interruptions in the supply of water, gas or electricity” because such outages “could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.” 7 FCC Rcd 8752, 8778, 1992 FCC LEXIS 7019, *66, 57 FR 48333, 71 Rad. Reg. 2d (P & F) 445 (F.C.C. September 17, 1992).
4. Messages from pharmacy benefit managers to obtain information needed to fulfill urgent prescriptions and where the patient “could end up in the hospital” without the medication. *Roberts v. Medco Health Sols., Inc.*, No. 4:15 CV 1368 CDP, 2016 U.S. Dist. LEXIS 97177, at *4 (E.D. Mo. July 26, 2016).

Courts have rejected the emergency purpose exception in several other instances, including:

1. In the context of prescription notice calls, where the recipient informed the pharmacy that he or she does not want to receive prescription notice calls and the calls continued. *St. Clair v. CVS Pharmacy, Inc.*, 222 F. Supp. 3d 779, 780 (N.D. Cal. 2016) (also rejecting the defense argument that “all prescription-related calls are categorically made for emergency purposes”).
2. Where the recipient informed the caller that the caller has reached the “wrong number” and the calls continued. *E.g., Coleman v. Rite Aid of Georgia, Inc.*, 284 F.Supp.3d 1343, 1346- 1347 (N.D. Ga. 2018).
3. Where the calls concern “telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content[.]” *ACA Int’l v. FCC*, 435 U.S. App. D.C. 1, 28, 885 F.3d 687, 714 (2018) (“Even if accounting systems are in some sense ‘necessary’ to the continued provision of healthcare, ‘[t]imely delivery of these types of messages is not *critical*’ to that goal.”); 7 FCC Rcd 8752, 8778, 1992 FCC LEXIS 7019, *67, 57 FR 48333, 71 Rad. Reg. 2d (P & F) 445, fn 85 (F.C.C. September 17, 1992) (“We emphasize that telephone solicitations as defined in our rules can never be classified as ‘emergencies.’”).

In sum, what qualifies as an “emergency purpose” is context specific and does not

categorically apply to every health or safety related communication. However, the exception likely applies in circumstances where urgent communication is necessary to advise a group of persons of potential exposure to disease and/or to avoid certain locations (like on office, school, or event with confirmed exposure). On the other hand, the emergency purpose exception may not apply where there is no *urgent* health or safety risk.

With these principles in mind, organizations should consider the following steps before clicking “send” on a mass message:

1. Request employees, parents, and/or other stakeholders opt-in to the organization’s emergency response system. Review the process with knowledgeable counsel to ensure the organization is properly obtaining, tracking, and preserving evidence of consent and that the communication falls within the scope of consent.
2. Where consent was previously obtained, consider renewing the request. Phone numbers change hands and recipients may provide alternative phone numbers for instant communication.
3. Organizations should review their emergency communication protocol and plan, in advance, for what types of events might warrant an emergency mass communication that does not rely on prior express consent. By anticipating the type of emergency event, organizations can create preemptive template text language that clears legal review prior to the emergency event. In a true emergency, every minute counts.
4. For important communications that do not rise to the level of an emergency, consider alternative forms of low risk communication (e.g., email) where prior express consent has not been obtained.

While instant text communication can be effective in a crisis, it is not without potential regulatory peril. Preparing in advance can help avoid these pitfalls and decision paralysis in an emergency.

¹ The Third, Seventh, and Eleventh Circuits have each rejected the Ninth Circuit’s sweeping ATDS definition.