

National Pharmacy Avoids TCPA Claim for Flu Shot Robocall under Health Care Rule Exemption

2 min read

Jun 2, 2017

A judge in the Southern District of New York recently held that an automated, pre-recorded message sent on behalf of Rite Aid informing recipients to obtain a flu vaccine shot was exempted from the Telephone Consumer Protection Act (TCPA), by virtue of the FCC's Health Care Rule exemption. The exemption permits health care providers to contact customers in order to convey important "health care messages" as defined and covered by HIPAA.

The case, *Zani v. Rite Aid Headquarters Corp.*, 14-cv-9701, involved an automated, pre-recorded message sent on behalf of Rite Aid informing recipients to obtain a flu vaccine shot from their local Rite Aid Pharmacy. In 2013, the putative plaintiff went to his local Rite Aid pharmacy and received a flu shot. He provided Rite Aid with his cell phone number and signed a privacy notice consenting to receiving health related communications by Rite Aid. Roughly a year after receiving his flu shot, he received a voice message reminder to get another flu shot at Rite Aid, as did all previous customers who obtained a flu shot and signed the privacy notice.

The case hinged on whether this automated call qualified under the FCC's Health Care Rule exemption. Rite Aid argued that the content of the message qualified for the exemption because the call delivered a "health care" related message. The court held that three factors are considered when analyzing whether a call is a "health care message:" (1) the call is about a health-related product or service, (2) the call is made between a patient and his provider with whom an established health care treatment relationship exists, and (3) the call concerns the individual health care needs of the patient.

The court found the flu shot calls conveyed a 'Health Care' message since they were made only to previous customers and concerned prescription medication and health care needs. Importantly, the court rejected the plaintiff's arguments that the flu shot calls were made with a marketing intent, noting intent was immaterial to the exemption.

Key Takeaway from the Decision

As the healthcare industry continues to expand, the development of the Health Care Rule exemption will likely continue to grow in importance. The most important takeaway from this decision is to consider the context of the message (e.g., is it health related) and the scope of the prior consent given by the customer. A well drafted privacy notice may be the critical difference in the applicability of the Health Care Rule exemption or liability under the TCPA.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

New York, TCPA, Telephone Consumer Protection Act, FCC