Don’t get caught in your birthday suit

All it takes is **one** text message – and **one** unhappy customer – for your company to be on the receiving end of a class action lawsuit alleging violation of the Telephone Consumer Protection Act (TCPA). *Brickman v. Facebook, Inc.* is an example of exactly that. After receiving just one text message from Facebook alerting him about a friend’s birthday, Brinkman filed a class action complaint in California. His “birthday” suit claims he did not consent to receive any text messages from Facebook, and alleges class damages in the billions. Though it’s possible, if not likely, Facebook will succeed in challenging this lawsuit (after recently filing a motion to dismiss), this case demonstrates the uncertainty companies face when trying to interpret Federal Communications Commission orders that many in the marketing industry believe overprotect consumers and unnecessarily restrict marketers. Protecting your company from being named in a “happy birthday”-type class action lawsuit is complicated and tricky as the law attempts to catch up with rapidly changing technologies. Here are some key things you should know about the TCPA:

- **Claim Elements** – The three basic elements of a TCPA claim are (1) the sender called a cellular number (2) using an automatic telephone dialing system (3) without the recipient’s prior express consent.
- **Definition** – A 2015 FCC order interprets the statutory definition of “automatic telephone dialing system” very broadly, concluding that it includes all smart phones and other programmable devices that have a capacity to automatically dial – even if it’s just a capacity in the future to be programmed or loaded with an application that would enable automatic dialing.
- **Non-Marketing Texts** – For these messages, express consent requires the sender’s ability to demonstrate the recipient gave express oral or written consent or, in the absence of instructions to the contrary, the recipient gave his or her wireless number to the sender.
- **Marketing Texts** – For these messages, express consent requires the sender’s ability to show the recipient received clear and conspicuous disclosure of the nature of the consent requested (e.g., for marketing messages, their frequency) and, after receiving that disclosure, unambiguously agreed in writing to receive such texts.
- **Written Consent** – This can be obtained via email, website form, text message, telephone keypress, voice recording or any other method conforming to the Federal E-SIGN Act.
- **Damages –** Violations carry statutory damages of $500 – $1,500 per message.

Determining when consent is required can often be complicated.

- Does it apply to a company salesperson’s texts to customers?
- What messages have a dual marketing and non-marketing purpose (e.g., Does Facebook ad revenue make a “happy birthday” text a dual purpose text)?
- What constitutes clear and conspicuous disclosure of the nature of the consent requested (e.g., Is disclosure of message frequency required)?
- What records maintenance is sufficient (e.g., Are procedures for monitoring revocations sufficient)?

So, don’t get caught in a “birthday suit.” Seek legal counsel **before** problems arise. *This article is very general in nature and does not constitute legal advice. Readers with legal questions should consult with an attorney prior to making any legal decisions.