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NORTH DAKOTA

Does North Dakota have its own version of the TCPA?

The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 by Congress to combat unwanted telephone marketing calls by placing restrictions around the use of an automated telephone dialing system as well as maintaining and adhering to Do Not Call lists.

North Dakota Century Code Chapter 51-28 regulates the use of automatic dialing-announcing devices ("ADADs") for commercial telephone solicitations in North Dakota. Similar to the TCPA, these statutes impose restrictions on the use of ADADs and prohibit certain telephone solicitations of North Dakota residents who register with the state's "do-not-call" list. *Fraternal Ord. of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 596 (8th Cir. 2005).

1. Prohibited Acts:

Automatic Dialing-Announcing Devices ("ADADs")

Section 51-28-02 provides, "A caller may not use or connect to a telephone line an automatic dialing-announcing device or deliver a prerecorded or synthesized voice message to a subscriber unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered." N.D. Cent. Code § 51-28-02. An ADAD is "a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." *Id*. § 51-28-01(1). A "caller" is defined as "a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line." *Id*. § 51-28-01(2). A "subscriber" is defined as "a person who has subscribed to a residential telephone line or the other persons living or residing with the subscribing person." *Id*. § 51-28-01(6). A "message" is defined as "any telephone call, including voice, text, or other electronic communication, regardless of its content." *Id*. § 51-28-01(5).

All ADADs must be designated and operated to disconnect within ten seconds after a subscriber terminates the telephone call. *Id*. § 51-28-04. ADADs that use a random or sequential number generator cannot be used unless certain types of telephone numbers are excluded, including phone numbers registered on the North Dakota "Do Not Call" list. *Id*. §

51-28-04(4). North Dakota has adopted the Federal Trade Commission National Do Not Call Registry as the state "Do Not Call" list. *Id*. § 51-28-09(1).

When an ADAD message is immediately preceded by a live operator, the operator must, at the outset of the message, disclose:

(1) the name of the business, firm, organization, association, partnership, or entity for which the message is being made;
(2) the purpose of the message;
(3) the identity or kinds of goods or services the message is promoting; and
(4) If applicable, the fact that the message intends to solicit payment or commitment of funds.

Id. § 51-28-03.

ADADs may not be used before 8:00 a.m. or after 9:00 p.m. at the telephone subscriber's location. *Id*. § 51-28-05.

Sections 51-28-02 and 51-28-05 do not apply to messages: (1) from a public safety agency notifying a person of an emergency; (2) from a school district to a student, a parent, or an employee; (3) to a subscriber with whom the caller has a current business relationship; or (4) advising an employee of a work schedule. *Id*. § 51-28-02.

Telephone Solicitations

Section 51-28-06 provides that "[a] caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber in this state who, for at least thirty-one days before the date the call is made," has been on the state Do Not Call list or the Federal Trade Commission National Do Not Call Registry. *Id*. § 51-28-06.

Any caller who makes a telephone solicitation to a subscriber in this state shall immediately and clearly state at the beginning of the call:

(1) the caller's true first and last name;
(2) the caller's telephone number;
(3) the caller's city and state of location; and
(4) the name of the business on whose behalf the telephone solicitation is made.

Id. § 51-28-07.

A caller who makes a telephone solicitation to a subscriber in this state may not knowingly use any method to block or otherwise deliberately circumvent the subscriber's use of a caller identification service. *Id*. § 51-28-08.

2. Enforcement:

Any person who receives a telephone solicitation or message in violation of Chapter 51-28 may bring an action to enjoin such violation, or for damages, or both. *Id*. § 51-28-11. The court may award the plaintiff actual damages or damages up to two thousand dollars for each violation, whichever is greater. *Id.* The court may also award the plaintiff costs, expenses, and reasonable attorney's fees. *Id.*

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by Chapter 51-28, the attorney general, without notice and hearing, may issue any cease and desist order which the attorney general deems necessary or appropriate in the public interest. *Id*. § 51-28-14. A person may make a written request for a hearing before the attorney general within ten days after receiving a cease and desist order. *Id.* The attorney general may also impose by order and collect a civil penalty against any person found in an adjudicative proceeding to have violated any provision of Chapter 51-28 in an amount no greater than $2,000.00 for each violation. *Id.* § 51-28-15. If the attorney general prevails in an adjudicative proceeding, the attorney general may assess the non-prevailing person for all adjudicative proceeding and hearing costs, including reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action. *Id.* § 51-28-16. Finally, the attorney general may bring an action in district court to recover such penalties and costs. *Id.* §§ 51-28-17; 51-28-18. For purposes of enforcement, each telephone solicitation or message constitutes a separate violation. *Id*. § 51-28-19.

3. North Dakota's Anti-Spoofing Law Struck Down as Unconstitutional:

In 2019, North Dakota passed its Anti-Spoofing Act. The law prohibited: (1) caller ID spoofing if done with the intent to defraud or mislead consumers; and (2) the use of a telephone number that the caller does not own. *Id.* § 51-28-08.1. However, in 2020, a federal judge determined the law "has the practical effect of regulating interstate commerce because it is impossible for Plaintiffs to determine whether a call recipient is physically within North Dakota." *SpoofCard, LLC v. Burgum*, 499 F. Supp. 3d 647, 656 (D.N.D. 2020). Therefore, the judge struck down the law as an unconstitutional violation of the Commerce Clause.

Distinctions between North Dakota Century Code Chapter 51-28 and the TCPA.

North Dakota Century Code Chapter 51-28 and the TCPA have key differences. Section (b) of the TCPA establishes requirements for sending communications via text, phone, or fax. Subsection (b)(1) established four prohibitions:

- Calls made using an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice message to (1) an emergency telephone line, (2) lines of any guest or patient rooms of a hospital, health care facility, elderly home or similar establishment, or (3) any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call (i.e. wireless lines) are forbidden. 47 U.S.C. § 227(b)(1)(A). Importantly, under the TCPA, the term "call" includes both voice messages and text messages. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016). Additionally, in *Facebook, Inc. v. Duguid*, 592 U.S. 395, 409 (2021), the Supreme Court held that to qualify as an ATDS, "a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." Subsection (b)(1)(A) exempts calls made for emergency purposes or made with "prior express consent" of the called party and calls to wireless lines by callers seeking solely to collect a debt owed to or guaranteed by the United States. *Id*. However, in *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 636 (2020), the United States Supreme Court invalidated the government-debt exception and severed it from the remainder of the TCPA.

- Calls made to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party are also prohibited unless the call (1) is initiated for emergency purposes, (2) is not made for a commercial purpose, (3) is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing, (4) is made by or on behalf of a tax-exempt nonprofit organization, (5) is made by or on behalf of a tax-exempt nonprofit organization, or (6) delivers a "health care" message for a covered entity or business associate as defined by the HIPAA

Privacy Rule. *Id*., § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3).

- Sending unsolicited advertisements to fax machines is proscribed unless the advertisement is from a sender with an established business relationship with the recipient, the sender obtained the recipient's fax number properly (e.g. via through voluntary communication of such number, or through a directory, advertisement, or Internet sit to which the recipient voluntarily agreed to make its fax number available for public distribution), and the fax contains the requisite opt-out notice. *Id*., § 227(b)(1)(C). The exception does not apply after a recipient submits a proper opt-out request. *Id*.

- Using automatic telephone dialing systems to engage two or more of a business' telephone lines simultaneously is prohibited. *Id*., § 227(b)(1)(D).

Section (b)(3) provides a private right of action to any person or entity to enjoin further TCPA violations and/or collect actual monetary loss, or receive $500 in damages for each violation, whichever is greater. *Id*., § 227(b)(1)(3). If the court finds that the defendant willfully or knowingly violated the TCPA, it may, at its discretion, award up to three times the amount of statutory damages, resulting in up to $1,500 per violation *Id*. Under section (b)(4), violations also result in a forfeiture penalty to be paid to the United States. *Id*., § 227(b)(1)(4). 47 U.S.C. § 503(b) outlines the different maximum forfeiture penalty amounts that can be imposed depending on the type of violator. For intentional violations, the civil forfeiture penalty is increased by an amount not to exceed $10,000. *Id*.

States may also bring a civil action on behalf of its residents to enjoin telephone calls or other transmissions that violate the TCPA and/or to recover for actual monetary loss, or receive $500 in damages for each violation. Again, if the court finds the defendant willfully or knowingly violated such regulations, the court may award up to three times the amount of statutory damages. 47 U.S.C. § 227(g).

Section (e) also prohibits any person, in connection with any voice service or text messaging service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value. *Id.*, § 227(e)(1). Violations are subject to a forfeiture penalty (in addition to other penalties provided by the TCPA). *Id.*, § 227(e)(5). Willful and knowing violations also carry the possibility of a criminal fine. *Id*. States have the authority to bring an action in federal court on behalf of all state residents for any violations under this section as well. *Id.*, § 227(e)(6).

The TCPA mandates the FCC to prescribe regulations implementing the TCPA. Accordingly, additional restrictions apply. For example, the Telemarketing Sales Rule, which was jointly implemented by the FCC and Federal Trade Commission ("FTC"), restricts telemarketers from making outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location. 16 C.F.R. § 310.4(c). The FCC and FTC also worked together to develop the national Do Not Call Registry, which became effective on March 31, 2023. *See* 15 U.S.C. § 6151. Telemarketers are prohibited from calling numbers on the registry, absent certain exceptions. For instance, the do-not-call registry restrictions do not apply to charitable or political fundraising calls. *See Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228 (2004). Additionally, telemarketers are not liable for calls made to numbers on the registry if they have obtained the consumer's prior express invitation or permission, evidenced by a signed, written agreement. *See Hossfeld v. Allstate Insurance Co*., 726 F.Supp.3d 852 (2024).

Related North Dakota consumer protection laws.

1. N.D. Cent. Code Chapter 51-51 (Unlawful Sales or Advertising Practices Act):

The North Dakota Unlawful Sales or Advertising Practices Act protects consumers against the use of fraudulent or deceptive practices in connection with the sale or advertising of merchandise. Section 51-15-02 prohibits “[t]he act, use, or employment by any person” of: (1) “any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby”; and (2) “any act or practice, in connection with the sale or advertisement of any merchandise, which is unconscionable or which causes or is likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition.” N.D. Cent. Code § 51-15-02. The North Dakota Supreme Court has held section 51-15-02 applies “only to the conduct of the person who sells or advertises merchandise.” *Thimjon Farms Partnership v. First Intern. Bank & Trust*, 837 N.W.2d 327, 337-38 (N.D. 2023). “Merchandise” means “any objects, wares, goods, commodities, intangibles, real estate, charitable contributions, or services.” N.D. Cent. Code § 51-15-01(3).

The attorney general is primarily responsible for enforcement of the act's provisions and may institute an action in district court. Available remedies include injunctive relief, civil penalties up to $5,000 per violation, and reasonable attorney’s fees and costs. *Id.* §§ 51-15-07, 51-15-10, 51-15-11. The Act also authorizes a private cause of action “by any person against any person who has acquired any moneys or property by means of any practice declared to be unlawful in [Chapter 51-15].” *Thimjon Farms*, 837 N.W.2d at 337 (quoting N.D. Cent. Code § 51-15-09). If the court finds the defendant “knowingly” committed a practice declared to be unlawful, it may award the consumer treble damages and it must award costs, disbursements and actual reasonable attorney's fees. N.D. Cent. Code § 51-15-09.

2. N.D. Cent. Code Chapter 51-27 (Commercial Electronic Mail Consumer Protection):

North Dakota Century Code Chapter 51-27 regulates false or misleading commercial electronic messages. "Commercial electronic mail message" means an electronic mail message sent to promote real property, goods, or services for sale or lease. N.D. Cent. Code § 51-27-01(2).

Section 51-27-02 prohibits initiating, conspiring to initiate, or assisting, the transmission of a commercial electronic mail message that: (a) uses a third-party's internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or (b) contains false or misleading information in the subject line. *Id.* § 51-27-02(1). These prohibitions only apply to messages transmitted “from a computer located in [North Dakota]” or “to an electronic mail address that the sender knows, or has reason to know, is held by a resident of [North Dakota].” However, a person “knows” the intended recipient is a North Dakota resident if this information “is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.” *Id.* § 51-27-02(2).

Additionally, the subject line of a commercial electronic message must start with “ADV” (or “ADV-ADULT” if the message contains material of a sexual nature), unless: (1) the recipient has consented to receive or has solicited electronic mail messages from the initiator; (2) the message is from an organization using electronic mail to communicate exclusively with its members; (3) the message is from an entity which uses electronic mail to communicate exclusively with its employees or contractors; or (4) there is a business or personal relationship between the initiator and the recipient. *Id.* § 51-27-04. The sender must include a toll-free number or other way for recipients to opt out. *Id.* § 51-27-05.

The recipient of a commercial electronic mail message sent in violation of Chapter 51-27 may recover $500, or actual damages, whichever is greater. *Id.* § 51-27-06(1). Damages to an interactive computer service resulting from a violation of Chapter 51-27 are $1,000, or actual damages, whichever is greater. *Id.* § 51-27-06(2).

Under Section 51-27-10, a person is guilty of a class C felony for certain conduct related to fraudulent or misleading communications if the person acts with intent to defraud or injure an individual, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by any other person. *Id.* § 51-27-10.

3. N.D. Cent. Code § 51-07-23 (Unsolicited Telefacsimile Advertising):

N.D. Cent. Code § 51-07-23 prohibits unsolicited advertisements sent via fax machine, unless: (a) the sender has had a prior contractual or business relationship with the recipient; or (b) the fax message does not exceed two pages and is sent between 9:00 p.m. and 6:00 a.m. Notwithstanding these exceptions, it is unlawful to send a fax message to a recipient who has previously sent a written or telefacsimile message to the initiator clearly indicating that the recipient does not want to receive any fax messages from the sender. *Id.*

A person who violates Section 51-07-23 is liable to the recipient for fifty dollars per month for each month in which the recipient receives the unsolicited message. *Id.*

How to comply with N.D. Cent. Code Chapter 51-28.

To maintain compliance with North Dakota's version of the TCPA and minimize the risk of an enforcement action, follow these best practices:

- Regularly check the National Do Not Call Registry, which North Dakota has adopted as the state "Do Not Call" list, to ensure you are not contacting numbers that have opted out of receiving telemarketing calls.
- Adhere to restrictions on calling times, avoiding calls outside of permissible hours (i.e., no telemarketing calls before 8:00 a.m. or after 9:00 p.m.).
- Always get explicit, written or recorded consent from consumers before making any telemarketing calls.
- Always identify yourself and your business clearly when making calls. Further identify the purpose of the call, the goods or services the message is promoting, and, if applicable, the fact that the message intents to solicit payment.
- Provide a clear and easy way for consumers to opt out of receiving communications.
- Maintain detailed records of all calls, including consent documentation and opt-out requests.