



Post-Pandemic Litigation Series

DESPERATELY SEEKING POST-COVID SALES?

Don't Forget About the TCPA and the
CAN-SPAM Act When Designing Your
Marketing Strategy

July 15, 2020

Seyfarth Shaw LLP

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Agenda

- 1 | Introduction
- 2 | CAN-SPAM
- 3 | TCPA Overview & Restrictions
- 4 | TCPA Terms of Art
- 5 | Recent Rulings
- 6 | Best Practices

What is the Telephone Consumer Protection Act?

- Enacted to protect privacy interests
- The TCPA places restrictions on:
 - calls and text messages to cellular telephones
 - calls to residential telephones
 - sending advertisements by facsimile
- Monetary exposure can be devastating
 - \$500 statutory damages *per violation* (per call, text or fax)
 - Up to \$1,500 per call and possible treble damages for “willful” violations
 - no cap on class damages

What is the CAN-SPAM Act?

- Enacted to protect consumers from receiving unsolicited commercial emails
- The CAN-SPAM Act requires/restricts:
 - the sender and header information on all emails
 - the format and content of commercial emails
 - Opt-out mechanisms and procedures
- Monetary exposure can be substantial
- No private right of action under federal law
 - Limited to FTC and States Attorney General
 - Broad preemption language re state law
 - CCPA may be new alternative/type claim

Why Should You Care About All These Acronyms?

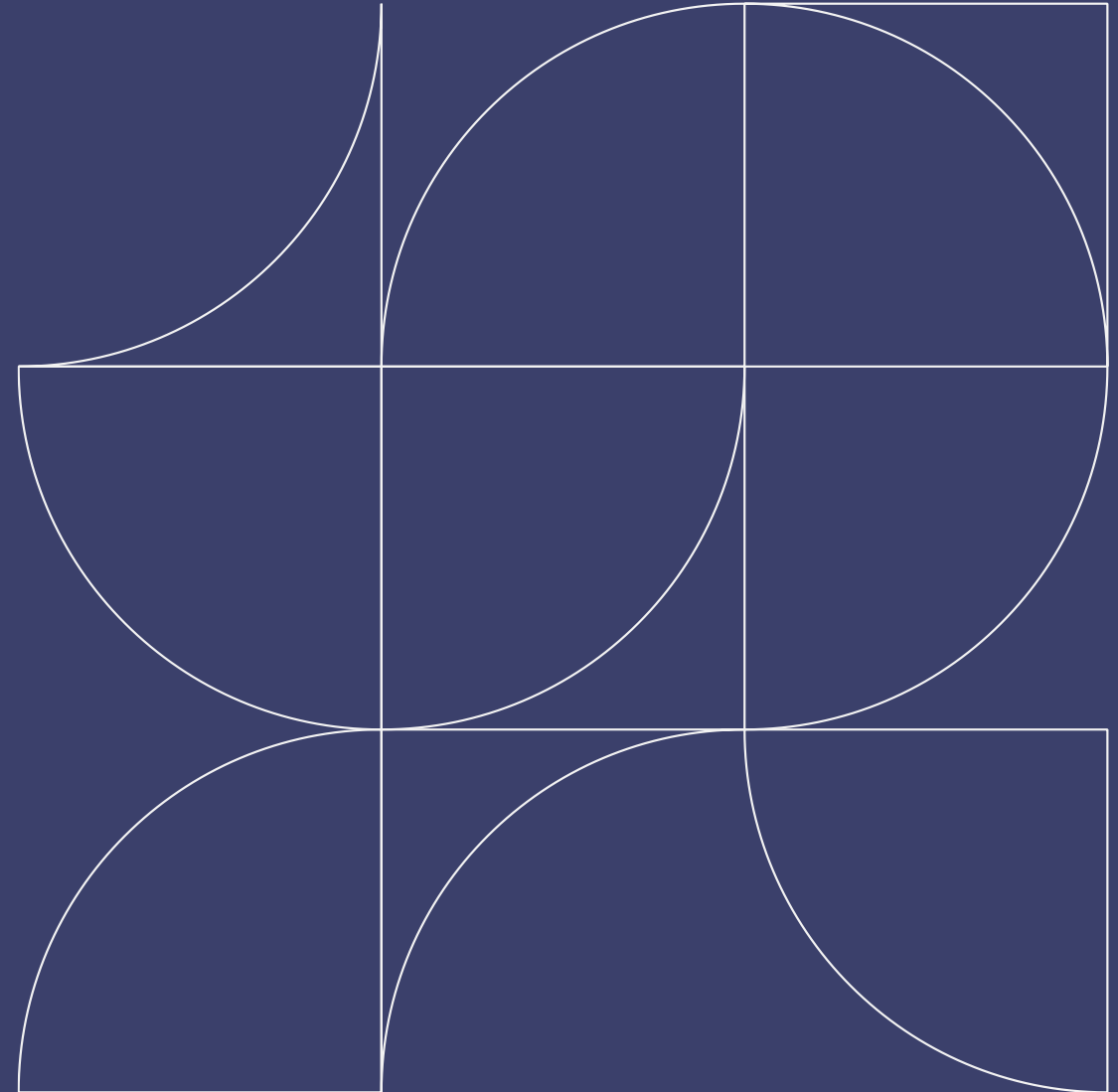
- Avoiding exposure
 - Statutory damages
 - Private lawsuits – single and class
 - Enforcement investigations/actions
- Goodwill

What Do They Have in Common?

- Apply to all industries
 - Plaintiffs' attorneys don't discriminate
 - Traditionally debt collection and retail were targeted
 - New industries being targeted include
 - Elections
 - Cannabis
 - Non-profits
- Apply to communications with consumers-most marketing campaigns
- All touch on issues of
 - Consent
 - Opting in / out

CAN-SPAM

15 USC §§ 7701-7713



CAN-SPAM Act Rule Requirements

- 1 Emails must contain accurate header and subject lines
- 2 Commercial emails must comply with 3-5
- 3 Identify itself as an advertisement
- 4 Valid physical address
- 5 Offer recipients a way to opt out of future messages

FTC: CAN-SPAM Enforcement

To: [REDACTED]
Date: 10/15/2015 11:00:30 AM
Subject: Local mommaking over 8,471/ month (Details)

From: [REDACTED]
Subject: [REDACTED]


Begin forwarded message:

> From: "Editorial" <Editorial@ [REDACTED]>
> Date: November 26, 2015 at 2:27:06 PM EST
> To: [REDACTED]
>

CNN

Trending News

Donald Trump Reveals Simple Plan to Help Every American Earn More Money



Can Americans double or even triple their incomes this year?


Donald Trump Speaks to a packed New Hampshire audience detailing his Income For Americans Plan.

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YOUR SOURCE TO SMARTER LIVING

"I went from a fixed salary at work to grossing an additional \$7,000-\$8,000 a month from my home computer"

Read Her Story!



WORK-AT-HOME JOBS are Crucial at this time

As seen on by:    

To Unsubscribe [Click Here](#)
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OnlineHomeCash.com

Commercial v. Transactional Relationship

- **Commercial** - content which advertises or promotes a commercial product or service, including content on a website operated for a commercial purpose
- **Transactional or relationship** - content which facilitates an already agreed-upon transaction or updates a customer about an ongoing transaction
- **Other** - content which is neither commercial nor transactional or relationship
- “Primary Purpose” Test

The primary purpose of an email is transactional when content....

1. facilitates or confirms an agreed commercial transaction;
2. provides warranty, recall, safety, or security information;
3. provides information about a change in terms, features, account balance, membership, subscription, account, loan or other information about an existing commercial relationship;
4. provides information about an employment relationship or employee benefits; or
5. delivers goods or services as part of an agreed transaction.

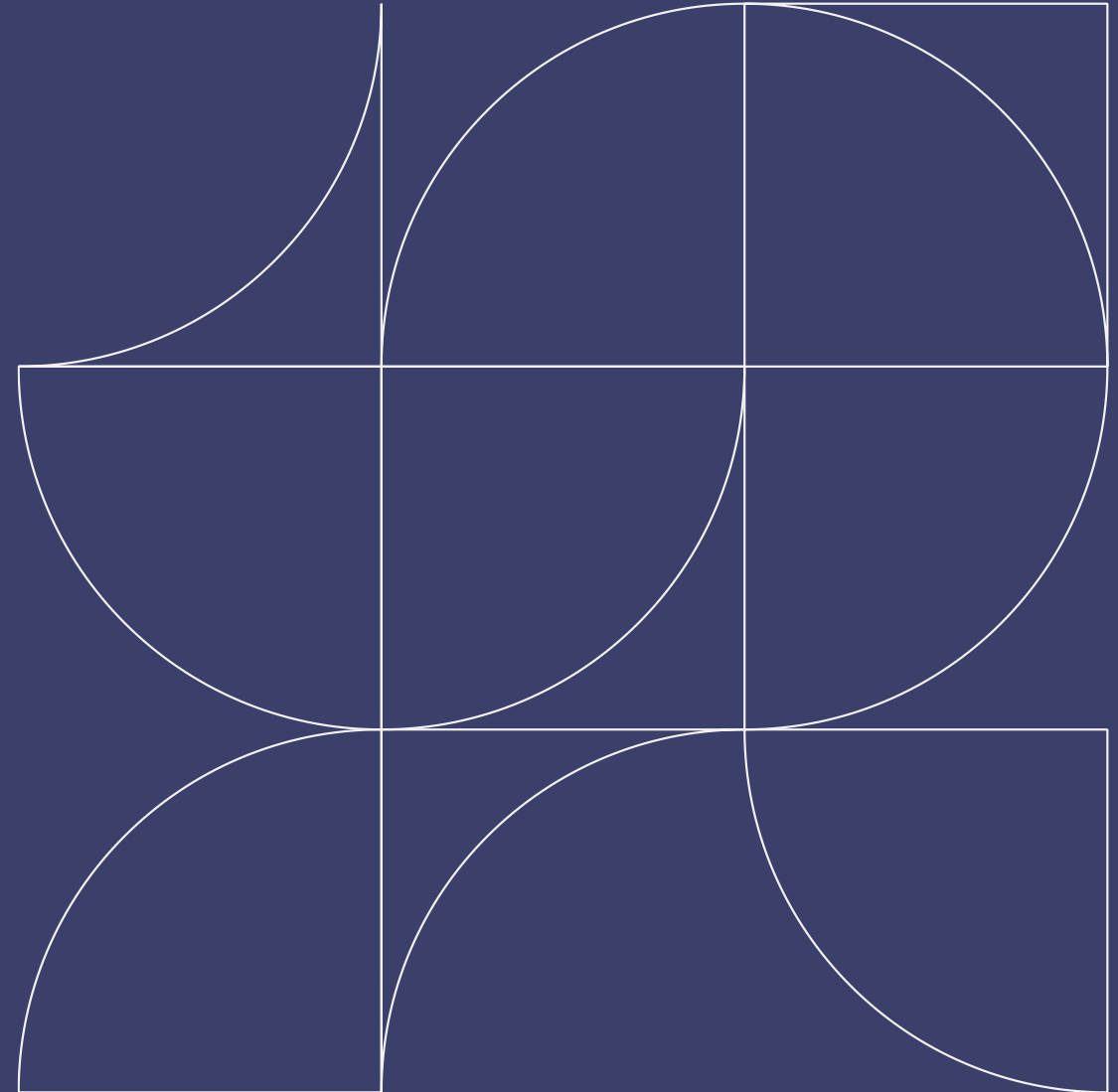
Determining the Primary Purpose of an Email

- WHATEVER CONTENT IS MOST PROMINENT
- Subject Line is Most Important—often forgotten
- Content Comes Next—is it substantially promotional
 - What comes first—beginning of message
 - What is emphasized most
 - No strict quantity test
- OK to put promotions in a confirming email, member newsletters
- NOT OK to disguise a special offer with the subject line reading “Account Notice”

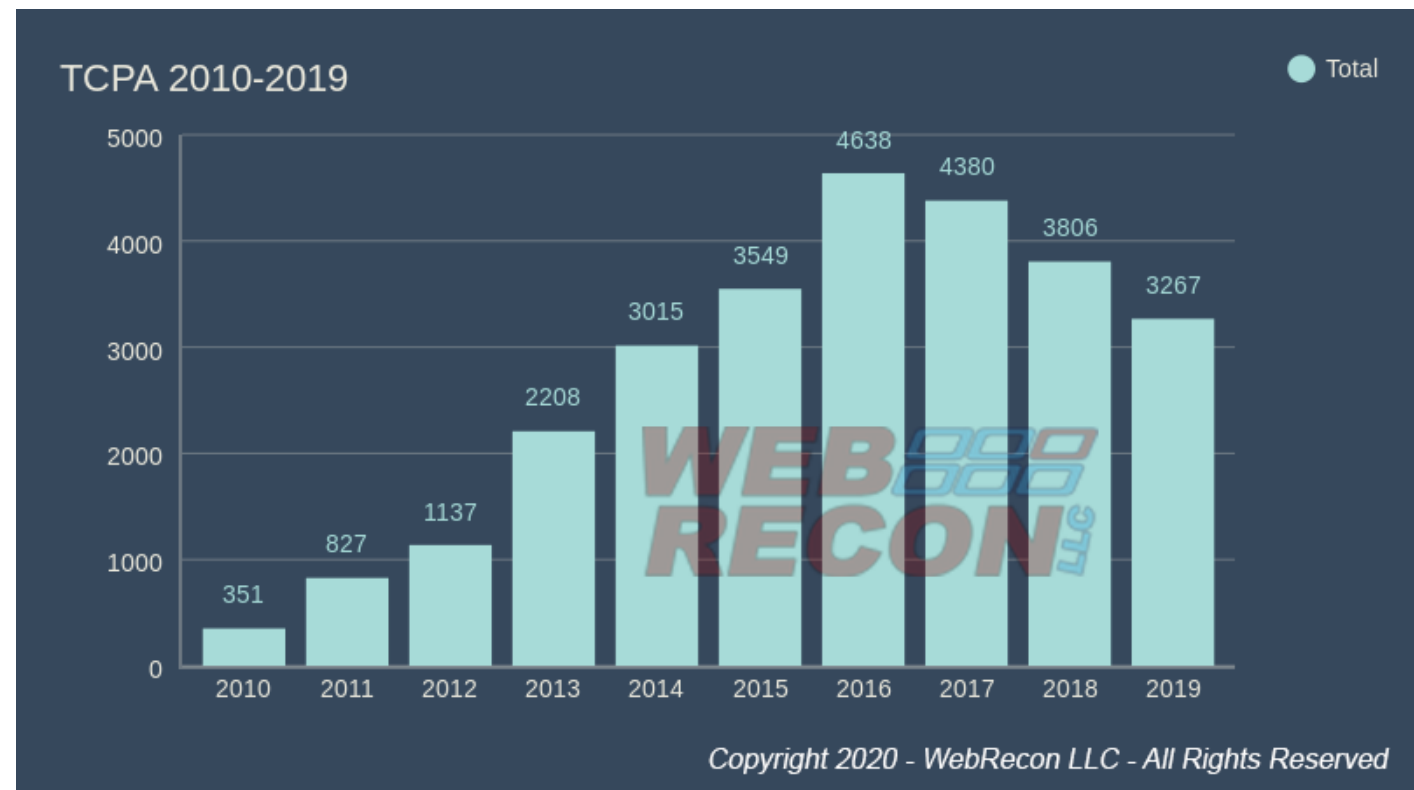
Commercial Email Requirements

- 1 Accurate header and subject lines
- 2 Identify itself as an advertisement (unless you have opt in)
- 3 Valid physical address of sender
- 4 Offer recipients a way to opt out of future messages

Telephone Consumer Protection Act 47 U.S.C. § 227



TCPA Overall Statistics



- 3,267 TCFPA filings in 2019
 - 14% **down** from 2018
- 1,911 TCFPA filings as of May 31, 2020
 - 26% **up** from May 31, 2019

TCPA Class Action Statistics

2019-20 Percent of TCPA suits filed as putative class actions	
December	26.5%
January	45.2%
February	48.3%
March	46%
April	30.4% (adjusted)
May	44.7%

5 Largest TCPA Class Action Settlements in History

Company	Settlement Amount
Caribbean Cruise Line (2016)	Up to \$76M
Capital One (2014)	\$75.5M
Dish Network (2017)	\$61M
US Coachways (2016)	\$49.9M
AT&T Mobility (2014)	\$45M

The TCPA: What does it apply to?

- Cell phone calls
 - Certain text messaging platforms
 - Ringless voicemails (RVM)
- Landline Calls
- Faxes
- Don't forget about vicarious liability too

Restrictions: Cell Phone Calls

- Covered by TCPA if made using
 - automated telephone dialing systems (ATDS) a/k/a “autodialer”
 - artificial / prerecorded voices
- Not for emergency purposes
 - certain COVID-19 calls, contaminated food, school closings / safety
- Without prior express consent
 - Telemarketing calls require prior express **written** consent and an opt-out mechanism
 - The calling party bears the burden of demonstrating prior express consent
 - Consent may be revoked by any reasonable means
- Does not fall within an FCC exemption
 - e.g., package delivery notifications, identity theft / data breach, prescription notifications, hospital discharge orders (2015 Omnibus Order)

Restrictions: Landlines

- Timing
 - 8 a.m. to 8 p.m.
- Method
 - Can use ATDS
 - Cannot use prerecorded / artificial voice
- Consent
 - Required if made for a commercial purpose and contain unsolicited advertisements
 - Otherwise not required (e.g. political calls, school closings, prescription refills)
- Identify / Opt Out

Restrictions: Faxes

- May not send unsolicited fax “advertisements”
 - Unsolicited means without prior express invitation or permission
 - Advertisement means “any material advertising the commercial availability or quality of any property, goods or services.” 47 U.S.C. §227(a)(5)
 - Construed broadly and includes faxes that offer **free** goods and services (e.g. desktop reference guide or free dinner seminar)
 - Some disagreement
- Need opt-out notice

Terms of Art - Consent

- Prior express **written** consent is required for telemarketing
 - “[A] consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer:
 - (1) received ‘clear and conspicuous disclosure’ of the **consequences** of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and
 - (2) having received this information, **agrees unambiguously** to receive such calls at a telephone number the consumer designates.”
 - “In addition, the written agreement must be obtained ‘without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.’”

Terms of Art – Revocation of Consent

- Consumers are allowed to revoke consent through reasonable means
 - What is reasonable?
 - A letter
 - An email
 - A statement on the phone
- Can a consumer unilaterally revoke consent given as part of a bilateral contract?
 - Some courts have answered “no”
 - *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017)
 - *Medley v. Dish Network*, No. 16-2534, 2018 WL 4092120, at *10 (M.D. Fla. Aug. 27, 2018)
 - *Harris v. Navient Sols.*, No. 15-564, 2018 WL 3748155, at *2 (D. Conn. Aug. 7, 2018)
 - *Barton v. Credit One Fin.*, No. 16-2652, 2018 WL 2012876, at *3–4 (N.D. Ohio Apr. 30, 2018) (written revocation required)
 - Other courts that have answered “yes”

Terms of Art – Established Business Relationship

- Different than consent
- Only for faxes
- Businesses may send a fax advertisement to you if you gave them permission.
- In all other instances, there must be **sort by both** an established business relationship between you and the fax sender (based on an inquiry, application, purchase or transaction) **sort by and** the sender must have obtained your fax number in one of the following ways:
 - Directly from you within the context of the established business relationship – for example, as part of an application, contact information form or membership renewal form.
 - From a directory, advertisement or web site to which you voluntarily agreed to make the number available for public distribution, and the sender has taken reasonable steps to verify that you consented to have the number listed.
 - From your own directory, advertisement or Web site, unless you have noted on such materials that you do not accept unsolicited fax advertisements.
- Fax advertisements sent as part of an established business relationship must include a notice informing you of your right to avoid future faxes and instructions for making an opt-out request.

Terms of Art – Opt Out

- For calls to cell phones and landlines
 - Automated, interactive opt-out mechanism required
- For faxes
 - Written
 - Clear and conspicuous;
 - On the first page of the fax;
 - Specific language:
 - Recipient may opt out of receiving future faxes;
 - The sender's failure to comply within a reasonable time is unlawful; and
 - Include a telephone and fax number where such a request can be sent

Terms of Art – Automated Telephone Dialing System

- What is an ATDS?
 - Defined as equipment which has the capacity
 - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - (B) to dial such numbers. 47 U.S.C. § 227 (a)(1)
- No one knows exactly what this means and appellate courts are split
 - Second and Ninth Circuit – Broad
 - Must be able to (1) store numbers to be called *or* (2) generate random or sequential telephone numbers and dial them
 - D.C., Third and Seventh – Narrow
 - Must be able to (1) generate random or sequential telephone numbers *and* (2) dial those numbers
 - *Facebook v. Duguid* – petition for cert granted on July 9, 2020
- ATDS even if a live person comes on the line when the call is answered
 - Key is ability to dial numbers without human intervention

Recent Rulings – First Amendment

- *Barr v. American Ass'n of Political Consultants* (July 6, 2020)
 - 2015 Congressional amendment to TCPA
 - Exempted cell phone calls to collect debts owed to the federal government
 - Multiple challenges brought by companies and political organizations
 - Fourth & Ninth Circuits held that the exception created a First Amendment violation
 - BUT the remedy was severance, which made the restriction on speech broader
 - The Supreme Court followed suit
 - Leveled down - everyone is on the same footing now
 - Applies prospectively only, i.e., won't apply until the District Court enters final judgment
 - Are First Amendment challenges dead?
 - Not necessarily

Recent Rulings – FCC Orders

- **P2P - Text Messaging Platform** (June 25, 2020)
 - Clarified that whether a text message platform is an ATDS depends on whether human intervention is required, not the volume of calls
 - No determination whether P2P technology was an ATDS
- **Anthem - Health Care** (June 25, 2020)
 - Asked FCC to eliminate prior express consent requirement for preventative care, case management, maintenance of health benefits
 - Argued such calls were “urgent” and wanted by consumers
 - Would have given opt-out option after the fact
 - FCC said no
- **COVID-19** (March 20, 2020)
 - COVID calls are made for an emergency purpose IF
 - From a hospital, health care provider or local / state official
 - And solely informational, directly related to imminent health or safety
 - Cannot use this exception to market COVID related services (e.g. grocery delivery)

What does the future hold?

- Clarity on ATDS in *Facebook v Duguid*
- Future First Amendment challenges
 - Based on FCC Exemptions
 - Timing / Hobbs Act issue
- Debate over whether FCC decisions are binding / advisory
 - *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.* (2019)
 - *Keep your eye on the conservative justices*
- Debate over what constitutes a fax “advertisement”
 - *Supply Pro Sorbents, LLC v. RingCentral, Inc.* (9th Cir. 2018)
 - Supreme Court declined to grant certiorari to review circuit split over what qualifies as an advertisement and whether to follow the 2006 FCC order in

Best Practices

- Arbitration clauses
- Class action waivers
- Keep your T&Cs and privacy policies up to date
- Consent
 - Get it in writing even if you don't need it in writing
 - Specify the method of revocation or that it cannot be unilaterally revoked
 - Make the scope of consent broad

Best Practices

- Monitor/Vet your service providers (and your service provider's service providers)
- Have a compliance policy
 - Train your employees
- Comply with do-not-call registry
- Consider your marketing list(s)
- Consider/revisit your opt out processes (integrate with CCPA)

Questions?





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July 22

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- Issue Spotting: Litigation Trends in the Post COVID-19 World
- Navigating the Residential Mortgage Landscape During COVID-19
- Protecting Trade Secrets in the Pharmaceutical Industry in the Age of COVID-19
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- Weathering the COVID-19 Storm With Your Trade Secrets and Customer Goodwill Intact

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