EXCLUSIVE FOR INSIDERS

GUEST COLUMN

Prevent shakedowns from consumers by knowing this about the Telephone Consumer Protection Act

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Marketing in 2020 has taken a pivot toward more direct methods of communications as a result of the global pandemic. While stay-at-home orders were executed across the country and non-essential travel essentially halted, technological forms of communication — such as telephone calls and text

messages — ramped up and have become the critical connecting points between companies and consumers.

This is especially true for cannabis and CBD companies which already face significant restrictions marketing online and in general. Now, there is an onslaught of claims being filed this year alleging that these companies are harassing consumers with spam text messages in violation of the Telephone Consumer Protection Act (TCPA).

Congress enacted the TCPA in 1991 to address the growing number of telephone marketing calls or "robocalls" taking place. The TCPA places restrictions on the making of telemarketing calls and the use of automatic telephone dialing systems (ATDS) and artificial or prerecorded voice messages. An important adoption to the rules was implemented in 1992, requiring entities making such telephonic solicitations to institute procedures for maintaining company-specific Do-Not-Call lists. These lists are meant to ensure that once a customer opts-out of communications, they are no longer contacted.

A recent 2012 adoption involved a Federal Communications Commission (FCC) revision to the rules that now require telemarketers, among other things, to:

1. Obtain prior express written consent from consumers before robocalling them
2. No longer rely on an "established business relationship" exemption for pre-recorded telemarketing calls to residential numbers, and
3. Provide consumers with an automated, interactive "opt-out" mechanism.

Although the TCPA prohibits the use of ATDS systems without the requisite consent as explained above, yet another amendment to the TCPA was added in 2015 which exempts certain automated calls. This "autodialer" amendment, and what constitutes an ATDS, has since been challenged in various lawsuits;

in fact, the US Supreme Court is poised to determine certain issues emanating from this amendment during its October 2020 term, involving a class action filed against Facebook.

Non-compliance with the TCPA, moreover, can lead to fines of up to $500 per unsolicited phone call or text message (regardless of whether it causes any tangible harm to the consumer), and up to $1,500 for each willful violation. All the more problematic is the growing trend where one aggrieved robocall "victim" institutes a class action on behalf of all consumers who have received similar communications. Thus, one violative call or text to the "wrong" plaintiff, costing $500, can result in millions of dollars in liability.

These lawsuits, especially class actions, are also often very costly to defend against and resolve. In order for companies and their agents in the cannabis industry to mitigate against such risk, compliance measures should be implemented immediately. Jackson v. Euphoria Wellness LLC, 3:20-cv-03297 (N.D. Cal.) is but one of many recent examples of a class action filed in federal court this year against a cannabis company, alleging that this particular Nevada dispensary sent text messages to members of the class who were on the national Do-Not-Call Registry and used an ATDS to market their products.

Serial TCPA plaintiffs and their attorneys are unquestionably trying to cash in on the green rush. So before your company launches that next text message campaign to promote your brand or upcoming rewards program, make sure you are up to date on these dynamic regulations to avoid being the next target.