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The Do's and Don'ts Of Minimizing Risk For TCPA Liability

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Law360, New York (July 14, 2017, 1:11 PM EDT) -- Uber has settled a pair of Telephone Consumer Protection Act class actions accusing it of sending texts to individuals on their cellphones without permission, according to notices filed on dockets in Illinois and California federal court. The notices alerted judges in the Northern District of Illinois and in the Northern District of California that months of mediation has produced a settlement, but that further details of the deal are being withheld until they can draw up an agreement for the courts' approval.

The Illinois case was brought by Maria Vergara, who filed suit in October 2015. She claims Uber contacted her at least six times with a request to confirm that she had signed up for the ride-hailing service. Of course, Vergara said she never signed up for the app and accused Uber of failing to look into the accuracy of phone numbers sent to the company by customers. In the other class action led by named plaintiffs James Lathrop, Justin Bartolet, Jonathan Grindell and Jennifer Reilly, the plaintiffs gave Uber their information as potential drivers, but then complained that they did not provide the requisite consent to receive text messages from Uber.

These latest settlements come after a long string of similar actions plaguing businesses across the nation. Indeed, the TCPA is the most abused federal statute in U.S. history as enterprising plaintiffs attorneys seek to extort record-breaking attorneys' fees from businesses facing exorbitant penalties in cases where there are no actual damages. Each settlement, including settlements like the ones Uber is finalizing, serves to embolden private plaintiffs and their counsel.

The takeaway message for businesses is clear: Businesses and their counsel need to be vigilant about TCPA compliance both internally and for third-party marketing partners and must ensure that consumer communications fall within the scope of consent provided by the recipient. Below are some considerations for any business that wishes to reduce its risk of TCPA liability, or at a minimum to ensure that key defenses are available in the event of TCPA litigation:

- **Do: Obtain express written consent prior to initiating or sending telemarketing calls to consumers.** Having documented express written consent is the best way to defend and resolve litigation that is filed. Conversely, contacting consumer mobile phones without prior express consent presents an extremely high risk of TCPA liability. Awareness among attorneys and consumers of the TCPA has grown, and the barriers to filing a TCPA action are relatively low. Indeed, at least two mobile phone applications have been created for the purpose of allowing consumers to create documentation of unwanted robocalls and other telemarketing calls and forward that information directly to law firms specializing in class action lawsuits.

- **Do: Provide one or more automated opt-out mechanisms.** While not expressly required by the TCPA, it is advisable to have easily accessible methods that allow a consumer to opt out

of (revoke his or her consent for) future communications. This process should be able to capture, document and process opt-out requests in a manner that ensures that communications will cease immediately after a consumer opts out. Some examples include allowing the consumer to text "stop," "end" or something similar, or directing the consumer to a straightforward web form that can be easily completed. The importance of allowing consumers to opt out is reinforced by the June 18 order, which apparently clarifies that consumers may revoke consent "in any reasonable way at any time."

- **Do: Require all third-party vendors or marketing partners to be in compliance with the TCPA.** Understand the activities and policies of any third-party marketing partners that you engage and ensure that they are TCPA-compliant. TCPA liability is not limited to the party who "initiates" an unsolicited call or fax in violation of the statute. Courts have held that a "seller" can be held directly liable under the TCPA for calls and messages sent by a third-party marketing firm engaged to promote the seller's goods or services. Accordingly, a business cannot shield itself from the TCPA by hiring a third party to handle direct communications with customers. Rather, a business should assume that any third-party activity that promotes or communicates about the business's products or services could subject the business to TCPA liability as if the business itself were making the call.

- **Do: Review and categorize messages sent.** The need for prior express written consent depends on whether a message or call is considered "telemarketing" in nature. Be vigilant to keep telemarketing and nontelemarketing campaigns separate, or get prior express written consent for all messages.

- **Do: Keep all records of consent for at least four years.** The statute of limitations for lodging a TCPA action is four years. Accordingly, records of consent should be maintained for at least that period, even if a phone number is no longer part of an active marketing campaign (i.e., the business is no longer making calls to the number). In TCPA litigation, consent is an affirmative defense — the burden falls on the defendant to prove consent, typically through record evidence.

- **Do Not: Assume that consent received in the past remains valid.** The Federal Communications Commission instituted the prior written consent requirement for telemarketing calls as of October 2013. A company cannot rely on consent that was valid at the time it was offered but would not suffice under current rules or court precedent. Similarly, the June 18 order makes clear that even otherwise valid consent can become "stale" after passage of time to the extent mobile phone numbers become reassigned. The limited "safe harbor" provided in the order will shield businesses from liability for only a single call to a reassigned number. At a minimum, companies should immediately remove mobile phone numbers from their database upon receiving notice that consent to contact has been revoked.

- **Do Not: Place unnecessary restrictions on the scope of consent.** TCPA litigation focuses not only on whether a consumer provided consent to be contacted, but also whether contact exceeds the scope of that consent. While clarity and transparency in consent documents should be encouraged, companies often place unnecessary boundaries on the scope of that consent — most frequently, by limiting the number of calls or texts that they will place in a given time period. Consider carefully whether to include a hard cap on the number of calls or texts that may be placed — any calls exceeding that limit are subject to TCPA liability, notwithstanding otherwise valid consent to contact the consumer. Such "scope of consent" class actions are now common.

- **Do Not: Assume that a device is not an automatic telephone dialing system (ATDS).** Remember that a device need not actually function as an ATDS in placing challenged calls or text messages. The focus is on capacity, and the FCC's June 18 order appears to clarify that even if a device does not have the present capacity, it may be considered an ATDS if it has the mere ability to function (for example, with future alteration) as an autodialer. In short, businesses should assume that the use of any electronic device to automate or facilitate mass communications with consumers is at significant risk for being interpreted as an ATDS.

- **Do Not: Assume that you are safe from TCPA liability by using a third-party marketer or vendor.** As explained above, vicarious liability is an increasingly significant area of TCPA

litigation, particularly where the third-party who initiated calls or texts is judgment-proof (through, for example, insolvency or foreign corporation status). While a business may attempt to protect itself through contractual requirements and indemnity clauses, it is unlikely that such agreements will prevent a TCPA lawsuit in the first instance (and the consequent defense costs) if a third-party vendor violates the TCPA.

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