Volume 1, Issue 2, September 2013

OUT OF THE BOX

Legal guidance for the consumer product + retail industry

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FROM FLYING ROBOTS TO LOGISTICS BLISS: A CASE STUDY

By Thomas J. Knox

The motors whirred as a robotic trolley sped down the long warehouse alleyway. As it went it rose ever higher in the ten-story tower, lifted by cables and pulleys. The trolley's mechanical arm picked a box from the rack suspended fifty feet above the warehouse floor and deposited it in a bin on its back. Within a minute the trolley returned to its starting point with its precious cargo.

This automated, robot-driven warehouse facility was a technological wonder 25 years ago when it was built by a multinational pharmaceuticals company. It stood on the company's main U.S. campus as a showcase and was a favorite stop for visitors on campus tours. Tour guides explained that almost all of the company's U.S. inventory spent time on these shelves before being shipped to destinations throughout the country.

That was then. Today, the robotic vertical warehouse is gone. In its place are green fields, a gleaming new research building, and a new logistics model that relies on a third-party logistics provider (or "3PL" in the language of the industry) for managing the flow of goods from the factory to the market. How and why did this happen? Four factors tell the story.

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Expense. During the many years that the company ran its own logistics operation using company employees, the quality of the operation was high. The numbers of inaccurate picks, spoiled products and out-of-stock events were small. But this good performance came at a steep price. The company had overinvested in capital equipment and real property, having built facilities that were expensive to maintain on prime real estate on a campus that lacked good access to interstate highways and other transportation corridors. Despite the automation of key elements of the operation, the department had substantial personnel expenses that were hard to manage.

The company asked us to assist it in assessing alternatives, including engaging a 3PL to take over the warehousing and transportation of its inventory. A vigorous proposal process followed. It revealed that substantial savings could be found by moving the inventory to the 3PL's warehouses and allowing its personnel to manage the inventory.

Expertise. Actually, cost savings weren't the primary driver in the company's drive to restructure its logistics and fulfillment operations. The company knew that it had not kept up with the state of the art over the previous 25 years and wanted to be sure it was using best practices in an effort to fulfill its mission of continuous quality improvement in all elements of its business. But the company's core competence was drug development, not warehousing. So it sought business partners with core competence in that arena who could commit to applying current and future best practices to drive more quality, accuracy and speed into the process. Of particular concern to the company was the 3PL's ability to handle the many regulatory requirements applicable to the handling of pharmaceuticals.

As part of the vendor downselect and contract negotiation process, we helped the company assess the experience and capabilities of the bidders in the pharmaceutical field. It was key to work with experts inside the company and with industry consultants to draft statements of work that describe in detail the current best practices to be used in the logistics operation while also incentivizing the implementation of newer, more efficient processes as they became available over time.

Efficiency. Despite the company's expertise, developed over many decades, in managing pharmaceutical product inventory, the company acknowledged that it did not possess the domain expertise and breadth of facilities, systems and personnel that dedicated logistics providers could offer. In making their pitches to the company, the providers emphasized the efficiencies that they could bring to bear. The key in negotiating the deal was to make sure these discussions would not be forgotten as sales talk, but would be woven into the fabric of the agreement.

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We advised the company on ways to enforce and encourage efficiency, using outcomes-based language in the contract and in statements of work, and measuring success using service level agreements (SLAs) and key performance indicators (KPIs) that would affect the payment of fees to the provider. Additional tools, including putting a part of the management fee at risk and offering to share newly found cost savings with the service provider, were made part of the agreement as well.

Risk. Whether we are counseling product companies in highly regulated industries such as pharmaceuticals or in less regulated industries such as consumer electronics, we still view our chief role as assisting our clients in assessing, allocating and minimizing risk – risk of product loss, risk of personal injury, risk to revenue, risk to reputation. All of these risks are elevated when a company entrusts the handling of its economic lifeblood – its inventory – to a service provider.

The old "warehouseman's" model, which limited liability based on "bailor-bailee" concepts known to all who have read the back of a parking garage claim ticket, has fortunately been overtaken at the top end of the industry by an increasingly sophisticated group of service providers that willingly assumes risk and liability for ever larger parts of the supply chain. These assumptions of risk and liability are not normally offered voluntarily. Instead, they are won by the demands of sophisticated customers, and by hard negotiation.

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It's worth noting that, in addition to negotiating favorable contractual terms, there are other ways to reduce business risk. One is to require that inventory be stored in multiple locations so that the catastrophic loss of one facility will not result in the loss of all inventory. Another is to strictly monitor the facilities to ensure that there is no undue risk of loss due to fire, flood, temperature excursions, pests or insufficient security. Substantial issues can arise when more than one company's products will be stored in the same facility.

Happily Ever After. The flying robots are gone. They've been replaced by sophisticated inventory management software, handheld scanners and, the flying robots' cousins, autonomous forklifts, all under the control of logistics experts who have dedicated their careers to the art and are willing to take responsibility for their work.

The story in this case study ends well. Although no relationship or business process is ever perfect, the company and the logistics service provider in this story are happy with their partnership and have just completed (with our help) negotiations to renew it. The provider takes pride in the efficiency of its services and its ability to deliver high quality services to a maker of vital medicines. The company is happy to have been brought to the leading edge of best practices while experiencing meaningful cost savings.

THE FCC'S NEW TCPA RULE SET TO TAKE EFFECT

By Tiffany Cheung and Julie O'Neill

Businesses that engage in telemarketing or the delivery of text messages, take note: the already tough rules of the Telephone Consumer Protection Act (TCPA) are about to get tougher.

The Federal Communications Commission (FCC) recently revised its TCPA rule[1] to make the consent requirements stricter for the delivery of certain autodialed and prerecorded telemarketing calls and marketing text messages.[2] The revised rule takes effect on **October 16, 2013**. In light of the Act's draconian penalties of up to $1500 per violating call or text, and plaintiffs' attorneys' aggressive and expansive use of the Act, it is critical that businesses conform their calling and text messaging practices to the revised rule, as described below.

New consent requirements for certain telemarketing calls and marketing text messages

The revised rule requires <u>prior</u> <u>express</u> <u>written</u> consent from the call or text message recipient for:

- **Autodialed[3] or prerecorded telemarketing calls and text messages delivered to a cell phone.[4]**
  For autodialed or prerecorded calls and text messages delivered to a cell phone that do not constitute telemarketing, the rule remains the same: only prior express consent (rather than prior express written consent) is required.

- **Prerecorded telemarketing calls to residential landlines.[5]**
  The revision eliminates the exception allowing sellers to place prerecorded telemarketing calls to landlines of persons with whom they have an established business relationship, thus conforming the FCC's rule to the Federal Trade Commission's Telemarketing Sales Rule.[6]

In light of the Act's draconian penalties of up to $1500 per violating call or text, and plaintiffs' attorneys' aggressive and expansive use of the Act, it is critical that businesses conform their calling and text messaging practices to the revised rule. . . .

The rule's new consent requirements apply only to advertising and telemarketing calls or messages, and not to purely informational or transactional calls or messages, such as flight updates, debt collection calls, surveys or bank account fraud alerts (the rule for which, when autodialed to a cell phone or prerecorded, remains the same — it requires prior express consent).[7] If, however, any portion of an otherwise informational call includes advertising or telemarketing, the prior express written consent requirement applies.[8]

What is "prior express written consent"?

The revised rule defines "prior express written consent" as a written agreement signed by the called party, in which he or she "clearly authorizes" receiving prerecorded or autodialed telemarketing calls or messages from the specific seller.[9] The agreement must include "clear and conspicuous" disclosures that:

- By signing the agreement, the individual authorizes the seller to deliver, to a designated phone number, telemarketing calls or messages using an autodialer or an artificial or prerecorded voice; and

- The individual is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods or services.[10]

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Electronic or digital signatures suffice for purposes of the rule, provided that they are recognized as valid under applicable federal law (e.g., the E-SIGN Act) or state contract law. This may include, for example, signatures obtained via e-mail, website form, text message, telephone key press or voice recording.[11]

Practice tips

Many companies obtain consent to deliver telemarketing calls or text messages online. When doing so, we suggest taking the following steps and otherwise complying with the E-SIGN Act or applicable state contract law, to help ensure compliance:

- Require an individual to check an unchecked box to indicate his or her agreement;
- Include language next to the unchecked box that explicitly states that the individual is agreeing to the disclosures described above. For example: *By checking this box, I agree to receive [prerecorded/autodialed telemarketing messages/autodialed marketing text messages] from or on behalf of [company] at the mobile number I have provided. I understand that consent is not a condition of purchase;*
- If the company is sending text messages, clearly and conspicuously make the customary additional disclosures (e.g., message frequency, "message and data rates may apply," unsubscribe instructions and help instructions);
- Include the following statement on the consent form: *Please print for your records*; and
- Retain the consent forms.

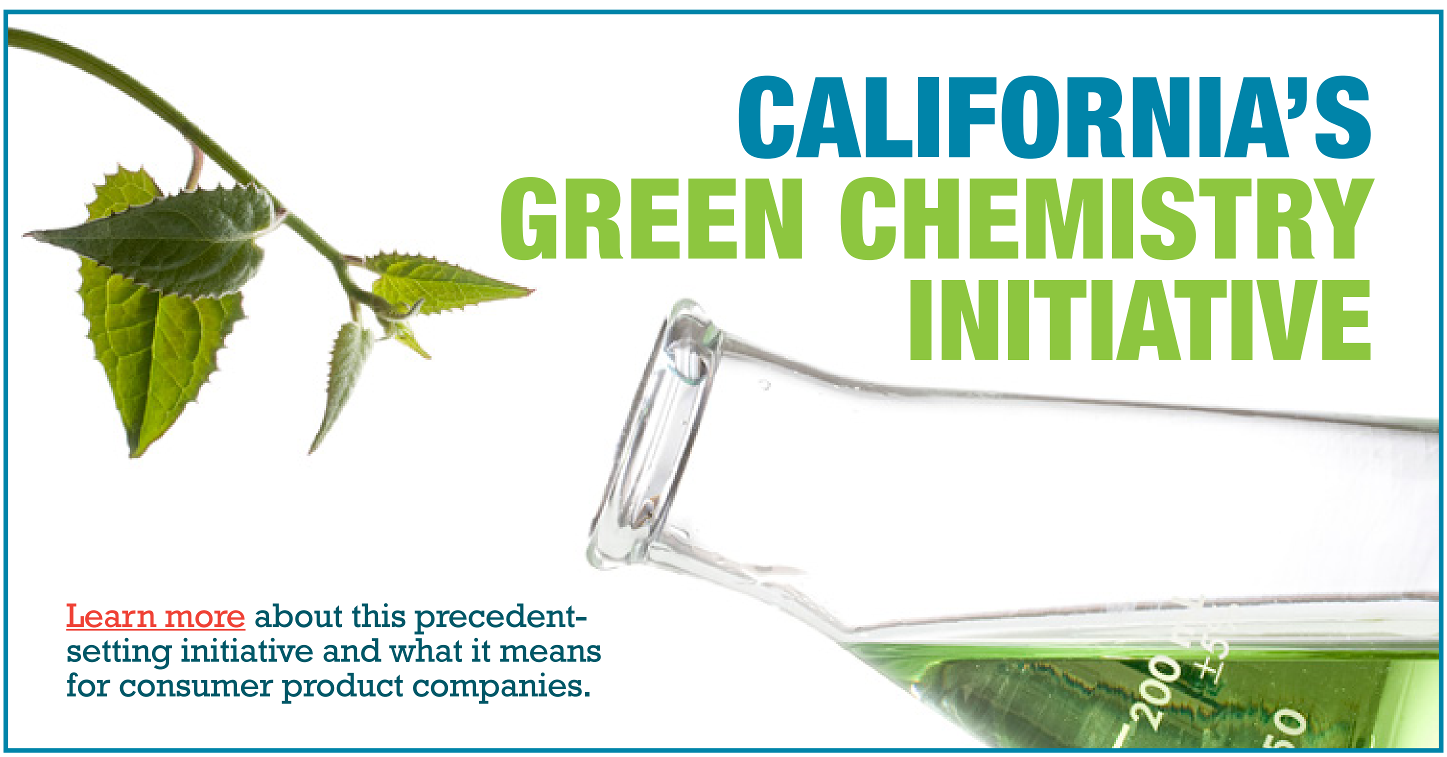
Conclusion

The penalties for violating the revised rule are severe, and the prospect of recovering millions of dollars in damages has made autodialed calls or text messages an attractive target for class action suits. To help minimize litigation risk, businesses that engage in telemarketing or the delivery of text messages must ensure that their methods for obtaining consent comply with the FCC's requirements.

CONSUMER RIGHTS SET TO CHANGE IN EUROPE

By Alistair Maughan

The consumer rights landscape in Europe will change later this year. The European Union has issued a Consumer Rights Directive (CRD) to simplify and harmonise consumer protection legislation throughout the European Union. The EU's aim is to increase certainty, consumer protection and confidence and cross-border trade. The CRD must be implemented into national laws by each EU member state by December 13, 2013.



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The CRD increases a consumer's rights where consumer goods are bought other than on retail premises – for example, where purchases are made online, from a catalogue or via online auction. It will apply to all such contracts concluded with EU-based consumers after June 13, 2014.

All businesses selling consumer products into the EU will need to review their current processes, website design and architecture, and terms and conditions to ensure compliance with the new laws.

All businesses selling consumer products into the EU will need to review their current processes, website design and architecture, and terms and conditions to ensure compliance with the new laws.

What are the key changes?

Information requirements

The CRD details the information that sellers must provide to EU consumers prior to conclusion of a contract. These requirements differ depending on whether the contract is concluded at a distance or otherwise. In the case of distance contracts, the CRD acknowledges that information requirements will need to be adapted to take into account technical restraints (e.g., space restrictions on a mobile phone screen).

Extension of cooling-off period

Consumers will have 14 days (increased from 7 days) to change their minds and withdraw from a distance or doorstep contract for any reason. For purchased services, this cooling-off period begins from the conclusion of the contract and, for goods, from the time that the consumer receives the goods. This period may be extended for up to 12 months (increased from 3 months) if the retailer fails to inform consumers of their withdrawal right during the sales process.

The withdrawal right does not apply to certain goods or services (e.g., personalised/bespoke goods). In addition, there is no right of withdrawal for service contracts after the services have been fully performed if the consumer expressly consented to such performance and acknowledged that the withdrawal right would be lost following such performance.

The CRD introduces a template withdrawal form and includes some model withdrawal rights wording for inclusion in terms and conditions.

Refund period reduced

Sellers will have 14 days from the date of a notice of cancellation to provide a refund (reduced from 30 days). The refund must include delivery costs.

Delivery period

All goods must be delivered within 30 days from conclusion of the contract, unless otherwise agreed.

Costs

- If a product seller wants consumers to bear the direct costs of returning goods, consumers must be clearly informed in advance.
- A seller may not charge more than its actual costs for use of credit cards or any other method of payment and may not charge consumers more than the basic rate for helpline calls.
- Sellers must ensure that the total cost of a product or service is disclosed prior to conclusion of the contract, including any additional charges.

Explicit acknowledgments

Sellers must ensure that consumers placing an online order explicitly acknowledge their obligation to pay. Indeed, the CRD suggests that the website button which is clicked to activate an order is labelled with the words 'order with obligation to pay' or similar clear wording. In addition, pre-ticked boxes for added extras are banned; consumers must expressly opt in.

Conclusion

Any business selling consumer goods into the EU should review its current sales channel procedures to check what changes will be needed to comply with the new laws implementing the CRD. Website terms may need to be changed and certainly online ordering processes (and corresponding refund and returns processes) will need to be updated.

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1 47 C.F.R. § 64.1200. On February 15, 2012, the FCC published a Report and Order that set forth the basis for its revisions. They are available on the FCC's website at http://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls-0.

2 The FCC has stated that its rule includes text messages. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14115, para. 165 (2003); *see, generally, Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

3 The TCPA defines an autodialer 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) (emphasis added). This definition has been construed very broadly, bringing within it not just equipment that actually "autodials," but equipment that has the capacity to "autodial," as defined in the Act. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, at 77, para. 131 (2003). The Ninth Circuit has agreed that the definition turns on the equipment's "capacity." *Satterfield*, 569 F. 3d at 951.

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4 47 C.F.R. § 64.1200(a)(2). Only prior "express consent," and not "express written consent" is required for autodialed or prerecorded telemarketing calls to cell phones that are placed by or on behalf of a tax-exempt nonprofit organization, or for calls that deliver a "health care" message made by or on behalf of a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule. *Id.*

5 47 C.F.R. § 64.1200(a)(3). The requirement does not apply to prerecorded telemarketing calls to landlines that are made by or on behalf of a tax-exempt nonprofit organization, or to calls that deliver a "health care" message made by or on behalf of a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule. *Id.*

6 16 C.F.R. § 310.

7 The rule defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1). "Telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." *Id.* § 64.1200(f)(12).

8 In its February 15, 2012 Report and Order, the FCC refers to its 2003 Order in which it addressed such dual-purpose calls: "The Commission provided that if the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement." Feb. 15, 2012 Report and Order, para. 30, citing *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14098, para. 142 (2003).

9 47 C.F.R. § 64.1200(f)(8).

10 47 C.F.R. § 64.1200(f)(8)(i).

11 Feb. 15, 2012 Report and Order, para. 34; see also 47 C.F.R. § 64.1200(f)(8)(ii). The E-SIGN Act is available at 15 U.S.C. § 7001 *et seq*.

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