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TCPA Class Action Update – January 2019

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The Carrier with Better Record-Keeping Practices Than the Insured Wins a Significant TCPA Insurance Coverage Dispute

Last week, the Eighth Circuit held that an insurance company was entitled to the presumption that its insured received notice of the TCPA policy exclusion. As a result, there was no coverage available in a TCPA lawsuit against the insured. The facts were on the carrier's side mainly because it maintained better record-keeping practices than the policyholder.

In this multimillion-dollar TCPA class action, the court's holding that the insurance carrier, American Family Mutual Insurance Company, had no duty to defend or indemnify a marketing firm, Vein Centers, hinged on documentation of communications between the parties. *See Am. Family Mut. Ins. Co. v. Vein Ctrs. for Excellence, Inc.*, No. 17-3266, 2019 U.S. App. LEXIS 98 (8th Cir. Jan. 3, 2019). The underlying 2011 TCPA lawsuit (which is still pending on appeal) was a class action alleging that the marketing firm violated the Telephone Consumer Protection Act by sending junk faxes. In that case, the firm's potential exposure was claimed to exceed $17.6 million.

At the inception of the 2011 TCPA class action, the marketing firm tendered the claim to the insurance carrier pursuant to a Businessowners Policy. When the carrier issued this policy to the marketing firm many years ago, the policy did not contain a TCPA exclusion. In 2008, however, the carrier added a TCPA exclusion to the policy. There was a dispute over whether or not the insured actually received a requisite notice of this exclusion. Initially, the carrier agreed to provide a defense in the 2011 TCPA class action, subject to a full reservation of rights. In 2015, however, the carrier filed a declaratory relief action, arguing that the TCPA exclusion added in 2008 was valid and enforceable.

This coverage dispute essentially came down to which side could prove that the 2008 notice of the TCPA exclusion was actually received by the insured. Had the carrier not given proper notice of the exclusion, the exclusion would have been invalid. The carrier could not locate the notice, and the insured maintained that it never received it, which rendered the exclusion invalid. The law typically presumes, however, that mailed materials are received by the intended recipient. In Missouri (where this coverage case was pending), the sender also does not need to show "direct proof" of the actual mailing.

Therefore, the carrier opted to prove its case via deposition testimony from its corporate representative, who testified that she mailed the notice years ago and that, based on the company's custom and procedures, the insurer likely sent the notice letter in a timely manner—just as it had done with other letters in similar circumstances. Notably, she also "identif[ied] an internal communication sent to American Family agents and staff, which indicated current holders of the Businessowners Policy would be sent a PLC notification setting forth the newly instituted" TCPA exemption. All this was sufficient to create a rebuttable presumption in the carrier's favor. Therefore, at least some rebuttal was needed from the insured showing that the coverage notice never arrived. The policyholder's failure to rebut the presumption of receipt negated coverage in this high-exposure TCPA case.

Admittedly, there was no "definitive proof" that the carrier had actually mailed the notice. Thus the appellant argued that the carrier's failure to produce the actual copy of the letter was a death knell to the insurer's case. It produced no rebuttal evidence, however, that the firm never received the notice. The court, therefore, held that the carrier's unrebutted evidence was sufficient to uphold the TCPA exclusion.

"Speculation that American Family's normal business procedures were not followed in this case is not the same as affirmative evidence that [the insured] did not receive the [notice] documents," held the Eighth Circuit. If the insured wanted to prove that it did not receive notice of the policy revisions with the added TCPA exclusion, it had to do more than make barebones assertions. Although the Eighth Circuit did not

specify what proof would have sufficed to rebut the presumption that the insured received notice, a log of incoming and outgoing correspondence to the carrier could have potentially satisfied the court and allowed for the possibility of coverage in this high-exposure case.

Insurance coverage litigation often postdates the issuance of the underlying policy by many years. In the interim, employees may change jobs; memories can fade; and records can get lost, destroyed, or never saved in the first place. Inevitably, insufficient record-keeping practices often lead to the loss of coverage. Therefore, those companies that choose to maintain careful record-keeping practices, logging or saving all communications (including notices) to and from their insurance carriers (and brokers) will find themselves better prepared for litigation and will greatly maximize coverage potential.

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