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TCPA & Consumer Calling

Monthly TCPA Digest

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We are pleased to present the latest edition of our *Monthly TCPA Digest*, providing insights and news related to the Telephone Consumer Protection Act (TCPA).

This issue provides insurance information for companies facing TCPA lawsuits and identifies the types of policies and provisions that may offer coverage. You will also find an update on the status of the proposed reassigned numbers database as well as information about a new FCC Public Notice, released August 10. Comments on the Public Notice are expected to lay the groundwork for the FCC's next major action on call blocking and methods to eliminate illegal robocalls.

If you have suggestions for topics you'd like us to feature in this newsletter, or any questions about the content in this issue, please feel free to reach out to an attorney on Mintz Levin's TCPA and Consumer Calling Practice Team. You can click here to subscribe to the *Monthly TCPA Digest*.

In This Edition

Part I – TCPA: Regulatory Update

Reassigned Numbers Database Finds Bipartisan Support from Senators

BY RUSSELL FOX, RADHIKA BHAT, AND ELANA R. SAFNER

On July 19, Senate Commerce Committee Chairman John Thune (R-SD) and Senator Ed Markey (D-MA) sent FCC Chairman Ajit Pai a letter commending the FCC for releasing its *Second Further Notice of Proposed Rulemaking* (discussed in our April *Monthly TCPA Digest*), which proposes to

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reduce unwanted robocalls and robotexts by creating a reassigned numbers database. In the bipartisan letter, the Senators encouraged the FCC to move forward with the creation of a reassigned numbers database and asked the FCC to prioritize considerations of comprehensiveness, accuracy, security, efficiency, and the creation of a reasonable safe harbor. The Senators believe a safe harbor would be appropriate if the caller "took all reasonable steps to properly use a reassigned numbers database," made the call or text in reliance on incorrect information in the database, had the consent of the original called party, and subsequently reported the inaccuracy.

Although many industry commenters favored the creation of a reassigned numbers database accompanied by a safe harbor from liability, some were less enthusiastic. Those parties expressed concerns about the potentially substantial costs to create and maintain such a database, which would likely fall on business callers, and with uncertain benefits.

Multiple parties used a related proceeding to contribute additional comments on the reassigned numbers database. On June 20, the FCC's Consumer and Government Affairs Bureau ("Bureau") released a Public Notice soliciting input for a staff report on robocalling. The FCC received approximately thirty substantive comments (the reply comment deadline is August 20). In the Public Notice, the FCC sought comment on a variety of topics related to illegal robocalls, including the effects of current initiatives such as SHAKEN/STIR to combat caller ID spoofing; data on notable trends in illegal robocalling; enforcement efforts; and remaining challenges. Several major trade associations and service providers filed comments in this proceeding endorsing market solutions to prevent robocalls to reassigned numbers, rather than the creation of a new database.

Also in response to the Public Notice, many commenters expressed support for industry efforts to implement the SHAKEN/STIR framework, a set of cryptographic protocols and operational procedures to authenticate calls and reduce illegal spoofing. Many also praised the FCC's 2017 *Call Blocking Report and Order and Further Notice*, which empowered providers to block calls that illegally spoofed some categories of telephone numbers, such as invalid numbers and numbers subject to a do-not-originate request.

FCC Seeks Comment on Additional Call Blocking Methods

On August 10, the Consumer and Government Affairs Bureau released a Public Notice seeking to refresh the record on advanced methods to target and eliminate unlawful robocalls. With this Public Notice, the FCC aims to build upon its inquiry into provider-initiated call blocking, which it began in the *March 2017 Call Blocking Notice of Proposed Rulemaking and Notice of Inquiry* and which led to new rules in November 2017 expressly authorizing providers to block clearly defined categories of calls highly likely to be illegal. The FCC now aims to "identify specific, enforceable criteria for targeting illegal calls that cannot be abused, while ensuring providers have sufficient flexibility available to adapt to dynamic calling patterns."

The FCC poses several questions, including:

- whether providers can reliably identify calls that are highly likely to be illegal beyond those calls the FCC approved for blocking in the *Call Blocking Report and Order and Further Notice*;
- whether and how providers could use specific criteria to prevent illegal calls from reaching consumers;

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- what the FCC can do to facilitate call traceback efforts and how SHAKEN/STIR will affect call traceback; and
- how to reduce the potential for false positives and how to address situations in which false positives occur.

Comments received on this Public Notice are likely to lay the groundwork for the FCC's next major action on call blocking and methods to eliminate illegal robocalls. Comments are due on September 24 and reply comments are due on October 8.

Petitions on Public Notice

The FCC continues to review reply comments it received to several petitions out on Public Notice. Reply comments on the Peer-to-Peer Alliance (P2P Alliance) Petition and the Insights Association, Inc. ("Insights Association") and the American Association for Public Opinion Research petitions were both due on July 9. As we reported previously, the P2P Alliance is a coalition of providers and users of peer-to-peer ("P2P") text messaging, and it has asked the FCC to clarify that P2P text messages are not subject to the TCPA. Very few reply comments were filed on the P2P Alliance petition, but all supported granting the petition. As we reported in June, the Insights Association petitioners asked the FCC to clarify several areas under the TCPA, including that "communications are not presumptively 'advertisements' or 'telemarketing' under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations." Few substantive reply comments were filed on this petition, all supporting the petition. In addition, of the over two hundred comments filed on this petition (many of which were brief "express" comments), only a single comment opposed the petition during the initial comment period, mainly focusing on the FCC's fax advertising rules.

Part II – TCPA: Litigation Update

Insurance Coverage May Be Available to Some Policyholders for TCPA Lawsuits

BY E. CRYSTAL LOPEZ

The volume of TCPA class actions has rapidly increased in recent years. TCPA cases are attractive to plaintiffs' lawyers because of high statutory damages of $500 per violation and up to $1,500 per willful violation. They are also expensive to litigate. The first step for a company faced with a TCPA lawsuit is to immediately retain a competent counsel who is well-versed in handling such cases. The next step is to review all insurance policies that may apply and to carefully scrutinize the policies, the exclusions, and the allegations in the underlying complaint. The policies that may, at least on occasion, provide coverage for TCPA class actions include (1) Commercial General Liability Policy (CGL); (2) Director & Officer Policy (D&O); (3) Error & Omission Policy (E&O); and (4) Cyber Liability Policy.

It is worth noting that modern general liability policies are typically drafted to avoid providing coverage for TCPA class actions. Many policies now routinely contain an express exclusion to that effect. And some of the older polices that did not originally have a TCPA exclusion in them may

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have been amended in recent years. Yet, such later-added exclusions may be unenforceable in some states. *See Cincinnati Insurance Co. v. Chapman*, 2016 IL App (1st) 150919, ¶ 1, 403 Ill. Dec. 887, 889, 55 N.E.3d 74, 76 (May 23, 2016). (Had Illinois law applied, the later-added TCPA exclusion would have been unenforceable.)

Additionally, most CGL insurers have successfully argued that TCPA claims are not covered by the policies because TCPA damages amount to "penalties," for which there is no coverage. But at least one court disagreed with that approach. *See Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258, 268 (Mo. 2013).

There are also some instances where coverage may still be found under a CGL policy. For example, a court may find that coverage exists in a CGL policy for alleged TCPA violations involving telemarketing calls or fax blasts. The reasoning here is that the complaint alleges "bodily injury" and "property damage" within the meaning of the policy or triggers the "advertising" and "right to privacy" provisions of the policy.

Currently, there is a small but growing body of federal and state case law in which courts across the country have interpreted TCPA violations as falling within the scope of the "advertising injury" provision—again, on the premise that such violations invade consumers' privacy rights. *See Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819 (8th Cir. 2012); *Park Univ. Enters. v. Am. Cas. Co.*, 442 F.3d 1239, 1249-1250 (10th Cir. 2006); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201, 208 (11th Cir. 2005); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960, 961 (5th Cir. 2004); *Valley Forge Inc. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352 (2006); *Standard Mut. Ins. Co. v. Lay*, No. 4-11-0527, 2014 WL 272773 (Ill; App. Ct. Jan. 23, 2014); *Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258, 270 (Missouri 2013); *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1006-07 (Fla. 2010). Some of these decisions have also emphasized that unsolicited faxes intrude on the recipient's right to privacy and seclusion, thus triggering CGL coverage. *See Standard Mut. Ins. Co. v. Lay*, No. 4-11-0527, 2014 WL 272773 (Ill; App. Ct. Jan. 23, 2014); *Penzer v. Transportation Insurance Co.*, 29 So. 3d 1000, 1007 (Fla. 2010).

At least one court found that the "property damage" provision triggered coverage for a TCPA lawsuit because unsolicited faxes allegedly wasted paper and ink and caused the recipient to lose the use of its fax machine during the transmissions. *Prime TV, LLC v. Travelers Insurance Company*, 223 F. Supp. 2d 744, 750 (M.D.N.C. 2002). This type of coverage may be more likely for fax-blast cases under the TCPA, as opposed to other types of TCPA cases, where the allegations in the complaint include claims that the fax consumed toner and paper (i.e., tangible property).

Turning to E&O coverage, at least one court found a potential for coverage under a professional liability policy for a claim involving unsolicited fax advertisements. *Landmark American Insurance Company. v. NIP Group, Inc*, 962 N.E.2d 562, 576 (Ill. App. Ct. 2011). And, in a more recent case, a policyholder successfully obtained E&O coverage for TCPA claims under the "professional services" provision. *Ill. Union Ins. Co. v. US Bus Charter & Limo Inc.*, 291 F. Supp. 3d 286, 293, 2018 U.S. Dist. LEXIS 38266, *14 (Mar. 8, 2018).

Where the complaint alleges improper acts by the company's directors, officers, or executives, there arguably may be TCPA coverage under a D&O policy. However, such arguments have not yet had much traction. Last year, the Ninth Circuit affirmed the lower court's ruling that invasion of privacy exclusion precluded D&O insurance coverage for a TCPA claim. *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795 (9th Cir. 2017).

In light of different state laws, varied policy language, and inconsistent interpretations by each court, it is often impossible to ascertain in advance whether TCPA claims will be covered by any given policy. Once the lawsuit has been filed, however, sophisticated legal counsel should be able to work with their coverage team to maximize coverage potential. Additionally, in light of a changing legal landscape and the growing number of TCPA lawsuits, businesses that engage in various forms of marketing should, where appropriate, obtain policies that specifically cover TCPA actions.

About Our TCPA & Consumer Calling Practice

In an economy where timely and effective communication with both current and prospective customers is vital to the success of nearly every business, modern technology, such as autodialers, recorded and artificial voice messages, text messaging, and e-mail provide companies the ability to reach large numbers of people with increasingly smaller up-front costs. But, companies cannot afford to overlook the hidden costs of using these mass communication methods if the many regulations that govern their use are not carefully followed.

Companies have been hit with class action lawsuits under the Telephone Consumer Protection Act (TCPA) for tens or even hundreds of millions of dollars. Mintz Levin's multidisciplinary team work tirelessly to help our clients understand the ever-changing legal landscape and to develop workable and successful solutions. TCPA rules can apply to certain non-sales calls, such as a recorded call to employees about a new work schedule or a text to customers about a new billing system. We advise on how to set up calling campaigns that meet state and federal requirements as well as how the Federal Communications Commission and the Federal Trade Commission apply their rules on calling, faxing, and texting. Given the uncertainties surrounding the TCPA as a result of the FCC's extensive and confusing rulings, we work with clients across many industries, health care, retail, communications and financial services, on matters relating to the following issues:

Compliance: Our TCPA team routinely advises companies on compliance with federal and state sales and marketing requirements. We also know what type of consumer consent is needed for each type of call and how specific consents must be worded. We know when and how to apply a do-not-call list and when and how an opt-out provision must be afforded.

Consumer class action defense: We've been called upon to handle TCPA class actions across all industries and in federal courts across the nation. Our seasoned litigators know the serial plaintiffs and counsel well and are unfazed by their schemes. Fortunately for our clients, our team has succeeded in winning at the motion stage or earlier in the vast majority of TCPA matters we have defended. That is what truly sets us apart. And if a case must go to trial, we have the experience and strength to follow it to the end.

Insurance coverage disputes: We know the arguments insurers use to deny coverage in TCPA suits because we've defended against them. More important, we have a long track record of convincing carriers to fund the defense of these actions and, in some cases, to pay significant portions of settlements. Our goal is to help secure insurance protection and to see to it that carriers make good on their coverage obligations when a claim arises.

