**Get Ready For More Aggressive TCPA Disputes**

Insurers are all too familiar with coverage disputes involving defense and indemnity issues pertaining to litigation under the Telephone Consumer Protection Act (TCPA). These disputes made their debut in the coverage litigation landscape nearly a decade ago and generally involved class actions filed by plaintiffs seeking to represent those whose day was so abruptly invaded by a facsimile advertisement that was received and printed by a fax machine.

These class actions (and the corresponding declaratory judgment actions filed in their wake) were sparked by the TCPA — a statute enacted in 1991 to shield consumers from telemarketers and the then-innovative idea of mass advertising via facsimile. No one could have fully appreciated it at the time, but the uncapped strict liability statute that awards $500 per violation ($1,500 per willful violation) and which was to empower consumers to seek redress in small claims court spawned a fledgling class action cottage industry.

Now, nearly a decade (and many millions of dollars) later, the continued use of fax machines coupled with new Federal Communications Commission regulations that take effect in 2013 signify that private class action enforcement of the TCPA will continue if not increase. This in turn will lead to an increase in TCPA coverage litigation.

This increase is anticipated in part because despite the many years of coverage litigation over these claims, there are many states where the question is still one of first impression. Further, insurers continue to face an emboldened TCPA plaintiff's bar that has become increasingly aggressive.

TCPA class actions are often styled as nationwide classes. Yet only a handful of state courts and federal courts have squarely addressed whether a violation of the TCPA is an insured risk under general liability policies. Those jurisdictions favorable to coverage, such as Illinois, quickly became hubs for the growing numbers of class action complaints over the years. This contributed to the development of case law in certain jurisdictions as opposed to others.

The early generation of TCPA class actions typically involved the small "mom and pop" businesses that saw facsimile technology as an opportunity to advertise to a large target audience at little cost. However, the explosion of social media gave way to alternatives to the fax blast that are just as capable of reaching large numbers of targets. These alternatives include SMS text message solicitations and automatic telephone dialing system (ATDS), commonly known as "robocalls." Unsolicited text messages and robocalls are also prohibited by the TCPA.

Technological advancements changed the face of the TCPA defendant. No longer are the defendants only those small businesses seeking maximum access to a target audience for minimal cost. Large corporations have also been caught in the TCPA class action net, the significant potential recovery against these actors for mass text offers or robocalls simply too irresistible a fruit for the plaintiff's bar to let pass.

This, coupled with the changes in the TCPA regulations that take effect on Oct. 16, 2013, (removal of the "existing business relationship" defense) fosters continued private enforcement of the TCPA by the class action bar.

That is not to say that the TCPA class actions based on unsolicited facsimiles is fading. To the contrary, despite the existence of more sophisticated technology, it is estimated that there are 131 million fax machines in operation worldwide.[1] Faxes will still form the basis of TCPA class actions because the use of fax machines persists despite this digital age. The blast fax cases will be joined in increasing numbers by text and robocall class actions.

The increased number of suits will result in greater chances of the suits being filed in a jurisdiction where the coverage question has not yet been asked, allowing an opportunity for development of case law in

these jurisdictions. Whether or not filed in a first impression jurisdiction TCPA coverage litigation could also include construction of the distribution of materials in violation of statute exclusion, commonly referred to as the “TCPA exclusion,” that started appearing in liability policies in or around 2006.

The second contributor to the expected increase in TCPA class action filings is the class action plaintiff’s bar. The new regulations that replace the "established business relationship" defense with an express written consent requirement reflect an interest in continued private enforcement of the TCPA and an intention to update the TCPA to keep up with advances in technology.

This is also a nod of encouragement of sorts to a plaintiff’s bar that does not need additional incentives to file class actions under this statute in light of the favorable opinions finding coverage for these claims. The plaintiff’s bar is all but invited to maintain its course and become progressively more assertive when it comes to fighting insurers for coverage.

This latter point should be of interest to insurers. Having staked out jurisdictions favorable to coverage, the TCPA plaintiff’s bar is now in a protection and exploitation mode. This two-pronged strategy is intended to funnel coverage disputes to certain preferred venues and once there, exploit the favorable rulings to the fullest extent possible without regard to such fundamental questions as where the insurance policy in dispute was issued.

TCPA plaintiffs now also no longer wait for insurers to initiate declaratory actions. With increasing frequency, TCPA plaintiffs file preemptive declaratory judgment actions in their preferred venues. Where the insurer was proactive in seeking judicial confirmation of its coverage position, TCPA plaintiffs respond by filing a competing declaratory complaint in preferred venues.

Whether preemptive (and questionably premature) or competing, the TCPA plaintiffs’ filings are the product of a determination to control or dictate the forum for the coverage dispute. The coverage litigation is then mired in a forum battle where standing and direct action issues are implicated.

On the other hand, a TCPA plaintiff facing a declaratory judgment in a jurisdiction that requires naming claimants as necessary parties routinely challenge personal jurisdiction over them, which results in the insurer having to litigate in the TCPA plaintiff’s home — and not by accident — preferred forum.

This perpetuates the case law development in the TCPA claimant-favorable jurisdictions while preventing development of case law in those jurisdictions that have yet to consider the question or where the prevailing rule is that there is no coverage for TCPA violations and leaves construction of policy exclusions intended to exclude TCPA liability to those courts.

The uncompromising and relentless quest for coverage by a seemingly insatiable TCPA plaintiff’s bar will continue and likely increase as application of the act is conformed to technological advancements subjecting a new genre of entities to TCPA liability.

TCPA coverage litigation will in turn continue whether or not a policy exclusion purports to exclude TCPA liability. The brazen TCPA plaintiff’s bar has not been given a reason to accept “there is no coverage” as the answer.

But there are still battles to waged. Successful navigation of TCPA coverage disputes can be achieved, provided there is vigilance and proactivity from insurers and determination and creativity from the defense bar.

To learn more, contact Rosa M. Tumialán, member in Dykema’s Litigation Department, at 312-627-2139.

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