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Consumer & Class Action Litigation Newsletter - October 2011 Edition

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House Bill Proposes Amendments to TCPA

A bill has been presented in the U.S. House of Representatives proposing significant amendments to the Telephone Consumer Protection Act (TCPA). The bill proposes to eliminate the prohibition of calls to mobile phone numbers using an autodialer or artificial or pre-recorded voice (absent consent or an emergency), if such calls are made for commercial purposes that do not constitute a telephone solicitation.

The bill amends the term "automatic telephone dialing system" to mean equipment that actually uses a random or sequential number generator to produce telephone numbers to be called and to dial such numbers. The current definition of the term includes equipment that has the capacity to store or produce telephone numbers to be called using such a generator.

The term "established business relationship," currently used in connection with residential calls, now appears in the general definition for "prior express consent." Under the bill, "prior express consent" means the oral or written approval of a person, at the time of sale or at another time during the established business relationship, evidenced by providing a telephone number as a means of contact.

The bill also provides that the TCPA preempts state laws and regulations that relate to the subject matters covered in the Act.

H.R. 3035, 112th Cong. (2011)

Class Awarded $4.2 Million for Faxes Sent in Violation of the TCPA

A federal district court judge in Chicago awarded a class $4.2 Million for unsolicited faxes. The court held that faxes were advertisements under the TCPA and that defendant, the sender of the faxes, was liable for all faxes that the class received. There then was an issue as to whether the faxes were actually received. Class counsel presented testimony from the chief financial officer of the company hired by the sender to fax the advertisements. The court accepted this testimony and awarded statutory damages of $500 for each of the 8,430 faxes received.

The court further denied the sender's motion to decertify the class. The court found that although most of the class members had claims in excess of $10,000, individual lawsuits are not superior to class actions, especially in actions seeking statutory damages where proof of actual damages is unnecessary. The court also held that the damage award of more than $4.2 million was not so excessive under a constitutional challenge, which holding was influenced by the fact that there appeared to be sufficient insurance to cover the award. The court stated that even if the damage award was constitutionally impermissible, it was not an appropriate remedy for the court to decertify the class.

Ira Holtzman, C.P.A & Associates Limited v. Gregory P. Turza, Case No. 08-CV-02014 (N.D. Ill. August 29, 2011)

Minnesota Federal Court Holds TCPA Violation Is Covered "Advertising Injury"

In *Owners Ins. Co. v. European Auto Works, Inc.,* Civ. No. 10-2868 (RHK/JJG) (D. Minn.), the U.S. District Court for the District of Minnesota concluded that CGL and umbrella policies that provided coverage for "advertising injury" arising from the "oral or written publication of material that violates a person's right of privacy" provided coverage for a Telephone Consumer Protection Act (TCPA) claim. In the underlying action, defendant insured was sued for allegedly sending unsolicited faxed advertisements in violation of the TCPA. That case ultimately settled for $1,951,500, or $500 per fax for 3,903 faxes.

The insured argued that the underlying lawsuit was covered under both the property damage and advertising injury provisions in the CGL and umbrella policies. Plaintiff insurers argued that there was no coverage because that lawsuit involved only a TCPA claim and a conversion claim, neither of which is a privacy tort, and neither of which requires proof of an invasion of privacy. The insurers further contended that even if an invasion of privacy were alleged in the underlying lawsuit, it could not give rise to coverage because of the type of privacy invasion at issue. According to the insurers, unsolicited faxes invade only the privacy right of seclusion, yet the policies, by requiring "publication," only provide coverage for invasions of the privacy right of secrecy.

The court concluded that the TCPA claim at issue arose from the "oral or written publication of material that violates a person's right of privacy," according to the plain and ordinary meaning of those words. Accordingly, coverage existed under the advertising injury provisions of the CGL and umbrella policies.

There is a split in jurisdictions as to whether or not a TCPA claim is covered "advertising injury" that arises out of the "publication" of material that "violates a person's right of privacy." Many of those cases, however, rely upon the distinction between the privacy interests of secrecy and seclusion to find no coverage. Here, the court concluded that such a distinction is "based upon legalistic and technical definitions of privacy" rather than upon the plain and ordinary meaning of the terms "publication" and "privacy."

*This article was originally published in the September 19, 2011, issue of the *Insurance Coverage Alert*, a Hinshaw & Culbertson LLP publication.

Florida Court Strikes as Hearsay Affidavit of Indebtedness in Foreclosure Action

In a decision that could affect foreclosure proceedings throughout Florida, the Florida Fourth District Court of Appeals ruled in favor of defendant, a homeowner whose bank, plaintiff, filed documents sworn to by an employee of the loan servicer with no personal knowledge of the case. Glarum v. Lasalle Bank National Association, Case No. 4D10-1372 (Fla. 4th DCA Sept. 7, 2011). The ruling reversed in part a 2010 Palm Beach County Circuit Court summary judgment finding that the homeowner owed the bank $422,677. That amount was based on an affidavit of indebtedness signed by a loan servicer employee who pulled the information from a company computer, a move that the appeals court judges said amounted to hearsay.

The court held that the affiant, based on his deposition testimony, did not know who, how or when the data entries were made into the computer system. Specifically, he: (1) could not state whether the records were made in the regular course of business; (2) relied on data supplied by the prior servicer, with whose procedures he was even less familiar; (3) could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system, notwithstanding that he had no knowledge of how that data was produced; and (4) was not competent to authenticate that data. Accordingly, the statements in the affidavit of indebtedness could not be admitted as a business record hearsay exception under Fla. Stat. § 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

Glarum v. LaSalle Bank National Association, Case No. 4D10-1372 (Fla. 4th DCA Sept. 7, 2011)

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