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Tough Call: TCPA Insurance Still a Challenging Market

Are you tired of receiving unsolicited robocalls, sales calls, and other spam? You're not alone. Regulators have recently cracked down on companies for alleged violations of the Telephone Consumer Protection Act (TCPA). Regulators aren't the only ones cracking down. Plaintiff attorneys have also targeted TCPA violations for potential lawsuits. In fact, as of May 2023, the total number of TCPA lawsuits had increased by 79% over the previous year.[1]

Several lawsuits have recently narrowed the scope of the TCPA, which could potentially reduce the number of violations. However, TCPA remains a difficult risk to insure. Many policies have specific exclusions for TCPA risks, and some will only cover the defense of a TCPA suit, but not the damages. These challenges can make it difficult for agents and insureds to find the right coverage for their TCPA risk profile.

ORIGINAL SCOPE OF THE TCPA

The TCPA was passed in 1991 to protect residential landlines from unsolicited sales and promotional calls. At that time, mobile phones were a rarity. The law primarily focused on prohibiting the use of "automatic telephone dialing systems," or roto dialers, to spam residential lines.[2]

However, over time litigation has slowly expanded the scope of the TCPA. For example, plaintiffs have successfully litigated cases involving order confirmations, appointment reminders, surveys, sales texts, and much more. While the TCPA was originally intended to protect landlines, it is now regularly used to protect cell phone lines. Violations can lead to private actions as well as fines of $500 to $1,500 with no cap.[2] A statutory fine of $500 may not seem like much, but that fine applies to every call that allegedly violates the TCPA. Many companies make thousands of such calls, so it's easy for a company to face damages in the tens of millions of dollars.

One 2018 study found that the average TCPA class action settlement reaches $6.6 million.[5]

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TCPA cases are also ten times more likely to be filed as class actions than other forms of consumer protection lawsuits as they are generally considered “low hanging fruit” due to the strict liability statute and heavy statutory fines. In addition, a violation, at least in some instances, is considered likely to cause meaningful harm to a plaintiff, and TCPA waters are teeming with sophisticated plaintiffs well versed in how to pursue class litigation. Since the TCPA is the richest opportunity for plaintiff’s law firms it naturally attracts heavy hitters. But the most substantial reason is that the TCPA does not provide attorney’s fees to a successful plaintiff. To ensure a significant recovery, plaintiff’s attorneys are much more likely to pursue a class action as supposed to an individual suit.[8]

BY THE NUMBERS

There was a drop in Do Not Call (DNC) Registry complaints filed in 2022. For the fiscal year ending in September 2022, the Federal Trade Commission (FTC) fielded 1.8 million complaints about robocalls. The top three categories of robocall complaints were imposters, warranties and protection plans, and prescription issues. That’s down from 3.4 million in 2021. The DNC Registry grew to encompass 246.8 million telephone numbers in 2022.[4]

In August 2023, the Federal Communications Commission (FCC) issued its largest fine ever against an operation that was using robocalls to contact individuals about extended car warranties. The $300 million fine was levied against a network of individuals, including the two masterminds who were already banned for life from making telemarketing calls.6 In another instance, real estate firm Keller Williams reached a $40 million class-action settlement with plaintiffs in Florida in 2023. The firm used pre-recorded calls to contact individuals about selling their homes. Individuals on the Do Not Call Registry were among those contacted.[7]

FACEBOOK V. DUGUID: A TURNING POINT FOR TCPA?

In 2021, the United States Supreme Court issued a unanimous decision in Facebook vs. Duguid that overturned a previous ruling by the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit had previously put forth a ruling that expanded the definition of an automatic telephone dialing system (ATDS).[2]

The Supreme Court’s decision to overturn that ruling narrowed the scope of what is and is not considered an ATDS. Under the ruling, an ATDS is a system that has either: 1) the capacity to store a telephone number using a random or sequential generator, or 2) the ability to produce a telephone number using a random or sequential generator.[2]

There was some thought that Facebook vs. Duguid would limit the number of TCPA lawsuits. Under the original legislation, even a smartphone could qualify as an ATDS. Plaintiff’s attorneys have made that argument successfully many times. Given the new narrower scope of an ATDS after Duguid, some believed it would be harder to file a TCPA lawsuit.

That has not been the case. There has been very little impact in the aftermath of the case. 2022 saw a 10% decline in the number of TCPA lawsuits from 2021.3 However, 2023 has seen a rise in TCPA lawsuits. Filings rose 98% from April 2023 to May 2023 and increased 17.6% through the first five months of the year.[1]

Instead of reducing the number of TCPA lawsuits, the Duguid case has simply changed the conversation. While the Supreme Court did define ATDS technology, it also created new questions. Many of the cases since the ruling have focused on whether the calls were made with a device that could randomly generate numbers, even if that wasn’t used to make the calls.

While the Duguid ruling may have narrowed the scope for ATDS, TCPA lawsuits are still in a murky area. Risk for lawsuits and fines still exists, especially in industries that are vulnerable to TCPA action. TCPA cases were also up 13.2% as of August 2023 even while other forms of consumer protection laws were trending downward. Despite favorable rulings for defendants such as Facebook vs. Duguid and other rulings narrowing the scope of ATDS, the plaintiff’s bar continues to find new avenues for litigation. In addition, more than a dozen recent state privacy laws that overlap with TCPA laws are also likely to cause further complication at the state level for TCPA violations.[9]

TEXT MESSAGES & TCPA RULES

Text marketing is on the rise and increasing TCPA exposures for those that utilize it. Text messages/SMS do fall under the definition of a "call" under the TCPA, and many consider text advertising to be spam. In March 2023, 11.6 million text spam messages were sent on American wireless networks, and that number has trended upward by roughly 20% per month throughout 2023. Why? Text messaging has become a preferred method for advertising as it is cheaper than phone calls and there are less filters in place to stop the messages than there are in traditional email. Unfortunately, those acting in good faith are being unfairly lumped into the category of spam as bad actors continue to flood cell phones with spam text messages.[10]

The consequences of violating TCPA guidelines via text message can be just as severe as doing so with telephone calls. Healthcare company AdaptHealth failed to heed stop requests from consumers in response to text messages the company was sending out. Ultimately 32,035 people received approximately 220,000 text messages after asking for texts to cease. While it was likely a glitch of some kind rather than an intentional act, the TCPA is a strict liability statute in most respects, and AdaptHealth was on the hook for a settlement of at least $6M.[11]

Five Largest TCPA Settlements:

1. Caribbean Cruise Line - $76 Million
2. Capital One - $75.5 Million
3. Dish Network - $61 Million
4. US Coachways - $49.9 Million
5. AT&T Mobile - $45 Million

COVERAGE CHALLENGES & STRATEGIES

For many businesses, finding sufficient TCPA coverage can be difficult. Several types of policies could offer protection, but many contain exclusions that limit protection for TCPA violations:

Errors & Omissions Insurance (E&O). Errors and omissions coverage is a logical starting point for professional services businesses like debt collectors and telemarketing companies. However, there aren't many carriers that provide this coverage. Many of those that do include lower coverage limits, exclusions, and a variety of underwriting parameters. There is also little consistency in coverage quality in this market. E&O coverage is a good fit for professional services businesses, but it may require more effort to find the right carrier for a company's specific needs.

Commercial General Liability (CGL). Historically, CGL policies were among the first to provide TCPA coverage. However, today nearly all CGL policies exclude TCPA claims. It is extremely difficult to find a CGL or umbrella policy that offers TCPA protection.

Directors & Officers insurance (D&O). In the early days following adoption of the TCPA, D&O coverage provided some protection against damages. However, most D&O policies now include TCPA exclusions. Some policies do provide defense-only protection. This means the policy will pay to defend against a TCPA lawsuit but will not indemnify damages. Most TCPA lawsuits are resolved via settlement and not a dismissal, so defense-only coverage is typically not sufficient.

Cyber Insurance. Cyber insurance may seem like a natural fit for TCPA coverage. However, since the earliest days of the cyber insurance market, nearly all policies have excluded TCPA damages. Like D&O coverage, some cyber policies provide defense-only protection but that may not be suitable for an insured's risk profile.

There is no market for coverage dedicated solely to TCPA insurance. Coverage must usually be found through one of the above policies. TCPA coverage is a complicated market, and inadequate coverage can mean significant damages for a client.

BOTTOM LINE

Legal challenges to the TCPA may change the marketplace in the long term, but in the short term, TCPA risks remain difficult to cover. Many companies who engage in telemarketing are either uninsured or underinsured against TCPA liability risk. While the market is challenging, the risk is too substantial to ignore. A TCPA violation can lead to costly fines as well as sizable class-action settlements. Agents can help their clients find the right TCPA coverage by working with an experienced and knowledgeable wholesale broker who knows the market well and can find the right carrier for a client's needs, risk profile, and budget. Reach out to your local CRC Group Producer today for more information.

CONTRIBUTORS

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END NOTES

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