FEBRUARY 17, 2017

The TCPA and Risk of "Sabotage Liability"

Takeaway: The Telephone Consumer Protection Act ("TCPA") broadly defines the "sender" of a facsimile advertisement to include any entity "whose goods or services are advertised." On its face, this language creates risk of liability arising out of an illegal fax campaign that a defendant has no knowledge of or control over. In the recent case *Comprehensive Health Care Sys. of Palm Beaches, Inc. v. Vitaminerals VM/Orthopedics, Ltd.*, No. 5:16CV2183, 2017 WL 27263 (N.D. Ohio Jan. 3, 2017) ("*Comprehensive*"), a district court in the Sixth Circuit observed the absurdity of potential "sabotage liability," where a company is exposed to liability where a *competitor* or another entity outside of its control advertises the *company's* products in an illegal fax campaign. Businesses should be aware of the potential reach of the TCPA and guard against potential TCPA liability in third-party distribution and marketing agreements. Cases brought under the TCPA often are based on fax ads that are not transmitted directly by the TCPA defendant. Accordingly, it is possible to be exposed to TCPA liability for a fax campaign conducted by third-party distributors or marketers over whom the TCPA defendant has little or no control. In some cases, the TCPA defendant first learns that its products or services have been advertised through a fax campaign when it is served with a TCPA complaint. The first question an in-house attorney might ask is: How can we be held directly liable for a fax campaign we did not authorize or even know about? *Comprehensive* demonstrates the potential reach of the TCPA and the possibility of "sabotage liability." There, a serial TCPA plaintiff alleged class-action TCPA claims against Vitaminerals ("VM"), a distributor of therapeutic products, as well as Hygenic, for faxes advertising the Hygenic product "Biofreeze." Although it was clear the faxes were sent only by VM, the TCPA plaintiff named both VM and Hygenic as defendants. The plaintiff alleged that, because the fax campaign advertised a product manufactured by Hygenic, Hygenic was a "sender" under the TCPA and could be held directly liable. Hygenic moved to dismiss, arguing there were no allegations it had knowledge or control over VM's fax campaign.

The TCPA broadly defines the "sender" of a fax to include the company whose products are advertised

As far-fetched as it may seem, the imposition of liability on Hygenic is arguably consistent with the FCC regulations interpreting the TCPA. Those regulations define the "sender" of a fax as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent ***or*** *whose goods or services are advertised or promoted in the unsolicited advertisement*." 47 C.F.R. § 64.1200(f)(10) (emphasis added). (This definition is unique to claims arising out of illegal *fax* campaigns. Direct liability for telephone solicitation is limited to the person that ***initiates*** the call. 47 CFR § 64.1200(f)(11).) The second clause – "or whose

goods or services are advertised or promoted" – was added by amendment in 2006. Although VM did not send the fax "on behalf" of Hygenic, there is no question the fax promoted Hygenic's "goods." Given the use of the word "or," Hygenic was subject to potential *strict* liability regardless of whether it had any knowledge of or control over the fax campaign.

In fact, the Sixth Circuit has adopted the broad reading. In *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 636 (6th Cir. 2015), the Sixth Circuit reversed the district court's dismissal of a direct liability TCPA claim against a restaurant featured in an illegal fax campaign, finding that direct liability attaches "if an unsolicited advertisement for [a defendant's] goods or services was faxed to an entity with which it had no existing business relationship." In *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 894 (6th Cir. 2016), the court affirmed *Imhoff's* broad reading and determined that, for faxes sent *after* the 2006 amendment, liability "extend[s] to both those entities 'on whose behalf the advertisement [was] sent' *and* those entities 'whose goods or services [were] advertised or promoted in the unsolicited advertisement.'" *Id.* at 894 (emphasis in original).

Relying on the Sixth Circuit's decision in *Siding*, district courts have found that defendants whose products were advertised fall within the definition of "sender," regardless of their knowledge of or control over the fax campaign. For example, in *JWD Auto., Inc. v. DJM Advisory Grp. LLC*, No. 215CV793FTM29MRM, 2016 WL 6835986, at *4 (M.D. Fla. Nov. 21, 2016), the Middle District of Florida denied a motion to dismiss filed by insurance underwriters. Although the TCPA complaint included no allegations "tying [the underwriters] directly or vicariously to the Fax's creation or dissemination," the court found that the underwriters fit within the definition of "sender" simply because the fax stated that the policies were "underwritten by Banner Life Insurance Company ... and William Penn Life Insurance Company." *Id.; see also Supply Pro Sorbents, LLC v. Ringcentral, Inc.*, No. C 16–02113 JSW, 2016 WL 5870111, at *4 (N.D. Cal. Oct. 7, 2016) (inclusion of defendant's name and website at the bottom of a fax promoted defendant's services and thus was "sufficient to permit Defendant to fall with[in] the statutory definition of sender"); *Arkin v. Innocutis Holdings, LLC*, 188 F. Supp. 3d 1304, 1309 (M.D. Fla. 2016) ("When the FCC defined 'sender,' liability was expanded to include the 'on-whose behalf' standard *and* a strict liability standard for entities whose good or services were advertised.")

***Comprehensive* criticizes the "absurd" results of an expansive reading of "sender"**

The district court in *Comprehensive* distinguished *Imhoff* and *Siding* while at the same time criticizing the Sixth Circuit's broad definition of "sender." 2017 WL 27263, at *5. The court granted Hygenic's motion to dismiss, holding that the "fact that VM promoted Hygenic's products, without more, does not make Hygenic liable under the TCPA." *Id.* at *6. The court pointed out the logical fallacy apparently overlooked by *Imhoff*, *Siding*, and similar cases – "sabotage liability." If a company can face TCPA liability for any unsolicited fax that advertises its goods or services, regardless of whether the fax was sent on its behalf, a company's rival could create a fax campaign ***for the purpose*** of triggering TCPA liability. For example, a disgruntled Atlanta Falcons fan, humiliated by his team's epic Super Bowl collapse, could execute a illegal fax campaign advertising New England Patriots season tickets. Although the faxes would

certainly not have been sent "on behalf of" the Patriots, because they advertise the Patriots' "good and services," the five-time Super Bowl champions could face liability under the TCPA.

Other courts have criticized the "absurd" results of such a broad reading. *See Bridgeview Health Care Ctr., Ltd. v. Clark,* 816 F.3d 935, 938 (7th Cir.), *cert. denied*, 137 S. Ct. 200 (2016) (rejecting broad reading of "sender" as "absurd," noting that "[t]he very notion of advertising one's goods entails that one must do something to advertise them."); *Cin-Q Auto., Inc. v. Buccaneers Ltd. P'ship* , No. 8:13-CV-01592-AEP, 2014 WL 7224943, at *6 (M.D. Fla. Dec. 17, 2014) (coining the phrase "sabotage liability"). *Comprehensive*, however, is the first Sixth Circuit district court decision to do so. As a result, the court was forced to carefully distinguish *Imhoff* and *Siding*. The district court observed that *Imhoff* and *Siding* both involved fax broadcasting companies paid *by the defendants* to execute fax campaigns. As a result, there was no question the faxes were sent on the defendant's behalf and no risk of "sabotage liability." These cases are distinguishable from cases like *Comprehensive*, where the defendant had no direct contact with the fax blaster. The court in *Comprehensive* persuasively demonstrated that extending direct liability to defendants like Hygenic, with no connection to or control over a fax campaign, is inconsistent with the purpose of the TCPA.

Implications for businesses

The FCC's definition of "sender" and cases applying that definition create challenges for TCPA defendants. Although "sabotage liability" may be an extreme example, there is risk of companies facing direct liability arising out of fax campaigns over which the company had little or no control over or even knowledge of.

Contractual protections to address this potential risk is often a desired approach to reducing litigation risk. Businesses that hire third party marketing companies should insist on the inclusion of strong indemnification provisions that specifically include protection against TCPA liability, as well as limitations on the use of the businesses' trade name in advertisements.