

## UTILITIES AND TELECOMMUNICATIONS ALERT

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### **JUST THE FAX...IT COULD COST YOUR COMPANY MILLIONS**

If your company advertises its products or services via fax marketing, beware: an odd federal law presents a costly trap for the unwary. And national class action counsel are springing the trap by filing stacks of nationwide class actions against such companies.

The Telephone Consumer Protection Act of 1991 (amended by the Junk Fax Prevention Act of 2005) generally prohibits the sending of unsolicited faxes (the "TCPA"). The TCPA allows the recipient of an unsolicited fax to seek damages in state or federal court from \$500 per fax up to \$1500 per fax if the sending of the fax willfully violated the law. In some cases, unsolicited fax recipients also have sought damages for conversion of their property (paper, toner, etc.) and for violations of state consumer protection laws.

The essentially-strict liability nature of the TCPA, coupled with the fact that rarely are such faxes sent only to a single recipient, has created a cottage industry for enterprising class action counsel. Thousands of such actions are pending in state and federal courts around the country.

Damages in these class actions can be substantial and may not be covered by insurance. In one recent case, where the defendant produced fax call lists that indicated it sent 7,725 unsolicited faxes, the court simply multiplied that number by \$500 for a summary judgment of \$3,862,500 to the class. See *Hinman v. M&M Rental Center, Inc.*, 596 F.Supp.2d 1152 (N.D. Ill. 2009). Coverage for TCPA claims often is specifically excluded in commercial liability policies.

Companies that intend to advertise by facsimile must ensure they follow the rules and regulations of the Federal Communications Commission. Such companies are typically legitimate businesses, such as small manufacturers, providers of services or sellers of consumer goods, and not the "penny stock investment" advisors and "discount vacation getaway" companies for which the TCPA was intended. To avoid being a victim of class action lawyers, a company advertising by fax must have evidence of consent to send faxes, or an existing (narrowly defined) business relationship with the recipient of the fax. Further, companies must include a very precise notice on the first page of the fax indicating specific methods by which the recipient may opt-out of receiving future faxes and must have obtained the fax number from certain legitimate sources.

Eckert Seamans is experienced in counseling clients through TCPA lawsuits and in ensuring that fax advertisements comply with federal and state laws. If you would like to know if your company's fax marketing campaign, as well as its email, text, and direct call campaigns, are in compliance with federal and state laws, or if your company is targeted in a TCPA lawsuit, please contact Charlie Zdebski (202.659.6605) or Eric Schwalb (202.659.6608) for assistance.

*This Utilities and Telecommunications Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice. If you have any questions please contact one of the attorneys listed above or contact any one of our other Utilities and Telecommunications Group attorneys at Eckert Seamans.*