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Fax Foibles Costly

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media•insights is published periodically by OneBeacon Professional Partners to address the broad scope of exposures faced by our agents' and brokers' clients, as media-related companies are scrambling to meet the public's appetite for information, news and entertainment in an increasingly litigious society. This issue of media•insights reveals what the latest amendments to the Telephone Consumer Protection Act mean for media companies and how best to mitigate the new, costly exposures resulting from the expanded regulations.

In July of 2005, Congress enacted the Junk Fax Prevention Act to amend the unsolicited fax advertisement provisions of the Telephone Consumer Protection Act of 1991 (TCPA) and directed the Federal Communications Commission (FCC) to issue regulations to implement the statute. The new rules were effective **August 1, 2006**. Media companies have been sued in class actions under the TCPA and have faced uninsured damages well in excess of \$100,000.

The new rules provide for an Established Business Relationship (EBR) exemption to the prohibition on sending unsolicited fax advertisements. Thus, the rules provide that it is unlawful to send unsolicited fax advertisements to any fax machine, including those at both businesses and homes, unless the recipient has provided prior express invitation or permission. However, the EBR exemption provides that fax advertisements may be sent to recipients with whom the sender has an EBR, so long as the fax number was provided voluntarily by the recipient.

Amounts recoverable include profits from the unauthorized use as well as punitive damages, attorneys' fees and costs.

A fax may be sent to the EBR if the fax number from the recipient was received on an application, contract information form or membership renewal form so long as obtained directly from the EBR. The number may also be obtained from the recipient's own directory, advertisement or website, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the fax number in question. If the source of the number is a directory or other source of information compiled by a third party, then the sender must take steps to verify that the recipient consented to have the number listed. If the EBR existed before July 9, 2005 and the sender also possessed the fax number before that date, the sender may send fax advertisements without demonstrating how the number was obtained. At this time, it is not clear whether an EBR can be created simply by showing a fax address on a homepage. As such, fax advertisers should use an abundance of caution and seek permission to send a fax that may be perceived as unsolicited by the receiver.

All fax advertisements, including those sent with the recipient's prior express permission, must include an "opt-out" notice allowing recipients to "opt out" of future faxes from the sender. Such notice must be clear, conspicuous and on the first page of the advertisement. The notice should indicate that the recipient may request that the sender refrain from sending future faxes, and

that failure to comply within 30 days is unlawful. The notice must include a phone number, fax number and a cost-free mechanism such as a toll free phone number or fax number, a website or an e-mail address to opt out of faxes. Such mechanisms must allow consumers to make opt-out requests 24 hours a day, 7 days a week. Senders that receive such a request to not send faxes in the future must honor the request within the shortest reasonable time, not to exceed 30 days. The sender is prohibited from sending future fax advertisements to the consumer unless it subsequently provides prior express permission to the sender, either orally or in writing.

Any person or business on whose behalf a fax is sent or whose goods or services are advertised, is liable for a violation of the law, even if it did not physically send the fax itself.

A claimant may bring a civil action against the violator and recover actual monetary loss or receive up to \$500 in statutory damages for each violation, whichever is greater. The court may triple damages for each violation if it finds the defendant willingly or knowingly committed the violation. Class action suits may also be brought, which generate significant statutory damages.

Media companies are certainly not immune to fax foibles. For example, class actions have been brought against radio stations that use blast faxes to advertise station lunch promotions. Enterprising plaintiff's attorneys are quick to certify class actions against businesses that engage in this wrongful

practice. Moreover, most media liability policies specifically exclude claims arising from such claims. To prevent this type of claim, in-house advertising departments and advertising agencies, who undertake fax campaigns on behalf of their clients, should educate their employees and distribute user-friendly copies of the TCPA.

The TCPA does not preempt any state law that may impose more restrictive regulations governing the use of faxes. If your client uses faxes to broadcast advertisements, local counsel should contact the state public utilities commission to determine what other laws may apply.

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