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Avoid Being Played in the "Faxtortion" Game

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The Telephone Consumer Protection Act ("TCPA") prohibits "any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine" The purpose of the Act was to help protect innocent individuals from the costs, burdens and annoyance associated with the receipt of unsolicited facsimiles.

Like many statutes that are designed to address a specific societal ill, the TCPA's purpose was and is laudable. However, as is often the case, some unscrupulous individuals have found ways to use the TCPA, not as a means to protect them from undesired facsimiles, but as a source of income. Indeed, for these individuals, the goal is not to stop receiving facsimiles, but instead to accumulate as many facsimiles as possible and then to sue everyone in sight, whether liable or not, to obtain the maximum monetary recovery. And, as the recovery can be as much as \$1500 per facsimile in some instances, the financial incentives for abusing the statute are powerful.

Now, if you are not among the carriers who are under siege from these individuals, you may be thinking—why should I care about this issue? I am not in the business of sending facsimiles. However, innocent as you may be, and even if you are only the provider of an inbound toll free service used in connection with the delivery of facsimile transmissions by third parties, you are in the crosshairs of those seeking to maximize their recovery.

Here's how the "faxtortion" game works. When an individual who is in the game—let's call them "players"—gets a facsimile, one of the first things he/she does is to contact the underlying carrier and/or the SMS database administrator to identify the entity that is the RESPORG (i.e., the Responsible Organization) for the toll free number. It is worthy of note that in many, if not most instances, the release of this information by the underlying carrier and/or the SMS database administrator may be in violation of the agreement under which they interact with the reseller or otherwise improper. In any event, in most cases, the player is able to get this information, to contact the RESPORG and to demand the name of the underlying customer.

If this is where the process ended, the problem would not be worthy of further discussion. However, whether by ignorance or intent, in many cases the communication by the player to the RESPORG is less than professional and often contains specific threats of legal action and, sometimes, even violence if the facsimile transmissions are not stopped. Of course, the RESPORG is never, or virtually never, the entity that is sending the facsimiles, and may not be in a position to block the transmissions (e.g. where it is non-switch based) even if were to elect or have the authority to do so.

The players of the world have also found that it can be difficult to find the entities that are actually sending the facsimiles, either because the pop up and down overnight, or because they hide offshore. Thus, even where these players are able to obtain judgments against these entities, it can be hard to collect. To address this problem, some of the more unscrupulous players are now bringing actions against the carriers whose services are used to deliver the facsimiles. Although these actions are, in most circumstances, without basis in law, the apparent goal of these players is to force innocent carriers to settle these cases rather than face the substantial legal fees required to litigate.

Although it may, at first glance, seem practical and economically rational to settle these cases for a relatively small amount, often, that may turn out to be the wrong decision, both as an economic and a practical matter. Indeed, our experience suggests that the network of players communicate regularly through websites like www.fax.org and target carriers who settle with endless threats of legal action. More importantly, if your role in the process is merely that of common carrier, and you do not have any substantial involvement in the creation of the facsimile transmissions or the selection of the telephone numbers to which the transmissions are sent, you are not legally liable and thus should not be required to pay the equivalent of “protection money” not to be sued.

In short, here is the law on the issue. As an initial matter, for the conduct to be unlawful under the TCPA, a defendant must have: (i) used a telephone facsimile machine, computer, or other device to, (ii) send an unsolicited advertisement, (iii) to a telephone facsimile machine. In virtually all cases, a common carrier does not actually own or operate a “telephone facsimile machine, computer, or other device,” nor have such entities ever “used” that device to “send an unsolicited advertisement.” As such, players are generally unable to present any of the facts necessary to state a claim against a common carrier defendant.

Moreover, as noted above, FCC has specifically concluded that common carriers are exempt from liability unless they have “a high degree of involvement” in sending unsolicited faxes. The required “high degree of involvement” can be found to exist only where the carrier has a direct role in creating the content of a facsimile message or where the carrier maintains lists of facsimile numbers used to direct its clients’ advertisements. “If a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that common carrier will not be liable for the facsimile.”

Further, in many instances, the common carrier may only be providing the inbound toll free service that is referenced on the facsimile as the number to call for more information about the product or service at issue or to get off the call list. We are aware of no sound legal theory under which such carriers—who are only involved on the inbound side and who have no relationship to the sending of the facsimile—can be liable under the TCPA.

These are just a few of the numerous defenses available to carriers and resellers. So, do not be a victim. Paying “protection money” is a losing proposition that will only

encourage the players and their endless list of clients to return to the money trough time and again.

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