

ALABAMA *Insurance Day*

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PUBLIC POLICY, LITIGATION, AND REGULATORY HOT TOPICS

Phillip E. Stano

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- 1. Unclaimed Property**
- 2. Captive Reinsurance**
- 3. Data Breach**
- 4. TCPA**
- 5. USSC: Class Certification Rulings**
- 6. DOL Fiduciary Rule**

Unclaimed Property: *Country Roads to Nowhere*



Unclaimed Property

- *State ex rel. Purdue v. Nationwide Life Insurance*
(West Virginia Court of Appeals)
- June 16, 2015 Decision – 63 Insurers
- Land, air and sea change
- No duty to search the Death Master File . . . but:
Dormancy period begins at insured's death
Death + 3 years – the clock stops ticking

- **Insurer's obligation to pay life insurance proceeds**
 - Arises upon insured's death?
 - Not triggered by beneficiary's claim
 - Insurer's lack of knowledge of insured's death no defense
 - Remit policy proceeds three years after insured's death
 - Presumption of abandonment

Unclaimed Property

- Insurer – “Duty to comply”
 - Keeping up with its insureds
- “each insurer . . . free to determine how it will investigate . . . discover whether its insureds are yet living”
- WV Court of Appeals suggested methodology:
 - Contacting its insureds directly
 - Farming the task out to its agents
 - Review the DMF

Unclaimed Property

- Penalties for faulty methodology (failure to timely report abandoned property)
- 12% interest
- \$200 a day penalty (\$5,000 maximum)
- Willful violation
 - \$1,000 a day
 - \$25,000 maximum; plus 25% of contested property value

Captive Reinsurance: Life Insurers At Risk



Captive Reinsurance: Life Insurers At Risk

- Wholly-owned subsidiaries reinsure life insurance policies
- 25% of reinsured policies
 - Jurisdictions – strict capital/reserve requirements
 - Regulators routinely approve transactions

June 2013 – New York Department of Financial Services Report

- “Shining Light on Shadow Insurance”
- Investigation of 17 NY-based life insurers’ financial captive practices
- LOC guaranteed by parent/affiliate of ceding insurers
- Alleged conditional LOC/hollow assets/Naked Parental Guarantees
- Misrepresentation of insurer’s financial condition

Captive Class Litigation

- At least ten insurers – putative class actions
- Alleged misrepresentation of reserves, finances
- Parental guarantees – alleged misrepresentation
- Questionable injury/standing

Data Breach: Your Place ~~or~~ is Mine



Data Breach: Your Place ~~or~~ is Mine

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We know it is bad . . .



Magnitude of Cyber Problem

Over the past decade, **590** known data breaches involve companies in the Financial and Insurance Services sector.*

Targets include:

- Health insurers
- Life insurers
- Disability insurers
- Workers' comp. insurers
- Homeowners insurers
- Title insurers
- Municipal bond insurers

Affiliate targets include:

- State health insurance exchanges
- Wholesale brokers
- Captive agents
- Independent adjusters
- FINRA
- N.Y. State Banking Department
- S.C. Department of Revenue


*Source: Privacy Rights Clearinghouse
www.privacyrights.org/data-breach/new

Insurance Companies are Targets . . .

Actual screen capture from underground website offering insurance records for sale.

Index » Finance Vendors » [US FULLZ][EXCLUSIVE] Names, Ssn, DL, Banking Info, Medical Recs.

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ImperialRussia	2014-06-15 00:14:32	#1
<p>Member</p>  <p>From: Imperial Russia Registered: 2014-04-07 Posts: 123</p>	<p>Store Grand Re-Opening!!!</p> <p>Live and Exclusive database of US FULLZ from an insurance company, particularly from NorthWestern region of US. All fullz come in a .pdf format and contain 7-16 pages of very exclusive information, live from companies db. Most of the fullz come with EXTRA FREEBIES inside as additional policy holders.</p> <p>[Name:] [Address:] [Phone #:] [Driver License #:] [SSN:] [DOB:] [Bank Name:] [Routing Number:] [Checking Account:] [+ Draft date for their automated monthly payment.] [Medical Records:]</p> <p>All of the information is accurate and confirmed, Clients are from an Insurance Company database with GOOD to EXCELLENT credit score!</p> <p>I, myself was able to apply for credit cards valued from \$2,000 - \$10,000 with my fullz.</p> <p>Info can be used to apply for loans, credit cards, lines of credit, bank withdrawal, assume identity, account takeover.</p> <p>BULK ORDER ONLY! 5 fullz = \$40; 10 fullz = 70; 15 fullz = \$110; 20 fullz = \$140; 30 fullz = \$210; 40 fullz = \$280; 50 fullz = \$320. BULK ORDERS ONLY!!!</p>	

Claims Asserted Against Insurers:

- Fair Credit Reporting Act
- Common law right to privacy
- Breach of contract (or implied contract)
- Unjust enrichment
- Breach of fiduciary duty
- Negligence, gross negligence, negligent misrepresentation
- State statutory violations, including consumer fraud and unfair trade practices statutes

Other Potential Claims:

- Health Insurance Portability and Accountability Act (HIPAA)
- Gramm-Leach-Bliley Act
- *Parens patriae* claims by State Attorneys General
- State notification statutes
 - As of 2012, 46 states and the District of Columbia have enacted laws requiring notice of security breaches of personal data.

Cases Against Insurers:

- Where plaintiffs are not able to allege actual harm (such as identify theft) . . .
 - Many courts have held that the mere increased risk of identity theft is too speculative to support standing.
 - *Galaria*, 998 F. Supp. 2d 646 (S.D. Ohio 2014).
 - *Allison*, 2010 WL 3719243 (E.D. Pa. Mar. 9, 2010).
 - *Randolph I*, 486 F. Supp. 2d 1 (D.D.C. 2007).
 - The speculative nature of the harm may prevent plaintiffs from stating a claim.
 - *Randolph II*, 973 A.2d 702 (D.C. 2009).

Cases Against Insurers:

- However, some cases have survived motion to dismiss.
 - Present emotional distress could give rise to actual injury and damages.
 - *Rowe*, 2010 WL 86391 (N.D. Ill. Jan. 5, 2010).
 - In some cases, plaintiffs are able to allege actual identity theft, as well as facts that satisfy a court that the identity theft was caused by the data breach.
 - *Resnick*, 693 F.3d 1317 (11th Cir. 2012).
- These cases have both settled.

Cyber Breaches: What's at Stake?

- Forensic investigation of the breach
- Notification costs
- Providing credit monitoring
- Regulatory fines and penalties
- Civil litigation damages
- Reputational injury

Cyber Breaches: Coverage Issues

- Business property (first-party) coverages
 - Covers direct *physical* loss
- Commercial General Liability (CGL) policies
- Personal and Advertising Injury coverages
- Employee Dishonesty / Fidelity policies

Service Providers and Vendors – Third-Party Relationships Create Risk

- You are only as secure as your partners
- If your service providers are vulnerable, so are you:
 - IT Contractors
 - Accounting Firms
 - Law Firms
- A service provider with electronic or physical access to your system provides an attack vector for hackers
- Require your third-party vendors to demonstrate they have robust cyber defenses and will not undermine your position

TCPA: Dialing for Dollars



The Telephone Consumer Protection Act (TCPA):

- Prohibits telemarketing (specifically to cell phones) and requires consumer consent for the use of:
 - automatic dialing systems
 - prerecorded voice messages
 - text messages
 - faxes
- Imposes statutory damages of \$500 per violation (and up to \$1500 if willfull or knowing) – **No cap on damages**

TCPA: Dialing for Dollars

TCPA and the Insurance Industry

- Why should insurance companies care?
 - Top four settlements in 2014 totaled \$174 million
 - Second most filed type of case in federal courts across the country for the last
- Class actions being filed specifically against insurance companies
 - More than a dozen class actions filed against insurance companies since January 2015
 - Targeted because of:
 - direct contact with customers
 - through agents/representatives
 - third-party liability

TCPA: Dialing for Dollars

Consent = Key to Avoiding Litigation

Consent to Call? Internet Leads and the Telephone Consumer Protection Act

PART 1: TCPA Rules and Steps for Compliance

Written by Klein Moynihan Turco LLP

Background on the TCPA

The TCPA was passed into law in 1991 and granted the Federal Communications Commission (FCC) the power to issue rules and regulations to govern the expanding telemarketing industry. Among other things, the TCPA allows individuals to file lawsuits and collect damages for receiving certain types of unsolicited telemarketing calls, text messages, faxes, pre-recorded calls and autodialed calls. The TCPA applies to both voice and short message service (SMS) text messages, if they are transmitted for telemarketing purposes – with limited exceptions (e.g., messages sent for emergency purposes). “Telemarketing” calls include those made by marketers that offer or market products/services to consumers. Purely informational calls and calls for non-commercial purposes are exempt from the TCPA amendments discussed below.

Autodialers

An autodialed call is a phone call, involving a live person or pre-recorded message, that is placed using an “autodialer,” or automatic telephone dialing system, that has the capacity to produce, store and call telephone numbers using a random or sequential number generator. The autodialer call definition should be broadly construed in an effort to avoid unwanted litigation and regulatory action. For instance, if you are utilizing any type of call center software as part of your telemarketing operations, you may be using an autodialer within the FCC’s definition. If you are unsure, we recommend that you consult with an attorney who has expertise in telemarketing law.

New TCPA Rules

In a Report and Order approved on February 15, 2012, the FCC adopted additional protections for consumers concerning unwanted autodialed calls/texts and/or pre-recorded messages. Two of these new rules are scheduled to go into effect very shortly.

First, beginning October 16, 2013, prior express written consent will be required for all autodialed and/or pre-recorded calls/texts sent/made to cell phones and pre-recorded calls made to residential landlines for marketing purposes. Compliance with the E-SIGN Act satisfies this requirement, meaning that electronic or digital forms of signature (i.e., agreements obtained via email, website form, text message, telephone keypad or voice recording). Under the new rule, consumer consent must be unambiguous, meaning that the consumer must receive a “clear and conspicuous disclosure” that he/she will receive future calls that deliver autodialed and/or pre-recorded telemarketing messages on behalf of a specific marketer; that his/her consent is not a condition of purchase; and he/she must designate a phone number at which to be reached (which should not be pre-populated by the marketer in an online form). Limited exceptions apply to this requirement, such as calls/texts from the consumer’s cellular carrier, debt collectors, informational notices and healthcare-related calls.

Sample Website Consent Language:

I hereby consent to receive autodialed and/or pre-recorded telemarketing calls from or on behalf of [Marketer’s Legal Name] at the telephone number provided above, including my wireless number, if applicable. I understand that consent is not a condition of purchase.

If a dispute concerning consent arises, the marketer bears the burden of proof to demonstrate that a clear disclosure was provided and that the consumer unambiguously consented to receive telemarketing calls to the number he/she specifically provided. It is a best practice for marketers to maintain each consumer’s written consent for five (5) years. Evidence of Internet-provided written consent includes, but is not limited to, website pages that contain consumer consent language and fields, an associated screenshot of the consent webpage as seen by the consumer where the phone number was inputted, and a complete data record submitted by the consumer (with time and date stamp), together with the consumer’s computer IP address.

To avoid potential liability and fines of up to \$500-\$1,500 per non-compliant text message, you must ensure ALL of your media/channels reflect the compliant TCPA and carrier verbiage shown below. This includes but is not limited to ALL print, TV, radio, Online, social, email, and onsite signage.

By [checking this box, signing this agreement, sending a text to this code] I agree to receive automated marketing text messages from [company] to the mobile number I have provided. I understand that I am not required to provide my consent as a condition of purchasing any goods or services. Up to [X] msgs/mo. Reply HELP for HELP. Reply STOP to cancel. Message & data rates may apply.

Best Practices & Recommendations

- Revocation of consent: honor requests to stop calling
- Consent runs with the consumer, not the phone number
- Calls with both non-marketing and marketing components = marketing calls
- Use common sense: do not call during off hours
- Check the Do Not Call (DNC) registry and maintain a company-specific DNC list
 - “Existing Business Relationship” exception
- Include an opt-out option in any prerecorded message, fax or email
- Keep records (written/electronic)

USSC: Upcoming Class Certification Rulings



Campbell-Ewald Co. v. Gomez (No. 14-857)

- Whether an offer of complete relief moots Plaintiff's claim?
- If yes, whether such offer moots a putative class rep's claim before class certification?
- Facts: plaintiff offered \$1,503 for receiving unsolicited text messages on behalf of U.S. Navy
 - Implications: effective class action defense
 - Encourage:
 - Mass actions
 - *Parens patriae* actions by State Attorney General

Tyson Food Inc. v. Bouaphakeo (No. 14-1146)

- Whether differences among individual class members may be ignored where liability/damages will be determined by statistical sampling?
- Whether Rule 23(b)(3) claim may be maintained when the claim contains many uninjured members?
- Facts: failure to pay overtime wages to workers donning/doffing work gear

Tyson Food Inc. v. Bouaphakeo (No. 14-1146)

- Implications
 - Impact on class definitions that include uninjured class members (no standing)
 - Class trials often times require statistical sampling
 - Does the Seventh Amendment nullify the class action devise?

Spokeo, Inc. v. Robins (No. 13-1339)

- Whether a Plaintiff who suffers no injury has Article III standing to sue for federal statutory violations?
- Plaintiff alleges defendant violated the FCRA when publishing erroneous personal information about plaintiff's credit worthiness.
- Ninth Circuit: "the actual or threatened injury . . . May exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."

Spokeo, Inc. v. Robins (No. 13-1339)

- Implications
 - Class actions brought under federal statute TCPA, ERISA, FDCPA
 - Class actions removed to federal court

DOL's Proposed Fiduciary Rule



DOL's Proposed Fiduciary Rule

Issued: April, 2015

Comment Period: concluded September 24, 2015

- Expansion of fiduciary standards/definition
- Applicable to retirement accounts
- Variable/fixed annuities; mutual funds
- ERISA Plans

Investment advisory fiduciary: any person, who, “in exchange for a fee” provides advice

1. Exchanging securities
2. IRA rollover recommendations
3. Recommending (for a fee) a person to advise on 1 or 2
4. Appraisals involving plan/IRA asset transactions

ERISA 404(a)(1) Fiduciary Requirement

- “Discharge his duties with respect to a plan”
- “Solely in the interest of the participants and beneficiaries”

Implications of DOL Rule

- DOL authority to create new fiduciary definition
- New causes of action
 - ERISA
 - IRA
 - Development of federal fiduciary common law?
- Smaller investors – loss of investment advice
- Disappointing investment returns
 - Sue your fiduciary-sales agent
 - Insurer exposure

Questions?

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Phillip E. Stano
Washington, DC
202.383.0261
phillip.stano@sutherland.com