



# TCPA INSURANCE COVERAGE

4 Things Every Company Should Know About  
Insurance Coverage and the TCPA

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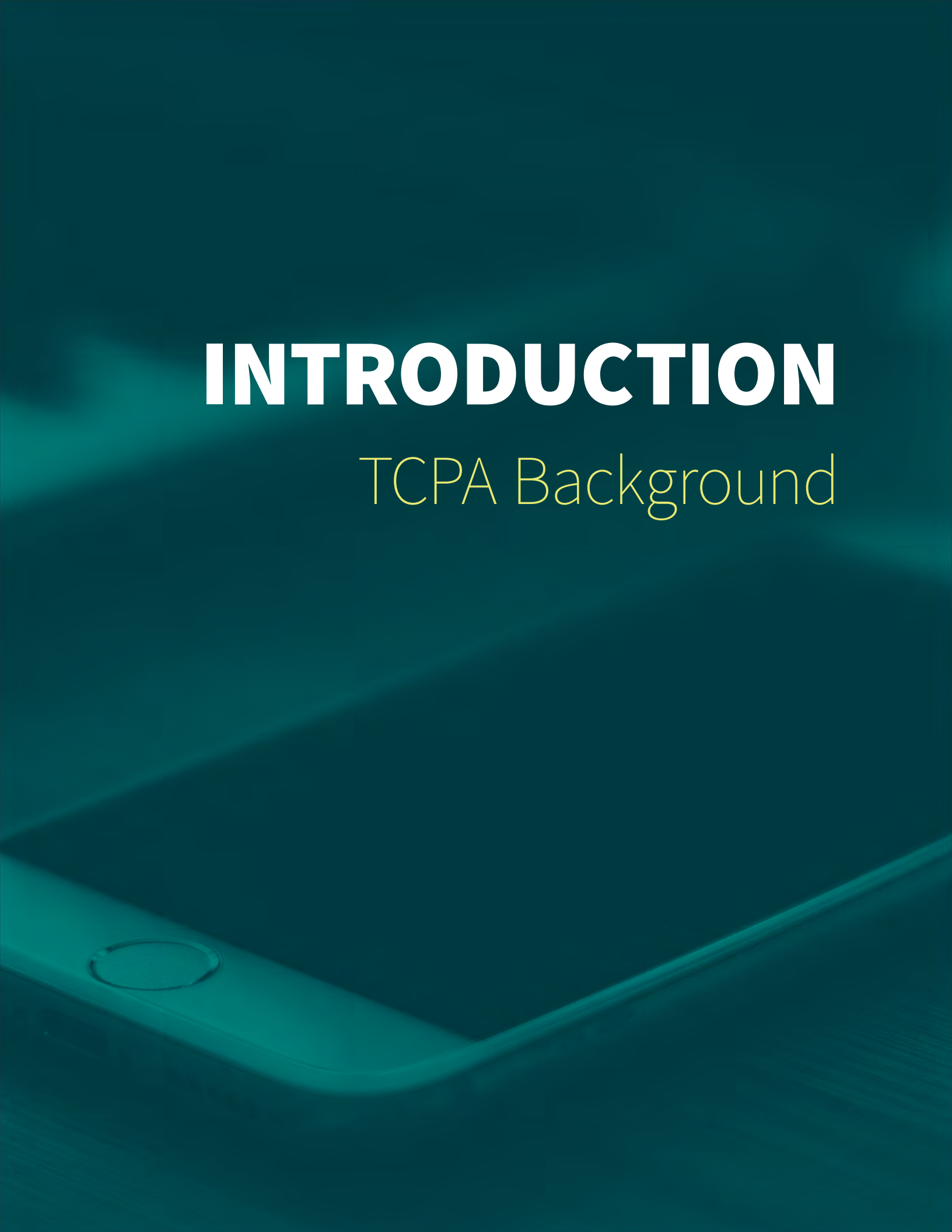
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If You've Already Been Sued, Look at All of Your Insurance Policies  
for Potential Coverage

# INTRODUCTION

TCPA Background



# TCPA Background

The volume of TCPA court cases has exploded in recent years. Currently, TCPA cases have become the **second most filed** type of case in our federal courts. TCPA cases, often filed as consumer class actions, are popular among the plaintiffs' bar because of the minimum statutory damages of \$500 per unlawful call, message or fax, and the potential for treble damages for knowing and willful violations.

These large statutory damages have also produced significant settlements. In September 2016 Caribbean Cruise Line and certain of its agents reached a settlement valued at \$76 million for robocalling millions of people with offers for free trips.

Rule changes implemented by the Federal Communications Commission (FCC) in 2015, and upheld in part by the D.C. Circuit in March 2018, may increase the number of TCPA cases. Those changes include requiring companies to honor any reasonable opt-out request made by a consumer that previously agreed to receive robocalls or text messages. The industry also continues to struggle with the issue of whether liability may be imposed on companies that had consent from a consumer to call or send text messages to a telephone number, but that number was subsequently reassigned to a new subscriber who has not provided consent. While the FCC is continuing to examine that issue, the uncertainty remains a potential TCPA risk.

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Because of the increase in litigation, and the significant damages at stake, insurance companies have also been responding. Insurance companies are increasingly attempting to escape responsibility for covering TCPA claims under general commercial liability policies whenever possible by expressly excluding the TCPA from their policies. On the other hand, some insurance companies are starting to allow their customer to purchase an additional rider to ensure TCPA coverage is available.

Finally, a pathwork of state law decisions evaluating the application of insurance policies to the TCPA makes thing even more complicated. Indeed, at least one court has concluded that a party is not entitled to obtain TCPA insurance coverage because the TCPA's penalties are meant to be "penal" in nature, and thus cannot be insured against.

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With these trends in mind, we explore 4 things every company should know about insurance coverage and the TCPA.

1. Read your insurance contracts now;
2. Different states will have different outcomes;
3. Avoid uncertainty; get a specific Rider Covering TCPA Claims; and
4. If you've already been sued, look at all of your insurance policies for potential coverage.



# CHAPTER 1

Read Your Insurance  
Contracts Now







## Read Your Insurance Contracts Now

The first recommendation for companies engaged in sending bulk faxes, autodialed or prerecorded calls, or text messages is to read your insurance policies **now**. Seriously, right now! (Or, you know, when you're finished with this e-guide.)

If you're unsure whether your insurance policy provides coverage for TCPA-related claims, then you should take the time to examine the issue now, before you're confronted with litigation and it is too late to make coverage adjustments. It is increasingly common for Commercial General Liability (CGL) policies to include explicit exclusions that deny coverage for TCPA claims. Thus, coverage may be expressly foreclosed by your insurance agreement.

**BEWARE:** even the policies without an explicit disclaimer aren't safe from denial. Insurance companies will often seek to deny coverage for TCPA claims given the potential exposure of TCPA class actions. In some states, insurance companies have successfully avoided coverage by arguing that exclusions for statutory violations or violations of consumer protection laws allow them to avoid providing coverage, even when there is no exclusion specifically for TCPA claims.

# CHAPTER 2

Different States Will Have  
Different Outcomes



# Different States Will Have Different Outcomes

The ability to obtain coverage for a TCPA claim may turn on the state law applicable to the policy. Insurance coverage is purely a question of state law and different states' laws may vary. Therefore, the outcome of an insurance-coverage claim may well depend on which state's law applies.

Courts have gone both ways on whether TCPA suits are covered under a particular set of facts. Policyholders have been able to win coverage, based on the terms of their specific policies, in the Fifth, Eighth, Tenth and Eleventh Circuit Courts of Appeals, as well as in federal courts in Massachusetts and Ohio, and before the Illinois and Missouri Supreme Courts. Claims for coverage have been rejected in other courts, however.

By way of example, the Fifth, Eighth, Tenth, and Eleventh Circuits interpret TCPA violations as falling within the scope of the “advertising injury” provision on the basis that they invade a consumer’s “right to privacy.” *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819 (8th Cir. 2012); *Park Univ. Enters. v. Am. Cas. Co.*, 442 F.3d 1239, 1249-1250 (10th Cir. 2006); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201, 208 (11th Cir. 2005); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960, 961 (5th Cir. 2004).

The Supreme Courts in Illinois, Missouri, and Florida have also adopted this view. *Valley Forge Inc. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352 (2006); *Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258, 270 (Missouri 2013); *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1006-07 (Fla. 2010).

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The Seventh Circuit, among the first federal appellate courts to address the issue, reached a different conclusion, however. In *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 941 (7th Cir. 2004), the Court predicted that under Illinois law, the policy provisions for coverage of an advertising-injury claim would extend only to claims involving the “right to secrecy,” rather than the “right to seclusion.” According to the court, TCPA liability was not the type of “advertising injury” covered by the policy. The Seventh Circuit’s prediction of how Illinois law would be interpreted was ultimately rejected by the Illinois Supreme Court in *Valley Forge*. Nevertheless, four years later, the Seventh Circuit again concluded that TCPA liability was not covered under the “advertising injury” provision, but, this time, the Seventh Circuit was predicting how the Iowa Supreme Court would decide the issue. *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 550 (7th Cir. 2008). The Fourth Circuit Court of Appeals has also found that the right to seclusion is not protected by policies insuring against advertising injuries. *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 639–40 (4th Cir. 2005).

Courts are also split about whether coverage may exist for policies that protect against “property damage.” This coverage may be more likely for fax-blast cases under the TCPA, where it can be shown that the fax consumed toner and paper (i.e., the consumption of tangible property), as compared to calls or text messages that do not impact tangible property. However, even for fax cases, courts have reached different conclusions. In *Prime TV, LLC v. Travelers Insurance Company*, a federal court in North Carolina found coverage because unsolicited faxes wasted paper and ink and caused the recipient to lose the use of its fax machine

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during the transmissions. 223 F. Supp. 2d 744, 750 (M.D.N.C. 2002). Meanwhile, a Seventh Circuit case held that the policyholder's transmission of unsolicited faxes was barred by the policy's intentional-conduct exclusion because the policyholder necessarily anticipated the consequences of their act, namely, that the faxes would use up the recipient's ink and paper. See *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004).

Further, a recent decision from the Tenth Circuit finding that Dish Network was not entitled to insurance coverage for the TCPA because the TCPA's minimum statutory penalties of \$500 are meant to be "penal" in nature, may have important and potentially far-reaching consequences. In *ACE American Insurance Company v. Dish Network, LLC*, a three-judge panel upheld a trial court's decision that Colorado law prevented Dish from receiving insurance coverage for its TCPA violations. The Tenth Circuit relied on Colorado insurance coverage law, stating:

The Colorado Supreme Court has held that Colorado public policy prohibits "insuring intentional or willful wrongful acts." *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1262 (Colo. 1998). "The purpose of the exclusion of intentional injuries from coverage is to prevent extending to the insured a license to commit harmful, wanton or malicious acts." *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 957 (Colo. 1991). Specifically, "[t]he public policy of Colorado prohibits an insurance carrier from providing insurance coverage for punitive damages." *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 517 (Colo. 1996). Punitive damages are "intended to punish the defendant for his wrongful acts and to deter similar conduct in the future" rather than compensate the plaintiff. *Id.*

The rationale for the Court's decision creates an important new precedent that any company seeking TCPA insurance coverage must bear in mind. Approximately half of the states in the U.S. have a public policy similar to Colorado's that prohibits the enforcement of insurance coverage for punitive damages. Thus, it may well be the case that even insurance policies expressly providing coverage for TCPA claims will be of questionable force if more courts follow the Tenth Circuit's reasoning. Therefore, companies that seek to obtain TCPA insurance coverage should pay careful attention to the question of which state's insurance law will be applied to interpret the policy if a coverage dispute arises.

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# CHAPTER 3

Avoid Uncertainty; Get a  
Specific Rider Covering  
TCPA Claims



## Avoid Uncertainty; Get a Specific Rider Covering TCPA Claims

Because of the differing interpretations under state law, and the differing language in specific policies, it may be extremely challenging to accurately predict whether TCPA claims will be covered by any given insurance policy in advance. We strongly recommend that companies seek out an insurance company that will sell an insurance rider clearly providing coverage for TCPA claims. They should also ensure that the policy includes a “most favored venue” provision that provides options for which state’s law will be applied to the policy. This provision increases the likelihood that the policy will be enforceable even if some states do not permit TCPA damages to be insured against.

While we do not endorse or recommend a particular product or service, we have identified the following insurance brokers that are familiar with the TCPA and have been able to obtain TCPA insurance coverage under certain circumstances:

### **Otto Foerster**

Executive Vice President

#### **JM Private Insurance**

[otto@jmprivate.com](mailto:otto@jmprivate.com)

7274 SW 48th Street

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### **Robert Horn**

Associate Director

#### **Crystal & Co.**

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# CHAPTER 4

If You've Already Been  
Sued, Look at All of Your  
Insurance Policies for  
Potential Coverage



# If You've Already Been Sued, Look at All of Your Insurance Policies for Potential Coverage

Here are a few other thoughts about how a company may be able to get insurance coverage for some or all of the defense or indemnity costs of a TCPA claim:

## PRE-RENEWAL CGL POLICY TERMS:

Even if a CGL policy has a TCPA-claim exclusion, if that exclusion was added to the policy at the time of a renewal, rather than included when the policy was first issued, it may be possible to challenge the process by which the exclusion was added. Many states have strict rules governing the ability of an insurance carrier to alter coverage when the policy is renewed. For example, in *Cincinnati Insurance Co. v. Chapman*, 2016 IL App (1st) 150919, the court examined the enforceability of a TCPA exclusion that was added to a renewal policy and precluded coverage for an underlying TCPA class action. There was a dispute about whether Illinois or Indiana law applied to the insurance contract. The court found that Indiana law applied and, therefore, the TCPA exclusion was enforceable. If Illinois law had applied, however, the TCPA exclusion would have been unenforceable because Illinois requires insurance providers to notify consumers in advance if coverage will be reduced at the time of renewal.



**DIRECTOR & OFFICER**

Director & Officer policies insure a company's directors and officers against claims arising out of their corporate duties and may be a source of coverage if individuals are named as defendants. Some policies include what is referred to as "Side C" or "entity" coverage that also protects the company against specific liability claims. D&O policies are often broad enough to cover TCPA claims.

**ERROR & OMISSION**

Error & Omission policies cover claims made by clients or customers arising out of professional advice or services, or products sold by the insured. The policies may cover claims for wrongful acts, negligence, and misrepresentation. Because TCPA claims often allege negligence or wrongful acts, E&O policies may be a source of coverage.

**CYBER LIABILITY**

Cyber Liability policies are often geared towards hacking and data breaches and the harms that result. However, some companies are including TCPA coverage as part of these policies, which may make them an attractive offering for protecting against this type of litigation.





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