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7th Circ. Robocall Ruling To Pad Already Swelling Docket

By **Allison Grande**

Law360, New York (November 27, 2013, 8:34 PM ET) -- The Seventh Circuit recently ruled that the Telephone Consumer Protection Act does not preempt state robocall bans, paving the way for the enforcement of more restrictive state statutes that experts say will lead to a spike in class actions over unwanted telemarketing solicitations.

In a Nov. 21 decision overturning a lower court's decision in favor of nonprofit Patriotic Veterans Inc., the three-judge panel found that a clause in the TCPA stating that the legislation does not preempt more restrictive state laws or outright bans on robocalls clearly operated to allow for the enforcement of telemarketing laws such as the one in Indiana. Unlike the federal statute, the Indiana law doesn't contain an exception for political robocalls to the general prohibition on making autodialed calls without prior consent.

While the appeals court dealt with only the Indiana law, the decision opens the door for all states to enforce and enact more restrictive autodialing laws that are likely to create both compliance and litigation headaches for companies across the U.S., attorneys say.

“Instead of having to follow one statute created by Congress, business and nonprofits will have to comply with a patchwork of state statutes and regulations, which will make it more expensive for companies to communicate with their audience and will become pitfalls for the unwary,” Reed Smith LLP partner Roxanne Wilson told Law360.

Although there has been an explosion in TCPA litigation in recent years due to the potential for plaintiffs to recover uncapped statutory damages of between $500 and $1,500 per violation, a similar swell in cases based on state court claims has not occurred, mainly due to the lack of penalties and prohibitions in many state laws as compared to the ones contained in the federal law, according to Locke Lord LLP counsel John Costello.

But the Seventh Circuit's decision sends a strong message to states that the federal statute sets only the floor, and that they have the power to push regulations that go beyond the penalties and prohibitions contained in the TCPA, attorneys say.

“On the logic of [the Seventh Circuit's decision], the TCPA only imposes minimum standards for regulating robocalls and other forms of telemarketing, which means that states can follow Indiana’s lead and pass laws that go above and beyond what is required by federal law,” Sheppard Mullin Richter & Hampton LLP attorney David Poell said. “In short, the proliferation of state laws that are not uniform among one another could result in a spike in lawsuits by consumers who receive robocalls in states that have stricter prohibitions or higher penalties than the TCPA.”

The more restrictive state laws are also likely to be attractive to plaintiffs' attorneys who are searching for ways to overcome an adverse ruling under the federal law, Locke Lord's TCPA class action litigation section head Martin Jaszczuk said.

“What could potentially happen is that plaintiffs' lawyers may now choose to bring lawsuits under state laws in jurisdictions where federal court decisions have been generally unfavorable to plaintiffs,” he said. “In those situations, plaintiffs may decide to proceed based on state law, given that it is likely to be a less developed body of law.”

The increased litigation risk created by the potential proliferation of more restrictive state laws makes it more important than ever that companies make sure they consider all applicable regulations before rolling out multistate marketing campaigns, attorneys say.

“From a compliance standpoint, companies need to realize that it is not a one-size-fits-all effort,” Troutman Sanders LLP partner Chad Fuller said. “If a campaign is rolled out that is in compliance with the TCPA but out of compliance with state regulations or state law on the subject, that could be another basis for plaintiffs' attorneys to come in and file an action.”

The Seventh Circuit's decision marks the latest chapter in efforts to clear up confusion surrounding the interplay between the TCPA and state telemarketing laws.

The U.S. Supreme Court tackled the long-running question of whether federal courts have jurisdiction over TCPA claims in 2012, when it unanimously ruled in Mims v. Arrow Financial Services LLC that private TCPA suits can be adjudicated in both state and federal courts.

Courts have also recently rejected numerous efforts by defendants to apply shorter state statute of limitation periods to TCPA claims rather than the federal catch-all limitations period of four years, according to Loeb & Loeb LLP partners Michael Mallow and Christine Reilly.

“Perhaps seizing on the recent 'federalizing' of the TCPA by the U.S. Supreme Court, Patriotic Veterans probably believed their preemption argument had a chance, notwithstanding the express savings clause in the TCPA,” they said in an email. “But given the history of the TCPA, arguing the TCPA was preempted presented numerous obstacles.”

The Seventh Circuit said in its opinion that it was "clear" that states have historically held the power to police harassing telephone calls, and that the district court had overstepped its authority by trying to fix what it perceived to be a “perplexing result” caused by the preemption clause that would have permitted states to ban robocalls but prevent them from putting in place more restrictive restraints.

“Even were this an odd result, the court’s job is not to fix it,” the panel ruled.

While the preemption question may be settled in the Seventh Circuit for the time being, the question of whether the Indiana law violates the First Amendment by restricting political speech — which the panel directed the district court to examine on remand — presents another issue that could also have a significant impact on the flow of telemarketing-related class actions challenges in the future, attorneys noted.

"A successful challenge on First Amendment grounds to the Indiana statute could apply equally to the mobile phone portion of the TCPA, which would then permit parties making noncommercial calls and messages that implicate the First Amendment to use autodialers to transmit such calls and messages," Mallow and Reilly said. "Given this potential impact on both the Indiana state statute as well as the federal TCPA, the Patriotic Veteran's case should be closely watched."

Patriotic Veterans is represented by Mark J. Crandley of Barnes & Thornburg LLP and Allison Hayward and Brad Smith of the Center for Competitive Politics.

The case is Patriotic Veterans Inc. v. State of Indiana et al., case number 11-3265, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Michael Lipkin. Editing by Elizabeth Bowen.