

Mich. TCPA Ruling Exposes Carrier Policies, Outreach Practice

By **Abraham Gross**

Law360 (June 6, 2023, 5:24 PM EDT) -- A Michigan appeals court ruling that an insurance company must face claims that its repeated calls to a man's cellphone broke legal protections against intrusive sales calls at home exposes carriers to risk and compliance issues, experts told Law360.



A Michigan Court of Appeals panel's finding that cellphones may constitute residential lines under the Telephone Consumer Protection Act and a Wolverine State's statute exposes insurance carriers to risk from the policies they issue and from their own telemarketing and consumer outreach practices, practitioners say. (AP Photo/Mark Lennihan, file)

The three-judge Michigan Court of Appeals panel on May 26 **unanimously rejected** a lower court's finding that Transamerica Life Insurance Co. could dodge most of the claims because the telemarketing laws it was accused of violating protected only "residential users" from abusive practices.

The judges followed federal courts and the Federal Communications Commission's guidance to find that mobile phone users can be residential users under the Telephone Consumer Protection Act, or TCPA, and a related Michigan telecommunications law.

The court's finding that cellphones may constitute residential lines under the TCPA and the Wolverine State's statute exposes insurance carriers to risk from the policies they issue and from their own telemarketing and consumer outreach practices, according to practitioners.

The increased exposure may push carriers to change their practices, further exclude TCPA-related claims and seek settlement over protracted and expensive discovery while they wait for further case law and federal guidance to clarify TCPA fact-finding thresholds and the scope of protections.

Expanding Protections Increases Carrier Exposure

The panel said in its opinion that the FCC has clearly stated TCPA protections for residential users apply to cellphone users, and federal courts have followed suit.

Applying the same reasoning to the Michigan Home Solicitation Sales Act, the judges found that the law's bans on robocalls to home phones and solicitation calls to people listed on the national do-not-call registry also cover cellphones, if those cellphones are used as home phones.

At the same time, the panel remanded the case to the lower court to determine if the plaintiff was using his cellphone as a residential phone, saying that the issue could not be determined until after discovery takes place.

Experts, including those representing carriers, broadly agreed that the finding that cellphones could qualify as residential lines was consistent with other court rulings and a practical consideration given the proliferation of cellphones, but said the decision raised hurdles for carriers.


"With these factual questions, it's more likely that defense is going to be expensive and less likely that the issues will be decided on motion," Jessica Collier of Husch Blackwell LLP said. "It would increase the exposure, especially if other states were to follow suit with these kinds of findings."

She told Law360 that the relative dearth of appellate court decisions on these issues meant the ruling could be used for cases in other jurisdictions, but would still force carriers into detailed fact-finding for the circumstances of each individual and how they use their cellphone

"I think it's helpful in Michigan because it's binding authority there, and then in other states it's persuasive authority," Collier said. "But at the end of the day, a lot of these are factual questions that the trial courts have to decide."

Overlapping Protections Exacerbate Uncertainty, Compliance Costs

The decision underscores how different state laws predating or modeled on the federal TCPA overlap and differ, raising the compliance cost for carriers looking to navigate the risks for their clients and in their own customer outreach efforts.

Alexandra Krasovec of Manatt Phelps & Phillips LLP told Law360 that many of the TCPA-related issues derive from the U.S. Supreme Court's unanimous April 2021 decision in **Facebook Inc. v. Duguid** , which **significantly narrowed** the scope of the TCPA by limiting the act to random-fired calls and texts to cellphones.

The justices overturned a Ninth Circuit ruling that broadly defined the type of automatic telephone dialing systems, or ATDS, prohibited by the TCPA to cover any equipment that has the capacity to store and automatically dial numbers, even if the numbers haven't been generated by a random or sequential number generator.

Instead, the high court agreed with **the stance pressed** by Facebook, the federal government and others that the lower court's broad view of the type of devices subject to the TCPA's robocall restrictions flew in the face of both grammar and the 1991 statute's purpose to stop random-fired calls.

Since then, Florida, Oklahoma, Washington, New York, Maryland and Michigan all have either proposed or enshrined TCPA-like protections into law, and laws predating the Facebook ruling have become newly relevant.

"There have been a lot of changes at the state level and there has been a lot of increase in state law claims as a result," Krasovec said. "Many of these laws were enacted or amended to address the contraction of the TCPA's application."

She noted that for carriers, decisions like the Michigan ruling raise further questions, like how a carrier

determines the recipient of a call, how their cellphone is used, the applicable state law that governs protections and how those protections can be enforced for cellphones crossing state lines.

The task is made more difficult by the ever-shifting landscape of state protections and insurer obligations.

In May, Florida amended its own mini-TCPA law to **roll back protections**, in a move that business leaders said would reign in a cottage industry of meritless lawsuits over legitimate texts to customers and opponents warned could unleash the telemarketing industry and flood Floridians with unwanted calls.

Case law governing the availability of insurance coverage for claims brought under the TCPA and parallel state laws also continues to evolve. In November, the California Supreme Court held that commercial general liability policies **may cover liability** for right-to-seclusion violations brought under the TCPA, as long as coverage is consistent with an insured's reasonable expectations.

"One of the things that makes TCPA compliance complex is that you need to know what the trends are and be able to figure out where everything is moving," Krasovec said.

Mich. Ruling Incentivizes Due Diligence, Carveouts, Settlements

The Michigan appeals court's decision to broaden the scope of TCPA and TCPA-like laws and impose additional fact-finding requirements may push insurers to alter their in-house outreach practices and the kind of protections they offer to policyholders, experts said.

Aaron French of Sandberg Phoenix & von Gontard PC noted that the decision found that callers could not rely on customer-information sheets from an acquired or acquiring company as proof of consent for outreach, a finding that challenges existing practices and stresses the importance of additional due diligence.

"In the insurance industry, that kind of stuff happens all the time, where certain insurers are purchasing others or divisions of others," French told Law360. "If you are a successor company, don't just think that you can get the customer list from your predecessor and start making calls."

Experts told Law360 that carriers will likely receive additional clarity as courts — including the trial court in Michigan — work through the details of discovery to determine what degree of fact-finding is necessary to conclude if a phone is residential and resolve other questions in TCPA-based claims.

Federal guidance is also crucial for assessing risk. In **rulemaking proposed** May 18, the Federal Communications Commission said it would consider toughening several consumer consent requirements for robocalls and junk texts, including clarifying how users can revoke consent.

The development comes as the agency continues to clamp down on illegal calls, **extending call-blocking rules** to cover more voice service providers and floating additional robocall measures.

Until that clarity comes, however, insurers may increasingly add TCPA exclusions to their general liability policies or seek to preempt disputes before they reach a discovery phase made all the more intricate and costlier by the Michigan court's findings, experts said.

"It could lead to muddier coverage disputes and also cost-benefit analyses that need to be done by insurers early on to determine, do we want to trigger a coverage fight here or do we want to get this thing resolved," French said.

--Additional reporting by Carolyn Muyskens, Allison Grande, Piper Hudspeth Blackburn, Christopher Cole and Carolina Bolado. Editing by Nick Petruncio.