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TCPA CLASS COUNSEL LOSES MILLIONS: \$60MM+ Class Recovery Looks to be Down the Tubes as Eleventh Circuit Finds No Insurance Coverage for TCPA Suit

"The policy at issue has an exclusion for claims 'arising out of' invasions of privacy."

Why this is important: When prosecuting claims on behalf of clients, one of the most important aspects of litigation management is the ability to actually recover or receive payment for any settlement, judgment, or jury award. Insurance coverage is often a critical component of plaintiffs' ability to recover when the company is small – especially when the amount is above the company's insurance deductible. Unfortunately, coverage issues almost always are decided *after* the fact. In this case, the parties settled a TCPA class action for \$60 million. Thereafter, the insurer denied coverage for the claims and refused to pay. The business assigned the right to sue to the plaintiff in exchange for an agreement not to pursue the \$60 million from the business. The district court held that the insurance policy did not cover the parties' TCPA claims due to an exclusion for invasion of privacy claims. On appeal, the Eleventh Circuit affirmed. **This case may set a precedent for insurance coverage for TCPA cases across the country. Businesses with current or pending TCPA claims should carefully review any reservation of rights letters and their insurance policies for potential exclusions relating to TCPA claims.** --- [Angela L. Beblo](#)

CUNA, Trades Request Rehearing on appeal's court FD CPA decision

"The organizations are seeking a re-hearing following the opinion released in the 11th Circuit Court that prohibits not only third-party debt collectors, but also the entire financial services industry from using third-party service providers which are vital to servicing loans."

Why this is important: Regular readers of *All Consuming* will remember we previously reported on the *Hunstein* decision, in which a panel of the 11th Circuit Court of Appeals held that a collector providing information to a vendor it retained to prepare and send letters to debtors violated the FD CPA. Since that decision was issued, the collector and many others in the accounts receivable industry have requested a rehearing before the entire 11th Circuit. The Credit Union National Association (CUNA) now has joined

the fight to request a rehearing to address the panel's decision and its impact on not only the accounts receivable industry, but also on what it sees as an impermissible restraint on commercial speech. **With so many trade organizations supporting the request for a rehearing and the possible punitive effects of the panel's decision, the question of whether a rehearing will be granted is being watched by virtually everyone in the accounts receivable industry.** --- [Nicholas P. Mooney II](#)

U.S. housing regulator extends eviction freeze for some multifamily property

"The move from the Federal Housing Finance Agency (FHFA) applies to any multifamily property owners who have sought forbearance with the enterprises due to financial hardship."

Why this is important: The Federal Housing Finance Agency (FHFA) is extending the ongoing moratorium on evictions at multifamily properties backed by Fannie Mae and Freddie Mac until the end of September 2021. Under the extension, multifamily property owners cannot evict tenants for not paying rent or charge late fees for unpaid rent. This relief is the third time the FHFA has extended the eviction moratorium in an effort to provide relief to struggling property owners and renters amid the pandemic. **The extended moratorium is another in the broader legal conflict about government efforts to curb evictions.** Earlier this year, several federal appeals courts issued conflicting opinions on the efforts to lift a separate nationwide moratorium on residential evictions established by the U.S. Centers for Disease Control and Prevention (CDC). --- [Bryce J. Hunter](#)

"Disturbing": Cell Phone Carrier's Internal Coding Leads to TCPA Suit —Case Brought from Resulting Confusion Dismissed but Attorneys' Fees Denied

"According to the decision, the Defendant initiated an investigation as to the source of Plaintiff's calls when it was sued for calls it believed it did not make."

Why this is important: This case involves a mistake that led to thousands of dollars of attorney's fees being incurred by a defendant. An individual sued a business under the TCPA for unwanted calls in *Davis v. Acorn Stairlifts, Inc.* Defendant determined that it did not make the calls and served a Rule 11 letter on plaintiff, based upon defendant's finding that the calls "had actually come from a third-party but that codes inserted by the plaintiff's cell phone carrier made it look like the calls had come from defendant[.]" Plaintiff dismissed at the last possible moment and defendant attempted to recover its costs and approximately \$44,000 in attorney's fees. The United States District Court for the Northern District of Texas denied fees, but granted costs totaling \$484.45. **While this matter appears to be an anomaly, it is a good reminder that businesses that find themselves facing TCPA claims with no record of actually making calls should pursue all avenues of investigation of the alleged calls to defend themselves.** --- [Angela L. Beblo](#)

Two Judges Question whether the 7th Circuit has Gone Too Far in Standing Decisions

"The Seventh Circuit Court of Appeals has been quite clear in its recent holdings regarding Article III standing in FDCPA cases: to have standing a consumer must do more than allege an FDCPA violation."

Why this is important: The 7th Circuit Court of Appeals has held that, to have Article III standing to bring an FDCPA case, a consumer must do more than merely allege an FDCPA violation. Last month, the 7th Circuit reiterated that holding in *Markakos*. In that case, a consumer claimed a debt collector sent her collection letters with inconsistent amounts that confused her. She did not pay the amounts and disputed the debt. The 7th Circuit ruled she did not have standing to pursue her claims because she failed to show she had suffered an injury in fact. As the court put it, she has not paid a dime, and she has properly disputed her debt. Thus, winning or losing the lawsuit will not change anything. If she loses, she will continue to dispute the debt, and, if she wins, she will do the same thing. **What is interesting about the court's decision is that two of the judges on the panel issued concurring opinions that question whether the 7th Circuit's standing decisions have gone too far. One judge**

questioned whether those decisions take "too restrictive a view" of standing. The other cautioned that the decisions run the risk of thwarting Congress' intent and that the court might be well advised to adopt a rule that an allegation of an FDCPA violation adequately alleges a risk of harm that would confer standing. The 7th Circuit's decisions have made it a court to watch as courts around the country weigh in on standing under the FDCPA. It will be interesting to see if the two concurring opinions in the *Markakos* case signal a change in direction in the 7th Circuit. --- [Nicholas P. Mooney II](#)

Incremental step toward necessary student debt relief

"Pennsylvania Attorney General Josh Shapiro is extending some relief to those who have attended schools within the State System of Higher Education."

Why this is important: Pennsylvania Attorney General Josh Shapiro announced that, effective May 5, 2021, nearly \$18,000,000 in unpaid fees owed by 4,760 students in the Pennsylvania State System of Higher Education system that had been passed on to private collection agencies would be recalled to the Office of the Attorney General ("OAG"). In a release, available [here](#), the OAG noted that "[t]he Commonwealth will no longer send outstanding student fees to for-profit debt collectors, and efforts by a university to send student fees to for-profit debt collectors before more consumer-friendly efforts are attempted will no longer be approved." The OAG noted it plans to establish an online system to make payments no later than 2022, and the OAG will build payment plans that accept personal checks, as opposed to only accepting cashier's checks and money orders. **Higher education stakeholders, and state and federal officials, will be paying close attention to this consumer-friendly development from AG Josh Shapiro.** Time will tell whether this new initiative is a success. --- [Wesley A. Shumway](#)

Featured Spilman Attorney Profile



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Ms. Marco is a Member attorney working out of Spilman's Harrisburg, Pennsylvania and Charleston, West Virginia offices. Her practice focuses on commercial transactions with an emphasis on serving health care, banking and finance, and industrial clients. She advises clients regarding contractual matters, corporate governance, and mergers and acquisitions. She also has served as outside general counsel for numerous clients throughout her career.

Ms. Marco has been listed on the West Virginia *Super Lawyers* "Rising Stars" list and is admitted to practice in West Virginia and Pennsylvania. She earned her undergraduate degree, *summa cum laude*, from Chatham College and her law degree, *summa cum laude*, from West Virginia University College of Law.

Thank you for reading this issue of *All Consuming!* We hope you found the information timely and useful. If you have topics you would like us to cover or would like to add someone to our distribution list, please [email us](#).

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