

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

Volume 9, Issue 5: Fall 2005

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“Opportunities and Pitfalls for Policyholders in Defending Blast Fax Class Action Lawsuits Under The TCPA”

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I. THE BETTER-REASONED CASE LAW CONTINUES TO AFFIRM THAT TCPA/“BLAST FAX” CLAIMS TRIGGER “INVASION OF PRIVACY” OFFENSE COVERAGE

Commercial General Liability policies from 1976 on provide coverage for “advertising injury” and “property damage” which include “advertising injury” as well as “personal injury” coverage for “invasion of a person’s right of privacy.” The “advertising injury” coverage requires that it be in the course of advertising.

The TCPA, at 47 U.S.C. § 227(b)(3), states, “A person or entity may . . . bring . . . (B) an action to recover for actual monetary loss from such a [unsolicited fax advertisement] violation, or to receive \$500 in damages for each such violation, whichever is greater If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.”

An Illinois appellate court recently addressed whether this language covers a claimed TCPA violation, applying Illinois coverage law, in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 834 N.E.2d 562 (Ill. App. Ct. (2d Dist.) 2005). The appellate court found that, while federal courts are not in agreement as to whether such claims are covered under the advertising injury provisions of a CGL policy, “insurance-policy construction in Illinois compels us to find a duty to defend in this case.” *Swiderski*, 834 N.E.2d at 571. The appellate court construed the language of the policy, which language is identical to that in most issued policies. The court found that the terms “publication” and “privacy” must be given their plain, ordinary and popular meanings which would reasonably be understood to include the alleged transmission of an unsolicited fax advertisement in violation of the TCPA. *Id.* at 573.

The appellate court refused to follow a recent decision by the Seventh Circuit Court of Appeals that held there was no potential for coverage for the normal consequences of facsimile advertising under a similar CGL policy. *See American States Ins. Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004). The Seventh Circuit found that the term “privacy” has many connotations, which means it has numerous reasonable meanings. *Id.* at 941. Instead of applying

Illinois coverage law to this finding, which would mean the term is ambiguous, the Seventh Circuit decided it was in the best position to decide what the term means in the policy. *Id.* at 942. The Seventh Circuit decided that the seclusion interest that is one of the reasonable meanings of “privacy” did not apply in that case because the corporation plaintiff did not have an interest in seclusion. *Id.* The court explained that corporate managers have interests in seclusion but less so at their place of business because they anticipate receiving business phone calls and faxes. *Id.*

Most TCPA cases include plaintiffs who are individuals who allegedly received unsolicited fax advertisements from class action defendants. The reasoning of the Seventh Circuit does not apply to circumstances based upon the admitted interest an individual has in seclusion, which is a reasonable meaning of “privacy.” It is further undisputed that the TCPA seeks to protect the privacy interests of telephone consumers. Thus, even under the analysis of the Seventh Circuit, class action claimants’ allegations include “violation of a person’s right of privacy.”

The policy also requires that the “violation of a person’s right of privacy” include publication. The Seventh Circuit found that publication was irrelevant to seclusion because a person’s seclusion interest may be violated without a publication. *Capital Associates*, 392 F.3d at 942. This determination, however, begs the question. For purposes of coverage, a seclusion violation is not covered unless there is a publication that violates the right of privacy. Thus, the seclusion violations that the Seventh Circuit found needed no publication would simply not be covered under the insurance policy. In fact, the court stated, “Perhaps automated faxes to hundreds of recipients could be deemed a form of publication . . .” *Id.* at 943. This is the very situation in which many corporate defendants found themselves; thus they allegedly violated the rights of privacy of the class plaintiffs through a publication.

The Illinois appellate court, in *Swiderski*, found that the term “‘publication’ would not convey to the average, ordinary, normal, reasonable person an intention to include only communications sent to a third party.” *Swiderski*, 834 N.E.2d at 573-74. Finding reasonable competing meanings to the term, the appellate court found “publication” is ambiguous and the court was not in a position to choose which interpretation to follow, as doing so is contrary to Illinois coverage law. *Id.* at 574. Since the Seventh Circuit agreed that the sending of faxes to numerous recipients could be a form of publication and an Illinois appellate court has so held, the sending of numerous faxes by class action claimants satisfies the publication requirement.

II. NO EXCLUSIONS EXCUSE DUTIES UNDER TYPICAL CGL POLICIES

A. The Insurer Bears the Burden of Proving the Applicability of Exclusions

In virtually every forum, an insurer attempting to eliminate its contractual obligations through application of exclusionary terms bears the burden of proof. *See Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 871-72 (1st Dist. 2003) (“[I]t is the insurer’s burden to affirmatively demonstrate the applicability of an exclusion. . . . [C]ourts will liberally construe any doubts as to coverage in favor of the insured, especially when the insurer seeks to avoid coverage based on an exclusion to the policy.” (citation omitted)).

Liability for violation of the TCPA attaches regardless of whether the damage results from an act that was expected or intended by the insured to cause injury. For example, the TCPA does not require that the defendant intend or knowingly transmit the fax to a recipient who has not welcomed or solicited the facsimile.

B. Willful Violations of a Penal Statute or Ordinance Exclusion

There are express “advertising injury”/“personal injury” exclusions in the insurer’s policy. They include “willful violations,” which provides, “[T]his insurance does not apply to **advertising injury** or **personal injury** arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the **insured**.”

One court has determined that the exclusion does not apply to claims alleging violation of the TCPA. In *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 848, 849 (N.D. Tex. 2003), the District Court analyzed Gulf’s assertion of the “willful violations” exclusion by comparing the definition of “penal statute” in relation to claims made under the TCPA and the Texas Fax Law at issue there. It found that “the determinative issue is whether the TCPA is a penal statute or ordinance. . . . In light of the definition of a penal statute, **the Court concludes that the Texas Fax Law is a penal statute, but that the TCPA is not.**” [Emphasis added.]

Similarly, the insurer's "willful violations" exclusion does not apply to the TCPA claims because it is not a penal statute or ordinance. This exclusion is much like that for criminal acts addressed and rejected as a grounds for denial of a defense in *Park University v. American Cas. Co.*, 314 F. Supp. 2d 1094 (D. Kan. 2004). There, the exclusion provided for "advertising injury" that "'aris[es] out of a criminal act committed by or at the direction of any insured.'" *Id.* at 1110. Rejecting the applicability of that exclusion to the TCPA violation, the court reasoned at 1110:

Again, American faces the same problem as with all of its arguments assuming that Park intentionally targeted people who did not solicit its advertisements. 720 ILCS § 5/26-3(b) only prohibits *knowingly* using a facsimile machine to send unsolicited advertising. The complaint in the underlying state court action does not allege only that Park *knew* that the facsimile was unsolicited; the complaint also alleges that Park *should have known* that the facsimile was unsolicited. Moreover, the complaint does not allege a criminal act under 720 ILCS § 5/26-3. For these reasons, the court cannot conclude that there is no possibility of coverage under the policy.

Thus, the "willful violation of a penal statute or ordinance" exclusion does not apply to the insured's alleged violation of the TCPA.

C. The "Prior Publication" Exclusion Does Not Excuse the Insurer's Defense Duty

Insurers may agree that their duties to corporate insureds are excused because an insured may have a similar advertisement prior to the policy inception. This assertion ignores the fact class action complaints allege that the corporate insured transmitted a fax advertisement prior to the policy's inception, let alone an injurious fax advertisement prior to their inception. Typically, the class representative only alleges receipt of an injurious fax advertisement during the insurer's policy and no evidence is often presented to the contrary.

In addition, the "first publication" exclusion's application has been limited by court decisions in the following ways:

1. This exclusion applies only to libel, slander, and invasion of privacy torts because only these offenses are based upon "oral or written publication of material."
2. It applies where injurious publication of material precedes policy inception for libel, slander and invasion of privacy torts.
3. Liability that first attaches for intellectual property rights that do not come into existence until after policy inception fall outside the exclusion.
4. Advertisements which differ from those issued during a preceding policy period are covered.

III. CONCLUSION

As noted in our last newsletter, insurers are seeking to limit coverage for TCPA claims by **endorsements that significantly limit potential coverage for TCPA ("blast fax") or CAN-SPAM ("misguided e-mail") claims.**

This is a critical year to be especially conscious of what form of policy your company will obtain that can respond to intellectual property/business torts and e-commerce risks. It is critical to review any new endorsements that limit this coverage and either negotiate the elimination/modification of these endorsements or procure broader coverage from another primary or umbrella insurer. **For a list of CGL insurers that still offer reasonably broad coverage, contact ntk@gauntletlaw.com. This effort should be resisted. Pursuit of TCPA coverage claims should continue as the policy's plain language, properly construed in accord with majority rules of construction, supports finding of a defense.**

PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at **1-800-638-8437**.

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- **April 23-27, 2005** – RIMS Annual Conference – Honolulu, Hawaii – David A. Gauntlett is a featured speaker. His presentation is entitled: Bringing the Insurer to the Table in Intellectual Property Litigation.

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If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

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