Case Alert

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# California Supreme Court Decision on TCPA Liability Could Provide Open Season for Policyholders

The California Supreme Court recently accepted a certified question from the Ninth Circuit regarding coverage for claims arising under the Telephone Consumer Protection Act ("TCPA"). The Court will determine whether a commercial general liability ("CGL") policy's modified personal and advertising injury coverage clause includes claims based on the insured's sending of unsolicited text messages that do not reveal private information.

In *Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania,* No. 17-16452 (9th Cir. 2019), National Union sold Yahoo! five consecutive one-year CGL policies. These policies include an endorsement that makes three key modifications to the personal and advertising injury coverage part.

1 .The endorsement deletes the standard ISO CGL exclusion which excludes coverage for violations of the TCPA.

2. The endorsement limits the scope of coverage to "personal injury," with five components to that definition. As is relevant here, the definition includes "[o]ral or written publication, in any manner, of material that violates a person's right of privacy."

3.The endorsement excludes coverage for "advertising injury," which also has multiple components. The pertinent component of the definition incorporates, "[o]ral or written publication, in any manner, of material in your 'advertisement' that violates a person's right of privacy."

Yahoo! was named as a defendant in five putative class action lawsuits: two in California, two in Illinois, and one in Pennsylvania. All five lawsuits alleged Yahoo! violated the TCPA by transmitting unsolicited text message advertisements to putative class members. Yahoo! tendered to National Union for defense under its CGL policies. National Union denied the tender and Yahoo! subsequently commenced an action for breach of contract.

In June 2017, the Northern District of California granted National Union's motion to dismiss, holding that the policy's coverage for personal injury arising out of "[o]ral or written publication, in any manner, of material that violates a person's right of privacy" did not apply to Yahoo!'s TCPA liability because of a distinction between the right to privacy of one's information and the right to seclusion from receiving material. Yahoo! appealed.

Two California Court of Appeals decisions have addressed this issue in slightly different contexts, each reaching different results that could influence the result in this case. In *ACS Systems Inc. v. St. Paul Fire & Marine Insurance Co.,*[1] the policy covered "advertising injury" only. The alleged "advertising injury" at issue arose from a disputed clause in the insured's policy, which referred to "[m]aking known *to any person or organization* written or spoken material that violates an individual's right of privacy."

The *ACS Systems* court determined that the injury was felt by the party whose private material was made known, not the one to whom information was made known. Thus, the court held that TCPA claims implicating the right to seclusion were not covered because the policy's coverage was limited to violations of the right to secrecy. However, *ACS Systems* also explained that other cases, which involved "differ[ent]" policy language that "did not define 'right of privacy' or 'oral or written publication," did include coverage for TCPA claims. The Ninth Circuit reasoned that, because the language present

in Yahoo!'s claim is similar to the language in cases *ACS Systems* distinguished, *ACS Systems'* holding could potentially support coverage in *Yahoo!*.

Conversely, in *State Farm Gen. Insurance v. JT's Frames Inc.*,[2] the Court of Appeals considered the policy language that ACS Systems distinguished – advertising injury arising from "oral or written publication of material that violates a person's right of privacy" – and held that it did not cover TCPA liability.

The court in *JT's Frames* utilized the legal concept of "last antecedent," which states that "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding…." Applying this principle, the court examined the phrase, "that violates a person's right to privacy" and concluded that the phrase must be construed to modify the word "material," rather than the phrase "publication of material."

The court further explained that "to come within the policies' definition of 'advertising injury,' the *material* at issue must violate a person's right to privacy." That can be the case only if the content of the material contains confidential information.

Given the legal cottage industry for TCPA class actions that has developed in recent years, akin to those for asbestos claims and ADA claims, this decision will have extensive importance for all policyholders operating in or based in California. SDV will continue to monitor this case and will provide additional insight when the California Supreme Court issues an opinion.

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1. *ACS Systems Inc. v. St. Paul Fire & Marine Insurance Co.,* 147 Cal. App. 4th 137 (2007).

2. *State Farm Gen. Insurance v. JT's Frames Inc.,* 181 Cal. App. 4th 429 (2010).