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TCPA Insurance Claim Issues Continue To Evolve

By **Cort Malone and Nicholas Maxwell** (March 21, 2018, 12:40 PM EDT)

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As plaintiffs seek to enforce the Telephone Consumer Protection Act of 1991 with greater regularity, high dollar-value judgments and settlements have become commonplace. This uptick in TCPA cases has in turn led to a wealth of new TCPA-related insurance coverage decisions, most recently in Illinois Union Insurance Company v. U.S. Bus Charter & Limo Inc. There, a New York federal court adopted a broad reading of one key policy term, "professional services," that could strengthen policyholders' arguments for TCPA coverage under errors and omissions policies.

TCPA claims spur coverage disputes in part because the same TCPA violation potentially can trigger multiple different types of insurance coverage: (1) property damage coverage under a commercial general liability policy's "Coverage A"; (2) intangible invasion of privacy coverage under a CGL policy's "Coverage B" for personal or advertising injury; (3) errors and omissions coverage for conduct undertaken in the course of a policyholder's provision of "professional services"; and (4) directors and officers coverage for allegations directed toward conduct by a company's directors or officers.

This article explores multiple evolving arguments for coverage for TCPA claims through the prism of three recent decisions.

The TCPA

In 1991, Congress passed the TCPA in an effort to protect consumers from unwanted automated telephone calls and faxes. The law now covers cell phone text messages as well. It attempts to set boundaries differentiating lawful communications (for example, those where the recipient has given consent in advance) from unlawful communications (for example, those including advertising content without consent).

Damages under the TCPA can be severe — $500 for every single unlawful call, fax or text, or actual

damages, whichever is higher. On top of that, courts can award treble damages for willful violations. In the past 5-10 years, hundreds of new TCPA cases have yielded a steady stream of high dollar-value judgments and settlements. In light of the $500 per call damages provision and the breadth of many TCPA automated calls, defendants often settle on favorable terms for class action plaintiffs rather than run the risk of an astronomically high judgment.

Evolving Coverage Issues

The nature of TCPA claims leaves policyholders with multiple possible avenues to coverage, but also incentivizes each potentially responsible insurance company to argue that its policyholder should look elsewhere for coverage. This area of law is rapidly evolving, making experienced insurance coverage counsel especially helpful for policyholders. There are at least three key questions that have arisen in recent cases involving insurance coverage for TCPA claims, which are discussed below.

Does a TCPA Claim Inherently Arise from an Invasion of Privacy?

In Los Angeles Lakers Inc. v. Federal Insurance Company, an Aug. 23, 2017, decision involving potential D&O coverage for automated texts sent by the Los Angeles Lakers, the U.S. Court of Appeals for the Ninth Circuit construed the policy's invasion of privacy exclusion. The exclusion barred coverage for claims "based upon, arising from, or in consequence of … invasion of privacy." The court analyzed the legislative purpose of the TCPA to determine whether Congress passed the statute to combat invasions of privacy, or was also intended to address other wrongs that might take it outside the scope of the exclusion.

The Ninth Circuit, though acknowledging that Congress may have enacted the TCPA to address other issues in addition to invasion of privacy, nonetheless held that any TCPA case alleged "an implicit invasion of privacy" and barred coverage based on the invasion of privacy exclusion, a version of which is found in many D&O policies.

Los Angeles Lakers, which happened to follow a factually identical TCPA claim against the Los Angeles Clippers, was touted as a victory for insurance companies. However, the reality is less clear. First, a strenuous dissent argued that looking beyond the plain text of the statute was inappropriate in the absence of textual ambiguity, and that TCPA claims were not automatically invasion of privacy claims. The dissent emphasized that the plaintiff chose not to bring common law invasion of privacy claims, which would have made the insurance company's argument stronger.

Second, and critical to the interpretation of the Lakers case, the judge who cast the deciding vote for the insurance company also wrote the following brief but pointed concurrence arguably limiting the scope of the ruling:

I concur with the court's order affirming the decision below. I write separately because the court can — and should — decide the question of whether Emanuel's [the underlying plaintiff's] claim arose from an invasion of privacy on narrower grounds. Emanuel alleged several times in his complaint that the

message he received was an invasion of his privacy. Those allegations are sufficient to determine that Emanuel's claim arose from an invasion of privacy. The court need not hold more broadly that a TCPA claim is inherently an invasion of privacy claim.

According to the concurrence, the simple presence of a TCPA cause of action does not mean an invasion of privacy exclusion automatically applies. Together, the concurrence and dissent could give D&O policyholders in the Ninth Circuit a plausible avenue to distinguish the Lakers decision.

Do TCPA Damages Arise from "Professional Services" Qualifying for Coverage under E&O Policies?

In its March 8, 2018, decision in Illinois Union Insurance Company v. U.S. Bus Charter & Limo Inc., a New York federal court considered whether unsolicited text messages from a bus chartering company fell within the policyholder's E&O coverage. The policy described the policyholder's "Professional Services" covered by the policy as including provision of "bus charter broker" services. The term "bus charter broker" was not defined in the policy, but the court looked to other statutes and the dictionary to characterize a broker as "one who acts as a middleman in bargains." In the text messages in question, the policyholder made various offers to recipients to book bus and limousine travel.

The court determined that the services offered were of precisely the sort that a "bus charter broker" would offer. The insurance company countered that "Professional Services" are those that a policyholder provides for its clients' benefit, not directly to consumers for its own benefit. The court was not persuaded, citing the overlap between advertising for oneself and for others in the "modern business world." The court granted coverage for the policyholder's $50 million settlement of the TCPA claims, explaining that excluding coverage would require it to "arbitrarily separate" one part of the policyholder's business from another.

The U.S. Bus Charter case is just the latest in a string of several cases where policyholders have successfully obtained E&O coverage for TCPA claims.

Are Damages Awarded under the TCPA Remedial or Punitive?

In its Feb. 21, 2018, decision in Ace American Insurance Company v. Dish Network LLC, the U.S. Court of Appeals for the Tenth Circuit addressed the "personal or advertising injury" coverage grant in a CGL policy. The insurance company alleged that the policyholder, who had been accused by the underlying plaintiff of "willful and knowing" TCPA violations, sought coverage for penalties that are uninsurable as a matter of public policy. The parties disputed whether statutory damages under the TCPA were "punitive" (intended to punish the defendant) or "remedial" (intended to remedy the underlying plaintiffs' losses). The former would be excluded; the latter would be covered.

Interestingly, the court reached its decision by assessing whether TCPA damages are theoretically assignable to another entity, because under Colorado law, punitive damages cannot be assigned from the offending defendant to another party. The Tenth Circuit acknowledged that courts in other jurisdiction have deemed the TCPA a remedial statute, and recognized the policyholder's argument that

statutes can be penal in some contexts and remedial in others. Nonetheless, the court deemed the statutory damages awarded against the policyholder in this case penal in nature, and therefore uninsurable.

While the insurance company won this round, the Tenth Circuit left open the option for future courts to reach the opposite conclusion. Rather than a blanket holding that all TCPA damages are penal, the court cited the underlying plaintiff's prayer for relief, which focused on the policyholder's "willful and knowing" conduct. Had the prayer been phrased differently, the court acknowledged that its decision might have been different.

Other Considerations

In addition to the cases discussed above, policyholders facing TCPA claims should be on the lookout for a host of other factors that can cut in favor of coverage, as well as several that insurance companies may use to attempt to exclude coverage.

First and foremost, every policy is different. The Lakers court emphasized the broad reading California courts give to exclusionary language for claims "arising from" alleged invasions of privacy. Had the policy instead said "for" or "caused by," the court easily could have sided with the policyholder. The definition of "wrongful act," the scope of exclusions for "advertising" and "broadcasting" companies, and the scope of exclusions for loss arising from intentional acts are just a few of the many instances where courts may base their decision on particular policy language — rather than on precedents specific to coverage for TCPA claims.

Second, insurance companies now regularly attempt to insert TCPA-specific exclusions. While policyholders can and should negotiate to avoid such exclusions at the outset, such exclusions do not necessarily bar coverage for underlying lawsuits alleging TCPA violations. Depending on the scope of the TCPA-specific exclusion, common law claims arising out of the same facts can fall outside the exclusion, triggering the insurance company's duty to defend, a duty that generally applies to the policyholder's entire defense — including the TCPA claim. Defending against TCPA/invasion of privacy cases can be very costly, making defense coverage alone a significant victory. And in some instances, defendants may secure dismissal of a TCPA claim based on the plaintiff's failure to meet the statutory elements but still settle on the remaining common law claims, avoiding the TCPA-specific exclusion entirely.

Third, insurance companies construing invasion of privacy exclusions in D&O or E&O policies may emphasize whether a jurisdiction protects a consumer's "right of seclusion" in addition to her "right of secrecy." It is well established that the invasion of privacy tort protects individuals against public disclosure of private information. However, the extent of protection given to an individual's right to be left alone — in this case from unwanted calls, faxes or text messages — is still evolving. Because TCPA violations are specific to this second type of privacy, policyholders must know if and how robustly a jurisdiction protects the "right of seclusion."

Conclusion

Because TCPA claims inherently exist at the nexus between multiple lines of coverage, the landscape of TCPA insurance coverage law is complex. It is also rapidly evolving. Language in an underlying complaint that may implicate an exclusion in one policy may be just what a policyholder needs to secure coverage under another type of policy. It behooves policyholders to think strategically about how their different lines of coverage interact and consult experienced insurance coverage counsel when confronted with a potentially costly TCPA claim.

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