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Policyholder Alert

Calling All Robo-Callers (and Texters and Emailers)! How a Recent Decision and Dissent Provide Ammunition in the Fight for Insurance Coverage for TCPA Claims


By Cort T. Malone **and** Fiona R. Hogan

Key points:

In *Yahoo, Inc. v. National Union*, the California Supreme Court found coverage for Yahoo's alleged TCPA violations, holding that violations of the "right of seclusion" fell within the policy's coverage grant.

A forceful dissent to an 11th Circuit decision in a second TCPA coverage case, *Horn v. Liberty Ins. Underwriters*, may provide ammunition to policyholders seeking TCPA coverage.

Policyholders facing TCPA liabilities should read their CGL and professional liability policies carefully with an eye toward both plain meaning and potential ambiguities.

As the trend of high dollar value judgments and settlements for plaintiffs alleging violations of the Telephone Consumer Protection Act of 1991 (TCPA) has continued in recent years, more TCPA-related insurance coverage cases have followed. The TCPA aims to protect consumers from unwanted automated telephone calls, faxes and text messages. 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.

A recent decision from the Supreme Court of California, *Yahoo, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa.*, No. S253593, 2022 WL 16985647 (Cal. Nov. 17, 2022), together with Circuit Judge Newsom's vehement dissent in the Eleventh Circuit case, *Horn v. Liberty Ins. Underwriters, Inc.*, 998 F.3d 1289 (11th Cir. 2021), may signal a changing tide in TCPA-related insurance coverage litigation. Policyholders should take note of this recent decision and dissent, as they add ammunition to policyholders' arsenals when seeking insurance coverage for these costly liabilities.

Yahoo

In Yahoo, the Ninth Circuit Court of Appeals certified a question to the Supreme Court of California, asking

whether a CGL insurance policy that provides liability coverage for injuries "arising out of … [o]ral or written publication, in any manner, of material that violates a person's right of privacy" provides coverage for right-of-seclusion violations under the TCPA. The Supreme Court responded that it does, "assuming such coverage is consistent with the insured's reasonable expectations." The decision defined the right of seclusion as "the right to be free, in a particular location, from disturbance by others."

This case arose after National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") denied coverage and declined to defend and indemnify its policyholder, Yahoo, Inc. ("Yahoo"), in a series of class action lawsuits alleging that Yahoo's unsolicited text messages violated the TCPA. Yahoo had purchased National Union's standard form CGL policy as modified by various endorsements, including the negotiated Endorsement No. 1. The policy provided liability coverage for "personal and advertising injury," defined in part to include "[o]ral or written publication, in any manner, of material that violates a person's right of privacy."

While the standard National Union policy form excluded injuries arising from TCPA violations, Endorsement No. 1 modified Yahoo's policy in several key ways. First, it "removed the exclusion for injuries arising from violations of the TCPA." Second, it "provided liability coverage only for 'personal injury' (as compared to 'personal and advertising injury' in the standard version of the policy)," and defined "personal injury" to include, among other things, injuries arising from "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." Third, Endorsement No. 1 excluded liability coverage for "advertising injury."

In interpreting the policy, the Supreme Court of California found the language to be ambiguous. Specifically, the court held that it was "unclear whether the restrictive clause 'that violates a person's right of privacy' modifies a group of words [oral or written publication, in any manner, of material] or a single word [material]." Because the policy language was facially ambiguous, the court attempted to resolve the ambiguity first by employing the standard rules of contract interpretation. Finding that rules of contract interpretation still did not resolve the ambiguity, the court next attempted to interpret the policy language "in favor of protecting the insured's reasonable expectations." There, the court was unable to determine Yahoo's reasonable expectations due to the presence of a Statute Endorsement in the policy and potentially other issues. Ultimately, the court interpreted these "unresolvable ambiguities in favor of the insured." The Supreme Court of California also rejected the Northern District of California's approach in applying the rule of the last antecedent to resolve the ambiguity and obviate coverage.

Thus, the Supreme Court of California held that a CGL policy such as National Union's could cover violations of the right of seclusion when such coverage is consistent with the reasonable expectations of the policyholder. And that "[s]uch a policy can also trigger the insurer's duty to defend the insured against a claim that the insured violated the TCPA by sending unsolicited text messages that did not reveal any private or secret information, provided that the alleged TCPA violation amounts to a right-of-seclusion violation under California law."

Policyholders facing liabilities from TCPA violations should be aware of the potential for ambiguities in their insurance policies, especially when such policies include exclusions and endorsements that alter the scope of coverage like the policy at issue in *Yahoo*.

Horn

In *Horn*, although a majority of the Eleventh Circuit Court of Appeals held that a policy exclusion barring coverage for "[c]laims … arising out of … an

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invasion of privacy" excludes coverage for claims alleging violations of the TCPA, Circuit Judge Newsom penned a **strenuous dissent** in favor of coverage. Judge Newsom's conclusions may aid policyholders in crafting arguments for coverage in other courts.

Judge Newsom disagreed with the majority's conclusion that "claims arising out of an 'invasion of privacy' cannot even reasonably be understood to refer to the century-old common-law tort called 'invasion of privacy.'" He found that not only is the policy at least susceptible to that interpretation, but that it is "best read that way." Judge Newsom noted that the majority failed to show why the plaintiff's interpretation—that "invasion of privacy" refers to the common law tort so that the exclusion excludes coverage only for that tort—was unreasonable. Judge Newsom noted that Florida law defines the common law tort "invasion of privacy" quite specifically: "Florida courts adjudicating invasion-of-privacy-by-intrusion claims require evidence of an invasion that is 'indecent and outrageous and calculated to cause ... excruciating mental pain.'" Furthermore, the dissent explained that the exclusion at issue included "invasion of privacy" in a list of eight other common law torts. The provision stated:

> [Liberty] shall not be liable under [the policy] for Loss on account of any Claim made against [iCan] ... based upon, arising out of, or attributable to any actual or alleged defamation, invasion of privacy, wrongful entry or eviction, false arrest or imprisonment, malicious prosecution, abuse of process, assault, battery or loss of consortium.

Thus, per Judge Newsom, the exclusion ought to have been construed in light of the neighboring words so that the TCPA lawsuit would fall outside the exclusion provision.

Conclusion

When faced with liabilities for TCPA claims, policyholders should read their CGL and professional liability policies carefully with an eye toward both the plain meaning of the contract and potential ambiguities, especially when such policies have exclusions and endorsements that alter the standard policy form. As recently demonstrated in *Yahoo* and *Horn*, both can be used to argue in favor of coverage for TCPA claims.

CORT T. MALONE *is a shareholder in the New York and Stamford, Connecticut, offices of Anderson Kill and practices in the Insurance Recovery and the Corporate and Commercial Litigation departments. He is an experienced litigator, focusing on insurance coverage litigation and dispute resolution, with an emphasis on commercial general liability, directors and officers, employment practices liability, advertising injury, and property insurance issues.*
cmalone@andersonkill.com
(212) 278-1382

FIONA R. HOGAN *is an attorney in Anderson Kill's New York office. She focuses her practice on insurance recovery, exclusively on behalf of policyholders, as well as on regulatory and white collar matters.*
fhogan@andersonkill.com
(212) 278-1017

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