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NEWSLETTER

Court Finds Insurance Coverage for TCPA Telemarketing Claims

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A federal district court, applying Illinois law, has found coverage under a Comprehensive General Liability (CGL) policy for a Telephone Consumer Protection Act (TCPA) claim based on telemarketing calls. *See Travelers Prop. Cas. Co. of Am. v. DISH Network, LLC*, No. 12-03098, 2014 WL 1217668 (C.D. Ill. Mar. 24, 2014). U.S. District Judge Sue Myerscough ruled that Coverage B encompassed the TCPA claims at issue and, in what appears to be a ruling of first impression, also found that the telemarketing claims alleged "bodily injury" and "property damage" within the meaning of Coverage A.

The policyholder, a provider of satellite television products and services, was sued for allegedly making unsolicited telemarketing calls to consumers in violation of the TCPA. When the policyholder sought coverage for that suit under a CGL policy, its insurer filed a declaratory judgment action regarding coverage, and later both parties moved for summary judgment. The court granted summary judgment for DISH, ruling that Travelers had a duty to defend the underlying lawsuit because there was the potential for coverage under provisions of the CGL policy.

Advertising & Personal Injury

The court first determined that the insurer had a duty to defend under the advertising injury and personal injury prongs of Coverage B in the policy, both of which afforded coverage for injuries arising out of the "[o]ral or written publication of material that violates a person's right of privacy." The court relied on the Illinois high court's ruling in *Valley Forge Insurance Co. v. Swiderski*, 860 N.E.2d 307 (Ill. 2006), a case involving "blast faxes," and it held that the language of the policy at

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issue provided coverage for claims alleging violations of individuals' seclusion and secrecy-related interests. In so ruling, albeit without much analysis, the federal district court extended the ruling in *Swiderski*—that a blast fax involved "publication"—to conclude that telemarketing calls did as well.

The court also rejected the insurer's argument that the claim was barred by a "broadcasting exclusion" in the policy. Instead, it concluded that the terms "broadcasting" and "telecasting" were ambiguous and could be read in favor of the insured to not bar coverage. The court acknowledged that its decision conflicted with a recent case involving the same insured and an identical exclusion, *see DISH Network Corp. v. Arch Specialty Insurance Co.*, No. 09-cv-0047, 2013 WL 5735028 (D. Colo. Oct. 22, 2013), stating simply that it "respectfully disagree[d]" with the conflicting decision.

Property Damage

Next, the court ruled that the claim involved "property damage" and thus also triggered coverage under the policy's Coverage A.

The term "property damage" was defined in the policy to include "[l]oss of use of tangible property that is not physically injured." In applying that definition, the court stated:

The Underlying Complaint alleges that [the insured] directly or indirectly made telemarketing phone calls to consumers in violation of state and federal law, specifically the Telephone Consumer Protection Act (TCPA). The natural consequence of such calls is that the consumers receiving them were unable to receive any other telephone calls for some time period. Tying up a consumer's telephone line arguably falls within the [insurer's] Property Damage Definition that includes the loss of the use of tangible property that is not physically injured.

Prior to *DISH Network*, a number of courts have found that claims involving "blast fax" violations of the TCPA alleged "property damage" in the form of lost ink, paper, and use of phone lines. *See, e.g.*, *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 881 (8th Cir. 2005) ("Congress identified the loss of use of equipment and phone lines ... [and] the expense of paper and ink ... as examples of the harm to individuals."); *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 639 (4th Cir. 2005) ("It is obvious to anyone familiar with a modern office that receipt is a 'natural and probable consequence' of sending a fax, and receipt alone occasions the very property damage the TCPA was written to address: depletion of the recipient's time, toner, and paper, and occupation of the fax machine and phone line."). In addition, at least one court had extended this rationale to a case involving text messages sent to cellular telephones. *See Collective Brands, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 11-4097, 2013 WL 66071, *13 (D. Kan. Jan. 4, 2013). Text messages are "calls" within the meaning of the TCPA. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

In what appears to be the first decision of its kind, however, *DISH Network* expands this rationale to rule that insured "property damage" may be alleged in cases involving telemarketing voice calls. Because "property damage" exclusions are commonly found in many professional liability policies, the ruling on "property

damage" may be significant to insurers in other settings. *See, e.g., Resource Bank v. Progressive Cas. Ins. Co.*, 503 F. Supp. 2d 789, 796-97 (E.D. Va. 2007) (property damage exclusion in professional liability policy barred coverage for TCPA claim involving blast faxes).

Bodily Injury

The court also determined that the insurer had a duty to defend under the "bodily injury" prong of Coverage A, observing that the policy at issue in this case defined the term "bodily injury" to include "mental anguish" and concluding that the operative complaint could be read as suggesting that the call recipients "experienced highly unpleasant mental reactions because of the telemarketing phone calls." In this regard, the *DISH Network* decision also appears to pave new ground, although the specific language at issue distinguishes this aspect of the ruling from other cases involving widely-used "bodily injury" definitions which do contain parallel "mental anguish" policy language. *See, e.g.*, *State Farm Fire & Cas. Co. v. Hiermer*, 720 F. Supp. 1310, 1314-15 (S.D. Ohio 1988), *aff'd*, 884 F.2d 580 (6th Cir. 1989) (emotional distress is not "bodily injury").

Expected & Intended

Finally, the court ruled that the claim potentially involved a covered "occurrence" under Coverage B. According to the court, because a question of fact remained about whether the insured believed that the telemarketing calls at issue were authorized, the insurer was not entitled to summary judgment that the claim involved "expected or intended injury." This ruling is contrary to a large number of prior TCPA coverage decisions addressing Coverage A, in which courts have found that there is no insured "occurrence" in a TCPA case since the harms complained of are expected or intended, or are not an accident, because they are the natural consequences of intentional acts. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp.*, 319 Fed. App'x 121, 127 (3d Cir. 2009) ("Because the property damage here is the depletion of paper and toner, and because [the insured] knew that this damage would occur as a result of its unsolicited advertisements, we hold that [the insured] expected or intended to cause the injury.").

Although a number of courts have found the potential for coverage for TCPA claims in the past, most of those rulings have been narrower—for instance, involving "blast fax" claims considered in the context of the advertising injury and personal injury prongs of Coverage B. Here, *DISH Network* goes much further in finding the potential for coverage for a telemarketing TCPA claim under both Coverage A and Coverage B of the CGL policy at issue. This decision is likely to face challenges in future litigation concerning the availability of general liability coverage for TCPA claims.