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NEWSLETTER

No Insurance Coverage for TCPA Claim Under Private Company D&O Policy

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The U.S. Court of Appeals for the Ninth Circuit, applying California law, has held that an invasion of privacy exclusion in a directors and officers (D&O) policy barred coverage for a claim alleging violations of the Telephone Consumer Protection Act (TCPA), which, among other things, creates consent requirements for automated calls and text messages to consumers. *Los Angeles Lakers, Inc.v. Federal Ins. Co.*, No. 15-55777, 2017 WL 3613340 (9th Cir. Aug. 23, 2017).

The Underlying TCPA Case

The insured, a professional basketball team, was sued for violations of the TCPA after it sent text messages to numerous individuals. Specifically, the basketball team invited fans in the arena to text a message to a short code for the message to appear on the arena's screen. When fans texted the short code, they received the following response text:

Thnx! Txt as many times as u like. Not all msgs go on screen. Txt ALERTS for Lakers News alerts. Msg & Data Rates May Apply. Txt STOP to quit. Txt INFO for info

In the underlying TCPA case, *Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12-9936-GW, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013), the plaintiff, who received this response text after texting the team's short code, alleged that the basketball team had violated the TCPA because the response text was an unsolicited automated text. The district court dismissed the plaintiff's claim, explaining that he voluntarily texted the team, and that the "single confirmatory response challenged here is simply not actionable under the TCPA." Nevertheless, the plaintiff appealed to the Ninth Circuit, an appeal

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that was eventually dismissed following the team's settlement with the plaintiff. *Emanuel v. Los Angeles Lakers, Inc.*, No. 13-55678 (9th Cir. Apr. 29, 2014).

The Coverage Litigation

The basketball team tendered the suit under its D&O policy. The insurer denied coverage on the basis that the policy barred coverage for any claim "based upon, arising from, or in consequence of ... invasion of privacy ...." After disputing the denial, the basketball team filed a coverage action against the insurer, arguing that the underlying suit alleged only economic injuries and did not seek damages for the violation of privacy interests. The district court granted the insurer's motion to dismiss and held that the invasion of privacy exclusion barred coverage for the underlying suit. The team appealed.

On appeal, the Ninth Circuit affirmed the dismissal in favor of the insurer. First, after citing the language of the exclusion, the court concluded that the breadth of the exclusion (in light of the "arising from" and "based upon" lead-in language) required only "a minimal causal connection or incidental relationship" between the underlying claim and any invasion of privacy. Next, the court analyzed the phrase "invasion of privacy" and the TCPA, ultimately concluding that "a TCPA claim is, by its nature, an invasion of privacy claim." On that basis, the court held that the complaint, which only alleged violations of the TCPA (and specifically disavowed personal injury claims), was barred by the invasion of privacy exclusion. It affirmed the dismissal in favor of the insurer on that basis.

In a concurring opinion, one judge concluded that while the underlying claim alleged violations of privacy, the court need not determine that all TCPA claims are necessarily claims for invasion of privacy. In a dissenting opinion, another judge suggested that because a TCPA plaintiff is not required to prove invasion of privacy, and because the plaintiff in the underlying case expressly disavowed common law invasion of privacy claims, the invasion of privacy exclusion did not apply.

Important Implications

The Ninth Circuit's decision is important for a number of reasons. First, it is the third case finding no coverage for TCPA claims under Private Company D&O policies. See *LAC Basketball Club Inc. v. Fed. Ins. Co.*, No. CV 14-00113 GAF FFMX, 2014 WL 1623704 (C.D. Cal. Feb. 14, 2014); *Resource Bank v. Progressive Cas. Ins. Co.*, 503 F. Supp. 2d 789, 797 (E.D. Va. 2007). The decision was also the first ruling on this issue from a federal appellate court.

Many other types of insurance policies contain exclusions, like those for invasion of privacy or otherwise, that also bar coverage for TCPA claims. Therefore, organizations facing exposure from claims for violations of the TCPA may be likely to find that their insurance policies do not respond.

The absence of insurance coverage may have a major financial impact on companies facing TCPA exposure. **First**, the cost of TCPA non-compliance is steep. The TCPA imposes statutory damages of $500 per violation, an amount that can be trebled to $1500 per violation if the caller is knowing or willful. These statutory damages can add up to astronomical amounts quickly. As examples, in 2016, a cruise line agreed to pay up to **$76**

million for alleged automated calls in violation of the TCPA, and in 2015, a court approved a **$75 million** class settlement involving a large bank.

Second, the volume of TCPA suits has exploded over the past several years. In 2007, there were 14 TCPA claims filed by unique consumer plaintiffs; in 2016, there were 4,860. *See* 2016 Year in Review: FDCPA Down, FCRA & TCPA Up, *Webrecon* (Jan. 24, 2017). In the 17 months since the Federal Communications Commission (FCC) issued an Order in July 2015 (discussed here), a total of 3,121 TCPA lawsuits have been filed in federal courts – which was a 46% increase in the number of suits from the 17-month period immediately before. In addition, many TCPA lawsuits (including more than 1,000 after the July 2015 FCC Order) are putative class actions – driving up the costs of defending and resolving claims.

Third, TCPA compliance is complex. The environment for companies reaching out to consumers via automated calls and texts is fraught with uncertainty and risk, due in large part to the FCC's July 2015 Order, which significantly broadened the scope of the TCPA. The July 2015 Order is currently being challenged in the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit may provide a much-needed check on the FCC's broad interpretation of the statute; however, that is yet to be determined. Another factor that contributes to the complexity of TCPA compliance is that much interpretation of the TCPA occurs in various district courts, resulting in oftentimes conflicting takes on the statute.

Given the potential for significant and uninsured exposure, and the complexity associated with compliance, companies should invest in legal compliance on the front end to minimize risk and develop practices do not run afoul of the TCPA.