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The Policyholder Law Firm



Alert: Two Recent Decisions in Disputes Over Insurance Coverage for TCPA Claims

By Cort T. Malone and Nicholas R. Maxwell

In recent years, high dollar value judgments and settlements for plaintiffs alleging violations of the Telephone Consumer Protection Act of 1991 (TCPA) have become commonplace. The high stakes in TCPA cases have in turn led to a wealth of new TCPA-related insurance coverage cases. Issues on which courts have ruled this year, discussed below, include the scope of professional liability coverage for TCPA claims and the nature of TCPA damages for purposes of fines and penalties exclusions.

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.

In recent months, federal courts have ruled on two key issues relating to coverage for TCPA judgments or settlements.

1. 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

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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 cases where policyholders have successfully obtained E&O coverage for TCPA claims.

2. Are Damages Awarded under the TCPA Remedial or Punitive?

In its February 21, 2018, decision in *Ace American Insurance Company v. Dish Network, LLC*, the U.S. Court of Appeals for the Tenth Circuit addressed how to characterize TCPA damages for purposes of assessing coverage under 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, was seeking 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 jurisdictions 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.

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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.

For a more in-depth discussion of a broad range of insurance coverage issues arising out of TCPA suits, please see our article, “TCPA Insurance Claim Issues Continue to Evolve” (*Law360*, March 21, 2018). ▲

About Anderson Kill

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