

## Wash. Ruling Endorses Broad Shield Against TCPA Coverage

By **Bibeka Shrestha**

*Law360, New York (January 31, 2013, 9:26 PM ET)* -- A Washington appeals court recently barred coverage for a privacy class action against Papa John's International Inc. franchisees even though a third party carried out the challenged text messaging campaign, bolstering insurers' arguments that an exclusion for potentially costly Telephone Consumer Protection Act claims should be viewed broadly.

Aided partly by a brief quoting children's author Dr. Seuss, Oregon Mutual Insurance Co. persuaded an appeals court to rule that it didn't matter whether the insureds or a third-party marketing company had illegally texted the pizza advertisements at the center of the underlying class action. In a Jan. 14 decision, the appeals court said an exclusion in Oregon Mutual's general liability policy wasn't limited to solely actions by the policyholders.

According to Edwards Wildman Palmer LLP partner Mary-Pat Cormier, the Washington appeals court is just the latest court to hold that the exclusion applies to vicarious liability as well as direct liability. The issue may be novel in Washington — the Papa John's ruling doesn't cite other decisions in the state — but courts in other jurisdictions have already resolved the question in favor of insurers, according to Cormier.

"It's a continuation of a trend," Cormier said. "There's nothing in this that says it has to be the insured."

Oregon Mutual's exclusion applies to injuries arising indirectly or directly out of "any" acts that allegedly violate laws against distributing materials. The insurer successfully argued to the appeals court that the exclusion unambiguously applied to acts by third parties and needed no further clarification.

"Finding ambiguity here is just as odd as finding ambiguity in 'I do not like green eggs and ham' and insisting on adding 'I could not, would not, on a boat. I will not, will not, with a goat ...'" the insurer said in its brief.

The coverage dispute stems from a lawsuit targeting Seattle PJ Pizza LLC, pizza businesses in Washington and Oregon with the same owner, and marketing company On Time 4 U LLC. The class action alleges violations of the TCPA, state laws against unsolicited text messages and automated dialing, and negligence.

While refusing to grant summary judgment to Oregon Mutual, a lower court stressed that the underlying suit hadn't accused some of the defendants of sending any of the text messages or directing anyone to send the messages. But the appeals court reversed that ruling, finding that at the very least, the underlying suit alleges that the defendants were responsible for the injuries because they negligently allowed texts to be sent or because they were vicariously liable for the advertising.

The exclusion "contemplates the situation where the insured may be responsible for an act or omission committed by another," the appeals court said.

Joshua Mooney, a White and Williams LLP attorney, said the appeals court's decision to side with Oregon Mutual could be helpful to other carriers facing coverage claims for TCPA and other types of privacy actions. Exclusions like the one Oregon Mutual used apply to a wide range of unlawful electronic communications, he said.

"It cuts off all these drafting techniques and these little games that plaintiffs' attorneys play to try to get around the exclusion," Mooney said. "[The court] said any act is any act. It doesn't matter who did it."

Specifically, the ruling could give insurers ideas on how to beat coverage claims involving junk faxes, texts or phone calls, according to Daniel Syhre, a Betts Patterson Mines PS attorney who represents Oregon Mutual.

But William Passannante, a shareholder at Anderson Kill & Olick PC, questioned how helpful the opinion would be, saying the appeals court hadn't taken a deeper look at coverage issues or tackled each of the five causes of action in the underlying class action to see whether they might be covered.

Some of the defendants were several steps removed from the activity that the exclusion targeted, Passannante said.

"An analysis of this exclusion really does require applying the exclusion narrowly to each of the claims alleged in the underlying complaint," he said. "When I see opinions that don't construe exclusions as narrowly as they might, I'm left with the impression that, once again, a court has been convinced to do post-loss underwriting."

According to Cormier, though, underwriters have already taken pains to freeze out coverage for TCPA and similar privacy claims because of uncertainty about pricing risks or a desire to push policyholders toward other insurance products.

"They draft the exclusion super, super, super broad so they can exclude all liability," Cormier said.

Attorneys for the Papa John's franchisees were not immediately available to comment Thursday.

Oregon Mutual is represented by Larry Gottlieb and Daniel Syhre of Betts Patterson & Mines PS.

The Papa John's franchisees are represented by Miles Yanick and Duncan Manville of Savitt Bruce & Willey LLP.

The case is Oregon Mutual Insurance Co. v. Rain City Pizza LLC et al., case No. 67471-4-1, in the Court of Appeals of the State of Washington.

--Editing by Elizabeth Bowen and Chris Yates.

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