Coughlin Midlige & Garland LLP

Alert

California Supreme Court to Rule Upon Pivotal Coverage Question for TCPA Claims

By: Laura A. Brady, Reka Bala
April 30, 2019

California's highest court is poised to decide a key question of law concerning potential "personal injury" coverage for claimed violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(C). In *Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, No. 17-16452 (9th Cir.)*, the Ninth Circuit has certified to the California Supreme Court the question of whether a liability policy's "personal injury" coverage for injury arising out of "[o[ral or written publication . . . of material that violates a person's right of privacy" triggers a duty to defend for claims that the insured "violated the [TCPA] by sending unsolicited text message advertisements that did not reveal any private information[.]"

In *Yahoo!*, the subject coverage grant is found within an atypical endorsement whereby the base coverage form's combined "personal and advertising injury" coverage is deleted and replaced with a singular "personal injury" coverage. The district court held the endorsement's coverage for injury arising out of "[o[ral or written publication . . . of material that violates a person's right of privacy" did not extend to underlying class-action suits alleging TCPA violations premised upon Yahoo's sending of unsolicited text-message advertisements.

On appeal, the Ninth Circuit noted the TCPA is intended to protect the privacy right of seclusion and reasoned that the coverage analysis turns on whether the covered "violation of privacy" offense "applies to the right to secrecy, seclusion or both." On that question, it found two California appellate decisions– *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co., 53 Cal. Rptr. 3d 786 (Ct. App. 2007)*, and *State Farm Gen. Ins. v. JT's Frames, Inc., 104 Cal. Rptr. 3d 573 (Ct. App. 2010)* – in "tension" thus warranting referral to the state Supreme Court.

Both *ACS* and *JT's Frames* concluded a "violation of privacy" offense within a liability policy's "advertising injury" coverage did not extend to underlying TCPA claims based on the sending of unsolicited facsimile advertisements. In *ACS*, the offense extended to injury caused by the "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" and in *JT's Frames*, to injury arising from "oral or written publication of material that violates a person's right of privacy." Both courts applied the "last antecedent" rule, as

well as other reasons, to construe the offenses as applying to claims involving the disclosure of a claimant's private information to a third party. *ACS, 53 Cal. Rptr. at 150-51; JT's Frames, 104 Cal. Rptr. 3d at 586-87*.

The synchronicity between the holdings of the key appellate decisions renders the Ninth Circuit's referral somewhat surprising. Ultimately, the California Supreme Court ruling will likely have one of two effects: It could close a chapter by endorsing the logical constructions in *ACS* and *JT's Frames*, or reach a contrary result that could give life to the issue for years to come.

To view the full article from Law360, please click here.