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Practice Group:

Insurance Coverage

Laying Down the Law: Illinois Appellate Courts Confirm Insurance Coverage in TCPA Cases

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The threat to many American businesses posed by the Telephone Consumer Protection Act of 1991 ("TCPA") (47 U.S.C. § 227(b)) is undeniable. A typical alleged violation of the TCPA may consist of sending a fax without the consent of the recipient or using an automatic telephone dialing system in a manner prohibited by the TCPA. Under certain circumstances, the TCPA imposes strict liability and permits recovery of $500 for each and every violation of the statute. Moreover, for those violations that are determined to be willful or knowing, those statutory damages can be trebled. Without a cap on statutory damages, the stakes are even higher in the case of a TCPA putative class action. When defendants ensnared in TCPA litigation have turned to their insurance policies, some insurers have sought to avoid providing any coverage.

A critical threshold coverage question concerns whether TCPA damages are "punitive" and thus supposedly uninsurable, as many insurers contend, or remedial and thus insurable, as policyholders contend. While some courts have held that the TCPA is penal in nature (thereby allowing insurers to disclaim coverage), Illinois appellate courts have concluded otherwise. In 2013, the Supreme Court of Illinois, in a highly-anticipated decision, held that the TCPA is a remedial statute and concluded that damages of $500 per violation constitute insurable damages. *Standard Mut. Ins. Co. v. Lay*, 989 N.E.2d 591, 600 (Ill. 2013). The Court, however, remanded the *Lay* case to the intermediate appellate court for further examination of other coverage defenses asserted by the insurer, Standard Mutual Insurance Company ("Standard"), including whether the underlying claim sought damages arising out of covered "advertising injury" and whether certain exclusions applied.

On remand, the Illinois Court of Appeals ruled squarely in the policyholder's favor, finding that Standard was required to cover the entire TCPA class action settlement that was reached between the policyholder and the class in the underlying litigation. *Standard Mut. Ins. Co. v. Lay*, No. 4-11-0527, 2014 WL 272773 (Ill. App. Ct. Jan. 23, 2014). These Illinois decisions are important not only for policyholders in Illinois, but also for policyholders throughout the country facing TCPA claims and possibly other claims based on similar consumer protection statutes, including those with statutory damages provisions.

Background

In 2006, Ted Lay Real Estate Agency ("Lay") hired a broadcaster to send a "blast fax," which is an inexpensive method of sending fax advertisements to thousands of fax machines. Locklear Electric, Inc. ("Locklear") allegedly received one of the unsolicited faxes. Locklear alleged that Lay violated the TCPA because recipients on the broadcaster's fax list did not consent to receive fax advertisements. In June 2009, Locklear brought a class action lawsuit

against Lay seeking, among other things, the TCPA-prescribed damages of $500 per violation.[1]

Lay tendered its defense to Standard, which had issued a commercial general liability insurance policy and a business liability insurance policy. Standard agreed to defend Lay under a reservation of rights. Thereafter, Standard filed a declaratory judgment action against Lay and Locklear seeking a declaration that Standard had no duty to defend or indemnify Lay. In response, Locklear sought a declaration that the policies covered Lay for the TCPA damages and required Standard to defend and indemnify Lay.

While the coverage dispute remained pending, Lay settled with the class for the full amount sought in the complaint ($1,737,500 plus costs). Pursuant to the settlement agreement, Locklear agreed it would seek satisfaction of the judgment only from Lay's insurance policies even if a court determined that Standard did not owe Lay coverage. In return, Lay assigned its claims against and rights to payments from Standard to the class. [2]

In the coverage action, the trial court found that Lay was not entitled to coverage and granted Standard's motion for summary judgment. The intermediate appellate court affirmed, concluding that the TCPA-prescribed damages of $500 per violation constituted non-recoverable punitive damages. Due to that determination, the appellate court did not address additional coverage arguments.

On appeal, the Illinois Supreme Court disagreed with the lower court and held that "[t]he manifest purpose of the TCPA is remedial and not penal."[3] Examining Congressional intent, the Court determined that "Congress intended the $500 liquidated damages available under the TCPA to be, at least in part, an incentive for private parties to enforce the statute."[4] Further, the Court concluded that the possibility of treble damages did not transform the TCPA into a penal statute, because such damages were "intended as a supplemental aid to enforcement rather than as a punitive measure."[5] The Court also rejected decisions from other jurisdictions that held that the TCPA-prescribed damages constituted penal or punitive damages and instead relied on cases that "ascertained the true intent of Congress in enacting the TCPA."[6] The Court remanded the case to the intermediate appellate court for consideration of the remaining coverage defenses.

The Court of Appeals Decision

On remand, the Illinois Court of Appeals made numerous pro-policyholder determinations.[7] Among other things, the court held that there was advertising coverage under Standard's "personal and advertising injury" provision because the faxes were sent without the permission of the recipients in violation of their right to privacy.[8] The court also held that the "professional services" exclusion was inapplicable, because Lay was a real estate agency,

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[1] *Standard Mut. Ins. Co. v. Lay*, 989 N.E.2d 591, 594 (Ill. 2013).

[2] *Id.* at 594-95.

[3] *Id.* at 599.

[4] *Id.* at 600 ("Whether we view the $500 statutory award as a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both, the $500 fixed amount clearly serves more than purely punitive or deterrent goals.").

[5] *Id.* (internal quotation omitted).

[6] *Id.*

[7] *Standard Mut. Ins. Co. v. Lay*, No. 4-11-0527, 2014 WL 272773 (Ill. App. Ct. Jan. 23, 2014).

[8] *Id.* at *6, ¶ 33.

not an advertising company, and the TCPA claim against Lay was not made in the course of Lay performing real estate services.[9] The court rejected Standard's argument that Lay's actions were intentional and, therefore, uninsured. The court determined that the proper focus was on whether Lay thought it had the authority to send the faxes (which Lay believed it did), rather than on whether Lay intended to send the faxes.[10] Finally, because a conflict of interest existed, the court held that "Standard had no right to require Lay to obtain permission to settle the underlying suit or to object to it itself."[11]

Conclusion

In combination, the appellate decisions in *Lay* provide persuasive and strong support for policyholders seeking to recover payments for TCPA claims under general liability insurance policies. Indeed, the effect of these decisions may extend beyond the TCPA context and encompass claims based on other consumer protection statutes (*e.g.*, the Fair Credit Reporting Act), where some insurers also have sought to avoid coverage on grounds similar to those rejected in the *Lay* decisions. In any case, policyholders facing TCPA claims will want to carefully review their insurance policies to determine whether they are entitled to the protections afforded under the reasoning of the *Lay* decisions.

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[9] *Id.* at *5, ¶ 28.
[10] *Id.* at *6, ¶ 31.
[11] *Id.* at *6, ¶ 35.

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