

Seventh Circuit Reminds Insurance Policyholders to Shop Carefully for TCPA Coverage

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Last week, the Seventh Circuit reminded advertisers of the narrowing availability of insurance coverage for [Telephone Consumer Protection Act \(TCPA\)](#) claims. In *Mesa Laboratories v. Federal Insurance Co.*, the court rejected a fax marketer's bid to make its insurer pay for its defense and settlement of an underlying unsolicited fax lawsuit. This decision underscores the insurance industry's recent trend of limiting TCPA coverage under general policy forms and requiring policyholders to seek out and purchase specific coverage for those types of claims.

At one time, insurance policies did not say whether they provided coverage for claims brought under the TCPA. When the statute was passed in 1991, many policyholders were able to secure coverage for TCPA claims under the "personal and advertising injury" portions of their general liability insurance policies, which typically cover any "oral or written publication that violates a person's right to privacy." With the explosion of TCPA lawsuits in recent years, however, insurers have looked to reduce their own exposure by adding exclusions to their policies that expressly bar coverage for TCPA claims. At the same time, many carriers have started offering affirmative coverage for TCPA liability. Policyholders usually must pay extra for this, however, and the coverage often comes with reduced sublimits of liability or other restrictions on coverage.

But even when a policy has an express TCPA exclusion, an insurer still might have to defend its insured in a lawsuit that asserts TCPA claims because of a general principle of insurance law recognized by courts around the country: if a lawsuit asserts multiple claims against an insured, and at least *one* of those claims is covered by the policy, the insurer must defend the entire lawsuit – even if the other claims are expressly excluded from coverage. Thus, an insurer whose policy excludes TCPA claims might have to defend a TCPA lawsuit if the plaintiff also includes a false advertising or defamation claim, both of which are expressly covered.

The Seventh Circuit chipped away further at this policyholder-friendly rule in *Mesa Labs*. The plaintiff in that case, Mesa, had been sued in an underlying class action lawsuit brought by a dentist who claimed that Mesa sent him unsolicited fax advertisements in violation of the TCPA and the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). The dentist plaintiff also asserted claims for common law conversion, nuisance, and trespass to chattels under the theory that, by sending the faxes, Mesa was appropriating the recipients' fax equipment, paper, ink and toner. Mesa looked to its insurance carrier, Federal Insurance, to pay for the defense of the lawsuit. Federal denied coverage, pointing to a policy exclusion that barred coverage for claims "arising out of" any actual or alleged violation of the TCPA or "any similar regulatory or statutory law." Mesa settled the class action lawsuit and then filed suit against Federal seeking to recoup the costs of the defense and settlement.

At issue on appeal was whether the presence of the common law claims triggered Federal's obligation to defend the entire lawsuit, or whether those claims, like the TCPA and ICFA claims, were barred by the policy's TCPA exclusion. Applying Illinois law, the Seventh Circuit held that, because the conduct supporting the common law claims – the sending of unsolicited faxes – was the same conduct supporting the TCPA and ICFA claims, the common law claims “arose out of” alleged violations of the TCPA and the ICFA, and therefore were excluded from coverage.

Advertisers who engage in telemarketing or other forms of digital marketing should be aware that insurance coverage for TCPA claims is available, but limited. Policyholders should seek out policies with express grants of TCPA coverage and not rely on older “silent” policy forms that may prove to have little coverage for TCPA claims. Kelley Drye's Insurance Recovery Group is closely following developments in TCPA insurance coverage, and will follow up with future notes and decisions of interest.

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