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CALIFORNIA COURT ISSUES LATEST IMPORTANT DECISION FOR INSURERS REGARDING LIABILITY COVERAGE FOR TCPA CLAIMS

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This year promises to be another busy one for courts addressing whether commercial general liability policies provide coverage for claims involving violations of the Federal Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"). Under the TCPA, it is unlawful to send unsolicited fax advertisements. A claimant may recover statutory damages of $500.00 or more for each violation. As a result of the numerous class actions and individual lawsuits that have spread throughout the country, there has been an increasing number of coverage disputes regarding these claims. On January 29, 2007, the California Court of Appeals, Second District, issued the latest ruling on this issue. *ACS Systems, Inc. v. St. Paul Fire & Marine Ins*. Co., --Cal. Rptr.3d--, 2007 WL 214258 (Cal. App. 2d Dist., Jan. 29, 2007).

In *ACS Systems*, claimants filed a class action against ACS alleging violations of the TCPA, violations of California unfair competition laws, negligence, and invasion of privacy. The plaintiffs alleged that ACS, a software company, used the services of DataMart Information Services to send 13,919 unsolicited faxes to 8,216 recipients in 1998 and 1999. ACS tendered the defense to St. Paul, its liability carrier, who denied it owed a duty to defend and indemnify ACS. St. Paul's policy provided coverage, in part, for liability caused by an advertising injury offense. An advertising injury offense was defined, in part, to mean "making known to any person or organization written or spoken material that violates an individual's right of privacy."

The California Court of Appeals began its analysis by noting that the "right of privacy" has two meanings: the right to secrecy and the right to seclusion. A person claiming the privacy right of seclusion asserts the right to be free from the disturbance by others. A person claiming the privacy right of secrecy asserts the right to prevent disclosure

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of personal information to others. The court also noted that by alleging violations of the TCPA, the class action plaintiffs alleged the violation of "seclusion" privacy. In other words, the complaint alleged injuries due to the invasion of a person's seclusion privacy as a result of the unwanted receipt of numerous faxes.

The court then examined the text of the "right of privacy" offense in the policy to determine whether coverage was afforded for secrecy or seclusion claims, or both. The court concluded that the policy wording restricts its application to injuries caused by the disclosure of private content to a third party, i.e., to the invasion of "secrecy privacy" caused by "making [materials] known" to a third party, that violates an individual's right of privacy. The content of the material must violate someone's right of privacy, *not the mere sending of the material.* Under this interpretation, the court noted that the content of the unsolicited fax advertisements did not violate the class members' secrecy right of privacy. The faxes contained no personal information about the recipients, and did not disclose or make known any facts about the recipients to third parties. Therefore, the TCPA claims did not fall within the right of privacy coverage afforded by the advertising injury section of the policy. The court cited with approval from two similar holdings reached by the Fourth and Seventh Circuit Courts of Appeals. *See Resource Bankshares Corp. v. St. Paul Mercury Ins. Co*., 407 F.3d 631 (4th Cir. 2005); *American States Insurance Co. v. Capital Associates of Jackson County,* 392 F.3d 939 (7th Cir. 2004). Furthermore, the court distinguished a line of authority reaching the opposite conclusion, reasoning that the policy language in those policies was different. *See ACS Systems*, 2007 WL 214258 at *10 (citations omitted).

The *ACS Systems* court also addressed another important issue regarding TCPA claims – whether complaints asserting violations of the TCPA alleged "property damage" under liability policies. The plaintiffs asserted that faxing unsolicited ads consumes the recipients' ink and paper and, therefore, ACS claimed that this constituted physical damage or loss of use of tangible property. The court rejected these arguments, holding that fax transmissions were not "accidents" as set forth in the policy, rather they were intentional acts. Further, ACS anticipated and intended that printing the faxes would use the recipient's ink and paper and would cause loss of use of the fax machine.

The *ACS Systems* decision comes on the heels of the Supreme Court of Illinois' opinion, which reached a contrary result. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc*., --N.E.2d--, 223 Ill.2d 352, 2006 WL 3491675 (Ill. Nov. 30, 2006). The court held that claims for violations of the TCPA were covered under the advertising injury provisions of the CGL policy. Importantly, however, the policy defined the privacy offense as "oral or written publication, in any manner, of material that violates a person's right of privacy." Conspicuously absent from this definition is the language "*making known* … material that violates an individual's right of privacy," which the *ACS Systems* court found persuasive in reaching its decision. This policy language focused on the content of the faxes, and thus only applied to the secrecy right of privacy. In contrast, the Illinois Supreme Court held that adopting the same position here would be impermissibly rewriting the policy.

In 2007, only one thing is certain in this area of the law: courts will continue to issue diverse and unpredictable results. Insurers would be well-advised to stay aware of the trends arising from these new decisions.

Cozen O'Connor is a recognized industry leader in all types of advertising injury and intellectual property coverage disputes, including coverage for TCPA claims. For more information, please contact Michael Hamilton at 215-665-2751 or mhamilton@cozen.com.