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Insurer's Duty to Defend Triggered by TCPA Claim Even Though Fax Recipient Was a Corporation

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Insights for Insurers

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Plaintiff insurer filed a declaratory judgment action seeking an order that it had no duty to defend or indemnify its insured in a class action lawsuit alleging, among other things, that the insured violated the Telephone Consumer Protection Act (TCPA). The TCPA prohibits the sending of an unsolicited advertisement to a telephone fax machine without the recipient's prior express consent. The insurer issued an insurance policy to the insured that provided liability coverage for an "advertising injury." The policy defined "advertising injury" to include injury arising out of the "[o]ral or written publication of material that violates *a person's* right of privacy." (Emphasis added). Because the underlying class action was filed on behalf of a corporation as the class representative, and not a "natural" person, the insurer argued that the underlying lawsuit did not fall within the policy's advertising injury coverage. The trial court rejected the insurer's argument and held that the insurer had a duty to defend the insured against the TCPA claim.

On appeal, the court rejected the attempted distinction between a natural person's right to privacy and a corporation's right to privacy. The court acknowledged that the U.S. Court of Appeals for the Seventh Circuit had previously found that the right of privacy has two components, a right of secrecy and a right of seclusion, and that a corporation has no right of seclusion. Although the present case involved the right of seclusion, the court declined to adopt the Seventh Circuit's holding. Instead, the court relied upon the Illinois Supreme Court's decision in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.,* 233 Ill. 2d 352 (2006), in which the Court held that advertising injury coverage could include a TCPA class action filed by a natural person. Nonetheless, the *Valley Forge* Court rejected the distinction between rights of secrecy and rights of seclusion, and did not distinguish between a person's right to privacy or that of a corporation. Moreover, the class action in *Valley Forge* may well have included corporations and natural persons, as the TCPA clearly applies to both. For these reasons, the appellate court held that the allegations in the underlying complaint triggered the insurer's duty to defend under the policy's advertising injury coverage.

The appellate court also rejected the insurer's argument that it had no duty to indemnify the insured for the settlement reached in the underlying lawsuit because the insured had violated the policy's "voluntary payments" provision.

The policy's voluntary payments provision provided that "[n]o insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." The court concluded that the insured did not violate this provision because it entered into the settlement after the insurer denied coverage for the claim. As the court explained, once the insurer breached its duty to defend, the insured no longer needed the insurer's consent to settle.

Practice Note

A general liability insurer that provides coverage for advertising injury may have a duty to defend its insured in an underlying action that alleges a violation of the TCPA even though the underlying plaintiff is a corporation and not a natural person. Furthermore, once an insurer denies coverage for a claim, its insured may enter into a settlement agreement with the claimant without the insurer's consent.

Pekin Ins. Co. v. XData Solutions, Inc., 2011 IL App (1st 102769)

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