



Alerts

Confirming a "But-For" Test, Federal Court Rejects "Semantic" Attempt to Narrow Liability Policy's TCPA Exclusion

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Insights for Insurers

An insured's attempt to exempt common law claims from the application of an "Information Laws Exclusion" to a blast fax claim was recently rejected by an Illinois federal court in *Mesa Laboratories, Inc. v. Federal Insurance Company*, No. 1:19-cv-02340 (N.D. Ill. Jan. 28, 2020). In the case, Mesa Laboratories (Mesa) was sued by a recipient of Mesa's unsolicited faxes. The complaint asserted causes of action for violations of the Telephone Consumer Protection Act (TCPA) and the Illinois Consumer Fraud Act. It also contained common law claims for conversion, nuisance, and trespass to chattels. Mesa tendered a claim to its liability insurer, Federal Insurance Company (Federal), which denied coverage based on an exclusion pertaining to "Information Laws, Including Unauthorized or Unsolicited Communications" (Information Laws Exclusion) and an intentional acts exclusion. Mesa then filed a coverage action, and Federal moved for judgment on the pleadings.

Federal's Information Laws Exclusion stated, in relevant part, that the policy "does not apply to any damages, loss, cost or expense *arising out of any actual or alleged or threatened violation of ... [TCPA] or any similar regulatory law in any other jurisdiction.*" (Emphasis added.) Mesa argued that Federal's exclusion was less broad in scope than the exclusions in cases on which Federal relied. Those exclusions applied to claims "arising directly or indirectly out of *any action or omission* that violates or is alleged to violate" TCPA. (Emphasis added.) In contrast to such *conduct* exclusions, Mesa claimed, Federal's exclusion looks only to the *violation* of a law or statute, and not to the *action or omission* that gave rise to the common law conversion and nuisance claims asserted against Mesa.

The court made fast work of Mesa's "semantic" argument, stating that it "could not discern any material difference" between the exclusions. Agreeing with Federal's "straightforward reading" of the exclusion, the court noted that the term "arising out of" calls for a "but for" analysis, and that all of the claims asserted against Mesa arose from the sending of unsolicited fax advertisements.

Based on Seventh Circuit precedent, the court also ruled that the policy's intentional acts exclusion precluded coverage because "Mesa, like any other sender of junk faxes, expected to harm the recipients by depleting their ink and paper." The court rejected Mesa's assertion that its faxes were sent with a good

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faith belief that they would be welcomed by the recipients, noting that the faxes were an offer to new customers from whom Mesa solicited contact information to "get started." Those facts, even when viewed most favorably to Mesa, confirmed that the recipients did not invite the faxes.