



## Alerts

### TCPA Fax Claim Is Not a Covered Occurrence; Personal and Advertising Injury Coverage Is Also Not Triggered, Rules Pennsylvania Federal Court

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*Insights for Insurers*

On March 30, 2020, a Pennsylvania federal district court granted an insurer's motion for summary judgment, ruling that coverage for a TCPA class action claim was barred by the intentional acts exclusion in its Businessowners Coverage and Commercial Umbrella policy and the claim did not constitute a covered Personal or Advertising Injury. *Selective Insurance Co. v. J. Reckner Associates, Case No. 2:18-cv-04450-JDW, (U.S. Dist. Ct., E.D. Pa. March 30, 2020)*

The insured in that case had been sued by a class action plaintiff for faxing unsolicited advertisements to plaintiff and other similarly situated persons. Plaintiff also asserted a conversion claim and requested treble damages for the insured's knowing and willful violation of the TCPA.

The court first addressed whether the insured's property damage claim constituted an occurrence, noting that under Pennsylvania law, "the insured must act with specific intent to cause the relevant harm, or harm of the same general type, in order for such conduct to fall outside the scope of an insurance policy which covers 'accidents.'"

The insured argued that it was unclear if the underlying plaintiff believed that his conduct was intentional because the TCPA complaint refers to the law as a strict liability statute, which means that the insured would be liable even if he acted negligently. Dismissing that assertion, the court stated "that abstract possibility does not mean the complaint . . . charges [the insured] with anything other than intentional conduct. No allegation in the TCPA Complaint charges [the insured] with negligence or suggests that [he] sent the fax by accident."

But even if the complaint alleged that the insured acted negligently, that "still would not mean that any resulting damages constitute an accident." The key inquiry was whether the damage was caused by an event "so unexpected, undesigned, and fortuitous as to qualify as accidental. Applying that analysis, the court concluded:

Here, the wear and tear that [the insured's] transmission of faxes caused was a reasonably foreseeable result of its conduct. [The insured] may not have intended to violate the TCPA, but [he] did intend to send faxes, and [he] knew that those faxes would be delivered through each recipient's fax machine. [He] also knows that the use of a fax machine will contribute to its gradual 'wear and

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tear' in much the same way that it will deplete paper and toner.

Because there was no covered property damage claim, the court declined to address the insured's claim that the insurer failed to provide notice of the policy's TCPA exclusion. The court noted its skepticism of that argument, however, since the exclusion had been included in the insured's policies since 2011.

The insurer also argued that the TCPA claim did not constitute a covered personal or advertising injury. Since the insured did not respond to that argument, the court deemed it conceded. Nevertheless, the court stated that the policy's "definition of personal and advertising injury only protects the privacy right to secrecy, not to seclusion . . . [and] does not extend to sending unsolicited faxes."

As we have [reported](#), a federal court in Illinois also recently ruled that an insured's TCPA blast fax claim was barred by an intentional acts exclusion.