Will Calif. High Court Settle TCPA Insurance Question?

By **Laura Brady and Reka Bala** (April 29, 2019)

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California's highest court is poised to decide a key question of law concerning potential personal injury coverage for claimed violations of the Telephone Consumer Protection Act.[1]

In Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania,[2] the U.S. Court of Appeals for the Ninth Circuit identified what it deemed an "important and unresolved" question of California law: whether a liability policy's "personal injury" coverage for injury arising out of "[o[ral or written publication ... of material that violates a person's right of privacy" extends only to claims alleging an invasion of claimants' secrecy rights or also encompasses claims implicating the right to seclusion.

The court thus certified to the California Supreme Court the question of whether a policy containing that offense "trigger[s] the insurer's duty to defend the insured against a claim that the insured violated the [TCPA] by sending unsolicited text message advertisements that did not reveal any private information[.]" The state court now has the opportunity to endorse the obvious and common sense reading of the plain language of the subject offense: that it applies only to secrecy violations.

In Yahoo!, the insurer declined coverage for underlying class action suits alleging TCPA violations premised upon Yahoo's sending of unsolicited text message advertisements. The district court held the "violation of privacy" offense did not cover TCPA liability.

That offense, incidentally, appears in the subject policy in an atypical endorsement whereby the base coverage form's "personal and advertising injury" coverage is deleted and replaced with a singular "personal injury" coverage, with an exclusion for damages arising out of "advertising injury" and "advertising injury" defined to include injury arising out of the "publication ... of material in your 'advertisement' that violates a person's right of privacy."

The endorsement thus reflects the sophisticated parties' purposeful removal of coverage for, among other things, privacy-invading publications of material occurring in the insured's advertising.

On appeal, noting that the TCPA is expressly intended to protect the privacy right of seclusion, the Ninth Circuit recognized that the coverage analysis turns on whether the covered "violation of privacy" offense "applies to the right to secrecy, seclusion or both." On that question, it found two California appellate decisions in "tension" and therefore requested that the state Supreme Court provide guidance.

At the heart of the referral are ACS Systems Inc. v. St. Paul Fire & Marine Insurance Co.,[3] and State Farm Gen. Insurance v. JT's Frames Inc.[4] ACS held the offense of "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" did not extend coverage to a TCPA claim alleging the sending of unsolicited facsimile advertisements.

The court construed that offense as applying to injury caused by the disclosure of confidential material to a third party. It reached that result based upon, among other things, the application of the "last antecedent" rule to the phrase "material that violates an individual's right of privacy" and the context of the "advertising injury" definition in which the offense appeared.[5]

Nevertheless, because ACS distinguished cases holding TCPA claims covered under policy language similar to that in Yahoo!, the Ninth Circuit reasoned that ACS "suggest[s]" a finding of coverage in Yahoo!.

JT's Frames also found no coverage for an underlying TCPA claim. The "violation of privacy" offense there contained language materially similar to that in Yahoo! (but appearing in an "advertising injury" definition). As in ACS, JT's Frames applied the "last antecedent" rule and held that the phrase "that violates a person's right to privacy" as found in the offense modifies "material," rather than "publication of material."

Thus, for coverage to lie, the "material" in question must have caused a privacy violation, which would happen only if the "material" (the content of the offending faxes) contained confidential information and violated the claimant's right to secrecy.[6]

The synchronicity between the holdings of the key appellate decisions — both finding no coverage — renders the Ninth Circuit's referral in this case surprising. The court asks the state Supreme Court whether it agrees with JT's Frames' application of the last antecedent rule and whether the construction of the offense might differ depending on whether the offense appears in an "advertising injury" or "personal injury" definition.[7] Those questions suggest a potentially nonsensical result, both generally and as to the policy in suit.

First, the coverage-endorsing conclusion seemingly invited by the Ninth Circuit would read the phrase "of material" out of the offense definition altogether. If the offense were intended to include any privacy-invading "publication," no matter its contents, the phrase "of material" would be unnecessary. The construction endorsed by JT's Frames is the only construction of the offense that gives meaning to all of the words contained within it.

Further, the suggestion that "making known" and "publication" might merit different constructions mistakenly ignores the context in which those policy phrases appear. To highlight just one aspect of that context, the construction of "publication" must consider the rest of the offense — "of material that violates a person's right of privacy." There exist four "invasion of privacy" offenses at common law, with three (public disclosure of private facts, commercial appropriation of name/likeness and false light) requiring "publication" and one (intrusion upon seclusion) not. In context, the policy requirement of a "publication" giving rise to actionable privacy violation necessarily requires the dissemination of privacy-invading material to a third party.

As to the policy in suit, the "violation of privacy" offense appears in the at-issue endorsement in both the "personal injury" and "advertising injury" definitions, with the latter containing the added requirement that the offending material be published in the insured's "advertisement." Materially similar policy language cannot mean two different things within the same policy.

Finally, the subject endorsement reflects the parties' clear intent to remove from the policy all coverage for privacy violations arising out of the insured's advertising activities. It thus defies common sense for a given clause within that endorsement to be construed so as to afford coverage for statutory damages faced by the insured based upon its sending of

unsolicited text-message advertisements.

Ultimately, the California Supreme Court ruling will likely have one of two effects. It will close a chapter on this issue by endorsing the logical constructions in ACS and JT's Frames, or reach a contrary result that could give life to the issue for years to come. Either way, it's one to keep tabs on.

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[1] 47 U.S.C. § 227(b)(1)(C)

[2] Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, No. 17-16452 (9th Cir.)

[3] ACS Systems Inc. v. St. Paul Fire & Marine Insurance Co., 53 Cal. Rptr. 3d 786, 794-95 (Ct. App. 2007)

[4] State Farm Gen. Insurance v. JT's Frames Inc., 104 Cal. Rptr. 3d 573, 585 (Ct. App. 2010)

[5] 53 Cal. Rptr. 3d at 795.

[6] Id. at 586.

[7] Yahoo!, slip op. at 11.