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A Brief Review of What's Happening in TCPA Insurance Coverage Case

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TCPA World featured two blog posts in May (May 6 and May 31) that discussed two TCPA coverage cases. In this post, we will cover some recent cases to see if there is any developing trend.

As the recent cases show, most insurance policies of recent vintage have explicit exclusions for any act or omission that violates or is alleged to violate the TCPA or similar laws. Most of the cases are about clever arguments seeking to circumvent these express exclusions. Some of the cases, however, are about whether TCPA violations are invasions of privacy, thus falling within exclusions for injuries allegedly arising out of invasions of privacy. In these insurance policies, there is no express TCPA exclusion, but there is an exclusion for privacy violations. Other cases are about whether a TCPA violation is negligence or an intentional act. Most insurance policies provide coverage for fortuitous events that are unintentional.

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11th Circuit (incl. bankruptcy)

TCPA Exclusion Case

In *American Family Mutual Insurance Co. v. Vein Centers For Excellence, Inc.*, 912 F.3d 1076 (8th Cir. 2019), the issue before the 8th Circuit was whether the insurance policies obligated the insurer to defend and indemnify the policyholder for lawsuits alleging a violation of the TCPA. The court concluded that the insurance policies did not cover the claims in the underlying class action.

The relevant policies both included provisions barring coverage for: "Bodily injury," "property damage," or "personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law.

Although this exclusion existed within the policy, the argument was that the insurer must defend the underlying claim because the insurer did not notify the policyholder of the exclusion's addition when the policy was renewed. Notice of changes in coverage typically are required for them to be enforceable. The court found, however, that the insurer sufficiently demonstrated compliance with the notice obligation.

As the court stated, "Missouri law recognizes a presumption as to receipt of mailed materials. Specifically, "[t]here is a presumption that a letter duly mailed has been received by the addressee." *Ins. Placements, Inc. v. Utica Mut. Ins. Co.*, 917 S.W.2d 592, 595 (Mo. Ct. App. 1992) (citing *Shelter Mut. Ins. Co. v. Flint*, 837 S.W.2d 524, 528 (Mo. Ct. App. 1992)). This presumption of receipt by the addressee can be triggered even in the absence of direct proof that a particular letter was mailed. *See id.* at 595-96. In circumstances where the customary volume of mail would render proof impractical or infeasible, the purported sender may rely on "evidence of the settled custom and usage of the sender in the regular and systematic transaction of its business" to establish the presumption. *Id.* at 595." "Missouri law does not require direct proof or personal knowledge of mailing; only 'evidence of the settled custom and usage of the sender in the regular and systematic transaction of its business.'"

The insurer mailed a Coverage Summary Letter to the policyholder more than sixty days prior to the Policy

renewal date as a part of its standard practice to provide notification of changes made to an insured's policy. This was demonstrated through expert testimony of one of the insurer's corporate representatives and therefore created a presumption that the policyholder received notice of the exclusion. This presumption may be rebutted with evidence of non-receipt, however no evidence of that kind was offered.

The court concluded that the insurer did not need to indemnify and defend the policyholder because the exclusion in the policy was valid, as shown through the proper notice procedure and lack of evidence to the contrary.

Privacy Exclusions Case

In *Horn v. Liberty Insurance Underwriters, Inc.*, No. 9:18-CV-80762, 2018 U.S. Dist. LEXIS 178940 (S.D. Fla. Oct. 17, 2018), the court addressed a motion to dismiss the complaint brought by settling plaintiffs in an underlying TCPA class action against the policyholder's insurance company. The settling plaintiffs sought a declaration that the insurer was obligated to defend and indemnify the policyholder. The insurer claimed that the underlying class action claim fell under a policy exclusion for loss on account of a claim "based upon, arising out of, or attributable to invasion of privacy."

In denying the motion to dismiss the complaint, the court found that the insurer was obligated to defend and indemnify the policyholder. The court discussed how the TCPA does not require the underlying plaintiff to prove an invasion of privacy in order to prevail. "A plaintiff need only show that a defendant made a call to a telephone number using an automatic telephone dialing system or an artificial or prerecorded voice and that such call was not made with prior express consent, for emergency purposes, or to collect a debt owed to or guaranteed by the United State."

The insurer argued that Congress' intent in passing the TCPA was to protect privacy. The court rejected this argument because the insurer had not pointed to any ambiguous language in the TCPA. The court stated that it could not conform an unambiguous statute to what Congress may have intended. Finally, the court noted a Ninth Circuit case where the court held that a plaintiff pleads an invasion of privacy in a TCPA claim. Because that decision came from a divided three judge panel and because the Ninth Circuit's opinion was not binding on this Florida district court, the court still concluded that the insurer must defend and indemnify the policyholder.

Fast forward to our blog post from May 31, 2019, which discussed the summary judgment ruling in this very case and where the district court granted summary judgment to the insurance company holding that a TCPA violation is an invasion of privacy and, therefore, the claim is barred by the policy exclusion for privacy violations. The findings a court makes on a motion to dismiss, giving all benefit to the plaintiff, does not necessarily hold when summary judgment comes around.

Intentional Act Case

In *G.M. Sign, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 17-14247, 2019 U.S. App. LEXIS 10868 (11th Cir. April 12, 2019), the court held that commercial general liability policies' coverage for "accidents" did not cover claims against the insured for violations of the TCPA, arising out of the insured's sending fax advertisements without the recipients' permission, because the faxes were intentionally sent, even if under the mistaken belief that there was consent.

The policyholder's judgment creditor brought an action seeking a declaratory judgment that the policyholder's insurer was required to indemnify the policyholder for liability incurred for faxing advertisements to recipients it mistakenly thought had consented to receipt. The judgment creditor argued that the insurer was required to indemnify the policyholder for its TCPA liability because the term "accident" under Georgia law covers injuries resulting from negligence. According to the judgment creditor, the policyholder sent the faxes negligently because it never intended to send any faxes without the recipients' consent.

The relevant policies covered "property damage" caused by "an event." They defined property damage as "physical damage to tangible property of others, including all resulting use of that property" or "loss of use of tangible property of others that isn't physically damaged." The policies defined an "event" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policies did not define the term "accident."

In affirming the district court's grant of summary judgment to the insurer, the circuit court stated "[i]n ruling, the district court relied on our decision in *Mindis Metals, Inc. v. Transportation Insurance Co.*, which held that under Georgia law intentional conduct premised on erroneous information is not an 'accident' for general liability insurance purposes. 209 F.3d 1296, 1297 (11th Cir. 2000). On appeal, G.M. Sign argues that the district court erred in granting St. Paul summary judgment because under Georgia law the term 'accident' covers injuries resulting from negligent acts. We conclude that G.M. Sign's argument is foreclosed by *Mindis Metals*. We therefore affirm the district court."

The 11th Circuit here discussed the contractual interpretation of the policies and specifically the meaning of "accident." "When an insurance policy fails to define a term or otherwise indicate that the term 'is used in an unusual sense, [Georgia courts] attribute to that term its usual and common meaning.' *Id.* at 590-91. The usual and common meaning of 'accident,' according to the Supreme Court of Georgia, is 'an unexpected happening without intention or design.' *Id.* at 591 (internal quotation marks omitted). Prior published precedent of this Court requires us to conclude that no accident occurred when MFG sent the faxes at issue here."

The court went on to conclude "MFG intended to send the faxes and thus intended to cause the resulting property damage, the use of the fax machines and the depletion of the machines' ink and paper. The fact that MFG mistakenly thought the recipients had consented to receive the faxes is insufficient under *Mindis Metals* to render the property damage an accident under Georgia law. Therefore, the Policies' property damage provisions provided no coverage for the TCPA liability arising from MFG's conduct."

Concluding Thoughts

So what do these recent cases tell us about insurance coverage for TCPA violations? If there is an express TCPA exclusion, it is likely coverage (including defense) will not be available. A TCPA violation appears to be an invasion of privacy violation and if an exclusion exists for claims of violation of privacy, coverage (including defense) will not be available. The intentional act of a TCPA violation is likely not an "accident" for purposes of insurance coverage.