

No Coverage for Insured's TCPA Defense Says Pennsylvania Federal Court

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Policyholders will look to their insurers when they are sued for unsolicited faxing under the [Telephone Consumer Protection Act](#) ("TCPA"). Do they have insurance coverage? That depends on the policy, but TCPA coverage is hard to come by. That doesn't stop policyholders from trying. In a recent case, a Pennsylvania federal court put an end to the policyholder's dream of coverage.

In *Selective Insurance Company of America v. J. Reckner Associates, Inc.*, No. 2:18-cv-04450-JDW (E.D. Pa. Mar. 30, 2020), the policyholder was accused in a putative class action of sending unsolicited faxes advertising the policyholder's business. The policyholder asked its insurance company for coverage. The policyholder was insured for Businessowners coverage and Commercial Umbrella coverage.

The policy provided coverage for any "property damage" caused by an "occurrence." The policy defined "occurrence" as "an accident, including continuous or related exposure to substantially the same general harmful conditions." It also provided coverage for personal and advertising injury, which included injury "arising out of one or more of the following offenses: (e) Oral or written publication, in any manner, of material that violates a person's right to privacy" The policy excluded damages "expected or intended from the standpoint of the insured." It also contained a TCPA exclusion, which excluded coverage for property damage "arising directly or indirectly out of any action or omission that violates or is alleged to violate . . . the [TCPA]."

The insurance company brought this declaratory judgment action seeking an order that the policy does not require the insurer to defend or indemnify the policyholder for the underlying TCPA suit. Both sides moved for summary judgment.

In granting summary judgment for the insurance company, the court found that the underlying TCPA action alleged that the policyholder's conduct was intentional. In rejecting the policyholder's argument that it was unclear whether the underlying plaintiff believed that its conduct was intentional, the court stated that "the abstract possibility does not mean that the complaint in the TCPA Action charges [the insured] with anything other than intentional conduct." The court countered that the complaint asserted a claim for conversion and sought treble damages, both of which require a willful or knowing violation.

The court also stated that even if it agreed that the complaint alleged negligence, it did not mean the resulting damages were caused by an accident. The court pointed out the need for fortuity and that the damage faxing caused the recipients was reasonably foreseeable result of the policyholder's conduct. "[The policyholder] may not have intended to violate the TCPA, but it did intend to send faxes, and it knew that those faxes would be delivered through each recipient's fax machine. [The policyholder] also knows that the use of a fax machine will contribute to its gradual "wear and tear" in much the same way that it will deplete paper and toner."

The court stated that "wear and tear" was obviously foreseeable and the court refused to require the insurance company to list as part of its definition of occurrence, "every possible type of damage that could result from intentional or foreseeable conduct." The court concluded that there was no coverage for property damage and no defense was required. The court did not address the TCPA exclusion.

On the personal and advertising injury coverage, the court held that the policyholder conceded that the underlying complaint did not allege a personal or advertising injury. Nevertheless, the court noted that the policy's 2017 definition of of personal and advertising injury only protected the privacy right to secrecy, not to seclusion and, therefore, did not extend to sending unsolicited faxes.

The court concluded that the TCPA claims all arose from the policyholder's intentional conduct and did not allege an advertising injury. Accordingly, there was no coverage for the TCPA action and summary judgment was granted to the insurance company.

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