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The “Fax” Don’t Add Up for Coverage

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The California Court of Appeal, Second Appellate District, has held that the receipt of unsolicited faxes is not covered as “advertising injury” or “property damage” for insurance purposes. *State Farm General Insurance Company v. JT’s Frame, Inc.*, 10 C.D.O.S. 1162 (January 27, 2010). Fax blasts (the sending of unsolicited faxes) that do not contain personal information do not violate a right to privacy, and therefore are not an advertising injury. In addition, because the practice of fax blasting is intentional, rather than accidental, any resulting property damage is not covered by insurance.

JT’s Frame sued on behalf of itself and a class of similarly situated entities based on the defendant’s transmission of over 74,000 unsolicited faxes to class members. The case settled for \$19,200,000, but the settlement specified that the judgment would be enforceable only against the proceeds of the defendant’s insurance policies. Defendant assigned to the class its claims and rights under its State Farm policies, and State Farm eventually filed a motion for summary judgment claiming that the policies did not cover the claims.

JT’s Frame claimed that the policy’s coverage for “advertising injury” covered fax blasting because the receipt of unsolicited faxes violated the recipient’s right of privacy. Advertising injury was defined by the policy to include: “a. oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; b. oral or written publication of material that violates a person’s right of privacy; c. misappropriation of advertising ideas or style of doing business; or d. infringement of a copyright or title.”

The court examined two common understandings of “right of privacy”: (1) the right to keep personal information confidential or secret, and (2) the right to seclusion. In

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holding that the policy applied only to the right to keep personal information confidential, the court interpreted the policy under the “last antecedent rule,” which provides that “qualifying words, phrases and clauses are to be applied to the words immediately preceding and are not to be construed as extending to or including others more remote.” Applying the last antecedent rule, the phrase “that violates a person’s right to privacy” was construed to modify the word “material.” Accordingly, “the *material* at issue must ‘violate a person’s right to privacy,’ which would be the case only if the material contained confidential information and violated the victim’s right to secrecy.”

This interpretation of the policy was also consistent with a reading of the provisions of the policy in context with one another. The “right of privacy” provision fell in the middle of four definitions of advertising injury. The first, third and fourth definitions all involved “injury caused by the information contained in the advertisement.” Under those definitions, the “victim is injured by the content of the advertisement, not its mere sending and receipt.” As such, the “right of privacy” definition was most reasonably interpreted as also referring to advertising material content that violated a person’s right to privacy. The faxes at issue did not contain private information and thus were not covered under the “advertising injury” provision of the policy.

In addition to its advertising injury claim, JT’s Frame also claimed that coverage existed for “property damage” under the State Farm policy, as damage resulted from the fax blaster’s unauthorized use of the recipients’ fax machines and toner. The State Farm policy covered “property damage caused by an occurrence.” An “occurrence” was defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage.”

The court denied that any property damage resulted from the receipt of faxes, holding that the damage must be caused by an “accident” for coverage to apply. “An accident required unintentional acts or conduct, whereas the insured intended the fax transmission to occur.” Because the faxes were intentionally sent, there was no accident, and no coverage under the property damage provision of the policy.

For additional information on this issue, contact:



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