

TCPA Claims Arising From Junk Faxes Do Not Allege Unexpected or Unintended 'Property Damage'

Insurance Law Update

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U.S. District Court for the Northern District of Illinois

In *Maxum Indem. Co. v. Eclipse Mfg. Co.*, ___ F.Supp.2d ___, (N.D. Ill. June 13, 2011), the U.S. District Court for the Northern District of Illinois held that claims asserted in an underlying class action based on the federal Telephone Consumer Protection Act (TCPA) did not allege covered "property damage" caused by an unexpected or unintended "occurrence," and that any potential advertising injury coverage for the TCPA claims was limited to claims asserted by individuals who are not associated with a business entity.

Maxum Indemnity Company and another insurer brought an action for declaratory relief regarding their duty to defend and indemnify their mutual insured in an underlying action that alleged that the insured sent an uninvited and unauthorized fax to members of the alleged class offering the insured's event planning services, in an alleged violation of the TCPA. Another insurer filed an intervening complaint seeking a declaration regarding its duty to defend and indemnify. Each of the three commercial general liability (CGL) policies at issue provided coverage for property damage caused by an occurrence as long as the damage is not expected or intended by the insured. Applying Illinois law, and following the holding in *American States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir.2004), the district court held that the allegations in the underlying complaint that a recipient of unauthorized faxes "loses the use of its fax machine, paper, and ink toner" did not create the potential for coverage because this alleged invasion of the recipient's property interest in consumables is the normal (or expected) outcome of sending a junk fax.

Two of the carriers' CGL policies also provided coverage for invasion of privacy as an advertising injury offense (the policies provided coverage for "oral or written publication of material that violates a person's right of privacy"). The carriers argued that Illinois case precedent finding coverage for TCPA claims under similar allegations did not support a finding of coverage in this case because the underlying class was composed solely of business entities that did not have privacy interests in seclusion; none of the class members were individuals with actual privacy rights. The carriers asserted that businesses' rights under the TCPA are limited to the property interests that the TCPA was designed to protect. The court agreed with the reasoning of the carriers' argument, but nevertheless held that the two carriers had a duty to defend because it was not clear that the underlying class was composed solely of business entities. The court noted, however, that in light of its ruling that advertising injury coverage was limited to claims made by individuals, the carriers' indemnity obligations would depend on the number of individuals, if any, in the class. Thus, the court recommended that the parties settle based on "what is likely to be a relatively small recoverable amount."

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