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"Invasion of Privacy Exclusion" in Professional Liability Policy Bars Coverage for TCPA Class Action

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Recently, the District Court for the Southern District of Florida held that an exclusion in a claims-made policy precluding coverage for loss arising out of invasion of privacy barred coverage for a TCPA class action.

In *Horn v. Liberty Ins. Underwriters, Inc.,* 2019 WL 2297528 (S.D. Fla. May 30, 2019), an underlying class action was filed against Liberty's insured, iCan Benefit Group, LLC ("iCan"), a "national direct response marketer and seller of insurance products," asserting violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") for iCan allegedly sending unsolicited text messages to members of the class.

Liberty issued a claims-made errors and omissions "Private Advantage Insurance Policy" that provided coverage to iCan Holding LLC, as a Named Insured. Liberty denied coverage for the underlying suit on multiple grounds, one of which was an "invasion of privacy" exclusion contained in the policy. Specifically, the exclusion barred coverage for "Loss" on account of any "Claim" made against the Company:

4. based upon, arising out of, or attributable to any actual or alleged defamation, invasion of privacy, wrongful entry and eviction, false arrest or imprisonment, malicious prosecution, abuse of process, assault, battery or loss of consortium.

Following Liberty's coverage denial, the class action parties entered into a "Coblentz" settlement agreement, whereby they ratified a consent judgment for $60,413,112.00 and an assignment of iCan's rights and interest under the Liberty Policy to the underlying class action plaintiffs, who then could pursue the damage amount from the insurer.

In the ensuing declaratory judgment action, the plaintiffs argued that the Liberty Policy's "invasion of privacy" exclusion did not apply, insofar as their underlying complaint included allegations and causes of action beyond just their invasion of privacy claim. In other words, the allegations of invasion of privacy were just one component of the underlying case. Moreover, plaintiffs contended that they did not have to prove invasion of privacy in order to prevail in the class action as it is not an element of their TCPA cause of action. For this reason as well, they advocated that the exclusion did not apply.

The District Court disagreed. Although invasion of privacy is not an element of a TCPA violation, the District Court found that such a violation may, in some circumstances, be considered an invasion of privacy for purposes of analyzing coverage in an insurance policy. Relying on earlier Florida case law and a recent decision from the Ninth Circuit Court of Appeals, the Court acknowledged that "the source of the right of privacy is the TCPA, which provides the privacy right to seclusion," and that the TCPA's purpose is grounded in protecting individuals' right to privacy. Horn, 2019 WL 2297528 at *4 quoting *Penzer v. Transportation Ins. Co.,* 29 So. 3d 1000, 1006 (Fla. 2010) ("The receipt of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion…"); see also Los Angeles Lakers, Inc. v. Federal Insurance Company. 869 F.3d 795, 806 (9th Cir. 2017) (because "a TCPA claim is inherently an invasion of privacy claim, [the insurer] correctly concluded that Emanuel's TCPA claims fell under the Policy's broad [invasion of privacy] exclusionary clause.").

Importantly, the Liberty Policy excluded claims that “arise out of” an invasion of privacy, a phrase construed broadly under Florida law to mean “originating from,” “having its origin in,” “growing out of,” “flowing from,” “incident to” or “having a connection with.” Horn, 2019 WL 2297528 at *5. By coupling case law that interprets TCPA violations as invasions of privacy with Florida’s broad interpretation of “arising out of,” the District Court held that the TCPA violations alleged in the underlying litigation arose out of an invasion of privacy, andwere excluded from coverage.

Pertinent to its analysis, the District Court found that (1) the underlying complaint explicitly stated that the class action plaintiffs’ privacy was invaded by the violative texts, (2) the suit was “premised on violations of the TCPA, which caused actual harm in the form of aggravation and nuisance and invasion of privacy,” and (3) plaintiffs’ had conceded in their underlying Complaint that the “pertinent allegations” for the relief sought included actual harm caused by “invasions of privacy that result from the sending and receipt of such text messages….” Thus, regardless of whether the “Claim” was viewed as the entire class action as a whole or as separate “Claims” for each cause of action, the District Court concluded that the Liberty Policy’s broad exclusion barring coverage for a “Claim” arising out of an actual or alleged invasion of privacy precluded coverage entirely.

For insurance carriers, the Horn decision cuts both ways. For commercial general liability insurers whose policies typically afford coverage for “written publication of material that violates a person’s right of privacy,” the decision reaffirms that the “[general liability] insurance policy provides coverage for sending unsolicited fax advertisements in violation of the TCPA.” As respects professional liability carriers, the holdingbrings Florida’s Southern District Court in line with those few decisions that construe the “invasion of privacy” exclusionbroadly, so as to bar coverage for TCPA class actions against an insured. Moreover, as states continue to enact regulations that increasingly focus on data privacy, the decision may take on greater significance in confirming the absence of coverage for claims asserting or arising out of actual or alleged invasion of individual privacy rights.