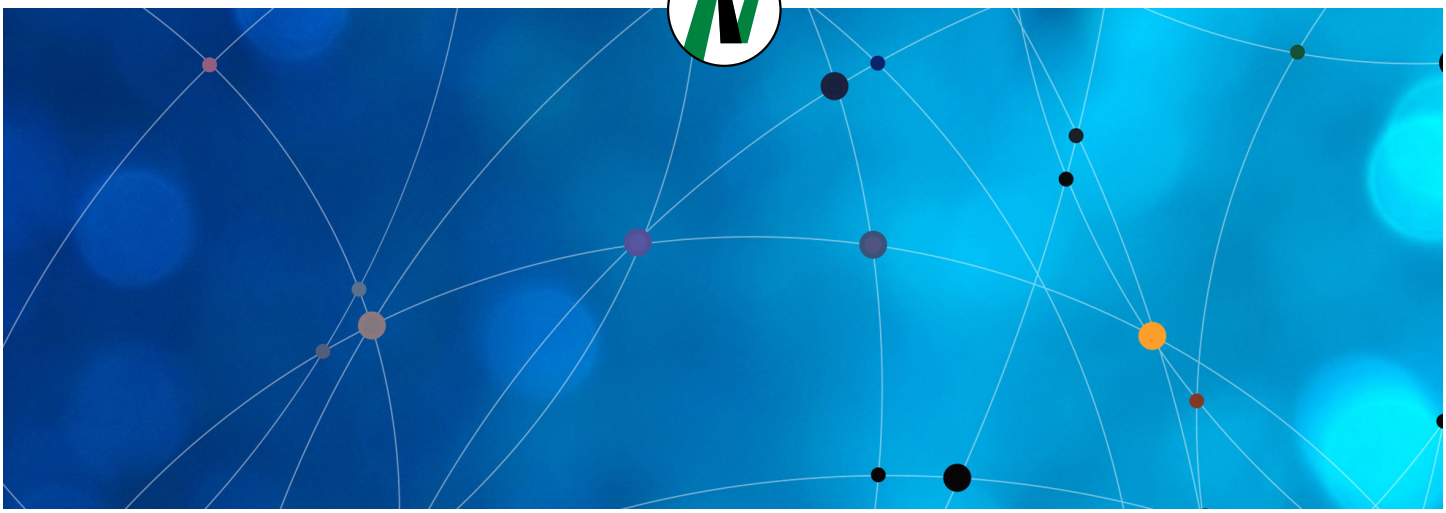

The Ninth Circuit Bars Wrongful Act Coverage Against TCPA Claims Despite Strong Dissenting Opinion that Majority Misconstrued the TCPA

08.28.2017 | By James H. Vorhis

On August 23, 2017, in a split Opinion, the Ninth Circuit issued its ruling in *Los Angeles Lakers, Inc. v. Federal Ins. Co*., Case No. 15-55777 (9th Cir. Aug. 22, 2017), an insurance coverage dispute related to an underlying lawsuit involving the Telephone Consumer Protection Act (TCPA). Unfortunately, the majority of the panel misapplied the general exclusion for General Commercial Liability (CGL) based coverages including breach of privacy, finding this exclusion somehow trumps the promised Wrongful Act coverage in a Directors & Officers (D&O) policy. The underlying claimant sought TCPA *statutory remedies only*—the mention of privacy claims was only in passing. Yet the majority locked onto the passing reference to breach of privacy, and read into the TCPA statute an implicit breach of privacy purpose to apply the exclusion. The majority ignored the statutory claims to find the exclusion barred even a defense of a plainly covered claim.

Generally speaking, the TCPA allows consumers to sue for statutory and other remedies when they receive unwanted phone calls or text messages. In the underlying lawsuit here, the plaintiff had attended a Lakers game in 2012. When a message on the scoreboard invited fans to send text messages to a specific number, he followed along hoping his message would be posted on the scoreboard. Shortly thereafter, he received an unwanted text message. He sued the Lakers under the TCPA.

The plaintiff filed a TCPA class action lawsuit. The Lakers, in turn, tendered that lawsuit under its Federal Insurance Company Forefront Portfolio insurance policy, which included D&O Wrongful act based coverage. D&O policies cover alleged Wrongful Acts which easily include the decisions related to sending these text messages, but also generally exclude what would be covered in the CGL policy—bodily injury, property

damage, breach of privacy and other torts. Federal Insurance Company denied coverage relying on this exclusion because the Plaintiff included passing references to breach of his privacy even though he sought only statutory remedies and not tort damages. The insurance coverage lawsuit followed. The question at issue for the District Court, and then the Ninth Circuit, was whether a TCPA action is solely based on the right of privacy, or whether the statutory remedies are outside of or in addition to any tort remedies applicable to breach of privacy.

The Forefront Portfolio Policy contained a Directors & Officers Liability Coverage Section which provided Corporate Liability Coverage. That coverage required Federal to pay for losses suffered by the Lakers resulting from any Insured Organization Claim . . . for Wrongful Acts. An Insured Organization Claim included a civil proceeding commenced by service of a complaint or similar pleading . . . against [the Lakers] for a Wrongful Act. The Policy defined Wrongful Acts as any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by the Lakers. Since the TCPA class action lawsuit was a civil proceeding involving an alleged misstatement, the Lakers asserted there was coverage under the policy.

However, the policy also had an exclusion that barred coverage for what would be covered under Part B of a CGL, the tort claims: based upon, arising from, or in consequence of libel, slander, oral or written publication of defamatory or disparaging material, invasion of privacy, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, malicious use or abuse of process, assault, battery or loss of consortium[.] While there was no specific exclusion for TCPA lawsuits, (which is now expressly excluded from coverage in almost all CGL policies) the District Court and Ninth Circuit questioned whether the TCPA action should be considered one for invasion of privacy because it involved the unwanted phone calls.

In reaching its holding, the majority Ninth Circuit opinion looked at how California courts have ruled on invasion of privacy lawsuits, which includes intrusion upon the plaintiff's seclusion. *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 118 Cal. Rptr. 370, 375 (Cal. Ct. App. 1974). The majority then looked at the TCPA language to determine the intent behind the statute. The majority opinion noted the use of the term privacy multiple times within the text. Because of that, and because California courts consider intrusion of seclusion a right of privacy lawsuit, the Ninth Circuit held that a claim for violation of the TCPA was an implicit invasion of privacy and thus there could be no coverage for TCPA actions because the CGL exclusion barred coverage for such tort claims. This may be the first time a court issued an opinion applying an exclusion to bar coverage based on an implicit claim read into a statute that is unambiguous!

However, it was only the dissent that analyzed this coverage issue correctly. First, Justice Tallman took issue with the majority's interpretation of the TCPA, [w]hen Congress defines a cause of action based on specific and unambiguous statutory elements, what matters is what the statute says—not what motivated enactment of the statute. He explained that **nothing in the TCPA requires a plaintiff to prove an invasion of privacy cause of action**, and thus it should not be the court's purview to read that into the TCPA. Second, Justice Tallman noted the majority went astray in reading into the TCPA an implicit breach of privacy because that is an improper redefining of a TCPA claim. The statute contains its own definition listing the essential elements which must be proven—and notably that list does not include breach of privacy.

Justice Tallman cited several decisions finding that statutory prohibitions often go beyond the principal evil they were enacted to remedy. For example, Racketeer Influenced and Corrupt Organization Act (RICO) was enacted to eradicate organized crime. But a RICO claim is not limited by the underlying purpose and has been applied in many other contexts including garden variety fraud and breach of contract. *Sedima S.P.R.L.*

v. Imrex Co. 473 U.S. 479,524 (1985). The majority erred by redefining a TCPA claim as a privacy claim and then invoking the contractual CGL exclusion to deny coverage.

Perhaps rather obviously, Justice Tallman also pointed out other purposes of the TCPA, including addressing public safety concerns, such as tying up phone lines when there is an emergency [47 U.S.C. §227 (b)(1)(A)(i)], economic injury, allowing for recovery of monetary loss [§227 (b)(3)] and protection of businesses allowing any person or entity to bring a claim for damages or injunctive relief [§227 (b)(3)]. Businesses, by the way, generally have no right of privacy yet have been able to recover on TCPA claims. As [m]ost states hold that business entities lack privacy interests, *Am. States Ins. v. Capital Assocs. of Jackson Cty.,Inc.*, 392 F.3d 939, 942 (7th Cir. 2004) (citation omitted), it is not surprising that Congress cited harms unrelated to invasion of privacy, as noted by Justice Tallman. It is a compelling conclusion that these examples demonstrate beyond cavil that Congress did not enact the TCPA only to prevent invasions of privacy. Not all TCPA claims are privacy claims. Finally, Justice Tallman wrote the proper inquiry is not whether a TCPA claim is automatically based on invasion of privacy, but whether the underlying claims in this particular case are based on invasion of privacy. Because the claimant's claims were not privacy claims, there was coverage in the D&O policy for them.

Justice Tallman easily found that there must be coverage because the black letter law is that coverage grants are broadly construed whereas exclusions must be read narrowly and in favor of coverage, where there is any ambiguity, which the majority opinion did not do. The dissent was consistent with the long history of both statutory construction and the insurance coverage law developed in California over the decades. It isn't hard to see why the majority ruling is problematic. There was no need to interpret the TCPA as designed to exclusively remedy privacy concerns, which is erroneous in any case.

It will be a dark day for Policyholders, if the majority opinion holds, as it is based on an attenuated and erroneous rationale to first narrow the purpose of the TCPA and then bring it within the scope of an exclusion to contradict the plain and broad coverage grant in the D&O policy. There is no public purpose in protecting the insurance industry from fulfilling their obligations to perform what they promised to do in their liability policies. It is somewhat shocking that the insurance industry carefully excluded TCPA claims expressly in their CGL products, forcing insured to seek coverage under other available policies, including D&O. Yet when a TCPA claim is presented to a D&O policy, the insurers vigorously argue the application of the CGL exclusion, (arguing that such claims may only be covered in CGL policies not D&O policies.) The insurers make such arguments knowing that the TCPA exclusions are safely in place in the CGL. The insurers' obvious goal is to avoid coverage altogether for TCPA claims even in D&O policies that otherwise would easily cover them.

Stay posted on whether there may be any effort to reconsider, seek *en banc* review, or further address this disturbing opinion.