Directors' & Officers' Liability Insurance Coverage for Claims Brought Under the Telephone Consumer Protection Act, and the 9th Circuit's Anticipated Decision in *Los Angeles Lakers v. Federal Insurance Company*

By Scott J. Hyman[i]

On January 18, 2017, the Court of Appeals for the Ninth Circuit heard oral argument on the *Los Angeles Lakers, Inc. v. Federal Insurance Company* case,[1] which will decide whether coverage exists under a Directors' and Officers' Liability Policy for a class action filed under the Telephone Consumer Protection Act. Congress passed the TCPA in 1991 in order to provide protection against unsolicited calls made using various electronic technologies such as fax machines, automatic dialing machines, and text messaging without the consent of the called party. The TCPA's damages can be astronomical. Like most consumer protection statutes, the TCPA permits recovery of actual damages,[2] but only as an alternative to statutory damages of $500 per call or $1,500 per call for a willful violation—a plaintiff may recover the larger of the two but not both.[3]

Given the TCPA's astronomical liability, the question of applicability of insurance coverage for such suits can be critical from both the policyholder's and carrier's standpoints. The first wave of

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1 15-55777 (9th Cir. 2015).

2 47 U.S.C. § 227(b)(3)(B) ("an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater").

3 Hashw v. Department Stores National Bank, et. al. 182 F.Supp.3d 935, 944 (D. Minn. 2016) ("TCPA also provides for statutory damages of $500 per violation, in the alternative to actual damages. . .").

TCPA coverage litigation dealt with whether the advertising liability provisions of CGL policies covered TCPA claims, with the vast majority of cases finding no coverage .[4] Non-publicly traded corporate policyholders holding D&O policies[5] then pivoted to these polices to

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[4] Marks, *Does your D&O policy provide coverage for TCPA claims?,* (28 Jan 2016) (http://rcmd.com/blog/does-your-do-policy-provide-coverage-tcpa-claims) ("Defendants in a TCPA action have traditionally sought coverage for this type of claim under the advertising injury or property damage coverage in their General Liability policy. Several courts have argued that there is no coverage for these claims because they are styled as penalties under the statute. Other courts have disagreed as to whether the violation of the TCPA amounts to a violation of the right to privacy dependent upon whether the right to privacy includes the right to seclusion. While some policy holders have had success with this argument, many General Liability carriers are now including a specific exclusion in their policies to address these claims. As a result, policyholders are looking elsewhere for coverage. Specifically, many are turning to their E&O and D&O policies, with limited success"); Wright, Blase & Miko, *A Primer on Insurance Coverage Issues under the Telephone Consumer Protection Act*, (3 March 2015) (http://www.klgates.com/a-primer-on-insurance-coverage-issues-under-the-telephone-consumer-protection-act-03-03-2015/) ("Companies and individuals facing TCPA claims have sought insurance coverage for defense costs, as well as the costs of judgment or settlement, under at least three different kinds of insurance policies, commercial general liability ("CGL") policies, errors and omissions ("E&O") or professional liability policies, and Directors and Officers ("D&O") liability policies. As discussed below, although policyholders have had some success securing coverage under these policies, insurers are increasingly challenging coverage for TCPA claims or outright excluding TCPA liability under their policies. In light of this changing landscape, policyholders should consider their risks and, where appropriate, consider securing policies that specifically cover TCPA liability. The key insurance coverage considerations for traditional policies are considered below, along with a brief discussion on alternative policies").

[5] LaCroix, *D&O Insurance: The Question of Coverage for TCPA Claims*, (September 15, 2015) (http://www.dandodiary.com/2015/09/articles/d-o-insurance/do-insurance-the-question-of-coverage-for-tcpa-claims/) ("It is probably worth noting that the question of D&O insurance coverage for TCPA claims is largely restricted to private company policyholders. In a TCPA action, the claimants typically name as defendants only the corporate entity that allegedly violated the statute. Entity coverage under public company D&O insurance policies is limited to claims for violations of the securities laws. So if the defendant company is a public company and no individual directors or officers are named as defendants, there will be no coverage for the claim under the company's D&O insurance policy simply because the claim does not fall within any of the policy's insuring provisions. Entity coverage under a private company D&O insurance policy is broader than under a

secure insurance coverage. The *Los Angeles Lakers* case is significant, however, because it is the first case to reach an appellate court and is being watched closely by policyholders and insurance carriers alike.[6]

The Telephone Consumer Protection Act

The Telephone Consumer Protection Act was enacted in 1991 to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers." The TCPA prohibits, generally and in part, calls (and text messages) using an automatic telephone dialing system without the prior express consent of the called party. [7] Since 1991, the FCC, who is directed to issue regulations implementing the Act, has expanded the applicability of the TCPA.[8]

The TCPA authorizes an award of $500 per violation; i.e. *per call,*[9] and is a strict liability statute. [10] The TCPA permits trebling of statutory damages if the Court finds that the statute was willfully or knowingly violated.[11] Unlike many consumer protection statutes, the TCPA does not provide for the recovery of attorney fees to the prevailing party.[12]

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public company D&O insurance policy, and so the claim arguably does fall within the entity coverage afforded in a private company policy").

[6] Levin & Roffi, *Tipoff for the question of whether D&O policies cover TCPA related claims*, (November 18, 2015) (http://www.lexology.com/library/-detail.aspx?g=5d7bd04f-0ebb-40c6-90cb-693671512f28) ("This is a game to watch. If the Ninth Circuit reverses the district court's holding it could solidify insured's claim to coverage for TCPA claims under D&O policies. If the Ninth Circuit affirms the District Court opinion, however, coverage under many D&O policies for TCPA claims may become more difficult than a half-court buzzer beater").

[7] 47 USC... §227(b)(1)(A)–(D).

[8] 47 USC §227(c).

[9] 47 USC §227(b)(3)(B).

[10] *See, e.g.,* Adamcik v Credit Control Servs., Inc. 832 F Supp 2d 744, 754 (WD Tex 2011) (Congress mandated at least $500 per violation, and no less, regardless of underlying behavior of consumer or other equitable considerations).

[11] 47 USC §227(b)(3)(B).

[12] See Holtzman v. Turza, 2016 WL 3648390, at *1-2 (7th Cir. 2016) ("The Telephone Consumer Protection Act is not a fee-shifting statute.")

D&O Coverage for TCPA Claims

The jurisprudential landscape leading up the *Los Angeles Lakers* appeal was sparse, with only two decisions analyzing D&O coverage for TCPA claims preceding the case.[13] The first case, In *Resource Bank v. Progressive Casualty Insurance Co.*, 503 F. Supp. 2d 789, 797 (E.D. Va. 2007), addressed whether D&O coverage existed for a "blast-fax" case filed under the TCPA. Progressives' D&O policy contained an exclusion that specifically barred coverage for claims based on "invasions of privacy". The District Court concluded that the D&O policy's privacy exclusion was not limited merely to excluding coverage for "secrecy-based" torts, but applied broadly to exclude coverage for all privacy based torts:

> First, the plain meaning of "invasion of privacy" encompasses both the seclusional and secrecy variants of the right to privacy. Resource I, 407 F.3d at 640 (quoting *Am. States Ins. Co. v. Capital Assocs. of Jackson County*, 392 F.3d 939, 941-42 (7th Cir.2004)). Second, interpreting "invasion of privacy" in relation to the other harms listed with it in Exclusion A does not narrow its meaning. There is nothing secret about defamation, false light, libel, or slander. These harms result from falsehoods, see Restatement (Second) of Torts § 558 (defamation), § 568 (characterizing libel and slander as species of defamation), § 652E (false light), rather than the revealing of truthful confidential information. That they are included alongside "invasion of privacy" in no way suggests that the draftsman intended to narrow that term's plain meaning. Moreover, other courts have held that similar terms cover TCPA claims. *See Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc., 300 F.Supp.2d 888, 895* (E.D.Mo.2004), aff'd, 401 F.3d 876 (8th Cir.2005)(holding that a policy covering "private nuisance (except pollution), [and] invasion of rights of privacy," without any qualifying terms, encompasses TCPA claims). Thus,

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[13] Wright, Blase & Miko, *A Primer on Insurance Coverage Issues under the Telephone Consumer Protection Act*, (3 March 2015) (http://www.klgates.com/a-primer-on-insurance-coverage-issues-under-the-telephone-consumer-protection-act-03-03-2015/) ("Coverage under D&O policies for TCPA violations remains a largely untested question.").

the TCPA claims' concern with seclusional privacy places them squarely within the bounds of Exclusion A.

It was seven years later before D&O polices were tested again with respect to TCPA coverage. In *LAC Basketball Club, Inc. v. Federal Insurance Co.*, [14], a California District Court reached the same conclusion as *Resource Bank*, albeit with regard to a text message class action instead of a 'blast-fax" case. The complaint claimed that the Los Angeles Clippers' solicitation for patrons to send text messages that would then be posted on a scoreboard at the game violated the TCPA. The Los Angeles Clippers sought insurance coverage under their D&O policy, which Federal denied based on the policy's invasion of privacy exclusion. The District Court found no coverage, looking to the Court of Appeals for the Ninth Circuit's interpretation of the TCPA's purpose of protecting privacy interests. The District Court ultimately concluded that "[b]ecause the D&O policy excludes claims involving invasion of privacy and because a violation of the TCPA is rooted in the recipient's privacy right, TCPA claims brought against [the Los Angeles Clippers] are excluded from coverage."

The Los Angeles Lakers Coverage Litigation

Much like *LAC Basketball Club,* the issue in the *Los Angeles Lakers* case is whether the Lakers' D&O Policy provided coverage for a TCPA class action filed by a Lakers fan, David Emanuel, who received a text message while at the Lakers' home court, the Staples Center. Emanuel saw a message on the scoreboard inviting fans to send text messages to a specific number so that the Lakers would put his personal message on the scoreboard. Emanuel then received a text message inviting him to receive Lakers News alerts. Emanuel filed a class action under the TCPA, claiming that the text message he received illegally attempted to solicit business from him. The Lakers moved to dismiss the claim, which the District Court granted on the basis that Emanuel consented to receive the text message at issue.[15]

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[14] No. CV 14-00113 GAF (FMx), 2014 WL 1623704 (C.D. Cal. Feb. 14, 2014)

[15] Los Angeles Lakers, Inc. v. Federal Ins. Co., No. CV 14–7743 DMG (SHx), 2015 WL 2088865, at *1 (C.D.Cal. April 17, 2015).

The Lakers' D&O policy was designed to protect the Lakers and its directors and officers in the event that claims were made against any of them, including claims for "wrongful acts." The Policy defined "wrongful acts" as "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committee or attempted by ... any Insured Organization[.]" The Policy stated that the Carrier "shall have the right and duty to defend any Claim covered by this Policy." The Policy contained an exclusion for any claim "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."[16]

District Judge Dolly Gee began her coverage analysis by evaluating the Carrier's argument that it had no duty to defend because of the Policy's invasion of privacy exclusion. The Carrier argued that a TCPA violation is, by its nature, a type of invasion of privacy as supported by the TCPA's text, legislative history, and established precedent. The Lakers argued, however, that the *Emanuel* lawsuit sought economic damages as well as protection against nuisance, neither of which should have been excluded by the policy's exclusion. Judge Gee disagreed, holding that "[w]hile it is true that the text of the TCPA does not use the word "privacy," it is the conceptual wellspring of the TCPA's protections."[17] Judge Gee found that the TCPA protects privacy interests, and since the exclusion used the broad language "arising from", the policy's exclusion encompassed TCPA claims, however constituted.[18]

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16 *Id.*, at pp. * 1.

17 *Id.* at pp. *5.

18 *Id.* at *8 ("Given courts' universal interpretation of TCPA claims as implicit invasion-of-privacy claims, the exclusion here encompasses TCPA claims. This is especially true given that the exclusion applies to claims that are "[b]ased upon, arising from, or in consequence of ... invasion of privacy." Policy at ¶ (C)(5). Under California law, "arising from" is interpreted broadly. *See, e.g ., Davis v. Farmers Ins*. Grp., 134 Cal.App.4th 100, 107, 35 Cal.Rptr.3d 738 (2005) (" '[a]rising out of' are words of much broader significance than 'caused by.' They are ordinarily understood to mean 'originating from[,]' 'having its origin in,' 'growing out of' or 'flowing from' or in short, 'incident to, or having connection with' "). The allegations in the Emmanuel Complaint fit within this broad exclusionary clause").

The Lakers appealed and, after full briefing, the Court of Appeals for the Ninth Circuit heard oral argument on January 18, 2017.[19] At oral argument, the Lakers argued that the District Court, in focusing on privacy interests, relied on the wrong section of the TCPA related to calls to residential telephones instead of the section related to telemarketing and calls to cellular telephones under which Emanuel sued. The Lakers reiterated their argument that the TCPA protects more than just privacy interests, and that Emanuel pleaded two theories: invasion of privacy as well a nuisance/economic loss. The Panel did not appear receptive, noting that the FCC was responsible for promulgating regulations to protect privacy rights. The Panel noted that the *Emanuel* Complaint pleaded both that the TCPA was promulgated to protect his privacy and that the text messages invaded his privacy. The Panel noted that the *Emanuel* Complaint clearly pleaded an invasion-of-privacy based claim, that the Policy excludes invasion of privacy, and that the inquiry should end there. Moreover, the Panel noted that there did not appear to be two legal theories, only two types of harm – each of which still arise out of a unitary privacy-based TCPA theory.

The Carrier responded that the policy exclusion is clear, and applies to exclude coverage the *Emanuel* case on its face. The Carrier argued that the Laker's search of an economic loss does not change the inquiry from the unitary privacy-based statutory theory. The purpose of the TCPA is to protect privacy rights; the economic harm is merely secondary. The Panel noted, however, that a business purchasing a D&O policy does not have "privacy" interests to protect like consumers do. So, the Panel inquired, wouldn't a business expect coverage for economic loss claims such as *Emanuel* or blast-fax cases? The Panel asked whether a business always is "out-of-luck" for TCPA claims under D&O policies? The Carrier responded affirmatively, that a business can never have coverage for privacy-based TCPA claims when a D&O policy contains in invasion of privacy exclusion. But, the Carrier argued, the Panel did not need to reach that universal question because as to the

[19] http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=-0000011004. The following discussion of oral argument is counsel's interpretation and extrapolation of the comments from the Panel and counsel.

case and the policy before the Panel, the *Emanuel* complaint was privacy-based and, therefore, was excluded under the Policy.

Conclusion

The Lakers did what many other companies have done when faced with the astronomical potential losses associated with a TCPA class action: they attempted to trigger insurance coverage. By seeking coverage under their D&O policy however, the Lakers took a different tact than others who largely had been unsuccessful in triggering insurance coverage under their CGL policies. Given the limited precedent on whether D&O policies cover TCPA claims and the relative unavailability of TCPA coverage under CGL policies, the Court of Appeals for the Ninth Circuit's decision in *Los Angeles Lakers* will be closely watched.

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