Insurance Coverage Under Directors & Officers Liability Insurance Policies for Claims Brought Under the Telephone Consumer Protection Act

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I. Introduction

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With the Telephone Consumer Protection Act's ("TCPA") remedy of actual damages,[1] $500 per call, or $1,500 per call for a willful violation,[2] exposure under the TCPA can be astronomical. Thus, the question of applicability of insurance coverage for TCPA suits can be critical from both the policyholder's and carrier's standpoints. Not surprisingly, entities sued under the TCPA looked to their insurance carriers for coverage for TCPA claims.

1. 47 U.S.C. § 227(b)(3)(B) ("[A]n action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater . . . .").
2. The TCPA provides: "If the court finds that the defendant willfully or knowingly violated [the TCPA] . . . the court may, in its discretion, increase the amount of the award to an amount equal to not more than [three] times the amount available under subparagraph (B) of this paragraph." *Id.* at § 227(b)(3); *see also* Hashw v. Dep't Stores Nat'l Bank, 182 F. Supp. 3d 935, 944 (D. Minn. 2016) ("[T]he TCPA also provides for *statutory* damages of $500 per violation, in the alternative to actual damages . . . .").

The first wave of TCPA coverage litigation dealt with whether the advertising liability provisions of commercial general liability ("CGL") policies covered TCPA claims, with the vast majority of cases finding no coverage.[3] Non-publicly traded corporate policyholders holding D&O policies then looked to their D&O polices to secure insurance coverage.[4] Unlike evolving

3. RCM&D, *Does Your D&O Policy Provide Coverage for TCPA Claims?*, http://rcmd.com/blog/does-your-do-policy-provide-coverage-tcpa-claims (Jan. 28, 2016) ("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 held 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 policyholders 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."); In Stephen P. Wright et al.'s, *A Primer On Insurance Coverage Issues Under the Telephone Consumer Protection Act*, the authors state,

> 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.

Stephen P. Wright et al., *A Primer on Insurance Coverage Issues Under the Telephone Consumer Protection Act*, K&L Gates (March 3, 2015), http://www.klgates.com/a-primer-on-insurance-coverage-issues-under-the-telephone-consumer-protection-act-03-03-2015/

4. Kevin LaCroix posits:

> 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

doctrines under CGL policies, the jurisprudential landscape analyzing coverage for TCPA claims under D&O policies was sparse, with only two decisions analyzing D&O coverage for TCPA.[5] And no D&O coverage case involving TCPA litigation had reached an appellate court.[6] On August 23, 2017, however, the Court of Appeals for the Ninth Circuit—over a strong dissent—addressed the issue for the first time on an appellate level, finding that Federal Insurance Company's D&O policy excludes coverage for the TCPA claim filed against the Los Angeles Lakers.[7] This Article seeks to thoroughly describe this legal landscape and the impact of the *Los Angeles Lakers* case.

II. Background

A. The Telephone Consumer Protection Act.

The TCPA 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 ([f]ax) machines and automatic dialers."[8] 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.[9] Since 1991, the Federal Communications Commission, which is directed to issue regulations implementing the Act, has expanded the applicability of the TCPA.[10]

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coverage under a private company D&O insurance policy is broader than under a public company D&O insurance policy, and so the claim arguably does fall within the entity coverage afforded in a private company policy.

Kevin LaCroix, *D&O Insurance: The Question of Coverage for TCPA Claims*, The D&O Diary (September 15, 2015), http://www.dandodiary.com/2015/09/articles/d-o-insurance/do-insurance-the-question-of-coverage-for-tcpa-claims/.

5. *See* LAC Basketball Club, Inc. v. Fed. Ins. Co., No. CV 14-00113 GAF (FFMx), 2014 WL 1623704 (C.D. Cal. Feb. 14, 2014); Res. Bank v. Progressive Cas. Ins. Co., 503 F. Supp. 2d 789 (E.D. Va. 2007); *see also* Wright, *supra* note 3 ("Coverage under D&O policies for TCPA violations remains a largely untested question.").

6. Barry Levin & Alison Roffi, *Tipoff for the Question of Whether D&O Policies Cover TCPA Related Claims*, Orrick Policyholder Insider (November 18, 2015), https://blogs.orrick.com/insurance/2015/11/18/tipoff-for-the-question-whether-do-policies-cover-tcpa-related-claims/ ("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. Los Angeles Lakers, Inc. v. Federal Ins. Co., 869 F.3d 795, 806 (9th Cir. 2017).

8. S. Rep. No. 102-178, at 1968 (1991).

9. 47 U.S.C. § 227(b)(1)(A)–(D).

10. *Id.* at § 227(c).

The TCPA authorizes an award of $500 per violation (i.e., *per call)*[11] and is a strict liability statute.[12] The TCPA permits trebling of statutory damages if the court finds that the statute was willfully or knowingly violated.[13] Unlike many consumer protection statutes, the TCPA does not provide for the recovery of attorney fees to the prevailing party.[14]

B. D&O Coverage for TCPA Claims.

The jurisprudential landscape leading up to the *Los Angeles Lakers* appeal was sparse, with only two decisions analyzing D&O coverage for TCPA claims preceding the case.[15] The first case, *Resource Bank v. Progressive Casualty Insurance Co.*,[16] addressed whether D&O coverage existed for a "blast-fax" case filed under the TCPA.[17] Progressive's D&O policy contained an exclusion that specifically barred coverage for claims based on "invasions of privacy."[18] 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.

11. *Id.* at § 227(b)(3)(B).
12. *See, e.g.*, Adamcik v. Credit Control Servs., Inc. 832 F. Supp. 2d 744, 754 (W.D. Tex. 2011) (noting Congress mandated "at least $500 per violation, and no less—regardless of the underlying behavior of the consumer, or other equitable considerations").
13. 47 U.S.C. § 227(b)(3)(B).
14. *See* Holtzman v. Turza, 828 F.3d 606, 608 (7th Cir. 2016) ("The Telephone Consumer Protection Act is not a fee-shifting statute."), *cert. denied*, 137 S. Ct. 1330 (2017).
15. Wright, *supra* note 3 ("Coverage under D&O policies for TCPA violations remains a largely untested question.").
16. Res. Bank v. Progressive Cas. Ins. Co., 503 F. Supp. 2d 789 (E.D. Va. 2007).
17. *See id.* at 791 (Resource's mortgage unit began to advertise by transmitting hundreds of thousands of unsolicited faxes to individuals and businesses in twenty-two states.").
18. *Id.* at 793.

> 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, the TCPA claims' concern with seclusional privacy places them squarely within the bounds of Exclusion A.[19]

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.*,[20] the United States District Court for the Central District of California reached the same conclusion as *Resource Bank*, albeit with regard to a text message class action instead of a "blast-fax" case.[21] 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.[22] The Los Angeles Clippers sought insurance coverage under their D&O policy, which Federal denied based on the policy's invasion of privacy exclusion.[23] The district court found no coverage, looking to the Ninth Circuit's interpretation of the TCPA's purpose of protecting privacy interests.[24] 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."[25]

C. The Los Angeles Lakers Coverage Litigation.

Much like *LAC Basketball Club*, the issue in the *Los Angeles Lakers* case was 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.[26] 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

19. *Id.* at 795.
20. LAC Basketball Club, Inc. v. Fed. Ins. Co., No. CV 14-00113 GAF (FFMx), 2014 WL 1623704 (C.D. Cal. Feb. 14, 2014).
21. *Id.* at *2.
22. *Id.*
23. *Id.*
24. *See id.* at *4 ("[T]he plain language of the insurance contract excludes from coverage any claims that are based on an invasion of privacy. In light of this language, there can be little dispute that the mutual intention of the parties was to circumscribe the scope of coverage to eliminate Federal's obligation to defend or indemnify against such claims made against LAC.").
25. *Id.* at *5.
26. Los Angeles Lakers, Inc. v. Federal Ins. Co., 869 F.3d 795, 799 (9th Cir. 2017).

the scoreboard.[27] Emanuel then received a text message inviting him to receive Lakers News alerts.[28] Emanuel filed a class action under the TCPA, claiming that the text message he received illegally attempted to solicit business from him.[29] The Lakers moved to dismiss the lawsuit, which the district court granted on the basis that Emanuel consented to receive the text message at issue.[30]

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."[31] "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."[32] The policy stated that the carrier shall have "the right and duty to defend any Claim covered by th[e] Policy."[33] 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."[34]

District Judge Dolly Gee began her coverage analysis by evaluating Federal's argument that it had no duty to defend the Lakers because of the policy's invasion of privacy exclusion.[35] Federal 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.[36] 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.[37] 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."[38] Judge Gee found that the TCPA protects privacy interests and that, be-

27. *Id.*
28. *Id.*
29. *Id.*
30. Los Angeles Lakers, Inc. v. Fed. Ins. Co., No. CV 14-7743 DMG (SHx), 2015 WL 2088865, at *2 (C.D. Cal. Apr. 17, 2015).
31. *Los Angeles Lakers*, 869 F.3d at 799.
32. *Id.* at 799–800.
33. *Id.* at 800.
34. *Id.*
35. *Los Angeles Lakers*, 2015 WL 2088865, at *5–9.
36. *Id.* at *5.
37. *Id.* at *7.
38. *Id.* at *5.

cause the exclusion used the broad language "arising from," the policy's exclusion encompassed TCPA claims, however constituted.[39]

The Lakers appealed and, after full briefing, the Court of Appeals for the Ninth Circuit heard oral argument on February 15, 2017.[40] 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.[41] 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 also 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.[42] 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.

Federal responded that the policy exclusion was clear and applied to exclude coverage of the *Emanuel* case on its face. Federal argued that the Lakers' search for an economic loss does not change the inquiry away from a unitary privacy-based statutory theory.[43] Federal propounded the view that the purpose of the TCPA is to protect privacy rights and that 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, is it not the case that a business would expect coverage for economic loss claims such as

39. *Id.* at *7–8. Judge Gee noted,

> 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." Under California law, 'arising from' is interpreted broadly. The allegations in the Emmanuel Complaint fit within this broad exclusionary clause.

Id. (citations omitted)).

40. Oral Argument, Los Angeles Lakers, Inc. v. Fed. Ins. Co., 869 F.3d 795 (9th Cir. 2017) (No. 15-55777), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030052. The following discussion of oral argument is the authors' interpretation and extrapolation after listening to the comments from the panel and counsel.

41. *Id.*

42. *Id.*

43. *Id.*

Emanuel or blast-fax cases? The panel asked whether a business always is "out-of-luck" for TCPA claims under D&O policies? Federal 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, Federal argued, the panel did not need to reach that universal question because, as to the case and the policy before the panel, the *Emanuel* complaint was privacy-based and, therefore, excluded under the policy.

II. The Court of Appeals's Holding

A. The Majority Held that Federal's Invasion of Privacy Exclusion Excluded Coverage for "Privacy-based" Statutory Claims, Such as Those Arising Under the TCPA.

The majority framed the question as follows:

> The Policy on its face clearly excludes from coverage claims "based upon, arising from, or in consequence of . . . invasion of privacy." The Policy does not explicitly exclude coverage of TCPA claims, so we must determine whether Emanuel's TCPA claims fall within this exclusion.[44]

With that syllogistic approach to the issue of whether the TCPA serves as the basis for a privacy-based tort, Federal's invasion of privacy exclusion would inevitably apply. "Federal argue[d that] a TCPA claim is inherently an invasion of privacy claim."[45] Undoubtedly, Federal was correct, since the Congressional purpose stated in the TCPA and a multitude of cases have found that the TCPA is a privacy-based statute.[46]

The Court of Appeals agreed:

> We have before outlined the three elements of a TCPA claim: "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." Absent from this list is proof that the call invaded the recipient's privacy. This omission is no mistake. As demonstrated by the explicitly stated purpose of the TCPA, Congress concluded that the calls it prohibited in passing the TCPA were an implicit invasion of privacy. In practice, there may be other interests that the TCPA protects. But these alternative interests do not transform Congress's express intent to craft the TCPA to serve privacy interests. Accordingly, in pleading the elements of a TCPA claim, a plaintiff pleads an invasion of privacy claim.[47]

44. Los Angeles Lakers, Inc. v. Federal Ins. Co., 869 F.3d 795, 801 (9th Cir. 2017).
45. *Id.* at 802.
46. *See id.* at 803 ("[T]he TCPA twice explicitly states that it is intended to protect privacy rights.").
47. *Id.* at 804 (citations omitted) (quoting Meyer v. Portfolio Recovery Ass'n, 707 F.3d 1036, 1043 (9th Cir. 2012)).

Accordingly, the Court of Appeals gave effect to the intent of the parties:

> When Federal received a request from the Lakers to defend them against the Emanuel complaint, Federal correctly identified the two TCPA claims as claims for invasion of privacy. It is evident from the plain language of the insurance contract that the parties intended to exclude all invasion of privacy claims. We recognize that exclusionary clauses are to be construed against the insurer; but here we must reconcile this rule with our canon of giving effect to the intent of the parties in light of a clause that broadly excludes coverage for any claim originating from, incident to, or having any connection with, invasion of privacy. A TCPA claim falls within the category of intrusion on the "right to be let alone" recognized under California law as an invasion of privacy. Emanuel's claim is unquestionably, at the very least, connected to an alleged invasion of privacy. Therefore, Federal properly concluded that the claims asserted in the Emanuel complaint were excluded from coverage under the Policy. The dissent's narrow construction of the exclusionary clause conflicts with the clear intent of the contracting parties.[48]

Nor did the Court of Appeals impose an obligation to defend the *Emanuel* litigation, even though the duty to defend is broader than the duty to indemnify. The Court of Appeals explained that the duty to defend, "while . . . broad, is not limitless."[49] That Emanuel swore off any personal injury claim and sought only the statutory penalty was of no moment. "[A] TCPA claim is an invasion of privacy claim, regardless of the type of relief sought. . . . [and] we will not allow Emanuel to redefine the TCPA by disclaiming any recovery for personal injury."[50] The Court of Appeals held that the Lakers could not "manufacture coverage" by changing their argument to suggest that the Emanuel complaint could have been amended to divorce itself completely from the "policy at the heart of the TCPA."[51]

B. The Dissent Would Have Found Coverage Under the D&O Policy.

The dissent's theory, essentially, was that because the TCPA does not have "invasion of privacy" as one of the elements that a TCPA plaintiff must prove, the invasion of privacy exclusion in Federal's D&O policy should not have applied.[52] "Because nothing within the words Congress chose suggests that a TCPA plaintiff must prove invasion of privacy, a TCPA claim is not automatically a privacy claim. And because Emanuel expressly disavowed his privacy claims and instead sought recovery

48. *Id.* at 805.
49. *Id.*
50. *Id.* at 806.
51. *Id.*
52. *Id.* at 807 (Tallman, J., dissenting).

under the TCPA, his claims were not common law privacy claims."[53] The dissent therefore accused the majority of setting up the proverbial strawman only to chop it down: "Judge Smith errs by redefining a TCPA claim as a privacy claim and then invoking the contractual exclusion to deny insurance coverage."[54] The dissent stated that "[t]he proper inquiry here 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."[55] Since Emanuel's TCPA claims against the Lakers were penalty based and not privacy based, the dissent would have concluded that the privacy exclusion in Federal's D&O policy should not have excluded coverage.[56]

III. Conclusion

The Lakers' creative tactic to seek insurance coverage when faced with a TCPA claim failed. The Court of Appeals for the Ninth Circuit put another roadblock before policyholders attempting to secure insurance coverage for astronomical TCPA damage claims and put another arrow in the quiver of carriers enforcing the exclusions in their policies that they believe preclude coverage for such claims. Although the district courts within the Ninth Circuit are bound by the Ninth Circuit's decision, other federal courts of appeals are not so bound. The dissent in *Los Angeles Lakers* may provide a road map upon which policyholders and less carrier-friendly courts of appeals might travel.

53. *Id.*
54. *Id.* at 809.
55. *Id.* at 810.
56. *Id.* at 812.