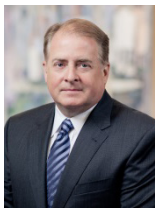
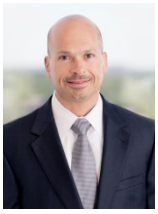
August 29, 2017

Insurers Win Series Against Lakers in TCPA D&O Shootout

by Lawrence Bracken II, Michael Levine and Geoffrey Fehling

Published in Law360


Last week, the Ninth Circuit affirmed that the Los Angeles Lakers were not entitled to coverage for a fan's class action alleging violations of the Telephone Consumer Protection Act due to a broadly worded invasion of privacy exclusion in the Lakers' director's and officer's (D&O) insurance policy.[1] In the underlying case, the plaintiff alleged that while attending a Lakers game he sent a text message in response to a prompt on the scoreboard and that the NBA team sent him a response text message without his consent using an automated dialing system in violation of the TCPA. A split Ninth Circuit panel held that "[b]ecause a TCPA claim is inherently an invasion of privacy claim, [the insurer] correctly concluded that [the claimant]'s TCPA claims fell under the Policy's broad exclusionary clause."

But, why did the policy contain such a broad invasion of privacy exclusion in the first place? This is the question other policyholders should be asking. In fact, many D&O policies no longer contain such exclusions, and to the extent they persist, the exclusions are routinely "written out" of D&O policies during the underwriting process or, where they remain, the wording is substantially narrowed. The Ninth Circuit's holding, therefore, should not be seen to foreclose future TCPA defendants from obtaining D&O coverage for lawsuits alleging TCPA claims in all circumstances. The decision does, however, send a staunch reminder to policyholders that they should carefully analyze the language of their D&O (and other) policies before agreeing to final wording.

As an initial matter, many private company D&O policies do not contain an invasion of privacy exclusion, so policyholders with potential TCPA exposure should insist at renewal that if their policy does contain such an exclusion, it should be removed. Where the carrier will not agree to the request, and moving to a different market is not an option, policyholders should attempt to negotiate narrower exclusionary language — such as requiring a trigger for only "actual or alleged" invasion of privacy claims — or otherwise clarifying whether TCPA telemarketing claims fall within the scope of coverage. Experienced brokers and coverage lawyers can help with this process.

But even where a broadly worded invasion of privacy exclusion is at issue, policyholders seeking D&O coverage for TCPA claims need look no further than the strongly worded dissent in the Lakers opinion itself, which explains how by excluding coverage "the court err[ed] by rejecting the statutory elements chosen by Congress and redefining a TCPA claim as a narrowly restricted privacy claim." Other courts may take a less restrictive view on coverage where claimants do not expressly allege an invasion of privacy claim.

The Lakers dissent also concludes (as the Lakers did in their briefs) that "it is simply not true that

Congress only enacted the TCPA to prevent invasion of privacy," noting that the TCPA "specifically addresses public safety concerns, provides redress for economic injury and protects businesses from [auto-dialer] calls." In fact, other courts have found that the TCPA's legislative history makes clear that the statute was enacted to remedy concerns other than invasion of privacy.[2] The Ninth Circuit ultimately reached a different conclusion, but policyholders should not abandon this argument in future coverage disputes, especially when litigating in courts beyond the Ninth Circuit.

Indeed, one could argue that the underlying case in Lakers is not about a privacy violation at all — rather, it is about an alleged statutory violation premised on an improper advertising campaign that violates the TCPA (a consumer protection statute), not a right to privacy. Likewise, the harm allegedly caused by the injurious conduct is not an infringement of one's privacy, but the apparent financial cost associated with receiving too many text messages — a harm that the TCPA's legislative history reveals as one the TCPA is specifically intended to remedy. Furthermore, looking to the elements of a TCPA claim, the private right of action created by the TCPA does not even reference a privacy interest. The dissent in the Lakers case highlights this point. It also notes the inherent conflict in the majority's statement that a plaintiff automatically "pleads an invasion of privacy claim" by "pleading the elements of a TCPA claim," where the actual elements of a prima facie TCPA claim make no such reference.[3]

In reaching its conclusion, Ninth Circuit also noted the breadth of the invasion of privacy exclusion at issue in the Lakers' policy in light of California's broad interpretation of the clause "arising from" in insurance contracts. Basic insurance contract principles, including under California law, dictate that an insurer may exclude coverage only where the exclusion clearly applies and is not susceptible to any other reasonable interpretation.[4] Once a policyholder shows that a claim falls within the scope of coverage provided by the policy, the insurer bears the burden to provide that the claim is expressly excluded.[5] Nevertheless, the Ninth Circuit found that the TCPA claims at issue were excluded, not because they specifically alleged "invasion of privacy," but because they fell "within the category of intrusion on the 'right to be let alone' recognized under California law as an invasion of privacy." Other courts applying different state law may take a narrower view of invasion of privacy exclusions than the Ninth Circuit's analysis under California law.

Finally, as with any coverage dispute, the available coverage is highly dependent on the specific facts and policy language at issue. The Lakers decision ruled for the insurers based in part on its conclusion that the claimant "asserted two invasion of privacy claims and nothing else in his complaint." After the Lakers opinion, putative TCPA class action plaintiffs may modify their pleadings in the future to avoid a similar result that prevents insurance proceeds from contributing to any potential award or settlement.

Policyholders should continue to evaluate all potential coverage options for TCPA claims. Even as TCPA exclusions become more common in D&O and general liability policies, TCPA claims may still trigger coverage under media liability, cyber or other specialty policies based on facts of each particular case. Lawsuits alleging wrongful acts other than those under the TCPA may still trigger D&O coverage, even if only some of the alleged claims are covered.

Lawrence Bracken II *is a partner at Hunton & Williams LLP in Atlanta. He focuses his practice on litigation and investigating class action, technology, insurance, environmental and commercial matters. He can be reached at (404) 888-4035.* ***Michael Levine*** *is a partner at Hunton & Williams, LLP in Washington, DC. He practices nationally focusing on insurance recovery, counseling and litigation. He can be reached at (202) 955-1857 or mlevine@hunton.com.* ***Geoffrey Fehling*** *is an associate at Hunton & Williams LLP in Washington, DC who focuses on complex civil litigation matters, with an emphasis on insurance coverage litigation and counseling. He can be reached at (202) 955-1944 or gfehling@hunton.com.*

[1] Los Angeles Lakers Inc. v. Federal Insurance Co., No. 15-55777 (9th Cir. Aug. 23, 2017).

[2] In Missouri ex rel. Nixon v. American Blast Fax Inc., 323 F.3d 649 (8th Cir. 2003), for example, the Eighth Circuit reviewed the legislative history leading up to the enactment of the TCPA and found that it was enacted at least in part to address cost-shifting concerns and other interference that unwanted advertising places on the recipient of junk faxes.

[3] "The three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." Meyer v. Portfolio Recovery Assocs. LLC, 707 F.3d 1036, 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(b)(1)).

[4] Haynes v. Farmers Insurance Exch., 89 P.3d 381, 385 (Cal. 2004) ("[T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' ... Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. The burden of making coverage exceptions and limitations conspicuous, plain and clear rests with the insurer." (quoting Steven v. Fidelity & Casualty Co., 377 P.2d 284 (Cal. 1962))).

[5] See Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704 (Cal. 1989) ("[O]nce the insured shows that an event falls within the scope of basic coverage under the policy, the burden is on the insurer to prove a claim is specifically excluded.").