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Commentary

Insurance Claims For 'Blast Faxes': Why The Courts Have It Wrong

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Can it be that almost every court and commentator to have examined whether "blast fax" claims are covered simply got the analysis wrong? Sure it's possible. After all, a bunch of really smart people used to think the earth was flat, right? The developing case law for "blast fax" claims raises the distinct possibility that a slightly unsound and unreasonable legal snowball got rolling when the first few decisions found that "blast fax" claims were intended to be covered under CGL policies. This conclusion has been rumbling along and packing new cases onto its body as it rolls over them. However, as we prepare for a new explosion of "blast fax" claims in 2005 due to the changing law, it is not too late for courts to reassess the skewed reasoning at the heart of the early legal decisions and to consider why these cases should not dictate the future of this area of insurance law.

The single case in the country to have differentiated itself in this manner is discussed in Section II. below. This article first sets forth the arguments as to why a "blast fax" claim is not intended to be covered under most CGL policies; it then analyzes the failure of the leading cases on this issue to have addressed any of these arguments — especially as they pertain to the more modern CGL forms. The final section of the article introduces the TCPA exclusion that will become effective this year, as well as a discussion of the related CAN-SPAM Act.

I. TCPA Background

If an insured faxes an unsolicited advertisement,[1] each recipient of that advertisement can bring a case for damages under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, et seq. ("the TCPA"). The TCPA provides a private cause of action for a party who receives unsolicited facsimile advertisements. Courts can award damages equal to actual monetary losses (ink, paper, etc.), or statutory damages of up to $500 per fax. This award can be tripled to $1,500 *per facsimile* if the infringement is found to be intentional.

Although the TCPA became effective in December 1992, it has only recently had a significant impact on the legal landscape as class action lawyers are learning of the riches hidden within this law. For example, since 2002, one judge alone in Cook County, Illinois has presided over more than 100 TCPA lawsuits seeking class action status.[2] As the number of class actions increase, so too do the judgments and settlements. In one recent case, Charter One Bank faced liability of $35 million for sending unsolicited faxes to approximately 70,000 phone numbers. The case settled for $1.8 million.[3] In another case recently certified for class action, a Georgia car wash that hired a company to send over 70,000 faxes to random phone numbers now faces up to $36.5 million in liability.[4] Amazingly, we can expect this type of claim activity to increase later this year. In July 2005, the tentacles

of the TCPA will reach even wider as an amendment becomes effective that will require fax senders to obtain written permission from each intended recipient before sending an advertisement via facsimile.

The initial rush of case law has found that TCPA claims are covered under the "invasion of privacy" coverage of CGL policies.[5] However, this does not mean that every future case examining insurance coverage for TCPA claims must follow suit. In fact, a new crop of TCPA case law may arise that considers certain arguments, issues and policy forms that have not yet been addressed by most courts. These arguments and issues are discussed in the two sections below.

II. Just The Fax, M'am? Do Policies Intend To Insure Privacy Claims Arising Out Of The Content Of A Publication Or From The Manner The Publication Was Transmitted?

If you're looking for a quick summary of this article, this paragraph is it. Most CGL policies provide certain coverage for invasion of privacy claims. These policies generally cover damages caused by:

> Oral or written publication of material that violates a person's right to privacy.

The provision above means that, if *the content of the material published* violates a person's right of privacy, then the insured's resulting liability is covered, subject to the other policy terms and conditions. However, most courts examining TCPA claims have misinterpreted this provision to mean that, *regardless of the content of the material published*, if the manner of publication (i.e. an unwanted facsimile) causes a privacy invasion, then the insured's resulting liability is covered. These courts have it wrong. The intent of the privacy coverage is to provide insurance for claims arising from the offensive *content of the material*, and *not* from the offensive manner in which innocent, non-infringing material was transmitted.

In other words, if an advertisement publishes your picture or private information without your permission, then that privacy invasion is likely within the privacy coverage provision, regardless of whether it is published in a newspaper, billboard, magazine or by facsimile. On the other hand, if an advertisement contains no private information, but simply says "25 cents off hamburgers," then the material in that communication has not caused a privacy violation at all, regardless of whether it is published in a newspaper, television commercial, or by facsimile. If the content of the material does not give rise to an invasion of privacy, then any liability resulting from the publication of that material is not within the contemplated scope of the invasion of privacy coverage provision. This article is premised upon the idea that the privacy analysis under a CGL policy should hinge upon *the content of the material rather than on the manner of transmission.*

Recently, the Seventh Circuit became the first court in the country, at any level, to have properly focused upon the point that CGL policies only intend to cover privacy violations that result from the content of published material. In American States Ins. Co. v. Capital Assoc. of Jackson County, 2004 WL 2964160 (7th Cir. (Ill.)(Dec. 23, 2004), the court analyzed a TCPA claim under the advertising injury coverage for "oral or written publication of material that violates a person's right of privacy."

The Seventh Circuit noted that, generally, there are two major types of privacy invasion claims. There are those that are "informational," wherein a person wishes to keep private certain facts and information. These types of privacy claims involve an invasion on a person's secrecy. A second type of privacy claims are those that are "locational," wherein a person wishes to stop solicitors from ringing his doorbell at 9 p.m., thereby preserving a person's right of seclusion. The court found that the language of the privacy coverage in the standard CGL policy seemed to cover only privacy claims involving intrusion upon a person's secrecy — "where an oral or written statement reveals an embarrassing fact or brings public attention to a private figure, or casts someone in a false light through a publication of true but misleading facts."[6] The court noted that such coverage could apply to improper disclosures of Social Security numbers, credit records, email addresses, and other details that could facilitate identity theft or spamming.

However, the TCPA claim at issue in Capital Associates, like almost every TCPA claim, did not allege any publication of secret information, and therefore it did not allege the type of privacy claim intended to be covered by the policy. The Seventh Circuit noted

that the lower court, like other courts, failed to properly consider that, although the TCPA is intended to protect against a particular *means of communicating* an advertisement, the advertising injury coverage is only intended to insure claims *dealing with informational content*.[7] In other words, the Seventh Circuit noted that courts analyzing TCPA claims must draw a distinction between privacy claims based on seclusion ("locational"), and those based on publication of secret facts ("informational).

No other court that has analyzed an insurance claim involving the TCPA has addressed this point. Instead, those courts have generally focused on different issues. Courts have analyzed:

1. Under the standard CGL policy's Coverage A, does the TCPA claim allege "property damage"?

2. If so, was it caused by an "occurrence"; i.e., by "accident"?

3. Under the standard CGL policy's Coverage B, does a TCPA claim present a privacy claim at all?

4. If so, does a facsimile constitute a "publication"?

5. Must the TCPA violation arise from the "material" that was published, or only from the manner of the publication?

While courts have disagreed on whether a TCPA claim causes covered "property damage," that is a topic for another article and is not addressed herein.[8] With respect to the analysis under Coverage B (personal and advertising injury coverage), not surprisingly, most courts have concluded that a fax is a "publication" and that a TCPA claim does constitute a privacy claim because the entire purpose of the TCPA was to protect privacy. This article deals with the last of the five questions above, because it is the one question that most clearly demonstrates that TCPA claims are not intended to be covered, and it is also the question most routinely and blatantly circumvented by policyholder counsel.

In order to judge whether the courts have properly analyzed the coverage for "oral or written publication of material that violates a person's right to privacy," this article first presents the pertinent arguments pertaining to this issue, and then examines the manner in which most leading cases have failed to address these arguments.

III. Factors That Indicate The Privacy Violation Must Be Caused By The Content Of The Material Published And Not Simply By The Manner Of The Publication

The single most important question for courts to answer when considering coverage for a TCPA claim is whether the privacy coverage in the CGL forms was intended to cover invasions of privacy that occur in the manner in which an ad is transmitted, or whether the privacy coverage was only intended to apply to privacy infringements that arise from the content of the ad itself. One logical place to find the answer to this question is within the policy language and its history. This policy language, often ignored by the courts' analyses, demonstrates that the CGL privacy coverage was only intended to cover claims arising from the content of the material being published, and not from the manner in which the publication was transmitted.

A. The History Of The CGL Privacy Coverage Grant Sheds Light On The Intent

1. The Intent Not To Cover Every Type Of Privacy Invasion

In 1973, the standard CGL form provided coverage for invasion of privacy in two places: the personal injury coverage provision, and the separate advertising injury coverage provision. Both provisions stated that they covered the broad enumerated offense of "violation of privacy." Based upon this phrase, there was coverage for just about any "violation of privacy" that satisfied the other terms and conditions of the policy. This would include not only privacy invasions that arose from the publication of private facts (i.e., "informational"), but it would also include violations caused by the intrusion upon a person's solitude, sometimes called "unreasonable intrusion upon the seclusion of another" (i.e., "locational").

However, in 1985, the privacy coverage in the standard Insurance Services Office (ISO) forms changed. Instead of covering "violations of privacy" the cover-

age grant was changed to "oral or written publication of material that violates a person's right of privacy." This change indicates that not all invasions of privacy are intended to be covered. Instead, only privacy invasions that arise from published material ("informational" claims) are intended to be covered.

The amended privacy language has remained in the CGL forms for the last 20 years, but the change has not been addressed by any every court to have examined coverage for TCPA claims. With respect to TCPA claims, the case law has largely reasoned that, if a TCPA claim is seen as involving an invasion of privacy, then it "logically" must fall within the CGL policy's coverage for privacy claims. This is simply wrong. The CGL policy clearly does not intend to cover all privacy violations, but only those that arise from the content of the material that is being published. In the case of a TCPA claim, the material itself does not give rise to the privacy violation, and therefore a TCPA claim is outside of the scope of the standard privacy provision.

2. The Elimination Of Any Advertising Requirement From CGL Privacy Coverage

Many followers of TCPA insurance cases would be shocked to know that privacy coverage hasn't existed in the standard advertising injury provision for seven years. Here's the scoop.

Beginning in 1985, the personal injury and the advertising injury provisions of the CGL policy each provided separate coverage for "oral or written publication of material that violates a person's right of privacy." To date, every reported decision to have analyzed coverage for TCPA claims has conducted this analysis under the advertising injury coverage provision and not under the personal injury coverage provision. While courts have not explained their decision to proceed under the advertising injury coverage analysis and not the personal injury coverage, it appears that courts have been drawn (albeit perhaps artificially so) to the logic that TCPA claims arise from advertising, therefore the coverage analysis should take place pursuant to the traditional advertising injury case law. In conducting this analysis, courts have placed an inordinate amount of reliance on the "advertising" tie between a TCPA claim and the "advertising injury" provision coverage, and thereby arrive at the conclusion that TCPA claims must be covered as advertising injury because they arise from advertising activities.

However, in 1998, the two separate coverage grants for personal injury and for advertising injury in the CGL policy were combined into a single coverage for "personal and advertising injury." As part of this combination, some of the enumerated offenses retained their required tie to advertising, while other enumerated offenses abandoned any requirement that they must arise from advertising, thereby reflecting their roots from the old personal injury coverage.

For example, since 1998, coverage for "copyright, trade dress or slogan" has required that these offenses must arise from an "advertisement," thereby representing its homage to the old advertising injury provision from which these offenses were taken. However, since 1998, coverage for "oral or written publication of material that violates a person's right of privacy" has had absolutely no advertising requirement at all, thereby representing its origin from the "personal injury" coverage grant. The impact of this distinction is that any court analyzing coverage for a TCPA claim under post-1998 CGL language should not engage in a discussion of "advertising injury" requirements because the privacy provision does not require any tie whatsoever to advertising activities. This is a wrinkle that has yet to be ironed out by courts that have examined TCPA claims.

Since 1998, the only invasion of privacy coverage in CGL policy forms is coverage that emanates from the earlier "personal injury" provision that covered invasion of privacy. The operative question which is then facing the courts becomes: "Does a TCPA claim really allege a privacy violation that qualifies as 'personal injury'?" While this issue has not been addressed, in at least one leading case discussed below, the parties agreed that the TCPA claim did not allege any "personal injury."[9] Other courts to consider this question may also have a difficult time finding that receiving an unsolicited facsimile constitutes a "personal injury."

3. The Distinction Between 'Publication' And 'Material'

When examining the phrase "oral or written publication of material that violates a person's right of privacy," most courts have essentially read this

phrase to eliminate the word "material" and to force the CGL policies to provide coverage for "oral or written publication that violates a person's right of privacy." Apparently, courts have seen nothing within the provision itself that demonstrates any intent to differentiate the word "publication" from the word "material." Therefore, the case law has simply lumped these terms together and found that TCPA claims are covered because there is really no difference in usage between the word "publication" and the word "material."

However, in 2001, there was a slight change to the standard provision that does acknowledge the separate and distinct meaning of the word "publication" from the word "material." In the 2001 CGL form, the phrase "in any manner" was added. If the CGL coverage was truly intended to cover invasions of privacy that occur in the method of publication (i.e. a "locational" claim), then the phrase could have been added as follows:

> oral or written publication of material, **in any manner**, that violates a person's right of privacy

In other words, the above phrasing would indicate that a privacy invasion caused by a publication, no matter how the publication was transmitted, is covered. **However, this is not the manner in which the phrase was added.** Instead, the phrase was added as follows:

> oral or written publication, **in any manner**, of material that violates a person's right of privacy[10]

In the above version of the phrase, the meaning is clear that, while the publication can take place in any manner, the privacy violation still needs to arise from the content of the material in order to constitute a covered claim. This slight change is representative of the fact that, even in pre-2001 forms, no matter how the alleged publication took place, the intent was still that the privacy invasion itself must arise from the "material" or the content of the publication. This slight change also indicates that, with respect to TCPA claims that are made under post-2001 forms, the additional phrase "in any manner" represents a second wrinkle that policyholder counsel must iron out if they are still determined to find coverage for TCPA claims where none was intended.

B. The Policy Should Be Interpreted To Give Meaning To Every Word

It is a fundamental rule of insurance policy construction that an interpretation that gives a reasonable meaning to all provisions is preferable to one that leaves a portion of the policy useless, inexplicable, or creates surplusage. Cicciarella v. Amica Mut. Ins. Co., 66 F.3d 764, 768 (5th Cir. 1995).[11]

Therefore, courts should strive to give meaning to each word in the following phrase:

> *oral or written publication of material that violates a person's right of privacy*

Courts to have examined coverage for TCPA claims have not adhered to this rule of construction. Instead, courts have found that the privacy coverage applies to any type of publication that violates a person's right of privacy, regardless of whether that violation is caused by the material being transmitted or by the method of transmission. In other words, courts have interpreted the invasion of privacy provision in a manner that completely erases the word "material" from the definition. Courts have rewritten the CGL privacy coverage to read:

> *oral or written publication that violates a person's right of privacy*

This interpretation, recently crafted by numerous courts, has not only rendered the word "material" to be meaningless, but it has also changed the privacy coverage to apply to any publication that leads to a privacy invasions — even if the invasion results from the method of transmission rather than from the material transmitted.

C. Read Policy As A Whole To Be Consistent

Another fundamental rule of policy construction is that policies are intended to be read as a whole and that they should be interpreted to harmonize various sections rather than to create an inconsistency.[12] Standard CGL policies include an exclusion that uses language very similar to the language in the invasion of privacy provision, and the language in these

sections should not be rendered inconsistent. The "knowledge of falsity" exclusion states that the policy will not cover advertising injury that:

> *arises out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.*

In reading the exclusion above, the only logical interpretation is that the "falsity" being referred to is falsity that is contained in the content of the "material" that is being published. The word "material" is used to indicate that the injury at issue is one that arises from the actual content of the publication. In keeping with traditional rules of contract construction, if the word "material" is used in this exclusion to refer to the content of the publication, then the word "material" should be afforded the same treatment in the privacy provision, thereby requiring that any covered invasion of privacy must result from the content of the material being transmitted. To find otherwise would be to create an inconsistency in the usage of the word "material" between these two provisions.

IV. Where The Courts Have Misfired

The preceding paragraphs demonstrate that the privacy coverage in CGL policies is only intended to apply to privacy violations which arise from published material that contains secret or private information about an individual. With this analysis in mind, it is more than disappointing that the first wave of courts to consider TCPA claims under the CGL privacy provision have not accurately analyzed this issue.

One of the first cases to lead the rampage toward coverage for TCPA claims was Prime TV, LLC v. Travelers Ins. Co., 223 F. Supp. 2d. 744 (M.D. N.C. 2002). In Prime TV, the court found that the TCPA claim was insured under the "property damage" coverage,[13] and the court barely addressed the advertising injury provision.

In a single paragraph of analysis at the end of the opinion, the court explained that the faxes were sent "in the course of advertising" as required by the policies. (As previously described, this factor is irrelevant under post 1998 coverage forms which do not require advertising activities for invasion of privacy coverage.) Then, in only two sentences, the court concluded that, because the TCPA was enacted to protect privacy, a TCPA claim must therefore fall within coverage for "written publication of material that violates a person's right of privacy."[14] The court offered no mention of the key question whether the policy was intended to cover every privacy invasion, or only those arising from the content of the material that was disseminated.

The next case to follow in the footsteps of Prime TV was Hooters of Augusta, Inc. v. American Global Ins. Co., 272 F. Supp. 2d. 1365 (S.D. Ga. 2003). In Hooters, the insured was accused of hiring another company to distribute unsolicited facsimiles. After a jury returned a verdict of $11.8 million against the insured, the verdict was appealed. While the case was pending on appeal, the matter settled for $9 million. In the subsequent insurance coverage litigation, the court first concluded that the TCPA's legislative history makes it clear that the TCPA was enacted to protect individuals' privacy. Therefore, the Hooters decision incorrectly concluded that a TCPA violation must fall within the advertising injury coverage for "oral or written publication of material that violates a person's right of privacy." The court did not even address the distinction between a privacy invasion that arises from the invasive content of material (i.e. a covered "informational" claim), and a privacy invasion that results from the invasive manner in which an otherwise innocuous piece of material is transmitted (i.e. a non-covered "locational" claim).

Another leading case to similarly avoid the key issue is Western Rim Investment Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d. 836 (N.D. Tex. 2003), *aff'd*, 96 Fed. Appx. 960 (5th Cir. 2004). The court in Western Rim examined a TCPA claim under an advertising injury provision which covered "Oral or written publication of material that violates a person's right to privacy." The court first ruled that the unsolicited faxes were "an oral or written publication," and then the court sought to address the key issue:

> The next issue is whether it's alleged that the publication was of material that violates a person's right of privacy.

However, after raising the key issue, the Western Rim decision, citing liberally to Prime TV, engaged in circular reasoning to create coverage and to avoid really addressing the issue.

The court made a passing effort to give distinct meaning to the word "material" by ruling that the "material" which gives rise to the violation of the right of privacy are the faxes themselves because it is the faxes, the unwanted advertisement, that causes the violation of the TCPA. Therefore, the court concluded that the claim arose from the content of the material (i.e., from advertising), and the TCPA claim is therefore covered. This conclusion is flat wrong. After all, if the exact same "material" was published in a newspaper or magazine, then it would not give rise to an invasion of privacy because the content of the material was not secretive or private in any way. Therefore, the privacy invasion at issue in a TCPA claim certainly does not arise from the material itself, as the court in Western Rim erroneously concluded. On appeal, rather than addressing this issue in any meaningful manner, the appellate court simply noted that it "affirms for essentially the reasons stated by the district court."

The flawed reasoning of Western Rim was relied upon to reach a similarly flawed conclusion in TIG Ins. Co. v. Dallas Basketball, Ltd., 129 S.W.3d 232 (Tex. App. 2004). The Dallas Basketball decision does present the valid point that "the term *material* as it is used in the insurance policies refers to the content of the publication at issue rather than the publication's physical form."[15] However, the court then latched onto the circular reasoning presented in Western Rim and concluded that, because the content of the "material" faxed was advertising content, then it is this content that caused the invasion of privacy under the TCPA. Therefore, because the invasion of privacy was caused by the material, the court found that the claim fell within the insurance policies' coverage for advertising injury.[16] Again, the court's reasoning was incorrect. The material at issue in these cases could be published in any newspaper without infringing on anyone's privacy. Therefore, the privacy invasion in these cases does not arise from the material itself, but only from the method in which the material is transmitted. The court's circular reasoning in Dallas Basketball did not address this issue, let alone soundly and overwhelming resolve the issue for future cases to rely upon.

Nevertheless, the difficulty in now stopping the coverage snowball that has been fueled by the above cases was demonstrated in Registry Dallas Associates v. Wausau Bus. Ins. Co., 2004 WL 614836 (N.D. Tex. Feb. 26, 2004). The underlying action alleged that a "blast fax" company sent over 30,000 unsolicited faxes on behalf of the insured. In considering whether the TCPA claims were covered as "oral or written publication of material that violates a person's right of privacy," the court began its analysis by noting that the Western Rim and Dallas Basketball cases are directly on point. Rather than becoming the first court to address the requirement that the privacy invasion must arise from the material that was faxed and not just from the method of transmission, the court in Registry instead simply noted that "the Western Rim and Dallas Basketball decisions aptly discuss the same issues that are present in this case, and this court can do nothing to enhance the excellent analysis and reasoning in those decisions." Registry at *4.

Similarly, in Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 323 F. Supp. 2d. 709 (E.D. Va. 2004), the court used the Western Rim case to avoid the key point at issue. The court noted: "St. Paul next claims that the (underlying claim) fails to allege an advertising injury because it is the content of the advertisement, not the advertisement itself, that must violate a person's right to privacy for coverage to exist." In order to evade this argument, the Resource Bankshares decision simply relied upon Western Rim, and explained that the unwanted facsimile is, by itself, the "material" that is offensive and violative of the right of privacy.

No matter how many courts latch onto the reasoning of Western Rim, it does not strengthen that reasoning. The fact will remain that if, after an unsolicited facsimile is received, somebody then broadcasts the content of that facsimile over television stations across the world, this "material" would not give rise to an invasion of privacy claim as long as no secret or private information is contained in the material. Therefore, it is not the material itself that causes the TCPA violation, but the manner in which it was transmitted. The CGL policies did not intend to provide coverage for the manner in which ads are transmitted. This point will be clarified in the coming months through the new addition to standard CGL policies, as described below.

V. The TCPA Exclusion Clarification And The CAN-SPAM Act

The courts have not recognized that the intent of the CGL provisions is to cover privacy claims arising from infringing content but not to cover innocent content

that happens to have been transmitted in an invasive manner. In order to clarify this point, the ISO has introduced a new exclusion for "Methods of Sending Material or Information." The new exclusion will go into effect in some states as early as March 1, 2005.[17] This exclusion provides that the following is added to Paragraph 2., Exclusions of Section I, Coverage B:[18]

> Personal and Advertising Injury Liability:
>
> 2. Exclusions
>
> This insurance does not apply to:
>
> DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES
>
> "Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> **a.** The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
>
> **b.** The CAN-SPAM Act of 2003 including any amendment of or addition to such law; or
>
> **c.** Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

The reference in the exclusion to the CAN-SPAM[19] Act of 2003 is a reference to 18 U.S.C. 1037, which became effective on January 1, 2004. The CAN-SPAM act makes it unlawful to send commercial e-mail that is deceptive or misleading. Specifically, it is a criminal offense to access another's computer to relay or retransmit multiple commercial e-mails with the intent to deceive or mislead. It also prohibits the sending of materially false header information on an e-mail with the intent to deceive or mislead, or creating false e-mail accounts to falsify the identity of the entity sending the e-mails.

Civil violations of the CAN-SPAM Act, Section 5(a), may include sending a commercial e-mail that contains a fraudulently acquired e-mail address in the header, or disguises the identity of the computer from which it originated, or does not otherwise accurately identify the initiator of the commercial e-mail message. The civil provisions also prohibit any misleading subject headings, and they also require every commercial e-mail to give the recipient the opportunity to "opt out" of receiving future commercial e-mails from the particular sender. The CAN-SPAM Act also requires the e-mail to identify that it is an advertisement or solicitation, and to list the sender's physical postal address. The law applies to the entity actually transmitting the spam e-mail, as well as the entity whose advertisement is being transmitted.

So, if the CAN-SPAM Act contains so many provisions cracking down on spam e-mails, then why are you receiving hundreds of spam e-mails each day, why is your company spending tens of thousands of dollars on spam filters, and why haven't we seen nearly the rush of CAN-SPAM claims as we have seen with TCPA claims? The first reason is that the CAN-SPAM Act largely *makes it legal to send unsolicited commercial e-mail* so long as its source and nature are not disguised. The second reason you are still inundated with spam e-mail is that the CAN-SPAM Act does not create a private right of action as does the TCPA. Spam claims can only be brought by the Federal Trade Commission (FTC), by states on behalf of their citizens, or by Internet Service Providers (ISPs). None of these entities are overly concerned about the particular problems of any individual consumer.

The FTC may seek an injunction and/or penalties from violators of the Act, while states and ISPs may seek injunctions and statutory damages by multiplying the number of violations by up to $250 if the claim is brought by a state, or up to $100 if the claim is brought by an ISP. Damages for claims brought by a state are generally capped at $2 million, while damages for claims brought by ISPs are capped at $1 million. There are various "aggravating activities" that can present circumstances which would lift these caps.

Unfortunately, although the CAN-SPAM Act is more sorely needed by the public than the TCPA, and although spam e-mails are certainly more invasive, time

consuming and expensive to avoid than facsimiles, the CAN-SPAM Act has not seen the type of practical usefulness as its cousin, the TCPA. However, even in the event that the FTC, ISPs or states begin frantically filing CAN-SPAM enforcement actions, or in the event a private cause of action is enacted, such claims would be excluded from insurance coverage under any form that has adopted the "Methods of Sending Material or Information" endorsement that will go into effect on many standardized CGL policies later this year.

VI. Conclusion

As long as class action attorneys continue to benefit from multi-million dollar settlements in TCPA claims, we can expect these claims to continue. The number of TCPA claims will certainly increase later this year when the new TCPA requirement takes effect that requires advertisers to obtain written permission from the recipient before sending an advertising facsimile. As the number of TCPA claims increase, so too will the number of insureds seeking insurance coverage for these claims.

Any TCPA claim that is governed by the new 2005 ISO CGL policy form will be excluded from coverage by the specific exclusion for TCPA claims. However, TCPA claims brought under older versions of the CGL provisions will require a more stringent legal analysis. If these claims are brought under a post-1998 coverage form, then the court should examine whether the TCPA claim is a "personal injury" that falls under the privacy coverage. In cases involving these post-1998 forms, the traditional advertising injury analysis should not be at all relevant.

In any event, under the pre or post-1998 forms, the real question facing courts is whether the CGL coverage for "oral or written publication of material that violates a person's right of privacy" is intended to apply to only "informational" invasions of privacy involving the publication of private facts, or whether this coverage was also intended to apply to "locational" invasions of privacy involving physical intrusion, without regard to the content of any publication. After analyzing the changes made to the privacy provisions since 1973, and after applying the fundamental rules of policy construction, a new crop of case law should emerge that follows the lead of American States Ins. Co. v. Capital Associates. These cases should melt the snowballing decisions that have found coverage for TCPA claims, and instead create the new precedent that TCPA claims which do not allege the publication of any private or secret facts are not the type of claims intended to be covered under the standard invasion of privacy coverage in CGL forms.

Endnotes

1. The law does not prohibit all unsolicited faxes, but only those that advertise the commercial availability or quality any property, goods, or services.

2. *A growth industry in Illinois: junk-fax suits*, CRAIN'S CHICAGO BUSINESS, December 13, 2004, at 1.

3. Id.

4. Hammond v. Carnett's, No. A03A2487 (Ct. App. Ga. March 12, 2004).

5. Cases finding coverage for TCPA claims include Park Univ. Enterprises, Inc. v. Am Cas. Co. of Reading PA, 314 F. Supp. 2d. 1094 (D.Kan. 2004); Registry Dallas Assoc. v. Wausau Bus. Ins., 2004 WL 614836 (N.D. Tex. Feb 26, 2004); TIG Ins. Co. v. Dallas Basketball, Ltd., 129 S,W.3d 232 (Tex. App. 2004); Universal Underwriters Ins. Co. v. Lou Fusz Auto Network Inc., 300 F. Supp. 2d. 888 (E.D. Mo. 2004); Hooters of Augusta, Inc. v. Am. Global Ins. Co., 272 F. Supp. 2d. 1365 (S.D. Ga. 2003); Western Rim Investment Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d. 836 (N.D. Tex. 2003), *aff'd*, 96 Fed. Appx. 960 (5th Cir. 2004); Merhcant's & Businessmen's Mut. Ins. Co. v. A.P.O. Health Co., Inc., 228 N.Y.L.J. 22 (N.Y. Sup.Ct. Aug. 29, 2002); Prime TV, LLC v. Travelers Ins. Co., 223 F. Supp. 2d. 744 (M.D. N.C. 2002).

6. Amer. States v. Capital Asso., 2004 WL 2964160 at *4.

7. Id. at *7.

8. In American States v. Capital Assoc., the Seventh Circuit found that, in every TCPA claim, the sender intended to use the recipients' consumables

(paper and ink). Therefore, to the extent the claim constitutes "property damage," it is excluded by the intentional acts exclusion which applies to property damage claims, but not to advertising injury. In Western Rim Investment Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d. 836, 842-44 (N.D. Tex. 2003), *aff'd*, 96 Fed.Appx. 960 (5th Cir. 2004), the court determined that the TCPA claim was not covered under the "property damage" provision because the TCPA claim did not constitute an "occurrence." The court found that an "occurrence" requires an "accident," and that the faxes sent by the insured constituted intentional behavior. See also, Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 323 F. Supp. 2d. 709 (E.D. Va. 2004)(finding no "property damage" coverage where unsolicited facsimiles were intentionally transmitted, even though insured mistakenly believed recipients had requested the information).

However, in Prime TV v. Travelers Ins. Co., 223 F. Supp. 2d. 744 (M.D. N.C. 2002), the court found that, under North Carolina law, the TCPA claim did present property damage resulting from an accidental "occurrence" because, although the insured intentionally requested a third party to fax the advertisements, the insured mistakenly believed that the recipients had requested the information in the advertisements. See also, Park University Ent. v. American Cas. Co. of Reading, PA, 314 F. Supp. 2d. 1094 (D. Kan. 2004)(holding that a TCPA claim did trigger coverage under the "property damage" provision).

9. See Western Rim Investment Advisors, Inc. v. Gulf Ins. Co., Brief of Appellee-Cross Appellant at FN.6, 2003 WL 23857543. In another early TCPA coverage case, Hooters v. American Global Ins. Co., 272 F. Supp. 2d. 1365, fn 3 (S.D. Ga. 2003), the court also noted that only two types of coverage at issue were property damages and advertising injury. The court gave no reason that personal injury coverage was not at issue.

10. The words "in any manner" were added to the 2001 ISO form in order to clarify that electronic communications that may arise from e-mail or web-sites were intended to be treated as an oral or written publication. ISO Commercial General Liability Forms Filing, GL-2000-OMF00.

11. See also, Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455, 458 (Tex. 1997); Liberty Mutual Ins. Co. v. American Employers Ins. Co., 556 S.W.2d 242, 245 (Tex. 1977)(holding that a policy should not be interpreted in a way that would render one of its terms meaningless or useless); Sommer v. New Amsterdam Cas. Co., 171 F.Supp. 84 (E.D. Mo.1959)(courts should not adopt an interpretation neutralizing a policy provision if another interpretation gives it effect.); Pfizer, Inc. v. Stryker Corp., 2004 WL 2750090, *65 (S.D.N.Y. 2004)(contract interpretation that renders provisions meaningless is not preferred under New York law if there is another construction that gives a reasonable and effective meaning to all terms of the contract); Affiliated FM Ins. Co. v. Owens-Corning Fiberglas Corp., 16 F.3d 684, 686 (6th Cir. 1994) ("Under Ohio substantive law, the courts construe insurance contracts in accordance with the same rules as other written contracts. . . . In construing a contract, a court . . . must give meaning to every paragraph, clause, phrase and word, omitting nothing as meaningless, or surplusage.").

12. Purdy Co. of Ill. v. Transp. Ins. Co., 568 NE2d 318, 321 (Ill. App. 1991); Haulers Ins. Co. v. Burke, 1997 WL 819929, *6 (Tenn. App. 1997).

13. The court found that the unsolicited facsimiles caused the recipients the "loss of use" of their fax machines and, therefore, the TCPA claim did allege "property damage" under the policies. This "property damage" was found to be the result of an accidental "occurrence" because the insured mistakenly believed that the facsimiles were only to have been sent to individuals who had requested such information from the insured. Prime TV, 223 F. Supp. 2d. at 750-51.

14. Id. at 752-53.

15. TIG v. Dallas Basketball, 129 S.W.2d at 237.

16. Id. at 238.

17. There are 21 states where the exclusion will become effective as of March 1, 2005. This means that the exclusion is approved as a standard endorsement to ISO CGL policy forms in those states.

18. The same exclusion will also apply to Section I — Coverage A — Bodily Injury and Property Damage Liability.

19. CAN-SPAM is an acronym for Controlling the Assault of Non-Solicited Pornography and Marketing. ■

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