

Unsolicited Fax Advertising Does Not Constitute an “Advertising Injury”

Insurance Law Update

October 2010

By: **Julie Kim**

Superior Court of Pennsylvania

In *Telecommunications Network Design and Paradise Distributing, Inc. v. Brethren Mut. Ins. Co.*, ___ A.2d ___, 2010 WL 3294319 (Pa. Super. Aug. 23, 2010), the Superior Court of Pennsylvania determined that an insurer had no duty to defend its insured in a lawsuit arising out of the insured’s transmission of unsolicited advertising faxes based on a policy provision providing coverage for “advertising injury.” Paradise was insured under business owners’ liability insurance policies issued by Brethren Mutual.

Paradise transmitted more than 1,000,000 unsolicited advertising faxes, which were received by, among others, Telecommunications Network Design (TND). TND filed a class action lawsuit against Paradise under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, on behalf of the persons and entities who had wrongfully received faxes sent by Paradise. Brethren refused to defend and indemnify Paradise under the policies. The action ultimately settled by way of a judgment against Paradise in the amount of \$3,999,999.00, to be satisfied only from the proceeds of the policies, which had been assigned to the plaintiff class.

Paradise and TND then filed a declaratory judgment action to determine Brethren’s liability, alleging that Brethren had acted in bad faith in denying coverage. The trial court determined that Brethren did not have a duty to defend under the policies’ “personal injury” and “advertising injury” provisions, but that it did have a duty to defend under the “property damages” provision based on the amended complaint’s allegations that Paradise had unintentionally transmitted the advertisements to the plaintiff class. Prior to trial of the action, Paradise and TND had agreed to dismiss with prejudice all the remaining claims under the “property damages” coverage and the one remaining bad faith claim.

Paradise and TND appealed the trial court’s holding that Brethren was not required to defend under the “advertising damages” provision of the policies. Paradise and TND argued that TND’s complaint arose under the TCPA and that the “junk fax” ban within the TCPA was intended to protect privacy rights. Thus, they contended that Paradise’s actions fell within the “advertising injury” clause of the policy, specifically, the clause that includes “oral and written publication of material that violates a person’s right of privacy.” Brethren

disagreed, arguing that the duty to defend under the advertising injury provision is triggered only if the content of the faxed material violates the privacy of the recipient.

Other jurisdictions have addressed the issue of whether violations of the TCPA are covered by insurance policies that contain similar language regarding “advertising injury” coverage. However, in deciding this issue of first impression for Pennsylvania, the court acknowledged that the TCPA was likely intended to protect a “right to seclusion” violated by unsolicited faxes, but found that the “advertising injury” clause was clear and unambiguous, and that Paradise’s actions were not covered. The court reasoned that “[w]hen the term is read within the context of the policies, it is clear . . . that the term ‘privacy’ is confined to secrecy interests.” Further, the policies define “advertising injury” with reference to specific offenses (e.g., libel or slander, publication of material that violates a person’s right to privacy), all of which focus on the messages’ content. Because the underlying action did not raise issues with the content of the faxes, the court concluded that the privacy interest at issue was not covered.

Related Practices:

[Insurance Practices](#)