

Ninth Circuit Certifies Right To Privacy Coverage Question To California Supreme Court

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Previous Insurance Law Alerts have discussed conflicting decisions as to whether fax blasting claims brought under the Telephone Consumer Protection Act (“TCPA”) are covered under a general liability policy. See [March 2010 Alert](#), [September 2013 Alert](#), [September 2017 Alert](#). These cases address whether personal and advertising injury coverage applies only to claims involving the right to secrecy (*i.e.*, the right to keep personal information private), or also to claims involving the right to seclusion (*i.e.*, the right to be free from unwanted intrusions). Last month, the Ninth Circuit asked the California Supreme Court for guidance on this issue. *Yahoo! Inc. v. Nat’l Union Fire Ins. Co.*, 2019 WL 209713 (9th Cir. Jan. 16, 2019).

The coverage dispute arose out of five class action suits filed against Yahoo, alleging that the company violated the TCPA by transmitting unsolicited text message advertisements to putative class members. National Union refused to defend the suits, arguing that coverage for claims arising out of “publication . . . of material that violates a person’s right of privacy” does not include TCPA claims, which implicate only the right to seclusion. A California district court agreed and granted National Union’s motion to dismiss.

On appeal, the Ninth Circuit noted the unsettled state of California law on this issue and certified the following question to the California Supreme Court:

Does a commercial liability policy that covers “personal injury,” defined as “injury . . . arising out of . . . [o]ral or written publication . . . of material that violates a person’s right to privacy,” trigger the insurer’s duty to defend the insured against a claim that the insured violated the Telephone Consumer Protection Act by sending unsolicited text message advertisements that did not reveal any private information?

We will keep you posted on any developments in this matter.

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