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## Insurance Law News Alert

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### **New Florida Supreme Court Holding: Commercial Liability Policy Providing Coverage for “Advertising Injury” Covers Damages for Violating Telephone Consumer Protection Act by Sending Unsolicited Advertisements by Fax**

Recently, in *Penzer v. Transportation Ins Co.*, No. SC089-2-068 (Fla. Jan. 28, 2010), the Florida Supreme Court answered a certified question from the 11th Circuit and held that a commercial liability policy providing coverage for “advertising injury” covers damages from sending unsolicited advertisements via fax in violation of the federal Telephone Consumer Protection Act (“TCPA”).

The plaintiff in *Penzer* filed a state class-action suit in 2003, alleging that Nextel or one of its agents sent him an unsolicited fax in violation of the TCPA, which prohibits the use of “any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” See 47 U.S.C. § 227(b)(1)(C) (2001). Nextel filed a third-party complaint against its agent, Southeast Wireless, which sought coverage from its commercial liability insurer, Transportation Insurance Company (“Transportation”). After Transportation denied coverage and refused to provide a defense, Southeast Wireless consented to a judgment and assigned its rights against Transportation to Penzer, which filed a declaratory judgment action against the insurer in the Southern District of Florida.

The policy at issue defines “advertising injury” as an “injury arising out of . . . [o]ral or written publication of material that violates a person’s right of privacy.” The insurer argued in the Southern District that the phrase “oral or written publication of material that violates a person’s right of privacy” provides coverage only for injuries to privacy rights caused by the **content** of the material -- as opposed to a violation of privacy caused by the fact of the publication of the material.

The Southern District ruled in favor of Transportation, and Penzer appealed to the Eleventh Circuit, which certified the following question to the Florida Supreme Court:

DOES A COMMERCIAL LIABILITY POLICY WHICH PROVIDES COVERAGE FOR “ADVERTISING INJURY,” DEFINED AS “INJURY ARISING OUT OF . . . ORAL OR WRITTEN PUBLICATION OF MATERIAL THAT VIOLATES A PERSON’S RIGHT OF PRIVACY,” SUCH AS THE POLICY DESCRIBED HERE, PROVIDE COVERAGE FOR DAMAGES FOR VIOLATION OF A LAW PROHIBITING USING ANY TELEPHONE FACSIMILE MACHINE TO SEND UNSOLICITED ADVERTISEMENT TO A TELEPHONE FACSIMILE MACHINE WHEN NO PRIVATE INFORMATION IS REVEALED IN THE FACSIMILE?

The Florida Supreme Court answered in the affirmative, holding that the language of the “advertising injury” provision provides coverage for TCPA infringements.

In reaching its decision, the Court focused on three “particularly relevant” terms not defined by the policy: “publication,” “material,” and “right of privacy.” The Court relied on dictionary definitions for “publication” and “material.” The Court found that the term “publication” -- defined as a “communication of information disseminated to the public” -- encompasses the 24,000 unsolicited blast-facsimile ads to Penzer and others. The Court further found that the faxed papers containing the unwanted ads met the definition of “material” because they “consist of matter” and “may serve as the basis for arriving at fresh interpretations or judgments or conclusions.”

The Court found, however, that the plain meaning of “right of privacy” must be gleaned from federal or Florida law, rather than defined by a dictionary, because the term “right” invokes legal authority. Here, the source of the right of privacy is the TCPA, which provides the privacy right to seclusion. The Court thus found that “there was a written publication [dissemination] of material [of 24,000 facsimiles] that violated a person’s right of privacy [that violated the TCPA].”

Accordingly, the Court held that the commercial liability policy at issue provides coverage for sending unsolicited faxes in violation of the TCPA. .

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