

## The Wisconsin Court Of Appeals Applies Personal and Advertising Injury Liability Coverage To Claim For Unsolicited Fax Advertisement

Jul 25 2012

Posted By: Heidi L. Vogt

Practice Area: Insurance Coverage and Risk Management

---

Plaintiff filed a class action lawsuit against Atlas Heating and Sheet Metal Works, Inc. ("Atlas") for violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff's claim was based on a one page unsolicited advertisement sent by Atlas to plaintiff's fax machine. Plaintiff claimed that receipt of the unsolicited advertisement violated his right of privacy.

Plaintiff also filed an action for declaratory judgment against Atlas's insurer, West Bend. The applicable policy included "personal and advertising injury" coverage. The policy defined "personal and advertising injury" to include a variety of offenses, including injuries arising out of "oral or written publication, in any manner, of material that violates a person's right to privacy." The policy also contained the "knowing violation" exclusion. The trial court ruled that West Bend has a duty to defend because plaintiff's TCPA claim fell within "personal and advertising injury." The trial court also determined that the knowing violation exclusion did not apply. In an opinion recommended for publication, the Court of Appeals affirmed.

The appellate court noted a split in authority from other jurisdictions about whether TCPA claims based on unsolicited fax advertisements can be considered an "oral or written publication ... of material that violates a person's right of privacy." The split in authority arises from the question of whether the term "right to privacy" encompasses both the right to keep certain facts secret (the right of secrecy) and the right to be left alone (the right of seclusion). The Court of Appeals held that it applied to both and, as a result, plaintiff's claim fell within West Bend's coverage for "personal and advertising injury."

The appellate court also concluded that the "knowing violation" exclusion did not apply. That exclusion requires a showing that: (1) the insured knowingly violated the rights of another; and (2) the insured knew that it would inflict "personal and advertising injury." In this case, the allegation that Atlas purposely sent the unsolicited fax arguably satisfied the first element. The allegation that Atlas "knew or should have known" that the advertisement was unsolicited failed to satisfy the second element because it left open the possibility that plaintiff's injury was caused by negligence.

Justice Fine dissented with respect to the court's conclusion on "personal and advertising injury." As he explained, the TCPA prohibits unsolicited fax advertisements but does not prohibit all unsolicited faxes. If transmitting a blank piece of paper, for example, does not violate the TCPA, there must be something about the content of the published material that violates another's right to privacy, i.e., publication of facts meant to be secret. In addition, tort law's right of seclusion refers to intrusions that would be "highly offensive to a reasonable person." Because a reasonable person would not find a one-page advertisement to be "highly offensive," the right to privacy in the definition of "personal and advertising" injury was not implicated. Lastly, he opined that coverage for TCPA violations would far exceed any reasonable expectations of the insured based on the policy's premium.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.