

The Unsettling Fax about Coverage Claims under the Telephone Consumer Protection Act

By Michael J. Rust and Pamela S. Webb

It could have started in any small business: a car wash, a chain of Chinese restaurants, or a mortgage broker. In Georgia, it started in a Hooters.

Sam Nicholson, a disgruntled consumer, filed a class action against Hooters of Augusta, Inc. and Bambi Clark d/b/a Value-Fax of Augusta alleging that Hooters had used Bambi to send unsolicited advertisements to facsimile machines in violation of the federal Telephone Consumer Protection Act of 1991 (TCPA).¹ The trial court certified the class, and that certification was upheld by the Georgia Court of Appeals.² Subsequently, a jury trial was held, and a verdict was returned against Hooters in the amount of \$11,000,889.³ After the judgment was entered, Hooters filed for Chapter 11 bankruptcy and resolved its claim with the plaintiffs by assigning its claim against Hooters's insurance carriers, which filed a declaratory judgment action in federal court.

For reasons discussed in more detail below, Judge Dudley Bowen determined that the class action claims brought by Nicholson were covered under the umbrella and excess liability insurance policies issued to Hooters. The coverage under the umbrella policy was triggered after the commercial general liability (CGL) insurer paid \$1 million to settle, thereby exhausting the primary policy.

Consequently, what started out as a one-page fax offer-

ing discount burgers and beer became a nightmare of eight-figure proportions. This bad dream is playing out across the country in numerous class actions being brought against businesses for unsolicited faxes, resulting in huge awards of damages and subsequent claims against insurance carriers for payment of those damages. For the most part, insurers' efforts to reject these claims have been unsuccessful.

The TCPA

The TCPA was the result of growing concern in Congress over the potential cost and invasion of privacy resulting from unsolicited faxes. It prohibits both junk calls and junk faxes.

Section 227 of the Act states that “[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine.” The statute defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission.”

Violations of the Act are punishable by injunctive relief, actual damages, or statutory damages of \$500 per violation. The statutory minimum damages may be trebled in the event that the violation is found to be willful.

There have been challenges to the TCPA and, conversely, the potential for huge damages under the Act via class actions. Those challenges have been rejected by the courts. Federal courts have ruled that the penalty provisions of the TCPA are not so disproportionate to actual damages so as to violate due process.⁴ Additionally, courts have found that the TCPA does not violate the First Amendment rights of the faxers.⁵

Coverage under CGL Policies

Courts interpreting coverage for TCPA claims under a typical CGL policy have reviewed whether they apply under either the Coverage A or Coverage B definitions. Coverage A in a typical CGL coverage form provides that the insurer will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies. It is required that such damage be caused by an “occurrence” that takes place in the coverage territory and during the coverage period. An occurrence is usually defined as “an accident, including continuous or repeated exposure to substantially the same generally harmful condi-

tions.” Usually, the term “accident” is not defined in the policy, but most states have adopted a definition of what constitutes an accident. Further, under Coverage A, bodily injury or property damage expected or intended from the standpoint of the insured is excluded from coverage.

This article focuses on TCPA claims as “advertising injuries” under Coverage B. However, since some courts have reviewed Coverage A as well as Coverage B, we discuss both below. In short, the courts that have reviewed the coverage for TCPA claims under Coverage A are split as to whether TCPA claims are afforded coverage. The courts that have reviewed the advertising injury claims are uniform in their interpretation, with rare exceptions.

Coverage B of the standard CGL policy affords coverage for “personal and advertising injury” arising from the following offenses:

- A. False arrest, detention or imprisonment;
- B. Malicious prosecution;
- C. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- D. Oral or written publication of material that slanders or libels a person or organization or disparages a person or organization’s goods, products or services;
- E. Oral or written publication of material that violates a person’s right of privacy;
- F. The use of another’s advertising idea in your “advertisement”; or
- G. Infringing upon another’s copyright, trade dress or slogan in your “advertisement.”

An advertisement is generally defined as a notice that is broadcast or published to the general public or specific market segments about goods, products, or services for the purpose of attracting customers.

Excluded from coverage under Coverage B are personal and advertising injuries:

- (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict personal and advertising injuries;
- (2) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
- (3) Arising out of a criminal act committed by or at the direction of any insured.

Now, back to Hooters. Nicholson took his \$11,689,000 judgment against Hooters and then, with Hooters’s cooperation, sued American Global Insurance Company (AGIC) and Zurich, the umbrella and excess liability carriers. Judge Bowen, of the U.S. District Court for the Southern District of Georgia, issued a lengthy opinion finding coverage and ruling against Zurich and AGIC.⁶ Bowen’s decision turns on his analysis of the advertising injury coverage provided by the Zurich and AGIC policies.

First, Bowen examined whether a TCPA violation constituted an advertising injury. The relevant terminology examined by Bowen was the “right of privacy” that is contained within the definition of advertising injury. Examining Georgia law on the issue of what constitutes a violation of the right of privacy, as well as other cases examining the intent and scope of coverage of the TCPA, Bowen concluded

Michael J. Rust is a partner in Gray, Rust, St. Amand, Moffett & Brieske in Atlanta. His practice focuses on litigation involving catastrophic injury, employment, insurance coverage, and products liability. He can be reached at mrust@grsmb.com.

Pamela S. Webb is an associate in the same firm and office. She concentrates on litigation in the fields of catastrophic injury, employment, municipal liability, insurance coverage, and products liability. Webb can be reached at pwebb@grsmb.com.

that a layperson reviewing the TCPA understands his or her right to be left alone to include being left alone at work or at home by advertisers sending unsolicited faxes. Accordingly, Bowen found that a TCPA violation may constitute an invasion of privacy within the applicable policies. More specifically, Bowen found that the product advertisements sent to Nicholson constituted a violation of Nicholson's right to privacy.⁷

Second, Bowen found that the TCPA violation involving Nicholson and the violation of his privacy was caused by Hooters's advertising activity.⁸

Third, Bowen addressed the insurers' argument that Section 227 of the TCPA, which provides for civil penalties, is a penal statute that the policy does not cover. In their thinking, even if an invasion of privacy had occurred as a result of an advertising injury, that invasion would be excluded from coverage. Specifically, Bowen examined the exclusion that stated that no coverage is provided for an advertising injury "arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured."

In examining whether this exclusion applied, Bowen applied the following three-part test established by the Eleventh Circuit Court of Appeals in *United States v. MEC Corp.*⁹ for determining whether a statute is penal or remedial:

- (1) Whether the purpose of the statute is to address individual wrongs, or more general wrongs to the public;
- (2) Whether recovery under the statute issues to the harmed individual or the public; and
- (3) Whether the recovery authorized by the statute is

wholly disproportionate to the harm suffered.¹⁰

The judge found that Section 227 was intended to provide a remedy to the individual fax machine owner who was harmed by the receipt of unsolicited fax advertisements and therefore satisfied the first factor as being a remedial rather than a penal statute.¹¹ Bowen also found that the second factor indicates that Section 227 is remedial inasmuch as any award of actual or statutory damages issues to

the harmed individual or entity, not to a third party.¹² Finally, the judge found that although statutory damages do not closely correspond to actual damage, this fact did not convert a remedial statute into a penal one.¹³ Consequently, Bowen found that Section 227 was a remedial and not a penal statute and thus the above-referenced exclusion did not apply.¹⁴

AGIC and Zurich also argued that Section 227, particularly in relation to a class action, provided for a penalty so excessive in relation

Insurance Services Office CGL Specific Exclusion

In response to advertising injury litigation, the Insurance Services Office developed a specific exclusion dealing not only with TCPA claims but also with recent federal regulations restricting unsolicited e-mails. The new CGL policy exclusion, promulgated in 2005, reads as follows:

"Exclusions of Section I—Coverage A—Bodily Injury and Property Damage Liability and Section I—Coverage B—Personal and Advertising Injury Liability:

"This insurance does not apply to any claim for or award of fines, penalties or damages resulting from violation of any federal, state or local statute, law or ordinance restricting or prohibiting unsolicited communications made via telecommunications equipment. For the purpose of this exclusion, this includes, but is not limited to:

- "1. Communications involving:
 - "a. facsimile machines;
 - "b. telephones, including cellular telephones, automatic dialing systems and/or pre-recorded voices;
 - "c. computers and/or e-mails."

to any actual damages that it constituted a punitive award of damages. Generally, insurance policies are said to provide coverage for damages and not penalties. The term “damages” refers to the loss suffered by an injured party expressed in a dollar amount. In contrast, penalties are not designed to compensate an injured party but are designed to deter conduct deemed undesirable by a legislature.¹⁵

Bowen initially found that the policy language did not differentiate between penalties and damages. The AGIC and Zurich policies provided that the insurers would pay those “sums that the insurer becomes obligated to pay by reason of liability imposed by law.” The judge found that, even if the sums are found to be punitive, Georgia law does not specifically exclude coverage for punitive damages.¹⁶ As a result, even if the sums involved were penalties, nothing under Georgia law would prevent coverage.¹⁷

Finally, AGIC made the argument that a specific endorsement in its policy set forth a broad exclusion providing that advertising injury coverage does not apply to “advertising injury arising out of the utterance or dissemination of matter published by or on behalf of the insured.” Bowen ruled that this endorsement was vague and unenforceable because it essentially would have excluded any advertising injury claim and therefore provided illusory coverage, which is not allowed under Georgia law.¹⁸

Although an appeal was initially filed in the Eleventh Circuit Court of Appeals and was terminated after the parties reached a settlement, an opinion was issued by the court but not published in the *Federal Reporter*.¹⁹ The court affirmed Bowen’s grant of summary

judgment to Hooters and the class, adding that the policy contained no language limiting the scope of the term privacy. Further, the court held that the policy terms did nothing to put policyholders on notice that coverage depends on the underlying law that confers the privacy right.²⁰ However, the court vacated the portion of the judgment ordering AGIC to pay postinterest, as provided by the policy once AGIC assumed the duty to defend Hooters, because AGIC never had a duty to defend due to the fact that AGIC settled with Hooters and terminated its appeal before the duty arose.²¹

Bowen’s opinion was not the first of its kind. An earlier case analyzing these issues was the 2002 decision of the U.S. District Court for the Middle District of North Carolina in *Prime TV, LLC v. Travelers Insurance Co.*²² In *Prime TV*, an insured satellite television marketer brought an action against Travelers, its CGL carrier insurer, seeking a declaration that Travelers had a duty to defend underlying actions against Prime TV for allegedly violating the TCPA. The claims against Prime TV involved fax solicitations that were sent out by an independent fax marketer that approached Prime TV regarding advertising. In this case, millions of faxes were sent nationwide on behalf of Prime TV and numerous lawsuits were filed. Travelers refused to defend the lawsuits and denied coverage.

Unlike Bowen in *Hooters*, the trial judge in *Prime TV* analyzed whether the TCPA claims constituted property damage under Coverage A of the CGL policy. The court noted that to establish coverage under Coverage A, the plaintiff must establish that the

injuries sought fall within the definition of property damage and constituted an occurrence under the policy. The court found without hesitation that fax advertising constituted property damage as defined by the policies and that the TCPA specifically contemplated that, as a result of unsolicited facsimile advertising, the recipients lost the use of their fax machines as well as permanent loss of facsimile paper and ink, constituting loss of tangible property as anticipated under the CGL policy.²³

The court also found that the property damage was an occurrence, as defined by the Travelers policy.²⁴ The court found that an accident is defined as “an event that takes place without one’s foresight or expectation . . . sudden and unexpected events without a chance for contingency.”²⁵ This is a fairly common definition of an accident under most states’ law. Even though the faxes were intentionally sent to the recipient, the court found that Prime TV believed that the recipients had requested the information regarding Prime TV’s services and that there was not a knowing violation of the TCPA as far as Prime TV was concerned. Therefore, the action of Prime TV was an occurrence under the policy.

Even though the judge in *Prime TV* determined that the TCPA violations constituted property damage under Coverage A, he went on to analyze whether those claims also constituted an advertising injury under Coverage B. Like Bowen in *Hooters*, the judge found that the faxes were sent as part of the advertising of Prime TV services and constituted a violation of the recipient’s right to privacy as contemplated under the TCPA.²⁶ Also, the court noted that because the fax compa-

nies independently sent the facsimiles to the recipients and because Prime TV believed that the recipients requested the information, Prime TV did not have knowledge of any falsity connected with the faxes so that the knowledge of falsity exclusion did not apply.²⁷

Subsequent Relevant Cases

A number of relevant cases have been decided since *Hooters* and *Prime TV*. The majority of courts have held that TCPA claims constitute advertising injuries under the standard CGL policy without the new exclusionary language, although a very few decisions have been rendered that provided the opposite holding and supporting rationale.

In 2003 the U.S. District Court for the Northern District of Texas—Fort Worth Division issued its ruling in *Western Rim Investment Advisors, Inc. v. Gulf Insurance Co.*²⁸ Western Rim was sued in 2001 by the plaintiffs, alleging violation of the TCPA. A company called American Blast Fax had solicited Western Rim and sent out 80,000 unsolicited facsimiles advertising apartment complexes to prospective tenants. Western Rim was insured by Gulf Insurance Company, which denied coverage and refused to defend. In turn, Western Rim filed a declaratory judgment action against Gulf. The arguments—yet again—were that the plaintiffs' actions and the consequences thereof constituted property damage under the CGL policy and also an advertising injury.

The court first addressed the property damage issue. As in *Prime TV*, the Texas court examined whether the plaintiffs' claims constituted an accident. Using Texas law, the court concluded that the alleged acts of the plaintiffs in this case did not constitute an accident and

therefore were not an occurrence and not covered under Coverage A of the policy. The court found that because the Western Rim entities intended for their agent to fax the advertisement to potential renters, this faxing of the unsolicited advertisements was not an accident and therefore could not be an occurrence under the CGI policy.²⁹

Next, the court addressed whether the TCPA claims amounted to an advertising injury under Gulf's CGL policy, and it concluded that Western Rim's alleged conduct constituted such an injury, as defined in the policy. Under Texas law, the court found that the acts alleged constituted an invasion of privacy and that therefore the advertising injury coverage afforded under the Gulf policy would apply.³⁰

Finally, the Texas court considered Gulf's argument that even if the plaintiffs' claims amounted to an advertising injury, those claims were excluded from coverage. The first exclusion relied upon by Gulf was the knowledge of falsity exclusion. The court found that exclusion did not apply because it was not alleged that Western Rim had sent out advertisements that it knew to contain false information.³¹ The second exclusion relied upon by Gulf is the same one examined in *Prime TV*, the exclusion for advertising injuries arising "out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured." The court found that the TCPA is not a penal statute although, interestingly, the court did find that Texas fax law was a penal law. Consequently, the exclusion did not apply and coverage was then afforded, and a defense should have been provided

to the insured by Gulf.³²

In *Universal Underwriters Insurance Co. v. Lou Fusz Automotive Network Inc.*,³³ West Brothers Chrysler and Lou Fusz Automotive Network were sued in two state court class actions in Missouri for violations of the TCPA. Both Lou Fusz and West Brothers were insured by Universal Underwriters Insurance Company under garage liability policies. These policies were very different in their form from the CGL policies previously discussed. However, the garage liability policies in question required an occurrence in damages similar to Coverage A of a standard CGL policy.

Universal Underwriters defended Lou Fusz and West Brothers under a reservation of rights and then filed a declaratory judgment action in the U.S. District Court for the Eastern Division of Missouri. The parties all moved for summary judgment, and the court determined that under the garage liability policy Universal had a duty to defend Lou Fusz and West Brothers.³⁴

Universal made the argument that all insurers in this scenario have made: that the claims under the TCPA are for statutory damages and civil penalties, not damages covered under the insurance policy. Universal also argued that the transmission of unauthorized faxes was an intentional act and therefore not an occurrence under the policies. Adopting the interpretation of the *Hooters* and *Prime TV* courts, the *Lou Fusz* court held that the TCPA claims were for damages and not civil penalties and that there was at least a factual issue as to whether Lou Fusz and West Brothers had intentionally transmitted the faxes so as to trig-

ger a duty to defend.³⁵

Universal appealed to the Eighth Circuit Court of Appeals, which affirmed on both grounds, adding that the allegations in the plaintiffs' complaints fit within the policy's definitions of nuisance and invasion of privacy and thus were covered injuries under the policy.³⁶

In another 2004 decision, *Park University Enterprises, Inc. v. American Casualty Co. of Reading, PA*,³⁷ Park filed suit against its insurer, American Casualty, regarding a lawsuit filed against Park for violating the TCPA. American Casualty had declined to defend Park in the underlying action.

The district court judge deciding the case examined whether the TCPA claims should be covered as property damage under Coverage A or an advertising injury under Coverage B. He found that the legislative history of the TCPA and other court decisions interpreting the TCPA established that the loss of the use of a fax machine, including facsimile paper and ink, amounted to a loss of use and property damage as defined by the policy.³⁸ He also found that the fax transmission could be construed as an occurrence under the policy.³⁹

The judge further ruled that the TCPA violations amounted to an advertising injury, noting that every court that has addressed this issue has felt that a TCPA claim falls under Coverage B. He agreed and found that enough evidence existed that a TCPA violation constituted an invasion of privacy and a publication sufficient to amount to an advertising injury so as to require the insurer to defend the action.⁴⁰

Finally, the judge found that none of the exclusions under the policy, including the intentional

act/expected conduct exclusion and the criminal act exclusion, were applicable.⁴¹

American Casualty appealed to the Tenth Circuit Court of Appeals, which affirmed on both grounds.⁴² On appeal, the insurer argued that Park University's conduct did not constitute an occurrence because the university did not intend injury as a result of the facsimile transmissions.⁴³ However, the court held that negligence alone could result in an occurrence and thus no analysis was necessary regarding whether the conduct and injury were intentional.⁴⁴ The court further held that the plaintiff's claims amounted to an advertising injury under the policy because privacy could be construed to include a right to seclusion.⁴⁵

In *TIG Insurance Co. v. Dallas Basketball, Ltd.*,⁴⁶ the plaintiffs sued the Dallas Mavericks basketball team in two lawsuits alleging that the Mavericks violated the TCPA by sending unsolicited advertisements for basketball tickets to the plaintiffs' fax machines. The plaintiffs sought statutory damages of \$500 per advertisement, asserted common-law claims for trespass that allegedly caused property damage, and claimed violations of their right to privacy. The Mavericks requested a defense and indemnification from their liability carrier, TIG, which denied coverage. The Mavericks then sued TIG for breach of contract, violation of Article 21.21 of the Texas Insurance Code, and for a declaratory judgment that TIG owed the Mavericks a defense and indemnity. Both parties filed motions for summary judgment. The trial court granted partial summary judgment in favor of the Mavericks, and both parties appealed.

The CGL policies issued by TIG to the Mavericks defined advertising injury to include "oral or written publication of material that violates a person's right of privacy." TIG argued on appeal that there was no advertising injury because the term "material," as used in the definition of advertising injury, refers to the content or substance of the publication, and the plaintiffs had not alleged that the content of the fax violated their right to privacy. TIG argued that the plaintiffs alleged only an invasion of privacy arising out of the physical intrusion of the faxes into an area where the plaintiffs had a reasonable expectation of privacy. The Texas Court of Appeals agreed that material refers to the content of the publication and not the physical form of the publication. Citing *Western Rim*, the court of appeals noted that the TCPA presumes that all unsolicited advertising is an offensive intrusion into the recipients' solitude. Therefore, the court concluded that the plaintiffs sufficiently alleged a violation of their rights of privacy by written material so as to fall within the insurance policy's coverage for advertising injury.⁴⁷

TIG also argued on appeal that the plaintiffs had not alleged a publication of the materials at issue and contended that the meaning of publication is limited when it is used in the context of invasion of privacy claims to mean the publication of material to third parties that wrongfully disclosed private facts. The Mavericks's insurance policy did not define the term publication. Applying the ordinary definition of publication, the court of appeals concluded that the Mavericks's distribution of the advertising to the fax centers was a publication of offending material

and that the plaintiffs' allegations were sufficient to fall within coverage. Therefore, the court held that TIG wrongfully refused to defend its insured.⁴⁸ This decision was subsequently followed by the U.S. District Court of the Northern District of Texas in *Registry Dallas Associates v. Wausau Business Insurance Co.*⁴⁹ and in *Nutmeg Insurance Co. v. Employers Insurance Co. of Wausau*.⁵⁰

In *Resource Bancshares Corp. v. St. Paul Mercury Insurance Co.*,⁵¹ a class action lawsuit was filed against Resource Bancshares in Indiana state court alleging violations of the TCPA and specifically alleging that Resource "blast faxed" unsolicited mortgage advertisements to prospective customers. Resource notified its insurer, St. Paul, of the Indiana litigation and requested that St. Paul provide a defense and indemnify Resource. St. Paul denied coverage, which resulted in a declaratory judgment action being filed in the U.S. District Court of the Eastern District of Virginia.

Judge Henry Coke Morgan performed the same analysis of these cases as have the other courts interpreting this issue. First, he agreed that the allegation of a TCPA violation amounted to an invasion of privacy, thereby bringing about a potential advertising injury under the policy.⁵² Morgan did not decide the issue of whether St. Paul was required to indemnify Resource but did find that St. Paul owed a duty to defend Resource based solely on the advertising injury claim.⁵³

On appeal, the Fourth Circuit affirmed the district court's grant of summary judgment to St. Paul on the property damage claim but reversed the grant of summary judgment to the plaintiffs on the adver-

tising injury claim.⁵⁴ In determining that the claims did not fall under the definition of property damage, the court was not persuaded that Resource's faxes were inadvertently sent to recipients who had not given prior consent to Resource and held that it was not reasonable for Resource to "mistakenly believe" that they had received express consent before the advertisements were sent.⁵⁵ Regarding the advertising injury coverage, the court held that the insurance policy did not provide coverage for the types of invasions of privacy contemplated by the TCPA's prohibition on unsolicited faxes.⁵⁶ The court explained that while the plaintiffs' complaint contained allegations that fell within the "seclusion" category of privacy, which relates to the *manner* of the advertisement, the insurance policy's advertising injury definition dealt exclusively with the "secrecy" type of privacy, which is concerned with the *content* of the advertisements.⁵⁷ As such, the insurance policy's coverage offered protection from advertisements that divulged private facts, as opposed to the TCPA, which provides facsimile owners with seclusion for their facsimile phone line and relief from multiple faxes that result in depletion of their paper and toner.⁵⁸

The final case we discuss is *St. Paul Fire & Marine Insurance Co. v. Brunswick Corp.*⁵⁹ Leiserv, Inc. contracted with Sunbelt Communication and Marketing to send advertisements via facsimile for Brunswick Corporation. One of the facsimile transmissions was received by an Atlanta attorney who filed a class action lawsuit against Brunswick alleging violations of the TCPA. St. Paul insured the defendant under a CGL umbrella policy and denied that it

had a duty to defend the defendant because the plaintiff's claims did not qualify as an advertising injury, personal injury, or property damage under the policy definitions.

First, the court relied on *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*⁶⁰ in determining that the injury was not an advertising injury.⁶¹ The court agreed that the policy language in this case read, as in *Jackson County*, similarly to coverage for an invasion of privacy tort claim, where public attention is brought to a private figure when a statement reveals an embarrassing fact about that person or where misleading facts are published casting a person in a false light.⁶² Further, the court pointed to the fact that the entire definition of advertising injury in the policy focuses on the information contained in the advertisement. Specifically, the inclusion of the words "material in your advertisement" in the definition of advertising injury indicates that the coverage depends on whether the injury is a result of the content of the advertisement.⁶³ For these reasons, and because the plaintiff's complaint did not allege that the content of the advertisement violated a privacy right, the court held that the injury was not an advertising or personal injury as contemplated by the policy.⁶⁴

Second, the court held that the property damage claimed, the loss of ink and paper by the plaintiff, was an expected outcome. Thus St. Paul had no duty to defend based on the property damage claim.⁶⁵

Policy Changes

In response to these cases, the Insurance Services Office (ISO) has developed a specific exclusion

dealing not only with TCPA claims but more recent federal regulations restricting unsolicited e-mails. The new exclusion, promulgated in 2005, reads as follows:

**Exclusions of Section I—
Coverage A—Bodily Injury and
Property Damage Liability and
Section I—Coverage B—Personal
and Advertising Injury Liability:**

This insurance does not apply to any claim for or award of fines, penalties or damages resulting from violation of any federal, state or local statute, law or ordinance restricting or prohibiting unsolicited communications made via telecommunications equipment. For the purpose of this exclusion, this includes, but is not limited to:

1. Communications involving:
 - a. facsimile machines;
 - b. telephones, including cellular telephones, automatic dialing systems and/or pre-recorded voices;
 - c. computers and/or e-mails.

Thus, the new policy language effectively eradicates any possibility of coverage for claims arising out of violations of the TCPA.

Conclusion

Because of the present status of class action laws, a seemingly innocuous claim based on an improper fax under the former exclusionary language can incongruously be turned into a potential suit for tens or even hundreds of millions of dollars. Faced with such claims, insureds would obviously aggressively pursue their insurers to pay the policy limits on these claims. For claims submitted to insurers that have not adopted the new exclusion drafted by ISO, litigation of this issue will continue. As the law presently

stands regarding the former exclusion, TCPA claims have, with rare exceptions, been found to constitute advertising injuries under the standard CGL policy. ■

Notes

1. 47 U.S.C. § 227.
2. *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 245 Ga. App. 363 (2000); *Hooters of Augusta, Inc. & Sam Nicholson v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365 (S.D. Ga. 2003).
3. *Hooters*, 272 F. Supp. 2d at 1375.
4. *Texas v. Am. Blast Fax, Inc.*, 121 F. Supp. 2d 1085, 1090 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997).
5. *Zouri v. Am. Blast Fax*, 323 F.3d 649 (8th Cir. 2003); *Destination Ventures, Ltd. v. FCC*, 43 F.3d 54 (9th Cir. 1995).
6. *Hooters*, 272 F. Supp. 2d at 1365.
7. *Id.* at 1374.
8. *Id.*
9. 11 F.3d 136 (11th Cir. 1993).
10. *Id.* at 137.
11. *Hooters*, 272 F. Supp. 2d at 1375.
12. *Id.* at 1376.
13. *Id.*
14. *Id.*
15. *Travelers Ins. Co. v. Waltham Indus. Labs. Corp.*, 722 F. Supp. 814, 828 (D. Mass. 1998).
16. *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 238 Ga. 313, 316–17, 232 S.E.2d 910 (1977).
17. *Hooters*, 272 F. Supp. 2d at 1376.
18. *Id.* at 1378.
19. *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. Appx. 201 (11th Cir. 2005).
20. *Id.* at 206.
21. *Id.*
22. 223 F. Supp. 2d 744 (M.D.N.C. 2002).
23. *Id.* at 750.
24. *Id.*
25. *Id.* at 751.
26. *Id.* at 752.
27. *Id.* at 753.
28. 269 F. Supp. 2d 836 (M.D. Tex. 2003).

29. *Id.* at 845.
30. *Id.* at 846–47.
31. *Id.* at 847–48.
32. *Id.* at 849–50.
33. 300 F. Supp. 2d 888 (E.D. Mo. 2004).
34. *Id.* at 895.
35. *Id.* at 894.
36. *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876 (8th Cir. 2005).
37. 314 F. Supp. 2d 1094 (D. Kan. 2004).
38. *Id.* at 1102.
39. *Id.* at 1105.
40. *Id.* at 1110.
41. *Id.*
42. *Park Univ. Enters., Inc. v. Amer. Cas. Co. of Reading, PA*, 2006 WL 766750 (10th Cir. 2006).
43. *Id.* at *5.
44. *Id.*
45. *Id.* at *8.
46. 129 S.W.3d 232 (Tex. App. 2004).
47. *Id.* at 238.
48. *Id.* at 239.
49. 2004 WL 614836 (N.D. Tex. 2004).
50. 2006 WL 453235 (N.D. Tex. 2006).
51. 323 F. Supp. 2d 709 (E.D. Va. 2004), *aff'd in part, rev'd in part and remanded*, 407 F.3d 631 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 568 (2005).
52. 323 F. Supp. 2d at 720.
53. *Id.*
54. 407 F.3d at 637.
55. *Id.* at 639.
56. *Id.* at 640.
57. *Id.* at 641.
58. *Id.* at 642.
59. 405 F. Supp. 890 (N.D. Ill. 2005).
60. 392 F.3d 939 (7th Cir. 2005).
61. *Brunswick*, 405 F. Supp. at 892.
62. *Id.* at 893.
63. *Id.* at 895.
64. *Id.*
65. *Id.* at 896.