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ILLINOIS SUPREME COURT FINDS TCPA IS REMEDIAL AND NOT PUNITIVE

STANDARD MUTUAL INSURANCE CO. V. LAY (ILL. MAY 23, 2013)

Insurance companies should take note of a recent decision by the Supreme Court of Illinois, in which the Court determined that the Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § 227(b)(3) (2006)) is a remedial and not a punitive statute. The Court did not reconsider the policy changing issue of whether punitive damages should be held to be insurable in Illinois, as it was unnecessary to reach the issue to resolve the appeal. Currently, punitive damages are uninsurable in Illinois as a matter of public policy. This ruling means that TCPA statutory damages of $500 per violation are insurable in Illinois.

Background

The underlying case involved a class action lawsuit alleging violations of the TCPA. Locklear Electric, Inc. (Locklear), brought an action against Ted Lay Real Estate Agency (Lay) which resulted in a court approved settlement of $1.7 million whereby Locklear agreed to only recover from Lay's insurer, Standard Mutual Insurance Company (Standard). After issuing its reservation of rights, Standard filed a complaint seeking a determination of Lay's insurance coverage for the underlying lawsuit and, eventually, the settlement. The court found that Lay was not covered, and granted summary judgment for Standard. The appellate court affirmed. 2012 IL App (4th) 110527, 2012 WL 1377599 (4th Dist. April 20, 2012).

Declaratory Judgment

In the coverage action, Locklear, the class representative, and Standard filed cross motions for summary judgment and the trial court granted Standard's. Locklear appealed. On appeal Locklear claimed that Standard failed to fully disclose the conflicts of interest before it appointed counsel to defend, and that the statutory damages of $500 per violation are remedial and not punitive.

The appellate court found that Standard sufficiently explained the conflicts to Lay, which he then waived. Thus, Standard would not be estopped from raising insurance policy coverage issues. The appellate court rejected Locklear's argument that the $500 per violation statutory damage is remedial and instead found that the $500 statutory fine is far in excess of the actual damages and thus are punitive and not insurable under Illinois law. See, *Landis v. Marc Realty, LLC*, 235 Ill.2d 1, 12-13 (2009).

Illinois Supreme Court Appeal

Locklear appealed to the Illinois Supreme Court, which affirmed the judgment of the appellate court in part and reversed in part.

Conflicts Notice

The Court found that, where a complaint against an insured alleges facts within or potentially within the insurance policy, and when an "insurer takes the position that the policy does not cover the complaint, the insurer must: (1) defend the suit under a reservation or rights; or (2) seek a declaratory judgment that there is no coverage." An insurer is estopped if it fails to take either of these actions. Standard provided a reservation of rights letters with an "extensive list of policy defenses" and, furthermore, advised Lay of the conflict of interest. Lay therefore knowingly chose to accept Standard's defense counsel. In addition the Court found that Lay was not prejudiced because it retained its own counsel and negotiated the settlement in the underlying action. "Standard availed itself of both of its only available options", it agreed to defend subject to a reservation of rights and it filed a declaratory judgment action. Thus, the appellate court's conclusion was upheld that Standard is not estopped from asserting coverage defenses.

Insurability of TCPA Damages

Locklear contended that the TCPA damages are insurable under Illinois because the TCPA is remedial and not a penal statute, and thus the statutory damages are not punitive damages. Locklear also asserted that the facts of the case fall within an exception to the rule of uninsurability. Finally, Locklear asked the Court to find that punitive damages are insurable under Illinois law.

The Court found that the "manifest purpose of the TCPA is remedial and not penal." The $500 liquidated damages available under the TCPA can be viewed as a "liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both." Therefore, "the $500 fixed amount clearly serves more than purely punitive or deterrent goals." The Court did not address whether punitive damages should be insurable under Illinois law and instead remanded the cause to the appellate court for consideration of Locklear's remaining contentions.

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