

WALKER WILCOX WINS DISMISSAL OF COVERAGE CASE ARISING FROM TCPA CLASS ACTION

On April 30, 2018, Walker Wilcox attorneys Ed Gibbons, Arthur McColgan, and Jeremy Kerman won a motion to dismiss on behalf of Walker Wilcox client ACE American Insurance Co., in the U.S. District Court for the Southern District of New York. *Flores v. ACE American Ins. Co.*, No. 1:17-CV-08674. ([Click here for order.](#))

In an underlying suit, Plaintiff Victoria Flores filed a class action lawsuit against ACE's insured – Grubhub. The complaint alleged that Grubhub violated the Telephone Consumer Protection Act ("TCPA") by sending unauthorized text messages to thousands of consumers. Eventually, Flores and Grubhub entered into a Settlement Agreement which provided for an \$8 million consent judgment. As part of the settlement, Grubhub assigned to Flores all claims and proceeds under the Grubhub insurance policy issued by ACE, and the parties agreed that the \$8 million consent judgement would be paid only out of the proceeds of the Grubhub insurance policy with ACE.

Flores then brought a declaratory judgment action seeking to collect the stipulated \$8 million judgment from ACE.

ACE moved to dismiss the action, arguing that, under the policy, two separate exclusions precluded coverage of the claims in the underlying suit. The first was an exclusion for all claims based on "unsolicited electronic dissemination of . . . communications by or on behalf of the Insured to multiple actual or prospective customers," explicitly including actions brought under the TCPA. The second exclusion excluded claims based on any "violation of consumer protection laws."

In response, Flores argued that the TCPA exclusion does not apply to the type of communication described in the complaint – individual text messages which were tailored to each customer based on restaurants they had ordered from. Instead, she argued that the exclusion applied to messages or phone calls transmitted or made *en masse* – i.e., to multiple recipients at once – as part of spam or mass marketing campaigns. Flores also argued that the "consumer protection law" exclusion did not apply because the TCPA can reasonably be interpreted to be a "privacy regulation."

Ultimately, Judge Alvin K. Hellerstein agreed with ACE that both exclusions applied. Judge Hellerstein opined that Flores was trying to read requirements into the TCPA exclusion that simply were not there. He wrote: "there is nothing in [the TCPA exclusion] requiring that the text messages sent to the customers be identical or sent at the same time," and found that the exclusion was unambiguous and clearly excluded coverage. Judge Hellerstein also found Flores' argument regarding the "consumer protection law" exclusion unpersuasive, writing that a Privacy Regulation as defined in the Policy refers to laws associated with the "control and use" of personal data which require commercial entities collecting such data to adopt security measures to avoid identity theft. That is not the purpose of the TCPA, and thus it is not a privacy regulation. Accordingly, Judge Hellerstein granted ACE's motion to dismiss.