

N.D. OF OHIO HOLDS UNSOLICITED COMMUNICATIONS EXCLUSION BARS COVERAGE FOR TCPA VIOLATIONS

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MCD Acquisition Co., et al. v. The North River Ins. Co., et al., No. 5:10CV 2855, 2012 WL 4483411, (N.D. Ohio Sept. 27, 2012). On September 27, 2012, Judge David D. Dowd, Jr. granted Travelers Property Casualty Company of America's ("Travelers") Motion for Summary Judgment finding there was no duty to defend or indemnify the Insureds in an underlying junk fax class action suit filed by Universal Health Resources ("UHR") based on an Unsolicited Communications exclusion.

In June 2009, UHR filed a class action lawsuit in California state court alleging that MDC Acquisition Co. ("MDC") and GRH Enterprises, Inc. ("GRH") (collectively the "Insureds" or "Plaintiffs") had violated the Telephone Consumer Protection Act of 1991 ("TCPA"), the Junk Fax Prevention Act of 2005 ("Junk Fax Act"), and the regulations promulgated under the Junk Fax Act by the Federal Communications Commission ("FCC"), by sending unsolicited facsimile advertisements to UHR. In April 2012, the California state court granted preliminary approval of a class wide settlement. The Insureds informed the court that they settled the class action for approximately \$6 million, \$4.1 million in damages and \$1 to 2 million in attorneys' fees. Thereafter, The North River Insurance Company was voluntarily dismissed from the coverage suit with only claims against Travelers' CGL and umbrella policies remaining.

Travelers denied Plaintiffs' request for defense and indemnification under the insurance policies, because the claims in the underlying action did not seek "bodily injury" or "property damage" under the policies, nor did they seek "personal injury," "advertising injury," or "website injury." Travelers further asserted that the "Unsolicited Communications Endorsement" specifically excluded coverage for TCPA claims. The "Unsolicited Communications Endorsement," which was included in the Travelers' policies since 2005 provides:

This insurance does not apply to 'bodily injury', 'property damage', 'personal injury', 'advertising injury' or 'website injury' arising out of unsolicited communications by or on behalf of any insured. Unsolicited communications means any form of communication, including but not limited to facsimile, electronic mail, posted mail or telephone, in which the recipient has not specifically requested the communication. Unsolicited communications also include but are not limited to communications which are made or allegedly made in violation of the Telephone Consumer Protection Act and any amendments and or local or state statutes that bar, prohibit or penalize such communications.

Plaintiffs sought reformation of the insurance policies contending that they did not receive notice of material changes to the insurance policies. Plaintiffs argued that, because of the lack of notice from Travelers, the

“Unsolicited Communications Exclusion” should be removed. Travelers argued that the Plaintiffs received actual notice of the changes to the policies, and the injuries alleged in the underlying class action are specifically excluded from coverage.

The issues were first raised with Magistrate Judge George J. Limbert who issued a May 15, 2012 Report and Recommendation finding that Plaintiffs received notice of the inclusion of the Unsolicited Communications Endorsement in 2005, and further finding that the plain language of the Exclusion applies to the claims asserted in the underlying class action. He recommended that the Court grant summary judgment and issue a declaration that Travelers has no duty to defend nor indemnify Plaintiffs for the claims asserted in the underlying action.

On September 27th, Judge Dowd accepted Magistrate Judge Limbert’s recommendations with only minor changes. The Court initially rejected Plaintiffs’ argument that Travelers failed to provide notice of the inclusion of the Unsolicited Communications Endorsement in its policies. Travelers presented evidence that, in advance of the 2005 renewal, it mailed the named insured a policyholder letter notifying the Plaintiffs of changes in the upcoming renewal. There was also evidence of a second policyholder letter that was included with copies of the renewal policies containing the Unsolicited Communications Endorsement. The Court found that the policyholder letters that used bold face and clear language, provided sufficient actual notice to Plaintiffs under Ohio law. The Court additionally found that, “while insureds are entitled to assume the terms of a renewal policy are the same as their original policy, and failure to read a renewal policy does not defeat reformation, knowledge of material change will be imputed to Plaintiffs if actual notice is provided through a “separately attached and clearly worded letter describing the modifications.” (Citations omitted).

The Court then turned to application of the Unsolicited Communications Endorsement. The Plaintiffs argued that, since the endorsement did not mention regulations, Travelers had a responsibility to defend the action. The Court disagreed citing the Junk Fax Act which specifically authorized the FCC to prescribe regulations to implement the statute’s prohibitions. The rules and regulations specify the acts that are prohibited by the Junk Fax Prevention Act and the Court reasoned that it would be absurd to conclude that violations of the regulations are not excluded by exclusion of violations of the Junk Fax Act, the regulation’s authorizing statute. The Court also rejected Plaintiffs’ argument that Travelers’ should have defended the underlying action because some of their faxes were solicited, and the exclusion only applies to unsolicited communications. The Court dismissed this argument noting that the endorsement excludes communications “which are made or allegedly made” in violation of the TCPA and its amendments. All of Plaintiffs’ faxes were allegedly in violation of the Junk Fax Act and Plaintiffs cannot avail themselves of either of the two TCPA defenses – “prior express invitation or permission” or an “established business relationship” – because the faxes failed to contain an Opt-Out Notice. Every allegation in the underlying action is a violation of the TCPA and its amendments and any lawsuit that alleges a violation of the TCPA, or its amendments, is excluded from coverage by the Unsolicited Communications Endorsement.