

## Tenth Circuit Rules That TCPA Damages and Injunctive Relief Are Uninsurable Penalties, Not Covered Damages

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The Tenth Circuit affirmed a Colorado federal district court decision holding that an insurer had no duty to defend or indemnify claims that DISH Network violated the Telephone Consumer Protection Act (“TCPA”) because relief under the statute is an uninsurable penalty rather than covered damages. *Ace American Ins. Co. v. Dish Network, LLC*, 883 F.3d 881 (10th Cir. 2018).

The United States and several states sued DISH, alleging that it had violated the TCPA and related state laws by making solicitation calls to phone numbers on the Do Not Call Registry. Plaintiffs sought statutory damages, civil penalties and an injunction preventing future TCPA violations. Ace filed a declaratory judgment action, seeking a ruling that it had no duty to defend or indemnify the claims. A Colorado district court agreed and granted Ace’s summary judgment motion. *Ace American Ins. Co. v. Dish Network, LLC*, 2016 WL 1182744 (D. Colo. Mar. 28, 2016) (see [April 2016 Alert](#)). The Tenth Circuit affirmed.

The Tenth Circuit ruled that TCPA statutory damages are penal in nature and thus uninsurable under Colorado public policy. The court rejected DISH’s argument that portions of the TCPA were remedial (rather than punitive) because they allowed for damages representing “actual monetary loss.” The court explained that even assuming that the TCPA has both remedial and penal components and that the remedial portions could fall within insurance coverage, the underlying complaint did not seek any remedial actual damages. Additionally, the court rejected DISH’s contention that Colorado’s public policy against insuring punitive damages was inapplicable because at least some of DISH’s alleged conduct was unintentional. The court explained: “If a distinction is to be drawn between penal statutes that involve willful conduct and penal statutes merely designed to deter, as DISH argues, ‘that decision is [the Colorado Supreme Court’s] decision to make, not ours.’”

Finally, the Tenth Circuit rejected DISH’s assertion that injunctive relief under the TCPA falls within the scope of insurable damages. The court acknowledged that the Colorado Supreme Court “has refused to draw a bright line between legal remedies and equitable remedies” in the context of environmental remediation, but deemed precedent in that context inapposite. The court explained that equitable relief in the pollution context addresses already existing damage (*e.g.*, pollution), whereas here, the equitable relief sought against DISH aimed to prevent potential future damages.

The question of whether TCPA claims are covered under a general liability policy under Florida law is likely to arise in light of a recent class action settlement in *Horn v. iCan Benefit Grp., LLC*, No. 9:17-cv-81027 (S.D. Fla. Mar. 2, 2018). A Florida federal district court issued preliminary approval of the settlement this month, setting the stage for coverage litigation between Liberty International Underwriters, Inc., the company’s insurer, and the plaintiff class, assignees of the insurance benefits under the policy. We will keep you posted on any developments in this matter.

As discussed in previous Alerts, the Supreme Courts of Illinois and Missouri have ruled that TCPA damages were not uninsurable punitive damages. See *Standard Mutual Ins. Co. v. Lay*, 989 N.E.2d 591 (Ill. 2013) ([June 2013 Alert](#)); *Columbia Casualty Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258 (Mo. 2013) ([Sept. 2013 Alert](#)).

Authors and  
Contacts

Bryce Friedman

Partner

[bfriedman@stblaw.com](mailto:bfriedman@stblaw.com)

+1-212-455-2235

