

Eleventh Circuit Rules That “Invasion Of Privacy” Exclusion Bars Coverage For TCPA Class Action Suit

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Applying Florida law, the Eleventh Circuit ruled an “invasion of privacy” exclusion precludes coverage for claims alleging violations of the Telephone Consumer Protection Act of 1991 (“TCPA”). *Horn v. Liberty Ins. Underwriters, Inc.*, 2021 WL 2200959 (11th Cir. June 1, 2021).

A class of consumers sued iCan Benefit Group, alleging that the company invaded their privacy by sending unsolicited text messages to their cellphones without their consent, in violation of the TCPA. Liberty refused to defend the suit on the basis of a policy exclusion that applied to loss “arising out of . . . invasion of privacy.” Thereafter, the underlying suit settled for approximately \$60 million. The settlement amount was not allocated between “actual” versus “statutory” damages, or between harms that arose from invasion of privacy as opposed to nuisance, annoyance or property damage.

A Florida federal district court granted Liberty’s summary judgment motion, ruling that the invasion of privacy exclusion barred coverage for the entire underlying action. Alternatively, the court ruled that even if only some of the settled losses were precluded by the exclusion, iCan’s failure to allocate the underlying settlement into covered and uncovered losses precluded recovery for any covered loss. The Eleventh Circuit affirmed.

Plaintiffs argued that the exclusion was ambiguous because (1) it listed several common law tort causes of action, but not statutory causes of action, such as the TCPA, and (2) a different exclusion in the policy listed several federal statutes, but not the TCPA. The court rejected both assertions. First, the court explained that “arising out of” is interpreted broadly under Florida law to mean “originating from” or “having a connection with.” As such, the court declined to limit the exclusion to common law invasion of privacy tort claims. Second, the court deemed the language in the other policy exclusion irrelevant, stating that “neither party has argued this other exclusion applies,” and “we are not persuaded by an argument that, because one exclusion does not apply, another applicable exclusion is somehow rendered ambiguous.”

As discussed in our [September 2017 Alert](#), the Ninth Circuit similarly ruled that an invasion of privacy exclusion barred coverage for statutory TCPA claims. *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795 (9th Cir. 2017). In that case, the court ruled that “a TCPA claim is, by its nature, an invasion of privacy claim.” Here, the Eleventh Circuit declined to address whether TCPA claims are per se invasion of privacy claims, and instead based its ruling on “the broad qualifying language” in the exclusion.

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