PLUNKETT COONEY

Injury Arising Out of Oral or Written Publication, Self-Insured Retention Coverage Update

December 1, 2022

Injury Arising Out of Oral or Written Publication – California

Yahoo Inc. v. Nat'l Union Fire Ins. Co. of Pitt., PA
--- P.3d ---, 2022 WL 16985647 (Cal. Nov. 15, 2022)

The California Supreme Court answered a certified question from the U.S. Court of Appeals for the Ninth Circuit regarding whether the commercial general liability policy issued to Yahoo Inc. (Yahoo) may provide liability coverage for right-to-seclusion violations litigated under the Telephone Consumer Protection Act of 1991 (TCPA). The Supreme Court held that such policies do provide coverage, "assuming such coverage is consistent with the insured's reasonable expectations."

Yahoo was sued in a series of putative class action lawsuits alleging that Yahoo's unsolicited text messaging violated the TCPA. In turn, Yahoo sought coverage under its policy with National Union Fire Insurance Company of Pittsburgh, PA (National Union), which provided coverage for injuries "arising out of ... [o]ral or written publication, in any manner, of material that violates a person's right of privacy." The policy was modified by an endorsement that removed an exclusion for injuries from violations of the TCPA. The endorsement also expressly excluded "advertising injury," which was defined as injury arising from any of four offenses, including "[o]ral or written publication, in any manner, of material in your 'advertisement' that violates a person's right of privacy."

National Union denied coverage under the policy, and Yahoo filed suit in federal district court. The trial court rejected Yahoo's argument that the policy, as modified by the endorsement, gave rise to the potential for coverage for TCPA claims alleged against it in the class action lawsuits. Yahoo appealed, and the appellate court certified the question to the California Supreme Court.

At the outset, the Supreme Court acknowledged that the TCPA created a statutory cause of action to redress telephonic intrusions that violate the common law right of seclusion, but that the TCPA did not concern disclosures that violated the common law right of secrecy. Thus, the question turned on whether the policy covered violations of the right of seclusion. The Supreme Court held that the insuring provisions of the policy were facially ambiguous, and because the standard rules of contract interpretation could not resolve the ambiguity, the Supreme Court must interpret the provision in favor

of protecting the insured's reasonable expectations.

The Supreme Court concluded that the policy's coverage for "personal injury" could cover liability for violations of the right of seclusion, such as under the TCPA, to the extent such coverage is consistent with the insured's objectively reasonably expectations. However, the fact that such policy has been modified by an endorsement with regard to advertising injury could affect such coverage and such duty to defend, but the Supreme Court did not decide that issue, leaving it open for the appellate court on remand.

By: Joshua LaBar

Self-Insured Retention – Washington

T-Mobile USA, Inc. v. Steadfast Ins. Co.
No. 82704-9-I, 2022 WL 17246715 (Wash. Ct. App. Nov. 28, 2022)

Zurich American Insurance Company and Steadfast Insurance Company (Steadfast) insured T-Mobile USA Inc. (T-Mobile) for losses arising from data privacy breaches. Under the Steadfast policy, T-Mobile was responsible for a $10 million Self-Insured Retention (SIR), for any loss arising from a data privacy breach. Steadfast was responsible for the next $15 million in covered losses.

In September 2015, Experian, a T-Mobile vendor, suffered a data privacy breach. T-Mobile notified Steadfast of the beach and tendered a claim for coverage. As a result of the data privacy breach, T-Mobile incurred $17.3 million in costs and expenses. T-Mobile filed an arbitration demand against Experian, and Experian counterclaimed. Ultimately, Experian agreed to pay T-Mobile $10.75 million to settle the matter.

Steadfast denied coverage for T-Mobile's claim for $17.3 million in damages, arguing that because T-Mobile recovered $10.75 million of its $17.3 million claim, T-Mobile's loss was less than the $10 million SIR. In response, T-Mobile sued Steadfast, with the parties cross-moving for summary judgment. Steadfast once again argued that T-Mobile did not satisfy its SIR because it recovered $10.75 million of its $17.3 million loss, leaving "T-Mobile's actual out of pocket losses ... less than $10 million." T-Mobile countered that the Steadfast policy does not allow Steadfast to "set off the Experian recovery against its payment obligation." The trial court granted T-Mobile's motion and denied Steadfast's motion. The parties moved to certify the trial court's rulings.

The Washington Court of Appeals, on certified question from the trial court, was tasked with determining whether the entire $17.3 million in costs and expenses that T-Mobile incurred amounted to a covered loss under the Steadfast policy. The appellate court found that all of the $17.3 million that T-Mobile incurred was a result of the Experian data breach, and as such, was a covered loss under the

Steadfast policy. Steadfast argued that the $10.75 million T-Mobile recovered from Experian should be excluded from T-Mobile's covered loss because the policy excludes from its definition of loss "any amount for which the Insureds are absolved from payment." Steadfast theorized that the $10.75 million recovery that T-Mobile received "'absolved' [it] from paying $10.75 million because Experian indemnified T-Mobile for costs it incurred as a result of the breach."

The appellate court rejected Steadfast's argument, reasoning that the Experian recovery did not absolve T-Mobile from its payment obligations of the costs and expenses it incurred from the data breach because "T-Mobile remained directly liable for those obligations and paid them in full." As such, the appellate court held that Steadfast must provide coverage to T-Mobile because T-Mobile incurred $17.3 million in loss as defined by the policy, which exceeded its $10 million SIR. The appellate court noted that the Steadfast policy allocated the first $10 million of the loss to T-Mobile pursuant to its SIR obligations and the remaining $7.3 million to Steadfast.

By: Danielle Chidiac