PLUNKETT COONEY

TCPA Claims, Duty to Defend, Number of Occurrences and Aggregate Limits of Liability Coverage Update

June 1, 2023

TCPA Claims – Michigan

Dobronski v. Transamerica Life Ins. Co.
No. 360506, --- N.W.2d ----, 2023 WL 3665869 (Mich. Ct. App. May 25, 2023)

Mark Dobronski (plaintiff) sued Transamerica Life Insurance Company (Transamerica), claiming that it condoned unlawful robocalls in violation of the Telephone Consumer Protection Act and other state law equivalents. In particular, the plaintiff's lawsuit alleged violations of federal and state protections against abusive telemarketing practices where Transamerica initiated telemarketing communications to the plaintiff's mobile phone, allegedly without his consent.

Transamerica moved for summary disposition on multiple grounds. First, it asserted that the plaintiff provided consent to receive the calls. Next, Transamerica argued that the marketing restrictions did not apply to the calls that were made because the plaintiff's mobile phone does not qualify as a residential phone. Finally, Transamerica asserted that it had a preexisting business relationship with the plaintiff that provided authorization for the calls.

Transamerica supported its motion with a customer sheet that indicated that the plaintiff had a life insurance policy with Transamerica since 1993 and a privacy notice that stated that Transamerica collects information on its customers and can use this information to "market products and services." The plaintiff argued that he obtained his life-insurance policy through a predecessor company and that his phone number had been on the national do-not-call registry since December 2004. The trial court ruled in favor of Transamerica, adopting its argument in its entirety with the intention of having the Michigan Court of Appeals issue an advisory opinion. The plaintiff appealed.

The appellate court first considered whether the plaintiff was a user of a residential telecommunications service, as required under the state and federal laws, where he received the calls on his mobile phone. The appellate court determined that the laws in question, which afford protections to residential telephone subscribers, also extend to mobile phone users who use their phones for residential purposes. Thus, a call to a mobile phone could still violate the laws.

The appellate court next considered whether the plaintiff consented to receive the marketing calls. The appellate court determined that Transamerica's customer sheet did not sufficiently prove whether the plaintiff consented to being contacted, instead finding that there remained a genuine issue of material fact as to consent.

Finally, the appellate court considered whether the plaintiff was entitled to a private right of action to enforce caller-ID requirements and concluded that no such right existed because there is no express private right of action under the statute, and it does not identify a particular statute under which the right was promulgated.

The appellate court ultimately affirmed the trial court's grant of summary disposition on the plaintiff's count relating to failure to transmit caller-ID and contact information, but otherwise vacated the trial court's grant of summary disposition on the plaintiff's remaining counts.

By: Danielle Chidiac

Duty to Defend, Number of Occurrences and Aggregate Limits of Liability – U.S. District Court for the Central District of California (California Law)

San Bernardino County v. The Ins. Co. of The State of Pennsylvania
Case No. 5:21-cv-01978-PSG-JEM (D. Cal. May 16, 2023)

The U.S. District Court for the Central District of California granted in part, and denied in part, the parties' cross motions for summary judgment. At issue between the parties, San Bernardino County (the county) and The Insurance Company of The State of Pennsylvania (ICSOP), was the scope of insurance coverage for the county's liability with respect to groundwater contamination at The Chino Airport.

In particular, the county sought coverage for the remediation it was ordered to complete under three separate cleanup and abatement orders issued by the California Regional Water Quality Control Board, Santa Ana Region (CAO). There was no dispute that coverage was afforded under the policies issued by ICSOP to the county from 1966 to 1975; rather, the parties disputed: (i) whether the policies afforded a duty to defend, (ii) the number of occurrences, and (iii) whether the policies had aggregate limits of liability.

Regarding the first issue, the district court ruled that, when reading the "Ultimate Net Loss" and the "Assistance and Co-Operation" provisions, the policies "plainly require only a duty to indemnify." The district court reasoned that while the "'Ultimate Net Loss' provision states that ICSOP must pay for 'fees, charges and law costs, ... expenses for ... lawyers, ... and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits ...' that provision must be read in

connection with the 'Assistance and Co-Operation' provision." And that latter provision gave ICSOP the right, not the duty, to participate in any claim or suit against the insured. Accordingly, the district court granted summary judgment in favor of ICSOP, ruling that it only had the duty to indemnify the county.

On the second issue, however, the district court ruled that there was a genuine dispute over the number of occurrences. Initially, the district court found that the county had the burden of showing multiple occurrences within the policy periods. The district court then found that the county had "presented enough evidence to show a triable issue of fact." In particular, it was noted that one of the county's experts opined that the plumes originated from two different source areas, and another expert opined that there were 18 separate causes of the contamination. The district court, therefore, denied summary judgment for ICSOP on this issue.

Regarding the third issue, the district court found that the policies "unambiguously include a general aggregate limit, which includes a limit on property damage, and separate aggregate limits." Thus, the policies could not "reasonably be interpreted under the circumstances to subject ICSOP to the potential of unlimited liability for property damage." In granting summary judgment in favor of ICSOP on this issue, the district court also found that a withdrawal order, allowing ICSOP to withdraw its previous admission that the policies were not subject to aggregate limits, was not clearly erroneous or contrary to law.