

TCPA Exclusion, Employer's Liability, Abuse or Molestation Exclusions Coverage Update

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TCPA Exclusion and Anti-Aggregation Rule – Eighth Circuit (Missouri Law)

American Family Mut. Ins. Co. v. Vein Ctrs. for Excellence Inc.

--- F.3d ---, 2019 WL 80707 (8th Cir. Jan. 3, 2019)

The U.S. Court of Appeals for the Eighth Circuit upheld a decision by the district court that American Family Mutual Insurance Company (American Family) had no duty to defend or indemnify Vein Centers for Excellence Inc. (Vein Centers) for a class action complaint, alleging that Vein Centers violated the Telephone Consumer Protection Act (TCPA) by sending junk faxes. American Family issued a businessowners liability policy to Vein Centers that contained a TCPA exclusion, which was added in a renewal policy. St. Louis Heart Center Inc. (St. Louis) sued Vein Centers, alleging that it received advertising faxes from Vein Centers in violation of the TCPA.

American Family denied coverage to Vein Centers and sought a declaratory judgment from the U.S. District Court for the Eastern District of Missouri. St. Louis asserted that American Family failed to properly notify Vein Centers of the TCPA exclusion. The district court rejected this argument, saying that American Family provided sufficient notice to Vein Centers at the time the endorsement was added, citing testimony from a representative of American Family regarding the insurer's standard business practices in mailing notices to policy holders. The appellate court agreed with the district court, saying that American Family had sufficiently demonstrated compliance with its obligation to notify Vein Centers of the new TCPA endorsement in a renewal policy.

The appellate court also examined whether it was proper for the district court to exercise diversity jurisdiction. St. Louis argued that the \$75,000 amount in controversy requirement was not met because the values of the claims of the underlying class plaintiffs were aggregated in order to exceed the amount in controversy threshold. The appellate court held that the claims were not improperly aggregated because, in the declaratory judgment action, there was only a single claim by the insured against the insurer for defense and indemnity. Quoting an opinion by the U.S. Court of Appeals for the Seventh Circuit, the appellate court stated that "the anti-aggregation rule does not apply to a federal declaratory-judgment action between a single plaintiff and a single defendant, just because the unitary

controversy between these parties reflects the sum of many smaller controversies.”

Employer's Liability and Abuse or Molestation Exclusions – Fifth Circuit (Texas Law)

United Fire & Cas. Co. v. Kent Distributors, Inc.

--- Fed. Appx. ---, 2019 WL 181182 (5th Cir. Jan. 11, 2019)

The U.S. Court of Appeals for the Fifth Circuit affirmed a holding by the district court that an insurer has no duty to defend a convenience store chain in an employee's lawsuit, alleging that the employee was sexually assaulted by a co-worker. In the underlying case, an employee of Kent Distributors, Inc. (Kent) was locking up the store at the end of her shift when she was attacked and sexually assaulted by a co-worker. In her complaint, the employee alleged that Kent failed to take proper security measures and knew of the attacker's dangerous nature. United Fire and Casualty Company (United) had originally agreed to defend Kent in the employee's suit, but later withdrew the defense after concluding that coverage was precluded by the policy's employer's liability and abuse or molestation exclusions. United subsequently filed a declaratory action in the U.S. District Court for the Western District of Texas, seeking a judicial ruling supporting its coverage position.

The district court held that both exclusions applied to preclude coverage for the employee's lawsuit. On appeal, Kent argued that the employer's liability exclusion was inapplicable because it was unclear whether the employee was engaged in work duties at the time of the attack. Kent also argued that the abuse or molestation exclusion did not apply because the employee did not allege "abuse, molestation, or intent." The appellate court, however, rejected these arguments and held that the allegations fell squarely within the employer's liability exclusion as well as the abuse or molestation exclusion. The appellate court, therefore, affirmed the district court's ruling that there was no coverage for the employee's lawsuit under the United policy.

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