



ILLINOIS STATE  
BAR ASSOCIATION

# THE POLICY

The newsletter of the ISBA's Section on Insurance Law

## In this issue

The Insurance Section of the Illinois State Bar Association typically reviews the majority of insurance decisions announced by Illinois courts. There are five co-editors of *The Policy* who work tirelessly on these case summaries and never fail to meet a deadline. Their names appear on the back of this issue. I would like to thank them for their hard work. This issue gives them a well-earned break

for a moment.

The Illinois Supreme Court issued an interesting opinion regarding the faxing activity of an insured and the Illinois Appellate Court issued two decisions in the long string of Targeted Tender cases. This issue address these cases in depth. The next issue of *The Policy* will again bring you the latest in Illinois opinion. As we approach the new year for the ISBA, (June) I encourage all inter-

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ested readers to consider joining the Insurance Section and if you have an idea for an article or would like to work on *The Policy*, please do not hesitate to contact the Chair. Thank you. David Roe.

## The Illinois Supreme Court holds that fax blasting may be potentially covered under a commercial liability policy

In *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 2006 WL 3491675 (Ill. 2006), the Illinois Supreme Court held that allegations against an insured for unsolicited faxes potentially fell within the insured's

commercial general liability "advertising injury" coverage as a "publication," and "material that violates a person's right of privacy." The "right of privacy" in the "advertising injury" provision connoted both an interest in seclusion and an interest in the secrecy of personal information.

In *Swiderski*, Swiderski Electronics sent Rizzo, a private detective, and others a fax advertisement with sales information on various types of electronic equipment. This type of advertising still occurs with unsuspecting new businesses or those that simply do not realize that it may be illegal. In response to this advertising, Rizzo filed a class action suit alleging that, by faxing copies of the advertisement without first obtaining the recipients' permission, Swiderski violated section 227 of the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227 (2000)). The

complaint sought damages, attorney fees, and injunctive relief on behalf of all individuals who received an unsolicited fax advertisement from Swiderski.

Swiderski tendered defense of the suit to its primary insurer, Valley Forge, and its excess insurer, Continental Casualty Corporation. The policies provided similar coverage. Under the Valley Forge policy, Valley Forge had a duty to defend Swiderski against any suit seeking damage caused by "personal and advertising injury." Personal and advertising injury included injury that arose from "oral or written publication, in any manner, of material that violates a person's right of privacy."

Swiderski argued that the complaint alleged facts potentially within policy coverage so that the insurer had a duty to defend.

The essence of a TCPA fax-ad claim is that one party sends another an unso-

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licited fax advertisement. The receipt of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion, and such a violation is one of the injuries that a TCPA fax-ad claim is intended to vindicate. The harm from unsolicited faxes involves protection of 'privacy.' The court found that the TCPA's private right of action was meant to remedy and prevent the twin harms of damage to privacy and economic damage. The court found that it was clear that the TCPA aimed in part to protect privacy. With the TCPA, Congress took aim at the intrusive nature of unsolicited faxes.

The complaint implicitly alleged a violation of a privacy interest. Based on the plain, ordinary, and popular meaning of those words, the court believed that this type of injury fell potentially within the coverage of the "advertising injury" provision.

The policy did not define the terms "publication," "material," or "right of

privacy." The court found that the "right of privacy" connoted both an interest in seclusion and an interest in the secrecy of personal information. The policy language "material that violates a person's right of privacy" could reasonably be understood to refer to material that violated a person's seclusion. Unsolicited fax advertisements, the subject of a TCPA fax-ad claim, fall within this category.

By faxing advertisements, Swiderski engaged in the "written \* \* \* publication" of the advertisements. The "material" that Swiderski allegedly published, advertisements, qualified as "material that violated a person's right of privacy," because, according to the complaint, the advertisements were sent without first obtaining the recipients' permission, and therefore violated their privacy interest in seclusion. The language of the "advertising injury" provision was sufficiently broad to encompass the conduct alleged in the complaint.

The court noted that its conclusion was in agreement with the majority of federal courts of appeals that have considered "advertising injury" coverage for fax-ad claims. State courts remain incongruent in their holdings due to varying policy language and a mixed application of the law.

In this case, what may have seemed like an innocent advertising action, can cause significant downstream damage. Here, an insured was merely sending out a notice of a sale and some rental information. This generated a private cause of action on the part of each recipient. A class action suit followed, triggering coverage under a liability policy.

Most businesses are now aware of the TCPA and refrain from this activity. For those few remaining companies, as well as new start-up companies, a fax-ad campaign could lead to a series of suits and potential coverage under a liability policy.

## Update on Illinois Targeted Tenders under *John Burns*: Businesses reduce costs through the shifting of defense and indemnification costs

With two additional decisions on targeted tenders and an answer to the decade-old question of horizontal exhaustion, it seems an appropriate time to review where we are with targeted tenders. Business owners, officers and risk managers have a unique tool at their disposal in Illinois for shifting defense and indemnification costs away from their insurance policy and targeting another company's policy—the Targeted Tender. In 1992, the Illinois appellate court reached a decision that resulted in confusion, litigation and unexpected results ever since. Under Illinois' unique rule, when a business is covered by two or more policies, it can select or target one insurer to respond to a claim. The Targeted Tender stops the selected insurer from recovering from any other policy including the business's own policy.

The ability to exercise this election arises where multiple avenues of insurance coverage exist including additional insureds and multiple policies covering one insured. An additional insured situation can arise from any contractual agreement wherein a business requires one of its vendors, sub-contractors or business partners to name it as an insured under the vendors, sub-contractors or business partner's policy.

For example, If ABC, Inc. is the owner of a property under development and is insured under a liability policy, and is also an insured under the general contractor, 123's policy, ABC, Inc. can elect to have 123's policy provide a defense and indemnification for a claim or suit. By requiring to be named an additional insured in a contract and selecting 123's insurer to pay for the costs, ABC, Inc. reduces its loss history, shifts defense and indemnification costs

and saves money.

The Targeted Tender rule is unique to Illinois. The action of shifting defense and indemnification costs has been referred to by various names including a "Selective Tender," "Targeted Tender," "Institute Tender," and "John Burns Tender." The names Institute and Burns arise from the two primary decisions creating and supporting what has been referred to as an insured's paramount right to select which insurer will respond to a loss. The court in *Institute of London Underwriters v. Hartford Fire Ins. Co.*, 234 Ill. App.3d 70, 599 N.E.2d 1311, 175 Ill. Dec. 297 (1st Dist. 1992), adopted the rule that an insured has the right to elect which of a multitude of insurance policies must defend and indemnify a claim by tendering its defense to only one of the insurers. An insured may select an insurance policy that additionally insures it to be the

