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Illinois Court Addresses Coverage Under Advertising Injury Provision

By Jennifer L. Smith

An appellate court was recently the first to address whether an advertising injury provision creates the possibility of coverage in Illinois, and ultimately, a duty to defend on the part of the insurer. *Valley Forge Insurance Company v. Swiderski Electronics, Inc.,* 834 N.E.2d 562 (2005). The court upheld a decision finding that the insurers had a duty to defend and ordered that they pay defense costs for the underlying suit.

In 2003, Plaintiff Ernie Rizzo brought a class action lawsuit against Swiderski Electronics, Inc. ("Swiderski") alleging, among other things, that Swiderski violated the federal Telephone Consumer Protection Act (the "Act") by sending out unsolicited facsimile (fax) advertisements. Swiderski had a commercial general liability policy with Valley Forge Insurance Company and Continental Casualty Corporation and tendered the defense of this action to them. The insurers disclaimed coverage and filed a complaint for declaratory judgment, alleging that they had no duty to defend or indemnify Swiderski under the "personal and advertising injury" provision of the policy. Swiderski filed a counterclaim alleging that this refusal constituted a breach of the insurers' duty to defend. On cross-motions for partial summary judgment, the trial court granted summary judgment in favor of Swiderski. In addition, the trial court ordered the carriers to pay the defense costs already incurred in the underlying action ($25,242.22), which was still pending, and to advance future defense costs pending resolution of any appeal. The insurers then appealed.

The court cited the well-known maxim that a duty to defend arises if the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage. When deciding whether a duty to defend exists, courts should liberally construe the underlying complaint and insurance in favor of the insured, with all doubts and ambiguities to be construed in favor of the insured. Quoting Illinois case law, a "refusal to defend is unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not fall potentially within the policy's coverage."

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In the first ruling of its kind in Illinois, an appellate court decided that an alleged violation of the federal Telephone Consumer Protection Act potentially falls within a policy's "personal and advertising injury" coverage, and therefore an insurer was wrong in declining to defend. The case turned upon several undefined policy terms and is a reminder that such terms, even when considered commonplace, can be given broad meanings and create coverage obligations.

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Under Swiderski's policy, the insurers had a duty to defend any suit seeking damages caused by "personal and advertising injury." One such offense was defined as an "oral or written publication, in any manner, of material that violates a person's right of privacy." The policy failed to define the words "publication" and "privacy." In addition, the policy excluded "'personal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" The insurers argued that a claim under the Act is not a violation of privacy and that the "sending" or "transmittal" of an unsolicited fax ad to a specific person does not constitute "publication."

First, the insurers argued that "publication" in the context of the policy required an injurious communication to a third party. This argument rested on whether or not the advertising injury coverage dealt with secrecy or seclusion. If coverage was limited to secrecy interests, then contacting one customer might not constitute "publication." Giving the word "publication" its plain, ordinary, and generally accepted meaning, the court found that there is no requirement that its scope be limited to material sent to a third party.

Similarly, the insurers argued that the unsolicited faxes involved the tort of intrusion on seclusion, while policy coverage was limited to secrecy interests. Therefore, such claims do not violate a person's right of privacy. The court disagreed, finding that "privacy is privacy," and transmitting an unwanted fax constituted an intrusion on seclusion and thus violated one's right of privacy. The sending of unsolicited fax advertising would fall potentially within the scope of coverage under the terms of the advertising injury provision.

Lastly, the insurers argued that any advertising injury coverage would be barred by the policy exclusion for "knowing infliction" of an advertising injury. Specifically, the act of sending out fax advertisements without prior permission "knowingly" caused the receipt of unsolicited fax ads and therefore fell within the exclusion. The court, in analyzing the Plaintiffs' complaint, found that it included alternate theories of intentional and negligent conduct. Since the policy provision barred only intentional conduct and not negligent conduct, the exclusion did not preclude all potential coverage.

Finding that the insurers had a duty to defend, the court also upheld the trial court's determination as to defense costs. The insurers remained obligated to defend Swiderski so long as there remained any question as to whether the underlying claims were covered by the policy. Once the trial court determined that insurers had a duty to defend in the underlying suit, the duty to defend continued during the pendency of the appeal.

Prior to the suit, no Illinois court had ever addressed whether an advertising injury provision such as the one at issue created the possibility of coverage. Most litigation of this nature had proceeded in federal courts, which are divided as to whether similar insurance provisions provided coverage for fax-advertising claims under the Act.

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We welcome your questions and comments.

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