

## **New York Federal Court Rolls Over Insurer's Attempt to Defeat "Blast Text" TCPA Coverage Claim**

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In a resounding win for policyholders, a New York district court found coverage for a nearly \$50 million class-action claim alleging that US Coachways, Inc., violated the Telephone Consumer Protection Act (TCPA) by sending unsolicited "blast text" advertisements to potential customers. *Illinois Union Ins. Co. v. US Bus Charter & Limo Inc.*, No. 1:16-CV-06602-FB-RLM, 2018 WL 1193464, at \*1 (E.D.N.Y. March 8, 2018). Specifically, the federal court granted US Coachways' motion for a partial summary judgment, holding that the policyholder's blast texts expressly fell within the scope of the insuring agreement in US Coachways' professional liability policy. Notably for all policyholders, the court's coverage ruling reasoned that a business's advertising of its services is covered because it is an integral part of its actual provision of those services.

In contrast, many of the prior TCPA coverage decisions have generally turned on whether invasion of privacy exclusions barred defense and indemnity coverage. See, for example, *Los Angeles Lakers, Inc. v. Federal Insurance Company*, 869 F.3d 795 (9th Cir. 2017); see also *Doctors Direct Ins., Inc. v. Bochenek*, 38 N.E.3d 116 (Ill. App. 2015) and *Resource Bank v. Progressive Cas. Ins. Co.*, 503 F.Supp.2d 789 (E.D.Va. 2007).[1] Other decisions have analyzed the insurability of damages awarded under the TCPA on public policy grounds. *Ace Am. Ins. Co. v. Dish Network, LLC*, 883 F.3d 881, 892 (10th Cir. 2018) (TCPA statutory damages were held to be punitive in nature, rather than remedial, and uninsurable under Colorado law).[2] The US Coachways decision differs from these cases for several reasons.

Unlike the cases cited above, coverage for US Coachways did not turn on the interpretation of exclusionary language, or questions of insurability and public policy. Instead, the court dealt squarely with the policy's definition of "professional services," finding that the policy "unambiguously" provided coverage for the TCPA violations at issue in US Coachways' capacity as both a "bus charter broker" and provider of "Travel Agency Operations." *US Coachways*, 2018 WL 1193464, at \*3. Notably, the court looked to federal statutory law (specifically the ICC Termination Act of 1995) for interpretive guidance on the coverage of blast text advertisements, and thus, had "no difficulty concluding that the services of a bus charter broker include advertising bus transportation to specific groups of people." *Id.* at \*3. Similarly, in construing the policy's definition of

“Travel Agency Operations,” the court concluded US Coachways’ blast text advertisements were “necessary or incidental to the conduct of travel agency business” as “attempted procurement for a fee or commission of travel.” *Id.* at \*4.

Interestingly, for those commercial policyholders facing TCPA blast text exposures in other contexts, the court’s reasoning with respect to US Coachways’ advertising activities is potentially applicable to the “advertising activities” of a variety of other businesses and industries. The court, in fact, emphasized that service providers “in virtually every industry offer services in bundles, saving consumers and other businesses” valuable time and expense. *Id.* (emphasis added). Thus, for US Coachways, the court found the bus blast text advertising “an essential part of the bundle of services it provides ... .” *Id.* Accordingly, the court rejected the insurer’s contention that that US Coachways’ blast text advertising activities were somehow not covered because they did not constitute performing services “for others ... for a fee,” finding “[t]hat interpretation ... at odds with how the modern business world operates.” *Id.*

In sum, the new US Coachways summary judgment ruling is an important blast text TCPA coverage decision that must be examined by corporate policyholders grappling with similar third-party claims exposures and developing TCPA coverage law. While the court’s findings are of course informed by the specific language of the US Coachways policy, the court’s broad articulation of its reasoning provides valuable pro-policyholder precedent that can be potentially applied to other businesses and advertising practices under various lines of commercial policies. It, moreover, is the first major blast text TCPA coverage decision to be decided by a New York federal court and under New York law. And if it is upheld by the Second Circuit, the importance of this decision could be further amplified to other blast text coverage matters throughout the country, as it provides powerful alternative reasoning to adverse pro-carrier decisions in other circuits.

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[1] See also G. Horowitz and J. Moreira, “‘Showtime’ for the Lakers: Split Federal Appellate Decision Leaves Door Open for Policyholders’ Full-Court Press on TCPA Coverage Claims,” *Sports Litigation Alert*, Vol. 14, Issue 20 (October 27, 2017).

[2] Our firm previously warned businesses about the next wave of TCPA class action lawsuits being filed against companies that send automated text messages without giving customers adequate means to withdraw their consent, or who fail to recognize when consumers withdraw prior consent through vague or ambiguous communications. Edward Fanning, et al., “TCPA: The Next Wave of Class Action Lawsuits Asserts Consumer’s Right to Withdraw Consent to Receive Text Messages” (February 16, 2017), available [here](#). Our colleagues also previously observed that despite the explosion of TCPA claims in recent years, FCC guidance on key provisions of the TCPA remains elusive, presenting businesses with unique compliance challenges. Matthew Tharney, et al., “TCPA Claims: FCC Guidance on Key Provisions Remains Elusive” (December 12, 2016), available [here](#). Most recently, our firm analyzed the ways in which ACC International’s successful challenge to the FCC’s July 10, 2015, Omnibus Order addressed, and failed to address, the expansion of TCPA liability and problems with compliance. See Matthew J. Tharney and Natalie S. Watson, “Expansiveness of TCPA Limited by ACA’s Win in FCC Lawsuit” (March 2018), available [here](#).

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