‘Showtime’ for the Lakers: Split Federal Appellate Decision Leaves Door Open for Policyholders’ Full-Court Press on TCPA Coverage Claims

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By now, virtually every team owner, sports industry executive, and league risk manager is aware of the Telephone Consumer Protection Act (TCPA) and the potentially enormous class action exposure it creates for companies in (and outside) the sports world that are accused of engaging in abusive telemarketing practices.[1] The law imposes a $500 minimum statutory penalty for every unsolicited marketing or advertising message—whether call, fax, or text—sent using an automated telephone dialing system (ATDS) or pre-recorded voice. Yet few have fully considered whether insurance may be available to pay the cost of defending against a TCPA class action, or whether coverage may fund damages in the event of an adverse judgment or settlement.

Traditionally, organizations faced with potential TCPA liability looked to their Commercial General Liability (CGL) carriers for coverage, arguing that the underlying TCPA claims alleged a form of third-party property damage or advertising injury. Increasingly, however, as CGL carriers have begun to include TCPA-specific exclusions in their policies, policyholders have looked to their Directors and Officers (D&O) carriers to protect against TCPA exposures. This is especially true of D&O policies issued to certain private and nonprofit entities, which typically provide broader “entity” coverage than D&O policies issued to publicly traded companies.

Sports organizations that wish to grow their brand, maximize fan engagement, and develop more personal connections with their customers through text messaging while simultaneously minimizing their TCPA exposure will need to familiarize themselves with the most recent TCPA coverage litigation. The Los Angeles Lakers’ recent attempt to obtain TCPA coverage from its D&O insurer sheds light on the insurance issues of which every sports organization should be aware.

The Lakers’ TCPA Coverage Dispute

In November 2012, a fan filed a class action suit against the Lakers contending that text messages he and other fans received after responding to a message posted on the Staples Center Jumbotron violated the TCPA by attempting to solicit business from them without their consent and invading their right of privacy. The Lakers filed suit against their D&O carrier seeking to recover their costs in defending the class action.

As in the handful of cases predating *Lakers* that dealt with D&O coverage for TCPA claims, the Lakers’ coverage case turned on whether an “invasion of privacy” exclusion included in its D&O policy barred coverage. The Lakers contended that because the underlying class action complaint did not solely allege invasion of privacy, but also included claims for economic and property damage, the “invasion of privacy”

exclusion did not eliminate its D&O carrier's duty to defend. Unpersuaded, the district court found "[t]he economic damages allegedly incurred" to be "a direct result of the invasion of privacy." As a result, the court found the invasion of privacy exclusion barred coverage and dismissed the Lakers' complaint.

The Ninth Circuit's Recent Decision

The Lakers appealed to the Ninth Circuit Court of Appeals. In a 2-1 split decision, the Ninth Circuit affirmed the district court's dismissal of the Lakers' complaint, holding that a claim under the TCPA is "inherently an invasion privacy claim." *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795 (9th Cir. 2017). As a result, it found that the invasion of privacy exclusion in the Lakers' D&O policy barred coverage.

While a setback for some D&O policyholders, the Ninth Circuit's split decision does not foreclose all potential options for securing coverage for TCPA-related liability. To the contrary, the dissent criticized the majority's finding that TCPA claims are "inherently" invasion of privacy claims, raising new questions with respect to obtaining D&O coverage for TCPA claims. Moreover, should the Ninth Circuit decide to rehear the case *en banc* (as requested by the Lakers in a recent petition), the majority's holding will be put in jeopardy of reversal. In any event, a number of important observations can be made regarding the Ninth Circuit's decision for organizations faced with TCPA exposures.

First, the majority's reasoning was either not endorsed (in the case of the concurrence) or expressly disapproved of (in the case of the dissent) by the other two judges on the panel. The fragmented nature of the court's opinion should limit any weight accorded to the majority opinion in other jurisdictions, or in other decisions within the Ninth Circuit that are pled in a different manner than the *Lakers* underlying complaint.

Second, the majority's reasoning is ambiguous and its holding is imprecise. While the majority professed to hold simply that "a TCPA claim is "*inherently*" an invasion of privacy claim," elsewhere it seems to suggest that a TCPA claim is also *exclusively* an invasion of privacy claim. This is not a merely semantic difference. If TCPA claims are deemed inherently (but not exclusively) invasion of privacy claims, the presence of an invasion of privacy exclusion will not necessarily foreclose other avenues for seeking coverage—especially for payment of defense costs based on broader TCPA allegations. If, however, TCPA claims are deemed to be inherently *and* exclusively invasion of privacy claims, the presence of a sufficiently broad invasion of privacy exclusion could eliminate coverage despite the presence of other allegations not based on an invasion of privacy. The distinction is an important one for policyholders. It may be the difference between having their coverage complaint dismissed (as in *Lakers*) and having access to millions of insurance dollars for payment of defense costs.

Finally, so long as a TCPA-specific exclusion is not present, the majority's finding that all TCPA claims are "inherently" invasion of privacy claims could potentially have a *positive* impact on the availability of coverage under certain CGL policies. If all TCPA claims are deemed inherently invasion of privacy claims, CGL carriers may no longer be able to argue that TCPA claims do not trigger personal and advertising injury coverage under their policies. Accordingly, under CGL policies without express TCPA exclusions, policyholders would have a strong argument for obtaining defense costs for future TCPA claims

Conclusion

Sports teams, venues, sponsors, advertisers, and industry promoters utilizing text-based marketing strategies need to be aware of the latest trends in TCPA coverage litigation in order to navigate the ever-changing landscape of TCPA class action liability. While the Ninth Circuit's majority decision may appear on its face to be problematic for D&O policyholders, there remain viable options for policyholders to seek coverage for TCPA liability under both D&O and CGL policies. Policyholders seeking D&O coverage for TCPA claims should not be discouraged by the Ninth Circuit's majority ruling. The fragmented nature of the court's decision will provide ample grounds for coverage attorneys to "push the ball" up the coverage court and press for more favorable holdings in other jurisdictions and factual scenarios.

Ultimately, the *Lakers* decision will likely lead to "showtime" for policyholders in the sports industry (and elsewhere), as consumers will undoubtedly continue to be barraged with text message advertising and marketing communications from their favorite sports teams and venues. Policyholders should ensure they have experienced coverage counsel on their team to guide them through the process of evaluating

all potential coverage options. In the absence of a clear and broad TCPA exclusion in the applicable third-party liability policy—whether CGL or D&O—there are still no “slam dunks” for carriers seeking to avoid coverage for the new wave of text message TCPA claims.