

Insured Real Estate Agency's "Blast Fax" Property Advertisements Do Not Involve Professional Services

February 2014

An Illinois intermediate appellate court has held that a professional services exclusion did not bar coverage for a class action alleging that an insured real estate agency violated the Telephone Consumer Protection Act (TCPA) by sending "blast faxes" that advertised a property offered for sale. *Standard Mut. Ins. Co. v. Lay*, 2014 WL 272773 (Ill. App. Ct. Jan. 23, 2014). In addition, the court ruled that an insurer could not rely on a consent-to-settlement provision because the insurer "surrender[ed] control of the defense" and "its right to control the settlement" when the insured obtained independent counsel after the insurer's reservation of rights. *Id.*

The policyholder, a real estate agency, was sued for alleged TCPA violations after it sent approximately 5,000 faxes advertising the sale of a particular property. One of the fax recipients filed a class action lawsuit against the insured, seeking statutory damages of \$500 for each fax sent. The policyholder tendered defense of the suit to its commercial general liability (CGL) insurer, which accepted the defense under a reservation of rights. The insurer then hired counsel to defend the insured after the insured agreed to waive the potential conflicts of interest in light of the insurer's reservation of rights. Subsequently, however, the insured retained new counsel, which advised the insurer that the insured was exercising its right to obtain independent counsel because of the conflicts of interest created by the insurer's reservation of rights. Later, the insured settled the class action without the insurer's consent.

In a subsequent coverage action, on remand from a decision from the Illinois Supreme Court holding that the settlement for statutory damages did not represent a settlement of uninsurable punitive damages, the intermediate appellate court ruled that the CGL policy afforded coverage for the underlying suit. First, the court rejected the insurer's argument that the policy's professional services exclusion barred coverage, reasoning that the insured was a real estate agency—not an advertising company—and thus that the exclusion did not apply given the absence of any allegations that the insured "incorrectly performed real estate services." Second, the court rejected the insurer's argument that the insured breached the policy's consent-to-settlement provision, concluding that "when an insurer surrenders control of the defense, it also surrenders its right to control the settlement of the action and to rely on a policy provision requiring consent to settle." Under the circumstances here, where the insurer reserved rights and permitted the insured to retain

independent counsel, the court ruled that the insurer "had no right to require [the insured] to obtain permission to settle the underlying suit or to object to it itself." In addition, the court observed that the insurer provided no evidence that it was prejudiced by the settlement, positing that the settlement was "supported by simple math" given that liability was clear and that the amount of statutory damages per violation was fixed.