

**ALERT**

# Illinois Supreme Court Holds TCPA Damages Are Not Uninsurable

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The Illinois Supreme Court, applying Illinois law, has held that the Telephone Consumer Protection Act of 1991 (TCPA) is a remedial statute and not penal, and thus minimum statutory damages prescribed under the TCPA and paid as part of a class action settlement for alleged TCPA violations did not constitute uninsurable punitive damages. *Standard Mutual v. Lay*, 2013 WL 2253203 (Ill. May 23, 2013). The court reached the issue after concluding that the insurer did not waive its policy defenses regarding coverage where the insurer's reservation of rights letter specifically identified potential coverage defenses and a conflict of interest and where the insurer brought a declaratory judgment action concerning coverage.

The insured, a real estate agency, was sued in a class action lawsuit alleging violations of the TCPA. The insured, which was sued in connection with its role in sending thousands of unsolicited faxes, subsequently sought coverage for the lawsuit. Agreeing to defend the insured subject to a reservation of rights, the insurer drafted a letter notifying the insured that the policies may not cover the alleged conduct because, among other things, the TCPA "may constitute a penal statute" and the policies excluded coverage for willful violations of penal statutes. Because a conflict of interest existed, the insurer then gave the insured the option of choosing its own defense attorney or waiving the conflict of interest and accepting counsel provided by the insurer. The real estate agency initially accepted the attorney hired by the insurer, but later decided to hire its own defense counsel. The insured and its own counsel ultimately settled the case, but neither informed the insurer-appointed attorney of the settlement until after it happened.

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The insurer subsequently filed a declaratory judgment action, seeking a determination regarding coverage for the underlying lawsuit and settlement. The insurer alleged that the TCPA-prescribed damages of \$500 per violation constituted uninsurable punitive damages and that it had no duty to indemnify the insured because it entered into the settlement agreement without its consent. Concluding that there was no coverage, the trial court granted summary judgment in favor of the insurer. The intermediate appellate court affirmed, but addressed only two issues. First, the court determined that the insurer was not estopped from raising coverage defenses. Second, the court concluded that TCPA-prescribed damages constitute uninsurable punitive damages.

On appeal, the Illinois Supreme Court agreed that the insurer was not estopped from asserting coverage defenses. In so doing, the court rejected the real estate agency's argument that the insurer's reservation of rights letter did not adequately inform it of potential coverage defenses and conflicts of interests. The court noted that the letter specifically referred to the conflict of interest regarding violation of penal statutes and also included an extensive list of policy defenses.

The Illinois Supreme Court, however, overturned the intermediate appellate court's ruling concerning whether the TCPA-prescribed damages constitute uninsurable punitive damages, reasoning that the "manifest purpose of the TCPA is remedial and not penal." The court explained that "Congress enacted the TCPA to address telemarketing abuses attributable to the receipt of unsolicited faxes," and that Congress identified the purpose of the TCPA as "prevent[ing] advertisers from unfairly shifting the cost of their advertisements to consumers while simultaneously preventing the use of their fax machines for legitimate purposes." Because the court determined that the TCPA is remedial and not penal, the court held that the TCPA-prescribed damages of \$500 per violation do not constitute uninsurable punitive damages.