

## **Commercial General Liability Policy Covers 'Blast' Faxes: Florida Court**

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Commercial general liability (CGL) insurance policies generally cover liability for unsolicited “blast faxes” that violate federal law, a Florida court has ruled.

The Supreme Court of Florida issued its ruling

Jan. 28 in a case involving a 2003 CGL policy provision on advertising injuries and the Telephone Consumer Protection Act (TCPA).

As a result, plaintiffs in a class action suit who sued Nextel South Corp. for violating their privacy by sending 24,000 blast faxes may be entitled to insurance benefits from Transportation Insurance Co. Transportation had sold the CGL insurance policy at issue to Southeast Wireless, an authorized agent of Nextel.

In June 2003, Michael Penzer filed a class action suit in a Florida state court against Nextel South Corp., alleging that Nextel or one of its agents sent him an unsolicited facsimile advertisement in violation of the TCPA. Nextel in turn filed a third-party complaint against Sunbelt, a blast-fax advertiser, and Southeast Wireless, an authorized agent of Nextel, seeking indemnity and contributions for any liability Nextel may have in the class action.

Nextel also alleged that Southeast Wireless hired Sunbelt to create the advertisement and that Nextel did not authorize the fax transmissions.

Penzer then filed a third-party complaint against Southeast Wireless requesting that Transportation Insurance Co., its commercial liability insurer, defend it in the class action. Transportation refused to

provide a defense for the class action suit or the Nextel complaint, and also disclaimed any coverage.

The CGL policy provided coverage for advertising injuries and included in its definition of “advertising injury” an injury arising out of “oral or written publication of material that violates a person’s right of privacy.”

Transportation argued that the phrase “oral or written publication of material that violates a person’s right of privacy,” provided coverage only for injuries to privacy rights caused by the content of the material. Also, the insurer maintained that Florida law interpreting the phrase “publication . . . in violation of an individual’s right of privacy” makes clear that coverage exists only when private matters about one person are communicated to another person.

Transportation contended that the phrase “that violates a person’s right of privacy,” modifies the term “material,” as opposed to “publication,” and thus can only apply when the content of the material violates a person’s right of privacy. Only a violation of the secrecy right of privacy will trigger coverage, not a violation of seclusion, the insurer said.

Although Southeast’s conduct in having the commercial advertisements sent by facsimile may have violated the TCPA, there was no coverage under the policy because there were no content-based privacy violations, according to the insurer.

One lower court agreed with Transportation that there was no coverage, while on appeal the Eleventh Circuit court sided with Penzer and found that neither the policy language nor Florida public policy supported denial of coverage. The case then went to the state Supreme Court.

The Supreme Court agreed with Penzer, finding that the “plain meaning” of the CGL policy provision on advertising injury was to provide coverage for a written publication of material that violates a person’s right of privacy.

The court dismissed Transportation’s grammar-based argument. “Even if the phrase ‘that violates a person’s right of privacy’ only modifies the term ‘material,’ it does not follow that only the secrecy right to privacy is implicated because ‘material’ could also invade one’s seclusion,” the high court stated.

William G. Passannante of Anderson Kill & Olick, represented the nonprofit advocacy group United Policyholders in filing an amicus brief in support of finding coverage under the CGL.

“Given that many state courts that have made similar determinations, it’s remarkable that insurance companies continue improperly to dispute their clear obligation under liability insurance policies to cover ‘blast fax’ violations under TCPA,” Passannante said.