

## **Lakers Get Support [from United Policyholders] In Bid To Undo TCPA Coverage Loss**

Law360

A nonprofit policyholder advocacy group on Monday urged the full Ninth Circuit to ax a panel's decision that the Los Angeles Lakers aren't covered for class allegations that the team sent unwanted text messages to fans in violation of the Telephone Consumer Protection Act, saying the ruling flouts basic insurance law principles.

Last month, a 2-1 appellate panel upheld a California federal judge's decision in favor of Federal Insurance Co., finding that because a TCPA claim is "inherently an invasion of privacy claim," the lower court properly concluded that David Emanuel's underlying suit against the National Basketball Association team is precluded from coverage by virtue of an invasion-of-privacy exclusion in Federal's policy.

The Lakers promptly lodged a petition for rehearing of the decision by the full Ninth Circuit, asserting that the majority opinion is contrary to applicable precedent regarding the interpretation of statutes and an insurer's duty to defend.

On Monday, the nonprofit group United Policyholders threw its support behind the NBA team, contending that the panel majority applied an impermissibly broad interpretation of the invasion-of-privacy exclusion.

"If California law required exclusions to be construed broadly and for coverage to be avoided wherever possible, then there could be no quarrel with the outcome of this action," the group argued. "Because California law commands the opposite, however, the panel's divided decision deserves additional scrutiny

and, ultimately, reversal.”

An attorney for Federal did not immediately respond to a request for comment.

The coverage dispute is rooted in an underlying suit filed in November 2012 by Emanuel, who said he used his phone to put a personal message on the scoreboard during a game at the Staples Center and then began receiving texts from an autodialer. Emanuel contended that the unsolicited messages violated the TCPA and cost him and other members of the proposed class in text-message charges.

U.S. District Judge George H. Wu dismissed Emanuel’s case with prejudice in April 2013 on the grounds that Emanuel implicitly consented to receiving a confirmation text from the Lakers when he submitted his original message. The Lakers settled with Emanuel in 2014 after he appealed to the Ninth Circuit.

In September 2014, the basketball team sued Federal, accusing the insurer of refusing in bad faith to defend or indemnify the Lakers in the Emanuel litigation under the team’s D&O policy.

Seven months later, U.S. District Judge Dolly M. Gee granted Federal’s motion to dismiss, agreeing with the insurer that the policy’s invasion-of-privacy exclusion precluded coverage on the grounds a TCPA violation allegation is at heart a claim for a privacy breach. The Lakers appealed to the Ninth Circuit.

In an Aug. 23 published opinion, the panel majority found that Judge Gee had reached the proper conclusion, noting that the text of the TCPA twice states that the statute is intended to protect privacy rights. Therefore, the majority said, Emanuel’s two causes of action for negligent and knowing or willful violations of the TCPA are necessarily claims for invasion of privacy, and there was no potential for Emanuel to amend his complaint to assert any claims potentially falling within the scope of the Federal policy’s coverage.

In a somewhat unusual twist, U.S. District Judge Stephen Joseph Murphy III, who sat by designation on the panel, wrote in a concurring opinion that he would have affirmed the lower court based solely on a finding that Emanuel’s claims arose out of an invasion of privacy, without ruling more broadly that a claim for an alleged TCPA violation inherently constitutes an invasion of privacy claim.

Meanwhile, U.S. Circuit Judge Richard Tallman tore into the majority opinion, saying in a scathing dissent

that nothing in the TCPA suggests that a plaintiff suing under the statute must prove an invasion of privacy.

The lack of unanimity among the judges on the panel led some insurance attorneys to predict that the case may be a candidate for en banc review. The Lakers filed their petition on Sept. 6, and several days later, the panel requested that Federal file a response.

In its amicus brief, UP said the majority opinion erred by construing the invasion-of-privacy exclusion as applying to any claims bearing a “minimal causal connection” to or “incidentally related” to an invasion of privacy, rather than requiring a direct causal connection as courts have done in the past.

“By effectively reversing the rules governing the interpretation of policy exclusions, the majority opinion puts yet another thumb on the scale in favor of insurance companies and against consumers, making them more vulnerable to technical — and unexpected — denials of coverage,” UP argued.

The nonprofit group added that, if Federal had wanted to bar coverage for TCPA claims, it could have added an explicit TCPA exclusion to its policy, as many insurers have done over the past decade as actions brought under the statute have proliferated.

“Instead, [Federal] collected premiums from its insured for a policy that, on its face, had no such exclusion, and when a claim arose that falls squarely within the coverage grant, relied on a court to eliminate coverage after the fact,” UP contended. “Such conduct jeopardizes coverage for all insurance consumers, large and small.”

United Policyholders is represented by its own Amy Bach and David E. Weiss of Reed Smith LLP.

The Lakers are represented by Kirk Pasich and Pamela Mary Woods of Pasich LLP.

Federal is represented by Robert M. Traylor.

The case is Los Angeles Lakers Inc. v. Federal Insurance Co., case number 15-55777, in the U.S. Court of Appeals for the Ninth Circuit.

-Editing by Philip Shea.