

## [‘Quirky’ TCPA Coverage Ruling Is Policy Interpretation Clinic](#)

Law360

The California Supreme Court took a big step forward for policyholders when it recently found that ambiguity in a policy issued by an AIG unit could lead Yahoo to have a reasonable expectation of coverage, thus potentially triggering the insurer’s duty to defend against four proposed class actions over alleged privacy violations.

The ruling is significant in a number of ways, experts say, ranging from how the justices interpreted policy language to how the court applied a legal doctrine known as “contra proferentem,” which involves interpreting ambiguous terms of a contract against the entity that drafted it.

As a result, the ruling could have ramifications beyond the case at hand, in which Yahoo is seeking a defense from AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa. against four proposed class actions accusing the tech company of violating the Telephone Consumer Protection Act, or TCPA, by sending unsolicited text messages.

### **Construing Contra Proferentem**

Albert K. Alikin of Freeman Mathis & Gary LLP’s Los Angeles office said that while the ruling is very case-specific overall, one of the biggest takeaways for carriers might be the justices’ take on the concept of contra proferentem.

He said policyholders often “jump to the conclusion that all ambiguities must be resolved against the insurer under contra proferentem, but jumping to this conclusion misses the critical step of determining what the objectively reasonable expectations of the insured were.”

In reaching its conclusion regarding the applicability of the contra proferentem doctrine, the court

unanimously found that even though the language in an endorsement in National Union's policy was customized, it was derived from the carrier's standardized policy form. As a result, the justices found that the AIG unit must be considered the drafter of the language for the purpose of finding ambiguity.

"Under such circumstances, the insured – Yahoo – cannot be charged with creating the ambiguity that led to the dispute, and therefore it is appropriate for courts to interpret any unresolvable ambiguities in Yahoo's favor," Justice Martin Jenkins wrote for the court.

The court stopped short, however, of declaring that National Union had a duty to defend Yahoo, saying further fact-finding is needed on whether the technology company had an "objectively reasonable" expectation of coverage for TCPA claims.

Alikin, who represents insurers, said the Golden State high court properly clarified that *contra proferentem* should only be used as a last resort when analyzing coverage disputes.

Based on this clarification, he said, the ruling "could be cited often by carriers."

Amy Bach, executive director of consumer advocacy group United Policyholders, which filed an *amicus curiae* brief in support of Yahoo, applauded the court for handing down a ruling that "appropriately applied and upheld several important rules of construction related to liability coverage/duty to defend disputes."

"The decision is a timely and important win for policyholders in an era where insurers have become increasingly bold in drafting exclusions and limitations that defeat the indemnification goal that compels people and businesses to spend considerable sums on insurance products," she told Law360.

Bach went on to say the court correctly found the potential for a duty to defend after considering ambiguities in the policy and endorsement language, interpreting the policy in accordance with Yahoo's reasonable expectations and applying *contra proferentem*.

Bach said, "United Policyholders particularly appreciates that the court considered the fact that policy was a manuscript policy but found the language to be standard, not specifically negotiated by the insured, and therefore construed it to support the insured's reasonable interpretation and expectation of coverage."

Lorelie S. Masters, a partner at Hunton Andrews Kurth LLP's Washington, D.C., office who represents policyholders, told Law360 she was gratified when reading the California high court's unanimous decision. She described the ruling as "very strong confirmation of how policy interpretation, principles should work."

"It's the only decision I can really think of where the court specifically talked about manuscript policy language in quotes and made the point that if the so-called manuscript language is using standard form terms, *contra proferentem* should still apply," she said.

### **The Power of Certification**

The coverage dispute came to the California Supreme Court via a certified question from the Ninth Circuit, which is reviewing a federal judge's 2017 decision holding that National Union had no duty to defend Yahoo.

Darren Teshima of Covington & Burling LLP told Law360 that Yahoo's case is a strong endorsement of federal courts seeking guidance from state supreme courts when facing uncertainty on state law questions.

"What struck me as significant is the California Supreme Court here correctly interpreted the policy language to be consistent with the policyholder's reasonable expectations of coverage where the federal district court had not," said Teshima, who represents policyholders.

Teshima went on to say that the ruling is important for policyholders since the justices acknowledged that Yahoo reasonably expected coverage for alleged TCPA violations when negotiating the terms of the policy. According to court records, a TCPA exclusion was removed from the commercial general liability policy, and the at-issue endorsement was then added.

"In this case, one of the things the court recognized was that the policyholder had the TCPA exclusion carved out of its coverage, which was helpful in terms of understanding the reasonable expectations of the policyholder," Teshima said.

Tim Law of Reed Smith LLP's Philadelphia office told Law360 that while there are some weird "quirks" in this case in terms of the language in the policy endorsement, the ruling has broad applicability because it

still interprets standard-form language.

Law, who represents policyholders and was counsel for United Policyholders, stressed the importance of the court's finding on ambiguity.

"There's just so much linguistic analysis that goes into insurance policy work," he said. "Courts are consistently finding insurance policy language ambiguous and giving guidance to insurance companies about how their insurance contracts fall short. You would think the insurance companies would just clarify their standard form language and make it unambiguous so it can only be interpreted in the way they want it interpreted, but typically they don't."

Hunton's Masters, who also represents United Policyholders, agreed that the ruling will have an impact in other TCPA cases and beyond.

"The court addressed how an insurance policy should be interpreted under California law and California is a huge market," Masters said. "It's very significant to have the affirmation of the breadth of these policy interpretation principles coming from the California Supreme Court."

Raymond Tittmann of TittmannWeix disagreed about the widespread impact of the ruling, noting the parties' agreement to remove the TCPA exclusion and further negotiate language in the endorsement. He also emphasized that the California high court did not conclusively answer the question of coverage.

"Effectively, it's a remand for the district court to determine Yahoo's reasonable expectations based on the negotiations and particular facts and circumstances of the placement of insurance," said Tittmann, who represents insurers.

Counsel for the parties and National Union declined comment on the ruling. Yahoo did not respond to a request for comment.

Justice Martin J. Jenkins wrote the opinion for the California Supreme Court.

Yahoo is represented by William T. Um of Jassy Vick Carolan LLP.

National Union is represented by Steven S. Fleischman, Mitchell C. Tilner and Emily V. Cuatto of Horvitz &



Levy LLP and by Richard H. Nicolaides Jr. and Daniel I. Graham Jr. of Nicolaides Fink Thorpe Michaelides Sullivan LLP.

The case is Yahoo Inc. v. National Union Fire Insurance Co. of Pittsburgh PA, case number 5253593, in the Supreme Court of the State of California.

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