

Yahoo Defense Tab Up for Grabs in California Supreme Court Case

Bloomberg Law

Yahoo! Inc., besieged by class actions accusing the pioneering internet search engine of sending unwanted ads via text message in violation of federal law, turned to its insurer to provide and pay for its legal defense.

But, despite the existence of specifically negotiated and distinct “personal injury” and “advertising injury” coverage provisions according to Yahoo, National Union Fire Insurance Co. of Pittsburgh, Pa., denied coverage.

A San Jose federal judge agreed with the carrier, but the more circumspect US Court of Appeals for the Ninth Circuit punted the issue to California’s Supreme Court, asking: Does a commercial liability policy that covers “personal injury”—defined as arising out of oral or written publication of material violating a person’s right of privacy—trigger an insurer’s duty to defend claims that the insured violated the Telephone Consumer Protection Act by sending those unsolicited texts, even if they didn’t reveal any private information?

The seven-member high court hears argument over the issue on Tuesday. Despite receiving the referral in 2019, by law they have just 90 days to issue a ruling.

California appellate courts, like courts across the country, are split on whether general liability policies cover only suits over the right to keep information confidential, called the right to secrecy, or whether they also cover the right to be free from unwanted intrusions, called the right to seclusion, said Scott M. Seaman, co-chair of Hinshaw & Culbertson LLP’s global insurance services practice group.

Telephone Consumer Protection Act claims typically only implicate the right to seclusion, Seaman said.

“All eyes will be on the California Supreme Court decision. It will be significant for TCPA cases applying California law and may be of interest beyond California and TCPA cases,” he said via email.

Yahoo counsel William T. Um, a partner with Jassy Vick Carolan LLP, declined comment on the case. Counsel with Horvitz & Levy LLP representing the insurer didn’t respond to emails seeking comment.

Five Class Actions

Yahoo was defending five putative class actions—two in California, two in Illinois, and one in Pennsylvania—alleging injuries that arose during time periods covered by the National Union policies. All five suits accused the company of violating the TCPA by transmitting those unsolicited ad messages to putative class members. The texts didn’t reveal any private information.

The company sued to compel National Union’s coverage, arguing the insurer had a duty to defend the company against the lawsuits. The district court threw out the case, concluding that the policy’s coverage of personal injury arising out of “publication . . . of material that violates a person’s right of privacy” doesn’t apply to Yahoo’s potential TCPA liability.

The district court narrowly and technically interpreted the terms “publication,” “material,” and “right of privacy” rather than giving them the plain and ordinary meaning as a layperson would understand them, Yahoo said in a state supreme court filing. The plain reading of those terms, the importance of which the high court has repeatedly emphasized, “at least potentially encompass TCPA claims,” the company said.

National Union counters the policy covers publication of private information in violation of the right to secrecy, not sending unsolicited texts in violation of the right to seclusion. The right to privacy means the right to secrecy, to which the TCPA doesn’t apply, not the right to seclusion, to which it does, the insurer said.

United Policyholders, in a friend of the court brief supporting Yahoo, contends the right to privacy is a broad term and can’t be restricted solely to the right to secrecy. Nor is the language unique or different from standard terms construed in TCPA cases around the country.

“The Court should uphold coverage, thus vindicating the rights of policyholders to the coverage they pay for and to the language that is clear and supports insurance policies’ dominant purpose of indemnity,” Hunton Andrews Kurth LLP and Reed Smith LLP counsel wrote for United Policyholders.

The case is Yahoo! Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., Cal., No. S253593, oral arguments 9/6/22.

To contact the reporter on this story: Joyce E. Cutler in San Francisco at jcutler@bloomberglaw.com

To contact the editors responsible for this story: Rob Tricchinelli at rtricchinelli@bloomberglaw.com; Andrew Harris at aharris@bloomberglaw.com