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Insurance Coverage for Junk Faxes Is Question for Jury, Appeals Court Says

An insurance company seeking to disclaim coverage for its insured's alleged junk-faxing may have to prove its case before a jury, thanks to a state appeals court ruling that offers guidance on interpretation of advertising-exclusion clauses in general liability policies.

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An insurance company seeking to disclaim coverage for its insured's alleged junk-faxing may have to prove its case before a jury, thanks to a state appeals court ruling that offers guidance on interpretation of advertising-exclusion clauses in general liability policies.

The issue on which coverage depended — whether the policyholder's "primary, essential, chief or principal" business was "advertising, broadcasting, publishing or telecasting" — is for the trier of fact, not a matter for summary judgment, the Appellate Division ruled in *Penn National Insurance Co. v. Group C Communications, Inc.*, A-2813-09.

Penn National, of Harrisburg, Pa., filed suit in Monmouth County in January 2009, seeking a declaration that it had no obligation to indemnify Group C Communications of Tinton Falls in connection with a series of advertising faxes sent by Group C in 2005.

Group C publishes periodicals and conducts conferences relating to commercial real estate. When it was promoting a 2005 trade show to be held in Chicago, the company rented a list of potential attendees from the Chicago Convention and Tourism Bureau. Group C then hired another company to send faxes advertising the show to companies on the list.

One recipient of the fax, G.M. Sign, of Round Lake, Ill., filed a putative class action against Group C in state court in Illinois. The suit claimed the defendant violated the Telephone Consumer Protection Act, 47 U.S.C. 227. That case was removed to federal court in the Northern District of Illinois, where an \$18 million judgment was entered against Group C in January.

In June 2010, Group C's legal counsel in the Illinois case, the Chicago firm of Sanchez, Daniels & Hoffman, received permission to withdraw from the case, citing its client's inability to pay. Group C did not retain other counsel, and when Penn National moved for summary judgment, there was no opposition. Penn National was awarded summary judgment in the Illinois case on Jan. 10 of this year and received a judgment of \$18,966,000, based on \$500 in statutory damages each for 37,932 fax transmissions.

Group C was covered by a business owners' policy and a commercial umbrella policy from Penn National. Both policies had identical clauses covering injuries "caused by an offense committed in the course of advertising your goods, products or services" except where those offenses were committed by a policyholder whose business is "advertising, broadcasting, publishing or television." Penn National argued that the exclusion applied because Group C described its business category as "offices-advertising" on its application for the primary policy.

Superior Court Judge John Tassini agreed and ruled on summary judgment that Group C was not entitled to coverage

because its line of business fell into the excluded categories.

Appellate Division Judges Ronald Graves, Carmen Messano and Alexander Waugh Jr. reversed and remanded for further proceedings, saying they were not persuaded by Group C's attempt to downplay the significance of its declaration on the insurance application.

The panel took note of Group C's "substantial" publishing business, which includes "Business Facilities," founded in 1983 and with a subscriber base of 43,000; and "Today's Facility Manager," founded in 1988 and with a subscriber base of 50,000. But it did have other business ventures, the panel said.

What's more, Tassini did not appear to apply the standard from *Am. Employers' Ins. Co. v. DeLorme Publ'g Co.*, 39 F. Supp. 2d 64 (D. Me. 1999), which says that an advertising exclusion applies to insureds whose primary, essential, chief or principal business is advertising, the panel said.

"Although Penn National has a strong argument in its favor, we believe that the determination as to whether Group C's 'primary, essential, chief or principal' business was 'advertising, broadcasting, publishing or telecasting' in 2005 should be made by the finder of fact, rather than in the context of a motion for summary judgment," the appeals court said.

Tassini also granted the insurance company summary judgment on application of the property damage coverage under the business owners' and umbrella policies. But the appeals court, citing Group C's assertion that it believed the businesses on the list it bought had consented to receipt of faxes, said there was a question of fact as to whether there was an intentional conduct exclusion to that part of the policy. It ordered the court below to consider whether class members' loss of paper and toner occurred as part of "an occurrence" or an intentional act.

The appeals court affirmed Tassini's award of summary judgment to the insurance company on a personal injury claim to the umbrella policy. Group C claimed it was entitled to coverage under the personal injury portion of the umbrella policy, since it did not include the same exclusion for offenses arising from advertising or publishing contained in the primary policy. But the appeals court said Group C ignored the umbrella policy's definition of "personal injury" to include oral or written publication of material that violates a person's right to privacy, arising out of the conduct of the insured's business, except advertising, publishing, broadcasting or telecasting. As a result, Tassini properly determined that no personal injury coverage is available under the umbrella policy, the panel said.

Penn National's lawyer, Robert Brigantic of Maloof, Lebowitz, Connahan & Oleske in Chatham, says the Appellate Division ruling gives Group C "the benefit of the doubt" on whether its primary business is publishing and whether it sent the faxes without the recipients' prior approval.

On remand, Brigantic says, the evidence will be the same as before.

The lawyer for Group C, Michael Canning of Giordano, Halleran & Ciesla in Red Bank, says he is confident he will be able to establish on remand that his client had a good-faith belief that the companies that got the faxes were willing to receive them.

Canning also says he will not have difficulty establishing that Group C's primary business is not publishing, but conducting trade shows.

