



SUPREME COURT OF MISSOURI HOLDS CGL POLICY COVERS STATUTORY DAMAGES CLAIM FOR VIOLATIONS OF TELEPHONE CONSUMER PROTECTION ACT (TCPA)

Columbia Casualty Company v. Hiar Holding, LLC,
411 S.W.3d 258 (Mo.banc 2013)

In *Columbia Casualty*, the Supreme Court of Missouri held that statutory damages for violations of the TCPA were firmly within the “property damage” and “advertising injury” coverage provided by a CGL policy. The Court rejected an argument that TCPA statutory damages are considered fines or penalties precluded from coverage under a CGL policy, abrogating *Olsen v. Siddiqi*, 371 S.W.3d 93 (Mo.App. E.D. 2012).

The insurer, Columbia Casualty Company, refused to defend its insured, Hiar Holding, LLC, in a class action brought against Hiar for alleged violations of the TCPA. The class plaintiffs alleged hotel proprietor Hiar used a marketing services company to send approximately 12,500 unsolicited advertising facsimiles, approximately 10,000 of which were received. The class plaintiffs sought injunctive relief and statutory damages under the TCPA of \$500 per occurrence. Columbia refused to defend, on the basis that the claims were outside the policy coverage provisions or otherwise excluded from coverage. Columbia rejected a settlement offer to Hiar for an amount within its coverage limits (\$1,000,000 per occurrence, or \$2,000,000 aggregate). Hiar defended at its own expense before agreeing to a class-wide settlement of \$5,000,000 (with liability limited to insurance assets).

The class brought a garnishment action against Columbia for the settlement amount, plus post-judgment interest. Columbia sought a declaratory judgment clarifying its duties to defend and indemnify the class’ claims under Hiar’s policy. The class’ garnishment action was stayed pending resolution of the declaratory judgment action. The trial court found Columbia owed Hiar a duty to defend the class action and a duty to indemnify Hiar for the full settlement, including interest, and that Columbia acted unreasonably and in bad faith in failing to do so. Columbia appealed.

The Supreme Court rejected Columbia’s argument that coverage for “property damage” and “advertising injury” does not encompass fines and penalties imposed for TCPA violations. The Court followed the 8th Circuit’s opinion in *Universal Underwriters Insurance Company v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876 (8th Cir. 2005). The 8th Circuit in *Universal Underwriters* found that a TCPA \$500 per occurrence statutory damages award is not a penalty. Rather, it represents a liquidated sum for uncertain and hard to quantify actual damages, including loss of use of equipment, expense of supplies, and inconvenience and annoyance of unsolicited faxed advertisements. The Court overruled the *Olsen v. Siddiqi* case, which held that the \$500 per occurrence statutory damages provision is penal in nature.

The Supreme Court also rejected Columbia’s argument that “property damage” coverage was not invoked because the sending of junk faxes was intentional, rather than accidental, and thus not an “occurrence” as defined by the policy. Columbia also argued that Hiar’s intentional actions were excluded from coverage under the policy’s “expected or intended” injury exclusion. The Supreme Court relied on the trial court’s factual determination that Hiar’s actions reflected negligent conduct, as Hiar did not intend to

violate the TCPA and did not intend injury to the class. The trial court made this finding because Hiar apparently believed that the marketing company it hired had the consent of the fax recipients to receive Hiar's advertising faxes.

The Supreme Court also found coverage existed under the "advertising injury" policy language because the class' TCPA claims included privacy rights violations.

This decision is significant for its abrogation of the *Olsen* case in favor of the *Universal Underwriters* holding and for its clarification of the law in Missouri that statutory damages under the TCPA are not considered fines or penalties that are necessarily incompatible with coverage under a CGL policy. Missouri courts will look to the insurance policy language to determine the scope of coverage, as well as the potential application of exclusions.



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