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Is There a Limit to Insurer Unwillingness to Cover Claims for Unsolicited Marketing Communications? Two Decisions by the Seventh Circuit Suggest the Question in a Unique Way

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Among the many unusual aspects of 2021 is that the same insurance company was before a federal appellate court on two separate but contemporaneous cases – one in which the insurer was asserting a lack of insurance coverage based on TCPA and TCPA-inspired policy exclusions, and the other in which the same insurer was actually a defendant in a lawsuit asserting TCPA and certain other causes of action. The juxtaposition of the two raises the question of whether there are any limits to insurer unwillingness to provide insurance coverage for claims alleging unsolicited marketing communications.

Mesa Laboratories, Inc. v. Federal Insurance Company[1] lays out an all-too-familiar battle. The policyholder, Mesa Laboratories, Inc. (Mesa), was sued in a putative class action asserting claims based on unsolicited marketing communications. The policyholder sought insurance coverage from its commercial general liability insurer, Federal Insurance Company (Federal, part of the Chubb family of insurance companies). The insurance claim was denied, and litigation ensued. The central issue before the court was whether the insurer had drafted exclusions that were sufficiently broad and sufficiently clear to exclude coverage for all of the claims asserted against the policyholder.

The class action complaint in *Mesa Laboratories* asserted claims based on the Telephone Consumer Protection Act (TCPA), the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) and common law.[2] The parties agreed that the insurance policy excluded the statutory claims, but disputed whether the common law claims were excluded. The issue was whether common law claims for conversion, nuisance and trespass to chattels were barred by an exclusion for "damages, loss, cost or expense arising out of any actual or alleged violation of … the [TCPA] … or any similar regulatory or statutory law in any other jurisdiction" (the "Information Laws Exclusion"). At the urging of Federal, the Seventh Circuit concluded that: "…common-law claims of conversion, nuisance, and trespass to chattels arise out of the same conduct as the statutory claims – the sending of unsolicited faxes.... None of [the underlying plaintiffs'] injuries would have occurred but for Mesa's sending unsolicited fax advertisements, so the Information Laws Exclusion applies to all of Mesa's claims."[3]

Viewed on its own, *Mesa Laboratories* provides fodder for vigorous debate between policyholders, insurers, and their respective counsel. After all, the Seventh Circuit's abbreviated analysis virtually ignored the fact that the exclusion at issue, by its terms, applied only to "regulatory or statutory law" and made no mention of common law claims. Yet the court nevertheless found that the exclusion unambiguously barred coverage for common law claims.

But there is an unexpected twist that is potentially far more interesting. At the very same time that Federal was before the Seventh Circuit in *Mesa Laboratories* – arguing that there was no potential insurance coverage for class actions complaining about unsolicited faxes – it was before the same court at the same time *as a defendant in a TCPA case*. *Bilek v. Federal Insurance Company*[4] – decided a few months after *Mesa Laboratories* – found that plausible claims for relief had been pled against Federal for violation of the TCPA and the Illinois Automatic Telephone Dialing Act (IATDA) based on the conduct of remote lead generators. The Seventh Circuit overruled the decision of the

district court, which had reached the opposite conclusion.[5]

The consumer in *Bilek* allegedly received unauthorized "robocalls" from a Federal telemarketing campaign seeking to advertise Federal's health insurance and solicit new customers. The calls allegedly came from lead generators who had been hired by Health Insurance Innovations (HII), a company with whom Federal had contracted to generate business. Bilek sought to hold Federal liable for the lead generators' violations of the TCPA and the IATDA based on theories of agency, and Federal moved to dismiss.

The district court granted Federal's motion, finding that Bilek did not plausibly allege an agency relationship between the lead generators and Federal. The Seventh Circuit reversed, finding instead that Bilek had "state[d] a plausible claim for relief under his actual authority theory of agency liability."[6]

In his complaint, Bilek alleged that the lead generators were agents acting with actual authority because Federal "authorized the lead generators to use its approved scripts, tradename, and proprietary information in making these calls."[7] Bilek further alleged that one of the lead generators provided him with a quote for Federal's health insurance, that the lead generators "were paired with these quotes in real time by [HII]," and that "[HII] then emailed quotes to call recipients and permitted the lead generators to enter information into its system."[8] The Seventh Circuit held that these allegations supported the inference that, in making these calls, the lead generators were Federal agents acting with actual authority such that the complaint could survive a motion to dismiss.

In so holding, the Seventh Circuit rejected as "unsupported" the district court's conclusion that Bilek's allegations were implausible. The district court had held that Bilek's complaint did not meet the Rule 12(b)(6) pleading standard because it lacked "allegations that [Federal] controlled the timing, quantity, and geographic location of the lead generators' robocalls."[9] The Seventh Circuit disagreed, stating that "allegations of minute details of the parties' business relationship are not required to allege a plausible agency claim."[10]

Although the Seventh Circuit ruled that Bilek's complaint was sufficient to survive a motion to dismiss, the court was clear that it "express[ed] no view on whether Bilek will ultimately succeed in proving an agency relationship between the lead generators and [Federal]."[11] The court also indicated that a "barebones contractual relationship," without more, would be insufficient to establish an agency relationship.

To support its argument that Bilek's complaint should be dismissed, Federal pointed to *Warciak v. Subway Restaurants, Inc*.[12] There, the Seventh Circuit affirmed the district court's dismissal of TCPA claims that sought to hold Subway vicariously liable for promotional text messages sent by T-Mobile offering a free Subway sandwich. Rejecting the idea that "a commercial contract between two sophisticated businesses [is] tantamount to an agency relationship," the court held that "allegations of a contract between Subway and T-Mobile—without anything else—failed to allege an agency relationship."[13]

The Seventh Circuit found Bilek's claims to be distinguishable from the claims in *Warciak*. The court explained that *Warciak's* allegations that T-Mobile promoted Subway's products through its own channels "is a common advertising arrangement" and "in no way suggests agency," while Bilek's specific allegations, as outlined above, "support the inference that the lead generators acted as Federal Insurance Company's agents with actual authority."[14]

The past years have seen a parade of "new and improved" TCPA and TCPA-inspired insurance policy exclusions, each purporting to be broader in its exclusionary scope than the last. (Those few insurers that are still willing to provide some level of coverage for TCPA and related claims have done so only with high retentions, smaller limits and at a significant cost to the policyholder.) Before the courts, insurers such as Federal have increasingly advocated for the broadest possible construction of these exclusions – *Mesa Laboratories* being a case in point. Insurance companies such as Federal also

purchase insurance, and their coverage is subject to the same exclusions. And against this backdrop one can only chuckle while imagining the internal conversations that might have occurred at Chubb over whether Federal could seek insurance coverage for the *Bilek* litigation under its own commercial general liability insurance coverage.

Irony aside, the juxtaposition of *Mesa Laboratories* and *Bilek* raises a more fundamental question: Is there a limit to the insurance industry's general unwillingness to cover TCPA liabilities? Federal's alleged liability in *Bilek*, if any, was vicarious. It flowed from a third-party's alleged violations of the TCPA. Federal itself did not make any unsolicited robocalls, send any unsolicited faxes, or otherwise do anything to directly or intentionally violate the TCPA. Its fault, if any, was its purportedly poor choices in selecting, contracting with and/or supervising HII and HII's subcontractors with respect to their marketing of Federal's products. Federal was thus in a very different position than Mesa Laboratories, which (per the district court) acted with intent: "Mesa, like any other sender of junk faxes, expected to harm the recipients by depleting their ink and paper."[15]

There may be fair questions as to whether claims premised on *Bilek*-inspired theories of TCPA liability are barred by the TCPA and TCPA-inspired policy exclusions currently in use in the market. But it is also a fair question whether there is (or ought to be) a logical limit to the ever-increasing expansion of those exclusions. Commercial general liability insurers routinely provide coverage for claims asserted in class actions, including for alleged privacy violations, as well as where the loss results from vicarious liability or from what amounts to a policyholder's alleged negligence. Should the result be any different in the context of the TCPA?

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[1] 994 F.3d 865 (7th Cir. 2021)

[2] *Id.* at 867.

[3] *Id.* at 869.

[4] 8 F.4th 581 (7th Cir. 2021) [hereinafter *Bilek II*].

[5] *Bilek v. Fed. Ins. Co*., No. 19-8389, 2020 WL 3960445 (N.D. Ill. July 13, 2020) [hereinafter *Bilek I*].

[6] *Bilek II*, 8 F.4th at 587. Bilek asserted agency claims based on actual authority, apparent authority, and ratification. However, the Seventh Circuit did not reach Bilek's apparent authority and ratification arguments because the court's finding that Bilek stated a plausible claim based on actual authority gave the court a sufficient basis to overturn the dismissal. *Id.* Accordingly, this article will also focus on actual authority.

[7] *Id*. at 587.

[8] *Id*. at 587–88.

[9] *Id.* at 588.

[10] *Id.*

[11] *Id.* at 584.

[12] 949 F.3d 354 (7th Cir. 2020).

[13] *Bilek II*, 8 F.4th at 588.

[14] *Id.* at 589. Bilek also sought to hold HII liable for the lead generators' statutory violations and asserted the same agency theories to argue that the court could exercise personal jurisdiction over HII. Although the District Court granted HII's motion to dismiss for lack of personal jurisdiction, the Seventh Circuit overturned that decision, finding that the lead generators were HII's agents, such that their

conduct within could be attributed to HII for the purposes of establishing personal jurisdiction. *Id.* at 591.

[15] *Mesa Laboratories, Inc. v. Federal Insurance Company*, 436 F.Supp.3d 1092, 1097 (2020).

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