

One Minute Memo[®]



Illinois Supreme Court Rules That TCPA Damages Are Remedial and Insurable, Not Punitive

Diverging with other states, the Illinois Supreme Court recently ruled that statutory damages of \$500 per violation under the Telephone Consumer Protection Act ("TCPA") are not punitive in nature but remedial and, therefore, are insurable. See *Std. Mut. Ins. Co. v. Lay*, 2013 IL 114617 (Ill. 2013).

Among other telemarketing practices, the TCPA prohibits the sending of junk faxes, i.e., faxes sent without the recipients prior express consent. The TCPA provides individuals with a private right of action and the ability to seek \$500 in damages for each violation (i.e. for each unsolicited fax) or treble damages (\$1500 per violation) where the unsolicited fax was sent willfully or knowingly. 47 U.S.C. § 227(b)(3).

The statute has become a boon for enterprising class action plaintiffs' attorneys who have taken advantage of this lucrative damages provision by filing lawsuits against companies who inadvertently violate this statute while advertising their goods or services. Plaintiffs' attorneys are therefore able to transform one fax or telephone call received by their client into a multi-million dollar lawsuit. Many believe it is abusive. Rulings from these types of cases are also beginning to shape Rule 23 questions as companies confront these claims.

Companies facing such lawsuits are often forced to fight a war on two fronts: (1) against the plaintiff asserting liability in the underlying suit; and (2) for coverage against their insurer. The Illinois Supreme Court's decision in *Lay* alleviates the second of these battles by clearing the way for insureds facing large potential liability under the TCPA to seek insurance coverage under Illinois law.

Factual Background

Locklear Electric, Inc. ("Locklear") sued Ted Lay Real Estate Agency ("Lay"), a small real estate agency, alleging that it had received an unsolicited fax from Lay in violation of the TCPA. Lay's fax was one of approximately 3,500 faxes which Locklear alleged were sent without the recipients' prior express consent. See Slip Op. at 2. Locklear sought approximately \$1.75 million in damages, or \$500 per violation. *Id.*

Lay settled with Locklear by allowing judgment to be entered against Lay for \$1,737,500 plus costs with the caveat that Locklear would seek satisfaction of the judgment only from Lay's insurance proceeds. *Id.* at 3. Locklear agreed not to execute against Lay's non-insurance assets even if a determination was made that Lay's insurance policy did not cover the damages. *Id.*

Lay's insurer, Standard Mutual Insurance Company ("Standard") sought declaratory relief in Illinois state court, seeking a declaration that, among other things, the TCPA damages were punitive in nature and, therefore, uninsurable under Illinois law as a matter of public policy. *Id.* at 3-4. The trial court entered summary judgment in favor of Standard and the Illinois Appellate Court affirmed. *Id.* at 9-10.

The Illinois Appellate Court ruled that the TCPA was a penal statute because actual damages incurred under the TCPA are small, often amounting only to the cost of wasted paper and toner, as well as the nuisance associated with receiving an unsolicited fax or telephone call. *Id.* at 10 (citing *Std. Mut. Ins. Co. v. Lay*, 975 N.E.2d 1099, 1105, 363 Ill. Dec. 790 (Ill. App. Ct. 4th Dist. 2012)). Given the disparity between actual and statutory damages, the Appellate Court ruled that the \$500 per violation damages provision must be understood as "a predetermined amount of damages [that] is clearly not meant to compensate for any actual harm." *Id.* (citing *Lay*, 975 N.E.2d at 1106). Because it found that the statute was penal in nature, the Appellate Court ruled that the \$500 statutory damages were punitive and therefore not insurable in Illinois as a matter of public policy. *Id.*

The Illinois Supreme Court's Opinion

The Illinois Supreme Court granted Lay's petition for leave to appeal and reversed the Appellate Court's decision. Examining the legislative intent behind the TCPA, the Supreme Court ruled that Congress primarily intended that the statutory damages provision compensate individuals who received unwanted faxes and telephonic communications. Slip Op. at 10. "The harms identified by Congress, e.g., loss of paper and ink, annoyance and inconvenience, while small in reference to individual violations of the TCPA are nevertheless compensable and are represented by a liquidated sum of \$500 per violation." *Id.*

Further, the Supreme Court found that the \$500 per violation statutory damages provision was intended by Congress to incentivize private parties to enforce the statute. *Id.* The possible imposition of treble damages under the TCPA did not make the statute penal in nature because it was "intended as a supplemental aid to enforcement rather than as a punitive measure." *Id.*

Accordingly, the Supreme Court held that "[w]hether we view the \$500 statutory award as a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both, the \$500 fixed amount clearly serves more than punitive or deterrent goals." *Id.* at 11 (citation omitted).

Because the TCPA was not penal in nature, the Supreme Court ruled that the settlement for \$500 per violation entered by Lay was not uninsurable as a matter of Illinois law.

In holding that the \$500 statutory damages provided for in the TCPA are not punitive in nature, the Illinois Supreme Court diverged with the opinions of other state courts that have addressed the issue. See, e.g., *Olsen v. Siddiqi*, 371 S.W. 2d 93, 97 (Mo. Ct. App. 2012) (TCPA is penal "when an individual seeks the statutory damages of \$500.00 for each violation); *Kruse v. McKenna*, 178 P.3d 1198, 1201 (Colo. 2008) ("[A] claim under the TCPA for \$500 in liquidated damages per violation is a penalty that cannot be assigned); *Kaplan v. Democrat & Chronicle*, 266 A.2d 848, 849 (N.Y. Sup. Ct., App. Div. 1999) ("We conclude that the [] remedy provided by the statute of up to \$500 in damages for each violation is punitive rather than compensatory.").

Implications

The Illinois Supreme Court's decision in *Lay* clears one major obstacle faced by companies defending TCPA class actions by ruling that statutory damages sought from an insured constitute a loss that may be insurable under Illinois law. However, the ultimate coverage decision still depends on the specific language of the insurance contract at issue. Given the steadily increasing popularity of TCPA class actions, companies are advised to pay close attention to whether TCPA claims will be covered by their policies and to negotiate Illinois choice of law provisions if possible. We will continue to track cases dealing with this issue and post updates on any new developments.

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