



# Insurance Coverage **ALERT**

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## Damages Sought Under the Telephone Consumer Protection Act (TCPA) Are Uninsurable as Punitive Damages Under Illinois Law

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The Illinois Fourth District Appellate Court recently held as a matter of first impression that damages sought for violations of the Telephone Consumer Protection Act (TCPA) are akin to punitive damages and, therefore, are uninsurable under Illinois law. The case involved a small real estate agency that hired a facsimile service to assist in the sale of a particular property. The fax service offered to blast fax the property listing to entities that had consented to receiving such advertisements by facsimile, but the recipients had not provided consent.

Three years later, the real estate agency was named as a defendant to a class action lawsuit filed by one of the fax recipients, who was a class representative. Plaintiffs in the underlying lawsuit sought damages from the agency for alleged willful violations of the TCPA, conversion, and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. They also sought treble damages. The agency tendered its defense to its insurance company, which provided a defense pursuant to a detailed reservation of rights.

In the reservation of rights letter, the insurance company advised the agency's owner that a conflict of interest might exist as to appointed defense counsel because of the penal and treble damages sought by the class. Additionally, its letter noted that the policy excluded coverage for intentional, nonaccidental acts. While the owners were provided the option to hire their own counsel at the insurance company's expense, at that time they elected to sign a written waiver and agreed to counsel appointed by the insurance company.

A few months later, the owner died, and his wife, as representative of his estate, decided to retain independent counsel. However, appointed defense counsel never withdrew. Thereafter, the wife entered into a stipulated settlement wherein plaintiff agreed to execute the judgment only against the insurance policies, and she assigned all of her claims and rights to payment from the insurance company to plaintiff. The district court approved the settlement.

The insurance company filed a declaratory judgment action concurrently with the underlying lawsuit and the parties filed cross-motions for summary judgment. In finding for the insurer, the appellate court addressed two main issues: (1) whether the carrier had fully disclosed the conflict of interest to the agency's owner before appointing defense counsel; and (2) whether the damages sought for violations of the TCPA constituted punitive damages. As to the conflict issue, the court found that the insurance



company had adequately raised and described all of the coverage defenses which could have triggered a conflict of interest in its reservation of rights letter issued to defendants in compliance with Illinois law.

As to whether TCPA statutory damages are uninsurable punitive damages—a matter of first impression—the court first noted that the TCPA provides for injunctive relief, monetary damages and even treble damages for willful violations. A plaintiff may seek actual monetary damages or \$500 for each violation, whichever is greater. Under Illinois law, the purposes of punitive damages are to: (1) act as retribution against a defendant; (2) deter a defendant from committing similar wrongs in the future; and (3) deter others from similar conduct. The court found that allowing an insured to shift payment of TCPA damages to its insurer would frustrate the deterrent purpose behind the TCPA. Additionally, under Illinois law a “penalty” is defined as punishment for the performance of an illegal act or the nonperformance of a required act. Because the statute is a strict liability statute with predetermined damages that are independent of actual damages, the TCPA is, indeed, penal in nature, providing compensation without regard to actual harm. Thus, those damages were akin to punitive damages. As is the case in numerous jurisdictions, punitive damages are not insurable as a matter of public policy in Illinois. The Fourth District affirmed the trial court’s ruling for the insurance company.

#### **Practice Note**

This case supports that a request for monetary damages under the TCPA may be uncovered in Illinois and other jurisdictions where punitive damages are uninsurable. Moreover, to avoid conflicts and equitable estoppel issue, the case cautions an insurer to be sure to address the reservation in writing and to be prepared to address a subsequent conflict of interest and/or right to independent counsel.

[Standard Mutual Ins. Co. v. Lay, 2012 WL 1377599 \(Ill. App. 4th Dist. 2012\)](#)

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