

Not All Damages Are Created Equal: Statutory Damages Are Penalties, Not “Damages” Under CGL Policy

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In *Olsen v. Siddiqui*, 371 S.W.3d 93 (Mo. Ct. App. E.D. 2012) and *Columbia Casualty Co. v. HIAR Holdings, LLC*, -- S.W. 3d --, 2012 WL 5214790 (Mo. Ct. App. E.D. 2012), the Missouri Court of Appeals held that statutory damages awarded under the Telephone Consumer Protection Act (TCPA) do not constitute “damages” covered by a commercial general liability (CGL) policy. The court concluded that the TCPA’s statutory damages, as opposed to the alternative relief for “actual monetary loss,” are penal in nature and therefore not “damages” covered under a CGL policy.

Under the TCPA, a plaintiff can seek injunctive and monetary relief against a person or entity that sends unsolicited faxes to his or her fax machine. The plaintiff must choose, however, whether he or she wants to recover her “actual monetary loss” or “statutory damages” of \$500 per violation. Considering the minute nature of the harm from one unsolicited fax, most plaintiffs opt for the \$500 statutory damages. For instance, in both *Olsen* and *Columbia Casualty*, approximately 10,000 faxes were reportedly sent in violation of the TCPA. A 5,000-sheet carton of paper can cost between \$20 and \$30, and an \$80 printer cartridge can print 2,000 pages. Therefore, it would be unlikely for the actual monetary loss in a case like *Olsen* or *Columbia Casualty* to exceed \$1,000. The statutory damages, on the other hand, increase the value of the cases to approximately \$5 million.

In *Olsen* and *Columbia Casualty*, the plaintiff classes sued entities for sending unsolicited fax advertisements in violation of the TCPA. After defendants’ insurers denied coverage, each case was resolved for approximately \$5 million. In both cases, the parties agreed to recover the amount under defendants’ insurance policies. Plaintiffs then filed garnishment actions against each insurer. Both insurers lost in the trial court and appealed.

In *Olsen*, the Missouri Court of Appeals observed that the TCPA “is both remedial – when an individual seeks recovery for actual monetary loss – and penal – when an individual seeks the statutory damages of \$500 for each violation.” The court concluded that because the statutory damages of \$500 are actually fines or penalties, they do not constitute “damages” covered by an insurance policy, unless otherwise bargained for. The court

distinguished *Universal Underwriters Insurance Company v. Lou Fusz Automotive Network*, 401 F.3d 876 (8th Cir. 2005), on the basis that the definition of “damages” in that case expressly included punitive damages and because Missouri case law has held that “laws which allow individuals to recover statutory damages have been declared to be penal.”

Although the *Olsen* plaintiffs argued that the TCPA was also remedial, the court noted that when “a statute is remedial in one part and penal in another, it should be considered as penal when enforcement of the penalty is sought.” Accordingly, even if the sum recoverable by statute is called “damages,” it will not prevent its being a penalty recoverable by a penal action.

The *Olsen* court also noted that there was no coverage under the “personal and advertising injury” section of the policy as a result of an endorsement which removed such coverage in exchange for a reduction in premium. The *Olsen* court’s holding that statutory damages do not constitute “damages” is therefore limited to insurance for “property damage” under Coverage A of the CGL form.

Relying upon *Olsen*, the *Columbia Casualty* court went a step further in concluding that “penalties” do not constitute “damages” under either the “property damage” or “advertising injury” coverage. The court noted that the *Olsen* court’s distinction between “property damage” damages and “advertising injury” damages was “irrelevant” and essentially meaningless.

The *Columbia Casualty* plaintiffs argued that the settlement amount – equaling only \$400 for each TCPA violation, as opposed to the \$500 statutory maximum – constituted an “arbitrary figure negotiated between the insured and the class” and therefore “does not reflect or comprise TCPA statutory damages.” According to plaintiffs, the settlement amount should properly be viewed as contractual consideration for the settlement and not an award of penalties. The court found that contention “dubious,” but noted that the CGL policy incorporated an exclusion for liability assumed in a contract which precludes coverage for damages assumed by the insured in a contract or agreement, except when the insured would still have the same liability in the absence of the contract or agreement. The court concluded that the insurer had no duty to indemnify the insured for the settlement amount, “unless [the insured] would have faced the same liability for *damages* absent the agreement.” Based on the *Olsen* court’s rationale that TCPA damages are “penalties,” the liability [that the insured] assumed in the settlement agreement was for something other than “damages” it would have had absent the agreement. Therefore, the exception to the exclusion could not apply and the exclusion barred coverage for the insured’s contractual liability under the settlement agreement.

Practice Note

The effect of *Columbia Casualty* and *Olsen* could significantly limit coverage for statutory damages in class action cases, even beyond the TCPA. By construing TCPA statutory damages as penalties, and not compensable damages under a CGL policy, the courts have given insurance companies a method to disclaim coverage for statutory damages awarded in class action lawsuits that does not rely upon exclusions, which are strictly

construed against the insurer. In addition, in many class actions for which plaintiffs' counsel seek statutory damages, the actual harm to each member tends to be *de minimus*, and the aggregate harm is not terribly large. Class action plaintiffs' counsel will need to consider the financial solvency of a potential target defendant, as insurance proceeds under a standard CGL policy will not provide coverage for statutory penalties.

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