

The California Supreme Court (and Court of Appeal) – November 14-18, 2022

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The California Supreme Court issued the following decision last week:

Yahoo, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, No. S253593. Yahoo!’s insurer, National Union, refused to indemnify Yahoo! in a series of putative class actions alleging Yahoo! violated the Telephone Consumer Protection Act (TCPA) by sending unsolicited text messages. Filed in federal court, the district court granted National Union’s motion to dismiss, concluding TCPA lawsuits do not fall within the policy’s coverage provision. Yahoo! appealed to the United States Court of Appeals for the Ninth Circuit, which certified the question of state law to the California Supreme Court. The California Supreme Court granted the Ninth Circuit’s request, but rephrased the question as: “[d]oes a [CGL] insurance policy that provides coverage for ‘personal injury,’ defined as ‘injury ... arising out of ... [o]ral or written publication, in any manner, of material that violates a person’s right of privacy,’ and that has been modified by endorsement with regard to advertising injuries, trigger the insurer’s duty to defend the insured against a claim that the insured violated the TCPA ... by sending unsolicited text message advertisements that did not reveal any private information[?]”

As the insured, Yahoo! bore the initial burden to prove its claim fell within the scope of potential coverage, which would shift the burden to the insurer to show the claim fell within one of the policy’s exclusions. In analyzing whether Yahoo! had met its burden, the Court focused on the text of the insurance policy. Specifically, the relevant language provided liability coverage for injuries “arising out of . . . [o]ral or written publication, in any manner, of material that violates a person’s right of privacy.” The Court noted that this provision can be read two different ways with two different meanings. The first would provide coverage for injuries from an *oral or written publication that violates a person’s right to privacy*, i.e., right-of-seclusion violations. The second would provide coverage only for an oral or written publication of *material that violates a persons’ right of privacy*, which implicates the privacy right of secrecy. Unlike the right of seclusion, the right of secrecy protects the *content* of private, personal information disclosed to a third person. Under the former reading, the *existence* of the communication violates the right of

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seclusion; under the latter reading, the *content* of the communication must be analyzed to determine whether private, personal information is disclosed.

The Court started by applying the standard rules of contract interpretation to determine whether the policy language was ambiguous. After applying the standard rules, the Court concluded the policy remained ambiguous. The Court then relied upon the rule that where the standard rules of contract interpretation fail to resolve an ambiguity, the objectively reasonable expectations of the *insured* control, but concluded that further litigation was required to determine Yahoo!'s objectively reasonable expectations. The Court advised that only if the foregoing procedures do not resolve the ambiguity, would the Court then resort to the rule that ambiguities are to be resolved against the drafter: here, the insurer.

In interpreting the foregoing disputed policy language, the district court had relied on the Rule of the Last Antecedent, under which “qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding them and are not to be construed as extending to or including other words or phrases more remote.” The Court rejected the district court’s reliance on this rule, noting that it is most readily applied where there is a list of several items, and the modifier comes immediately after the last item on the list, but here there is no list of items followed immediately by a modifier; instead, there is the phrase “[o]ral or written publication, in any manner, of material” followed immediately by a modifier.

In conclusion, the Court held a CGL insurance policy that provides coverage for “personal injury,” defined, in part, as “injury . . . arising out of . . . [o]ral or written publication, in any manner, of material that violates a person’s right of privacy,” can cover liability for violations of the right of seclusion if such coverage is consistent with the insured’s objectively reasonable expectations. Such a policy can also trigger the insurer’s duty to defend the insured against a claim that the insured violated the TCPA by sending unsolicited text messages that did not reveal any private or secret information, provided that the alleged TCPA violation amounts to a right-of-seclusion violation under California law. Nonetheless, the fact that such a policy has been modified by an endorsement with regard to advertising injuries may affect such coverage and such duty to defend

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