The Coverage Inkwell

Emerging Coverage Issues in Intellectual Property, Privacy, and Cyber Liability

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MICHIGAN COURT EXPANDS MEANING OF "MATERIAL THAT VIOLATES A PERSON'S RIGHT OF PRIVACY"

The scope of the phrase "written publication of material that violates a person's right of privacy" is frequently litigated. Two important issues implicated in the phrase's meaning are: (1) whether a "person" also includes a corporation, and (2) whether the "right of privacy" offense includes the tort cause of action for right of seclusion.

The first issue seems self-explanatory. One would think that "person" does not mean a corporation. For one, the libel/disparagement offense in the definition for "personal and advertising injury" (Oral or written publication, in any manner, of material that slanders or libels a person **or** organization or disparages a person's **or** organization's goods, products or services) differentiates between the two. Given that this offense appears just above the "right of privacy" offense, it seems self-evident that use of the word "person" only in the right of privacy offense demonstrates the intent to exclude corporations. To hold otherwise would make the "or organization" language in the libel/disparagement offense superfluous, and courts are not supposed to do that. A second consideration is the fact that some jurisdictions do not recognize corporations as having rights of privacy. Simple and straightforward, right?

Issues surrounding the meaning of "privacy" also should be clear. The right of privacy constitutes four separate torts actually: the right of secrecy, false light, misappropriation of name or likeness (sometimes loosely referred to as the right of celebrity), and right of seclusion. The first three torts have a publication requirement in each tort's elements; the right of seclusion, which prohibits unwanted surveillance, spying, and solicitation, does not. (How can surveillance be a publication?)

Because the offense "written publication of material that violates a person's right of privacy" has a publication requirement, whereas the tort of right of seclusion does not, it makes little sense for the offense—which has a publication requirement—to mean a tort that does not have a publication requirement. The phrase "material that violates" also supports this conclusion—it's the content of the material that is the focus of whether a right of privacy (*i.e.*, right of secrecy, false light, or

misappropriation of name or likeness) has been violated. Shoehorning an offense addressing spying or solicitation into this paradigm is counter intuitive. Yet, . . .

Courts have found otherwise. *Auto-Owners Ins. Co. v. Tax Connection Worldwide, LLC*, 2012 WL 6049631 (Mich. Ct. App. Dec. 4, 2012) (*per curiam*) is one of those cases.

In that case, the insured, Tax Connection, was sued for violation of the TCPA for sending an unsolicited facsimile advertisement to the plaintiff, Jackson's Five Star Catering, as well as to a putative class. Auto-Owners issued a general business owners liability policy to Tax Connection providing coverage for "advertising injury," defined in part as injury arising out of "[o]ral or written publication of material that violates a person's right of privacy." *Id.* at *3. The trial court concluded that the policy imposed a duty to defend and to indemnify against the TCPA complaint on the basis that the unsolicited facsimile advertisement sent by defendants constituted a "written publication of material that violates a person's right of privacy." *Id.* On appeal, Auto-Owners did not challenge the trial court's finding that the facsimiles constituted a "publication," but instead argued that the facsimiles were not "material that violates a person's right of privacy." *Id.* at *4. The Michigan Court of Appeals affirmed, dispensing with Auto-Owner's arguments in summary fashion.

First examining the dictionary definition for "material," the Court held that the facsimiles constituted "material" under the Policy:

> The *American Heritage Dictionary of the English Language* (2006) defines "material" as "the substance or substances out of which a thing is or can be made." A faxed paper containing the advertisement clearly consists of a substance out of which something can be made.

Id.

Next, noting that dictionaries defined the word "person" include both "human" and "organization," the Court held that the term "person" in the business owner's liability policy also contemplated both persons and organizations, such as Jackson's Five Star Catering:

> Subsection (b) next requires that the written public announcement "violates a person's right of privacy." *The American Heritage Dictionary of the English Language* (2006) defines "person" as "a human or organization with legal rights and duties." *Black's Law Dictionary* (7th ed.) similarly defines this term both as a "human being" and "an entity (such as a corporation) that is recognized by law as having the rights and duties of a human being." Thus, corporations "come within the generally understood meaning of the word 'person.'"[Citation Omitted].

Id.

In so holding, the Court rejected Auto-Owner's argument that it had no coverage obligations under the policy because the phrase "person or organization" in the libel/disparagement offense of the policy's definition for "advertising injury" demonstrated that the omission of the phrase "or organization" in the right of privacy offense was meant to exclude corporations from the offense. *Id.* The Court gave two reasons for rejecting the argument. First, the Court explained that "Jackson's underlying complaint was brought on behalf of all persons who received defendants' unsolicited advertising facsimile," and thus "the allegations set forth in the complaint certainly could include persons within any meaning ascribed to that term in subsection." *Id.* That's a fair cop.

The second reason is not. Without further analysis, the Court read an ambiguity into the right of privacy offense and held that there was coverage because "where there is any ambiguity in a policy that cannot otherwise be resolved, the ambiguity is to be construed against the insurer." *Id.* How the policy created or contained an ambiguity, the Court did not explain. Nor did the Court bother to elaborate on why its determination that the term "person" means both human and organization does not make the phrase "or organization" superfluous in violation of a fundamental canon of contractual interpretation. *E.g.*, *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 793 (Mich. 2003).

The Court continued with analytical leaps, concluding that the term "privacy" included the tort cause of action for right of seclusion. In so holding, the Court reasoned that if "insurers wished to limit their policy coverage to, for example, only those violations of privacy created by the content of the material itself, they could have drafted their polices to effect that intent." *Id at *5*. Well, it seems that the insurers did just that. *(Supra.)*

What does this case mean? Given the rise of TCPA exclusions, its effect on TCPA litigation should not be far-ranging. However, the Court's holding is important in two aspects. According to the Michigan Court of Appeals, (1) a "person's" right of privacy also includes a corporation's right of privacy, notwithstanding earlier policy language indicating otherwise, and (2) the "right of privacy" includes the tort for right of seclusion despite the fact that the tort has no publication requirement. These determinations can have much broader affect as insurance coverage is litigated under different factual scenarios.

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