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# Illinois Federal Court Holds Intended/Expected Exclusion and Information Exclusion Preclude Coverage for TCPA Lawsuit

BY:

Mesa Laboratories (“Mesa”) sterilizes medical equipment and, in an effort to build their clientele, sent fax advertisements to dozens of dentists. James L. Orrington (“Orrington”), one of the dentists in receipt of the faxed advertisement, brought an action on behalf of a putative class against Mesa. Orrington alleged that the unsolicited faxes were in violation of the Telephone Consumer Protection Act (“TCPA”) and the Illinois Consumer Fraud Act (“ICFA”). Because the faxes also consumed ink and toner, Orrington accused Mesa of common law conversion, nuisance, and trespass to chattels. After incurring \$75,000 in defense costs, Mesa settled the class action lawsuit for \$3.3 million.

Mesa sought coverage for the class action settlement from its insurer, Federal Insurance Company (“Federal”). Federal disclaimed coverage under the following exclusions: (1) the Intended or Expected Exclusion, which precludes coverage for bodily injury or property damage intended by the insured or that would be expected from the standpoint of a reasonable person in the circumstances of the insured; and (2) the Information Exclusion, which bars coverage for damages and expenses arising out of an actual, alleged, or threatened violation of the TCPA or any similar regulatory or statutory law.

With respect to the Intended or Expected Exclusion, the court cited Seventh Circuit precedent that those who send junk faxes are presumed to know exactly how the faxes deplete recipients’ consumables. The court applied this presumption and held that Mesa, by sending unsolicited faxes, expect to harm the recipients by depleting their ink and paper. While the court discussed the more “generous standard” applied by Illinois state courts, that an injury is not expected or intended if an insured believed the fax was welcome, the court refused to apply that standard for the following reasons: the Northern District is bound by Seventh Circuit precedent; and even under the Illinois state court standard, the content of Mesa’s faxes confirmed that the dentists did not invite the faxes.

Turning to the Information Exclusion, the parties did not dispute that the exclusion covered Orrington’s TCPA claims; however, they disputed whether the exclusion barred coverage for the common law claims brought by Orrington. Mesa asserted that the exclusion applies to TCPA claims based on statutes and regulations but not to similar claims based on common law. The court disagreed with Mesa, explained that interpreting the exclusion in this manner would almost nullify the exclusion altogether because most of the time plaintiffs will supplement their TCPA claims with common law claims and, further, applying Mesa’s reading of the exclusion would render the exclusion inoperative in most instances in derogation of controlling case law on contract interpretation. The court concluded that Orrington’s common law claims arose out of Mesa’s alleged TCPA violations.

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The court held that Federal had no duty to defend or indemnify Mesa in connection with the TCPA lawsuit under either exclusion.

*Mesa Labs., Inc. v. Fed. Ins. Co.*, No. 19 C 2340, 2020 WL 433876, at \*4 (N.D. Ill. Jan. 28, 2020)