



## Ninth Circuit Court of Appeals holds Telephone Consumer Protection Act claims excluded from coverage based on invasion of privacy exclusion

**Los Angeles Lakers, Inc. v. Fed. Ins. Co., 2017 U.S. App. LEXIS 16109 (9th Cir. 2017)**

Ninth Circuit Court of Appeals holds Telephone Consumer Protection Act claims excluded from coverage based on invasion of privacy exclusion

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The Ninth Circuit Court of Appeals (“Ninth Circuit”) recently held Federal Insurance Company (“Federal”) had no duty to defend the Los Angeles Lakers against allegations it violated the Telephone Consumer Protection Act (“TCPA”) by sending unsolicited text messages to fans attending games at its arena. Central to the Ninth Circuit’s holding was its determination the legislative purpose of the TCPA is to protect privacy interests. Under California law, it held, individuals have “the right to be let alone.”

Holding Federal properly denied the Lakers’ tender of defense, the Ninth Circuit determined California Courts have given a broad interpretation to “arising from,” “arising out of,” and “based on” clauses in insurance contracts. The policy at issue contained an exclusion which provided, in part, no coverage would be available for a claim based upon, arising from, or in consequence of, an invasion of privacy.

### The Underlying Action

Plaintiff in the Underlying Action attended a basketball game at the Lakers’ home arena – the Staples Center. While at the game, plaintiff observed a message on the scoreboard, inviting attendees to send a text message to a specific number. Plaintiff sent a text, hoping the Lakers would display the message on the scoreboard.

In response, plaintiff received the following text message:

Thnx! Txt as many times as u like. Not all msgs go on screen. Txt ALERTS for Lakers News alerts. Msg&Data Rates May Apply. Txt STOP to quit. Txt INFO for info.

Plaintiff filed a class action against the Lakers, alleging the Lakers sent the response text message using an Automatic Telephone Dialing System (“ATDS”), in violation of the TCPA. He asserted, several times, the Lakers’ message was an invasion of his privacy, and the Lakers had invaded the privacy of other class members. Plaintiff brought two claims for: (1) negligent violation of the TCPA, and (2) knowing and/or willful violation of the TCPA. Plaintiff sought statutory damages and injunctive relief.[1]

### Relevant portions of the Federal Policy

The Lakers tendered its defense to Federal shortly after plaintiff initiated the Underlying Action. The Federal “ForeFront Portfolio” policy (“Policy”) at issue contained a Directors & Officers Liability Coverage Section which required Federal to pay for losses suffered by the Lakers “resulting from any Insured Organization Claim... for Wrongful Acts.”

An “Insured Organization Claim” included a civil proceeding commenced by service of a complaint or similar pleading against the Lakers for a “Wrongful Act.” The Policy defined “Wrongful Acts” as “any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by” the Lakers.

The Policy also contained an exclusion providing in relevant part “no coverage will be available for a claim based upon, arising from, or in consequence of ... invasion of privacy.”

### The Coverage Dispute

Federal denied coverage and declined to defend the Lakers. It concluded plaintiff in the Underlying Action had brought an invasion of privacy suit, which was excluded from coverage based on the aforementioned exclusion. The Lakers filed suit against Federal in the Los

Angeles Superior Court, alleging causes of action for breach of contract and tortious breach of the implied covenant of good faith and fair dealing based on Federal's denial of coverage.

Federal removed the action to federal court, and filed a motion to dismiss on the ground the Lakers failed to state a claim upon which relief could be granted. The district court granted the motion, and dismissed the case without giving the Lakers leave to amend. It held the Lakers could not succeed in the suit under any cognizable legal theory, because TCPA claims are "implicit invasion-of-privacy claims" that fall squarely within the Federal Policy's "broad exclusionary clause."

## **The Decision by the Ninth Circuit Court of Appeals**

### **Judge Smith's Majority Opinion**

Judge Smith, writing for the majority, held that because a TCPA claim is inherently an invasion of privacy claim, Federal correctly concluded the underlying TCPA claims fell under the Policy's exclusionary clause.

The majority recognized how broad the Federal exclusionary clause is, and explained California courts and the Ninth Circuit have consistently given a broad interpretation to the clause "arising from" in an insurance contract. It explained the Federal exclusion broadly excluded from coverage claims with a minimal causal connection or incidental relationship to invasion of privacy. The Ninth Circuit explained California Courts also give the clause "based on" the same broad reading as "arising out of."

In holding the Federal exclusion applied to the Lakers' claim, the Ninth Circuit explained California courts have held tortious invasion of privacy claims include the intrusion upon plaintiff's seclusion or solitude – "the right to be let alone." The Ninth Circuit determined unwanted calls, received at inconvenient times, generally invade an individual's privacy and right to be let alone.

Central to the Ninth Circuit's holding was its determination the legislative purpose of the TCPA is to prevent invasions of privacy. The Ninth Circuit acknowledged there is no section in the TCPA dedicated to describing its purpose. However, the Ninth Circuit found Congress explicitly stated the purpose of the TCPA in two sections which provide, in part, the Federal Communications Commission may prescribe conditions necessary in the interest of the privacy rights the TCPA is intended to protect. The Ninth Circuit presumed from those statements, and the lack of other statements expressing an alternative intent, the purpose of the TCPA is to protect privacy rights and privacy rights alone.

The majority held plaintiff's complaint in the Underlying Action asserted two invasion of privacy claims and nothing else. It explained Federal correctly identified the two TCPA claims as claims for invasion of privacy. It conceded exclusionary clauses are to be construed against the insurer, but opined it was required to reconcile this rule with the principle of giving effect to the intent of the parties in light of a clause that broadly excludes coverage for any claim originating from, incident to, or having any connection with, an invasion of privacy.

Ultimately, it concluded a TCPA claim falls within the category of intrusion related to the "right to be let alone" established under California law as an invasion of privacy.

### **Judge Murphy's concurring opinion**

Judge Murphy's concurring opinion provides the issue of whether the Lakers' claim was subject to the exclusionary clause should have been decided on narrower grounds. Judge Murphy pointed out that plaintiff's complaint in the Underlying Action alleged several times the message he received was an invasion of privacy. Those allegations were sufficient to establish plaintiff's claims arose from an invasion of privacy. Judge Murphy determined the Ninth Circuit need not hold more broadly a TCPA claim is inherently an invasion of privacy claim.

### **Judge Tallman's dissent**

Judge Tallman, dissenting, opined that a TCPA claim is not automatically a privacy claim. Because plaintiff in the Underlying Action expressly disavowed his tortious privacy claims and instead sought recovery under the TCPA, Judge Tallman found his claims were not common law privacy claims; rather, they were statutory TCPA claims. Judge Tallman believed plaintiff's claims did not fall under the Federal exclusion, and Federal had a duty to defend the Lakers.

Judge Tallman opined the majority erred by refusing to define a TCPA claim by its unambiguous statutory elements, and instead redefined and limited a TCPA claim based on the TCPA's underlying purpose. He recognized those elements do not say anything about privacy.[2]

He explained the TCPA also provides redress for economic injury in excess of the fixed statutory awards for negligent and knowing violation of the TCPA. Because the TCPA specifically allows for “actual monetary loss,” he determined it is clear Congress was also concerned about the economic injury caused by ATDS calls in addition to privacy issues.

His dissent further provides Congress included businesses as protected by the TCPA from ATDS calls. He reasoned because most states hold business entities lack privacy interests, it is not surprising Congress cited harms unrelated to invasions of privacy in the TCPA.

As to the claims in the Underlying Action, Judge Tallman believed the proper inquiry is not whether a TCPA claim is automatically based on invasion of privacy, but whether the underlying claims in the particular case are based on invasion of privacy. He concluded because plaintiff’s claims in the Underlying Action were statutory TCPA claims, and not tortious invasion of privacy claims, they should have been covered.

Judge Tallman acknowledged California’s policy of interpreting “wrongful acts” coverage clauses “broadly so as to afford the greatest possible protection,” and the exclusionary clause contained in the Policy should have been interpreted narrowly against Federal. He ultimately held because plaintiff in the Underlying Action sought recovery based on an alleged violation of the TCPA, and did not seek recovery based on invasion of privacy, he would have reversed the district court’s order dismissing the Lakers’ claims.

## **Conclusion**

The Ninth Circuit’s holding provides TCPA lawsuits can be construed as invasion of privacy claims, which could be subject to policy exclusions precluding coverage for claims “based upon” or “arising from” an “invasion of privacy.” The holding provides additional precedent that the terms “based upon” or arising from” will be interpreted broadly, even in the context of insurance policy exclusionary clauses.

[1] While not addressed in the Ninth Circuit’s opinion, plaintiffs and the Lakers reached a settlement in the Underlying Action following plaintiffs’ appeal of the dismissal of their lawsuit.

[2] The elements of a TCPA claim include: 1) defendant called a cellular telephone number; 2) using an automatic telephone dialing system; 3) without the recipient’s prior express consent.