

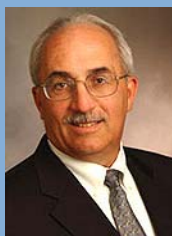


COUGHLIN DUFFY LLP

CASE ALERT, NO. 14

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New Jersey Court Imposes Duty To Defend On Insurer For Telephone Consumer Protection Act Claims. *Myron Corp v. Atlantic Mutual Ins. Co.*



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On January 22, 2007, the New Jersey, Superior Court, Law Division addressed the question of whether a commercial liability insurer had a duty to defend and indemnify its insured for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C.A. 227 ("TCPA"), which creates a private right of action against anyone that uses "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." Myron Corporation v. Atlantic Mutual Insurance Corporation, Docket No. BER-L-5539-06 (Law Div. 2007). The court ruled that the general liability insurer had a duty to defend its insured from suits and claims arising from the insured's transmission of unsolicited facsimile advertisements under both the property damage and personal and advertising injury coverages of the policy.

The complaint filed by Myron Corporation ("Myron") sought a finding as to whether Atlantic Mutual Insurance Company ("Atlantic") owed a duty to defend or indemnify Myron in connection with multiple lawsuits and claims against Myron for its alleged violations of the TCPA. The underlying TCPA suits and

claims allege that Myron forwarded unsolicited facsimiles to the claimants, which impermissibly used their paper and ink toner and caused wear and tear on their facsimile machines.

The court held that the allegations in the underlying TCPA suits triggered Atlantic's duty to defend under the property damage coverage of Coverage A because the alleged loss was caused by an "occurrence". The court reasoned that although Myron intentionally transmitted the facsimiles, the alleged loss arose from an accident or an "occurrence" because Myron subjectively believed that it was, according to the court, "privileged" to send the facsimiles. Turning to the personal and advertising injury coverage of Coverage B, the court stated that the TCPA protects a person's privacy interest in seclusion from receiving unsolicited facsimiles. The court determined that Atlantic's policy language relating to a violation of "a person's right to privacy" encompasses conduct that violates a person's seclusion. Thus, the court held that the allegations arising from the TCPA suits triggered Atlantic's duty to defend Myron under Coverage B.

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The court held that Atlantic must provide a defense to Myron under Coverage A and Coverage B of the Atlantic policy because of the factual dispute regarding Myron's claim that it was "privileged" to send the facsimiles and that it did not intend to injure. However, the court stated that the question of whether Myron is entitled to indemnification remains to be determined after a plenary trial because of the possible applicability of certain policy exclusions.

Please feel free to contact Mr. Wolff or Mr. Moriarty should you have any questions regarding this opinion.