

## 9th Circ. Dubious Of Lakers' Bid To Ax TCPA Coverage Denial

By Jeff Sistrunk

*Law360, Los Angeles (February 15, 2017, 5:50 PM EST)* -- A Ninth Circuit panel on Wednesday appeared skeptical of the Los Angeles Lakers' argument that a fan's putative Telephone Consumer Protection Act class action alleged more than invasion of privacy claims excluded under the team's directors-and-officers policy but indicated that parts of the suit could potentially trigger coverage.

The Lakers organization has asserted in appellate briefs that a California federal court applied an overly narrow reading of the TCPA when it concluded that an invasion-of-privacy exclusion in the NBA team's D&O policy with Federal Insurance Co. barred coverage for its defense and settlement of an underlying suit brought by David Emanuel. In his complaint, Emanuel accused the Lakers of sending unsolicited text messages in violation of the statute.

During a Wednesday morning hearing in Pasadena, California, members of a three-judge appellate panel pointed out the repeated mentions in Emanuel's complaint of alleged privacy rights violations, opining that those references seemed to support the lower court's conclusion.

"It seems like the complaint, very simply put, dealt with [Emanuel's] privacy rights, and it seems like the policy excludes claims based on, arising from, or in consequence of an invasion of privacy," said U.S. District Judge Stephen J. Murphy III, who sat by designation on the panel. "That all supports dismissal of the case. Why do we need to get into the legislative history [of the TCPA] and all these other things when we can simply affirm the district court on the decision she made?"

The Lakers' attorney, Kirk Pasich of Liner LLP, told Murphy he disagreed with that assessment in multiple respects, arguing that the TCPA does not only address invasions of privacy.

"Emanuel also put allegations not related to invasion of privacy in the complaint," Pasich said, citing a passage from Emanuel's suit alleging that the Lakers' purportedly illegal messages caused "plaintiff and the class members to incur certain telephone charges or reduce cellular telephone time for which plaintiff and the class members previously paid."

"The theory of liability is the interference with property use, and that is recognized and discussed in some of the cases we cited, where it is an injury to a right in property," Pasich later explained. "In this case, it is intangible property, but there is no requirement in the policy that it be tangible."

In response to a query from Judge Murphy, Pasich contended that Federal had a duty to defend the

Lakers if any portion of Emanuel's complaint alleged something other than an invasion of privacy. An insurance company cannot escape its duty to defend "even if the predominant aspect of the lawsuit is not covered," Pasich said.

Federal's attorney, Robert M. Traylor of Seltzer Caplan McMahon Vitek, later countered that the lower court reached the correct result in what he characterized as a "straightforward" case.

U.S. Circuit Judge N. Randy Smith asked Traylor whether the allegations in Emanuel's complaint cited by Pasich implicated any claim not based in privacy rights.

Traylor argued that the legislative history of the TCPA makes it "crystal clear" that the statute's primary objective was to provide protection from invasions of privacy. Any economic harm tied to an alleged invasion of privacy is merely "additive" and not a separate claim, he said.

"The property right harm does not stand alone and cannot stand alone under the TCPA, which is the only thing we're addressing here," Traylor replied. "Congress clearly did not set out to protect people's phone minutes. This is why I do think the TCPA's legislative history is important when we look at the statute."

The coverage dispute is rooted in a proposed class action filed in November 2012 by Emanuel, who said he used his phone to put a personal message on the scoreboard during a Lakers game at Staples Center and then began getting texts from an autodialer. Emanuel contended that the unsolicited messages violated the TCPA and cost him and other members of the proposed class in text-message charges.

U.S. District Judge George H. Wu dismissed Emanuel's case with prejudice in April 2013, finding that Emanuel had implicitly consented to receiving a confirmation text from the Lakers when he submitted his original message. The Lakers settled with Emanuel in 2014 after he appealed to the Ninth Circuit.

In September 2014, the Lakers sued Federal, accusing the insurer of refusing in bad faith to defend or indemnify the team in the Emanuel litigation under its D&O policy. Seven months later, U.S. District Judge Dolly Gee granted Federal's motion to dismiss, agreeing with the insurer that the policy's invasion-of-privacy exclusion precluded coverage on the grounds that a TCPA violation allegation is, at heart, a claim for a privacy breach.

The Lakers are represented by Kirk Pasich, Pamela Mary Woods and Anamay M. Carmel of Liner LLP.

Federal is represented by Robert M. Traylor of Seltzer Caplan McMahon Vitek.

The case is Los Angeles Lakers Inc. v. Federal Insurance Co., case number 15-55777, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Sara Ziegler.