

SC93026

IN THE MISSOURI SUPREME COURT

COLUMBIA CASUALTY COMPANY,

Appellant,

v.

HIAR HOLDINGS, L.L.C. and HMA RIVERPORT L.L.C.,

and

KAREN S. LITTLE, LLC, individually and on
behalf of the other members of the certified class, as assignees,

Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri

The Honorable Mark D. Seigel

Circuit Court No. 07SL-CC-00520

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I. JURISDICTIONAL STATEMENT

This is an appeal from a final judgment issued by the Circuit Court of Saint Louis County, Division 3, on November 29, 2011, holding that Columbia Casualty Company (“Columbia”) owes a duty to indemnify its insured, HIAR Holdings, L.L.C. (“HIAR”). This matter arises within the territorial boundary of this Court pursuant to Mo. Rev. Stat. § 477.050. This Court has general appellate jurisdiction under Article V, § 3 of the Missouri Constitution. Columbia seeks a declaration under Mo. Rev. Stat. § 527.010 that it owes no duty to defend or indemnify HIAR, HIAR’s putative assignee, Karen S. Little, L.L.C. (“Little”), or HMA Riverport, L.L.C. (“HMA”) under an insurance policy issued to HIAR, for an underlying action (“TCPA Action”) alleging that HIAR violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). On December 29, 2011, Columbia filed a Motion to Amend and Reconsider the Circuit Court’s November 29, 2011 “Order & Judgment.” On March 16, 2012, the Circuit Court denied the Motion to Amend and Reconsider the November 29, 2011 “Order & Judgment.” Columbia filed its Notice of Appeal within ten days thereof, on March 26, 2012.

On October 23, 2012, the Court of Appeals, Eastern District, Division One, reversed the Circuit Court’s November 29, 2011 “Order & Judgment” and remanded the case for entry of summary judgment in favor of Columbia. On November 7, 2012, Little filed motions for rehearing before the Missouri Court of Appeals, Eastern District, or for transfer to the Missouri Supreme Court. On November 29, 2012, the Missouri Court of Appeals denied both motions. On December 14, 2012, Little filed an application for

transfer to the Missouri Supreme Court. On February 26, 2013, this Court ordered transfer.

II. STATEMENT OF FACTS

A. THE TCPA ACTION

On September 26, 2002, Onsite Computer Consulting Services, Inc. (“Onsite”), as putative class representative, filed a lawsuit styled Onsite Computer Consulting Services, Inc. v. HIAR Holdings, L.L.C., No. 02-CC-003767, in the Circuit Court of St. Louis County, Missouri (“TCPA Action”). (LF48-54.) HIAR, Lara Albrecht (“Albrecht”), and Sunbelt Communications and Marketing, L.L.C. (“Sunbelt”) were named as defendants in the TCPA Action. The initial “Class Action Petition” alleged that HIAR, Albrecht, and Sunbelt violated the TCPA by sending junk faxes. (Id.) On August 24, 2004, Onsite filed an “Amended Class Action Petition,” adding HMA as a defendant. (LF43-47.) On October 12, 2004, Karen S. Little, Esq. (individually) substituted for Onsite as proposed class representative under a “Second Amended Class Action Petition.” (LF36-42.) Onsite later withdrew from the TCPA Action and dismissed its claims against all defendants. (LF384.) Karen S. Little L.L.C. eventually substituted for Karen S. Little, Esq. (individually) as proposed class representative. (LF384.)

According to the petition, on October 17, 2001, Sunbelt faxed advertisements on behalf of HIAR and HMA. (LF37 ¶¶ 11-12.) The petition further alleged that Sunbelt, HIAR, and HMA violated the TCPA. (LF39-40 ¶¶ 25-28.) Count I of the petition included the following class definition: “All persons and other entities within the (314)

and (636) area codes to whom were sent one or more facsimile transmissions by Sunbelt Communications and Marketing, advertising the Holiday Inn at Riverport from January 1, 2000 to date, as reflected in the records of Sunbelt Communications and Marketing, LLC.” (LF39 ¶ 24.)

B. THE COLUMBIA POLICY

Columbia issued a commercial general liability policy to “Holiday Inn Airport,” policy number 195943024, in effect from June 1, 2001 through June 1, 2002 (“Policy”). (LF133-191.) HIAR, but not HMA, is an additional named insured on the Policy. (LF151.) The Policy has limits of \$1,000,000 per “occurrence” and \$2,000,000 in the aggregate. (LF155.)

The “Insuring Agreement” for Coverage A states, “We will pay those sums that the insured becomes legally obligated to pay as damages because of...‘property damage’ to which this insurance applies....” Coverage A “applies to...‘property damage’ only if:...[t]he...‘property damage’ is caused by an ‘occurrence’” (LF156.)

Coverage A contains the following definitions:

12. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

- 14 a. “Products-completed operations hazard” includes all... “property damage” occurring away from premises you

own or rent and arising out of “your product” or “your work”....

15. “Property damage” means:
- a. Physical injury to tangible property, including all resulting loss of use of that property...; or
 - b. Loss of use of tangible property that is not physically injured....

(LF165-66.)

Coverage A contains exclusion (a), which precludes coverage for “property damage” “expected or intended from the standpoint of the insured,” and exclusion (b), which precludes coverage for “property damage” “for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.”

(LF156.)

The “Insuring Agreement” for Coverage B states, “We will pay those sums that the insured becomes legally obligated to pay as damages because of...‘advertising injury’ to which this insurance applies....” Coverage B “applies to...‘Advertising Injury’ caused by an offense committed in the course of advertising your goods, products or services....”

(LF158-59.)

The term “Advertising injury” means an “injury arising out of one or more of the following offenses:”

- a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- b. Oral or written publication of material that violates a person's right of privacy;
- c. Misappropriation of advertising ideas or style of doing business;
- d. Infringement of copyright, title or slogan.

(LF163.)

Coverage B excludes coverage for "advertising injury":

- (3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.
- (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the Insured would have in the absence of the contract or agreement.

(LF159.)

Section III, "Limits of Insurance," states:

- 1. The limits of Insurance shown in the Declarations and the rules below fix the most we will pay....

2. The General Aggregate Limit is the most we will pay for the sum of:

- b. Damages under Coverage A, except damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard”; and
- c. Damages under Coverage B.

3. The Products Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of...“property damage” included in the “products-completed operations hazard”.

4. Subject to 2, above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of...all “advertising injury” sustained by any one person or organization.

5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

- a. Damages under Coverage A[[]]....

(LF161.)

The Policy requires HIAR to, inter alia: (1) “notify [Columbia] as soon as practicable;” (2) “[i]mmediately send [Columbia] copies of any demands, notices, summonses or legal papers;” and (3) “[c]ooperate with [Columbia] in the...defense against the ‘suit.’” The Policy prohibits HIAR from entering into settlements, except at its own cost, and from joining Columbia as a party to an underlying lawsuit. (LF162.)

C. HIAR’S TENDER OF THE TCPA ACTION

On November 22, 2002, HIAR notified Columbia of the TCPA Action. (LF218.) HMA never tendered the TCPA Action to Columbia. (LF55.) On December 2, 2002, Columbia disclaimed any duty to defend or indemnify HIAR for the TCPA Action, but invited HIAR to provide additional facts to support its request for coverage for the TCPA Action. (LF58-63.)

On October 2, 2003 and October 22, 2003, HIAR again tendered the TCPA Action to Columbia. (LF64-68.) HIAR did not provide any additional facts for Columbia’s consideration. (Id.) On November 13, 2003, Columbia reiterated its disclaimer and again invited HIAR to provide additional facts to support its request for coverage. (LF70-82.) Columbia stated, “[S]hould there be any further revision in the wording of the Onsite Complaint, please forward to [Columbia] a copy of such revised complaint for further consideration.” (LF82.)

On March 3, 2005, counsel for Little demanded of HIAR the “[Columbia] policy limits of \$2 million, to settle this case.” (LF84.) The letter mentions “6456 successful transmission logs recovered from the Sunbelt Hard drive.” (Id.) On March 4, 2005, HIAR forwarded the March 3, 2005 demand to Columbia. (LF85.) On March 8, 2005, Columbia

reiterated its position that there was no coverage for the TCPA Action, including an analysis of case law supporting its disclaimer, but nevertheless requested information from HIAR to evaluate the demand. (LF87-95.) Columbia requested that HIAR disclose any settlement discussions and stated that it would “give due consideration to any serious demand for participation in a settlement...” (LF88.) Columbia again requested that “should there be any further revision in the wording of the Onsite Complaint, please forward to Columbia a copy of such revised complaint for further consideration.” (LF88.) Columbia received no further communications from HIAR.

D. SETTLEMENT OF THE TCPA ACTION

On January 26, 2007, HIAR and HMA executed a settlement agreement (“Settlement”) with Little. (LF97-110.) Under the Settlement, HIAR, HMA, and Little stipulated to the following terms:

- The settlement class (“Class”) includes: “All persons to whom Sunbelt, on behalf of Defendants, sent unsolicited advertising faxes during the period October 1, 2001 through October 31, 2001 without prior express permission or invitation.” (LF103 ¶ 11.)
- The Class includes “approximately 12,500 persons” to whom Sunbelt sent unsolicited fax advertisements. (LF97-98.)
- HIAR and HMA concede liability for damages of \$5,000,000 and the entry of a judgment against them for that amount (“Consent Judgment”). (LF103 ¶¶ 5, 12.)

- Little and the Class may not enforce the Consent Judgment against HIAR or HMA; rather, Little and the Class may enforce the Consent Judgment solely from the proceeds of HIAR and HMA's insurance policies. (LF101 ¶ 7.)
- HIAR assigns all rights under the Policy arising out of the duty to indemnify to Little and the Class. (LF100 ¶ 6.)
- HIAR and HMA retain all rights under the Policy arising out of the duty to defend. (Id.)

On January 30, 2007, the Circuit Court issued an order certifying the Class, preliminarily approving the Settlement, and approving the class notice ("Preliminary Order"). (LF2111-14.) The January 30, 2007 Order required notice of the Settlement to all class members and that all Claims Forms be "returned on or before July 23, 2007, or be barred." (LF2114.)

Only 488 claim forms were returned seeking payment under the Settlement. (LF1589 at 11:20 to 12:6; LF1607 at 83:23 to 84:5.) Schnucks Markets, Inc. ("Schnucks") submitted 143 of the 488 claims forms. (LF 2268-70.) Schnucks submitted a claim form listing 155 telephone numbers, including telephone numbers that fell outside the certified Class definition and duplicate numbers. (Id.) Of the 155 Schnucks "Store" and "Corporate" fax numbers, only 107 were unique 314 or 636 area code numbers. (Id.)

On April 12, 2007, the Circuit Court entered "Final Judgment Approving Settlement and Class Certification" ("Final Judgment"). (LF112-128; LF2117-32.) The

Final Judgment stated, “The Parties estimate the Class size is at least 10,000 individuals and business[es].” (LF104 ¶ 3.A.)

The Final Judgment stated, in pertinent part:

The \$5,000,000.00 judgment will comprise the class recovery....[E]ach Class member, including Plaintiff, who submits a valid claim form and does not exclude itself, will receive a pro rata share (not to exceed \$500.00 per valid claim) of the class recovery.... Any unclaimed remainder will be distributed via cy pres to charitable organizations.

(LF118; LF125 ¶ I.) Upon payment of the \$244,000 due to members of the Class, presumably, the remainder (i.e., \$4,756,000), less attorneys’ fees (estimated to be at least \$1,500,000), would be distributed as a cy pres award.

E. THE GARNISHMENT ACTION

On July 2, 2007, Little and the Class filed a garnishment proceeding under case number G-135885 against Columbia seeking \$5,087,554.24 (“Garnishment Action”). (LF130-31.) Columbia learned of the Settlement by way of the Garnishment Action. The Garnishment Action is stayed pending the resolution of this action.

F. TENDER OF THE TCPA ACTION TO ZURICH

American Guarantee & Liability Insurance Company (“AGLIC” or “Zurich”) issued an excess policy to HIAR, in effect from June 1, 2001 to June 1, 2002 (“Zurich Policy”). (LF1367-73.) Upon information and belief, during July 2007, Columbia notified Zurich of the TCPA Action. Upon information and belief, on or about July 29,

2008, Zurich issued a coverage position letter to HIAR, wherein it disclaimed coverage to HIAR for the TCPA Action. (Id.) Upon information and belief, the basis for Zurich’s July 29, 2008 disclaimer letter was late notice of an “occurrence” and/or late notice of a claim or “suit.” (Id.)

G. THE COVERAGE ACTION

On October 25, 2007, Columbia filed a “Declaratory Judgment Petition” against HIAR, HMA, and Little styled Columbia Casualty Company v. HIAR Holdings, L.L.C., No. 07SL-CC00520, in the Circuit Court of Saint Louis County, seeking a declaration of the rights and obligations of the parties under the Policy (“Coverage Action”). (LF19-191.) On July 18, 2008, Little served an answer, affirmative defenses, and counterclaim in the Coverage Action. (LF538-47.) Little’s counterclaim incorporated the same claim that was asserted in the Garnishment Action—i.e., that Columbia owed a duty to indemnify HIAR (and Little, as assignee) that had been assigned under the Settlement. (LF545-46.) On August 25, 2008, HIAR and HMA filed answers in the Coverage Action. (LF551-58; LF559-66.)

On September 10, 2009, Little filed a Motion for Partial Summary Judgment concerning the alleged duty to defend under the Policy. (LF588-97.) While the Motion for Partial Summary Judgment on the duty to defend was pending, on March 17, 2010, HIAR was granted leave to file counterclaims against Columbia. (LF923-26.) Due to the dismissal of certain counterclaims, as of August 6, 2010, the only live counterclaims asserted against Columbia by HIAR were for (1) breach of contract concerning the duty to defend, and (2) bad faith. (LF927-31; LF932-45; LF946-50; LF951.) Columbia filed

an answer and affirmative defenses to HIAR's counterclaim on August 6, 2010. (LF952-65.)

On October 19, 2010, the Circuit Court issued an "Order & Judgment" holding that Columbia owed HIAR a duty to defend against the TCPA Action on the grounds that the TCPA Action alleged: (1) "property damage" because there were allegations of lost ink toner, paper, and loss of use of recipients' fax machines; (2) an "occurrence" because the petition alleged negligence and "[t]he injury that the TCPA protects against is not injury from receiving faxes, but injury from receiving a specific type of printed material—an advertisement sent without permission; and (3) "advertising injury" because (a) the TCPA protects the privacy interest in seclusion, and (b) the Policy's offense of "oral or written publication of material that violates a person's right to privacy" is not limited to content-based offenses but rather includes privacy rights to seclusion. In addition, the Circuit Court found that although Little is an incorporeal entity, the faxes violated its right to seclusion and that the "first publication" exclusion of the Policy does not apply. (LF1051-78.)

On May 6, 2004 and February 20, 2011, HIAR was deposed. (LF1853-1920; LF1939-63.) HIAR testified that it intended for recipients to receive and print the faxed advertisements. (LF1945 at 28:24-25; LF1946 at 29:1-5; LF1946 at 29:15-24; LF1946 at 19:8-16.)

On April 15, 2005, Karen S. Little, Esq. and, on December 22, 2010, Little, were deposed. (LF2162-2202; LF2217-62.) Little testified that it had no knowledge of receiving a fax from HIAR. (LF2183 at 22:13-25; LF2184 at 23:1-23; LF2223 at 22:3-

25, 23:1-25, 24:1-25; LF2224 at 25:1-19.) Little testified that it did not reside within the geographical areas defined by the certified settlement Class, and its number does not appear on the list of numbers to which Sunbelt purportedly sent faxes. (LF2235 at 69:20-25, 70:1.)

On January 14, 2011, Little filed a Motion for Summary Judgment on Columbia's alleged duty to indemnify. Columbia opposed the motion. (LF1081-89.)

On February 8, 2011, Columbia filed a Motion to Amend and Reconsider the October 19, 2010 "Order and Judgment" on the duty to defend to correct numerous factual and legal errors in the Order. (LF1250-1469.) This motion was granted. On May 18, 2011, the Circuit Court issued an "Amended Order and Judgment" that corrected factual inaccuracies in the October 19, 2010 "Order and Judgment," but did not correct legal errors made by the Circuit Court in finding a duty to defend. (LF1539-61.)

On July 28, 2011, HIAR and HMA—which assigned Little the claim that Columbia allegedly owed HIAR a duty to indemnify—filed a request to join in Little's Motion for Summary Judgment. (LF2334-5.) Columbia opposed HIAR and HMA's joinder. (LF3281-92.)

On August 22, 2011, Columbia filed a Motion for Summary Judgment concerning the duty to indemnify. (LF2470-76.) On that date, Columbia also filed a Motion for Leave to File a "First Amended Declaratory Judgment Petition" for the purpose of adding Columbia's excess insurer, Zurich, as a defendant to obtain a declaration of the rights and obligations under Zurich Policy concerning the TCPA Action. (LF3146-66.)

On September 1, 2011, the Circuit Court set a hearing for Little's Motion for Summary Judgment for October 14, 2011. (LF3293.) The Circuit Court denied Columbia's request for a hearing on its own Motion for Summary Judgment. (Id.) On September 26, 2011, Columbia filed a Motion to Clarify the September 1, 2011 Order, requesting that the Circuit Court hear Columbia's own Motion for Summary Judgment on the October 14, 2011 hearing date. (LF3294-99.) On October 5, 2011, the Circuit Court denied Columbia's request to hear its Motion for Summary Judgment on the same date as Little's Motion for Summary Judgment. The Court also denied Columbia's Motion for Leave to File a "First Amended Declaratory Judgment Complaint" to add Zurich as a party to the coverage action without explanation. (LF3318.)

On October 13, 2011, Columbia entered into a settlement and stipulation of dismissal with prejudice as to HIAR and HMA. (LF3327-29.) The stipulation expressly released all claims brought by, and that could have been brought by, HIAR and HMA against Columbia arising out of the duty to defend, including HIAR's counterclaims for breach of contract and bad faith. Id. On October 14, 2011, the Circuit Court issued an order dismissing HIAR and HMA from the Coverage Action. (LF3331-33.) On that same date, the Circuit Court heard oral argument on Little's Motion for Summary Judgment but refused to hear Columbia's Motion for Summary Judgment. (LF3330.)

On November 29, 2011, the Circuit Court issued an "Order & Judgment" granting Little's Motion for Summary Judgment, finding that Columbia had a duty to indemnify

HIAR.¹ (LF3451-75.) Specifically, the Circuit Court ruled that: (1) the TCPA is not a “penal” statute or ordinance; (2) HIAR’s actions were not willful because it did not know about the TCPA; (3) an exclusion for “advertising injury” “arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured” did not apply; (4) “the fact that only some class members took the affirmative step of submitting claim forms when they had their first opportunity to do so in the Underlying Action is irrelevant to the amount of liability or damages;” (5) HIAR did not assume more liability than it was potentially liable for; (5) although it was not a party to the TCPA Action, “Columbia is collaterally estopped” from litigating whether the Class actually received any faxes and whether HIAR intended to injure the Class; (6) the damages at issue in the Consent Judgment fall within the Policy’s “products-completed operations hazard” because the advertisements are “representations regarding goods or products;” and (7) “the policy limits do not matter” because Columbia breached its alleged duty to defend and duty to settle within policy limits. (LF3451-75.)

The November 29, 2011 “Order & Judgment” also determined—without a jury trial—that the Settlement was reasonable and negotiated in good faith,² and that Columbia acted unreasonably and in bad faith in handling HIAR’s claim for coverage for

¹ The November 29, 2011 Order is nearly identical to a “Proposed Order” drafted and submitted by counsel for Little. (LF3374-99.)

² Columbia’s expert opined that a reasonable settlement amount could have been in the range of \$100-250 per violation. (LF 3041-49.)

the TCPA Action. (Id.) Without a hearing on damages, the Circuit Court then awarded Little \$5,000,000 in damages, plus pre- and post-judgment interest. (Id.)

On December 29, 2011, Columbia filed a Motion to Amend and Reconsider the November 29, 2011 “Order & Judgment.” (LF3476-3520.) Columbia argued that: (1) Columbia had no duty to indemnify HIAR under the terms of the Policy; (2) Columbia was not liable for extra-contractual damages because they were not awarded by a trial on the merits, as is required by this Court; (3) Columbia was not liable for extra-contractual damages pursuant to Little’s counterclaim, which did not even assert a claim seeking extra-contractual liability; and (4) any indemnity obligation would be limited to the Policy’s \$2,000,000 aggregate maximum. The Circuit Court denied Columbia’s Motion to Amend and Reconsider. (LF3545.) As a result, on March 26, 2012, Columbia filed this appeal. (LF3546-3623.)

On October 23, 2012, the Court of Appeals, Eastern District, Division One, reversed the Circuit Court’s November 29, 2011 “Order & Judgment” and remanded the case for entry of summary judgment in favor of Columbia. (“Little”, Appendix at A-1.) In its Order, the Court of Appeals found that statutory relief under the TCPA is penal in nature and, as such, does not constitute “damages” covered by the following policy language: “We [i.e., the insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of [‘property damage’ or ‘advertising injury’] to which this insurance applies.” [Emphasis added.] The Court of Appeals correctly applied Missouri precedent in finding that, as a matter of Missouri law, the term “damages” does not include fines and penalties, such as TCPA penalties. The Court of

Appeals also correctly found that the \$500 per fax amount is not compensatory given that junk faxes cost pennies to receive.

III. POINTS RELIED ON

A. The Circuit Court erred in granting summary judgment in favor of Little by ruling that broadcasting junk faxes triggers “property damage” coverage because “property damage” coverage only applies to compensatory damages for injuries unintended by an insured in that (a) liquidated statutory relief under the TCPA is a penalty and not “damages” covered by the Policy; (b) there was no “occurrence” that would invoke “property damage” coverage; and (c) any injury to the Class was intended by HIAR and was thus excluded from “property damage” coverage.

- Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997).
- Olsen v. Siddiqi, 371 S.W.3d 93 (Mo. Ct. App. 2012).
- Schulte v. Florian, 370 S.W.2d 623 (Mo. Ct. App. 1963).
- D.R. Sherry Constr., Ltd v. Am. Family Ins. Co., 316 S.W.3d 899 (Mo. 2010).

B. The Circuit Court erred in granting summary judgment in favor of Little by ruling that broadcasting junk faxes triggers “advertising injury” coverage because “advertising injury” coverage only applies to compensatory damages and does not protect against damages to incorporeal organizations’ privacy interests in seclusion in that (a) liquidated statutory relief under the TCPA is a penalty and not “damages;” (b) the offense of sending “oral or written publication of material that violates a person’s right of privacy” only involves claims where the content of an advertisement violates an individual’s privacy right; (c) the TCPA is an economic regulation and not a privacy-protecting

regulation; (d) the Class representative is not a “person” whose right to privacy has been violated; and (e) the penal statute exclusion bars coverage.

- Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997).
- Olsen v. Siddiqi, 371 S.W.3d 93 (Mo. Ct. App. 2012).
- Todd v. Mo. U. Sch. Ins. Council, 223 S.W.3d 156 (Mo. 2007).
- Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. 2010).

C. The Circuit Court erred in granting summary judgment in favor of Little by ruling that the “contractual liability” exclusions do not apply because HIAR assumed more liability in the Settlement than it was legally obligated to in that only 488 of the supposed 10,000 Class members made claims under the Settlement.

D. The Circuit Court erred in refusing to consider Columbia’s argument that the Settlement is uninsurable because insuring the Settlement would be akin to insuring punitive damages in that liquidated relief under the TCPA is a penalty that serves a similar purpose as punitive damages.

- Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997).
- Standard Mut. Ins. Co. v. Lay, 975 N.E.2d 1099, reh’g denied (June 11, 2012), appeal allowed, 979 N.E.2d 889 (Ill. 2012).

E. The Circuit Court erred in refusing to consider Columbia’s arguments that HIAR’s breaches of the duties to cooperate and to provide notice vitiate coverage in that the breaches serve as additional bases for denying coverage to HIAR.

- Rocha v. Metro. Prop. & Cas. Ins. Co., 14 S.W.3d 242 (Mo. Ct. App. 2000).

F. The Circuit Court erred in binding Columbia to the Settlement because this Court’s precedent permits insurers to challenge the reasonableness and binding effect of settlements entered into by insureds in the absence of trials in that the Settlement—rather than a trial—set liability and damages in the TCPA Action.

- All Am. Painting, LLC v. Fin. Solutions & Assoc. Inc., 315 S.W.3d 719 (Mo. 2010).
- Gulf Ins. Co. v. Noble Broad., 936 S. W.2d 810 (Mo. 1997).
- Schmitz v. Great Am. Assurance Co., 337 S.W.3d 700 (Mo. 2011), reh’g denied, (May 31, 2011).

G. The Circuit Court erred in holding that the Policy’s limits “do not matter” because it awarded extra-contractual damages on a non-existent claim in that (a) Little never requested extra-contractual damages in its counterclaim; (b) HIAR released its counterclaims for extra-contractual damages; and (c) Columbia’s indemnity obligation is limited to \$2,000,000 in the absence of a successful claim for extra-contractual damages.

- Schmitz v. Great Am. Assurance Co., 337 S.W.3d 700 (Mo. 2011), reh'g denied, (May 31, 2011).

H. The Circuit Court erred in denying Columbia's Motion for Leave to Amend because leave should be granted freely in that HIAR's amendment would have added HIAR's excess insurer as a party, thereby preventing the award of extra-contractual damages against Columbia and providing enough insurance to potentially cover the entire Settlement amount.

- Mo. Sup. Ct. R. 52.06.
- Mo. Sup. Ct. R. 55.33.
- Hoover v. Brundage-Bone Concrete Pumping, Inc., 193 S.W.3d 867 (Mo. Ct. App. 2006).

I. The Circuit Court erred in refusing to consider Columbia's argument that insuring TCPA relief would frustrate public policy because the central purpose of the TCPA is to deter junk fax broadcasts in that insuring the Settlement would provide an incentive for, rather than deter, junk fax broadcasts and would not satisfy the fortuity test that exists in all insurance claims.

- Easley v. Am. Family Mut. Ins. Co., 847 S.W.2d 811 (Mo. Ct. App. 1992).

IV. SUMMARY OF THE ARGUMENT

This action arises out of the Settlement of the TCPA Action. Little, as putative representative of the Class of 10,000 individuals and businesses, commenced the TCPA Action against HIAR and HMA for “junk faxes” allegedly broadcasted by their agent on October 17, 2001.

Columbia disclaimed any duty to defend or indemnify HIAR for the TCPA Action. Although HIAR initially defended itself, on January 26, 2007, HIAR and Little signed a Settlement wherein HIAR admitted liability for damages of \$5,000,000, assigned any indemnity rights under its insurance policies to the Class, and consented to a judgment against it that would be enforceable only against HIAR’s insurance assets.

The Court of Appeals correctly found that Columbia has no duty to indemnify HIAR (or Little) for the Settlement. In so holding, the Court of Appeals properly followed this Court’s precedent in holding that the policy language, “[The insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of [‘property damage’ or ‘advertising injury’] to which this insurance applies,” only applies to compensatory damages—not to fines and penalties. The Court of Appeals was also correct in finding that the Settlement was based upon a statutory penalty—i.e., \$500 per violation of the TCPA—rather than compensatory damages. Indeed, the statutory amount eclipses any actual damages suffered by the Class members (estimated to be pennies per class member) and, therefore, serves a deterrent, penal function. Thus, the Settlement does not fall within the insuring agreement of the Policy.

In addition to the well founded conclusions by the Court of Appeals, numerous other grounds exist that support a finding of no coverage. First, there was no “occurrence,” as required by the Policy, given that HIAR intended to cause the exact injuries alleged in the TCPA Action. HIAR conceded this point in its deposition.

Next, no “advertising injury” coverage exists for the TCPA Action. The content of the alleged advertisements did not violate a person’s privacy rights. In fact, incorporeal organizations (like Little) do not have privacy rights. Finally, the Policy expressly excludes coverage for willful violations of penal statutes like the TCPA. Therefore, there is no “advertising injury” coverage in any event.

Although there is no coverage for the Settlement, the Court of Appeals correctly recognized the Circuit Court’s error that “the policy limits do not matter.” Specifically, Columbia cannot be held liable for the entire \$5,000,000 Settlement given that the Policy exhausts—is fully paid out—when \$2,000,000 is paid. Indeed, Little never filed a counterclaim seeking extra-contractual damages, and HIAR released any such claim in a separate settlement with Columbia. Therefore, the Circuit Court committed clear error in finding Columbia liable in excess of its Policy limit of \$2,000,000 apparently based upon a non-existent extra-contractual damages claim.

At bottom, Little and HIAR’s unusual deal smacks of unreasonableness. HIAR and Little stipulated to the full \$500 penalty in the Settlement because HIAR never would be called upon to pay even a single dollar of that amount. There was no determination of liability or damages at a trial. To the contrary, HIAR’s liability and damages were established by agreement of the parties. The Circuit Court should not have denied

Columbia the opportunity to argue the reasonableness and binding effect of the Settlement at trial.

More fundamentally, the loss alleged by the Class lacks fortuity—a requirement for every insurance claim. HIAR intended for Class members to receive junk faxes. As a result, HIAR cannot seek insurance for the intended result of this conduct. Providing insurance for non-fortuitous losses, like this loss, frustrates public policy. Separately, it undermines the deterrent aspects of the TCPA.

Based upon the foregoing, the Court of Appeals correctly reversed the Circuit Court's Order dated November 29, 2011. This result is warranted here and Columbia is entitled to judgment as a matter of law in its favor, finding that the Settlement is not covered by the Policy.

V. ARGUMENT

THE STANDARD OF REVIEW

The review of an order granting summary judgment is “essentially de novo.” ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993). “The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.” Id. Summary judgment should not be granted, or affirmed, if the movant is not entitled to judgment as a matter of law or if genuine issues of material fact exist. Id.; see also Mo. Sup. Ct. R. 74.04(c).

All contracts, including insurance policies, are interpreted using the same rules of construction. Blair by Snider v. Perry Cty. Mut. Ins. Co., 118 S.W.3d 605, 606 (Mo. 2003). Unambiguous provisions of an insurance policy must be enforced as written. Peters v. Employers Mut. Cas. Co., 853 S.W.2d 300, 302 (Mo. 1993). The insured bears the burden of showing that a claim falls within the policy’s “insuring agreement.” Am. States Ins. Co. v. Mathis, 974 S.W.2d 647, 649 (Mo. Ct. App. 1998). An insured’s assignee shares this burden of proof. Johnston v. Sweany, 68 S.W.3d 398, 401 (Mo. 2002).

The Circuit Court erred in granting summary judgment in favor of Little for reasons discussed in each of the points below. The standard of review is the same for each point.

This appeal is limited to the question of whether Columbia owes a duty to indemnify HIAR for the Settlement.³ The duty to indemnify requires an insured (or its assignee) to prove that damages actually fall within the terms of the insurance contract. Am. States Ins. Co. v. Herman C. Kemper Constr. Co., 71 S.W.3d 232, 239 (Mo. Ct. App. 2002) (contrasting the duty to indemnify with the duty to defend).

Neither HIAR nor Little proved that the damages at issue in the Settlement fall within the Policy terms. The Court of Appeals correctly recognized this fact and remanded the matter for judgment in Columbia's favor.

A. COLUMBIA HAS NO DUTY TO INDEMNIFY HIAR FOR THE SETTLEMENT UNDER THE "PROPERTY DAMAGE" COVERAGE

The Circuit Court erred in granting summary judgment in favor of Little by ruling that broadcasting junk faxes triggers "property damage" coverage because "property damage" coverage only applies to compensatory damages for injuries unintended by an insured in that (a) liquidated statutory relief under the TCPA is a penalty and not "damages" covered by the Policy; (b) there was no "occurrence" that would invoke "property damage" coverage; and (c) any injury to the Class was intended by HIAR and was thus excluded from "property damage" coverage.

³ The Circuit Court's ruling on the duty to defend was incorrect. Nonetheless, HIAR settled and released Columbia from all claims arising out of the duty to defend including any claims for purported bad faith.

The Policy’s “property damage” coverage applies only to compensatory damages because of “property damage” caused by an “occurrence.” In two separate lawsuits, two separate panels of the Court of Appeals correctly concluded that liquidated relief under the TCPA does not constitute “damages” or “property damage.” In reaching this finding, the Court of Appeals correctly applied Missouri precedent and the common sense notion that a \$500 recovery for pennies worth of damage is a penalty as a matter of law.

There is no “property damage” coverage for the additional reason that HIAR and Little never proved that an “occurrence” took place. To the contrary, the evidence demonstrated that HIAR intended to cause the exact injuries alleged in the TCPA Action—receiving, printing, and viewing junk faxes. Thus, not only was there no “occurrence” that is necessary to invoke “property damage” coverage, but broadcasting junk faxes was explicitly excluded from such coverage. Columbia therefore has no duty to indemnify under the “property damage” coverage in any event.

1. Liquidated TCPA Relief Is Not “Damages” or “Property Damage”

The Policy defines “property damage” to mean “damages” because of “Physical injury to tangible property” and/or “Loss of use of tangible property that is not physically injured.” The Policy limits “property damage” coverage to “sums that the insured becomes legally obligated to pay as damages because of... ‘property damage.’”

a. Penalties Are Not “Damages” or “Property Damage”

The Settlement resolved HIAR’s liability for TCPA penalties of \$500 per fax. (LF104 ¶ 3.A; LF119 ¶ 9(f); LF98; LF118.) The Court of Appeals has twice held that liquidated TCPA relief is an uninsurable penalty, not “damages.” See Little, at A-4;

Olsen v. Siddiqi, 371 S.W.3d 93, 95 (Mo. Ct. App. 2012), transfer denied, (Mo. Aug. 14, 2012) (determining the same issue under identical policy language). In this case, the Court of Appeals stated:

Subsequent to the trial court's judgment, this court issued its opinion in Olsen v. Siddiqi holding that statutory damages under the TCPA were penal in nature and, as penalties, did not constitute "damages" covered by the subject insurance policy. 371 S.W.3d 93, 98 (Mo. Ct. App. 2012). The relevant policy language examined in Olsen is identical to HIAR's policy with Columbia: "[The insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of [property damage or advertising injury] to which this insurance applies." Neither policy further defined the term damages, and, as noted in Olsen, "[u]nder Missouri law, unless otherwise bargained for, the term 'damages' does not include fines and penalties." 371 S.W.3d at 97. Relying on Olsen, Columbia submits that the underlying settlement award is a penalty and thus outside the policy's coverage.

(Little, at A-4.)

In Olsen, as it did in this case, the appellate court made two important findings. First, it held, "[T]he term 'damages' does not include fines and penalties." Id. at 97

(citing Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997)). This finding was properly grounded in this Court’s precedent holding that the ordinary meaning of the word “damages” in a liability policy limits the scope of insurance to compensatory relief only. See Farmland, 941 S.W.2d at 510-11 (“[F]ines or penalties are not included within the ordinary meaning of ‘damages.’ The ordinary meaning of ‘fine’ or ‘penalty’ is not compensation or reparation for an injury; rather, it is a sum imposed as punishment.”).

According to this Court’s Farmland ruling, the phrase “all sums which the insured shall become legally obligated to pay” fundamentally differs from the phrase “all sums which the insured shall become legally obligated to pay as damages.” Id. at 511. The former phrase is broader than the latter; the latter is limited to compensatory relief only. See id. Fines and penalties grow out of statutory law, and their purpose is to punish and deter. As such, Farmland found that the latter language (i.e., “all sums which the insured shall become legally obligated to pay as damages”) includes amounts an insured must pay to restore the environment—but not fines or penalties for destroying it. See id. at 511.

Second, the appellate court correctly held that the TCPA is a hybrid statute. The TCPA permits recoveries for actual damages, liquidated relief, or trebled liquidated relief. 47 U.S.C. § 227(b)(3)(B). The TCPA is remedial (when individuals seek actual damages) and penal (when individuals seek liquidated statutory relief of \$500.00 per violation). Olsen, 371 S.W.3d at 97. Liquidated relief of \$500 must be a penalty because that amount eclipses any actual damages suffered by fax recipients (i.e., pennies per fax).

Id.; see also Harjoe v. Herz Financial, 108 S.W.3d 653 (Mo. 2003) (characterizing the \$500 amount as a “penalty” that deters future violations of the TCPA); Standard Mut. Ins. Co. v. Lay, 975 N.E.2d 1099, 1106, reh’g denied, (June 11, 2012), appeal allowed, 979 N.E.2d 889 (Ill. 2012) (“We find the \$500 in liquidated damages provided in the TCPA is a penalty and is in the nature of punitive damages.”).

The holdings of the Court of Appeals make sense even under Little’s flawed reasoning that the TCPA provides relief where fax transmissions fail. Little’s Motion for Summary Judgment argued, “HIAR’s liability in the absence of the agreement is the mathematical multiplication function of the number of faxes it sent.” (LF2347.) Under this logic, an intended recipient that never even received a fax would be entitled to \$500. Thus, the \$500 amount indisputably serves a deterrent, penal function. The Court of Appeals correctly recognized the direct correlation between the Settlement amount and the statutory penalty of \$500 per violation. (Little, at A-4 n.2.)

A penalty is not “Physical injury to tangible property” or “Loss of use of tangible property that is not physically injured.” A penalty also is not compensatory damages. As such, Columbia has no duty to indemnify HIAR for the Settlement under the “property damage” coverage.⁴ Therefore, this Court should hold that Columbia does not owe a duty to indemnify HIAR.

⁴ Given that there is no “property damage,” there can be no damage falling within the “products-completed operations hazard.” (LF165.) Therefore, the Circuit Court’s rulings

b. De Minimis Damages Are Not “Property Damage”

To the extent that the penalty serves any compensatory function, actual damages would be minimal and would not be entitled to relief under the doctrine of de minimis non curat lex. That doctrine provides that the law does not take notice of trifling matters. Missouri courts have applied the doctrine. See Schulte v. Florian, 370 S.W.2d 623, 625 (Mo. Ct. App. 1963) (affirming directed verdict where the defendant allegedly used a plaster mixing machine owned by the plaintiff and left the machine in a dirty condition, because “[t]here was no evidence introduced, and no proof offered, that plaintiff sustained any actual damages on account of defendant’s use of the machine or any loss of any kind on account of being deprived of its use.”); Hogan Motor Leasing, Inc. v. Avis Rent-A-Car Sys., Inc., 512 S.W.2d 427, 428 (Mo. Ct. App. 1974) (affirming trial court judgment although there was a discrepancy of \$7.00); Hickey v. Metro. Life Ins. Co., 270 S.W. 388, 389 (Mo. Ct. App. 1925) (refusing remittitur for a discrepancy of \$0.17).

Here, the Class’ actual damages (if any) were so minimal—i.e., loss of two sheets of paper, loss of business opportunity for an instant, and loss of facsimile access momentarily—that they did not seek their “actual damages” in the TCPA Action. Rather, the Class sought a lavish penalty of \$500. To the extent that the TCPA’s penalty serves a compensatory function, any such relief would not be insurable under the doctrine of de minimis non curat lex.

that the Policy’s limit of insurance should somehow be expanded due to the “products-completed operations hazard” must be reversed as well. (LF3463-66.)

2. There Is No Proof of an “Occurrence”

Even in the absence of the Court of Appeals decisions in Olsen and in this matter, intentionally broadcasting junk faxes is not an “occurrence.” In order for the Policy to cover “property damage,” it must be caused by an “occurrence.” Under the Policy, “occurrence” means “an accident....” (LF165.) There is no “occurrence” where (like here) the insured admits that it expected and intended to cause the exact injury complained of by a claimant. Specifically, the evidence proves that HIAR expected and intended to cause the exact injuries suffered by the Class—receipt of faxes. (LF1945 at 28:24-25 to LF1946 at 29:1-11; LF1945 at 28:6-15; LF1949 at 49:20-25; LF1950 at 50:1-10.) Therefore, there is no “occurrence.”

“The determinative inquiry into whether there was an ‘occurrence’ or ‘accident’ is whether the insured foresaw or expected the injury or damages.” D.R. Sherry Constr., Ltd v. Am. Family Ins. Co., 316 S.W.3d 899, 905 (Mo. 2010); see also Todd v. Mo. U. Sch. Ins. Council, 223 S.W.3d 156, 162 (Mo. 2007) (holding that intentional injuries to an assault victim were not accidental and were not an insurable “occurrence”); Elliott v. Nat’l Fire Ins. Co. of Hartford, 922 S.W.2d 791, 793 (Mo. Ct. App. 1996) (finding no “occurrence” where the insured intentionally discharged an employee because it “was substantially certain that some injury to plaintiff would result”); Cameron Mut. Ins. Co. v. Moll, 50 S.W.3d 329, 333 (Mo. Ct. App. 2001) (finding no “occurrence” where the insured expected or intended to harm trespassers). Allegations of negligence do not prove an “occurrence.” See Am. States Ins. Co. v. Mathis, 974 S.W.2d 647, 650 (Mo. Ct.

App. 1998) (finding no “occurrence” where the insured negligently or intentionally did not perform a contractual duty).

Here, HIAR retained Sunbelt to ensure that Class members received faxed advertisements. HIAR admitted this in its deposition:

Q: When Sunbelt was sending the 12,500 faxes, they were—they were acting at your direction, correct?

A: Yes, sir.

Q: And Sunbelt didn't do anything that you did not want them to do, correct?

A: I—I assume not.

Q: Okay.

A: I couldn't tell you, for sure, that they didn't though.

Q: All right. But all you wanted them to do was send faxes out?

A: Correct.

(LF1945 at 28:24-25 to LF1946 at 29:1-11.) HIAR also expected and intended that Class members would receive, print, and view the advertisements:

Q: Did you have any understanding or expectation about, you know, where you wanted to send the faxes? In other words, to businesses or to people's homes?

A: My assumption was, they were going to go to businesses.

Q: Okay. All Right. And did you have any discussion about the types of businesses that you were going to send faxes to?

A: Not that I recall.

Q: Did—well, what did you—what did you expect would happen at the recipient's end? That they would actually read the document you were faxing out?

A: We hoped.

Q: And how would they read that document?

A: On a screen, on a piece of paper, on their phone. I don't know. I don't—I'd have the same expectation I have today. Some people have their fax numbers going to all different things. I was just hoping they would read it somehow.

Q: Somehow?

A: Yes, sir.

Q: And “somehow” could include the fact that they would print it, right?

A: It could.

(LF1945 at 28:6-15; LF1949 at 49:20-25; LF1950 at 50:1-10.)

The record proves that HIAR intended to send facsimiles to members of the Class. The record proves that HIAR intended for Class members to receive, print, and view the faxes. The Class's receipt of faxes clearly was not accidental.

In precisely this context, state appellate courts have found no duty to defend TCPA claims under the "property damage" coverage. State Farm Gen. Ins. Co. v. JT's Frames, Inc., 181 Cal. App. 4th 429, 450 (2d Dist. 2010) (the transmission of faxes is not accidental); ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co., 147 Cal. App. 4th 137, 155 (2007) (same); Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 413 (2007) (insured intended that recipients receive the faxes and, therefore, sending was not accidental). The weight of federal court authority likewise finds no coverage for TCPA claims under the "property damage" coverage. Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3d 543, 551 (7th Cir. 2009) ("While it is true that the one-page fax advertisement consumed a small amount of ink and one sheet of paper from Gortho's machine, this consequence was both expected and intended by Websolv."); Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631, 638-9 (4th Cir. 2005) ("Because Resource plainly (1) intended to transmit the faxes to someone, and (2) fails to present evidence that could reasonably be mistaken as express permission to send these faxes, we can only conclude that the sending was not accidental."); W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d 836, 844-45 (N.D. Tex. 2003), aff'd, 96 F. App'x 960 (5th Cir. 2004) (broadcasting junk faxes was intentional).

In Western Rim, a Texas federal court analyzed whether a TCPA claim constituted an accident. The district court held that two elements must be considered in determining

whether an event is accidental: (1) the intent underlying the actor's conduct, and (2) whether the injury is a reasonably foreseeable or intended consequence of the actor's actions. Id. at 844. Despite fleeting allegations of negligence, the court found no accident: "Although the faxing of the unsolicited advertisements is alleged to have been performed negligently, the damages that [plaintiffs] alleged they incurred are the intended and expected effects even if [defendant] had acted non-negligently by obtaining the permission of the [plaintiffs] before they faxed the advertisements." Id. at 844-45 (emphasis added).

The effects of the insured's deliberate act was that the class members used their fax machines, lost potential business opportunities, and used ink and paper in receiving and printing the faxes. Id. at 845. Of course, these effects "would have occurred even if [defendant] had not acted negligently by obtaining permission to fax the advertisements to [plaintiffs]." Id. Therefore, faxing uninvited advertisements is not an "occurrence."

Here, the Petition alleged that HIAR was liable for broadcasting unwanted faxes to Class members. (LF37 ¶ 11; LF38 ¶¶ 13-18.) The allegations are virtually identical to Western Rim. Therefore, the reasoning of that case should apply.

Like Western Rim, the relevant inquiry is whether HIAR expected or intended to cause the injury alleged. All evidence shows that HIAR expected and intended to injure the Class in precisely the manner alleged—receipt of faxes. That HIAR may (or may not) have unintentionally violated the TCPA is immaterial. There simply is no evidence of an "occurrence." Therefore, the lack of an "occurrence" also results in there being no coverage under the "property damage" coverage part.

3. The “Expected Or Intended” Injury Exclusion Bars Coverage

The Policy excludes “property damage” “expected or intended” from the standpoint of the insured. (LF156.) The Circuit Court failed to consider this exclusion. (LF3294-99, 3318.) Insurers must show that the insured intended an act that caused injury and that injury was intended or expected from the acts. In undertaking this inquiry, insurers may show that the consequences were “substantially certain” to flow from the insured’s intentional acts. See Am. Fam. Mut. Ins. v. Lacy, 825 S.W.2d 306, 314 (Mo. Ct. App. 1991). As discussed in Point A.2., above, HIAR intended both injury and damage to the facsimile recipients.

Senders of facsimiles know that their recipients will consume paper and toner, and will temporarily lose use of the telephone line. Am. States Ins. Co. v. Capital Assocs., 392 F.3d 939, 943 (7th Cir. 2004) (barring coverage for a TCPA claim under the expected or intended injury exclusion); St. Paul Fire & Marine Ins. Co. v. Brother Int’l., 319 Fed. App’x 121, 127 (3rd Cir. 2009) (“[The insured] must have expected or intended that damage to occur when it engaged in blast-faxing.”); Maxum Indem. Co. v. Eclipse Mfg. Co., 848 F. Supp. 2d 871, 880-1 (N.D. Ill. 2012).

There is no evidence that HIAR intended to obtain the Class members’ consent to receive junk faxes. To the contrary, HIAR testified that it expected and intended for members of the Class to receive, print, and review faxes, without consent. (LF1945 at 28:6-15; LF1949 at 49:20-25; LF1950 at 50:1-10.) The natural and probable consequence of HIAR’s act was the use of Class members’ ink, paper, and fax machines.

Therefore, the “expected or intended” injury exclusion serves as an additional basis to find no duty to indemnify under the “property damage” coverage.

B. COLUMBIA HAS NO DUTY TO INDEMNIFY HIAR UNDER THE “ADVERTISING INJURY” COVERAGE

The Circuit Court erred in granting summary judgment in favor of Little by ruling that broadcasting junk faxes triggers “advertising injury” coverage because “advertising injury” coverage only applies to compensatory damages and does not protect against damages to incorporeal organizations’ privacy interests in seclusion in that (a) liquidated statutory relief under the TCPA is a penalty and not “damages;” (b) the offense of sending “oral or written publication of material that violates a person’s right of privacy” only involves claims where the content of an advertisement violates an individual’s privacy right; (c) the TCPA is an economic regulation and not a privacy-protecting regulation; (d) the Class representative is not a “person” whose right to privacy has been violated; and (e) the penal statute exclusion bars coverage.

The Policy’s “advertising injury” coverage applies only to “damages” because of “advertising injury” caused by an offense arising out of HIAR’s business. As an initial matter, as discussed above, the Policy does not cover penalties. “Advertising injury” means an injury arising out of one or more offenses, including the offense of “oral or written publication of material that violates a person’s right of privacy.” (LF158-59.) The claims in the TCPA Action do not constitute “advertising injury” covered by the Policy because the definition of “advertising injury” does not include the privacy interest

in seclusion. Therefore, there is no coverage for the Settlement under the “advertising injury” coverage.

1. Penalties Are Not “Damages”

As discussed above, the Court of Appeals correctly recognized that the Policy’s “advertising injury” language is nearly identical to the language in the Policy’s “property damage” coverage part regarding “damages.” (Compare “those sums that the insured becomes legally obligated to pay as damages because of...’property damage,” with “those sums that [HIAR] becomes legally obligated to pay as damages because of...’advertising injury.’”) (LF165; LF158-9.) Accordingly, these arguments apply to “advertising injury” coverage with equal force and will not be repeated here.

2. “Advertising Injury” Coverage only Applies to Content-Based Claims

There is no “advertising injury” coverage because the offense of sending “material that violates a person’s right of privacy” does not protect the right to seclusion. As discussed below, the phrase “that violates a person’s right to privacy” modifies the word “material,” Thus the content of the material itself must invade a person’s privacy rights for coverage under this provision. The material faxed by HIAR did not contain confidential information and did not violate a person’s right to secrecy. Therefore, Columbia does not owe a duty to indemnify HIAR for the Settlement under “advertising injury” coverage.

a. **The Policy’s Language Demonstrates that “Advertising Injury”
Offenses Apply to Content-Based Claims**

Under Missouri law, courts must read an insurance policy as a whole and in context. Todd, 223 S.W.3d at 160. Other courts applying this maxim have concluded that, as a matter of law, TCPA damages attributable to the right to seclusion are not insurable under the “advertising injury” coverage. See JT’s Frames, 104 Cal. Rptr. 3d at 587 (“Looking at the relevant definition of advertising injury in context persuades us that the advertising injury coverage applies only to content-based claims”); Telecommc’ns Network Design v. Brethren Mut. Ins. Co., 2010 PA Super 155 (2010), appeal denied, 2011 WL 1661515 (Pa. May 3, 2011) (“[I]t is clear...that the term ‘privacy’ is confined to secrecy interests.”); Resource Bankshares, 407 F.3d at 641 (“[T]hese four offenses all share the common thread of assuming that the victim of the advertising injury offense is harmed by the sharing of the content of the ad, not the mere receipt of the advertisement.”). Like those courts, this Court should analyze the Policy as a whole. Undefined terms should be given their ordinary meaning, consistent with the intent of the parties.

The Policy’s “advertising injury” coverage only includes content-based offenses. The offenses include: (1) material that slanders or libels; (2) misappropriation of advertising ideas; (3) infringement of copyright, title, or slogan. Each offense concerns harm caused by the content of the relevant material. See JT’s Frames, 181 Cal. App. 4th at 448 (“Definitions 1, 3, and 4 all involve injury caused by the information contained in the advertisement. In each of these cases, the victim is injured by the content of the

advertisement, not its mere sending and receipt.”) (emphasis added). The phrase “material that violates a person’s right of privacy” is no different. Id. Therefore, read in the context of the Policy as a whole, the phrase “material that violates a person’s right to privacy” must mean privacy rights arising out of the material itself. Id.

The rule of noscitur a sociis requires this result. Under this rule, “general and specific words, capable of analogous meaning, when used together, take color from each other, so that general words are restricted to a sense analogous to the less general, and the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.” State v. Jones, 172 S.W.3d 448, 452 n.3 (Mo. Ct. App. 2005) (internal quotations omitted). The rule of noscitur a sociis “is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth” in statutory construction.” Id. (quotations omitted). Under the rule of noscitur a sociis, the general term “right to privacy” properly should be restricted by the type of events described in the surrounding offenses such that the phrase “material that violates a person’s right to privacy” means privacy rights arising out of content of the material at issue.

Here, the Circuit Court ruled that the receipt of fax advertisements disturbed Class members’ rights to seclusion protected by the TCPA. Little did not allege that the content of the faxes violated a secrecy right. Therefore, the claims at issue in the Petition, and the claims purportedly resolved under the Settlement, do not fall within the Policy’s “advertising injury” coverage.

The “last antecedent rule” also supports the interpretation that “advertising injury” only applies to content-based claims. The maxim provides that qualifying words, phrases, and clauses are to be applied to the words immediately preceding and are not to be construed as extending to or including others more remote. Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683, 688 (Mo. 2010); Hendricks v. Curators of Univ. of Mo., 308 S.W.3d 740, 744-45 (Mo. Ct. App. 2010); JT’s Frames, 181 Cal. App. 4th at 446. In JT’s Frames, the Court found that the material at issue must violate a person’s right to privacy under the last antecedent rule. 181 Cal. App. 4th at 446. The last antecedent rule further supports Columbia’s position that the offense of “material that violates a person’s right of privacy” applies only to secrecy claims—not seclusion claims. Id.

Here, the word “that” serves the function of a restrictive pronoun in the phrase “material that violates a person’s right of privacy.” The restrictive pronoun refers to its immediate predecessor, i.e., “material,” thereby requiring that the material violate a person’s right of privacy. The last antecedent rule requires the “material” itself to violate a person’s right to privacy. See JT Frames, 181 Cal.App.4t at 446 (“[T]he material at issue must ‘violate[] a person’s right of privacy,’ which would be the case only if the material contained confidential information and violated the victim’s right of secrecy.”).

TCPA liability does not depend upon the content of a faxed advertisement but, rather, upon the means of transmission. The same advertisement, sent by mail or left on a windshield, would not give rise to liability. Unlike the TCPA, due solely to the method of transmission—regardless of the advertisement’s content, the “advertising injury” coverage only applies when material violates a person’s right of privacy. Neither Little

nor the Class pleaded that the advertisements' content violated a secrecy right. Therefore, no "advertising injury" coverage exists.

b. **The TCPA Is an Economic Regulation that Incidentally Protects Seclusion**

The TCPA was passed for the purpose of protecting commerce—not privacy rights. The legislative history is solely focused upon the economic impact of junk faxes, rather than any incidental privacy interest in seclusion:

Facsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.

See H.R. Rep. No. 102-317, 1991 WL 245201, at *10 (1991). Any "privacy" interest incidentally implicated by the TCPA solely concerns "seclusion," which is not included in the relevant "advertising injury" offense. See Resource Bankshares, 407 F.3d at 639-41; Capital Assoc., 392 F.3d at 941-43.

3. The Offense Applies to a “Person”—Not to an Organization

The only offense under Coverage B that is relevant to this appeal is for “material that violates a person’s right to privacy.” The absence of the word “organization” means that the scope of the offense is limited to corporeal persons—not incorporeal entities. This critical distinction is made throughout the Policy and precludes coverage for the incorporeal entity that serves as class representative under the Settlement, i.e., Karen S. Little, L.L.C. The use of the word “person” harmonizes with the common law, which does not provide privacy rights to incorporeal organizations. The Circuit Court clearly erred in failing to appreciate the significance of this distinction given that insureds (not insurers) bear the burden of proving coverage.

Incorporeal entities have no right to privacy. Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998); Restatement (Second) of Torts, Ch. 28A, Invasion of Privacy § 6521(c); accord FCC v. AT&T, Inc., 131 S.Ct. 1177, 1181 (2011) (holding that the term “personal privacy” does not extend to corporations); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). There is no Missouri case extending the privacy right to seclusion to an incorporeal entity. This is why the offense does not extend coverage to an incorporeal “organization.” See Websolv Computing, 580 F.3d at 550 (“[B]usinesses generally do not enjoy a common-law right to seclusion, making it unlikely that the ‘right of privacy’ provision in a corporate insurance policy was meant to cover seclusion interests.”).

The words “organization” and “person” are separate and distinct throughout the Policy and, consequently, must be given separate and distinct meanings. See ABM

Indus., 2006 WL 2595944, at *21 (“[T]he National Union policy refer[red] separately, throughout the policy, to ‘person’ and ‘organization’ and repeatedly use[d] the phrase ‘person or organization.’”). This Court requires courts to read the provisions of an insurance policy as a whole, giving effect to each provision. See Gulf Ins. Co. v. Noble Broad., 936 S.W.2d 810, 817 (Mo. 1997). Therefore, construing “person” and “organization” distinctly is required by Missouri law.

The word “person” does not include incorporeal entities, and numerous courts recognize this to be the case.⁵ See Mirpad, LLC v. Cal. Ins. Guar. Assoc., 132 Cal. App. 4th 1058, 1073 (2d Dist. 2005) (“An examination of how the isolated word ‘person’ is used throughout the policy...demonstrates that it is consistently used to refer only to natural persons....Other types of legal entities (i.e., corporations, partnerships or joint ventures) on the other hand, are clearly characterized as ‘organizations.’”); Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc., 97 F. Supp. 2d 913, 934 (S.D. Ind. 2000) (“[T]he insurance policy’s coverage for invasion of the right of privacy, by its own terms, applies only to a ‘person’s,’ not an ‘organization’s,’ right of privacy.”); Scottsdale Ins. Co. v. Attnys. Process & Investig. Servs., Inc., 778 N.W.2d 218 (Iowa Ct. App. 2009); 47 Mamaroneck Ave. Corp. v. Hartford Fire Ins. Co., 857 N.Y.S.2d 610 (App. Div. 2d Dep’t 2008); ABM Indus., Inc. v. Zurich Am. Ins. Co., No. 05-cv-3480, 2006 WL 2595944, at *21 (N.D. Cal. Sept. 11, 2006).

⁵ Even the TCPA itself distinguishes between corporeal “persons” and incorporeal organizations. See 47 U.S.C. § 227(b)(3) (distinguishing between a “person or entity”).

Here, if the Court concludes that the right of seclusion is covered by the Policy, Little would bear the burden of proving that it falls within the terms of the Policy because it has a privacy right to seclusion. Christian v. Progressive Cas. Ins. Co., 57 S.W.3d 400, 403 (Mo. Ct. App. 2001). Nonetheless, Little—the class representative—is an incorporeal organization that has no privacy rights. As a result, Little has failed to demonstrate that “advertising injury” coverage exists. Therefore, the Circuit Court clearly erred when it disregarded the distinction between “person” and “organization.”

4. The TCPA Action Arises out of the Willful Violation of a Penal Statute

The Policy excludes coverage for an “advertising injury” “arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.” (LF159.) As stated above, liquidated relief under the TCPA is a penalty. The Settlement represents the negotiation of statutory penalties on a class-wide basis. Therefore, the Circuit Court erred when it held that “TCPA is not a ‘penal’ statute or ordinance.” (LF3455-58.)

The Circuit Court also erred when it examined HIAR’s intent to violate the TCPA—rather than HIAR’s intent to send or consent to the sending of junk faxes, as is the test for willfulness under the TCPA. (LF3455.) Under the TCPA, “willful” means “the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision [of the TCPA].” 47 U.S.C. § 312(f)(1). Willfulness under the TCPA focuses on an actor’s objective intent to send junk faxes. Id. An actor’s subjective intent to violate the TCPA is irrelevant. See id.

Here, HIAR admitted at deposition that it willfully violated the TCPA. HIAR testified that: (1) it retained an agent (i.e., Sunbelt) for the purpose of transmitting junk faxes; (2) neither HIAR nor Sunbelt obtained prior consent from the recipients to send the junk faxes; and (3) HIAR intended for the recipients to receive the junk faxes. (LF1945 at 28:6-15; LF1949 at 49:20-25 to LF1950 50:1-10.) The evidence demonstrates that HIAR willfully violated the TCPA. Therefore, HIAR's willful violation of the TCPA falls within the scope of the "penal statute" exclusion, and Columbia affirmatively proved that this loss is barred by the "penal statute" exclusion under the "advertising injury" coverage.

C. THE "CONTRACTUAL LIABILITY" EXCLUSIONS BAR COVERAGE FOR \$4,756,000 OF THE SETTLEMENT

The Circuit Court erred in granting summary judgment in favor of Little by ruling that the "contractual liability" exclusions do not apply because HIAR assumed more liability in the Settlement than it was legally obligated to in that only 488 of the supposed 10,000 Class members made a claim under the Settlement.

The Policy excludes "property damage" that HIAR is obligated to pay "by reason of the assumption of liability in a contract or agreement" and/or "advertising injury" for which HIAR "has assumed liability in a contract or agreement." (LF156; LF159.) The exclusions do not apply to liability that the insured would have "in the absence of the contract or agreement." (Id.)

The Court of Appeals correctly held that these exclusions apply because "the liability that HIAR assumed by virtue of the settlement contract is for something other

than ‘damages’ that it would have had absent the agreement.” (Little, at A-4.) (LF3459-61.) In contrast, the Circuit Court improperly ignored the fact that only 488 of the supposed 10,000 Class members actually made claims against the Settlement fund. Given that there was so little participation (less than 5%), the exclusions clearly apply to the excess of the Class’ proven loss—i.e., more than 95% of the Settlement fund—because that amount was gratuitously assumed by HIAR.

Here, the TCPA Court approved the Settlement based upon Little’s representation that the Class included 10,000 members. (LF104 ¶ 3.A.) Nonetheless, only 488 Class members opted-in to the Settlement. (LF1589 at 11:20 to 12:6; LF1607 at 83:23 to 84:5; LF 2484.) According to the “Proof of Claim Form” agreed-to by HIAR and Little, Class members who did not mail a proof of claim form “WILL NOT RECEIVE A SHARE OF ANY POTENTIAL SETTLEMENT PROCEEDS.” (LF2039.) In turn, the Court’s “Final Judgment Approving Settlement and Class Certification” dated April 12, 2007 permits only those Class members who submitted valid claim forms to participate in the Settlement. (LF122.)

The fact that only 488 responses were received means that the liquidated relief under the TCPA, if proper, would have been \$244,000 (i.e., 488 claim forms multiplied by \$500).⁶ The difference between the Settlement and the proven damages amount is \$4,756,000. The Court of Appeals correctly recognized that this amount represents

⁶ Assuming, arguendo, that each claim form was entitled to liquidated relief in the full \$500 amount, the amount of provable liability would be \$244,000.

damages that were assumed by HIAR in a written contract or agreement (i.e., the Settlement) and that HIAR would not have incurred liability in the absence of the Settlement. Therefore, the Court of Appeals correctly concluded, in the alternative, that the Policy's "contractual liability" exclusions bar coverage for the \$4,756,000 for which HIAR gratuitously assumed liability under the Settlement.

D. LIQUIDATED TCPA RELIEF IS AN UNINSURABLE PENALTY

The Circuit Court erred in refusing to consider Columbia's argument that the Settlement is uninsurable because insuring the Settlement would be akin to insuring punitive damages in that liquidated relief under the TCPA is a penalty that serves a similar purpose as punitive damages.

The Court of Appeals correctly held that liquidated relief under the TCPA is an uninsurable penalty. This type of relief is uninsurable for the additional reason that permitting insurance for TCPA claims would defeat the deterrent aspects of the TCPA. Liquidated relief under the TCPA is a penalty. See Olsen, 371 S.W.3d at 97. In this regard, liquidated relief under the TCPA is akin to punitive damages, which seek to punish a wrongdoer. For the same reason that punitive damages are uninsurable, liquidated relief under the TCPA should be treated as being uninsurable as a matter of law. See Lay, 975 N.E.2d at 1106.

In Lay, Locklear Electric, Inc. ("Locklear") filed a putative class action lawsuit against Theodore Lay d/b/a Ted Lay Real Estate Agency ("Lay") in federal court, alleging that Lay transmitted an advertisement in violation of the TCPA to Locklear and other members of a class. Id. at 1101. Thereafter, Lay entered into a settlement with

Locklear and the class for the full amount sought in the class action complaint. Id. at 1102. Lay also assigned his rights against his insurer in exchange for a covenant not to execute any portion of the settlement against Lay's other assets. Id. The federal court approved the settlement and entered a consent judgment. Id.

During Locklear's pursuit of insurance coverage, Lay's insurers argued that the TCPA's statutory relief was an uninsurable penalty. Id. 1104. The Illinois Court of Appeals agreed, finding that the TCPA's liquidated relief of \$500 per violation far exceeded any actual damages. Id. 1106 ("We find the \$500 in liquidated damages provided in the TCPA is a penalty and is in the nature of punitive damages. They are not insurable as a matter of Illinois law and public policy...."). Indeed, the TCPA's purpose is to "deter future sending of unwanted fax transmissions by those sending the faxes and deterring others from doing the same by shifting the cost and imposing penalties on those sending the unwanted fax transmissions." Id. at 1105. Because the actual cost of receiving an unwanted fax is far less than the liquidated relief, that amount "is a penalty to the sender." Id. This holding is consistent with this Court's ruling that "fines or penalties are not included within the ordinary meaning of 'damages.'" See Farmland, 941 S.W.2d at 510-11.

The same logic applies in this case. Under Missouri law, the TCPA's liquidated relief is punitive, not compensatory. See Olsen, 371 S.W.3d at 97. It affects the public policy of deterrence. In Missouri, punitive damages are not insurable as a matter of law. See DeShong v. Mid-States Adjustment, Inc., 876 S.W.2d 5, 7 (Mo. Ct. App. 1994).

Therefore, liquidated relief under the TCPA should be deemed uninsurable as a matter of law.

E. HIAR AND HMA FAILED TO NOTIFY AND COOPERATE WITH COLUMBIA

The Circuit Court erred in refusing to consider Columbia’s arguments that HIAR’s breaches of the duties to cooperate and to provide notice vitiate coverage in that the breaches serve as additional bases for denying coverage to HIAR.

The Circuit Court erred by failing to consider the argument in Columbia’s Motion for Summary Judgment, that no coverage is available because HIAR and HMA breached separate duties to provide notice and cooperate. The Policy requires every party seeking coverage to provide notice of a lawsuit “as soon as practicable” and cooperate with Columbia in investigating or settling the lawsuit. Columbia was prejudiced by HIAR’s failure to abide by these conditions and, therefore, the breach of these duties vitiates coverage as a matter of law.

Conditions requiring notice “as soon as practicable” and that lawsuit papers be forwarded immediately are enforceable. Johnston, 68 S.W.3d at 401. An insurer must be given notice of the complaint or pleading, which would invoke the duty to defend. See Rocha v. Metro. Prop. & Cas. Ins. Co., 14 S.W.3d 242, 248 (Mo. Ct. App. 2000) (holding that the insured’s failure to forward copy of an amended petition to insurer was unexcused, creating a presumption of prejudice such that the insurer owed no coverage obligation).

Cooperation clauses also are enforceable under Missouri law. Kearns v. Interlex Ins. Co., 231 S.W.3d 325, 331 (Mo. Ct. App. 2007). “A cooperation clause in an insurance policy is a condition subsequent which necessitates proof by the insurer of facts sufficient to relieve it of liability.” Id. To avoid coverage, the insurer must show: (1) the insured materially breached the cooperation clause; (2) the insurer was substantially prejudiced as a result of the breach; and (3) the exercise of reasonable diligence to secure the insured’s cooperation. Med. Protective Co. v. Bubenik, 594 F.3d 1047, 1051 (8th Cir. 2010); Kearns, 231 S.W.3d at 331. Furthermore, an insured must provide notice to its insurer of an amended pleading even if the insurer has disclaimed coverage for a prior pleading. Rocha v. Metro. Prop. & Cas. Ins. Co., 14 S.W.3d 242, 246 (Mo. Ct. App. 2000); Dickman Aviation Servs., Inc. v. U.S. Fire Ins. Co., 809 S.W.2d 149, 152-53 (Mo. Ct. App. 1991). Failure to give notice will relieve the insurer of liability. Rocha, 14 S.W.3d at 246; Dickman, 809 S.W.2d at 153.

Here, it is undisputed that HMA never notified Columbia of the TCPA Action. It also is undisputed that neither HIAR nor HMA notified Columbia of the “Amended Class Action Petition” (adding HMA as a defendant) or the “Second Amended Class Action Petition” (replacing Onsite with Little). Columbia repeatedly requested additional information, including amended pleadings, to assist Columbia in evaluating coverage. (LF58-63; LF70-82; LF87-95.) Columbia even expressed its willingness to participate in settlement discussions with HIAR and Little. (LF88.) Nonetheless, Columbia did not learn of HMA’s involvement in the TCPA Action until Columbia was served with the Garnishment Action. Because HIAR and HMA never advised Columbia of any claims

against HMA and never advised that HMA was named as a defendant in the TCPA Action, HIAR and HMA breached the conditions of the Policy requiring notice of a suit and cooperation. These breaches vitiate coverage under the Policy as a matter of law. Therefore, the Circuit Court erred by failing to consider Columbia's argument in this regard.

F. **THE SETTLEMENT WAS UNREASONABLE**

The Circuit Court erred in binding Columbia to the Settlement because this Court's precedent permits insurers to challenge the reasonableness and binding effect of settlements entered into by insureds in the absence of trials in that the Settlement—rather than a trial—set liability and damages in the TCPA Action.

The Court of Appeals correctly put to rest the concept that this Court's holding in Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700, 708 (Mo. 2011), somehow permits an insured to benefit from coverage where none exists in the first instance. (Little, at A-5 n.4.) In contrast, the Circuit Court erroneously found that Schmitz could apply where a finding of no coverage would be made. This holding simply is not supported by Schmitz. See generally Schmitz, 337 S.W.3d 700.

The Circuit Court failed to even consider factual evidence presented by Columbia that the Settlement was unreasonable and was not negotiated in good faith. The Circuit Court abandoned its duties in this regard, instead holding that "Columbia's arguments [regarding the unreasonableness of the Settlement] are precluded by the fact that the underlying judgment specifically found, after hearing, that the settlement was fair,

adequate and reasonable.” Quite to the contrary, the record is barren of any evidence supporting any argument that the Settlement was reasonable.

To bind an insurer to the terms of a settlement entered into by an insured without the approval of its insurer, the settlement must be reasonable and free of fraud and collusion. Gulf Ins. Co. v. Noble Broad., 936 S.W.2d 810, 816 (Mo. 1997). In Gulf Insurance, this Court held that “a reasonableness standard is appropriate in determining the enforceability of section 537.065 settlements.”⁷ Schmitz, 337 S.W.3d at 708 (quoting Gulf Ins. Co., 936 S.W.2d at 815). Gulf Insurance requires the insured to demonstrate that a settlement was what “a reasonably prudent person in the position of the defendant would have settled for on the merits of the plaintiff’s claim.” Id. at 709 (emphasis added). A reasonableness hearing must be held even if another court approved of an underlying settlement. See Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297, 303-4 (Mo. Ct. App. 2007) (“When Plaintiffs and Defendants agreed to the amount of damages to be awarded by the wrongful death court, as memorialized in the proposed judgment and presented to the wrongful death court for its signature, they left no issues in dispute

⁷ Section 537.065 applies to settlement agreements where there are alleged damages “on account of bodily injuries or death.” Mo. Rev. Stat. § 537.065. It is unclear how HIAR and Little’s Settlement fits within section 537.065, but that is only one of the many areas that would have been explored had Columbia been permitted an opportunity to challenge the reasonableness of the Settlement.

at the wrongful death hearing, and therefore, the wrongful death judgment was the result of a settlement, rather than a trial on the merits.”).

In Schmitz, this Court held that the reasonableness test does not apply where liability and damages are determined at trial—rather than by the parties themselves. 337 S.W.3d at 709. Where there has been no trial on the merits, the settlement must pass a reasonableness test:

The structure of the section 537.065 agreement actually gave [the insurer] more protection than a settlement that admitted liability and determined damages. The [claimants] still had the burden to prove liability and damages in a bench trial....
The judgment here is not a settlement and is not subject to the Gulf Insurance reasonableness test.

Id. (emphasis added). In Schmitz, the settlement stated that any recovery against the insured would be limited to the insured’s insurance policies. Id. at 704, 709. The parties expressly agreed that matters of liability and damages “would be submitted to the trial court.” Id. A trial on the merits determined liability and damages. Id. Thus, a trial determining liability and damages should be treated differently than a mere stipulation of liability and damages. Where there has been a trial on the merits, there simply would be no reason to test a judgment for reasonableness. Id. at 709. For this reason, this Court was persuaded in Schmitz that the trial on the merits safeguarded the insurer against collusion such that the Gulf Insurance test did not apply. Id.

Here, as part of the Settlement, HIAR and Little stipulated to liability and damages. HIAR had nothing to lose by entering into a \$5,000,000 Settlement, because it would never be required to pay for it. A final approval hearing for objections to the Settlement was held on April 12, 2007. (LF112-28.) There is no evidence of any objections or cross-examination at the final approval hearing. There was no trial on the merits holding Little had satisfied its burdens to prove liability and damages. By all accounts, the Settlement was simply approved as drafted. This is precisely the one-sided presentation of evidence that the Gulf Insurance Court held was not binding upon an insurer. See 936 S.W.2d at 816.

The Circuit Court's November 29, 2011 Order incorrectly bound Columbia to the Settlement due to Columbia's refusal to defend this claim. The fact remains that Schmitz did not bind the insurer to a settlement that admitted liability and damages. Id. at 710. Therefore, the Circuit Court's reliance upon Schmitz in holding Columbia liable for extra-contractual liability, in excess of the policy limits, was erroneous.

Little's only argument that the Settlement was reasonable is that it was approved by the Circuit Court. Little proffered that 12,500 faxes were sent, thereby exposing HIAR to a judgment of \$6,250,000. Nonetheless, Little never offered any evidence that 12,500 faxes were received by the Class. As noted above, the Circuit Court never tested the evidence supporting Little and HIAR's representation that 12,500 were received.

Little argued below that the Settlement permitted HIAR a 20% discount from HIAR's minimum liability. This argument is specious given that TCPA liability for damages should be measured by the number of faxes received—not sent. See All Am.

Painting, LLC v. Fin. Solutions & Assoc. Inc., 315 S.W.3d 719, 722, 724 (Mo. 2010) (“TCPA creates a private cause of action for any person or entity that receives an advertisement in violation of the act....”) (citing Phillips Randolph Enters., LLC v. Adler–Weiner Research Chi., Inc., 526 F. Supp. 2d 851, 852 (N.D. Ill. 2007) (“Congress’ primary purpose in enacting the TCPA was to prevent the shifting of advertising costs to recipients of unsolicited fax advertisements.”)). Although the Consent Judgment states that at least 10,000 faxes were received, a settlement communication from Little to HIAR dated March 3, 2005, states that 6,456 faxes were received.⁸ (LF84.) Furthermore, despite faxing the “Class Settlement and Claim Form” to over 15,000 fax numbers and publishing a “Notice of Class Action and Proposed Settlement,” only 488 claim forms were submitted alleging receipt of the fax and seeking relief under the Settlement. (LF1589 at 11:20 to 12:6; LF1607 at 83:23 to 84:5; LF 2484.) Therefore, Little has no proof—save for speculation—that the Settlement amount reflects damages that were actually suffered by the Class.

Even assuming that 10,000 faxes were received, the test of reasonableness is “what a reasonably prudent person in the position of the defendant would have settled for on the merits of the plaintiff’s claim.” Gulf Ins. Co., 936 S.W.2d at 816. HIAR settled the TCPA Action for the full penalty of \$500 per violation. This amount was equal to the maximum penalty that Little could have been awarded in the TCPA Action in its best-

⁸ Little’s counsel testified that the number of successful faxes is unknown. (LF 1592 at 22:2-8.)

case scenario.⁹ A reasonable settlement amount—taking into consideration a discount for substantial litigation costs and expenses—could have been in the range of \$100-250 per violation. (LF 3047-49.) Clearly, the Settlement was HIAR’s worst-case scenario with respect to the \$500 penalty and demonstrates unreasonableness.

The facts demonstrate the TCPA Action should have been dismissed. Karen S. Little, Esq. and Little testified that they have no personal knowledge of receiving a fax from HIAR. (LF2183 at 22:13-25; LF2184 at 23:1-23; LF2223 at 22:3-25, 23:1-25, 24:1-25; LF2224 at 25:1-19.) Rather, Little’s attorneys told her that she received a fax from HIAR. (LF2183 at 22:13-25; LF2184 at 23:1-23; LF2223 at 22:3-25, 23:1-25, 24:1-25; LF2224 at 25:1-19.) Little did not even reside within the designated areas where the faxes were to be sent, and Little’s fax number does not appear on the list of fax numbers where Sunbelt purportedly sent the faxes. (LF2235 at 69:20-25, 70:1.) “To have standing [under the TCPA], the parties seeking relief must have some legally protectable interest in the litigation.” All Am. Painting, 315 S.W.23d at 724. A reasonably prudent person would not have settled on worst-case terms where the class representative could not even establish that it fell within the Class.

A reasonably prudent defendant would have settled with claimants that actually submitted claim forms to prove their claims—not issued a blank check, 95% of which would be payable to an unnamed cy pres fund.

⁹ Little maintains that HIAR’s conduct was negligent, not willful, so Little could not have obtained treble damages.

Here, a mere 488 claim forms were returned seeking recovery under the settlement.¹⁰ The payout clearly should have been \$244,000—not \$5,000,000. Therefore, the \$5,000,000 settlement cannot be reasonable. At the very least, there is an issue of material fact about what constitutes a reasonable settlement amount, and the Circuit Court incorrectly denied Columbia the opportunity to investigate this aspect of the Settlement.

G. COLUMBIA IS NOT LIABLE FOR EXTRA-CONTRACTUAL DAMAGES

The Circuit Court erred in holding that the Policy’s limits “do not matter” because it awarded extra-contractual damages on a non-existent claim in that (a) Little never requested extra-contractual damages in its counterclaim; (b) HIAR released its counterclaims for extra-contractual damages; and (c) Columbia’s indemnity obligation is limited to \$2,000,000 in the absence of a successful claim for extra-contractual damages.

¹⁰ Many of the 488 claims may not have been valid. For example, 143 of the 488 claims were attributed to Schnucks Markets (“Schnucks”). (LF2268-70.) Schnucks submitted a claim form listing 155 telephone numbers, including non-314 and 636 area code numbers and duplicate numbers. Of the 155 Schnucks “Store” and “Corporate” numbers, there were 107 unique 314 or 636 area code numbers. Therefore, at most, 107 class claims should have been accounted for as claims made by Schnucks. Further review of these 107 claims reveals that only 11 were identified on the list of over 15,000 numbers for the geographic areas where HIAR faxed advertisements. (*Id.*)

The Circuit Court erroneously held Columbia liable for extra-contractual damages, finding that the Policy limits “do not matter,” in the absence of a claim for bad faith. (LF3467-75.) The fact remains that Little never filed a counterclaim seeking extra-contractual damages against Columbia—either for breach of the duty to defend or for breach of the duty to settle. (LF545-46.) Rather, Little’s counterclaim merely re-alleged a garnishment claim seeking the turnover of the Policy proceeds—not damages in excess of the Policy limits. There is no Missouri case law that permits the entry of a judgment in excess of the policy limits where a bad faith claim never even was brought. Therefore, the Circuit Court erred in granting Little extra-contractual relief based upon a non-existent “bad faith” claim. Even more egregiously, the Circuit Court did not even undertake fact-finding to enable it to rule upon such a claim, had one been brought by Little.

Little also did not have any right under the Settlement to assert counterclaims for bad faith arising out of an alleged breach of the duty to defend or duty to settle in any event. Columbia settled all such claims with HIAR and HMA. The settlement between Columbia and HIAR expressly released all claims brought by HIAR and HMA against Columbia including, without limitation, HIAR’s counterclaims for breach of contract and bad faith. (LF3327-29.) To the extent that a breach of the duty to defend or settle gave rise to a bad faith claim, that claim was retained by HIAR and HMA under the HIAR-Little Settlement and was later released in the Columbia-HIAR/HMA settlement. Therefore, no claim seeking extra-contractual damages was before the Circuit Court on summary judgment, and the Circuit Court clearly erred in holding to the contrary.

Finally, the Circuit Court erroneously expanded the scope of Schmitz by recognizing a de facto right to extra-contractual damages for breaching the duty to defend. Contrary to the Circuit Court’s holding, Schmitz did not create a right to extra-contractual damages where an insured settles in excess of the policy limits. Schmitz only held that an insurer may not challenge the reasonableness of an underlying judgment that falls within the policy limit and that was entered into following a determination of liability and damages by a Court at a trial. See 337 S.W.3d at 710. In Schmitz, this Court did not bind the insurer to a settlement that admitted liability and damages in excess of the policy limit—like the Circuit Court did with the Settlement in this case. Significantly, this Court never endorsed the award of extra-contractual damages for breach of the duty to defend. The Circuit Court’s expansion of Schmitz was wholly unsupported by this Court’s precedent. Therefore, the Circuit Court’s failure to limit Columbia’s indemnity obligation to the Policy’s \$2,000,000 limit should be reversed.

H. COLUMBIA SHOULD HAVE BEEN PERMITTED LEAVE TO AMEND

The Circuit Court erred in denying Columbia’s Motion for Leave to Amend, because leave should be granted freely in that HIAR’s amendment would have added HIAR’s excess insurer as a party, thereby preventing the award of extra-contractual damages against Columbia and providing enough insurance to potentially cover the entire Settlement amount.

The Circuit Court erred by rejecting Columbia’s efforts to implead HIAR’s excess insurer, Zurich, in this action. Missouri Supreme Court Rule 55.33 provides that pleadings “may be amended only by leave of court or by written consent of the adverse

party; and leave shall be fully given when justice so requires.” Mo. Sup. Ct. R. 55.33(a) (emphasis added). “The intent of this rule is that courts should liberally allow pleadings to be amended when justice requires.” Hoover v. Brundage-Bone Concrete Pumping, Inc., 193 S.W.3d 867, 870 (Mo. Ct. App. 2006). “Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” Mo. Sup. Ct. R. 52.06.

Here, Columbia’s proposed amendment would have added Zurich as a defendant to resolve any obligation owed by Zurich for the Settlement. Zurich may be liable to indemnify Columbia for a portion of the Settlement—i.e., that portion that exceeds the Columbia Policy’s limit of \$2,000,000. Making Zurich a party to this litigation would have served the goal of judicial efficiency. (Due to the Circuit Court’s erroneous ruling, Columbia has been forced to file a separate lawsuit against Zurich, Little, and HIAR, which is pending before the Circuit Court under case number 12SL-CC-02076.)

Columbia moved to add Zurich as a defendant as soon as Columbia learned of the existence of the Zurich Policy. No trial had been scheduled at the time when Columbia attempted to add Zurich as a party to the Coverage Action. Rather than permit Columbia leave to amend, the Circuit Court abused its discretion by rejecting Columbia’s motion and, holding Columbia liable for the full \$5,000,000 Consent Judgment, plus statutory interest at 9% per annum, although the Policy’s limit is only \$2,000,000.

I. INSURING TCPA CLAIMS WOULD FRUSTRATE PUBLIC POLICY

The Circuit Court erred in refusing to consider Columbia’s argument that insuring TCPA relief would frustrate public policy because the central purpose of the TCPA is to deter junk fax broadcasts in that insuring the Settlement would provide an incentive for, rather than deter, junk fax broadcasts and would not satisfy the fortuity test that exists in all insurance claims.

Providing insurance for the TCPA Action would contravene well-settled public policy guarding against insuring non-fortuitous losses and would undermine—rather than effect—the purpose of the TCPA, which is to deter junk fax broadcasts by penalizing senders. Missouri’s doctrine of fortuity embodies the public policy that an insurable loss must be accidental rather than intentional. See Easley v. Am. Family Mut. Ins. Co., 847 S.W.2d 811, 812 (Mo. Ct. App. 1992) (“Permitting an insured to insure himself against his wanton, reckless or willful acts would enable him to insure himself from bearing the consequences of his intentional acts and would, therefore, be contrary to public policy.”); Keeler v. Farmers & Merchants Ins. Co., 724 S.W.2d 307, 309 (Mo. Ct. App. 1987) (“[A]s a matter of public policy, a person should not be able to insure himself from having to bear the consequences of his own intentional acts.”); Fid. & Cas. Co. of N.Y. v. Wrather, 652 S.W.2d 245, 249 (Mo. Ct. App. 1983) (“[A]s a matter of public policy, a liability insurance policy does not afford coverage for damage intentionally inflicted by the insured; that is, for damage resulting from acts deliberately done by the insured, ‘knowing that they were wrong, and intending that harm result from said acts.’”).

A liability policy is designed to protect the insured from “fortuitous injury” and if the insured is permitted “to consciously control the risks covered by the policy, a central concept of insurance is violated.” Farm Bureau Town & Country Ins. Co. of Mo. v. Turnbo, 740 S.W.2d 232, 236 (Mo. Ct. App. 1987). This central concept, which is grounded in public policy, “is based on the thesis that wrong-doing is discouraged by the imposition of personal punishment.” Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964). “If a person is able to insure himself against punishment, he gains a freedom inconsistent with the establishing of sanctions against such misconduct.” Id.; see also Nw. Elec. Power Co-op., Inc. v. Am. Motorists Ins. Co., 451 S.W.2d 356, 362 (Mo. Ct. App. 1969) (“It is true that, as a matter of public policy, a liability insurance contract does not afford coverage for damage intentionally inflicted by the insured, that is, for damage resulting from acts consciously and deliberately done by the insured, ‘knowing that they were wrong, and intending that harm result from said acts.’”) (citations omitted).

Here, the evidence demonstrates that HIAR intended to send faxes to individuals within the Saint Louis metropolitan area.

Q: Okay. And was Sunbelt acting at the direction of your company to send the 12,500 faxes in St. Louis?

A: Yes.

Q: Did Sunbelt do anything that you told them not to do?

A: No. I guess not.

(LF 2497.) Based upon its agreement with Sunbelt to broadcast junk faxes, HIAR intended (1) to use the paper, ink, and machines of each recipient and (2) to disturb the seclusion of each fax recipient. There is no proof of fortuity in this loss. Certainly, ignorance of the law does not give rise to fortuity. Absent fortuity, there can be no insurance for the TCPA Action, and the Circuit Court erred by holding otherwise.

The import of the fortuity doctrine is only amplified when considered in the context of the legislative intent of the TCPA. As discussed above, liquidated relief under the TCPA is a penalty. Permitting insurance coverage for the Settlement—particularly given the cost-shifting nature of its assignment of rights—would undermine the penal effect of the TCPA. HIAR attempted to use the assignment of rights to defeat the penal aspects of the TCPA. Rewarding HIAR for its TCPA violations with insurance coverage would create a perverse incentive for HIAR (and for other actors) to continue disseminating junk faxes in contravention of Congressional intent to deter and punish junk fax senders. To preserve the TCPA’s penal objectives, and to maintain the integrity of Missouri’s fortuity doctrine, this Court should find that violations of the TCPA are not an insurable loss as a matter of law. This Court also should find that the Settlement is not entitled to coverage given that its terms frustrate the public policy objective of deterring junk faxes and frustrate Missouri’s fortuity doctrine.

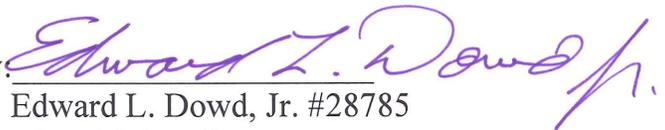
VI. CONCLUSION

Based upon the foregoing, Columbia respectfully requests that this Court: (1) agree with the Court of Appeals ruling in its entirety; (2) reverse the Circuit Court's November 29, 2011 order and judgment; (3) deny Little's Motion for Summary Judgment; (4) grant Columbia's Motion for Summary Judgment; (5) enter an order declaring that Columbia has no duty to indemnify HIAR for the TCPA Action, Settlement, or Consent Judgment; and (6) grant such other relief as this Court deems just and appropriate.

Date: March 18, 2013

Respectfully submitted,

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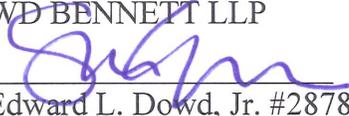
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**CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULES 55.03 AND 84.06**

This brief complies with the requirements of Rule 55.03. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 84.06 because this brief contains 18,156 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2013, a true and correct copy of the foregoing brief was filed electronically using the Missouri e-Filing System, which automatically will send email notification to counsel of record, including:

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