SC 93026

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

RESPONDENT'S SUBSTITUTE BRIEF

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INTRODUCTION

Karen S. Little, LLC ("Little") filed a class action lawsuit for illegal junk faxes against HIAR Holdings, LLC ("HIAR"). HIAR promptly tendered defense of that suit to its insurer, Columbia Casualty Company ("Columbia"). Even though it was already defending other insureds against the same type of junk faxing claims in neighboring Illinois and Kansas, Columbia refused to defend HIAR. HIAR was thus abandoned and forced to defend itself at its own expense for five years before finally agreeing to a class wide settlement. The settlement was limited to its insurance assets as approved in *Schmitz v. Great Am. Assurance Co.*, 337 S.W.3d 700 (Mo. banc 2011).

Because the underlying case was a class action, the settlement was subject to notice, an opportunity to object, and a court hearing to determine whether it was fair, reasonable and not the result of collusion. After consideration of all of the record evidence and a hearing, the trial court in the underlying case found the settlement was fair, reasonable and not the product of collusion and entered a final judgment for the class.

This coverage action followed when Little sought to collect the underlying judgment against Columbia for the class. The Columbia policies covered HIAR for both "advertising injury" and "property damage." The trial court, like the vast majority of courts that have considered these coverage questions, held that both coverages applied because claims for unsolicited fax advertisements are within the plain and ordinary meaning of "advertising injury" and "property damage." The Appellate Court reversed because it felt compelled to follow the novel and unprecedented holding in *Olsen v.*

Siddiqi, 371 S.W.3d 93 (Mo. App. 2012), that statutory damages are not "property damage." As discussed below, *Olsen* was wrongly decided because the plain and ordinary meaning of "property damage" encompasses statutory damages caused by illegal junk faxes. Moreover, *Olsen* did not compel reversal here because the policy in *Olsen* expressly excluded "advertising injury" coverage. *Id.* at 97-98. In contrast, the policy Columbia issued to HIAR, does not exclude advertising injury coverage, so *Olsen* was not controlling. The trial court expressly found coverage under "advertising injury." LF 3453. Thus, Columbia had a duty to defend HIAR even if statutory damages for illegal junk faxes are not property damage because they still cause "advertising injury." Columbia wrongfully refused to defend and therefore is liable for the full underlying judgment pursuant to *Schmitz*, and the trial court's judgment should be affirmed.

STATEMENT OF FACTS

I. The Class Action Petition in the Underlying Suit.

The underlying case began in 2002 when Onsite Computer Consulting Services, Inc. ("Onsite") filed a Class Action Petition alleging HIAR violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. (hereinafter "TCPA") by hiring Sunbelt Communications & Marketing, LLC ("Sunbelt") to send unsolicited fax advertisements in October 2001. LF 50. Sunbelt sent 12,500 junk faxes for HIAR. LF 208. The TCPA allows a private cause of action to recover the "greater" of "actual monetary loss" or "$500" for each unsolicited fax advertisement sent. 47 U.S.C. § 227 (b)(3) (B). In 2004, Little filed a Second Amended Class Action Petition to substitute for Onsite as the new named plaintiff. LF 36. The initial and amended petitions sought

recovery under the TCPA for all persons within the 314 or 636 area codes to whom HIAR sent faxes advertising its Holiday Inn business. LF 39, 45, 52.

II. The Columbia Policy.

Columbia issued policy No. 195943024 to HIAR on June 1, 2001, effective from that date to June 1, 2002. LF 133. HIAR sent its advertising faxes in violation of the TCPA on October 17, 2001, so they were sent during the Policy period. *Id.*; LF 119. The Policy provided coverage for "property damage" caused by an "occurrence" which means "an accident." LF156, LF165-166. In addition, the Policy covered "'advertising injury' caused by an offense committed in the course of advertising your goods, products or services." LF159. "Advertising injury" was defined as, "oral or written publication of material that violates a person's right to privacy." LF 163.

III. HIAR's Tender of Defense and Columbia's Refusal to Provide Coverage.

Promptly after receiving the Petition, HIAR tendered its defense to Columbia. LF 208, LF 217. On December 2, 2002, Columbia sent a letter to HIAR refusing to defend the case and denying coverage. LF 226-31. HIAR asked for a defense and coverage again in October, 2003, but Columbia repeated its refusal to defend and denied coverage. LF 220-23, LF 232-44. On March 3, 2005, Little made a settlement offer to HIAR that was within the Policy limits. LF 220. The next day, HIAR forwarded the demand to Columbia. LF 208, LF 225. Columbia again refused to defend or cover the claims, and also refused to participate in the proposed settlement. LF 245-262. HIAR received no further correspondence from Columbia. LF 208.

IV. Discovery, Settlement, Approval, Class Certification, and Judgment in the Underlying Case.

HIAR's director of sales was Thomas Dempsey. LF 1896. Dempsey testified that he hired Sunbelt to broadcast fax advertisements to Sunbelt's target lists in the St. Louis area. LF 1897-1989, LF 932. Sunbelt produced its target lists and other computer records to Little's expert, Robert Biggerstaff. LF 2388. Biggerstaff analyzed Sunbelt's records and identified the fax (image #8155) that Sunbelt sent for HIAR. LF 2392. Biggerstaff was also able to retrieve some of the targets to whom Sunbelt successfully faxed image #8155 and these included Little's fax number. LF 2394 (¶26), LF 2409 (line 355), LF 2186. Thus, there is clear proof that HIAR's fax advertisement was successfully sent by Sunbelt to Little. *Id.*[1]

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[1] Columbia misleadingly cites Little's deposition testimony to try to raise doubt on this fact, but her testimony only shows that she did not specifically recall receiving HIAR's unwanted junk fax. Appellant's Substitute Brief, pp. 12-13. Columbia also claims she could not identify her name on the list of Sunbelt's targets, but the list she was shown at the deposition was incomplete. LF 2237 at 78-80 (lines 25, 1-3). And Columbia's claim that she did not reside "within the geographical areas defined by the certified class" is also false because the certified class was defined as all persons to whom Sunbelt sent HIAR's advertising faxes, not geographical areas. LF 2117 (The Petitions had previously defined the class by area codes 636 and 314 (LF 39), and Little's area code was 636. LF 2186.) In any event, Sunbelt actually sent HIAR's fax to Little's

Dempsey testified that:

- He did no investigation into the "legality of sending advertising faxes," and he "relied on what they [Sunbelt] told" him. (LF 1906-1907);
- He did not know about the TCPA and did not ask Sunbelt about laws or regulations governing faxing (LF 1889, LF 1899-1900, LF 1906-1907);
- Sunbelt failed to tell him that it did not have express permission from the fax recipients, or that express permission was required (LF 1900-01, LF 1907); and
- 12,500 faxes were sent (LF 1893, 1895).

Dempsey also executed an affidavit stating:

- We contacted Sunbelt and HIAR was advised by Mark Olson that Sunbelt's fax advertising program complied with all applicable laws (LF 2055);

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fax number as shown by Sunbelt's computer records, and this question of fact on the underlying merits was resolved by the underlying judgment. LF 2394 (¶26), LF 2409 (line 355), LF 2186.

- Mark Olson of Sunbelt represented to HIAR that Sunbelt had permission to send facsimile advertisements to the 100,000 fax numbers in the St. Louis area (*Id.*); and
- HIAR believed that Sunbelt had the consent of those persons listed in their 100,000 St. Louis database to receive advertising faxes. (*Id.*)

Following Columbia's abandonment of HIAR, its refusal to participate in settlement negotiations, and HIAR's providing a defense at its own expense for more than five years, HIAR and Little agreed to a class wide settlement. LF 2021-2035. On January 30, 2007, Little moved for preliminary approval of the settlement. LF 2008. Plaintiff submitted evidence in support of the reasonableness of the settlement, including Dempsey's sworn affidavit. LF 2054-2109. The trial court in the underlying case considered the evidence and found it was sufficient to grant preliminary approval and to send notice to the class. LF 2111-14. The notice provided a website where class members could get more information. *Id.* The notice allowed class members to file objections before March 23, 2007, and set a final hearing date of April 12, 2007. *Id.* No objections were filed. LF 2124.

Following the final approval hearing on April 12, 2007, the trial court (Gaertner, J.) entered a Final Judgment Approving Settlement and Class Certification against HIAR in the underlying case (the "Judgment"). LF 112-128. Based upon the record evidence and statements made in open court, the trial court found that: (1) the settlement amount was reasonable; (2) the decision to settle was made in good faith; (3) the settlement amount was reasonable because it is what a reasonably prudent person in the position of

HIAR would have settled for on the merits of Plaintiff's claims; (4) on or about October 17, 2001, Sunbelt sent advertisements by facsimile to 12,500 persons within the 314 and 636 area codes; (5) at least 10,000 of the advertisements were received; (6) HIAR did not intend to injure the recipients of the faxes; (7) HIAR believed Sunbelt had the recipients' consent to send advertisements by fax; and (8) HIAR believed that the recipients had consented to receive lodging information by fax. LF 118-21. The court entered judgment in favor of the Class and against HIAR and HMA Riverport, L.L.C., jointly and severally in the total amount of $5,000,000.00. LF 121. The court also approved HIAR's assignment to the Class of all of HIAR's claims, rights to payment, and rights of action against every insurer, including Columbia and the Columbia Policy. *Id*.

STANDARD OF REVIEW

Appellant's Points A-E relate to the trial court's grant of summary judgment, its holding that Columbia has a duty to indemnify the Underlying Judgment, and its denial of Columbia's post judgment motion to amend the judgment. Review of the summary judgment rulings is *de novo*. *See ITT Comm. Fin. Corp. v. Mid–Am. Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). Review of the denial of the motion to amend the judgment is for abuse of discretion. *See LaRose v. Wash. Univ.*, 154 S.W.3d 355, 370 (Mo. App. 2004). Point H relates to the trial court's denial of leave to amend to add new parties. That order is reviewed for abuse of discretion. *See Asmus v. Capital Region Family Practice*, 115 S.W.3d 427, 432 (Mo. App. 2003).

ARGUMENT

I. Columbia Had a Duty to Defend and Indemnify and Breached those Duties. (responding to Appellant's points relied on A, B, C, and E)

A. Insurance Policies Should Be Construed in Favor of Coverage and in Accordance with the Ordinary Meaning of the Language Used.

Most of the issues raised by Columbia turn on a technical and legalistic reading of the language in its Policy, but terms in an insurance policy must be given their "ordinary meaning." *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. 1997). Thus, contrary to Columbia's arguments the word "damages" as used in its Policy should be given the "broad and inclusive" construction "that a layperson would reasonably understand 'damages' to mean." *Id.* No lay person would reasonably understand that "damages" excludes "statutory damages," "penal" claims cannot cause "damage," or "damages" mean only "compensatory damages." Columbia's Policy did not define "damages' or modify the word by preceding it with the adjective "compensatory," so Columbia should not be allowed to add those qualifiers now.

An insurer's duty to defend does not depend on whether the underlying petition makes particular allegations or has language affirmatively bringing the claims within the scope of the insurance. "To extricate itself from a duty to defend the insured, the insurance company must prove that there is ***no possibility*** of coverage." *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 79 (Mo. App. 2005) (emphasis in original; internal citations omitted). The insurer may refuse to defend only if the petition's allegations preclude any possibility of coverage. *Id.* at 83 (emphasis added). The insurer

has a duty to defend if the petition alleges facts that give rise to a claim potentially within the policy's coverage. *See McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 170-71 (Mo. banc 1999). "The facts decided in the underlying action most often will determine whether there is a duty to indemnify." *Assurance Co. of Am. v. Secura Ins. Co.*, 384 S.W.3d 224, 227 (Mo. App. 2012). Ambiguities are construed in favor of coverage. *See Chamness v. Am. Family Mut. Ins. Co.*, 226 S.W.3d 199, 204 (Mo. App. 2007).

Here, Little sought recovery of "the full amount of statutory damages allowed under 47 U.S.C. § 227 (b) (3), including treble damages." LF 46. Under the above principles for assessing coverage, this cannot be construed as a claim for $500 in statutory damages only. It is a claim for all statutory damages that Little might recover under the TCPA which necessarily means the "greater of actual monetary loss or a fixed sum of $500 per violation plus treble damages if appropriate." *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 880 (8th Cir. 2005). Thus, Little's Petition did not exclude potential recovery of actual damages. *Id.*

B. The TCPA Is a Remedial Statute that Gives Rise to Claims for Damages.

1. The History of the TCPA Shows its Remedial Purpose to Protect Privacy Rights of Individuals and Businesses.

The TCPA became law in 1991 and is now more than twenty years old. Pub. L. No. 102-243, 105 Stat. 2395 (codified as 47 U.S.C. § 227). Sending an "unsolicited advertisement" to a telephone facsimile machine has always been a violation of the Act.

47 U.S.C. § 227 (b) (1) (C). "Unsolicited advertisement" is defined to include "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* (a) (5).

The TCPA's express purpose was to protect "privacy rights." H.R. Rep. No. 102-317, pp. 5-6 (1991). The final House Report explained the purpose as follows:

> The purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment. … [I]t restricts use of facsimile machines, computers or other electronic devices to send unsolicited advertisements.

H.R. Rep. No. 102-317, pp. 5-6 (1991).

Congress was specifically concerned with protecting businesses. *Telemarketing Practices: Hearing on H.R. No. 628, H.R. No. 2131, and H.R. No. 2184 before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 1st Sess., pp. 54-55 (1989) ("[B]usiness owners [were] virtually unanimous in their view that they [did] not want their fax lines tied up by advertisers trying to send messages.") "Extensive research … revealed no case of a company (other than those advertising via fax) which oppose[d] legislation restricting advertising via fax." *Id.* at 54 n.35.

From its inception, the TCPA has provided that "a person or entity" may bring "an action based on a violation … to recover for actual monetary loss from such violation, or

to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227 (b) (3) (B). The TCPA does not allow recovery of costs or attorney fees. *Id.* (b) (3) (B). It does not allow for recovery of statutory damages in addition to actual damages, only permitting recovery of "whichever is greater." *Id.* And in Missouri, corporations cannot bring a claim without hiring a licensed lawyer. *Property Exchange & Sales, Inc. (PESI) by Jacobs v. Bozarth*, 778 S.W.2d 1, 2-3 (Mo. App. 1989). This is true in federal courts as well. *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council,* 506 U.S. 194, 201-02 (1993) (citing *Osborn v. President of Bank of U.S.,* 22 U.S. (9 Wheat.) 738, 829 (1824)).

The sponsor of the TCPA explained:

> The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

Remarks of Sen. Hollings, 137 Cong. Rec. 16205-06 (1991); *see also All Am. Painting, LLC v. Fin. Solutions and Assocs., Inc.*, 315 S.W.3d 719, 724 (Mo. banc 2010) ("Here, plaintiffs owned the machines and computers on which the advertisements were received. Plaintiffs paid for the ink and paper that was consumed to print those advertisements. As such, plaintiffs were the parties damaged by the receipt of the unsolicited advertisements. The legislative history of the TCPA shows that the act was intended to protect against this type of harm.")

The TCPA's remedy of $500 in statutory damages is also consistent with the common law doctrine of "general" damages which allows recovery for invasions of privacy and other torts where damage is inherent but difficult to quantify without the need to prove or quantify any actual loss. *Doe v. Chao*, 540 U.S. 614, 621 (2004) ("Traditionally, the common law has provided such victims with a claim for 'general' damages, which for privacy and defamation torts are presumed damages: a monetary award calculated without reference to specific harm); *Terra Nova Ins. Co. v. Fray Witzer*, 869 N.E.2d 565, 576 (Mass. 2007) ("The statutory provision allowing for recovery of the greater of the actual monetary loss or $500 to compensate consumers for difficult to quantify business interruption losses does not amount to punitive damages."); *Restatement (Second) of Torts* § 621 (comment a) ("At common law general damages have traditionally been awarded not only for harm to reputation that is proved to have occurred, but also, in the absence of this proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved.") Missouri also recognizes this principle. *See Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684, 687 (Mo. App. 1986). The $500 in statutory damages available under the TCPA serves the same compensatory purpose as this well-established common law principal of general compensatory damages because damage is inherent in any violation of the TCPA but difficult to quantify. *All Am. Painting*, 315 S.W.3d at 724.

Despite numerous amendments, legal challenges, and frequent class action litigation, Congress has never amended the amount of damages available under the TCPA. *See, e.g., The Junk Fax Protection Act of 2005*, Sen. Rep. No 109-76 (June 7,

2005); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. __, 132 S. Ct. 740, 753 (2012) (finding federal question jurisdiction for TCPA claims); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002) (finding that TCPA claims may be brought in Missouri courts without enabling legislation and by businesses); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307 (Ill. 2006) (finding that insurer had a duty to defend a TCPA class action).

In finding federal question jurisdiction for TCPA claims, the United States Supreme Court stated:

> The current federal district court civil filing fee is $350. 28 U.S.C. § 1914(a). How likely is it that a party would bring a $500 claim in, or remove a $500 claim to, federal court? Lexis and Westlaw searches turned up 65 TCPA claims removed to federal district courts in Illinois, Indiana, and Wisconsin since the Seventh Circuit held, in October 2005, that the Act does not confer exclusive jurisdiction on state courts. All 65 cases were class actions, not individual cases removed from small-claims court. There were also 26 private TCPA claims brought initially in federal district courts; of those, 24 were class actions.

132 S. Ct. at 753.

The TCPA's ban on junk faxing and the provision of a private right of action are now more than twenty years old. TCPA class actions and the insurance issues raised in this case were apparent and well known before Columbia last refused to defend HIAR. *See, e.g., Universal Underwriters*, 401 F.3d 876; *Hooters of Augusta, Inc. v. Am. Global*

Ins. Co., 157 Fed. Appx. 201 (11th Cir. 2005); *Park Univ. Enters., Inc. v. Am. Cas. Co.*, 314 F. Supp. 2d 1094 (D. Kan. 2004), *aff'd* 442 F.3d 1239 (10th Cir. 2006); *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N.D. Tex. 2003), *aff'd* 96 Fed. Appx. 960 (5th Cir. 2004); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744 (M.D.N.C. 2002); *Valley Forge Ins. Co. v. Swiderksi Elecs., Inc.,* 834 N.E.2d 562 (Ill. App. Ct. 2005), *aff'd*, 860 N.E.2d 307 (Ill. 2006) (finding insurer had duty to defend TCPA class action); *Acuity v. Superior Mktg. Sys., Inc.*, No. 02 CH 8643, 2003 WL 24004567 (Ill. Cir. Ct. May 30, 2003); *Insurance Coverage for Claims of Violations of the Telephone Consumer Protection Act (47 U.S.C.A § 227)*, 3 A.L.R. 6th 625 (2005). In the twenty years since the TCPA was enacted, it has been repeatedly challenged and generated extensive class action litigation, but Congress has not changed it or the private remedies it provides.

2. The TCPA Is Not a Penal Statute.

As the above legislative history shows, the TCPA's liquidated damages of $500 per fax was intended to provide a "fair" remedy, and the overwhelming majority of courts to have considered the question have concluded as much. For example, the Eighth Circuit Court of Appeals held:

> Whether we view the fixed award as a liquidated sum for actual harm or an incentive for aggrieved parties to act as private attorneys general, or both, it is clear that the fixed amount serves more than purely punitive or deterrent goals. Also, the fact that Congress elected to make treble damages

> available separate from fixed damages strongly suggests that the fixed damages serve additional goals other than deterrence and punishment.

Universal Underwriters, 401 F.3d at 881.

Similarly, the Eleventh Circuit Court of Appeals held:

> Florida's public policy prohibiting insuring against punitive damage liability does not apply. The TCPA provides for $500 statutory damages and for treble damages for willful or knowing conduct, 47 U.S.C. § 227 (b)(3), which is an indication that the statutory damages were not designed to be punitive damages.

Penzer v. Transp. Ins. Co., 545 F.3d 1303, 1311 (11th Cir. 2008).

The Massachusetts Supreme Court also concluded:

> [T]he insurers have offered little evidence to show that Congress intended this provision to be punitive in nature. As with countless other statutes, the TCPA's damages provision serves to "liquidate uncertain actual damages and to encourage victims to bring suit to redress violations."

Terra Nova, 869 N.E.2d at 576 (quoting *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.,* 300 F. Supp. 2d 888, 893 (E.D. Mo. 2004) (quoting *Mourning v. Family Publ. Serv., Inc.,* 411 U.S. 356, 376 (1973))).

And many other courts have adopted the same view. *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F. 3d 768, 776-79 (11th Cir. 2011) (holding that even the treble damages available under the TCPA are not punitive because "given the relatively small amount of statutory damages available under the TCPA, trebling these damages appears

to be a mechanism to encourage victims of unsolicited 'junk' faxes to file suit"); *Subclass 2 of Master Class of Plaintiffs v. Melrose Hotel Co.*, 503 F.3d 339 (3d Cir. 2007), *aff'g and adopting reasoning of Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F. Supp. 2d 488, 509 n.10 (E.D. Pa. 2006) ("The Court also rejects St. Paul's argument that the TCPA is a penal statute."); *Hooters,* 157 Fed. Appx. at 209 (11th Cir. 2005) ("the TCPA was a remedial statute, not a penal statute"); *Kavu, Inc. v. Omnipak Corp*., 246 F.R.D. 642, 649 (W.D. Wash. 2007) (damages available under the TCPA are not punitive); *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659, 667 (Ohio App. Ct. 2009) (damages under the TCPA are not punitive in nature); *Terra Nova*, 869 N.E.2d 565 (TCPA is a remedial statute intended to address misdeeds suffered by individuals, rather than one that punishes public wrongs); *USA Tax Law Center, Inc. v. Office Warehouse Wholesale, LLC*, 160 P.3d 428, 434 (Colo. App. Ct. 2007) ("The TCPA is a remedial statute"); s*ee also Mo. ex rel. Nixon v. Am. Blast Fax, Inc.,* 323 F. 3d 649, 654-55 (8th Cir. 2003) (detailing compensatory nature of liquidated damages).

This overwhelming body of cases also is not only consistent with the legislative history and purpose of the TCPA, it is also consistent with Missouri law. In *Tabor v. Ford*, the Appellate Court noted:

> [I]f a statute imposes a penalty or forfeiture which accrues to the party aggrieved, to be recovered by private action, although not limiting the right of recovery to the amount of actual loss, it is remedial and not a penal statute. But if a statute imposes a penalty or forfeiture, to be recovered by the Government, then the statute is regarded as penal and not remedial.

> Measured by the above rule the statute in question is both penal and remedial; penal in that the Government may recover penalties against violators, and remedial in that individuals may recover actual damages as well as cumulative damages, by private action.

240 S.W.2d 737, 740 (Mo. App. 1951). Thus, the trial court was correct to apply the view of the cases cited above not only because it was persuasive but also because nothing unique to Missouri compelled a different result.

3. TCPA Claims Give Rise to Damages and the *Olsen* Opinion Should Be Abrogated.

It is self-evident that when a person violates the TCPA by sending a junk fax to a victim, the victim necessarily suffers damages because of the interference and loss of use of his fax machine and telephone line, the use of toner and paper, and the time wasted sorting wanted faxes from unwanted ones. Thus, it would seem equally clear that Little's Petition sought recovery of "damages" from HIAR, and when HIAR settled, HIAR paid damages to Little and the Class. Nevertheless, the Appellate Court in this case believed it was compelled by *Olsen*, 371 S.W.3d 93, to find otherwise.

The majority in *Olsen* ignored the overwhelming majority of precedent including *Tabor* and the legislative history of the TCPA to find that the TCPA's statutory damage remedy was penal and, therefore, not damages. In a dissent, Judge Mooney noted the novel and wholly unprecedented nature of the majority's holding. 371 S.W.3d at 98-99. Judge Mooney's dissent was correct and should be adopted as the correct application of the law in Missouri.

To reach its unprecedented and novel result, the *Olsen* majority relied principally on dictum from a *dissenting* opinion that is over one hundred years old. 371 S.W.3d at 97 (citing *State ex rel. McNamee v. Stobie*, 92 S.W. 191, 212 (Mo. banc 1906) (Marshall, J. dissenting)).[2] The majority pulled the following quote from the lengthy *McNamee* dissent, "Where the sum given by a statute is called damages by it, the fact will not prevent its being a penalty to be recovered by penal action, if such is its real nature." *McNamee* had absolutely nothing to do with insurance or construction of an insurance contract. *Id.* Instead, it was concerned solely with whether a Justice of the Peace could proceed on a criminal complaint for trespass against St. Louis police officers who had entered a racetrack outside of the city limits. The case is completely irrelevant to the ordinary meaning of language in an insurance policy issued in 2001, and it was error to rely on dictum from an ancient dissent to limit the word "damages" wherever found in an insurance contract to "compensatory damages" based on such an esoteric legal theory.

The *Olsen* majority also cited *Collier v. Roth*, 468 S.W.2d 57 (Mo. App. 1971), but it was also not a coverage case and had nothing to do with construing the language of an insurance policy. *Collier* simply held "penal" statutes should be "strictly construed" and this applied to the treble damage provision of the Unfair Milk Sales Practices Act. *Id.* at 60 (citing *Powell v. St. Louis Dairy Co.*, 276 F. 2d 464, 467 (8th Cir. 1960)). In addition, the *Olsen* majority quoted, "[w]here a statute is remedial in one part and penal

[2] The *Olsen* majority did not acknowledge that it cited to the dissenting opinion in the case and it is not clear if the court knew it was citing the dissent. 371 S.W.3d at 97.

in another, it should be considered as penal when enforcement of the penalty is sought." *Id.* But, under *Collier*, as adopting *Powell*, the part of the TCPA that is the penalty is the "treble damages." *Id.* The base liquidated minimum damages of $500 is not a penalty. This is in line with the Eighth Circuit's reasoning in *Universal Underwriters*: "the fact that Congress elected to make treble damages available separate from fixed damages strongly suggests that the fixed damages serve additional goals other than deterrence and punishment." 401 F. 3d at 881.

Olsen also cited *Farmland Industries, Inc. v. Republic Ins. Co.,* 941 S.W.2d 505, 510–11 (Mo. banc 1997). But *Farmland* did not limit coverage, it held "damages" include the cost of providing equitable relief in the form of environmental clean-up costs. 941 S.W.2d at 508. The Court held that these costs were "damages" because "the equitable relief at issue is a cost that Farmland is legally obligated to pay as compensation or satisfaction for a wrong or injury." *Id.* at 509. It further held that "[t]he word 'damages' is used to make clear that insurers are obligated to cover both direct and consequential losses because of property damage for which an insured can be held liable, irrespective of whether the claimant itself has sustained property damage." *Id.* at 510.

The *Farmland* language quoted by the *Olsen* majority was dicta in response to an argument by the insurer. The insurer argued that construing damage to include equitable costs would render the word superfluous because it would no longer have any meaning in the phrase "legally obligated to pay as damages." The Court noted this was not true because it still could preclude coverage for a "fine" or "penalty." *Id.* at 510-11. But the Court was obviously discussing the issue of fines or penalties imposed by the government

for environmental violations, and this is exactly the same distinction the *Tabor* court made. The *Farmland* opinion says nothing that suggests the statutory damages under a statute like the TCPA are not "damages" where it is plainly "a cost that [the insured] is legally obligated to pay as compensation or satisfaction for a wrong or injury." *Id.* at 510. The *Olsen* majority's *Farmland* quote is not relevant to coverage of a private cause of action under the TCPA, and its citation to it is no more persuasive than its citation to the dissent in *McNamee*.

Here, as Judge Mooney explained in his dissent in *Olsen*, the Eighth Circuit has explained at length that the $500 minimum in statutory damages are compensation or reparation for an injury that serves to "liquidate uncertain actual damages" and not purely punitive. *See Olsen*, 941 S.W.3d at 99 (quoting *Universal Underwriters*, 401 F. 3d at 881). Contrary to the majority's discussion in *Olsen*, the *Universal Underwriters* holding does not depend on the fact that the policy in that case provided coverage for punitive damages. Rather, the Eighth Circuit stated, "[E]ven if Universal's proffered definition did not create an internal inconsistency [by including punitive damages but excluding civil fines, penalties, or assessments], a duty to defend would exist because a portion of the fixed amount represents a liquidated sum for actual harm for uncertain and hard to quantify actual damages." *Id.* at 880. The $500 is Congress' attempt to liquidate the damages suffered each time a junk fax is sent by settling on a number that takes into account both the ordinary case which involves a small actual cost and the extraordinary one such as a junk fax transmission closing the communication network of the pharmacist who is unable to receive an emergency prescription by a doctor, causing a patient to die

or the businessman who is unable to receive a contract losing him a deal. Additionally, neither costs nor attorneys' fees are recoverable on a TCPA claim. "The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer." (137 Cong. Record S16205 (daily ed. Nov. 7, 1991) (statement of Senator Hollings, sponsor of the TCPA)).

Moreover, in *Tabor*, the court held that **"if a statute imposes a penalty or forfeiture which accrues to the party aggrieved, to be recovered by private action, although not limiting the right of recovery to the amount of actual loss, it is remedial and not a penal statute.** But if a statute imposes a penalty or forfeiture, to be recovered by the Government, then the statute is regarded as penal and not remedial." 240 S.W.2d at 740. (emphasis added); *see also Shqeir v. Equifax, Inc.*, 636 S.W.2d 944, 947 n.2 (Mo. 1982) (adopting *Tabor* definition of what is penal); *Addison v. Jester*, 758 S.W.2d 454, 457 (Mo. App. 1988) (usury law was remedial). Thus, if "a 'penalty' is a forfeiture inflicted by a penal statute," 371 S.W.3d at 97, the TCPA damages cannot be one because they "accrue to the party aggrieved." And the minimum statutory liquidated damages under the TCPA are damages under the *Farmland* standard.

The Statutory Damages provided by the TCPA are within the plain and ordinary meaning of damages. Thus, contrary to Columbia's arguments, the undefined word "damages" should be given the "broad and inclusive" construction "that a layperson would reasonably understand 'damages' to mean." *Id.* No lay person would reasonably understand that (1) "damages" excludes "statutory damages;" (2) "damages" means only "compensatory damages;" or (3) claims only a legal scholar might classify as "penal"

cannot legally obligate the insured to pay "damages." Columbia did not define "damages" in its Policy and did not specify that its Policy only covered compensatory damages. It should not be allowed to rewrite its Policy now to narrow the plain and ordinary meaning of the language it chose to use.

C. Advertising Injury Coverage Exists.

(responding to Appellant's Point B)

1. The policy language covers the underlying claims.

Columbia argues that the Policy's definition of "personal and advertising injury" does not encompass the claims at issue, but the TCPA was enacted more than a decade before Columbia issued the Policy. If Columbia had wanted to define "advertising injury" to exclude TCPA claims it could have done so. Columbia was the master of the policy it offered for sale, and that policy broadly covers, without exception, every "publication of material that violates a person's right to privacy." The policy makes no attempt to limit the scope or types of privacy rights that are covered. The Class Action Petition alleged a publication that violated the class members' rights of privacy created by the TCPA, and those allegations support the underlying judgment.

The TCPA was enacted to protect privacy rights by restricting unsolicited facsimile transmissions. *See Int'l Science & Tech. Inst. v. Inacom Commc'ns*, 106 F.3d 1146, 1150-51 (4th Cir. 1997). The Eighth Circuit interpreting Missouri law found coverage for TCPA claims based on the violations of privacy rights alleged. *See Universal Underwriters*, 401 F.3d at 881-83 (construing Missouri law).

Columbia's policy provides liability coverage for violations of a right of privacy. "In common parlance, 'privacy' is understood to mean 'freedom from unauthorized intrusion.'" *Hooters of Augusta, Inc. v. Am. Global Ins. Co.,* 272 F. Supp. 2d 1365, 1372 (S.D. Ga. 2003), *aff'd*, 157 Fed. Appx. 201, 208 (11th Cir. 2005) (citing Webster's New Collegiate Dictionary 908 (1979)). Merriam-Webster's Online Dictionary defines "privacy" as "(a) the quality or state of being apart from company or observation; seclusion; (b) freedom from unauthorized intrusion (one's right to privacy)." Merriam-Webster's Online Dictionary at http://www.merriam-webster.com/dictionary/privacy (parenthetical in original) (viewed April 1, 2013). *See also* American Heritage Dictionary 669 (4th ed. 2001) (defining "privacy" as "the condition of being secluded from others").

Junk faxes disturb their recipients and invade upon their seclusion. *See Nixon*, 323 F.3d at 654–55; *Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296, 300-303 (Cal. App. Ct. 2003) (discussing the legislative history of the TCPA and holding the Act to be constitutional) (quoting Enrolled Bill Report: "[w]e view unsolicited faxed ads as an invasion of privacy…."). "The TCPA mandated that the FCC implement regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising." *Id.* at 310.

All three state Supreme Courts that have issued definitive rulings on the question found in favor of coverage. *See Penzer v. Transp. Ins. Co.*, 29 So.3d 1000 (Fla. 2010); *Terra Nova*, 869 N.E.2d 565; *Valley Forge*, 860 N.E.2d 307. Many state appellate courts have also found advertising injury coverage. *See Auto-Owners Ins. Co. v. Tax*

Connection Worldwide, LLC, No. 306860, 2012 WL 6049631 (Mich. App. Ct. Dec. 4, 2012) (per curiam); *Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250 (Wis. App. Ct.), *review granted*, 827 N.W.2d 95 (Wis. 2012); *Motorists Mut*, 912 N.E.2d 659; *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App. Ct. 2004); *see also Penn Nat'l Ins. Co. v. Group C Commc'ns., Inc.,* Case No. L-134-09, 2011 WL 3241491, at *6-8 (N.J. Super. A.D. Aug. 1, 2011) (holding that litigation over "business of advertising" exclusion was necessary because TCPA claims were otherwise covered by "advertising injury" coverage grant).

Further, in addition to the discussion in *Universal Underwriters*, three of the four federal courts of appeal to resolve junk fax coverage claims under the same "personal and advertising injury" language used by Columbia in its Policy also found coverage. *See W. Rim Inv. Advisors, Inc. v. Gulf Ins Co.*, 96 Fed. Appx. 960 (5th Cir. 2004), *affirming* 269 F. Supp. 2d 836 (N.D. Tex. 2003); *Park Univ.*, 442 F.3d 1239; *Hooters,* 157 Fed. Appx. at 208.

Given that Missouri case law holds that there is coverage as long as there exists any reasonable interpretation of an insurance policy under which coverage exists—*see, e.g., Velder v. Cornerstone Nat. Ins. Co.*, 243 S.W.3d 512, 517 (Mo. App. 2008) ("When an insurance contract can be interpreted in two equally reasonable ways, we must construe the insurance contract against the drafter") (quoting *Barron v. Shelter Mut. Ins. Co.,* 230 S.W.3d 649, 653 (Mo. App. 2007))—Columbia essentially is arguing that all of these courts interpreted the policy language so unreasonably as to be beyond the pale. That position is untenable. *See Terra Nova*, 869 N.E.2d at 573 ("we cannot ignore the

body of national case law addressing the same or similar policy language and falling on both sides of this interpretive ledger. It is fair to say that even the most sophisticated and informed insurance consumer would be confused as to the boundaries of advertising injury coverage in light of the deep difference of opinion symbolized in these cases."); *Penzer*, 29 So.2d at 1009 (in concurrence).

Columbia relies heavily on *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631 (4th Cir. 2005), a case that construed an advertising injury clause in a St. Paul policy that was worded much differently, and more narrowly, than Columbia's policy language. The St. Paul policy defined "advertising injury" as "making known to any person or organization ['covered' or 'written or spoken'] material that violates a person's right of privacy." *Id.* at 634. The clause "making known to any person" arguably requires a disclosure to third parties that violates a plaintiff's right of privacy.

United States Supreme Court Associate Justice David Souter, sitting by designation in the First District Court of Appeals, explained why the language difference is significant and why the language used in Columbia's Policy provides coverage while that in the St. Paul policies did not:

> The relative specificity of 'making known' thus distinguishes it from the more general verb 'publishing,' which can be used in either of two normal senses, to refer to revealing information or merely to the act itself of conveying material considered apart from its content.

Cynosure, Inc. v. St. Paul Fire & Marine Ins. Co., 645 F.3d 1, 4 (1st Cir. 2011). *See Penzer*, 545 F.3d at 1308-09 (same). In sum, if Columbia wished to limit its privacy

coverage to secrecy rights or particular content, it could have defined advertising injury as St. Paul did. It did not. The Court should enforce the actual policy language used, and not rewrite the policy for Columbia.

Moreover, contrary to Columbia's unsupported assertions (Appellant's Substitute Brief, pp. 41-42), even if Columbia were right and Justice Souter were wrong, TCPA violations *do* depend upon the content of the material transmitted; the TCPA prohibits only the transmission of a particular content - advertising. Thus, Columbia's argument that its policy does not cover the claims at issue because it covers only "content-based" violations fails for this additional reason.

The privacy interest created by the TCPA is based on content. The TCPA bans only "advertisements," defined as "any *material* advertising the commercial availability of or quality of any property, goods or services." 47 U.S.C. § 227 (a) (5) (emphasis added). It is common sense that people find advertising material intrusive in a way that they do not find other material. Certainly, Columbia's policy language is capable of being reasonably construed to cover a person's privacy interest in seclusion from advertising content. *See Motorists Mut.*, 912 N.E.2d at 665 ("Motorists' argument fails, however, because the content of the unsolicited faxes—advertising—was indeed objectionable.").

The other things covered under the "personal and advertising injury" heading are content-based, Columbia argues, so therefore "publication, in any manner, of material that violates the right to privacy" must also be confined to the violation of a secrecy right.

This argument is wrong because the content – advertising – is an element of Little's TCPA claim, but it also fails as a matter of law and logic.

Columbia's argument is akin to arguing that one can discern the character of items on a grocery list by examining what else is on the list. Nothing in the policy indicates that the five offenses are intended to be related to one another through any particular or limited theme. The various "offenses" in the "advertising injury" definition cover a wide range of potential liabilities an insured might face. Each is unique and independently covered. For this reason, the parties are not discussing any coverage grant other than that for "oral or written publication of material that violates a person's right of privacy."

Citing *State v. Jones*, 172 S.W.3d 448, 452 n.3 (Mo. App. 2005), Columbia invokes the doctrine of *noscitur a sociis*, but fails to note that the case concerned construction of a criminal statute. Appellant's Substitute Brief, p. 41. In contrast to insurance policies, which must be construed liberally in favor of coverage, criminal statutes must be construed strictly against the state. 172 S.W.3d at 456. Moreover, the doctrine only applies to resolve ambiguities, and insurers must defend unless coverage is not even fairly debatable. *See Chamness*, 226 S.W. 3d at 204. Ambiguities are resolved in favor of coverage, not by what a court might decide is the best potential meaning among many of an ambiguous term. *Id.*

Columbia also relies on the "last antecedent" rule. That rule is not an absolute. *See Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 688 (Mo. banc 2010) (rule does not apply "[w]here several words are followed by a clause as much applicable to the first and other words as to the last"); *see also Penzer* 29 So.3d at 1007 ("This rule of

statutory construction … is not controlling or inflexible.") Moreover, applying it to the present case does not leave the phrase "oral or written publication of material that violates a person's right to privacy" incapable of being reasonably construed to cover the underlying plaintiffs' TCPA claim. *See Penzer*, 29 S.W.3d at 1006; *Motorists Mut.*, 912 N.E.2d at 666, (quoting *TIG Ins.*, 129 S.W.3d at 238)); *Valley Forge*, 860 N.E.2d at 317.

Columbia's arguments against coverage are not new. They track the narrow, minority reasoning rejected in the cases cited above. This Court should not rewrite Columbia's policy. Rather, it should follow the canons of policy construction and find, as the majority of other courts around the country have held, that the broad coverage language in Columbia's policy covers the claims at issue.

2. Little's status as a limited liability company does not preclude advertising injury coverage.

Columbia next argues that there is no advertising injury coverage here because the class representative, Karen S. Little, LLC, is a corporation. Columbia asserts that the policy's undefined use of the word "person" excludes corporations. This frivolous argument has been considered and rejected by numerous courts—and adopted by none. *See Tax Connection*, 2012 WL 6049631 at *4; *Sawyer*, 821 N.W.2d 250, ¶¶ 15-16; *XData*, 958 N.E.2d at 401-03; *Park Univ.*, 442 F. 3d at 1247 n. 4 (10th Cir. 2006); *Owners Ins. Co. v. European Auto Works*, 807 F. Supp. 2d 813, 818 n.4 (D. Minn. 2011) (citing cases).

Columbia's policy does not define "person" or "person's right of privacy." The Seventh Circuit Court of Appeals has held that where an insurer does not define the term

"person" in an insurance contract, the term should be broadly construed to include corporations. *See Supreme Laundry Service, L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 747 (7th Cir. 2008). Specifically, that court reasoned that:

> The term "person" is not defined by the policy, and Illinois courts have held that if a term in a contract is undefined, a court should afford the term its plain, ordinary and popular meaning ... [as] derived from the term's dictionary definition." Webster's Dictionary defines "person" as "one (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties." *See also* Oxford English Dictionary 597 (2d ed. 1989) (defining "person" as "[a] human being (natural person) or body corporate or corporation (artificial person), having rights or duties recognized by the law"); Black's Law Dictionary 1162 (8th ed.2004) (defining "person" as both a human being and an entity). Thus, the ordinary meaning of the word "person" can refer to a corporation.

Id.; s*ee also* 1 U.S.C. § 1 (the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

And Columbia's assertion that corporations have no privacy rights under the common law is irrelevant because the TCPA expressly created a privacy right for businesses. 47 U.S.C. § 227 (b) (3). The federal Eleventh Circuit Court of Appeals has explained:

> The findings accompanying the TCPA legislation illustrate that Congress was expressly concerned about protecting privacy interests, including privacy interests in places of business. *See, e.g.,* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394 ("Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."); *id.* § 2(14) ("Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.")

Hooters, 157 Fed. Appx. at 206 (emphasis added). The statute's legislative history shows that the fax ban was intended to protect businesses as well as consumers. *Id.; see also Telemarketing Practices: Hearing on H.R. No. 628, H.R. No. 2131, and H.R. No. 2184 before the Subcomm. on Telecommunications and Finance*, 101st Cong. 1st Sess., pp. 54-55 and n. 35 (1989) ("[B]usiness owners [were] virtually unanimous in their view that they [did] not want their fax lines tied up by advertisers trying to send messages . . . . Extensive research . . . revealed no case of a company (other than those advertising via fax) which oppose[d] legislation restricting advertising via fax."). Thus, the TCPA and its legislative history make clear that the statute is explicitly designed to create privately enforceable privacy rights for fax recipients, whether natural persons or corporations.

Because the TCPA provides a right to privacy for individuals and entities alike, it is irrelevant whether other legally created rights to privacy are confined to individuals. As the Tenth Circuit held, "[w]e reject out of hand American's argument that there can be no coverage here because the named plaintiff in the underlying suit, JC Hauling, is a corporation, and corporations cannot claim a right to privacy." *Park Univ.*, 442 F. 3d at 1247 n.4; s*ee also See W. Rim.*, 96 Fed. Appx. 960 (plaintiff was a group of businesses); *Universal Underwriters*, 401 F.3d at 882-83 (plaintiff was a computer business); *Penzer*, 29 So.3d at 1006 ("Because the policy provides coverage for a violation of a "*right* of privacy," which can only arise from the law, it is not necessary to separately discern the plain meaning of "privacy." If "privacy" was not preceded by "right of" then the dictionary definition of "privacy" would be relevant under a plain meaning analysis. Stated another way, the plain meaning of "right of privacy" is the legal claim one may make for privacy, which is to be gleaned from federal or Florida law, rather than defined by a dictionary. In this case, the source of the right of privacy is the TCPA, which provides the privacy right to seclusion.") The TCPA is clear that it creates and protects privacy interests of both individuals and businesses. It creates a statutory right to privacy. Thus, to the extent that corporations lack common law privacy rights, the TCPA created privacy rights for corporations to be free from unsolicited advertising faxes.

Moreover, even if this Court were inclined to agree with Columbia's arguments, every fax sent to a business necessarily invaded the privacy of the natural persons working there. Under the TCPA, the business can sue for the invasion. Thus, HIAR violated the privacy rights of Little and the Class (which contains both natural persons

and corporate persons), and Columbia's policy does not restrict coverage based on the injured party's status.

3. The "willful violation of a penal statute" exclusion does not apply.

Columbia argues for application of the policy exclusion for acts "arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured," but HIAR's liability was negligent not willful, and as explained above, the TCPA is not a penal statute.

It is well settled in Missouri that where an insurer had an opportunity to defend, but refused, then any judgment rendered in the underlying action is preclusive as to all issues decided therein. *See Schmitz*, 337 S.W.3d 700; *Stark Liquidation*, 243 S.W.3d at 399 ("Where an insurer is bound to protect another from liability, it is bound by the result of the litigation to which such other is a party, provided it had the opportunity to control and manage it.") (quoting *Cox,* 992 S.W.2d at 224–25); s*ee also Finkle v. W. Auto Ins. Co*., 26 S.W.2d 843, 849 (Mo. App. 1930); *State ex rel. Sago by and through Sago v. O'Brien*, 827 S.W.2d 754, 755-56 (Mo. App. 1992).

The underlying Judgment here specifically holds that HIAR did not act willfully. LF 2125. It therefore precludes application of this exclusion. There was no finding in the Judgment that HIAR willfully violated a statute. *Id.* Rather, the Judgment specifically found that HIAR "did not intend to injure the recipients of the faxes." *Id.* The TCPA "is essentially a strict liability statute." *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, PA*, 314 F. Supp. 2d 1094, 1103 (D. Kan. 2004). It provides enhanced

damages for willful conduct. 47 U.S.C. § 227. The liability imposed upon HIAR by the Judgment is not premised on willful conduct. In order for the exclusion to apply, HIAR must have "committed … a willful violation of a penal statute or ordinance." HIAR did not, so the exclusion does not apply.

Columbia does not address the findings of the underlying court, or the affidavit of Thomas Dempsey that that court considered in making them, instead opting to cherry pick statements Dempsey made in his deposition in the coverage case. As discussed, Columbia cannot relitigate the findings in the underlying action. Even if it could, however, none of the testimony cited by Columbia shows that HIAR willfully violated anyone's rights. A violation of the TCPA requires the sender to send faxes to those from whom he does not have permission and simply asserting, as Columbia does, that Dempsey intended to send faxes does not establish that he intended to violate the Act. Appellant's Substitute Brief, p. 47. In fact, Dempsey's affidavit and other testimony show the opposite. He testified: (1) he did not know about the TCPA and did not ask Sunbelt about laws or regulations governing faxing; and (2) Sunbelt failed to inform HIAR that it did not have express permission from the fax recipients, or that express permission was required, and Dempsey relied on what Sunbelt told him. LF 2055. Columbia cites no case—including *Olsen*—in which any court has held that this exclusion applies to bar coverage for TCPA claims. The TCPA is not a penal statute and HIAR's violation of it was not willful. Therefore, the exclusion does not apply.

D. The "Contractually Assumed Liability" Exclusion Is Inapplicable and HIAR Did Not Breach the Cooperation Clause. (responding to Appellant's Points C and E)

As discussed above, an insurer that refuses to defend relinquishes completely the right to enforce policy provisions entitling it to control the litigation or settlement, such as cooperation clauses and assumption of liability provisions. *See Schmitz*, 337 S.W.3d at 709-10; *Stark Liquidation*, 243 S.W.3d at 399 (quoting *Rinehart v. Anderson,* 985 S.W.2d 363, 371 (Mo. App. 1998)); *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 481 and n.2 (Mo. App. 1992). A settlement creates a legal obligation to pay. *See D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899, 906 (Mo. banc 2010). Here, Columbia refused to defend HIAR, releasing it to conduct the litigation and settle the case provided that such settlement was reasonable. The court in the underlying case found the settlement reasonable, as discussed more fully below. Therefore, Columbia cannot now rely on the "assumption of liability" exclusion or the "cooperation clause" to evade its indemnity obligations.

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 here. Indeed, the claims process itself is wholly a creature of the settlement agreement; it is not an inherent feature of class judgments. Rather, class counsel uses best efforts to locate and distribute funds made available by a class judgment to the entire class.

The Judgment here imposes no bar on compensating class members who did not submit a claim during the approval process. Rather, it certifies the class to include "All persons to whom Sunbelt, on behalf of Defendants, sent unsolicited advertising faxes…." LF 2117. It notes that "[t]he Settlement Class consists of thousands of individuals and businesses." *Id.* It provides that "[t]he $5,000,000 judgment will comprise the class recovery." LF2122. It states that "[i]f subsequent litigation against Defendants' insurer results in a recovery, each Class member, including Plaintiff, who **submits** a valid claim form…." *Id.* Thus, it specifically contemplates another claims process following recovery from Columbia—if it did not, it would have said "submitted." *Id.* Therefore, Columbia's argument regarding claims submitted to date is irrelevant—the rest of the class will have another opportunity to submit claims.

Even if that were not the case, however, the Judgment also specifically provides that "[a]ny unclaimed remainder will be distributed via *cy pres* to charitable organizations." *Id.* Under Missouri law, distribution of *cy pres* is a valid use of unclaimed class funds. *See Bachman v. A.G. Edwards, Inc*. 344 S.W.3d 260, 267 (Mo. App. 2011); *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192, 195-196 (Mo. banc 2003) (Wolff, J., concurring). Thus, even to the extent that no members of the class submit claims other than those who claimed initially, the Judgment resolved all of their claims, and the remaining money in the Judgment is still due and owing—and will be distributed as *cy pres*.

In any event, HIAR's *liability* in the absence of the agreement is at least $6,250,000. The possibility that some of HIAR's victims might ultimately not be found

in order to be compensated does not reduce the scope of HIAR's liability. The settlement thus actually saved HIAR (and Columbia) more than a million dollars of liability (and over $14 million as compared to the worst-case scenario wherein HIAR could have been found liable for willful violations). It certainly was not over and above HIAR's potential liability for its fax program. Calling these facts "specious" does not change anything.

E. Property Damage Coverage Also Exists.

(responding to Appellant's Point A)

1. The underlying damages are for "property damage" as defined by the policy.

The TCPA was enacted in part because Congress sought to prevent advertisers from shifting the cost of their marketing to the recipients. *See* H.R. Rep. No. 102-317 (1991), p. 25. In other words, the TCPA was enacted to curb damage to fax recipients' property, including loss of use. This constitutes "property damage" under the Policies. *See, e.g., Park Univ.*, 442 F.3d at 1244-45 ("JC Hauling lost the use of its fax machine, ink, and paper."); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744, 750 (M.D.N.C. 2002) ("The act of faxing DirecTV advertisements to the recipients constituted "property damage" as defined by the Travelers policies.")

The TCPA's damages provision works to "liquidate uncertain actual damages and to encourage victims to bring suit to redress violations." *Universal Underwriters*, 300 F. Supp. 2d at 893 (E.D. Mo. 2004) (quoting *Mourning v. Family Publ. Serv., Inc.*, 411 U.S. 356, 376 (1973)). In *Universal Underwriters*, the Eighth Circuit affirmed a finding that an insurer owed a defense against TCPA claims. That court held that the underlying

plaintiff sustained property damage: "[t]he facts as alleged, however, plainly identify harm to Onsite. Onsite alleged that it was sent an unsolicited fax. Although the monetary impact of a single unsolicited fax is minor, it is nevertheless a cost borne by the recipient and recognized by Congress as a compensable harm." *Universal Underwriters,* 401 F. 3d at 880 (citing *Nixon,* 323 F.3d at 654-55 as "listing the various harms caused by the receipt of unsolicited faxes.")

2. The "property damage" was caused by an "occurrence" and was not expected or intended injury.

Under Missouri law, a junk fax can constitute an "accident" and thus constitute an "occurrence." *See Universal Underwriters*, 401 F. 3d at 882-83. When a "liability policy defines occurrence as meaning accident Missouri courts consider this to mean injury caused by the negligence of the insured." *Wood v. Safeco Ins. Co. of Am.*, 980 S.W.2d 43, 49 (Mo. App. 1998) (internal citations omitted); *see also N.W. Elec. Power Coop., Inc. v. Am. Motorists Ins. Co*., 451 S.W.2d 356 (Mo. App. 1969). When utilized without definition or restriction in liability policies, "accident has been held not to exclude injuries resulting from ordinary, or even gross, negligence." *Wood*, 980 S.W.2d at 49.

The issue that must be determined is whether the *injury* was expected or intended, not whether the *acts* were performed intentionally. *See Stark Liquidation*, 243 S.W.3d at

393.[3] This is determined, in the absence of specific restrictions in the policy, with all doubts construed in favor of coverage. *See Scottsdale Ins. Co. v. Ratliff*, 927 S.W.2d 531, 534 (Mo. App. 1996) ("If insurance companies do not intend to cover such claims…they might consider using language directed to the particular hazards and risks of that business rather than boiler plate. It is appropriate to resolve doubtful questions of construction in favor of the insured.").

This Court's decisions in *Stark Liquidation* and *Wood* are instructive. Those cases hold that an injury based on a negligent misrepresentation is covered under Columbia's policy language. In those cases, the insurer made the argument Columbia makes here: that because the insured acted intentionally and the injury flowed from the action, it is not covered. This Court rejected that argument, holding there was "no evidence that Stark either intended or expected the crop loss and attendant economic damages that occurred…. Thus, Duffin's claims were an 'occurrence' within the meaning of the CGL

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[3] The cases finding no coverage for TCPA claims are largely from states without such a rule, and the holdings turn on that fact. *See Res. Bankshares,* 407 F.3d at 637-38 (contrasting North Carolina and Virginia law); *ACS Sys., Inc. v. St. Paul Fire and Marine Ins. Co.,* 53 Cal. Rptr. 3d 786, 799 (Cal. App. Ct. 2007) (in California, "the event may not be deemed an 'accident' merely because the insured did not intend to cause injury") (citing cases); *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573, 589 (Cal. App. Ct. 2010).

policies." 243 S.W.3d at 393. *See also Lampert v. State Farm Fire & Cas. Co.*, 85 S.W.3d 90, 94 (Mo. App. 2002) (negligent misrepresentation claim covered); *Am. States Ins. Co. v. Herman C. Kempker Constr. Co., Inc.*, 71 S.W.3d 232, 236-37 (Mo. App. 2002) (same). Just as the insured in *Stark Liquidation* spoke falsely and caused damages though believing his statements were true, HIAR here sent faxes and caused damages but believed it had consent to do so.

Likewise, the Missouri Supreme Court has held that "[i]t must be shown not only that the insured intended the acts causing the injury, but that the injury was intended or expected from these acts." *Columbia Mut. Ins. Co. v. Pacchetti*, 808 S.W.2d 369, 370 (Mo. banc 1991); *see also Harrison v. Tomes*, 956 S.W.2d 268, 269 (Mo. banc 1997) (although allegations "may support a conclusion that Tomes' action in grabbing the steering wheel was intentional and reckless, it does not necessarily follow that he intended or expected that injury would result"); *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 910-11 (8th Cir. 2007) (Under Missouri law, negligent injury is occurrence despite criminal conviction for conduct). As one court explained:

> [T]he term "caused by accident," as used in policies of liability insurance, is satisfied where the insured did not intend that damage result from his act although the act itself was intentional and did so result. *White* points out that, as 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**."

> There is nothing in the instant record to show that Wrather, by his conduct in lighting the various fires, intended to cause damage to Nanny's tractor-trailer unit.

Fidelity & Cas. Co. of New York v. Wrather, 652 S.W.2d 245, 249 (Mo. App. 1983) (quoting *White v. Smith,* 440 S.W.2d 497, 507 (Mo. App. 1969)) (emphasis added).

A party can be found liable under the TCPA for sending an unauthorized fax, even if that party believed, reasonably and in good faith, that the recipient wanted and had authorized receipt of the fax. *See Park Univ.,* 442 F.3d at 1245-46 (interpreting Kansas law). Under such circumstances, it cannot be said that the party sending the fax "expected or intended" to cause any injury. *Id*. The determinative issue is whether HIAR expected or intended the faxes it sent to cause "property damage." *Universal Underwriters*, 401 F.3d at 882-83. In *Universal Underwriters*, the Eighth Circuit observed that "intent is not a prerequisite to liability under the Act" in affirming a finding that an insurer owed a defense against TCPA claims under the property damage clause of a policy worded materially the same as the Columbia Policy. *Id.*

Contrary to Columbia's assertions, it is not the sending of the fax that caused legal injury in this case it is the fact that it was *uninvited*. A recipient who receives an invited fax is not injured and the sender has not violated the TCPA. Because HIAR sent the faxes believing there was consent a TCPA injury was not intended and liability was caused by accident. Numerous other courts have found property damage coverage for TCPA claims predicated on junk faxing under policies worded identically to Columbia's policies here. *See Erie Ins. Exchange v. Lake City Indust. Prods.*, 2012 WL 1758706 (Mich. App. Ct.

May 17, 2012); *Ins. Corp. of Hanover v. Shelborne Assocs.,* 905 N.E.2d 976, 983 (Ill. App. Ct. 2009); *Park Univ.,* 442 F.3d at 1245; *Harford Mut. Ins. Cos. v. Agean, Inc.*, Case No. 1:09CV461, 2011 WL 2295036 (M.D.N.C. June 8, 2011); *Penn Nat'l*, 2011 WL 3241491, at *9-10; *Prime TV,* 223 F. Supp. 2d at 751-52 (applying North Carolina law).

The Petition here alleges negligent conduct. LF 40. The Petition avers that HIAR "knew **or should have known"** that its conduct was without authorization. *Id.* In other words, the Petition allegations did **not** involve a class of persons against whom HIAR intended to cause property damage. It is not clear from the Petition that HIAR expected or intended any "property damage" injuries resulting from its fax transmissions. Therefore, the Petition's allegations did not preclude the potential for coverage.

Further, the Judgment was entered on the Petition's allegations of HIAR's negligent transmission of the advertising faxes as part of the class settlement fairness process. As discussed, where an insurer had an opportunity to defend, but chose not to defend, any judgment rendered in the underlying action is preclusive as to all issues decided therein. Because Columbia failed to defend, it is bound by the holding that HIAR did not intend to cause injury.

Therefore, Columbia is bound by what was found in the underlying Judgment. This includes: whether HIAR violated the TCPA and injured class members; how many violations of the TCPA there were; and whether those violations were negligent or intentional (which would have entitled Plaintiffs to enhanced damages under the TCPA,

see 47 U.S.C. § 227). The Judgment, which, contrary to Columbia's contentions, was entered following a hearing, explicitly makes findings on all of these issues.

Specifically, it found that: (3) HIAR did not intend to injure the recipients of the faxes; (4) HIAR believed Sunbelt had the consent of the recipients to send advertisements by fax: (5) HIAR believed that the recipients had given their consent to receive lodging information by fax. LF 2123. That Judgment is preclusive as to HIAR's negligent transmission of the advertising faxes. Columbia is collaterally estopped from contesting those factual findings.

Even if Columbia was not bound by the issues resolved in the underlying suit, the evidence in the record here compels the same result. The findings in the Judgment were based on Dempsey's sworn affidavit stating that:

> 8. HIAR Holdings believed that the persons within the 100,000 database had given their consent to receive lodging information by fax. Hiar Holdings relied on Sunbelt to comply with all applicable laws. (LF 208)
>
> 9. Other than the fax broadcasting campaign conducted on Hiar Holdings' behalf by Sunbelt, Hiar Holdings sent no other advertising faxes. *Id.*
>
> 11. Hiar Holdings did not intend to injure the recipients of the faxes. We intended only to send faxes to those persons who had expressly consented to them. *Id.*

The deposition testimony Columbia cites in no way contradicts any of these statements. At most, that testimony establishes that HIAR made no independent investigation of Sunbelt and its practices. But mistakenly trusting a third party does not equal intending to harm—and Columbia does not and cannot argue otherwise. The findings are the findings and the evidence is the evidence, and both support "property damage" coverage under the Policies.

3. The underlying judgment is not for damages at the statutory minimum amount of $500 per fax.

While the Petition explicitly sought the maximum statutory damages allowed under the TCPA, it did not preclude statutory damages in the amount of actual damages or treble damages. As discussed above, an insurer must defend unless there is no possibility of a covered claim. *See Prairie Framing*, 162 S.W.3d at 79. Based on the plain language of the TCPA, there was at least a possibility of an award of damages that was not limited to the $500 minimum. Following Columbia's failure to defend, the parties proceeded to settle all claims involving the 12,500 faxes HIAR sent for a total of $5,000,000.[4] This works out to $400 per fax sent—not the $500 per fax awardable under the TCPA and discussed in *Olsen*. Following fairness hearings and evidence, the underlying court found the settlement to be reasonable and approved it.

[4] It is the sending, not the receiving, of a fax that is actionable under the TCPA. *Am. Home Servs., Inc. v. A Fast Sign Co., Inc.*, 734 S.E.2d 31 (Ga. 2012); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 263 P.3d 767, 778-79 (Kan. 2011).

Schmitz clearly holds that where an insurer wrongfully refuses defense and abandons an insured, it is liable for any resulting settlement. In that case, the Supreme Court denied an insurance company that abandoned its insured "two bites of the apple" when it tried to litigate liability and damages following a failure to defend. *Id.* at 709. As a result of Columbia's abandonment of its insured HIAR, any claim that the damage award contained in the Judgment entered by the trial court was for the $500 statutory minimum per fax is no longer open to judicial review. Even under the *Olsen* majority's own reasoning, Columbia had a duty to defend at the time it denied the tender because the Petition was not limited to the $500 minimum.

Columbia's refusal to defend was wrongful and when a claim comes within the policy's coverage, the insurer's refusal to defend is unjustified, and the insurer is guilty of a breach of contract. *See Schmitz*, 337 S.W.3d 700*; Butters v. City of Independence,* 513 S.W.2d 418, 424-425 (Mo. 1974); *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307 (Mo. App. 1993). As discussed above, where an insurer had an opportunity to defend, but abandons the insured, any judgment rendered in the underlying action is preclusive as to all issues decided therein. "Where one is bound to protect another from liability, he is bound *by the result of the litigation* to which such other is a party, provided he had opportunity to control and manage it." *Schmitz*, 337 S.W.3d at 709 (citing *Drennen v. Wren,* 416 S.W.2d 229, 234–35 (Mo. App. 1967) and *Listerman v. Day & Night Plumbing & Heating Serv., Inc.,* 384 S.W.2d 111, 118–19 (Mo. App. 1964)) (emphasis in original).

Following Columbia's refusal to defend, the parties entered into an agreement under Mo. Rev. Stat. Mo. § 537.065, and judgment was entered on it. A settlement agreement creates a legal obligation to pay damages: "Because of the settlement agreement, Sherry legally was obligated to pay damages to the homeowners." *D.R. Sherry*, 316 S.W.3d at 906. The judgment here is based on a settlement; it is *not* premised on any particular measure of damages under any single claim. Indeed, unlike in *Olsen*, the measure of damages is less than the per fax statutory damages under the TCPA. Therefore, Columbia must indemnify. *See Schmitz*, 337 S.W.3d at 710.

II. Public Policy Does Not Bar Forcing Columbia to Honor Its Contractual Obligations in this Case. (responding to Appellant's Points D and I)

Columbia next asks this Court to extend the holding of *Olsen* (and the holding of the only Missouri case it cites, *DeShong v. Mid-States Adjustment, Inc.*, 876 S.W.2d 5, 8 (Mo. App. 1994) ("the court does not reach the question of whether public policy prohibits insurance coverage for vicariously imposed punitive damages")) past policy interpretation and to categorically hold that there can never be coverage for TCPA damages based on public policy regardless of what the insurer has agreed to cover. As discussed above, the damages here are not TCPA statutory damages in the minimum amount of $500 per fax but rather a comprehensive settlement. Moreover, under Missouri law, these statutory damages are not punitive damages. "[P]unitive damages are measured by the extent of the malice of the actor." *Schnuck Markets*, 652 S.W.2d at 209. That Court held that such damages were not covered in that case because "punitive damages are never awarded merely because of a 'bodily injury' or 'personal injury' **but**

only when the actor's conduct displays the requisite malice, we find they are not in the category of damages for 'bodily injury' or 'personal injury'." *Id.* at 209-10 (emphasis added).

Here the damages were not awarded because of any malice on HIAR's part. HIAR was found to have acted negligently, and the TCPA's damages are strict liability—awardable regardless of an actor's intent. Thus, Columbia's entire argument regarding non-fortuitous damages is off base.

The only case in the country to have ever held that such damages are uninsurable is *Standard Mut. Ins. Co. v. Lay*, 975 N.E.2d 1099 (Ill. App. Ct.), *appeal allowed*, 979 N.E.2d 899 (Ill. 2012). The Illinois Supreme Court has granted review, and is likely to reverse because it is contrary to numerous Illinois decisions. These conflicts include:

- the Illinois Supreme Court's holding in *Valley Forge*, 860 N.E.2d 307, that TCPA claims are potentially covered such that a duty to defend exists and specific adoption in that case of the portion of *Universal Underwriters,* 401 F.3d at 881 specifically rejecting the *Lay* analysis;
- the Illinois Supreme Court's holding (*see, e.g., Wilson v. Norfolk & Western Ry. Co.*, 718 N.E.2d 172, 175 (Ill. 1999)), that Illinois courts are bound by federal interpretations of federal statutes and thus Illinois courts are bound to regard the TCPA as a remedial statute;
- the holding of another Illinois Appellate court in *Pekin Insurance Co. v. XData Solutions, Inc.*, 958 N.E.2d 397 (Ill. App. Ct. 2011) under the same facts as *Lay* that an insurer had a duty to defend TCPA claims and

indemnify a judgment based on the TCPA's statutory damages;

- the holding of another Illinois Appellate court in judicial dicta in *Italia Foods, Inc. v. Sun Tours, Inc.*, 927 N.E.2d 682, 865-866 (Ill. App. Ct. 2010) (citing cases), *vacated on other grounds*, -- N.E.2d --, 2011 WL 2163718 (2011), that the TCPA is remedial; and
- the holding of another Illinois Appellate court in *Valley Forge*, 834 N.E.2d at 575 that coverage of TCPA claims is not against public policy.

This Court should not follow the Illinois appellate court's *Lay* decision; rather, it should adhere to actual Missouri public policy which is simply to prevent insuring against one's own malicious conduct. That public policy is inapplicable here because HIAR's liability did not arise from malicious misconduct.

III. The Settlement Was Found to Be Reasonable by the Underlying Judgment and Columbia Does Not Get to Relitigate the Issues Determined Therein. (responding to appellant's point F)

Columbia wants a "do over" on its decision to abandon HIAR. Columbia's arguments are precluded by the fact that the underlying judgment specifically found, after hearing, that the settlement was reasonable and by the Supreme Court's holding in *Schmitz*.

Columbia argues that the reasonableness determination required by *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 816 (Mo. banc. 1997) and its progeny has not properly been made here. Columbia is wrong for the simple reason that the situation presented here is dissimilar to that faced in the cases it cites. This was not a Mo. Rev.

Stat. § 537.065 situation in which the insured and the tort victim contracted to allow the victim to recover from the insurer and simply entered a consent judgment. Every case Columbia cites—*Gulf*, *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297 (Mo. App. 2007), and *Taggart v. Md. Cas. Co.*, 242 S.W.3d 755 (Mo. App. 2008)—is precisely that.

This case does not involve a limited Section 537.065 proceeding. Instead it involves a full-fledged class action settlement fairness hearing. Unlike in the Section 537.065 context, the underlying court's function in the class settlement context is to act as a gatekeeper and keep out unreasonable settlements based on collusion and to question any one-sided presentation of evidence until satisfied that the settlement is a reasonable one. *See Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 492 (Mo. App. 2000). That is what occurred here. Judge Gaertner critically examined the evidence and entered a Judgment, including specific findings that "the settlement amount is reasonable because it is what a reasonably prudent person in the position of the Defendants would have settled for on the merits of Plaintiff's claims," and "Defendants' decision to settle was made in good faith." "The Court hereby finds that the Agreement is the result of good faith arm's-length negotiations by the parties thereto, and that it will further the interests of justice. The Court finds that the Agreement is fair, adequate and reasonable." LF 117. "[T]his matter has been aggressively litigated by both parties and arms-length settlement discussions have been going on for over a year..." LF 122. The Judgment specifically notes that it was entered following a hearing.

The *Ring* decision provides a dissertation on the role a court plays in the class settlement process and the significance of its approval and entry of judgment. Columbia attempts to distinguish the decision on the ground that the context in which a judgment following a class settlement and fairness hearings was being collaterally attacked is different than the context in which Columbia is collaterally attacking the Judgment here. But the analysis is the same, and the result compelled by that analysis holds true here: a holding that a class settlement is reasonable such that it can form the basis of a final judgment is not open to collateral attack later.

In *Schmitz*, the Supreme Court rejected the applicability of the *Harford Insurance* test of reasonableness to allow an insurer a second bite of the apple in a situation similar to the case at bar. In *Schmitz*, the underlying court held a hearing that resulted in findings. *Id.* at 704. The case involved a situation where the parties entered a Mo. Rev. Stat. § 537.065 settlement under which plaintiff's recovery was limited to the proceeds of the defendant's insurance policies in exchange for the defendant not putting up a defense at a bench trial. Plaintiffs presented evidence and the court entered a judgment in the amount of $4,580,076. *Id*. Plaintiff then litigated with the insurer to collect the judgment. The insurer argued, as Columbia does here, that the underlying court's findings were subject to the *Gulf Insurance* reasonableness test. In rejecting that argument, the Supreme Court held:

> The award of damages in this case was a judgment entered after a bench trial, yet Great American argues that this "trial" lacked any semblance of an adversarial proceeding because CPB did not present a defense. What Great

> American ignores is that it had an opportunity to present a defense but declined to do so.

Id. at 709.

Columbia's argument about the class settlement reasonableness hearing is almost verbatim what the Supreme Court rejected in *Schmitz*. Columbia's attempts to distinguish *Schmitz* are unavailing. Evaluation of the merits of the claims and the damages is the entire point of the class settlement reasonableness hearing. *See Ring*. In other words, there was roughly the same chance of an adverse ruling to Little as to the plaintiff in *Schmitz*. Further, the findings in the Judgment were based upon evidence reviewed by the underlying court.

Indeed, the underlying court here found that the settlement was reasonable even though it provided that class members could only recover from insurance proceeds. It was doubtless aware that *Gulf* is the law of the land. Under *Gulf*, an unreasonable settlement is not collectable from an insurer. Therefore, if Judge Gaertner signed off on an unreasonable settlement, he consigned the absent class members to an illusory recovery in direct violation of his function in evaluating the settlement in the first place. In short, Columbia argues not only that the explicit reasonableness findings should be ignored but that the underlying court acted in dereliction of its duty to absent class members. There is no evidence to support Columbia's attack.

Columbia takes issue with the findings as to the number of TCPA violations as well as the Underlying Court's evaluation of potential liability. Columbia also makes the unsupportable assertion that HIAR should only have settled with class members who

submitted claim forms. As noted above, the claim forms were *part of the Settlement itself*; in the absence of this particular settlement, there would be no claims process.

The amount of the Judgment here is well within the potential liability. The Judgment amount of $5,000,000.00 is reasonable because HIAR's 12,500 faxes exposed it to statutory liability of 25% more than the amount of the judgment, or $6,250,000. It was only 27% of HIAR's liability of $18,750,000 if the damages had been trebled. Despite Columbia's best spin, this liability was real. The Dempsey affidavit attached HIAR's contract with Sunbelt to send 12,500 faxes—supporting his testimony about the number of faxes sent.

Contrary to Columbia's assertion, the TCPA requires only that a plaintiff establish that a fax was sent. *See* 47 U.S.C. § 227 (b) (1) (C) ("It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement."); *see also Am. Home*, 734 S.E.2d at 847 (Ga. 2012) ("[A] sender is liable for the unsolicited advertisements it attempts to send to fax machines, whether or not the transmission is completed or received by the targeted recipient."); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 263 P.3d 767, 778-779 (Kan. 2011) ("The TCPA specifically prohibits using electronic devices 'to send' unsolicited advertisements. 47 U.S.C. § 227(b) (1) (C). The statute creates no requirement that a transmission be received…."); *Hinman v. M & M Rental Center, Inc.*, 596 F. Supp. 2d 1152, 1159 (N.D. Ill. 2009) ("On

its face, the statute prohibits the *sending* of unsolicited fax advertisements and make no reference at all to receipt").

The case on which Columbia relies, *All Am. Painting*, 315 S.W.3d 719, contains no discussion of whether damages are properly measured by number "received" as opposed to number "sent." Indeed, liability was supported in that case by the fact that the defendant "had no reason to believe the advertisements were not received by" the class members. *Id.* at 722. That is also true here. Thus, there is no indication that the underlying court got it wrong when it found the settlement was fair, reasonable and adequate; was a result of substantial arms-length negotiations; certified the class; and entered Judgment.

None of Columbia's contentions diminish the finding that the settlement was reasonable and collusion-free. Indeed, at oral argument Columbia conceded that there was no fraud on the underlying court here. Moreover, Columbia's arguments are beside the point. The underlying court's blessing of the agreement was the adjudication of reasonableness required by *Gulf*, and cannot be collaterally attacked. As the Supreme Court held in *Schmitz*:

> Great American's proposed application of the *Gulf Insurance* test is inconsistent with the doctrine of collateral estoppel. If Great American's proposed application of the *Gulf Insurance* test is accepted, it will encourage insurers to refuse to defend on behalf of insureds. The insured, unwilling to expose itself to liability beyond the insurance policy, will enter into a section 537.065 agreement limiting any collection of damages. Once

> the trial court renders its judgment and the plaintiff files an equitable garnishment lawsuit against the insurer, the insurer will challenge the trial court's finding of liability and damages. Then, the plaintiff will be forced to re-litigate the entire case for the equitable garnishment court so that it can determine whether the judgment was reasonable. The result of Great American's proposed application of the *Gulf Insurance* test is that all insurers would receive "two bites of the apple" – once when the trial court determines liability and damages and once when the equitable garnishment court determines reasonableness.

337 S.W.3d at 709. That is precisely what Columbia seeks to do here.

IV. The Trial Court Appropriately Ordered Columbia to Pay the Full Underlying Judgment. (responding to Appellant's Point G)

Columbia argues that even if its refusal to defend was wrongful and it has a duty to indemnify the Underlying Judgment, its policy limits mean that the trial court erred in entering judgment against it for the entire Judgment. Columbia is wrong, and the trial court is correct, for two reasons. First, the Missouri Supreme Court has made it clear that a wrongful refusal to defend obligates an insurer to indemnify all damages flowing from the breach of the duty to defend, which is the entire resulting judgment. Second, Columbia had a duty to HIAR to attempt to settle the action within policy limits in order to protect HIAR from an excess judgment. Having failed to do so and having abandoned

HIAR entirely, Columbia is liable for the entire judgment through bad faith failure to settle principles.

A. Because Columbia Wrongfully Refused to Defend, It Must Indemnify HIAR for the Resulting Judgment.

The Supreme Court in *Schmitz* clearly held that an insurer's failure to defend despite a duty to do so, regardless of the reason, results in liability for the entire resulting judgment: "That the refusal of the insurer to defend on the ground that the claim is outside the policy is an honest mistake, nevertheless constitutes an unjustified refusal and renders the insurer liable to the insured for all resultant damages from that breach of contract." 337 S.W.3d at 710 (quoting *Whitehead*, 844 S.W.2d at 481). Columbia contends that this holding is inapplicable because, it posits, *Schmitz* did not involve an indemnity obligation in excess of Great American's policy limit. Nothing in *Schmitz* supports this assertion; the Supreme Court does not even recite what the Great American policy limit was. This is for the simple reason that in these circumstances, the limit is irrelevant because the Supreme Court meant what it said: a wrongful failure to defend "renders the insurer liable to the insured for all resultant damages." *Schmitz*, 337 S.W.3d at 710.

B. Because It Failed to Settle within Policy Limits, Columbia Must Indemnify the Entire Judgment Irrespective of Limits.

"An insurer under a liability policy has a fiduciary duty to its insured to evaluate and negotiate third-party claims in good faith." *Shobe v. Kelly*, 279 S.W.3d 203, 209

(Mo. App. 2009) (citing *Duncan v. Andrew County Mut. Ins. Co.,* 665 S.W.2d 13, 18 (Mo. App. 1983)). "Where it wrongfully breaches this duty and refuses to settle within policy limits, the insurer may be held liable for resulting losses to the insured." *Shobe*, 279 S.W.3d at 209. The "obligation to act in good faith regarding settlement continues even if an insurer denies coverage and refuses to defend the insured." *Prairie Framing,* 162 S.W.3d at 94.

In finding an insurer liable for the entire judgment amount on a bad faith failure to settle theory, the *Shobe* court recently explained:

> The insurance company incurs liability exposure when the company refuses to settle a claim within the policy limits and the insured is subjected to a judgment in excess of the policy limits as a result of the company's bad faith in disregarding the interests of its insured in hopes of escaping its responsibility under the liability policy …. The tort creates liability in order to compensate an insured where she has been wrongly subjected to an excess judgment, and to deter insurance companies from failing to fulfill fiduciary duties to their insureds…. **If an insurer wrongly denies coverage, denies even a defense under a reservation of rights, and then completely refuses to engage in settlement negotiations, it cannot avoid liability** by its wrongful refusal to assume control of the proceedings.

279 S.W.3d at 210-11 (internal quotations and citations omitted; emphasis added) (citing and quoting *Zumwalt v. Utils. Ins. Co.,* 360 Mo. 362, 228 S.W.2d 750 (Mo. 1950)); *Overcast v. Billings Mut. Ins. Co.,* 11 S.W.3d 62, 67-68 (Mo. banc 2000); *Prairie*

Framing, 162 S.W.3d at 94. Because Columbia not only wrongly refused to defend HIAR but also refused to engage in settlement negotiations, it is liable for the judgment in excess of its policy limits.

C. Columbia's Quibbles with the Pleadings Are Irrelevant.

Without citing any authority whatsoever, Columbia argues that the facts that Little did not formally plead a claim for "insurance bad faith" and HIAR settled such claim precludes an award of judgment over policy limits. The lack of citation in this argument is telling. Appellant's Substitute Brief, pp. 60-62. The facts on which Columbia relies are irrelevant for the simple reason that damages over limits are awardable on a bad faith failure to settle claim regardless of whether the case features a cause of action for insurance bad faith. Indeed, there was no insurance bad faith claim in *Schmitz*, just a garnishment. 337 S.W.3d at 704 ("The parents filed a section 379.200 equitable garnishment lawsuit against Virginia Surety and Great American to recover the judgment from CPB's insurance policies.") Once again, Columbia cites no authority for the proposition that a formal claim for insurance bad faith is a prerequisite for collecting a judgment over policy limits where the insurer breached the duty to defend, under a bad faith failure to settle theory or otherwise.

Further, as discussed in the summary judgment briefing, Columbia was on notice throughout the lawsuit that plaintiff was seeking to collect the entire underlying judgment from Columbia and that HIAR had long ago assigned plaintiff what rights it had in order to assist plaintiff in doing so. "[A] cause for bad faith refusal to settle may be assigned to a judgment creditor either by the insured or his trustee in bankruptcy." *Ganaway v.*

Shelter Mut. Ins. Co., 795 S.W.2d 554, 565 (Mo. App. 1990). Plaintiff incorporated its pleadings from the underlying garnishment action which sought to recover the full judgment. That it did not spell out all of the legal authority supporting why Columbia is obligated to pay the judgment is beside the point.

As for the settlement Columbia and HIAR reached, that was for a completely separate bad faith claim alleged by HIAR. HIAR's Counterclaim for Breach of Contract, Breach of Fiduciary Duty to Defend, Bad Faith Refusal to Defend, and Vexatious Refusal to Pay does not seek indemnification of the Judgment. LF 927-30. Nor could it; HIAR had assigned those rights to Plaintiff. Rather, HIAR's claims were an entirely separate dispute relating to payment of a portion of HIAR's defense costs in the underlying action. The Counterclaim sought "a judgment in the amount of $40,000, pre-judgment interest, attorneys' fees expended herein, punitive damages, and for such other and further relief as this Court deems appropriate." *Id*. The settlement of those claims by HIAR and Columbia has precisely zero effect on Columbia's duty to indemnify the Underlying Action.

D. Even If the Policy Limits Apply, Columbia Must Indemnify up to Its General Aggregate Limits Plus the Products-Completed Operations Limits.

As discussed above, Columbia is liable for the entire Underlying Judgment plus interest because it wrongfully failed to defend and refused to settle within policy limits. Even if Columbia's liability were limited to the available limits under the Policies, however, as the trial court held and Columbia does not contest in its brief, those limits per

policy are the combined $4 million under the general aggregate (other than products-completed) and the products-completed operations limits. Little adopts the trial court's reasoning on this point, and Columbia has waived any opposition to it.

V. The Trial Court Correctly Denied Columbia's 11th Hour Attempt to Bring Third Party Claims against Another Insurer and any Error in Doing so was Harmless. (responding to Appellant's Point H)

Columbia's final argument is that the trial court abused its discretion in refusing to allow Columbia to amend its petition to add contribution claims against another insurer. Columbia is wrong. It did not seek to add the other insurer until summary judgment was fully briefed and the proposed new pleading would not affect the coverage issues between Columbia and Little in any way. A trial court is under no obligation to take up a motion to amend before ruling on motions for summary judgment. *See Sun Elec. Corp. v. Morgan*, 678 S.W.2d 410, 412 (Mo. App. 1984). Moreover, Columbia has not been prejudiced in any way. It has filed a new action asserting the claims against Zurich it was prevented from raising in this action. *See Columbia Cas. Co. v. Am. Guar. & Liab. Ins. Co.*, Cause No. 12SL-CC02076 (Cir. Ct. St. Louis Co. – Filed June 5, 2012). It can litigate its contribution claims in that action.

CONCLUSION

The trial court correctly held that Columbia had a duty to defend HIAR in this action and wrongfully failed to do so and that Columbia rejected the tender of defense and now must indemnify HIAR for the resulting judgment plus post-judgment interest. The trial court should be affirmed.

Respectfully submitted,

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Rule 84.06(C) Certificate

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. Sup. Ct. R. 84.06(b), and that the number of words in this brief is 15,733, excluding the parts of the brief exempted by Rule 84.06(b), as indicated by Microsoft Word. I further certify the font used is 13 point Times New Roman, double spaced.

/s/ Alan S. Mandel

Rule 55.03 Verification

The undersigned certifies that the attorney electronically signing this document has also signed the original and will keep it during the pendency of this appeal.

/s/ Alan S. Mandel

Certificate of Service

Pursuant to Supreme Court Rule 103, the undersigned hereby certifies a true and accurate copy of the foregoing was served via electronic filing through the Missouri eFiling System, on this 8th day of April, 2013.

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