# THE SEVENTH CIRCUIT'S TCPA INSURANCE QUANDARY

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## I. INTRODUCTION

The Telephone Consumer Protection Act ("TCPA") makes it unlawful to send unsolicited advertisements via fax, and perhaps via text,[1] in specified circumstances.[2] The purpose of the statute "is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment."[3] The TCPA guards against invasions of "consumer privacy."[4]

TCPA claims may be covered by various types of insurance policies, including general liability insurance, professional liability insurance, and directors and officers liability insurance. With regard to the advertising and personal injury coverage in general liability insurance policies, there are two lines of precedent nationwide: one considering "publication" language,[5] and another considering "making known" language.[6]

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1. In 2012, the FCC took the position that text messages were the same as phone calls and text message broadcast systems were the same as automated telephone dialing systems ("ATDS"). In effect, the FCC said text messages sent by an ATDS would be covered under the TCPA effective Oct. 16, 2013.

2. *See* 47 U.S.C. § 227(b) (2018).

3. H.R. REP. NO. 102-317, at 5 (1991); *see also* S. REP. NO. 102-178, at 1 (1991) ("The purposes of the bill are to protect the privacy interests of residential telephone subscribers.").

4. *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14018 (2003). *See* Matthew S. DeLuca, *The Hunt for Privacy Harms After Spokeo*, 86 FORDHAM L. REV. 2439, 2447 (2018) ("Privacy statutes tend to be scattered and of limited scope. The small handful of federal statutes targets a range of specific privacy concerns and includes . . . the Telephone Consumer Protection Act.").

5. *See* Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3d 543, 548 (7th Cir. 2009) (considering the publication language: "oral or written publication of material that violates a person's right of privacy.")

6. *See* Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631, 634 (4th Cir. 2005) (considering the making-known language: "making known to any person or organization written or spoken material that violates a person's right of privacy").

Courts typically find coverage for TCPA claims under the "publication" language,[7] but not under the "making known" language.[8] The path to coverage under the publication language is straightforward. The sending of a fax is a "publication of material" and a TCPA claim seeks damages for a violation of the plaintiff's "right of privacy" in seclusion; so, a TCPA violation constitutes the "oral or written publication of material that violates a person's right of privacy." The sending of a fax does not, however, "mak[e] known" material that violates a right of privacy, as the "making known" language implies the dissemination of private facts.

In distinguishing a Massachusetts Supreme Court case that had found coverage under the publication language,[9] the First Circuit reasoned that "[t]he 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."[10] Thus, the First Circuit predicted that the Massachusetts Supreme Court would find no coverage under the "making known" language even though it had found coverage under the "publication" language.[11] As with many issues in insurance, substantial consequences can flow from slight variations in policy wording.

When applying the "publication" language, every high court to have considered the question has found coverage for TCPA claims.[12] Indeed, a substantial majority of state and federal courts have found coverage.[13] There is an outlier, however, in the federal system: The Court of Appeals for the Seventh Circuit.

## II. FEDERAL COURT DEFERENCE TO STATE LAW

In our judicial system, we often presume that the federal judiciary is superior to state courts. When considering questions of state law, however, federal judges have a duty to submit themselves to a humble prediction and application of state law. These issues are addressed in great detail in the precedent and in

7. *See, e.g.*, Owners Ins. Co. v. European Auto Works, Inc., 695 F.3d 814, 819 (8th Cir. 2012); Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, Pa., 442 F.3d 1239 (10th Cir. 2006); Hooters of Augusta, Inc. v. Am. Global Ins. Co., 157 F. App'x 201 (11th Cir. 2005); W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co., 96 F. App'x 960 (5th Cir. 2004);

8. Cynosure, Inc. v. St. Paul Fire & Marine Ins., 645 F.3d 1 (1st Cir. 2011); St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp., 319 F. App'x 121 (3d Cir. 2009); St. Paul Fire & Marine Ins. Co. v. Onvia Inc., 301 F. App'x 707 (9th Cir. 2008); Subclass 2 of Master Class of Plaintiffs v. Melrose Hotel Co., 503 F.3d 339 (3d Cir. 2007); Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631 (4th Cir. 2005).

9. Terra Nova Ins. v. Fray-Witzer, 869 N.E.2d 565, 574 (Mass. 2007).

10. *Cynosure,* 645 F.3d at 4.

11. *Id.*

12. *See* Columbia Cas. Co. v. HIAR Holding, LLC, 411 S.W.3d 258, 269–70 (Mo. 2013); Penzer v. Transp. Ins. Co., 29 So. 3d 1000, 1002 (Fla. 2010); *Terra Nova Ins.*, 869 N.E.2d at 574; Valley Forge Ins. Co. v. Swiderski Elec., Inc., 860 N.E.2d 307 (Ill. 2006).

13. *See Valley Forge Ins. Co.,* 860 N.E.2d at 319 ("We observe, however, that our conclusion in this case that the insurers owe Swiderski a duty to defend pursuant to the policies' 'advertising injury' provision is consistent with the conclusion reached by the majority of federal courts of appeals that have considered the applicability of 'advertising injury' coverage to TCPA fax-ad claims.")

scholarly commentary, including in an excellent article in the *Seton Hall Circuit Review*.[14]

In *Erie Railroad Company v. Tompkins*, the United States Supreme Court held that in cases in which state law provides the rule of decision, federal courts have an obligation to ascertain and apply the law of the relevant state.[15] A federal court must follow a controlling decision of a state's highest court[16] "unless it can be said with some assurance" that the state high court would not follow its own ruling.[17] If a state's high court has not addressed an issue of state law, but its intermediate court has spoken to the question, then the federal court should not disregard the state decision "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."[18]

Where there is no relevant state court precedent, the federal court must make its best prediction of how the state's highest court would rule using other persuasive authorities, including "decisions from other jurisdictions."[19] The highly respected former Seventh Circuit Judge Richard Posner reasoned that the decisions of other state high courts may be the most persuasive evidence when considering what a state supreme court would do if faced with an unclear or undecided question of state law. In *Vigortone AG Products, Inc. v. PM AG Products, Inc.*,[20] the Seventh Circuit held that when confronted with an uncertain question of state law, "the best guess is that the state's highest court, should it ever be presented with the issues, will line up with the majority of the states."[21] As already noted, with regard to coverage for TCPA claims under the publication language, every high court to have considered the question has found coverage.[22] The California Supreme Court is currently considering the issue.[23]

14. Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predictions*, SETON HALL CIR. REV., Vol. 3:001 (2006).

15. 304 U.S. 64 (1938).

16. Vandenbark v. Owens-Ill. Glass Co., 311 U.S. 538, 543 (1941).

17. Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943).

18. West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940); Stoner v. N.Y. Life Ins. Co., 311 U.S. 464, 467 (1940).

19. Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1090 (7th Cir. 1999).

20. 316 F.3d 641, 644 (7th Cir. 2002).

21. *Id.*

22. *See HIAR Holding*, 411 S.W.3d at 269–70; *Penzer,* 29 So. 3d at 1002; *Terra Nova Ins.*, 869 N.E.2d at 574; *Valley Forge Ins. Co.*, 860 N.E.2d at 307.

23. Yahoo! Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., Docket No. S253593, upon certification from the Court of Appeals for the Ninth Circuit, Case No. 17-16452. By Order dated April 10, 2019, the California Supreme Court certified the following question for review:

> Does a commercial general liability insurance policy that provides coverage for personal injury, defined as injury arising out of oral or written publication, in any manner, of material that violates a person's right of privacy, and that has been modified by endorsement with regard to advertising injuries, trigger the insurer's duty to defend the insured against a claim that the insured violated the Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227) by sending unsolicited text message advertisements that did not reveal any private information?

2019 Cal. Lexis 3004, at *1.

Notably, unlike some other circuits,[24] the Seventh Circuit does not consider itself bound by its own, prior *Erie* predictions. In *Taco Bell Corp. v. Continental Casualty Co.*,[25] the court declined to follow *Green v. J.C. Penny Auto Ins. Co.*,[26] in favor of state intermediate appellate court precedent that had rejected it. However, in *Reiser v. Residential Funding Corp.*, the Seventh Circuit described state intermediate appellate court decisions as "just prognostications" that "could in principle persuade us to reconsider and overrule our precedent."[27]

## III. THE SEVENTH CIRCUIT'S *ERIE* PREDICTIONS OF TCPA COVERAGE

In 2004, the Seventh Circuit issued an early prediction of how Illinois law would treat coverage for TCPA claims under the publication language and found no coverage.[28] Two years later, the Illinois Supreme Court rejected the Seventh Circuit's prediction and found coverage for TCPA claims under the publication language.[29]

In making its prediction, the Seventh Circuit recognized that the few other court decisions that had been issued at that early point in the development of the jurisprudence had found coverage for TCPA claims under the publication language (as had the district court the Seventh Circuit was reversing). Nevertheless, the Seventh Circuit decided to strike its own path by ruling that the publication language reached only the privacy right of secrecy, rather than the right of seclusion, narrowly limiting the publication language to reach only invasions of the right of privacy that exist through the material's "informational content."[30]

In rejecting the Seventh Circuit's prediction, and affirming an intermediate appellate court decision, the Illinois Supreme Court found that the "receipt of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion, and such a violation is one of the injuries that a TCPA fax-ad claim is intended to vindicate."[31] Looking to the plain meaning of the component words and phrases of the publication language ("publication," "material," and "right of privacy"), the court found that the publication language "can be reasonably understood to refer to material that violates a person's seclusion."[32] The defendant was alleged to have engaged in the written publication of advertisements by faxing them to the proposed class, and the material that was published (the faxes) violated a person's right of privacy; i.e., the right of the proposed class to be let alone.[33]

24. Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003); Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1310 (11th Cir. 2005).

25. 388 F.3d 1069 (7th Cir. 2004).

26. 806 F.2d 759 (7th Cir. 1986).

27. 380 F.3d 1027, 1029 (7th Cir. 2004).

28. American States Ins. Co. v. Capital Assocs. of Jackson Cty, Inc., 392 F.3d 939 (7th Cir. 2004).

29. *See* Valley Forge Ins. Co. v. Swiderski Elect., Inc., 860 N.E.2d 307 (Ill. 2006).

30. *American States*, 392 F.3d at 943.

31. *Valley Forge Ins. Co.,* 860 N.E.2d at 365.

32. *Id.* at 368.

33. *Id.*

Several years later, the Seventh Circuit had the opportunity to predict Iowa law on the same issue, which was a blank slate.[34] In the absence of any applicable Iowa precedent on the question, the Seventh Circuit was called upon to predict whether the Iowa Supreme Court would be more likely to adopt the Seventh Circuit's prior interpretation of the publication language in *American States* or, alternatively, the Illinois Supreme Court's approach in *Swiderski*, which had rejected *American States* and adopted the majority rule.[35] In other words, the Seventh Circuit had the opportunity to make the same prediction as it had in *American States* or to revisit its reasoning in light of *Swiderski*.

In *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*,[36] when predicting Iowa law, the Seventh Circuit decided to follow its own precedent interpreting Illinois law.[37] The Seventh Circuit explained that it "continue[d] to read the policy's use of the word 'publication' in the advertising injury definition to narrow the scope of the 'privacy rights' referred to in the same clause," adding that "[t]he most natural reading of this language is that it covers claims arising when the insured publicizes some secret or personal information–not claims arising when the insured disrupts another's seclusion."[38] Notably, the Seventh Circuit did not cite any Iowa law on the interpretation of insurance contracts, which might have pointed to a different conclusion.[39]

## IV. APPLICATION OF SEVENTH CIRCUIT PRECEDENT

Three lower courts in the Seventh Circuit have followed the Seventh Circuit's *American States* and *Websolv* precedents, as they are perhaps obligated to do,[40] in predicting Indiana law where there is no state precedent interpreting the

34. Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3d 543 (7th Cir. 2009).

35. *Id.*

36. *Id.*

37. Judge Frank Easterbrook drafted the decision in *American States* and was on the panel that decided *Websolv*.

38. *Websolv*, 590 F.3d at 550.

39. Rich v. Dyna Tech., Inc., 204 N.W.2d 867, 872 (Iowa 1973) ("Where insurance contracts are ambiguous, require interpretation, or are susceptible to equally proper constructions, the court will adopt the construction most favorable to the insured.")

40. In Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004), the Seventh Circuit admonished the district court for refusing to follow prior Seventh Circuit precedent construing the state law at issue in favor of two state court intermediate appellate court decisions post-dating the Seventh Circuit's prior decision. Likewise, in Taco Bell Corp. v. Continental Casualty Co., 388 F.3d 1069, 1077 (7th Cir. 2004), the court ruled "that the district court was bound [by the Seventh Circuit's prior prediction], as a lower court cannot overrule the decision of a higher one." Those decisions seem wrong under Supreme Court precedent. The district court owes deference to those intermediate state court precedents, just as the Seventh Circuit does. The intervening intermediate appellate court decisions make the prior predictions of the Seventh Circuit distinguishable, as the Seventh Circuit presumably would have followed those state intermediate court precedents had they been issued at the time. Indeed, some district court judges have rejected decisions of their higher courts due to subsequent state court precedent. *See In re* E. & S. Dists. Asbestos Litig., 772 F. Supp. 1380, 1391 (E. & S.D.N.Y. 1991), *rev'd on other grounds*, *In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831 (2d Cir. 1992); Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, LLP, 267 F. Supp. 2d 601 (E.D. Tex. 2003); Hittle v. Scripto-Tokai Corp., 166 F. Supp. 2d 159 (M.D. Pa. 2001).

publication language in relation to TCPA claims.[41] Thus, while the Seventh Circuit's incorrect prediction of Illinois law in *American States* has no binding force in light of *Swiderski*, it continues to be followed to some extent (although not as an accurate statement of Illinois law) in the federal courts of the Seventh Circuit.

The Seventh Circuit covers federal courts in three states: Illinois, Indiana, and Wisconsin.[42] The courts in two of those three states (Illinois and Wisconsin) have *explicitly* rejected the Seventh Circuit's approach.[43] The third (Indiana) has no state precedent, but now has federal court decisions predicting no coverage based on the Seventh Circuit precedent.[44]

In *Sawyer v. West Bend Mutual Insurance Co.*,[45] the Court of Appeals of Wisconsin was explicit in adopting the Illinois Supreme Court's interpretation and rationale in *Swiderski* over the Seventh Circuit's approach in *American States* and *Websolv*. The Wisconsin court identified three essential disagreements with the Seventh Circuit's approach. First, the Wisconsin court disagreed with the Seventh Circuit's "operating premise that publication is implicated only where the relevant concern is a secret" because publication is the manner by which the violative material is transmitted; it is an act of distributing copies, for example, which describes fax transmissions whether or not those transmissions reveal a secret.[46] Second, the Wisconsin court disagreed with the Seventh Circuit's conclusion that the publication language covered only secrecy interests due to other advertising offenses which were focused on the content of the communication, noting that "[t]he definition of personal and advertising injury includes seven separate and distinct scenarios, ranging from false arrest to copyright infringement."[47] The court found the *Swiderski* precedent more persuasive, noting that the Illinois Supreme Court relied on the plain meaning of the terms used in the policy and refused to add limitations to coverage that were not found in the insurance policy's text.[48] Any prediction of Wisconsin law should apply the *Sawyer* precedent.

Likewise, in predicting Michigan law in *Indiana Insurance Co. v. CE Design Ltd.*, Judge Harry D. Leinenweber of the United States District Court for the Northern District of Illinois did not follow the Seventh Circuit precedent in *American States* and *Websolv*.[49] Judge Leinenweber predicted that the Michigan

41. *See* ACE Rent-a-Car, Inc. v. Empire Fire & Marine Ins. Co., 580 F. Supp. 2d 678 (N.D. Ill. 2008) (predicting Indiana law); ACE Mortgage Funding, Inc. v. Travelers Indem. Co. of Am., No. 1:05-cv-1631, 2008 WL 686953 (S.D. Ind. Mar. 10, 2008) (predicting Indiana law); Erie Ins. Exch. v. Watts, No. 1:05-CV-867, 2006 WL 3776255 (S.D. Ind. 2006) (predicting Indiana law).

42. *See About the Court*, United States Court of Appeals for the Seventh Circuit, http://www.ca7.uscourts.gov/about-court/about-court.htm.

43. *Valley Forge Ins. Co.*, 860 N.E.2d at 307; Sawyer v. West Bend Mutual Insurance Co., 821 N.W.2d 250, 258 (Wis. Ct. App. 2012).

44. *See Valley Forge Ins. Co.*, 860 N.E.2d 307; *Sawyer*, 821 N.W.2d at 250 (Wis. Ct. App. 2012).

45. *Sawyer*, 821 N.W.2d at 258.

46. *Id.* at 257.

47. *Id.* at 258.

48. *Id.*

49. 6 F. Supp. 3d 858 (N.D. Ill. 2013).

Supreme Court would likely follow Michigan intermediate appellate court decisions to find coverage under the publication language, rather than adopt the Seventh Circuit's rationale. When making an *Erie* prediction in *American States* and *Websolv*, the Seventh Circuit did not have any intermediate state court decisions to consider from the relevant states (Illinois and Iowa, respectively). But when Judge Leinenweber decided *CE Design*, there were two relevant intermediate appellate court decisions in Michigan finding coverage under the publication language, and those decisions controlled "[i]n the absence of persuasive indications that the Michigan Supreme Court would decide the case differently."[50] Judge Leinenweber found "no flaw" in the reasoning of those intermediate appellate cases under Michigan law.[51]

When predicting the law of Indiana, district courts in the Seventh Circuit have followed Seventh Circuit precedent in the absence of state court precedent from Indiana.[52] It is an interesting question of federal jurisprudence whether they are bound to do so. The Seventh Circuit predicted Iowa law in *Websolv*, not Indiana law. However, the Seventh Circuit relied on its own contractual interpretation, rather than Iowa law, in doing so; as a result, a district court may be reluctant to interpret the insurance policy language in a contrary manner without clear guidance from an Indiana state court. In contrast, a federal court in the Seventh Circuit predicting Wisconsin law, as well as federal courts in other circuits, should follow the Wisconsin intermediate appellate precedent rather than the federal court precedent it explicitly rejected.

In the absence of state court precedent, a federal court will often view persuasively a federal Court of Appeals decision predicting undecided state law questions if the state is in that circuit.[53] Notably, Iowa is in the Eighth Circuit. Before the Seventh Circuit decided *Websolv*, the Eighth Circuit had decided *Universal Underwriters Insurance Co. v. Lou Fusz Automobile Network, Inc.*,[54] predicting Missouri law and finding coverage for TCPA claims under the publication language. After the Seventh Circuit decided *Websolv* in 2009, the Eighth Circuit decided *Owners Insurance Co. v. European Auto Works, Inc.*, which considered the publication language under Minnesota law and also found coverage under the plain meaning of the insurance policy.[55] The Seventh Circuit did not look for any guidance from the Eighth Circuit when deciding *Websolv*. Nevertheless, it seems clear based on the Eighth Circuit's precedent that if the Eighth

50. *Id.* at 867.

51. *Id.*

52. *ACE Rent-a-Car*, 580 F. Supp. 2d at 678; *ACE Mortgage Funding,* 2008 WL 686953; *Kevin T. Watts, Inc.*, 2006 WL 3755329.

53. *See* Casey v. Merck & Co., 653 F.3d 95, 101 (2d Cir. 2011) (reasoning that where state law is inconclusive, "our general practice is to look next to the law of the circuit in which the state is located"); Dawn Equipment Co. v. Micro-Trak Systems, Inc., 186 F.3d 981, 989 n.3 (7th Cir. 1999) ("normally" court "defers" to prediction of federal court of appeals in the relevant state). However, such precedent is not binding. Factors, Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 283 (2d Cir. 1981) ("We need not and do not conclude that the state law holding of the pertinent court of appeals is automatically binding upon the federal courts of all the other circuits."). *See generally How Far Does an Erie Prediction Extend*, DRUG &DEVICE LAW (October 19, 2012).

54. 401 F.3d 876, 881 (8th Cir. 2005).

55. 695 F.3d 814, 819 (8th Cir. 2012).

Circuit had been doing the predicting in *Websolv*, rather than the Seventh Circuit, the result in *Websolv* would have been flipped, with coverage being found. This may be sufficient grounds in itself for courts outside of the Seventh Circuit to decline to follow the Seventh Circuit's prediction of Iowa law.

## V. THE PUBLICATION LANGUAGE REACHES THE ENTIRE RIGHT OF PRIVACY.

It is perhaps a universal rule that any ambiguities in insurance policies are construed in favor of coverage.[56] Many courts have found coverage because the plain language of the publication language fits TCPA claims so comfortably. It would take a strained reading of an insurance policy to say that there is no reasonable interpretation of the publication language that would cover TCPA claims. When a reasonable interpretation of an insurance policy exists that results in coverage, courts will typically find coverage even if other reasonable interpretations exist because those other interpretations would simply create an ambiguity that must be resolved in favor of coverage.[57]

The interpretation of the publication language that provides coverage for TCPA claims is the majority rule for good reason. If the provision were intended to be limited to secrecy interests or the content of the communication, the coverage could have used the phrase "right of secrecy" rather than "right of privacy" or make clear that the content of the material, rather than the sending of material, must violate a person's right of privacy. Or the insurance company could simply use the "making known" language which courts have universally found does not reach TCPA claims.

The term "right of privacy" is broad—broader than the right of seclusion, the right of secrecy, and even broader than the term "invasion of privacy" which could conceivably be construed as being limited to a tort. The "right of privacy" can be protected by statutes, regulations, tort precedent,[58] a state Constitution, or the federal Constitution. The TCPA is a statute that protects a person's privacy right of seclusion. It therefore protects a right of privacy.

56. 1-5 New Appleman on Insurance Law Library Edition § 5.02; Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 538 (1996) (describing the "hornbook statement of contra proferentum, enunciated thousands of times by courts in every jurisdiction" as "[i]f a policy provision is 'ambiguous'—reasonably susceptible to more than one interpretation by the ordinary reader of the policy—then the provision is interpreted against the drafter and the interpretation more favorable to the insured governs, even if the provision could not reasonably be made less ambiguous.")

57. Terra Nova Ins. Co. v. Fray-Witzer, 869 N.E.2d 565, 573 (Mass. 2007) ("[I]n evaluating the ambiguity of the phrase, we cannot ignore the body of national case law addressing the same or similar policy language and falling on both sides of this interpretative 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.")

58. Most states recognize at least four types of privacy violations: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places the other in a false light.

The term "right of privacy" is broad and comprises all sorts of privacy rights – seclusion, secrecy, publicity, false light, etc. Indeed, intrusion upon seclusion probably "best captures the common understanding of an 'invasion of privacy'":[59]

> Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an "invasion of privacy." It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.[60] It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity. "[A] measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."[61]

Beginning more than a decade ago, the insurance industry started adding TCPA exclusions to general liability insurance policies when they intended to exclude TCPA liabilities. TCPA exclusions typically exclude claims "arising directly or indirectly out of any action or omission that violates or is alleged to violate: a. The Telephone Consumer Protection Act (TCPA) . . . ."[62] When clear exclusionary language exists in the insurance marketplace, insurance companies should use that language if they intend to exclude a particular liability. Courts should not rescue an insurance company by writing a better policy for the insurance company than the one it issued.[63]

Thus, the publication of material that invades someone's seclusion, and violates their right to be let alone, is a quintessential violation of the right of privacy. TCPA allegations assert that faxes or text messages are unwanted and violate the recipient's right to be let alone, the right to seclusion. The sending of unwanted faxes or text messages therefore constitute the publication of material

59. Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 230–31 (1998) (emphasis added).

60. *See* RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW. INST. 1977)

61. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964).

62. *E.g.,* Windmill Nursing Pavilion, Ltd. v. Cincinnati Ins. Co., 2 N.E.3d 582, 591 (Ill. App. Ct. 2013) (quoting the terms of the TCPA endorsement in a general liability policy).

63. Sphere Drake Ins. Co., v. Y.L. Realty Co., 990 F. Supp. 240, 244 (S.D.N.Y. 1997) (finding that insurance company could have drafted pollution exclusion with sufficient specificity to exclude personal injuries from lead paint); Vigilant Ins. Co. v. V.I. Techs., Inc., 676 N.Y.S.2d 596, 598 (App. Div. 1st Dep't 1998) (noting that insurance company's argument that pollution exclusion applied to damages from contamination of blood plasma by the seepage of ethylene glycol was undercut by the ease in which an appropriate exclusion could have been drafted). *See generally* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996) (noting that decisions invoking *contra proferentum* sometimes consider how simple it would have been for the insurer to draft a clearer provision).

that violates a person's right of privacy. Unless TCPA liabilities are clearly excluded through the adoption of standard exclusions available in the insurance marketplace, they are covered under the publication language.

## VI. CONCLUSION

The Court of Appeals for the Seventh Circuit predicted that the state high courts of Illinois and Iowa would find no coverage for TCPA claims under the personal and advertising injury coverage in a standard-form general liability policy. The Illinois Supreme Court rejected the Seventh Circuit's prediction, while the Iowa Supreme Court has yet to rule on the issue. Moreover, the intermediate appellate court in Wisconsin has rejected the Seventh Circuit's predictions, as have decisions in the Eighth Circuit where Iowa resides.

The Seventh Circuit's decisions regarding insurance coverage in TCPA cases have run contrary to the precedent nationwide construing the publication language in the personal and advertising injury coverage of general liability insurance policies. Although district courts in the Seventh Circuit may be bound by the Seventh Circuit's predictions in the absence of intervening state court precedent, the Seventh Circuit, sitting *en banc*, is not. In an appropriate case, the Seventh Circuit should consider whether its prior predictions of state law in the interpretation of the publication language remain the most accurate and fair prediction of state law in light of subsequent precedent.