

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 6 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

YAHOO! INC., A Delaware corporation,

Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH,  
PENNSYLVANIA, a Pennsylvania  
corporation,

Defendant-Appellee.

No. 17-16452

D.C. No. 5:17-cv-00447-NC

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Nathanael M. Cousins, Magistrate Judge, Presiding

Argued and Submitted December 17, 2018  
Submission Withdrawn January 16, 2019  
Resubmitted December 2, 2022  
San Francisco, California

Before: M. SMITH and NGUYEN, Circuit Judges, and RESTANI,\*\* Judge.

Yahoo! Inc. appeals from the district court's judgment dismissing its

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

complaint against National Union Fire Insurance Company of Pittsburgh, Pennsylvania for failure to state a claim. Yahoo! alleges that National Union breached its duty to defend Yahoo! against claims that Yahoo! violated the Telephone Consumer Protection Act (“TCPA”). The lawsuits against Yahoo! alleged that it invaded consumers’ privacy by sending them unsolicited text messages. The district court ruled that the insurance coverage provision at issue, for personal injury arising out of “[o]ral or written publication, in any manner, of material that violates a person’s right of privacy,” does not apply to the TCPA litigation against Yahoo!.

Because it was unclear how California courts would interpret this coverage provision, we certified the question to the California Supreme Court. *See Yahoo! Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 913 F.3d 923 (9th Cir. 2019). That court held that the coverage provision “can cover liability for violations of the right of seclusion,” including liability for “violat[ing] the TCPA by sending unsolicited text messages that did not reveal any private or secret information,” so long as “such coverage is consistent with the insured’s objectively reasonable expectations.” *Yahoo Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. S253593, slip op. at 23, 2022 WL 16985647, at \*10 (Cal. Nov. 17, 2022). If so, then the insurer has a duty to defend the insured against the TCPA claims, “provided that the alleged TCPA violation amounts to a right-of-seclusion

violation under California law.” *Id.*

The California Supreme Court expressed no opinion as to the ultimate question—whether Yahoo! is entitled to a defense—because “Yahoo!’s objectively reasonable expectations . . . must be determined in further litigation.” *Id.* at 18, 2022 WL 16985647, at \*8. Because the present record may be inadequate for us to determine Yahoo!’s reasonable expectations and the parties have not briefed the issue, we remand for the district court to resolve it, as well as any other issues that arise,<sup>1</sup> in the first instance.

**REVERSED AND REMANDED.**

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<sup>1</sup> The California Supreme Court did not address National Union’s new argument that a policy exclusion for advertising injury bars coverage because “the record . . . does not indicate whether the text messages at issue here were advertisements as that term is defined in the policy.” *Id.* at 23, 2022 WL 16985647, at \*9.