EXHIBIT 8

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Citation: **2007 Cal. App. LEXIS 113**

*147 Cal. App. 4th 137, *; 2007 Cal. App. LEXIS 113, **;*
2007 Daily Journal DAR 1299

ACS SYSTEMS, INC., et al., Plaintiffs and Appellants, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY et al., Defendants and Respondents.

B181837

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

147 Cal. App. 4th 137; 2007 Cal. App. LEXIS 113; 2007 Daily Journal DAR 1299

January 29, 2007, Filed

NOTICE: CERTIFIED **[**1]** FOR PARTIAL PUBLICATION*

*Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part IV.E.

PRIOR HISTORY: Superior Court of Los Angeles County, No. BC305455, Robert L. Hess, Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured sought review of a judgment on the pleadings from the Superior Court of Los Angeles County (California), which, in an action alleging that defendant insurer had a duty to defend under commercial general liability and umbrella liability policies, sustained the insurer's demurrer without leave to amend and entered a judgment of dismissal.

OVERVIEW: The policies required the insurer to provide a defense in suits alleging injury or damage resulting from property damage caused by an event or caused by an advertising injury offense committed during the policy term. An advertising injury offense was defined to include making known to any person or organization written or spoken material that violated an individual's right of privacy. The insured was named as a defendant in an action alleging that it sent unsolicited advertisements to fax machines in violation of federal and state law. The complaint included a claim for invasion of privacy. The court held that the insurer had no duty to defend because the advertising injury coverage, as it related to invasion of privacy, applied to liability for injury caused by the disclosure of private content to a third party. The coverage did not apply to invasion of a person's seclusion privacy caused by receipt of an unauthorized advertising fax because no disclosure of private facts to a third party occurred. Moreover, the sending of unsolicited faxes was not an accidental event because the fax transmissions were not accidental, and an exclusion for intentional damage applied.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: advertising injury, coverage, right of privacy, fax, insured, recipient, property damage, insurance policy, seclusion, unsolicited, secrecy, advertisement, spoken, duty to defend, advertising, privacy, insurer, faxed, invasion of privacy, tangible property, privacy

right, loss of use, ambiguous, third party, invasion, aking, demurrer, sending, policy language, antecedent

LexisNexis(R) Headnotes • Hide Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Demurrers

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 A demurrer tests the legal sufficiency of factual allegations in a complaint. In reviewing the sufficiency of a complaint against a general demurrer, an appellate court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. The appellate court also considers matters that may be judicially noticed. When a demurrer is sustained, the appellate court determines whether the complaint states facts sufficient to constitute a cause of action. When a demurrer is sustained without leave to amend, the appellate court decides whether a reasonable possibility exists that amendment may cure the defect; if it can the appellate court reverses, but if not the appellate court affirms. More Like This Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN2 An insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. The nature and kinds of risks covered by the insurance policy establish the scope of the duty to defend. It is the potential for coverage under a particular policy, and in light of the specific pleadings and known facts of the third party claim, which establishes the insurer's obligation to defend. If, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance. The interpretation of an insurance policy is a question of law. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

HN3 The interpretation of an insurance policy corresponds to the interpretation of contracts generally. The parties' mutual intention when they form the contract governs interpretation; the fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. If possible, a court infers this intent solely from the written provisions of the insurance policy. If the policy language is clear and explicit, it governs. When interpreting a policy provision, a court must give its terms their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage. The court must also interpret these terms in context and give effect to every part of the policy with each clause helping to interpret the other. A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > General Overview

HN4 If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, the objectively reasonable expectations of the insured. Only if this rule does not resolve

the ambiguity does a court then resolve it against the insurer. Thus in determining whether a policy provides coverage based on policy language that is claimed to be ambiguous, the court must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy. This is because language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract. More Like This Headnote

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN5 The courts have found it analytically helpful to identify two meanings for the right of privacy: secrecy and seclusion. A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. Thus a person claiming the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance by others. A person claiming the privacy right of secrecy asserts the right to prevent disclosure of personal information to others. Invasion of the privacy right of seclusion involves the means, manner, and method of communication in a location (or at a time) which disturbs the recipient's seclusion. By contrast, invasion of the privacy right of secrecy involves the content of communication that occurs when someone's private, personal information is disclosed to a third person. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN6 The last antecedent rule provides that qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote. Ordinarily the last antecedent rule applies to statutory construction, but it has also been stated to apply to contracts and has been used specifically to interpret insurance policy language. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Entire Contract

HN7 A court interprets an insurance policy provision by giving effect to every part of the policy, with each clause helping to interpret the other, so as to avoid finding ambiguity in the abstract and in order instead to construe language in the context of the contract as a whole. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > Accidents

HN8 An accident requires unintentional acts or conduct. Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an accident merely because the insured did not intend to cause injury. More Like This Headnote

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SUMMARY:
CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court, in an action alleging that an insurer had a duty to defend under commercial general liability and umbrella liability policies, sustained the insurer's demurrer without leave to amend and entered a judgment on the pleadings dismissing the action. The policies required the insurer to provide a defense in suits alleging injury or damage resulting from property damage caused by an event or caused by an advertising injury offense committed during the policy term. An advertising injury offense was defined to include making known to any person or organization written or spoken material that violated an individual's right of privacy. The insured was named as a defendant in an action alleging that it sent unsolicited advertisements to fax machines in violation of federal and state law. The complaint included a claim for invasion of privacy. (Superior Court of Los Angeles County, No. BC305455, Robert L. Hess, Judge.)

The Court of Appeal affirmed the judgment, holding that the insurer had no duty to defend because the advertising injury coverage, as it related to invasion of privacy, applied to liability for injury caused by the disclosure of private content to a third party. The coverage did not apply to invasion of a person's seclusion privacy caused by receipt of an unauthorized advertising fax because no disclosure of private facts to a third party occurred. Moreover, the sending of unsolicited faxes was not an accidental event because the fax transmissions were not accidental, and an exclusion for intentional damage applied. (Opinion by Kitching, J., with Klein, P. J., and Croskey, J., concurring.) **[*138]**

HEADNOTES:
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Insurance Contracts and Coverage § 77--Liability and Indemnity Insurance--Duty to Defend.--An insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. The nature and kinds of risks covered by the insurance policy establish the scope of the duty to defend. It is the potential for coverage under a particular policy, and in light of the specific pleadings and known facts of the third party claim, which establishes the insurer's obligation to defend. If, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance. The interpretation of an insurance policy is a question of law.

(2) Insurance Contracts and Coverage § 13--Rules in Aid of Interpretation of Contracts--Interpretation as Affected by Intent of the Parties--Inferred from Policy Provisions.--The interpretation of an insurance policy corresponds to the interpretation of contracts generally. The parties' mutual intention when they form the contract governs interpretation; the fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. If possible, a court infers this intent solely from the written provisions of the insurance policy. If the policy language is clear and explicit, it governs. When interpreting a policy provision, a court must give its terms their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage. The court must also interpret these terms in context and give effect to every part of the policy with each clause helping to interpret the other. A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.

(3) Insurance Contracts and Coverage § 15--Rules in Aid of Interpretation of Contracts--Interpretation Against Insurer--Ambiguity--Objectively Reasonable Expectations.--If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. This rule, as applied to a promise of coverage in **[*139]** an

insurance policy, protects not the subjective beliefs of the insurer but, rather, the objectively reasonable expectations of the insured. Only if this rule does not resolve the ambiguity does a court then resolve it against the insurer. Thus in determining whether a policy provides coverage based on policy language that is claimed to be ambiguous, the court must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy. This is because language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.

(4) Privacy § 2--Definitions and Distinctions--Secrecy and Seclusion.--The courts have found it analytically helpful to identify two meanings for the right of privacy: secrecy and seclusion. A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. Thus a person claiming the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance by others. A person claiming the privacy right of secrecy asserts the right to prevent disclosure of personal information to others. Invasion of the privacy right of seclusion involves the means, manner, and method of communication in a location (or at a time) which disturbs the recipient's seclusion. By contrast, invasion of the privacy right of secrecy involves the content of communication that occurs when someone's private, personal information is disclosed to a third person.

(5) Insurance Contracts and Coverage § 10--Rules in Aid of Interpretation of Contracts--Last Antecedent Rule.--The last antecedent rule provides that qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote. Ordinarily the last antecedent rule applies to statutory construction, but it has also been stated to apply to contracts and has been used specifically to interpret insurance policy language.

(6) Insurance Contracts and Coverage § 10--Rules in Aid of Interpretation of Contracts--Giving Effect to Every Word.--A court interprets an insurance policy provision by giving effect to every part of the policy, with each clause helping to interpret the other, so as to avoid finding ambiguity in the abstract and in order instead to construe language in the context of the contract as a whole.

[*140]

(7) Insurance Contracts and Coverage § 79--Liability and Indemnity Insurance--Risks Covered by Liability Insurance--Advertising Injury.--Because an advertising injury offense provision in commercial general liability and umbrella liability policies did not cover the insured's conduct of sending unsolicited advertisements to fax machines as alleged in litigation against the insured, the insurer had no duty to defend the insured under that provision.

[2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 148.]

(8) Insurance Contracts and Coverage § 78--Liability and Indemnity Insurance--Definitions and Distinctions--Accident.--An accident requires unintentional acts or conduct. Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an accident merely because the insured did not intend to cause injury.

COUNSEL: Wright, Robinson, Osthimer & Tatum, Charles H. Horn and Brian S. Inamine for Plaintiffs and Appellants.

Michelman & Robinson and Carol Boyd for Defendants and Respondents.

JUDGES: Kitching, J., with Klein, P. J., and Croskey, J., concurring.

OPINION BY: Kitching

OPINION:

KITCHING, J.--

I. INTRODUCTION

This case presents the question whether a liability insurer providing coverage for "advertising injury" and "property damage" is required to defend its insured in an action charging the insured with sending unsolicited advertisements to fax machines in violation of the federal Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § 227(b)(1)(C)), and with invasion of privacy caused by those faxed advertisements.

Because we hold that the advertising injury and property damage provisions of the insurance policy did not provide coverage for liability for violations of the TCPA or for **[**2]** invasion of privacy caused by the sending of unsolicited faxed advertisements, we conclude that no potential for coverage **[*141]** existed and no duty to defend arose. The trial court correctly sustained a demurrer without leave to amend and entered a judgment of dismissal, and we affirm.

II. PROCEDURAL AND FACTUAL HISTORY

This appeal involves commercial package policies issued by St. Paul Fire and Marine Insurance Company and by St. Paul Mercury Insurance Company. These companies will be referred to as "St. Paul." The policies insured Fidelity National Title Insurance Company, ACS Systems, Inc. (ACS), and others. Fidelity National Title Insurance Company is the parent corporation of Micro General Corporation, the successor in interest through merger of ACS.

The Underlying Action, Kaufman v. ACS Systems, Inc.: On January 3, 2000, ACS was named as a defendant in the Los Angeles County Superior Court action, *Kaufman v. ACS Systems, Inc.* (No. BC 222588). The *Kaufman* class action lawsuit alleged violations of the TCPA, which prohibits sending unsolicited advertisements to fax machines (47 U.S.C. § 227(b)(1)(C)), violations of California's **[**3]** unfair competition laws (Bus. & Prof. Code, § 17200 et seq.), negligence, and invasion of privacy.

St. Paul's Denial of Coverage for Defense and Indemnity: On January 25, 2000, ACS notified St. Paul of the *Kaufman* complaint. On April 4, 2000, stating that the policy did not cover the type of invasion of privacy alleged in the *Kaufman* complaint, St. Paul informed ACS that it denied coverage for defense and indemnity.

The ACS Complaint Against St. Paul: On November 3, 2003, ACS filed a complaint for breach of contract, equitable subrogation, implied indemnity, and declaratory relief against St. Paul. After the trial court sustained St. Paul's demurrers with leave to amend, ACS filed a first amended complaint on August 4, 2004, which is the operative complaint.

Allegations of the ACS Complaint: Pursuant to the applicable standard of review, n1 the operative complaint sets forth the following facts. St. Paul issued **[*142]** commercial package policy No. RP06649251 insuring ACS, among others. The policy included commercial

general liability and umbrella liability insurance, and was in effect from February 1, 1998 to February 1, 1999, and from **[**4]** February 1, 1999 to April 1, 2000.

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n1 HN1 A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank--California* (1994) 27 Cal.App.4th 800, 807 [32 Cal. Rptr. 2d 735].) In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. This court also considers matters that may be judicially noticed. When a demurrer is sustained, this court determines whether the complaint states facts sufficient to constitute a cause of action. When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58].)

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The commercial general liability policy included St. Paul's duty to defend any insured in suits alleging injury or damage resulting **[**5]** from property damage caused by an event, or caused by an advertising injury offense committed during the policy term.

Provisions of the Policy Obligating St. Paul to Pay for Damages for Covered Advertising Injury or Property Damages: The relevant portions of the St. Paul commercial general liability policy n2 describe what the policy covers:

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n2 The St. Paul umbrella policy uses slightly different wording in some of its provisions, but we do not regard these differences as significant.

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"**Bodily injury and property damage liability**. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage, or premises damage that:

". happens while this agreement is in effect; and

".is caused by an event."

"**Advertising injury liability**. We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:

". results from the advertising of your products, work or completed work; and

". is caused by an advertising injury offense committed **[**6]** while this agreement is in effect."

"*Advertising injury* means injury, other than bodily injury or personal injury, caused by an advertising injury offense.

"*Advertising injury offense* means any of the following offenses:

". Libel or slander.

". Making known to any person or organization written or spoken material that belittles the products, work or completed work of others. **[*143]**

". Making known to any person or organization written or spoken material that violates an individual's right of privacy.

". Unauthorized taking or use of any advertising idea, material, slogan, style or title of others.

"*Advertising* means attracting the attention of others by any means for the purpose of seeking customers or increasing sales or business."

"*Property damage* means:

". physical damage to tangible property of others, including all resulting loss of use of that property; or

". loss of use of tangible property of others that isn't physically damaged."

"*Event* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In the underlying lawsuit, the *Kaufman* plaintiffs alleged that ACS, a software company, used the services **[**7]** of DataMart Information Services Corporation (DataMart) to send 13,919 unsolicited faxes to 8,216 recipients in 1998 and 1999.

The Kaufman Complaint Alleges Three Breach of Contract Causes of Action: The first cause of action for breach of contract alleged that the *Kaufman* complaint sued ACS for "property damages," seeking damages for actual losses incurred by recipients of unwanted faxes, which included use of recipients' paper and loss of use of fax machines while they printed faxed advertisements. Because the *Kaufman* complaint alleged that ACS was liable for "property damages" under the policy, the ACS complaint alleged that St. Paul breached its contracts with ACS by refusing to defend ACS in the *Kaufman* litigation.

The first cause of action alleged that ACS contracted with DataMart, an advertising agency, to promote the services of ACS, and that ACS itself did not send the faxes that are the subject of the *Kaufman* suit. The complaint alleged that ACS did not authorize DataMart to send faxes in violation of any law, and at most negligently failed to assure that DataMart sent faxes only to persons giving express or implied permission to receive them. The complaint **[**8]** alleged that ACS reasonably believed that recipients of faxes sent **[*144]** by DataMart gave express or implied permission to receive them, and that whether the faxes caused damages depended on the perspective of those receiving them. The complaint also alleged that where the insured's conduct resulted in accidental damages from the fax recipient's perspective, it constituted an "event" for purposes of the "accident" requirements of liability policies.

A second breach of contract cause of action alleged that the *Kaufman* complaint sued ACS for damages for "advertising injury." Invasion of privacy causes of action in the *Kaufman* complaint alleged that unsolicited faxes from ACS invaded the *Kaufman* plaintiffs' solitude and violated their common law and California constitutional rights of privacy. The ACS complaint also alleged that ACS had an objectively reasonable expectation that coverage for "advertising injury" in the St. Paul policies extended to all torts recognized as an "invasion of

privacy" in California law. The ACS complaint alleged that St. Paul breached its contracts with ACS by claiming that "advertising injury offenses" in the policies provided no coverage and by refusing **[**9]** to defend ACS in the *Kaufman* litigation.

The ACS complaint alleged a third cause of action for breach of contract for "advertising injury" based on umbrella liability coverage, which included coverage for invasion of privacy torts alleged in the *Kaufman* complaint. This cause of action alleged that St. Paul's refusal to defend ACS in the *Kaufman* litigation breached St. Paul's umbrella liability policies.

The *Kaufman* complaint also brought causes of action for equitable subrogation and for indemnification, which alleged that St. Paul should pay ACS's attorney fees incurred in defending the *Kaufman* litigation, which attorney fees had been paid by Micro General Corporation and Fidelity National Information Solutions, Inc. A declaratory relief cause of action sought a declaration of the obligations of ACS, Micro General Corporation, and Fidelity National Information Solutions, Inc., which contended that ACS was entitled to a defense and indemnity in the *Kaufman* litigation, and of St. Paul, which denied those obligations.

St. Paul's Demurrer: St. Paul demurred to the first amended complaint, arguing that (1) intended conduct is not an accident, whether or not **[**10]** the resulting damage was intended; (2) sending unsolicited faxes could not be "making known ... material that violates an individual's right of privacy" **[*145]** because the content of faxed advertisements did not include private material about recipients of the faxes; and (3) no insured could have an objectively reasonable expectation that it could shift the consequences of such illegal activity to its insurer.

ACS's opposition argued that ACS had an objectively reasonable expectation of coverage for all types of invasion of privacy reasonably within the policies' advertising injury provisions, which did not restrict coverage to fewer than all four "invasion of privacy" torts; and ACS had a reasonable expectation of coverage for property damage, because the policies' insuring agreements for property damage liabilities, using "event" rather than "occurrence," included an occurrence, incident, consequence or result, and was not limited to unexpected or unintended conduct or damages.

Sustaining of the Demurrer and Appeal by ACS: The trial court sustained the demurrer without leave to amend. After the court filed a judgment of dismissal, ACS timely filed a notice of appeal. **[**11]**

III. ISSUES

In the published portion of this opinion, we address plaintiffs' claims that:

1. A duty to defend exists for advertising injury liabilities; and

2. A duty to defend exists for property damage liabilities.

IV. DISCUSSION

A. *The Insurer Owes a Duty to Defend Only if the Liability Policy Provides a Potential for Coverage*

CA(1)**(1)** By this action ACS seeks to require St. Paul, based on the duty to defend contained in the insurance policies, to defend ACS against the *Kaufman* plaintiffs' claims. HN2"[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19 [44 Cal. Rptr. 2d 370, 900 P.2d 619].) The nature and kinds of risks covered by the insurance policy establish the scope of the duty to defend. (*Ibid.*) "It is the potential for coverage under a particular policy, and in light of the specific pleadings and known facts of the third party claim, which establishes the insurer's obligation to defend." (*Mez* **[*146]** *Industries, Inc. v. Pacific Nat. Ins. Co.* (1999) 76 Cal.App.4th 856, 877 [90 Cal. Rptr. 2d 721].) **[**12]** "[I]f, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655 [31 Cal. Rptr. 3d 147, 115 P.3d 460].) The interpretation of an insurance policy is a question of law. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 [90 Cal. Rptr. 2d 647, 988 P.2d 568].) We therefore examine the "advertising injury" and "property damage" provisions to make a determination, as a question of law, whether the St. Paul policy provided a potential for coverage of claims in the *Kaufman* litigation against the insured, ACS.

B. *The Interpretation of Insurance Policies*

HN3CA(2)**(2)** The interpretation of an insurance policy corresponds to the interpretation of contracts generally. The parties' mutual intention when they form the contract governs interpretation; "[t]he fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal. Rptr. 2d 538, 833 P.2d 545].) "If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] **[**13]** If the policy language 'is clear and explicit, it governs.' [Citation.] [P] When interpreting a policy provision, we must give its terms their ' "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage." ' [Citation.] We must also interpret these terms 'in context' [citation], and give effect 'to every part' of the policy with 'each clause helping to interpret the other.' " (*Palmer v. Truck Ins. Exchange, supra*, 21 Cal.4th at p. 1115.) "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract." (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at p. 18.)

CA(3)**(3)** "On the other hand, HN4'[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.' [Citations.] This rule, as applied to a promise of coverage **[**14]** in an insurance policy, protects not the subjective beliefs of the insurer but, rather, 'the objectively reasonable expectations of the insured.' [Citation.] Only if this rule does not resolve the ambiguity do we then resolve it against the insurer." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at pp. 1264-1265.) **[*147]**

Thus in determining whether a policy provides coverage based on policy language that is claimed to be ambiguous, the court "must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy. [Citation.] This is because '*language in a contract* must be construed in the context of that instrument as a whole, and in the circumstances of that case, and *cannot be found to be ambiguous in the abstract*.' " (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1265.) **[**15]**

C. *The "Advertising Injury" Provision of the St. Paul Policy Does Not Provide Liability Coverage for TCPA Violations or for Invasion of Privacy Arising from Unsolicited Faxed Advertisements*

ACS claims that the *Kaufman* action alleges a particular invasion of privacy, the " 'unreasonable intrusion upon the seclusion of another,' " n3 that this tort is included within the definition of "advertising injury offense" in the St. Paul policy, and that the St. Paul policy therefore covered this liability and St. Paul owed ACS a duty to defend. We disagree.

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n3 California recognizes four common law claims for invasion of privacy: (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 before the public. (*Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365, 372 [103 Cal. Rptr. 2d 410]; Rest. 2d Torts, § 652A, p. 376.)

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As we have seen, the advertising injury liability provision obligated St. Paul to indemnify and to provide a defense for damages for covered advertising injury "caused **[**16]** by an advertising injury offense committed while this agreement is in effect." The policies define four advertising injury offenses:

"Libel or slander.

"Making known to any person or organization written or spoken material that belittles the products, work or completed work of others.

"*Making known to any person or organization written or spoken material that violates an individual's right of privacy.* n4

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n4 The umbrella policy definition of this advertising offense refers to "written or spoken material that violates a person's right of privacy." We do not regard this slight variation in wording as significant.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*148]**

"Unauthorized taking or use of any advertising idea, material, slogan, style or title of others." (Italics added.)

ACS argues that the italicized advertising injury offense provided liability coverage for the allegations in the *Kaufman* complaint. The *Kaufman* complaint alleged that defendants (ACS and DataMart) faxed thousands of unsolicited advertisements for ACS to facsimile machines of **[**17]** persons, businesses, and entities in California, which violated the TCPA and Business and Professions Code section 17200, negligently breached duties (owed to persons who received their advertisements) to advertise in a lawful manner that complies with these

statutes, and invaded the plaintiffs' privacy in violation of common law and rights of privacy under the California Constitution.

The issue in this appeal is whether the conduct alleged in the *Kaufman* suit constitutes the "advertising injury offense" of "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" in the St. Paul policy.

We examine both the text--the written advertising injury provision--of the St. Paul insurance policy, and interpret this provision in context, giving effect to every part of the policy with each clause helping to interpret the others. (*Palmer v. Truck Ins. Exchange, supra*, 21 Cal.App.4th at p. 1115.) By interpreting the text of the advertising injury offense--"[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy"--and **[**18]** by analyzing this provision in the context in which it appears in the St. Paul policy, we conclude that the policy does not provide liability coverage for the conduct alleged in the *Kaufman* suit.

1. *The "Right of Privacy": Seclusion and Secrecy*

HN5[CA(4)] **(4)** The courts have found it analytically helpful to identify two meanings for "the right of privacy": "secrecy" and "seclusion." (*Resource Bankshares v. St. Paul Mercury Ins. Co.* (4th Cir. 2005) 407 F.3d 631, 640-641 (*Resource Bankshares*); *American St. Ins. v. Capital Assoc. Jackson Co.* (7th Cir. 2004) 392 F.3d 939, 941 (*American States*).) "A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion." (*American States*, at p. 941.) Thus a person claiming the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance **[*149]** *by* others. A person claiming the privacy right of secrecy asserts the **[**19]** right to prevent disclosure of personal information *to* others. Invasion of the privacy right of seclusion involves the *means, manner, and method* of communication in a location (or at a time) which disturbs the recipient's seclusion. By contrast, invasion of the privacy right of secrecy involves the *content* of communication that occurs when someone's private, personal information is disclosed to a third person. (*Id.* at p. 943.)

St. Paul contends that its policy provision provides coverage for invasions of a person's secrecy privacy, which the *Kaufman* complaint did not allege against ACS. ACS contends that the St. Paul policy provision provides coverage for the invasions of a person's seclusion privacy which were alleged in the *Kaufman* complaint. We must decide which of these two mutually exclusive interpretations is correct.

By alleging violations of the TCPA, the *Kaufman* suit alleged the violation of "seclusion" privacy. (*Resource Bankshares, supra*, 407 F.3d at p. 641; see also 47 U.S.C. § 227; Cong. Statement of Findings, Pub.L. No. 102-243, § 2 (Dec. 20, 1991) 105 Stat. 2394; *American States, supra*, 392 F.3d at pp. 942-943.) **[**20]** Our task, however, is not to identify which privacy right is enforced by 47 United States Code section 227(b)(1)(C) of the TCPA. The issue is whether the "advertising injury offense" provision of the St. Paul policy creates a potential for coverage of claims in the *Kaufman* suit brought under this TCPA statute. (See *American States*, at p. 942.) We find that both the text of the advertising injury offense at issue and the context in which that advertising injury offense appears in the St. Paul policy confirm that the policy did not provide liability coverage for claims in the *Kaufman* suit.

2. *Analysis of the Text*

The text of the advertising injury offense at issue is "making known to any person or organization written or spoken material that violates an individual's right of privacy." It is true that sending unsolicited faxed advertisements constitutes a "making known" of "written ... material" to the recipient. Under the St. Paul policy, however, making known written material is not enough to trigger coverage. Coverage requires an additional element, the making known of "material" that violates a person's right of privacy. That is, the **[**21]** *content* of the "material" violates someone's right of privacy when that material is "made known." " '[M]aking known' implies telling, sharing or otherwise divulging, such that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known." (*Resource Bankshares, supra*, 407 F.3d at p. 641, original italics.) **[*150]**

Thus the coverage applies to liability for injury caused by the disclosure of private *content* to a third party--to the invasion of "secrecy privacy" caused by "making known" to a third party "material that violates an individual's right of privacy." The coverage does not apply to injury caused by receipt of an unauthorized advertising fax, because in that case no disclosure of private facts to a third party has occurred: The recipient of an unauthorized advertising fax has no claim that "material that violates an individual's right of privacy" has been "made known" to a third party.

CA(5) **(5)** The "last antecedent rule" underscores this interpretation. HN6 The last antecedent rule provides that " ' "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are **[**22]** not to be construed as extending to or including others more remote." ' " (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743 [110 Cal. Rptr. 2d 828, 28 P.3d 876].) Ordinarily the last antecedent rule applies to statutory construction, but it has also been stated to apply to contracts (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 529 [132 Cal. Rptr. 2d 151]) and has been used specifically to interpret insurance policy language. (*Anderson v. State Farm Mut. Auto. Ins. Co.* (1969) 270 Cal. App. 2d 346, 349 [75 Cal. Rptr. 739]; *State Farm Mut. Auto. Ins. Co. v. Eastman* (1984) 158 Cal. App. 3d 562, 569 [204 Cal. Rptr. 827].) Considered grammatically, the word "that" in "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" can reasonably be interpreted only to refer to "material." We find that "material" is not only the last antecedent of "that" but is also its only antecedent. "That" does not refer to "making known." Thus this particular advertising offense only refers to "material that violates an individual's right of privacy," and does not refer to a "making known that violates **[**23]** an individual's right of privacy."

Nothing in the *content* of the "written or spoken material" in unsolicited faxed advertisements violated the recipients' secrecy right of privacy. The faxes contained no facts about the recipients, and did not disclose or "make known" any private information about the recipients to third parties. (See *St. Paul Fire and Marine Ins. v. Brunswick Corp.* (N.D.Ill. 2005) 405 F. Supp. 2d 890, 895.) Analyzing the same St. Paul policy language as that in this appeal, *Resource Bankshares, supra*, 407 F.3d 631, concluded: "It requires undue strain to believe that sending an unsolicited fax ad that has no private information or content (but rather simply advertised fairly the sender's wares) can reasonably be said to 'mak[e] known' material that violates a person's right to privacy. ... [T]he plainest and most common reading of the **[*151]** phrase indicates that 'making known' implies telling, sharing or otherwise divulging, such that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known." (*Id.* at p. 641, fn. omitted.)

Therefore the faxes **[**24]** did not violate the recipients' right of privacy so as to constitute an "advertising injury offense," and this provision of the St. Paul policy did not provide a potential for coverage.

3. *Analysis of the Context*

HN7[↑]CA(6)[↑] **(6)** We interpret an insurance policy provision by giving effect to every part of the policy, with each clause helping to interpret the other, so as to avoid finding ambiguity in the abstract and in order instead to construe language in the context of the contract as a whole. (*Palmer v. Truck Ins. Exchange, supra*, 21 Cal.4th at p. 1118.) The St. Paul policy definitions of "advertising injury offenses" provide a context that clarifies the meaning of the provision at issue in this appeal.

As stated, the St. Paul policy defines four "advertising injury offenses." The first, "libel or slander," involves a publication of defamatory content about someone to a third person. (Civ. Code, §§ 45, 46; *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal. App. 3d 1277, 1284 [286 Cal. Rptr. 198]; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal. Rptr. 2d 397].) The second, "[m]aking known to any person or **[**25]** organization written or spoken material that belittles the products, work or completed work of others," likewise involves a publication to a third person of content that belittles someone's products, work or completed work. The fourth advertising injury offense involves the unauthorized taking or use of content--of someone else's "advertising idea, material, slogan, style or title." These three advertising injury offenses therefore all involve the insured's making known or unauthorized taking or use of *content* which injures someone. Interpreting "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" in the context of the other three advertising injury offenses leads to the conclusion that it likewise involves not the mere communication or "making known" of written or spoken material. The covered advertising injury offense involves communication or making known of written or spoken material whose content injures someone else. Interpreting a St. Paul insurance policy containing these same four definitions of advertising injury, *Resource Bankshares, supra*, 407 F.3d 631 **[*152]** stated: "[T]hese four offenses **[**26]** all share the common thread of assuming that the victim of the advertising injury offense is harmed by the sharing of the *content* of the ad, not the mere *receipt* of the advertisement." (*Id.* at p. 641, original italics.)

Therefore the St. Paul advertising injury offense before us provides coverage only if the harmful content violates the secrecy right of privacy, and does not provide coverage for a violation of the seclusion right of privacy. The TCPA prohibits the faxing of unsolicited advertising rather than prohibiting or regulating advertising content itself. By focusing on the means, manner, and method--the faxing--of the advertising, the TCPA protects the seclusion right of privacy. (*Resource Bankshares, supra*, 407 F.3d at p. 642.) The three other advertising injury offenses in the St. Paul policy provide coverage for liability arising from injury to the secrecy privacy right caused by the publication or taking or use of content. Given this context, it would be unreasonable to give a different interpretation to the advertising injury offense at issue. It likewise does not cover liability for injury caused by the mere sending of unsolicited **[**27]** faxes; "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" provides liability coverage only when the content of an unsolicited fax (or other spoken or written material) causes injury to someone else by violating that person's secrecy right of privacy.

All four advertising offenses involve violations of the "secrecy" right of privacy. None of them involves the "seclusion" right of privacy--the right claimed to have been violated in the *Kaufman* litigation. The context of the other three advertising injury offenses indicates that the St. Paul policy did not provide coverage for liability caused by the transmission to a recipient of faxed advertisements whose content (1) contained no private information about the recipient and (2) was not communicated to a third party, and which for both these reasons did not violate the recipient's right of privacy.

4. *Other Case Authority Has Held That the Advertising Injury Offense at Issue Did Not Provide Coverage for TCPA Violations, and Case Authority Provided by ACS Is Distinguishable*

Two federal cases have held that TCPA violations were not covered as an advertising **[**28]** injury offense. *American States, supra*, 392 F.3d 939 also involved a class action suit brought by recipients of unsolicited faxed advertisements against the insured, the sender of the faxes, for violations of the TCPA. The insured tendered defense of the suit to the insurer, claiming coverage under an insurance policy that defined advertising injury as " 'oral or written publication of material that violates a person's right of privacy.' " (392 F.3d at p. 940.) *American States* held that this advertising-injury policy clause **[*153]** provided coverage for injury arising from violation of secrecy privacy and did not provide liability coverage for the normal consequences of unsolicited faxed advertisements. (*Id.* at p. 943.)

Resource Bankshares, supra, 407 F.3d 631 also involved a class action suit brought by recipients of an insured's faxes claiming violations of the TCPA. The insured, Resource Bankshares Corporation, sought a declaration that the class action suit triggered coverage under St. Paul insurance policies containing an advertising injury offense identical to that in the St. Paul umbrella policy in this appeal, defining the advertising injury **[**29]** offense as "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy." (407 F.3d at p. 634, italics omitted.) *Resource Bankshares* followed the analysis of seclusion privacy and secrecy privacy in *American States*, and held that the St. Paul advertising injury offense did not provide coverage for injury caused to recipients of unsolicited faxed advertisements in violation of the TCPA. (*Resource Bankshares*, at p. 640.)

ACS relies on cases which, it argues, found that, based on advertising injury policy provisions, insurers owe a duty to defend insureds sued in TCPA cases. These cases are distinguishable because they are based on policy language which differs from the advertising injury offense of "[m]aking known to any person or organization written or spoken material that violates an individual's right of privacy" in the St. Paul policy.

Universal Underwriters v. Lou Fusz Automotive (8th Cir. 2005) 401 F.3d 876 found that a complaint against an insured for violations of the TCPA alleged an "injury," defined by the insurance policy to include " 'private nuisance (except pollution), [and] **[**30]** invasion of rights of privacy or possession of personal property,' " without limiting, defining, or qualifying these terms in any way. (401 F.3d at p. 881.)

Park Univer. Enter. v. Am. Cas. Co., Reading, PA. (D.Kan. 2004) 314 F. Supp. 2d 1094 found that an insurer owed a duty to defend an insured, which was sued for violations of the TCPA, based on policy language requiring the insurer to pay an insured's damages caused by an " 'advertising injury,' " defined as " 'injury ... arising out of ... oral or written publication of material that violates a person's right of privacy,' " where the policy did not define "right of privacy" or " 'oral or written publication.' " (*Park Univ. Enter.*, at pp. 1099, 1106, 1108-1110; affd. (10th Cir. 2006) 442 F.3d 1239, 1248-1251.) The other cases reached the same result based on the same insurance policy language. (*Hooters of Augusta, Inc. v. American Global Ins. Co.* (S.D.Ga. 2003) 272 F. Supp. 2d 1365, 1371-1374; *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.* (N.D.Tex. 2003) 269 F. Supp. 2d 836, 845-847; **[**31]** *Prime TV, LLC v. Travelers Ins. Co.* (M.D.N.C. 2002) 223 F. Supp. 2d 744, 748, **[*154]** 752-753; and *TIG Ins. Co. v. Dallas Basketball, Ltd.* (Tex.App.--Dallas 2004) 129 S.W.3d 232, 237-239.)

5. *Conclusion*

CA(7)**(7)** Because the "advertising injury offense" provision in the insurance policies did not cover ACS's conduct which was alleged in the *Kaufman* litigation, St. Paul had no duty to defend ACS under that provision.

D. *The "Property Damage" Provision of the St. Paul Policy Does Not Provide Liability Coverage for TCPA Violations or for Invasion of Privacy Arising from Unsolicited Faxed Advertisements, and the Policy Specifically Excludes Intentional Property Damage from Coverage*

The insurance policies obligate St. Paul to pay amounts any protected person is legally required to pay as damages for covered property damage "that happens while this agreement is in effect; and is caused by an event." The policies define "property damage" to mean "physical damage to tangible property of others, including all resulting loss of use of that property; or loss of use of tangible property of others that isn't physically damaged." The commercial general liability **[**32]** policy further states: "We'll consider all loss of use of damaged tangible property to happen at the time of the physical damage which caused it. And we'll consider all loss of use of undamaged tangible property to happen at the time of the event which caused it." n5 Under the policies, an "event" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

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n5 The umbrella policy contained similar language: "We'll consider all loss of use of: damaged tangible property to happen at the time of the physical damage which caused it; and undamaged tangible property to happen at the time of the event which caused it."

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ACS argues that facts alleged in the *Kaufman* action--that faxing unsolicited ads consumes the recipients' ink and paper--constitute "physical damage to tangible property of others," and also "loss of use of tangible property of others" while a fax machine receives the unsolicited advertisement. ACS therefore claims that allegations in the **[**33]** *Kaufman* complaints implicate both definitions of "property damage," that this property damage was alleged to have happened during the terms of the St. Paul policies, and that the trial court erroneously found that those facts did not constitute an "event" necessary to trigger insurance coverage.

The *Kaufman* complaint did not specifically cite the consumption of ink and paper by unsolicited faxed advertisements, but instead referred to "a shifting of advertisement costs from defendants onto the persons, businesses **[*155]** and entities who have received these faxes." The *Kaufman* complaint asserted statutory damages for TCPA violations under section 227(b)(3) of the TCPA.

CA(8)**(8)** Assuming without deciding that the *Kaufman* complaint alleged "property damage," the St. Paul policy did not provide coverage, for two reasons. First, this property damage was not caused by an "event" because the fax transmissions were not an "accident." HN8An "accident" requires unintentional acts or conduct. (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1045 [92 Cal. Rptr. 2d 473].) ACS intended the fax transmissions to occur. "[W]here the insured intended all of the acts that resulted in the victim's injury, **[**34]** the event may not be deemed an 'accident' merely because the insured did not intend to cause injury." (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal. App. 3d 41, 50 [261 Cal. Rptr. 273]; see also *Quan v. Truck Ins. Exchange* (1998) 67

Cal.App.4th 583, 598-599 [79 Cal. Rptr. 2d 134].)

Second, the St. Paul policy expressly excludes "[i]ntentional bodily injury or property damage" from coverage. A section of the policy captioned "Exclusions--What This Agreement Won't Cover" states, in relevant part: "We won't cover bodily injury or property damage that's expected or intended by the protected person." This exclusion reiterates the concept that the St. Paul policy does not cover property damage not caused by an "event"--that is, which is not accidental. "Because *every* junk fax invades the recipient's property interest in consumables, this normal outcome is not covered" by the St. Paul policy. (*American States, supra*, 392 F.3d at p. 943.) The sender of a fax necessarily anticipates and intends the consequence that printing the faxed document will use the recipient's ink and paper and will cause the recipient's loss of use of the fax machine during transmission. **[**35]** The exclusion for intentional property damage therefore forecloses coverage, because the fax recipient's loss is " 'expected or intended from the standpoint of the insured.' " (*Ibid.*; see also *Resource Bankshares, supra*, 407 F.3d at p. 639.)

For these reasons, the property damage provision of the St. Paul policy provided no coverage, and therefore St. Paul had no duty to defend ACS in the *Kaufman* suit.

E. *The Trial Court Properly Denied Plaintiff's Untimely Motion for Judgment on the Pleadings** [NOT CERTIFIED FOR PUBLICATION]

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*See footnote, *ante*, page 137.

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V. DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants St. Paul Fire and Marine Insurance Company and St. Paul Mercury Insurance Company.

Klein, P. J., and Croskey, J., concurred.

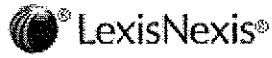

EXHIBIT 9

Service: **Get by LEXSEE®**
Citation: **240 Va. 185**

*240 Va. 185, *; 397 S.E.2d 100, **;*
*1990 Va. LEXIS 126, ****

Janet Maybin Brenner v. Lawyers Title Insurance Corporation

Record No. 891441

Supreme Court of Virginia

240 Va. 185; 397 S.E.2d 100; 1990 Va. LEXIS 126

September 21, 1990

PRIOR HISTORY: [*1]**
Appeal from a judgment of the Circuit Court of the City of Alexandria. Hon. Donald H. Kent, judge presiding.

DISPOSITION: *Affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured brought an action against defendant insurer for breach of its duty to defend the insured in a chancery action, which had been filed to determine whether the insured's neighbors had a prescriptive easement across the insured's property. The Circuit Court of the City of Alexandria (Virginia) granted summary judgment for the insurer. The insured challenged the judgment.

OVERVIEW: The insured brought an action against the insurer on a title insurance policy, alleging that the insurer breached its contractual duty to defend actions over alleged defects, liens, or encumbrances on the property. The insured had received an adverse ruling in a third-party claim and had been enjoined from interfering with her neighbor's prescriptive easement. On appeal of the summary judgment for the insurer, the court noted that the policy excluded loss or damage by reason of encroachments that would be disclosed by an accurate survey and loss or damage by reason of adverse claims against title created after the date of the policy. The court noted that the prescriptive easement at issue concerned a driveway that was the only access to the public road, the insured admitted she knew of the driveway when she purchased the property, and the driveway appeared on a survey. The court held that because the prayer for relief against the insured related solely to the driveway, which was excluded from coverage under the policy's survey exception, the insurer had no duty to defend the insured. The court held that refusal to defend where there was no coverage could not be bad faith.

OUTCOME: The court affirmed the summary judgment for the insurer.

CORE TERMS: insured, insurer, driveway, duty to defend, quitclaim, easement, neighbors, coverage, deed, encumbrance, prescriptive rights, present action, prescription, outlet, cloud, prescriptive easement, obligation to defend, summary judgment, founded, motion to strike, contractual duty, public street, storm sewer, parallelogram, consisting, inspection, bad-faith, forwarded, crossing, sustaining

LexisNexis(R) Headnotes ◆ Hide Headnotes

Insurance Law > General Liability Insurance > Obligations > Defense

HN1 The insurer's obligation to defend is broader than its obligation to pay. The obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy. However, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Types of Contracts > Covenants

Insurance Law > General Liability Insurance > Obligations > Defense

HN2 The duty to defend is to be determined initially from the allegations of the complaint. But if it is doubtful whether the case alleged is covered by the policy, the refusal of the insurer to defend is at its own risk. And, if it be shown subsequently upon development of the facts that the claim is covered by the policy, the insurer necessarily is liable for breach of its covenant to defend. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > General Liability Insurance > Obligations > Defense

HN3 The mere fact that a claim could have been made against the insured for which there may have been coverage under the policy is irrelevant in determining whether there was a duty to defend. Any such duty must be determined by the claim actually made. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > The Judiciary > Case or Controversy > Mootness > General Overview

Insurance Law > General Liability Insurance > Coverage > Triggers > General Overview

Real Property Law > Deeds > Types > Quit Claim Deeds

HN4 Where the policy excludes coverage on one basis, the applicability of another provision negating coverage becomes irrelevant, and a ruling on the issue becomes moot. More Like This Headnote

Insurance Law > Bad Faith & Extracontractual Liability > Refusals to Defend

HN5 There can be no bad faith in refusing to defend where there is no coverage under the policy. More Like This Headnote

Criminal Law & Procedure > Appeals > Remands & Remittiturs

Insurance Law > General Liability Insurance > Obligations > Defense

Real Property Law > Deeds > Types > Quit Claim Deeds

HN6 The determination of the "real nature" of the claim against the insured must be based upon an analysis of the pleadings and the relief sought in the litigation, not upon a court ruling in a claim prosecuted by the insured. More Like This Headnote | *Shepardize:* Restrict By Headnote

◆ Hide Headnotes / Syllabus

HEADNOTES:
Title Insurance -- Prescriptive Easements -- Policy Exclusions -- Duty to Defend -- Survey Exceptions
When plaintiff property owner bought a lot which was subject to a storm sewer easement, she obtained an owner's policy as the named insured insuring her title to the property. Neighbors purchased the adjoining property and claimed that they had an easement by prescription over a portion of the insured property. The portion subject to the claim was at the tip of a storm sewer easement, where part of a driveway crossed and provided an outlet from the neighbors' property to a public street. The neighbors brought a chancery suit against the insured and the city, asking the trial court to determine that they had acquired a prescriptive easement on the outlet. The insured forwarded the suit papers and exhibits to the title insurer and called upon it to defend the suit on her behalf. The insurer refused. Subsequently the trial court ruled that no prescriptive right could be acquired in property affected with a public interest or dedicated to a public use. **[***2]** The insured filed the present action against the insurer based on the insurer's alleged breach of its duty to provide a defense to the neighbors' suit. In the meantime, the neighbors appealed the dismissal of their suit and the Supreme Court of Virginia ruled that they could acquire the insured's rights in the portion of the driveway by prescription, which rights would be subject to the rights of the city. On remand, the court below ruled against the insured and permanently enjoined her from interfering with the prescriptive rights of the neighbors. A jury trial of the present action was held, and the trial court sustained the insurer's motion to strike the evidence. The insured's petition for appeal was refused and the trial court entered summary judgment in favor of the insurer, which judgment is here appealed.
1. Settled principles apply to an insurer's duty to defend under policy conditions like the ones in this case. The insurer's obligation to defend is broader than its obligation to pay.
2. The obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risks covered by the policy. **[***3]** However, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend.
3. While the duty to defend is to be determined initially from the allegations of the complaint, if it is doubtful whether the case alleged is covered by the policy, the refusal of the insurer to defend is at its own risk. If it is shown upon development of the facts that the claim is covered by the policy, the insurer necessarily is liable for breach of its covenant to defend.
4. Under the title insurance policy here, the insurer was obligated to provide for the defense of the insured in all litigation consisting of actions or proceedings commenced against the insured founded upon an alleged encumbrance insured against. The claim against the insured's property related solely to the driveway portion. An alleged cloud on title of a larger area emerged at the time of the litigation but that issue was raised by the insured and was not the subject of the neighbors' claim against the insured in the litigation, upon which the insurer's contractual duty to defend must be determined.
5. The neighbors' claim related solely **[***4]** to the driveway portion of the property and any such claim was excluded from coverage under the Survey Exception in the policy because it is undisputed that the driveway and its use would have been disclosed by an accurate survey and inspection of the premises.
6. Thus, the insurer had no duty to defend because it appears clearly that it would not be liable under its contract for any judgment based upon the allegations of the neighbors' complaint.
7. Where the policy excludes coverage on one basis, here the Survey Exception, the applicability of another provision negating coverage, here the Post-Policy Exclusion, becomes irrelevant, and ruling on the issue becomes moot.
8. The trial court did not err in striking the insured's evidence on the bad-faith issue because there can be no bad faith in refusing to defend where there is no coverage under the policy.
9. The trial court did not err in refusing to admit as evidence in this trial the ruling made on remand in the related case because the determination of the "real nature" of the neighbors'

claim must be based upon an analysis of their pleadings and the relief sought in the litigation, not upon a court ruling in a claim prosecuted **[***5]** by the insured.

SYLLABUS:

In a title insurance case, the trial court correctly held that since the litigation concerned only the driveway portion of the insured's property, and that any claim relating solely to the driveway was excluded from coverage, the insurer had no duty to defend since it appears clearly that it would not be liable under its contract for any judgment based upon the allegations of the complaint.

COUNSEL: *William F. Etherington (Beale, Wright, Balfour & Davidson*, on briefs), for appellant.

Robert W. Wooldridge, Jr. (Frederick H. Kruck, Jr.; McGuire, Woods, Battle & Boothe; Matricardi & Kruck, on brief), for appellee.

JUDGES: Carrico, C.J., Compton, Stephenson, Russell and Whiting, JJ., and Poff, Senior Justice, and Cochran, Retired Justice. Justice Compton delivered the opinion of the Court.

OPINION BY: COMPTON

OPINION: [*187] [101]** In this action brought on a title insurance policy, the dispositive question is whether the insurer violated its contractual duty to defend suits founded upon alleged defects, liens, or encumbrances insured against by the policy.

In 1966, appellant Janet Maybin Brenner, then Janet Maybin Jonas, purchased property in the City of Alexandria described as Parts of Villa **[***6]** Site "A" and Lot 28, Block 23, Section 4 of the Rosemont subdivision. The eastern 50 feet of the property was subject to a storm sewer easement previously conveyed to the City. That easement is shaped like a parallelogram lying generally northwest to southeast diagonally across the Brenner property. At the time of the purchase, appellee Lawyers Title Insurance Corporation issued an owner's policy to Jonas as the named insured insuring the title to the property.

By deed dated in March 1982, Robert and Linda Preshlock purchased property adjoining Brenner's to the east from Charles C. and Augustine C. Walker. In January 1984, an attorney for the Preshlocks wrote Brenner claiming that the Preshlocks had an easement by prescription over a portion of Brenner's property. The portion subject to the claim was at the southeastern tip of the parallelogram where part of a driveway crossed which provided an outlet from the Preshlocks' property to a public street.

In March 1984, the Preshlocks brought a chancery suit against Brenner and the City asking the trial court to determine that they had acquired a prescriptive easement to the outlet. Brenner forwarded the suit papers and exhibits, **[***7]** including a copy of the Walker to Preshlock deed, to the title insurer and called upon it to defend the suit on her behalf. The insurer refused.

Subsequently, the trial court sustained Brenner's demurrer, granted the City summary judgment, and dismissed the Preshlocks' bill of complaint. The court ruled that no prescriptive **[*188]** right could be acquired in property affected with a public interest or dedicated to a public use.

In September 1984, Brenner filed the present action against the insurer based on the insurer's alleged breach of its duty to furnish a defense to the Preshlock suit. In two counts, the plaintiff sought recovery in damages for breach of contract and a declaratory judgment that the insurer had a duty to defend the Preshlock suit. In July 1986, the plaintiff filed an amended motion for judgment, adding a third count asserting a tortious bad faith refusal to defend.

In the meantime, the Preshlocks appealed the dismissal of their suit. In November 1987, we reversed the trial court, ruling that the Preshlocks could acquire Brenner's rights in the portion of the driveway by prescription, which rights would be subject to the rights of the City. *Preshlock* v. *Brenner*, 234 Va. 407, 411, 362 S.E.2d 696, 698 (1987). **[***8]** Concluding that the trial court erred in sustaining Brenner's demurrer, we remanded the suit for further proceedings.

In January 1989, after a trial in the Preshlock suit, the court below ruled against Brenner, held that the Preshlocks had acquired a prescriptive easement to the portion of the driveway in issue, and permanently enjoined Brenner from interfering with the prescriptive rights.

In May 1989, a jury trial of the present action was held and, at the conclusion of the plaintiff's evidence, the court sustained the insurer's motion to strike the evidence. In July 1989, we refused Brenner's petition for appeal to the judgment entered upon remand in *Preshlock*. In August 1989, the trial court entered summary judgment in the present action in favor of the insurer. In January 1990, we awarded Brenner this appeal from that order.

The pertinent provisions of the title policy in question should be summarized. In the insuring agreement, the company **[**102]** promised to insure "against loss or damage" not exceeding a specified amount, "together with costs, attorneys' fees and expenses which the Company may become obligated to pay as provided in the Conditions and Stipulations" of the **[***9]** policy, "which the Insured shall sustain by reason of . . . any defect in or lien or encumbrance on the title to the estate or interest covered hereby in the land described . . . existing at the date hereof. . . ."

The policy also provided that it did not insure against loss or damage by reason of: "Encroachments, . . . or any matters not of **[*189]** record which would be disclosed by an accurate survey and inspection of the premises" (the Survey Exception).

Additionally, the policy excluded from the coverage "loss or damage" by reason of: "Defects, liens, encumbrances, adverse claims against the title as insured or other matters . . . attaching or created subsequent to the date" of the policy (the Post-Policy Exclusion).

Finally, the policy provided that: "The Company, at its own cost and without undue delay, shall provide for the defense of the Insured in all litigation consisting of actions or proceedings commenced against the Insured . . . which litigation . . . is founded upon an alleged defect, lien or encumbrance insured against by this policy, and may pursue such litigation to final determination in the court of last resort."

[1-2] Settled principles apply to an insurer's **[***10]** duty to defend under policy conditions like those in this case. HN1 The insurer's obligation to defend is broader than its obligation to pay. *Lerner* v. *General Ins. Co. of America*, 219 Va. 101, 104, 245 S.E.2d 249, 251 (1978). The obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy. *Id.* However, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, "it has no duty even to defend." *Travelers Indem. Co.* v. *Obenshain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978).

[3] HN2 The duty to defend is to be determined initially from the allegations of the

complaint. But if it is doubtful whether the case alleged is covered by the policy, the refusal of the insurer to defend is at its own risk. *London Guar. Co.* v. *White & Bros., Inc.*, 188 Va. 195, 199-200, 49 S.E.2d 254, 256 (1948). And, if it be shown subsequently upon development of the facts that the claim is covered by the policy, the insurer **[***11]** necessarily is liable for breach of its covenant to defend. *Id.* at 200, 49 S.E.2d at 256.

As we review the facts developed at trial, attention should be focused upon the precise nature of the Preshlocks' claim and whether the claim was for prescriptive rights to the driveway portion or to the entire area of Brenner's property which was subject to the City's easement. Brenner first learned of the claim upon receipt of the attorney's January 1984 letter. The relevant portion of the letter stated: "Obviously, Mr. Preshlock has an easement by prescription over the portion of the property in question, as it has **[*190]** been used as a driveway for a period in excess of forty-three years." Brenner promptly forwarded a copy of this letter to the insurer along with a copy of a 1962 plat showing the southeast corner of her property and a "CONCRETE DWY." crossing it. The insured wrote: "At my SE corner there is an old concrete driveway, crossing a triangle of my property and also crossing the City's easement." The remainder of the letter referred to her discussions with Mr. Preshlock about the "driveway" and the "triangle."

Claims counsel for the insurer **[***12]** immediately responded to the insured's letter, noting it would conduct an investigation of the "potential claim" and calling attention to the Survey Exception. In March 1984, claims counsel wrote the insured that the claim of prescriptive easement across her property was "not covered by your policy."

When the Preshlock suit was filed in March 1984, as we have noted, the insured sent the bill of complaint and exhibits to the insurer with a request for the company's **[**103]** "legal help in this matter." The Preshlock complaint asserted: "There is a driveway running from plaintiffs' property which continues through a portion of defendant, Janet M. Brenner's land and conterminous with a portion of the easement of the City of Alexandria, to the public road . . . . The driveway is the only outlet from the plaintiffs' land to" the public road. The complaint went on to assert that the Preshlocks and their predecessors in interest "have used the driveway" for the prescriptive period, and that Brenner had threatened to block access to the "driveway." The complaint also alleged that the threatened obstruction "of the driveway" would cause irreparable injury. The Preshlocks asked for a temporary and **[***13]** permanent injunction based on a determination that they had acquired prescriptive rights to the "free and dominant use of the driveway."

The 1982 Walker to Preshlock deed, a copy of which was sent to the insurer with the Preshlock suit papers, described the property conveyed as, "All of lot TWENTY-EIGHT (28) Block TWENTY-THREE (23), Section Four (4), of the Subdivision of ROSEMONT . . . ." The final paragraph of that deed provided:

> "Further, the Grantors hereby convey and quitclaim unto the Grantees as tenants by the entirety with common law right of survivorship all of the Grantor's [sic] right, title, and interest in and to that portion of Villa Site "A" which lies on **[*191]** the land subject to an easement granted to the City of Alexandria in Deed Book 94 at page 196, which lands have been continuously occupied and maintained by the Grantors for a period of more than twenty years."

The Walker quitclaim does not refer to the driveway only but to most of the parallelogram and to an area considerably larger than the area included in the driveway portion.

The amended motion for judgment repeated the allegations of the original motion and, in the added bad-faith count, sought **[***14]** damages for a tortious refusal to defend, without making any specific reference to the driveway portion or any other, larger area.

In sustaining the motion to strike the plaintiff's evidence, the trial court stated from the bench: "The Court finds that even considering the evidence in the light most favorable to the Plaintiff, . . . there has not been shown any breach of contract on the part of the Defendant." In the August 1989 order entering summary judgment for the insurer, the trial court noted certain admissions of fact made by Brenner. She "admitted" that she knew of the existence of the driveway at the time she purchased the insured property; that she had possession of the 1962 survey which disclosed the existence of the driveway; and, that a survey performed in 1966 would have disclosed the driveway. After referring to the Survey Exception, the court ruled that the insured could not recover "as a matter of law."

On appeal, the insured maintains, first, that the trial court erred in applying the Survey Exception and in ruling that the insurer had no duty to defend. The insured argues, "Lawyers Title's duty to defend arose at the time it was presented with the Walker quitclaim **[***15]** and the Bill of Complaint of the Preshlocks." The insured contends that the Preshlock complaint, which incorporated the Walker to Preshlock deed containing the quitclaim, "states the claim under which the Preshlocks were operating: the Walker quitclaim affects an area 100 times greater than the driveway, and on its face creates a cloud on title." She says that the "survey exception is applicable to but 1% of the quitclaimed area and cannot obviate Lawyers Title's duty as to the whole," because, she notes, the "quitclaimed area would not have been shown by any survey." Continuing, the insured urges that, under a so-called "two-part analysis," the insurer "had a duty to defend against the broad quitclaim language and the cloud on title it created, as well **[*192]** as the companion claim as to the driveway, since the duty to defend extended to the occurrence (the Walker to Preshlock deed) and any claims arising therefrom." We do not agree.

[4] **[**104]** The complete answer to the insured's argument is that the Preshlock claim was confined to an assertion of prescriptive rights to the driveway portion only, and not to the whole area referred to in the quitclaim. Under the title policy, the insurer **[***16]** was obligated to provide for the defense of the insured "in all litigation consisting of actions or proceedings commenced against the Insured . . . founded upon an alleged . . . encumbrance insured against." In the Preshlock "litigation," the only reference in the bill of complaint to the deed containing the quitclaim was in paragraph 1 where the plaintiffs asserted that they were owners of their property "by virtue of" the Walker deed. But the entire bill of complaint focused on the driveway portion and contained no allegations relying upon the language of the quitclaim. Significantly, the prayer for relief related solely to the driveway portion. And, in the pre-litigation correspondence, the driveway was the subject of the controversy, not any other or larger portion of the property insured.

We have not overlooked the fact that Brenner, after remand in *Preshlock* as best we can determine from the record before us, filed a cross-bill in that suit seeking reformation of the Walker quitclaim. The alleged cloud on title of the larger area emerged at that time in the litigation. But that issue was raised by the insured and was not the subject of the Preshlocks' claim against **[***17]** the insured in the litigation, upon which the insurer's contractual duty to defend must be determined. *HN3* The mere fact that the Preshlocks could have made a claim against Brenner for which there may have been coverage under the policy is irrelevant in determining whether there was a duty to defend. Any such duty must be determined by the claim actually made.

[5-6] Therefore, to summarize, we conclude that the Preshlock allegations in the litigation concerned only the driveway portion. Further, any claim relating solely to the driveway portion was excluded from coverage under the Survey Exception because it is undisputed

that the driveway and its use "would have been disclosed by an accurate survey and inspection of the premises," in the language of the Exception. Indeed, Brenner testified that she was aware that the Preshlocks and their predecessors in interest used the driveway daily "much as though it had been a public **[*193]** street." Thus, the insurer had no duty to defend because it appears clearly that it would not be liable under its contract for any judgment based upon the allegations of the Preshlock complaint.

[7] The foregoing ruling disposes of the insured's other contentions. **[***18]** She argues that the insurer is not entitled to rely on the Post-Policy Exclusion because, although the 1982 quitclaim was recorded after the date of the 1966 policy, the 20-year Walker interest was "in place" at least by 1962 or before. But, HN4 where the policy excludes coverage on one basis, the Survey Exception, the applicability of another provision negating coverage, the Post-Policy Exclusion, becomes irrelevant, and a ruling on the issue becomes moot.

[8] The insured also argues that the trial court erred in striking her evidence on the bad-faith issue. HN5 There can be no bad faith in refusing to defend where there is no coverage under the policy.

[9] Finally, the insured argues that the trial court erred in refusing to admit as evidence in the instant trial the ruling made upon remand of *Preshlock* which, according to her, disclosed the "real nature of the Preshlock claim" as one which "went beyond a mere driveway." The remand ruling was that the quitclaim was a cloud on Brenner's title, and the court ordered it deleted from the land records. n1 But, as we have said, HN6 the determination of the "real nature" of the Preshlocks' claim must be based upon an analysis of their pleadings **[***19]** and the relief sought in the litigation, not upon a court ruling in a claim prosecuted by the insured. Therefore, the proffered evidence was irrelevant and properly refused. n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The court also reformed the Walker to Preshlock deed to except from the conveyance the southwest corner of Lot 28 because of the original description "All of lot TWENTY-EIGHT."

n2 We find no merit in the insurer's assignment of cross-error which attacks the denial of its post-trial motion for an award of expenses pursuant to Rule 4:12(c) (party failing to admit truth of any fact as requested may be liable for reasonable expenses incurred by adverse party in thereafter proving such fact). We cannot say the trial court abused its discretion, under the circumstances of this case, by refusing to require the insured to reimburse the insurer for the expense of having a surveyor available for trial to establish that the driveway would have been disclosed by an accurate survey. The insured admitted the fact at trial after having refused to admit it pre-trial in response to requests for admissions.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***20]**

[105]** Consequently, we hold there was no error in the rulings below, and the judgment in favor of the insurer will be

Affirmed.

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