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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT COURT OF CALIFORNIA

SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICAN ONLINE, INC., a Delaware corporation,

Plaintiffs,

vs.

FEDERAL INSURANCE COMPANY, an Indiana corporation; et al.,

Defendants.

CASE NO. 5:06-CV-00198 JW (PVT)

SUPPLEMENTAL COMPENDIUM OF CERTAIN AUTHORITIES IN SUPPORT OF ST. PAUL'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION

Defendant St. Paul Mercury Insurance Company hereby attaches the following authorities in connection with its Motion for Partial Summary Judgment and in opposition to plaintiffs' Cross-Motion for Partial Summary Judgment:

Cases

TAB 5: *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, ___ Cal.Rptr.3d ___, 2007 WL 214258 (Cal.App. 2007).

TAB 6: *Royal Indemnity Group v. Travelers Indem. Co. of RI,* 2005 WL 2176896 (N.D. Cal. 2005).

TAB 7: *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose,* 2006 WL 3832794 (N.D. Cal. 2006).

TAB 8: *Valley Forge Ins. Co. v. Swiderski Elec., Inc.*, ___ N.E.2d ___, 2006 WL 3491675 (Ill. 2006).

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Other

TAB 9: *American Heritage Dictionary,* (4th ed. 2000), p.10 (definition of "access").

DATED: February 9, 2007

GORDON & REES LLP

By: /s/
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D. Christopher Kerby
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TAB 5

Briefs and Other Related Documents
ACS Systems, Inc. v. St. Paul Fire and Marine Ins. Co.Cal.App. 2 Dist.,2007.Only the Westlaw citation is currently available.

Court of Appeal, Second District, Division 3, California.
ACS SYSTEMS, INC., et al., Plaintiffs and Appellants,
v.
ST. PAUL FIRE AND MARINE INSURANCE COMPANY et al., Defendants and Respondents.
No. B181837.

Jan. 29, 2007.
Certified for Partial Publication.[FN*]

Background: Insured software company brought action, alleging breach of contract and other causes of action, against its commercial liability insurer, which had denied coverage for lawsuit against insured for sending unsolicited advertisements to fax machines in violation of federal Telephone Consumer Protection Act of 1991 (TCPA) and for invasion of privacy. The Superior Court, Los Angeles County, No. BC305455,Robert L. Hess, J., sustained insurer's demurrer without leave to amend and dismissed complaint. Insured appealed.

Holdings: The Court of Appeal, Kitching, J., held that:

(1) "advertising injury" provision did not provide coverage, and

(2) "property damage" provision did not provide coverage.

Affirmed.

[1] Pleading 302 193(5)

302 Pleading
302V Demurrer or Exception
302k193 Grounds for Demurrer to Declaration, Complaint, Petition, or Statement
302k193(5) k. Insufficiency of Facts to Constitute Cause of Action. Most Cited Cases

A demurrer tests the legal sufficiency of factual allegations in a complaint.

[2] Appeal and Error 30 917(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k917 Demurrers
30k917(1) k. In General. Most Cited Cases

In reviewing the sufficiency of a complaint against a general demurrer, the reviewing court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.

[3] Appeal and Error 30 837(4)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k837 Matters or Evidence Considered in Determining Question
30k837(4) k. Pleadings and Rulings Thereon. Most Cited Cases

In reviewing the sufficiency of a complaint against a general demurrer, the appellate court considers matters that may be judicially noticed.

[4] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

When a demurrer is sustained, the reviewing court determines whether the complaint states facts sufficient to constitute a cause of action.

[5] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
When a demurrer is sustained without leave to amend, the reviewing court decides whether a reasonable possibility exists that amendment may cure the defect; if it can the court reverses, but if not it affirms.

[6] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters Beyond Pleadings. Most Cited Cases
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.

[7] Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
The nature and kinds of risks covered by the insurance policy establish the scope of the duty to defend.

[8] Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases

Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters Beyond Pleadings. Most Cited Cases
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.

[9] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters Beyond Pleadings. Most Cited Cases
If, as a matter of law, neither the complaint against the insured nor the known extrinsic facts indicate any basis for potential coverage, the insurer's duty to defend does not arise in the first instance.

[10] Insurance 217 1863

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 k. Questions of Law or Fact. Most Cited Cases
The interpretation of an insurance policy is a question of law.

[11] Insurance 217 1806

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1806 k. Application of Rules of Contract Construction. Most Cited Cases
The interpretation of an insurance policy corresponds to the interpretation of contracts generally.

[12] Insurance 217 1812

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1812 k. In General. Most Cited Cases

The parties' mutual intention when they form the insurance contract governs interpretation; the fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.

[13] Insurance 217 1813

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1813 k. Language of Policies. Most Cited Cases

If possible, courts infer the mutual intent of the parties to an insurance contract solely from the written provisions of the insurance policy.

[14] Insurance 217 1809

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1809 k. Construction or Enforcement as Written. Most Cited Cases

If insurance policy language is clear and explicit, it governs.

[15] Insurance 217 1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases

When interpreting an insurance policy provision, courts 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.

[16] Insurance 217 1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases

Courts must interpret terms in an insurance policy in context, and give effect to every part of the policy with each clause helping to interpret the other.

[17] Insurance 217 1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases

Insurance 217 1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases

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.

[18] Insurance 217 1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases

Insurance 217 1817

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1817 k. Reasonable Expectations. Most Cited Cases

In determining whether an insurance 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.

[19] Insurance 217 2300

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2297 Advertising Injury

217k2300 k. Violation of Privacy Rights. Most Cited Cases

"Advertising injury offense" provision in commercial liability insurance policy did not cover suit against insured software company for sending unsolicited advertisements to fax machines in violation of federal Telephone Consumer Protection Act of 1991 (TCPA); coverage for "making known" "material that violates an individual's right of privacy" covered only privacy right of "secrecy," and TCPA protected "seclusion" right of privacy. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶ 7:1008 et seq. (CAINSL Ch. 7C-B); 2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 91.

[20] Torts 379 329

379 Torts
379IV Privacy and Publicity
379IV(A) In General
379k329 k. Types of Invasions or Wrongs Recognized. Most Cited Cases

Thee are 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. Restatement (Second) of Torts, § 652A.

[21] Torts 379 340

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k340 k. In General. Most Cited Cases

Torts 379 350

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k350 k. In General. Most Cited Cases

There are two meanings for the right of privacy, "secrecy" and "seclusion"; a person claiming the privacy right of "seclusion" asserts the right to be free, in a particular location, from disturbance by others, while a person claiming the privacy right of "secrecy" asserts the right to prevent disclosure of personal information to others.

[22] Insurance 217 1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases

Courts 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.

[23] Insurance 217 2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases

Insurance 217 2277

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property Damage. Most Cited Cases

Insurance 217 2278(3)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(2) Intentional Acts or Injuries
217k2278(3) k. In General. Most Cited Cases

"Property damage" provision in commercial liability insurance policy did not cover suit against insured software company for sending unsolicited advertisements to fax machines in violation of federal Telephone Consumer Protection Act of 1991 (TCPA); any damage was not caused by accidental "event," since faxes were sent intentionally, and policy expressly excluded intentional bodily injury or property damage. Telephone Consumer Protection

--- Cal.Rptr.3d ----
--- Cal.Rptr.3d ----, 2007 WL 214258 (Cal.App. 2 Dist.)
(Cite as: --- Cal.Rptr.3d ----)

Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[24] Insurance 217 ⚿2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
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.

Wright, Robinson, Osthimer & Tatum, Charles H. Horn, and Brian S. Inamine, Los Angeles, for Plaintiffs and Appellants.
Michelman & Robinson and Carol Boyd, Encino, for Defendants and Respondents.KITCHING, J.

I. INTRODUCTION

***1** 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 invasion of privacy caused by the sending of unsolicited faxed advertisements, we conclude that no potential for coverage 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., et al.* (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 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.

[1][2][3][4][5] *Allegations of the ACS Complaint:* Pursuant to the applicable standard of review,[FN1] the operative complaint sets forth the following facts. St. Paul issued 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 February 1, 1999 to April 1, 2000.

***2** The commercial general liability policy included St. Paul's duty to defend any insured 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.

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 CGL policy [FN2] describe what the policy covers:

"**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 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.

"• 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 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.

***3** 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 alleged that ACS reasonably believed that recipients of faxes sent 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 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 the resulting damage was intended; (2) sending unsolicited faxes could not be "making known ... material that violates an individual's right of privacy" 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.

***4** 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.

III. ISSUES

In the published portion of this opinion, we address plaintiff's 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*

[6][7][8][9][10] 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. "[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 Industries, Inc. v. Pacific Nat. Ins. Co.* (1999) 76 Cal.App.4th 856, 877, 90 Cal.Rptr.2d 721.) "[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*

[11][12][13][14][15][16][17] 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.] If the policy language 'is clear and explicit, it governs.' [Citation.] [¶] 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, 90 Cal.Rptr.2d 647, 988 P.2d 568.) "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, 44 Cal.Rptr.2d 370, 900 P.2d 619.)

***5** "On the other hand, '[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 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, 10 Cal.Rptr.2d 538, 833 P.2d 545.)

[18] 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, 10 Cal.Rptr.2d 538, 833 P.2d 545.)

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

[19][20] ACS claims that the *Kaufman* action alleges a particular invasion of privacy, the " 'unreasonable intrusion upon the seclusion of another,' " [FN3] 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.

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 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.*[FN4]

"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 *Kauffman* complaint. The *Kaufman* complaint alleged that defendants (ACS and DataMart) faxed thousands of unsolicited advertisements for ACS to facsimile machines of 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.

***6** 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.4th at p. 1115, 90 Cal.Rptr.2d 647, 988 P.2d 568.) 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 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*

[21] The courts have found it analytically helpful to identify two meanings for "the right of privacy:" "secrecy" and "seclusion." (*Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.* (4th Cir.2005) 407 F.3d 631, 640-641) (*Resource Bankshares*); *American States Ins. Co. v. Capital Associates of Jackson County* (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." (*Ibid.*) 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. (*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, Congressional Statement of Findings, Pub.L. No. 102-243, § 2, and *American States, supra,* 392 F.3d at pp. 942-943.) 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*

*7 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 *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, italics in original.)

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.

The "last antecedent rule" underscores this interpretation. 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." ' " (*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 an individual's right of privacy."

Nothing in the *content* of the "written or spoken material" in unsolicited faxed advertisements violated the recipient's 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 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.)

***8** Therefore the faxes did not violate the recipient's 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*

[22] 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, 90 Cal.Rptr.2d 647, 988 P.2d 568.) 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 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 stated: "[T]hese four offenses all share the common threat 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, italics in original.)

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 faxes; "making 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.

***9** 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 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.' " (*Ibid.*) *American States* held that this advertising-injury policy clause 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 offense as "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy." (*Id.* 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 "making 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] invasion of rights of privacy or possession of personal property,' " without limiting, defining, or qualifying these terms in any way. (*Id.* at p. 881.)

***10** *Park University Enterprises, Inc. v. American Cas. Co. of 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." (*Id.* at pp. 1099, 1106, 1108-1110; affd., *Park University Enterprises, Inc. v. American Cas. Co. of Reading, PA.* (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; *Prime TV, LLC v. Travelers Ins. Co.* (M.D.N.C.2002) 223 F.Supp.2d 744, 748, 752-753; and *TIG Ins. Co. v. Dallas Basketball, Ltd.* (Tex.App.-Dallas 2004) 129 S.W.3d 232, 237-239.)

5. *Conclusion*

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*

[23] 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 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." [FN5] Under the policies, an "event" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

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 *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.

***11** 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 and entities who have received these faxes." The Kaufman complaint asserted statutory damages for TCPA violations under section 227(b)(3) of the TCPA.

[24] 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." An "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, 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. 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* FN**

[The following material is not certified for publication under California Rules of Court, rules 8.1105 and 8.1110.]

ACS claims that the trial court erroneously denied its ex parte application for leave to file a motion for judgment on the pleadings. ACS cites authority that a motion for judgment on the pleadings may be made at any time. (*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650, 122 Cal.Rptr.2d 747.) While this may be true of a motion by a defendant, as in *Stoops*, Code of Civil Procedure section 438 treats motions for judgment by a plaintiff differently from those by a defendant. The statute limits plaintiffs' motions for judgment on the pleadings to a single ground: "that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (Code Civ. Proc., § 438, subd. (c)(1)(A).) The statute thus requires a plaintiff's motion for judgment after defendant's answer. More expressly, subdivision (f) of section 438 states that a motion for judgment on the pleadings "may be made only after one of the following conditions has occurred: [¶] (1) If the moving party is a plaintiff, and the defendant has already filed his or her answer to the complaint and the time for the plaintiff to demur to the answer has expired." ACS's motion for judgment on the pleadings, made before defendant's answer, was untimely, and the trial court properly refused to hear that motion.

[The preceding material is not certified for publication under California Rules of Court, rules 8.1105 and 8.1110.]

V. DISPOSITION

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

We concur: KLEIN, P.J., and CROSKEY, J.

FN* 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).

FN1. 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.)

FN2. The St. Paul umbrella policy uses slightly different wording in some of its provisions, but we do not regard these differences as significant.

FN3. 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.)

FN4. 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.

FN5. 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."

FN** See footnote *, *ante*.

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Briefs and Other Related Documents (Back to top)

- 2006 WL 3242422 (Appellate Brief) Reply Brief of Appellants (Jun. 1, 2006)
- 2006 WL 1286804 (Appellate Brief) Respondents' Brief (Mar. 3, 2006) Original Image of this Document (PDF)
- 2005 WL 3977726 (Appellate Brief) Brief of Appellants (Oct. 21, 2005) Original Image of this Document (PDF)
- B181837 (Docket) (Mar. 8, 2005)

END OF DOCUMENT

TAB 6

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2005 WL 2176896 (N.D.Cal.)
(Cite as: Not Reported in F.Supp.2d)

C
Briefs and Other Related Documents
Royal Indem. Group v. Travelers Indem. Co. of R.I.N.D.Cal.,2005.Only the Westlaw citation is currently available.

United States District Court,N.D. California.
ROYAL INDEMNITY GROUP, the Greystone Group, Inc., Plaintiffs,
v.
THE TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, Stedman Construction Company, Does 1-100, Defendants.
No. C-04-00886 RMW.

Sept. 6, 2005.

Michael Avery Mathews, Law Offices of Michael A. Mathews, San Francisco, CA, for Plaintiffs.
David Christophe Hungerford, Michael D. Prough, William C. Morison-Knox, Morison-Knox Holden Melendez & Prough, LLP, Walnut Creek, CA, for Defendants.

ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT AND ADJUDICATION; GRANTING IN PART AND DENYING IN PART ROYAL INDEMNITY'S MOTION TO STRIKE

[Re Docket No. 27, 28, 29, 60]

WHYTE, J.
***1** Plaintiffs Royal Indemnity Group ("Royal") and Greystone Group, Inc. ("Greystone") move for summary adjudication on two issues: (1) that defendant Travelers' Indemnity Company of Connecticut [FN1] ("Travelers") had a duty to defend co-defendant Stedman Construction Company ("Stedman") against a cross-complaint brought by Greystone in a now-resolved California state court action; and (2) that coverage under the policies issued to Stedman by Travelers was triggered by the occurrence of property damage during the coverage period irrespective of when that damage manifested or whether the present claimant then owned the property. Plaintiffs also move to strike portions of Travelers' reply to its motion for summary adjudication and its opposition to plaintiffs' motion for summary judgment. Defendant Travelers moves for summary judgment on plaintiffs' complaint as a whole, contending that plaintiffs' claims should either be stricken for failure to prosecute, are barred by the statute of limitations, or are otherwise unsupportable based on the record before the court. These motions were heard on April 22, 2005. The court has reviewed the papers and heard the arguments of the parties. For the reasons set forth below, the court grants Royal's motion for summary adjudication and grants in part and denies in part Travelers' motion for summary judgment.

FN1. Defendant was erroneously sued as The Travelers Indemnity Company of Rhode Island.

I. BACKGROUND

This is an insurance coverage dispute concerning alleged construction defects in an apartment complex in San Jose known as "The Fountains." The dispute is essentially between two insurance companies: Royal, the insurance provider for the owner of the apartment complex, and Travelers, the insurance provider for one of the subcontractors on the original construction of the complex.

In 1990 and 1991 the developer and original owner, WIC/W188 Ltd. ("WIC") worked with general contractor Worthing to build the complex. Worthing retained Stedman as a framing contractor on the project. During the time it worked on the Fountains project, Stedman held two Commercial General Liability ("CGL") insurance policies with defendant Travelers: policy number EE-SLS-685J728-5-89, in force September 22, 1989 through September 22, 1990 ("the 1989 policy"); and policy number EE-SLS-685J728-5-89-90, in force September 22, 1990 through September 22, 1991 ("the 1990 policy") (collectively "the Stedman policies").

While construction was ongoing, Worthing sold its assets to plaintiff Greystone, which assumed Worthing's rights and responsibilities. WIC, Worthing, and Greystone were insured by plaintiff Royal. After the completion of the project, The Fountains changed ownership. On or about June 5, 1996, Bay Apartment Communities, known since 1999 as AvalonBay Communities ("AvalonBay"), purchased The Fountains.[FN2] Hungerford Decl., Exh. K.

FN2. Travelers asks the court to take judicial notice of the four complaints filed in the AvalonBay action as well as the order and judgment entered against Stedman. Plaintiffs ask for judicial notice of the Third Amended Complaint in the AvalonBay action and the cross-complaint filed by Greystone in that action. The court grants both parties' requests.

A. The AvalonBay Action

In 1999, AvalonBay filed suit in Santa Clara Superior Court over damage to the property caused by, *inter alia,* water intrusion resulting from alleged defects in construction. *AvalonBay Communities, Inc. v. WIC/W188,* No. CV782693 (*"AvalonBay* action"). The Third Amended Complaint in the matter, filed on September 13, 2000, added Greystone and Stedman as defendants. Harrington Decl., Exh. 1. In the complaint, AvalonBay alleged that "during the approximate period of 1990 to the date of this Third Amended Complaint, Defendants negligently ... constructed, inspected and installed the Project elements, including, but not limited to, the Project's framing, exterior siding and siding systems...." AvalonBay Third Amended Complaint ("ATAC"), Harrington Decl., Exh. 1 ¶ 32. The complaint further alleged that AvalonBay "sustained and suffered consequential damages resulting from Defendants' acts and/or omissions, including, without limitation, physical injury and/or destruction of tangible property and the loss of use of the Project to real and personal property within the Project as a result of said acts and/or omissions...." ATAC ¶ 30; *see id.* ¶ 38. The ATAC further sets forth that AvalonBay was "unaware of when all of the defective conditions alleged first occurred or manifested themselves or caused physical injury to or destruction of tangible property ... but asserts that the construction deficiencies at the Project have developed and occurred over a number of years ... said deficiencies and resulting physical injuries being continuous and progressive." *Id.* at ¶ 29.

B. Tenders

***2** WIC and Worthing tendered the *AvalonBay* action to Travelers under Stedman's CGL policies for defense and indemnification. Travelers rejected the tender in a letter dated April 1, 2001, asserting that the Certificate of Insurance naming Worthing lacked an Additional Insured Endorsement, thus neither entity was an additional insured under the relevant CGL policy. Hungerford Decl., Exh. H. Thus, plaintiff Royal alone defended WIC, Worthing, and Greystone in the *AvalonBay* action. Pursuant to a contractual indemnity clause in the subcontract between Worthing/Greystone and Stedman, Greystone cross-complained for indemnity against Stedman on March 30, 2001. Harrington Decl., Exh. 2.

After receiving the tender from WIC and Worthing, Travelers sent a letter to Stedman on April 3, 2001, care of its vice president, Robert Douds. This letter denied coverage to Stedman stating that Stedman's policies had expired in 1991-prior to 1996 AvalonBay's acquisition of the property to which it claimed damage attributable to Stedman had occurred. Mathews Decl., Exh. 7. Stedman subsequently tendered to Travelers Greystone's cross-complaint for defense and indemnity on October 19, 2001, which Travelers declined on similar grounds. Mathews Decl., Exh. 5. Stedman did not appear in the *AvalonBay* action, failing to answer either AvalonBay's complaint or Greystone's cross-complaint. On September 17, 2002, the court granted a default judgment against Stedman on the cross-complaint in the amount of $ 2,648,804.18, plus $62,785.18 in costs and attorney's fees incurred by Greystone defending the *AvalonBay* action. Travelers' Req. Judicial Notice, Exh. G.

Eventually, AvalonBay settled with Greystone and Greystone settled with Stedman. In its settlement with Greystone, Stedman assigned its claims against Travelers to Greystone. Royal asserts that it is subrogated to any rights Greystone may have against any third party in the *AvalonBay* action by virtue of having defended Greystone. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.3d 622, 633-34, 119 Cal.Rptr. 449, 532 P.2d 97 (1975); *In re Romero*, 956 S.W.2d 659, 661 (Tex.App.1997); *see also Thoreson v. Thompson*, 431 S.W.2d 341, 347 (Tex.1968) ("By paying part of plaintiff's loss, its insurer ... became a pro tanto owner of the cause of action. The payment itself creates this right and need not be expressed in the insurance contract.").

C. The Present Suit

In the present action, plaintiffs Greystone and Royal seek payment for (1) amounts allegedly incurred by WIC, Worthing/Greystone, and Royal in the *AvalonBay* action; (2) amounts allegedly incurred by Stedman as a result of Travelers' failure to defend and

indemnify under the insurance policy; (3) amounts allegedly incurred by Greystone as a result of Travelers' failure to defend and indemnify it directly under the insurance policy; and (4) amounts Travelers allegedly should have contributed toward settling Greystone's liability in the *AvalonBay* action. Plaintiffs' claims are based upon a combination of direct claims against Stedman and Travelers and claims assigned by Stedman as a result of its settlement with Greystone.

***3** First, Greystone sues Stedman directly for express indemnity based on a provision in the construction subcontract between Greystone and Stedman (claim 1).

Second, Greystone sues Stedman based on an assignment from AvalonBay of AvalonBay's claims for negligence and strict liability (claims 2 and 3).

Third, Greystone sues Travelers directly for breach of the insurance contract. Greystone contends that it is an additional insured under Travelers' insurance policy (claim 4).

Fourth, Greystone sues Travelers for breach of contract on Stedman's behalf. Greystone's right to sue is based upon Stedman's assignment of its claims against Travelers to Greystone as part of the settlement between Greystone and Stedman in the AvalonBay action (claim 5).

Fifth, Royal sues Travelers (1) in its own right for equitable contribution and (2) by subrogration to Greystone's rights, which includes the assignment of Stedman's rights against Travelers (claim 6).

Finally, plaintiffs seek declaratory relief (claim 7).

II. ANALYSIS

The parties do not dispute that the outcome of the underlying *AvalonBay* action resulted in default judgment against Stedman. Nor do they dispute that the policies between Stedman and Travelers were standard third party CGL insurance policies. What they do dispute is (1) whether the policies are to be interpreted in accordance with Texas or California law; (2) whether Travelers had a duty to defend; and (3) even assuming Travelers had a duty to defend, which, if any, claims Royal and Greystone may legitimately assert against Travelers in this action. Travelers asserts that the court's determination regarding the law applicable to the insurance contracts impacts the analysis of Travelers' duty to defend, because California and Texas law differ as to what triggers liability coverage under a standard CGL insurance policy.

A. Summary Judgment

Summary judgment is proper when there are no genuine issues as to any material fact and the moving party is entitled judgment as a matter of law. *See* Fed R. Civ. P. 56(c). Where the non-moving party bears the burden of proving an element of a claim, a party moving for summary judgment may simply "point [ ] out ... the absence of evidence to support [the] claim." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001). The burden then shifts to the non-moving party to present evidence that could cause a reasonable jury to find in its favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must view the evidence in the light most favorable to the non-moving party. *See Rowe v. City & County of San Francisco*, 186 F.Supp.2d 1047, 1050 (N.D.Cal.2002).

B. Choice of Law

The threshold issue in this case is whether Texas or California law governs the interpretation of the insurance policy. In a diversity case, a federal district court is to apply the law of the forum state for choice of law purposes. *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir.2003) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). Thus, California choice of law rules apply to this action.

***4** Royal argues that California's choice of law rules require the court to apply the governmental interest test to determine whether Texas or California law applies. *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906, 915, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001). ("[W]hen there is no advance agreement on applicable law, but the action involves the claims of residents from outside California, the trial court may analyze the governmental interests of the various jurisdictions involved to select the most appropriate law."). Travelers, on the other hand, contends that to determine the law governing a contract, California courts look first to the relevant statute and, only should further guidance be necessary, second to the governmental interest test.

Shannon-Vail Five, Inc. v. Bunch, 270 F.3d 1207, 1210 (9th Cir.2001); *Bassidiji v. Goe*, 413 F.3d 928 (9th Cir.2005).

An insurance policy is a contract subject to the choice of law provisions codified in Civil Code section 1646. *Gitano Group, Inc. v. Kemper Group*, 26 Cal.App.4th 49, 57, 31 Cal.Rptr.2d 271 (1994). Civil Code section 1646 provides, "[a] contract is to be interpreted according to the law and usage of the place where it is being performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Furthermore, "[t]he language of a writing is to be interpreted according to the meaning it bears in the place of its execution unless the parties have reference to a different place." Cal.Civ.Proc.Code § 1857.

The parties do not dispute that the insurance policies neither include a choice of law provision nor indicate a place of performance. Thus, the court looks first to the place where the contracts were made to determine whether California or Texas law supplies the law for interpreting the terms of Stedman's policies. Applying the relevant statutes demonstrates that the interpretation of the contracts should be governed by Texas law. Stedman is a Texas corporation. It procured its insurance policies with Travelers through a Texas insurance broker, Fort Bend Insurance Agency ("Fort Bend"). Floyd Decl. ¶ 3, Exh. A. It entered into the insurance contracts in Texas with an insurer doing business in Houston, Texas. *Id.* ¶ 2, 3, 31 Cal.Rptr.2d 271. The underwriter for the policies were based in Houston, Texas. *Id.* ¶ 4, 5, 31 Cal.Rptr.2d 271. Both policies executed by Stedman and Travelers include several endorsements required by Texas law. Fitts Decl., Exh. A at 6, 19, 20-22; *Id.*, Exh. B at 15, 24, 17-18 ("Texas Changes-Conditions Requiring Notice"; "Texas Changes-Cancellation and Renewal"; "Premium Discount Endorsement-Texas").

Royal contends that the court may not confine its inquiry to California's statutory choice of law provisions and must engage in the three-step governmental interest analysis most recently set forth in *Washington Mutual Bank v. Superior Court*, 24 Cal.4th 906, 919, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001). It claims that *Washington Mutual* requires applying the governmental interest analysis to all choice of law questions and, therefore, has overruled the statutory choice of law provisions set forth in the California Civil Code and Code of Civil Procedure. However, there is no indication in that case that the California statutory choice of law provisions for contracts have been abrogated. *Washington Mutual* involved a class action certification and implicated a more detailed governmental interest analysis than would be warranted where the issue at hand is determining the law governing the interpretation of a contract.

***5** In further support of the contention that California law governs the interpretation of the insurance policies, plaintiffs cite *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal.App.4th 637, 17 Cal.Rptr.2d 713 (1993). *Stonewall*, applying a governmental interest test to the choice of law determination regarding an insurance contract, states that where a casualty insurance contract is in dispute "particular importance is placed on the location of the subject matter of the contract, i.e., the location of the insured." *Id.* at 646, 17 Cal.Rptr.2d 713. However, *Stonewall* and the other cases cited by Royal that applied the governmental interest test to determine the choice of law for insurance contracts, did so when the statutory choice of law provision was uninformative. In particular, the cases cited by Royal examine the choice of law outside the context of contract interpretation, which is clearly governed by the California statutory directives set forth above. *See, e.g., Stonewall*, 14 Cal.App.4th at 649-50, 17 Cal.Rptr.2d 713 (whether liability insurance should be governed by Wisconsin law where punitive damages are covered or by California law where punitive damages are uninsurable); *Downey Venture v. LMI Ins. Co.*, 66 Cal.App.4th 478, 514, 78 Cal.Rptr.2d 142 (1998) (whether insuring willful misconduct violates California's public policy).

The court thus finds Royal's arguments that Civil Code section 1646 is inapplicable to be unpersuasive. In light of the undisputed evidence that the contract was entered into in Texas and the clear direction provided by section 1646, this court will apply Texas law to interpret the critical language in the contract without need to resort to the *Washington Mutual* government interest analysis. Further, cases like *Stonewall* do not present contract interpretation issues but rather policy questions on issues such as coverage for willful acts.

C. Traveler's Duty to Defend

An insurer's duty to defend arises when a plaintiff alleges facts that potentially support claims for which there is coverage. *National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139,

141 (Tex.1997); *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 275, 54 Cal.Rptr. 104, 419 P.2d 168 (1966) ("An insurer is under a duty to defend any 'suit which potentially seeks damages within the coverage of the policy.' "). "Texas courts apply the 'eight corners' rule to determine whether an insurer has the duty to defend an insured, comparing the plaintiff's pleading allegations to the insurance contract provisions without regard to the facts that develop during discovery and trial." *Pilgrim Enterprises, Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488, 493 (Tex.App.2000) (citing *Merchants Fast Motor Lines.*, 939 S.W.2d at 141). However, "an insurer is required to defend only those cases within the policy coverage.... If the petition only alleges facts excluded by the policy, the insurer is not required to defend." *Fidelity & Guaranty Insurance Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex.1982). "[I]n case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in [the] insured's favor." *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex.1965).

***6** Travelers contends that it had no duty to defend Stedman because AvalonBay in its complaint and Greystone in its cross-complaint alleged only facts excluded by the policy. Specifically, AvalonBay did not own The Fountains until 1996 and was unaware of the alleged damage until after it purchased the property. Thus, Travelers asserts, even assuming that AvalonBay's complaint properly alleged that Stedman's acts caused damage of a continuous nature to The Fountains during the policy period, the claimant could have suffered no property damage during the policy period, which ended long before AvalonBay took ownership of the property.

With regard to insurance coverage, Stedman's 1989 policy provides:
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies ....."
b. This insurance applies to "bodily injury" or "property damage" only if:
(1) ...
(2) the "bodily injury" or "property damage" occurs during the policy period."

Mathews Decl., Exh. 1, § I, ¶ 1, at Trav 0008. The 1989 policy defines "property damage" as:a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

Id. § V, ¶ 12, at Trav 0018.[FN3] The parties dispute whether property damage triggering coverage under the Stedman policies occurred between September 22, 1989 and September 22, 1991.

FN3. Stedman's 1990 policy contains similar, but not identical, language. *See* Mathews Decl., Exh. 2, § I, ¶ 1, at Trav 0032; *Id.* § V, ¶ 12, at Trav 0041. Neither party contends that the differences in the language of the two policies is material to the determinations to be made.

1. Duty to Defend Stedman

The parties vigorously dispute whether Travelers had a duty to defend Stedman. Travelers contends it had no duty to defend Stedman in the *AvalonBay* action because the claimant, AvalonBay, could not have suffered property damage until 1996, when AvalonBay purchased the property. The Stedman policies were only in effect from September 22, 1989 through September 22, 1991. Thus, prior to 1996, Travelers argues, no damage to claimant AvalonBay could have occurred. In essence, Travelers asserts that the policy requires damage to The Fountains to have occurred while AvalonBay was owner of the property such that the *claimant* against Stedman suffered the property damage.

a. Trigger of Coverage

Travelers first contends that Texas has adopted a strict manifestation trigger for damage under the occurrence wording set forth in the Stedman policies that requires the "bodily injury" or "property damage" to occur within the policy period. In *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex.App.1987), the Texas Court of Appeals considered the question of "whether there is coverage for property damage resulting from workmanship performed during the policy period when the property damage is not manifested until after the policy period." *Id.* at 383. Examining authorities from the Florida Court of Appeals and Idaho Supreme Court, the court held that "no liability

exists on the part of the insurer unless the property damage manifests itself, or becomes apparent, during the policy period." *Id.*

*7 If, as Travelers contends, a manifestation trigger applies, no property damage manifested during the policy period under the allegations in AvalonBay's complaint because the facts alleged in the AvalonBay complaint set forth that AvalonBay only became aware of the property damage after taking ownership of The Fountains in 1996. AvalonBay alleged, "Following the purchase of the Project, but within three (3) years of the filing of the original complaint in this action, Plaintiff became aware of certain deficiencies in and to the Project." ATAC ¶ 21. Because no property damage manifested during the policy period, Travelers contends that it could have no duty to defend.

Royal argues that *Dorchester* inaccurately stated the rules set forth in the out-of-state authorities on which it relied and thereby inadvertently created a manifestation trigger. It contends that the Texas court's statements of the Florida and Idaho cases reveals the misstatement, which has since been perpetuated through subsequent Texas court decisions and Fifth Circuit opinions applying Texas law. *See, e.g.,* Cullen/Frost Bank v. Commonwealth Lloyd's Ins. Co., 852 S.W.2d 252, 257 (Tex.App.1993) (stating "coverage is not afforded unless an identifiable damage or injury, other than merely causative negligence, takes place during the policy period"); *Am. Home Assurance Co. v. Unitramp Ltd.,* 146 F .3d 313, 314 (1998) (citing to *Dorchester* in support of its interpretation of *Cullen/Frost Bank* stating "We read 'identifiable' as synonymous with 'manifest' and 'apparent.' ').

Royal's criticism of *Dorchester* has merit. The Texas Court of Appeals summarized the Florida court's holding on which it relied as follows:
The court said that the words 'caused by an occurrence' within the policy provisions did not indicate that coverage was afforded for damages sustained after expiration of the policy period due to causative negligence occurring within the policy period. *In other words, coverage is not afforded unless an identifiable damage or injury, other than merely causative negligence, took place during the policy period.*

Dorchester, 737 S.W.2d at 383 (summarizing Travelers Insurance Company v. C.J. Gayfer's & Co. Inc., 366 So.2d 1199, 1201 (Fla.1979)). The Texas Court of Appeals then went on to quote the Idaho Supreme Court on whose opinion it also relied:[I]t is well settled that the time of the occurrence of an "accident," within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged.

Id. (quoting Miller's Mutual Fire Ins. Co. of Texas v. Bailey, Inc., 103 Idaho 377, 647 P.2d 1249, 1251 (Idaho 1982)). But then the *Dorchester* court goes on to hold that the that "no liability exists on the part of the insurer unless the property damage *manifests* itself, or becomes apparent, during the policy period." *Id.* (emphasis added). This newly-appearing manifestation requirement is accompanied by no additional explanation but appears to be the court's synthesis of the two cases upon which it relies. As there is no mention of a manifestation requirement in either of the cited opinions, the rule announced by *Dorchester* may, indeed, have inadvertently adopted a manifestation trigger when the Florida and Idaho cases cited seem to stand only for the proposition that there must be at least some demonstrable property damage during the policy period.

***8** A relatively recent Texas Court of Appeals' decision held that an exposure trigger should be applied to a continuous property damage claims resulting from asbestos. Examining Texas and Fifth Circuit cases addressing the issue, the appeals court in Pilgrim Enterprises, Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 496 (Tex.App.2000), concluded that, because the Texas Supreme Court had not addressed the issue, it faced a matter of first impression in determining what trigger to apply to continuous property damage in conjunction with asbestos contamination. The *Pilgrim* court looked at the nature of the policy. As here, the policy was an occurrence-based policy, covering "all claims based on an event occurring during the policy period, regardless of whether the claim or occurrence is brought to the attention of the insured or made known to the insurer during the policy period." Yancey v. Floyd West & Co., 755 S.W.2d 914, 918 (Tex.App.1988). It contrasted claims-made policies which cover "only injuries or damages that come to the attention of the insured and are made known to the insurer during the policy period." *Id.* The court then noted that the policy language contained no express reference to a manifestation requirement or other statement that the damage must be identified during the policy period. *Pilgrim,* 24 S.W.3d at 497. Finally, it applied the principle of insurance policy construction that "doubt as to whether the allegations of a complaint against the insured state a cause of action within the coverage

of a liability policy sufficient to compel the insured to defend the action ... will be resolved in [the] insured's favor." *Id.* at 498 (citing *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex.1965)).

As noted by the *Pilgrim* court, the Texas Supreme Court has thus far declined to rule on what the trigger of coverage for continuing damage is. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 853 n. 20 (Tex.1994) (surveying various states' triggers and stating "We believe it would be unwise to select among these tests, or formulate our own, when the outcome of this case does not require resolution of this issue."). However, it seems likely that the Texas Supreme Court would follow the *Pilgrim* approach. That approach seems consistent with the actual language of the Travelers policies-" 'property damage' occurs during the policy period." The policy language does not suggest that the damage must both occur and be discovered during the policy period. This interpretation is consistent with constructions made by courts in other jurisdictions. *See, e.g., Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 689, 42 Cal.Rptr.2d 324, 913 P.2d 878 (1995) ("We agree with the conclusion of the Court of Appeal below that to apply a manifestation trigger of coverage to Admiral's occurrence-based CGL policies would be to effectively rewrite Admiral's contracts of insurance with Montrose, transforming the broader and more expensive occurrence-based CGL policy into a claims made policy.").

b. Existence of Property Damage

***9** Travelers next argues that Texas law requires that the *claimant* suffer the property damage during the policy period in order to trigger liability coverage. Thus, because AvalonBay as claimant did not own The Fountains at the time the policy was in effect, it could not have suffered damage during the policy period. Travelers cites language from a Texas and a California case that says that an occurrence takes place when the injured party suffers damage, rather than at the time the act causes the damage. *Snug Harbor, Ltd. v. Zurich Ins.*, 968 F.2d 538, 544 (5th Cir.1992); *Montrose*, 6 Cal.4th at 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153. However, these cases were distinguishing the time the negligent act occurred from the time when damage first occurred. They were not dealing with a situation such as the one here, where damage occurred during the policy period but did not become apparent until after the property changed hands. It appears that no Texas court has yet addressed whether property damage triggers coverage in a case where the damage occurs during the policy period, but the claim for such damage is not made until after the property has changed hands. However, it seems unlikely that the Texas Supreme Court would read into a CGL policy a requirement that there must be continuous ownership of property between the time an occurrence-based policy is issued and the claim in order for liability coverage to arise under a CGL policy. The Stedman policies define property damage as "physical injury to tangible property ... including loss of use of that property." They impose no requirement that the present claimant have owned the property at the time of the physical injury. As the California Court of Appeal noted, "Nowhere do the policies say to whom that property must belong, save that it must not belong to the insured. In other words, the policies themselves do not expressly require that the eventual claimant own the property at the time the property is damaged for coverage to ensue; they merely require that the damage, the 'physical injury to ... tangible property,' take place during the policy period." *Garriott Crop Dusting Co. v. Superior Court*, 221 Cal.App.3d 783, 791, 270 Cal.Rptr. 678 (1990).

AvalonBay's third amended complaint sufficiently alleges that damage occurred during the Stedman policy period and the policy sets forth no requirement that the claimant own the property during the policy period. Thus, based on the allegations in AvalonBay's complaint and the policy terms, Travelers had a duty to defend Stedman.

2. Duty to Defend Greystone

Plaintiffs contend that Travelers had a duty to defend Greystone as an additional insured under Stedman's policy. Travelers, on the other hand, moves for summary judgment that Greystone has no direct claim for breach of contract because neither Greystone nor its predecessor in interest, Worthing, were covered under the Stedman insurance policy as additional insureds.

As evidence that Greystone and Worthing were additional insureds under the Stedman policy, plaintiffs present three certificates of insurance issued by Stedman's insurance agent, James Harper of Fort Bend Insurance Agency. Eeds Decl. Supp. Mot. Summ. Adjudication, Exh. 2-3. Travelers argues that these certificates do not constitute evidence that Travelers ever added these entities as additional

insureds under Stedman's policies. Plaintiffs concede that certificates of insurance standing alone do not confer insured status. Opp. Travelers' Mot. Summ. J. at 24. Nevertheless, they contend that there is sufficient evidence to raise a material issue of triable fact as to whether Fort Bend acted as Travelers' actual or ostensible agent when issuing the certificates of insurance.[FN4]

FN4. Travelers objects to plaintiffs' submission of these certificates, submitted as attachments to the Declaration of Walter Eeds, as improperly authenticated. However, Eeds's declaration sets forth that he was an employee of both Worthing and Greystone during the relevant time and received these certificates. The court finds this authentication sufficient to overrule Travelers' objection to the evidence.

***10** An agency is either actual or ostensible. Cal. Civ.Code § 2298. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Cal. Civ.Code § 2300. To establish a triable issue of fact that an insurance agent otherwise unaffiliated with the insurer was the insurer's ostensible agent, a plaintiff asserting that it is an additional insured must produce some evidence that the insurance company, not the insurance agency, "intentionally or by want of ordinary care has caused or allowed [plaintiff] to believe the agent possesses such authority....Ostensible authority must be established through the acts or declarations of the principal and not the acts or declarations of the agent." *Am. Cas. Co. of Reading, Pennsylvania v. Krieger*, 181 F.3d 1113, 1121 (9th Cir.1999) (citing *Preis v. American Indem. Co.*, 220 Cal.App.3d 752, 761, 269 Cal.Rptr. 617 (1990)).

Plaintiffs acknowledge that they currently cannot prove that Mr. Harper acted as Travelers' actual or ostensible agent but that "they mean to try." Opp. Travelers' Mot. Summ. J. at 25. However, plaintiffs have presented no evidence of acts or statements by Travelers in support of their contention that Harper acted as Travelers' agent. Nevertheless, the court cannot finds that evidence presented by Travelers, combined with the certificates of insurance, are sufficient to raise a question as to whether Harper may have acted as Travelers' agent.

Travelers submitted the declaration of William C. Floyd, in support of its contentions that Fort Bend Insurance Agency was a Texas corporation and the insurance policy was underwritten in Texas. This declaration states that "Fort Bend Insurance Agency was one of the insurance agencies for which I was responsible. When I was account manager, I handled all applications for new business and renewals that Travelers and its related entities received from Fort Bend Insurance Agency in Stafford, Texas." Floyd Decl. ¶ 4. That declaration also establishes that Fort Bend submitted an application for insurance for Stedman to Travelers, which Floyd claims he was responsible for underwriting. *Id.* ¶ 5, 269 Cal.Rptr. 617. Floyd also states that he "communicated with James Harper regarding Stedman Construction Companies...." *Id.* Travelers' declaration, combined with the fact that the certificates of insurance were provided by Fort Bend, is sufficient to raise a triable issue of fact as to whether Harper acted as Travelers' ostensible agent. As the Ninth Circuit stated in *Krieger*, "[I]t is arguable that one who has obtained insurance through a broker would ask the same broker to have an additional insured covered by the policy." Thus, here, as in *Krieger*, there "is a triable issue of fact whether the insurance company, having issued the policy at the request of that broker, has clothed the broker with ostensible authority to add an additional insured to that policy." *Krieger*, 181 F.3d at 1121.

C. Greystone's Motion for Summary Adjudication

***11** As set forth above, Travelers had a duty to defend Stedman. Thus, Royal's motion for summary adjudication is granted on this issue. Furthermore, as discussed, the court has determined that, under Texas law, the occurrence of covered damage to property, regardless of whether the present claimant owned it when the damage occurred, will trigger coverage.

D. Travelers' Motion for Summary Judgment

1. Claims Against Stedman

Defendant moves for summary judgment that plaintiffs have abandoned the three claims for relief asserted directly against Stedman by failing to serve Stedman. Travelers contends that the court should dismiss these claims under Federal Rule of Civil Procedure 4(m). Plaintiffs did not oppose this motion. Thus, the following claims are dismissed: (1) Greystone's express indemnity claim against

Stedman; (2) AvalonBay's assigned strict liability claim against Stedman; and (3) AvalonBay's assigned negligence claim against Stedman.

2. Declaratory Relief Claim

Defendant likewise moved for summary judgment on plaintiffs' declaratory judgment claim on the grounds that it is duplicative of the issues to be adjudicated in this action. Again, plaintiffs failed to address defendant's motion in any briefing. Plaintiffs' claim for declaratory relief is hereby dismissed.

3. Breach of Contract Claims

As set forth above, the court has determined that Travelers had a duty to defend Stedman in the AvalonBay action. Nevertheless, Travelers asserts that Royal has not sufficiently demonstrated that Stedman assigned its claims to Greystone. However, plaintiffs attached to their complaint the "Assignment of Cause of Action in Exchange for Covenant not to Execute" executed between the Greystone and Stedman on February 26, 2002. That assignment provides:

In consideration of Greystone's covenants and undertakings hereunder, Stedman hereby assigns and transfers to Greystone all claims and causes of action Stedman may now have or hereafter acquire against Travelers Insurance based on Travelers Insurance's failure and refusal to defend and indemnify Stedman as hereinabove recited.

The court finds this is sufficient evidence to demonstrate that Stedman assigned its claims against Travelers to Greystone. Accordingly, Travelers' motion for summary judgment on Greystone's assigned breach of contract claim is denied.

As discussed, there is also sufficient evidence on record to present a material issue of disputed fact as to whether Fort Bend acted as Travelers' ostensible agent in issuing the Certificates of Insurance. Furthermore, although plaintiffs have produced no evidence that Greystone suffered damages as a result of any refusal of Travelers to defend or indemnify because it admitted that Royal undertook its defense and payment of the settlement, Greystone is likely an indispensable party to this action. Greystone's direct breach of contract claim is likely necessary for Royal's subrogated recovery, should such recovery be warranted, or Royal's equitable contribution claim. Accordingly, Traveler's motion for summary judgment on Greystone's direct claim for breach of contract is likewise denied.

4. Royal's Equitable Contribution Claim

***12** As set forth above, there is an issue of fact as to whether Greystone was an additional insured under the Stedman policies. Thus, Travelers' contention that it is entitled to summary judgment on Royal's equitable contribution claim because Royal and Travelers were not co-insurers of Greystone's loss fails.

Travelers further contends that Royal's claim for equitable contribution is barred by a two-year statute of limitations. *Century Indemnity Co. v. Superior Court*, 50 Cal.App.4th 1115, 1117, 58 Cal.Rptr.2d 69 (1996).[FN5] Travelers argues that because Greystone settled the action with AvalonBay on September 6, 2001, its contribution claim, filed in state court on January 7, 2004 is time-barred. Plaintiffs, on the other hand, contend that the contribution claim is timely because Royal paid the final settlement in the AvalonBay action on January 9, 2002, within the statute of limitations.

FN5. The court agrees with Travelers that the two-year statute of limitations, not the four-year statute of limitations applicable to contracts, applies to the equitable contribution claim. *Century*, 50 Cal.App.4th at 1117, 58 Cal.Rptr.2d 69; *cf. Signal Cos., Inc. v. Harbor Ins. Co.*, 27 Cal.3d 359, 369, 165 Cal.Rptr. 799, 612 P.2d 889 (1980) ("The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other."); *Travelers Cas. and Sur. Co. v. Century Sur. Co.*, 118 Cal.App.4th 1156, 1162, 13 Cal.Rptr.3d 526 (2004).

"[A]n action for equitable indemnity does not accrue, for purposes of the statute of limitations, until the indemnitee pays a judgment or settlement that entitles him to indemnity ..." *Lantzy v. Centex Homes*, 31 Cal.4th 363, 378 n. 12, 2 Cal.Rptr.3d 655, 73 P.3d 517 (2003) (citing *Valley Circle Estates v. VTN Consolidated, Inc.*, 33 Cal.3d 604, 611, 189 Cal.Rptr. 871, 659 P.2d 1160 (1983)). In its reply, Travelers shifts to arguing that Royal failed to prove that it ever paid the settlement. As set forth below, although

untimely, the court chooses to accept plaintiffs' proffer of a copy of the settlement check as evidence that Royal paid the settlement amount. The fact of payment appears not to be subject to dispute and Travelers was not prejudiced by the late disclosure. Thus, the court denies Travelers' motion for summary judgment on Royal's equitable contribution claim.

E. Plaintiffs' Motion to Strike Portions of Travelers' Briefing

Plaintiffs moved to strike portions of Travelers' briefing. Plaintiffs seek to strike arguments on page 1 of Travelers' reply in support of its motion for summary judgment that (1) plaintiffs have presented no evidence that Royal paid any sums on the settlement; (2) that Royal has not produced evidence that it insured Greystone; and (3) plaintiffs have failed to prove a valid assignment of claims between Stedman and Greystone.

Plaintiffs contend that they were not required to respond on these points because Travelers produced no evidence in support of its positions in its motion for summary judgment. As set forth above, where the non-moving party bears the burden of proving an element of a claim, a party moving for summary judgment may simply "point[ ] out ... the absence of evidence to support [the] claim." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001). Thus, Traveler's responds that plaintiffs should have presented evidence to refute these points in response to Travelers' motion for summary judgment.

First, plaintiffs submitted a supplemental declaration on April 20, 2005, two days before the hearing on the parties' motions, presenting a copy of a check for $3.6 million dated January 9, 2002 and made out to the trustee in the AvalonBay action. Travelers objected to the late filing on the grounds that this information had not previously been produced in discovery and contends that this court should strike the additional evidence. While the court agrees that the late production and receipt by the court of this evidence violates the rules of procedure, it elects to consider the evidence establishing that Royal paid the settlement in the AvalonBay action. Plaintiffs' motion to strike is denied as to this argument.

***13** Second, the court agrees that Travelers' argument that plaintiffs had failed to demonstrate that Royal insured Greystone should be stricken. Travelers' motion states, "Here, *because Royal insured Greystone* but Travelers did not, Royal has no claim against Travelers for equitable contribution ...". Travelers' Mot. Summ. J. at 12-13 (emphasis added). Travelers did not place the relationship between Royal and Greystone at issue in its motion and, in fact, indicated that the issue was undisputed. Plaintiffs' motion to strike is granted as to this argument.

Third, since the court finds sufficient evidence that Stedman assigned its claims to Greystone in the attachment to the complaint titled "Assignment in Exchange for Covenant Not to Execute" signed on February 26, 2002 by representatives of Greystone and Stedman, plaintiffs' motion to strike Travelers' motion regarding the assignment is moot.

Plaintiffs also seek to strike section III of Travelers' opposition to plaintiffs' motion for summary adjudication setting forth Travelers' arguments regarding plaintiffs' ability to proceed directly against Stedman under California Insurance Code section 11580(b)(2). Plaintiffs contend that these arguments are an impermissible attempt by Travelers to continue the arguments from its own motion for summary judgment in order to escape the page limit imposed by the Local Rules. Plaintiffs' motion to strike is denied. Plaintiffs' motion for summary judgment asserts in a footnote on page 3 that plaintiffs are permitted to proceed directly against Stedman under California Insurance Code section 11580(b)(2). After raising the issue in their motion, plaintiffs cannot complain that Travelers addressed it in opposition. Furthermore, the court agrees that direct action under this insurance code section was not pleaded in the complaint.

III. ORDER

Plaintiffs' motion for summary adjudication and defendant Travelers' motion for summary judgment are granted and denied as follows:

1. Summary adjudication is granted that Travelers had a duty to defend Stedman and that coverage under the subject policies was triggered by the occurrence of property damage without regard to when the damage was discovered or when AvalonBay acquired the damaged property is granted;
2. Royal's direct claims against Stedman are dismissed.
3. Royal's declaratory judgment claim is dismissed.
4. Travelers' motion for summary judgment on plaintiffs' breach of contract claims is denied.
5. Travelers' motion for summary judgment on

Royal's equitable indemnity claim is denied.
6. Plaintiffs' motion to strike portions of Traveler's reply is granted and denied as set forth above.

The parties shall appear for a case management conference on Friday, September 30, 2005 at 10:30 a.m. to discuss resetting the trial and pre-trial dates previously vacated at the parties' request.

N.D.Cal.,2005.
Royal Indem. Group v. Travelers Indem. Co. of R.I.
Not Reported in F.Supp.2d, 2005 WL 2176896 (N.D.Cal.)

Briefs and Other Related Documents (Back to top)

- 2006 WL 3847273 (Trial Motion, Memorandum and Affidavit) Travelers' Reply in Support of Motion for Reconsideration of Order Regarding Cross-Motions for Summary Judgment/Adjudication (Nov. 2, 2006) Original Image of this Document (PDF)
- 2006 WL 3609610 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Travelers' Motion for Reconsideration Re Motion for Summary Judgment (Oct. 26, 2006)
- 2006 WL 3609609 (Trial Motion, Memorandum and Affidavit) Travelers' Motion for Reconsideration of Order Re: Cross-Motions for Summary Judgment/Adjudication; Declaration of Philip D. Witte (Oct. 12, 2006)
- 2005 WL 3606766 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum in Opposition to Travelers' Motion to Compel Production of Documents (Nov. 30, 2005) Original Image of this Document (PDF)
- 5:04cv00886 (Docket) (Mar. 04, 2004)

END OF DOCUMENT

TAB 7

Briefs and Other Related Documents
San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San JoseN.D.Cal.,2006.Only the Westlaw citation is currently available.

United States District Court, N.D. California, San Jose Division.

SAN JOSE SILICON VALLEY CHAMBER OF COMMERCE POLITICAL ACTION COMMITTEE, et al., Plaintiffs,
v.
THE CITY OF SAN JOSE, et al., Defendants.

No. C 06-04252 JW.

Sept. 20, 2006.

Gabe Omar Camarillo, Ion Brady Meyn, James Ross Sutton, San Francisco, CA, for Plaintiffs.
Sandra Sang-Ah Lee, Lisa Herrick, Office of the City Attorney, San Jose, CA, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

JAMES WARE, J.

I. INTRODUCTION

*1 Plaintiffs, San Jose Silicon Valley Chamber of Commerce Political Action Committee and COMPAC Issues Fund, sponsored by the Silicon Valley Chamber of Commerce (collectively, "COMPAC,") have filed this action against the City of San Jose, the San Jose Elections Commission, (collectively, "Defendants,") under 42 U.S.C. § 1983, claiming that San Jose Municipal Code Section 12.06.310 violates the First and Fourteenth Amendments both facially and as-applied. Presently before the Court are the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The Court conducted a hearing on September 18, 2006. Based upon the papers submitted to date and the oral arguments of counsel, the Court GRANTS COMPAC's Motion for Summary Judgment and DENIES Defendants' Motion for Summary Judgment.

II. BACKGROUND

The parties have jointly stipulated to the following facts:

Beginning on May 16, 2006, COMPAC distributed to San Jose residents six versions of mailers and one version of telephone messages relating to recent events in San Jose. (Stipulated Facts and Exhibits to Respective Summary Judgment Motions by All Parties ¶ 1, hereafter "Stipulated Facts," Docket Item No. 11.) Each mailer and telephone message referred to City Councilperson Cindy Chavez ("Chavez"), a mayoral candidate in the June 6, 2006 primary election and November 2006 general election. (Stipulated Facts ¶ ¶ 2-3.) Each mailer or telephone message attributed actions, decisions, or voting stances to Chavez regarding San Jose's $4 million payment related to the Grand Prix Auto Race, the Norcal garbage contract, certain city eminent domain actions, or Mayor-City Council relations. (Stipulated Facts, Exs. A-H.) Each mailer concluded, "There has to be a better way for San Jose," or "There just has to be a better way for San Jose." *Id.* The mailers and telephone messages were paid for with contributions to COMPAC from individuals and organizations, some of whom contributed more than $250 each. (Stipulated Facts ¶ 7.)

A citizen complaint about COMPAC's messages was filed with the San Jose Election Commission ("Election Commission") on May 17, 2006. (Stipulated Facts ¶ 4.) The Election Commission began an investigation, conducted by its Evaluator, to determine whether the mailers and telephone messages violated the San Jose Municipal Code's ("SJMC") requirements for independent expenditures or contribution limits on independent committees. *Id.* The Evaluator concluded that COMPAC's mailers and telephone calls were not "independent expenditures" under SJMC law, because they did not "expressly advocate" Chavez's election or defeat or otherwise refer to Chavez's mayoral campaign or candidacy. (Stipulated Facts at ¶ 6.)

The Election Commission held a hearing on May 31, 2006. (Stipulated Facts ¶ 8.) It adopted the Evaluator's conclusion that COMPAC had not violated the SJMC's independent expenditures restrictions or reporting requirements. *Id.* However, it found that COMPAC, by funding its communications

with individual contributions exceeding $250, had violated SJMC Section 12.06.310, which provides:

*2 Contribution Limitations to Independent Committees.

A. No person shall make nor shall any person accept any contribution to or on behalf of an independent committee expending funds or making contributions in aid of and/or opposition to the nomination or election of a candidate for city council or mayor which will cause the total amount contributed by such person to such independent committee to exceed two hundred fifty dollars per election.

B. Independent committees contributing to election campaigns in addition to City of San Jose council or mayoral campaigns shall segregate contributions received or expenditures made for the purpose of influencing such San Jose elections from all other contributions or expenditures. Where an independent committee has segregated such contributions and expenditures for such city elections, contributors to that committee may contribute more than two hundred fifty dollars so long as no portion of the contribution in excess of two hundred fifty dollars is used to influence San Jose council or mayoral elections.

C. This section is not intended to prohibit or regulate contributions to independent committees to the extent such contributions are used on behalf of or in opposition to candidates for offices other than mayoral or council offices of the city of San Jose.

The Elections Commission decided to impose a civil fine against COMPAC. (Stipulated Facts ¶ 9.) The exact amount of the fine is pending receipt of information from COMPAC about the number of contributions exceeding $250 that it used to fund the communications. *Id.*

On June 21, 2006, the Elections Commission issued COMPAC a letter of public reprimand for its violation of SJMC Section 12.06.310. (Stipulated Facts ¶ 10.)

On July 11, 2006, COMPAC filed this 42 U.S.C. § 1983 action, asserting that Section 12.06.310 violates the First and Fourteenth Amendments of the United States Constitution. Both parties have moved for summary judgment.

III. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.C iv.P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If it meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it bears the burden of proof at trial. *Id.* at 322-23.

*3 The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law ... Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588; *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 630 (9th Cir.1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the non-moving party, coupled with disputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv.*, 809 F.2d at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a

reasonable jury could not return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial." ' *Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

Plaintiffs seek summary judgment on their claims that the City of San Jose and the Elections Commission violated their Fourteenth Amendment due process and First Amendment free speech rights by imposing or threatening to impose public censure and civil penalties pursuant to an allegedly unconstitutional municipal ordinance. Defendants seek summary judgment on the grounds that the contested campaign contribution ordinance is consistent with the First Amendment and is not vague or overbroad.

A. *First Amendment*

i. Standard of Review

COMPAC contends that the challenged ordinance is subject to strict scrutiny, because it imposes a content-based expenditure limit on an independent political committee. (Memorandum and Points of Authority in Support of Motion for Summary Judgment or Partial Summary Judgment by All Plaintiffs at 16, hereafter "Plaintiffs' Motion," Docket Item No. 10.) The Defendants contend that the ordinance is subject to a lower level of constitutional scrutiny because it is a contribution limit. (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment or in the Alternative, for Partial Summary Judgment at 16, hereafter, "Defendants' Motion," Docket Item No. 28.)

***4** The Supreme Court first drew a distinction between government-imposed limits on expenditures and contributions in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In *Buckley*, numerous plaintiffs (including candidates, political parties, and contributors) brought suit against defendant government officials in their official capacity and as members of the Federal Election Commission. *Id.* at 7-8. The plaintiffs challenged the constitutionality of various provisions of the Federal Election Campaign Act of 1971 ("FECA"). *Id.* at 7. Certain of the challenged FECA provisions prohibited contributions exceeding $25,000 per year or $1,000 per single candidate for an election campaign, and from spending more than $1,000 per year "relative to a clearly identified candidate." *Id.* at 12-13. In this seminal case, the Supreme Court held that both FECA's contribution and expenditure limits implicated First Amendment interests, but "its expenditure ceilings impose[d] significantly more severe restrictions on protected freedoms of political expression and association than [did] its limitations on financial contributions." *Id.* at 23. The Supreme Court held that contribution limits will be upheld even if they represent a "significant interference with protected rights of political association," so long as they are closely drawn to match a sufficiently important governmental interest. *Id.* at 25. The Court explained:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21. Expenditure limits present greater cause for constitutional concern because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. More recent Supreme Court cases "have construed *Buckley* as requiring strict scrutiny of limitations on independent expenditures and lesser

constitutional scrutiny of limitations on contributions." *Lincoln Club v. City of Irvine*, 292 F.3d 934 (9th Cir.2001), citing (*inter alia*) *Fed. Elec. Comm'n v. Colorado Republican Fed. Campaign Comm'n*, 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

*5 The leading Ninth Circuit case bearing on the contribution/expenditure distinction is *Lincoln Club,* to which both COMPAC and Defendants cite heavily. In *Lincoln Club,* the City of Irvine enacted a campaign finance law that placed a ceiling of $320 on the contributions a person or committee could receive from a single source during a two-year election cycle. 292 F.3d at 936. Plaintiff and its two affiliated political action committees were funded by annual dues of $2000 per member; because their dues payments exceeded the law's ceiling, the plaintiff was barred from making any expenditures whatsoever to support or oppose candidates. *Id.* Plaintiff sued the city under 42 U.S.C. § 1983, alleging that the law violated its First Amendment rights of free speech and association. *Id.* The Ninth Circuit noted that its own and Supreme Court precedent cases had dealt with contributions to candidates rather than to independent expenditure committees. *Id.* at 937. It characterized the ordinance before it as both an expenditure and contribution limitation. First, the ordinance restricted contributions to independent expenditure committees, which was not a constitutionally severe burden on speech and associational freedoms post-*Buckley*. *Id.* at 938. Second and more problematically, the campaign finance law restricted expenditures; it barred independent committees from making any political contributions if their source of money was membership dues exceeding the Ordinance's maximum. *Id.* To comply with the ordinance, the plaintiff's choices were (1) to rearrange its financial structure drastically or (2) to abstain from making any political expenditures in Irving municipal elections. *Id.* at 938-39. The Ninth Circuit concluded, "The Ordinance's expenditure limitation is a double-edged sword, placing a substantial burden on protected speech (i.e. barring expenditures) while simultaneously threatening to burden associational freedoms (i.e. by requiring a restructuring of the Lincoln Club.) We conclude that such substantial burdens on protected speech and associational freedoms necessitate the application of strict scrutiny to the Ordinance." *Id.* at 939. Since the Ninth Circuit's decision, no district court in this circuit has confronted this issue.

This case is factually distinguishable from *Lincoln Club* in multiple ways. However, the Court concludes-applying the rationale of *Lincoln Club*-that SJMC Section 12.06.310 serves as a dual limit on contributions and expenditures. On one hand, the ordinance limits contributions that the committee can use to support or oppose a candidate for municipal government to $250. Here, strict scrutiny is not triggered as per *Buckley,* particularly since there is no substantial interference with protected rights of political association. Would-be contributors may donate to COMPAC in whatever increments they choose, subject to the ordinance's requirements regarding segregating funds to be used for aiding or opposing a candidate. However, the restriction also serves as a content-based expenditure limit-independent committees may spend only $250 per donor, if they are spending to aid or oppose a candidate for San Jose municipal office.[FN1] The Defendants' conduct substantiates the conclusion that the ordinance does function as an expenditure limit. As COMPAC correctly contends:

> FN1. That the ordinance is a content-based expenditure limitation is made clear because it is susceptible to the following interpretation: contributions of *any* amount may be made to an independent committee, even for the committee's use in aid of or opposition to candidates. Applying the ordinance, a contributor could donate $1000 to COMPAC to be used in aid of or opposition to the nomination or election of four candidates for San Jose Mayor or City Council-but COMPAC could not use the entire sum in aid of or opposition to a single candidate.

*6 That the ordinance is essentially a limitation on expenditures is also exemplified by the Commission's enforcement action against COMPAC: the Commission did not issue a reprimand against COMPAC's *contributors* for violating the $250 limit-but rather against COMPAC for funding its mailers and telephone messages. More importantly, the Commission did not base its reprimand solely on COMPAC's receipt of contributions exceeding $250, but on the Commission's *interpretation* of COMPAC's expenditures-the Commission concluded that the mailers and telephone messages aided or opposed a mayoral candidate.
(Plaintiff's Motion at 15.) It is indisputable that there has been no showing of hardship to COMPAC

comparable in magnitude to that suffered in *Lincoln Club.* Rather than facing a complete bar on expenditures, COMPAC faces restrictions on expenditures. Rather than an ordinance requiring a complete restructuring of its finances, COMPAC is confronted with a statute requiring it to set procedures in place to segregate funds exceeding $250 under particular circumstances. However, since *Buckley,* the Supreme Court has viewed expenditure limits with heightened concern because of their potential to alter the quantity and manner of a political speaker's speech. *Buckley,* 424 U.S. at 19. Even though the harm to the COMPAC here is not as pronounced as in *Lincoln Club,* the Court holds that the appropriate level of constitutional review is strict scrutiny: the restriction must be narrowly tailored to serve an overriding state interest. *ACLU of Nevada v. Heller,* 378 F.3d 979, 992-93 (9th Cir.2004).

ii. Constitutionality of the Ordinance Under Strict Scrutiny

The Defendants contend that contribution limits serve two important government interests: to prevent "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." (Defendants' Motion at 16, quoting *McConnell v. Federal Elections Commission,* 540 U.S. 93, 136, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003)). COMPAC first contends that the proffered government interest in campaign finance regulation-preventing corruption and the appearance of corruption-is not an overriding state interest when "grafted on" to laws regulating independent committees rather than candidates. (Plaintiffs' Motion at 16-17.) Second, COMPAC contends that the contested ordinance is not narrowly drawn to serve a compelling government interest due to vagueness, overbreadth, and a contribution limit so low as to create serious associational and expressive problems. (Plaintiffs' Motion at 17-18.)

The Court finds that preventing corruption and the appearance of corruption is an important government interest when applied to contribution limits on candidates or committees who coordinate with candidates. *McConnell,* 540 U.S. at 136. However, SJMC Section 12 .06.310 is not narrowly tailored to serve that interest, because it also serves as an expenditure limit on independent committees. Far from narrow tailoring, the ordinance sweeps broadly to regulate a significant amount of protected speech. For instance, COMPAC correctly contends that the contested ordinance, as presently written and interpreted by the Election Commission, could encompass conduct as mundane as "mentioning the vote of a city official on a piece of legislation in a newsletter sent to ... members." (Plaintiffs' Motion at 17.) The Defendants contend that COMPAC's conduct is distinguishable from this example: "it is hard to believe that COMPAC is genuinely so confused as to not know the difference between its mass mail and telephone campaign targeting a mayoral candidate launched three weeks before the mayoral election and simply inviting an official to speak on a panel or mentioning a City Council vote in a newsletter." (Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 12, hereafter, "Defendants' Opposition," Docket Item No. 35.) Moreover, although it is not dispositive, the $250 contribution limit per election is low, particularly in its failure to adjust for inflation. In invalidating $200-400 limits on individual contributions to state races, the Supreme Court considered, *inter alia,* the limits placed on challengers seeking to run competitive campaigns, the absence of automatic adjustment for inflation, and the absence in the record of "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" described. *Randall v. Sorrell,* --- U.S. ----, ---- - ----, 126 S.Ct. 2479, 2495-99, 165 L.Ed.2d 482 (2006).

*7 Although the Defendants are correct that COMPAC's conduct is factually distinguishable, the Court holds that SJMC Section 12.06.310 regulates more speech than is necessary to advance the government interest of preventing corruption and the appearance thereof.[FN2] As such, it cannot survive a strict scrutiny challenge.

FN2. Defendants also argue that due deference to the legislative determination is appropriate. (Defendants' Motion at 18.) This argument is predicated on an incorrect level of scrutiny.

B. *Fourteenth Amendment*

i. Vagueness

COMPAC challenges the constitutionality of SJMC Section 12.06.310, contending that the words "in aid of or opposition to" violate due process because their meaning is "entirely dependent on the subjective interpretation of the Commission," they invite an

"arbitrary and discriminatory application" of the law, and as applied, they have had a chilling effect on COMPAC's exercise of its free speech rights. (Plaintiffs' Motion at 5-9.) Defendants contend that the ordinance's language is not vague or overbroad because the Supreme Court has found similar language constitutional, the language is properly tailored, and COMPAC could have obtained an advisory opinion about the legality of its planned mailer and telephone campaign. (Defendants' Motion at 19-21.)

A high ("stringent") degree of clarity is constitutionally required of laws that "threaten to inhibit the exercise of constitutionally protected rights," including laws affecting freedom of speech. *Hoffman Estates v. Flipside*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). SJMC Section 12.06.310 cannot pass constitutional muster because it does not provide fair or adequate warning to speakers in the political process as to what conduct is prohibited. Nowhere in the Defendants' papers is a satisfactory explanation to the scenarios that COMPAC raises:

What does in aid of or in opposition to a candidate mean? If a COMPAC mailer praises a candidate's stance on an unpopular issue, does that aid or oppose the candidate? What if a communication vilifies a candidate's support of a popular issue? Does televising a candidate forum sponsored by a business group aid or oppose a candidate who has taken positions unpopular with the business community?

(Plaintiffs' Motion at 6.)

SJMC Section 12.06.310 is subject to "arbitrary and discriminatory application." (Plaintiffs' Motion at 7.) This finding is exemplified by the Election Commission's adoption of the Evaluator's Report, which said of COMPAC's conduct, "Slogans like 'there has to be a better way for San Jose' and 'is this any way to run a city,' may not rise to the level of 'express advocacy,' but the intent to affect the election seems clear to us." (Stipulated Facts, Exh. at 18.) The Court finds that it is clear that San Jose's framework for independent committees to follow is constitutionally untenable. Put simply, a committee knows that it may not finance communications "in aid of or in opposition to" a candidate with contributions exceeding $250. If the committee is unclear on whether its proposed communication would violate the ordinance-for instance, because it merely plans to mention how elected representatives seeking reelection voted on a particular issue-it may seek an advisory opinion from the Election Commission. The Election Commission, in issuing its advisory opinion, may consider what the intention of the would-be communicator appears to be. This statutory setup is plainly vague, as it does not afford a would-be speaker a reasonable means of discerning ex ante whether its conduct is lawful. Further, it affords troubling discretion to the Election Commission to base its determination of whether a speaker's communication is lawful on that speaker's perceived intent.

***8** Defendants' principal argument is that the Supreme Court found in *McConnell* that the words "oppose," "attack," and "support" were not unconstitutionally vague. (Defendants' Motion at 20.) In *McConnell,* the Supreme Court considered the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 540 U.S. at 115. The BCRA was enacted to close a gap in campaign finance law that allowed political parties and candidates to circumvent the Federal Election Campaign Act of 1971 ("FECA"). *Id.* at 132. FECA imposed "hard money" contribution limitations, imposing a ceiling on contributions for the purpose of advocating a candidate's election or defeat. Political parties and candidates were circumventing FECA's limitations through soft-money contributions. *Id.* at 124. BCRA was enacted to eliminate FECA's soft money loophole. Under BCRA, one of the new categories of "federal election activity" subject to restrictions was "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for state or local office is also mentioned or identified) and that promotes or supports a candidate for that office; or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate.)" 2 U.S.C. § 431(20)(A)(iii).

Defendants appear to contend as an absolute proposition that the Supreme Court held that the words "oppose," "attack," and "support" were not unconstitutionally vague in *McConnell.* (Defendants' Opposition at 14-15.) The correct reading of *McConnell* is not so broad. The Supreme Court's finding that those words satisfied due process must be interpreted in the context of BCRA, which was an "electioneering communication" ordinance. It applied pointedly and specifically only to (1) broadcast, satellite, and cable communications (2) clearly identifying a candidate for federal office (3) airing within sixty days of a general election or thirty days of a primary, and (4) targeted to the relevant electorate, i.e. those in the relevant jurisdiction, if for

an election other than President or Vice-President. 540 U.S. at 189-191; *see also* 2 U.S.C. § 434(f)(3)(A)(i). In contrast, the SJMC ordinance applies (1) to expenditures on all manner of communications; (2) that can be construed in aid of or opposition to a candidate, which could potentially include ads that do not directly mention the candidate,[FN3] and (3) without regard to the timing relative to the election. Thus, three of the four constraints that lent meaning to the words in BCRA are not applicable here.

FN3. Of course this is not one such case. However, if the Election Commission is willing to consider the Evaluator's determination of intent, then it is conceivable that the ordinance could apply to communications not directly referencing a candidate if the speaker's perceived intent is to aid or oppose a candidate.

Defendants contend that COMPAC could have obtained an advisory opinion from the Elections Commission or the San Jose City Attorney. (Defendants' Motion at 21.) However, it is axiomatic that Defendants cannot salvage an unconstitutionally vague law by offering would-be speakers an opportunity to have their speech green-lighted in advance, and the case that Defendants cite in support of this proposition does not so hold.[FN4] In *McConnell,* the Supreme Court was satisfied that the challenged statutory language was not unconstitutionally vague, independently of the possibility of the plaintiffs obtaining an advisory opinion. The Supreme Court's vagueness discussion upholding the BCRA's use of the words "promote," "oppose," "attack," and "support" did so in the context of speech by *political parties.* *McConnell,* 540 U.S. at 170. The Supreme Court held that the four challenged words "clearly set forth the confines within which *potential party speakers* must act in order to avoid triggering the provisions." *Id.* (emphasis added.) In holding that the four words "provide explicit standards for those that apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," the Supreme Court wrote:

FN4. Defendants cite to *Buckley v. Valeo,* 424 U.S. at 24. (Defendants' Motion at 21.) However, their quotation is taken from *McConnell,* 540 U.S. at 170 n. 64.

***9** This is particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns. *See* *Buckley,* 424 U.S. at 79 (noting that a general requirement that political committees disclose their expenditures raised no problems because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" and thus a political committee's expenditures "are, by definition, campaign-related.") *Id.* The Supreme Court's focus, then, was on political parties and their speakers. Due to the presumption that political parties act in connection with political campaigns, it was reasonable that their members of "ordinary intelligence" could ascertain whether party speech promoted, opposed, attacked, or supported a candidate. Only after that finding did the Supreme Court write in dicta, "Furthermore, should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification and thereby 'remove any doubt there may be as to the meaning of the law." ' *Id.* Here, the conduct of an independent committee-not a political candidate or committee "the major purpose of which is the nomination or election of a candidate"-has been implicated by SJMC Section 12.06.310. As such, Defendants cannot rely on the Supreme Court's dicta on advisory opinions in *McConnell* to salvage an unconstitutionally vague law.

The Court concludes that SJMC Section 12.06.310 violates the Due Process Clause of the Fourteenth Amendment, because it is impermissibly vague and susceptible to arbitrary or discriminatory interpretation.

ii. Overbreadth

Because SJMC Section 12.06.310 is unconstitutionally vague, the Court deems it unnecessary to address the question of whether the ordinance is overbroad.

iii. Narrowing Construction

COMPAC contends that the Court should give the challenged ordinance a limiting construction, applying it only to express advocacy. (Plaintiffs' Motion at 10-11.) The Ninth Circuit has held that "*McConnell* left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which

regulate more speech than that for which the legislature has established a significant government interest." *Heller,* 378 F.3d 985 (quoting *Anderson v. Spear,* 356 F.3d 651, 664-65 (6th Cir.2004)).

Federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Stenberg v. Carhart,* 530 U.S. 914, 944, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (quoting *Boos v. Barry,* 485 U.S. 312, 330, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)). Here, COMPAC contends that the Ninth Circuit has held that statutes that turn on whether conduct "influences" an election are subject to a narrowing construction. (Plaintiffs' Motion at 12, citing *Heller,* 378 F.3d at 986 n. 5.) The Ninth Circuit in *Heller* referenced two other circuit decisions that held statutes susceptible to constitutional narrowing: (1) a Seventh Circuit case regarding the phrase "to influence the election of a candidate ... or the outcome of a public question" and (2) a Fourth Circuit case regarding the phrase "for the purpose of influencing the outcome of an election for public office." *Id.,* citing *Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503, 510 (7th Cir.1998); *Va. Soc'y for Human Life, Inc. v. Caldwell,* 152 F.3d 268, 269 (4th Cir.1998). One question posed by *Caldwell, Heller,* and *Baldwin* is whether this case's phrase, "in aid of or opposition to," is closer to "influencing," which the Fourth and Seventh Circuits held were susceptible to narrowing constructions, or "related to," which the Ninth Circuit held was not. However, the Court need not decide this question, because, as the Fourth Circuit held in *Caldwell:*

***10** A federal district court "lacks jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 369 (1971). As the Seventh Circuit has explained: "An important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative. If the district judge [reads the state's] statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined."

152 F.3d at 270 (some citations omitted). For this reason, the Court's supplying a narrowing construction would not supply COMPAC with the relief that it seeks. The plaintiff in *Caldwell* faced exactly this issue:The district court's holding, that the Virginia statutes at issue did not apply to [plaintiff], could not prevent a private party from suing to enjoin [plaintiff's] distribution of campaign literature based on the statutes, nor could it prevent the state from prosecuting [plaintiff] for failing to comply with the statutes. Because the scope of the statutes' applicability had not authoritatively been narrowed and by their plain terms they applied to [plaintiff], [plaintiff's] speech was still chilled by the statutes.

Id. The proper remedy, then, for the violation of due process at issue here is for the Court to invalidate the statute and enjoin its enforcement.

V. CONCLUSION

The Court GRANTS COMPAC's Motion for Summary Judgment and DENIES Defendants' Motion for Summary Judgment. Plaintiffs are entitled to reasonable attorney's fees.

N.D.Cal.,2006.
San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose
Slip Copy, 2006 WL 3832794 (N.D.Cal.)

Briefs and Other Related Documents (Back to top)

- 2006 WL 2703481 (Trial Motion, Memorandum and Affidavit) Memorandum of Points and Authorities in Opposition to Motion for Judgment on the Pleadings (Aug. 30, 2006) Original Image of this Document (PDF)
- 2006 WL 2703479 (Trial Motion, Memorandum and Affidavit) Memorandum and Points of Authorities in Opposition to Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment (Aug. 28, 2006) Original Image of this Document (PDF)
- 2006 WL 2703480 (Trial Motion, Memorandum and Affidavit) Opposition of Defendants City of San Jose and San Jose Elections Commissions to Plaintiffs' Motion for Summary Judgment (Aug. 28, 2006) Original Image of this Document (PDF)
- 2006 WL 2703477 (Trial Motion, Memorandum and Affidavit) Memorandum of Points and Authorities in Support of Defendants' Motion for Judgment on the Pleadings ŶFRCP 12(c)¨ (Aug. 18, 2006) Original Image of this Document (PDF)
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• 2006 WL 2580327 (Trial Pleading) Defendants City of San Jose and San Jose Elections Commission's Answer to Plaintiffs' Complaint for Violation of Civil Rights (Aug. 1, 2006) Original Image of this Document (PDF)
• 5:06cv04252 (Docket) (Jul. 11, 2006)

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TAB 8

H

Valley Forge Ins. Co. v. Swiderski Electronics, Inc.Ill.,2006.

Supreme Court of Illinois.

VALLEY FORGE INSURANCE COMPANY et al., Appellants,
v.
SWIDERSKI ELECTRONICS, INC., et al., Appellees.

No. 101261.

Nov. 30, 2006.

Background: Commercial general liability (CGL) insurers sought a declaratory judgment that they did not have duty to defend insured with regard to lawsuit alleging that, by sending unsolicited facsimile advertisements, insured violated the Telephone Consumer Protection Act and converted the recipients' fax machine toner and paper. The Circuit Court, McHenry County, Michael J. Sullivan, J., entered summary judgment for insured. Insurers appealed. The Appellate Court, Bowman, J., 359 Ill.App.3d 872, 296 Ill.Dec. 5, 834 N.E.2d 562, affirmed. Insurers petitioned for leave to appeal.

Holdings: The Supreme Court, Garman, J., held that:

(1) allegations against insured potentially fell within the coverage of policies' "advertising injury" provision;

(2) insured's alleged sending of unsolicited facsimile advertisements constituted "publication," for purposes of policies' "advertising injury" provision;

(3) unsolicited facsimile advertisements constituted "material that violates a person's right of privacy," for purposes of policies' "advertising injury" provision; and

(4) "right of privacy" in policies' "advertising injury" provision connoted both an interest in seclusion and an interest in the secrecy of personal information.

Affirmed.

[1] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

A circuit court's entry of summary judgment is subject to de novo review.

[2] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Construction of an insurance policy, which presents a question of law, is reviewed de novo.

[3] Insurance 217 1813

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1813 k. Language of Policies. Most Cited Cases

Court's primary objective in construing the language of an insurance policy is to ascertain and give effect to the intentions of the parties as expressed by the language of the policy.

[4] Insurance 217 1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases

Like any contract, an insurance policy is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose.

[5] Insurance 217 1809

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1809 k. Construction or Enforcement as Written. Most Cited Cases
If the words used in an insurance policy, given their plain and ordinary meaning, are unambiguous, they must be applied as written.

[6] Insurance 217 1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases
If the words used in an insurance policy are ambiguous, they will be strictly construed against the drafter.

[7] Insurance 217 1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases
Words used in an insurance policy are ambiguous if they are reasonably susceptible to more than one interpretation, not simply if the parties can suggest creative possibilities for their meaning.

[8] Insurance 217 1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases
Court will not search for ambiguity in an insurance policy where there is none.

[9] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
To determine whether an insurer has a duty to defend its insured from a lawsuit, a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy.

[10] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
Allegations in the underlying complaint must be liberally construed in favor of the insured in determining whether an insurer has a duty to defend.

[11] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 2922(1)

217 Insurance
217XXIII Duty to Defend
217k2920 Scope of Duty
217k2922 Several Grounds or Causes of Action
217k2922(1) k. In General. Most Cited Cases
If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer is obligated to defend its insured, even if the allegations are groundless, false, or fraudulent, and even if only one of several theories of recovery alleged in the complaint falls within the potential coverage of the policy.

[12] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
An insurer may not justifiably refuse to defend a lawsuit against its insured unless it is clear from the face of the underlying complaint that the allegations set forth in the complaint fail to state facts that bring the case within, or potentially within, the coverage of the policy.

[13] Telecommunications 372 888

372 Telecommunications
372III Telephones
372III(F) Telephone Service

372k888 k. Advertising, Canvassing and Soliciting; Telemarketing. Most Cited Cases
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 Telephone Consumer Protection Act fax-ad claim is intended to vindicate. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[14] Telecommunications 372 888

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k888 k. Advertising, Canvassing and Soliciting; Telemarketing. Most Cited Cases
The Telephone Consumer Protection Act can fairly be described as protecting a fax recipient's privacy interest in seclusion. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[15] Telecommunications 372 888

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k888 k. Advertising, Canvassing and Soliciting; Telemarketing. Most Cited Cases
A violation of privacy in the sense of a violation of seclusion is implicit in a Telephone Consumer Protection Act fax-ad claim. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[16] Insurance 217 2300

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2297 Advertising Injury
217k2300 k. Violation of Privacy Rights.
Most Cited Cases
Allegations that insured sent unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act potentially fell within the coverage of commercial general liability policies' "advertising injury" provision, which afforded coverage for liability resulting from insured's written publication of material that violated a person's right of privacy. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[17] Insurance 217 1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases
When insurance policy does not define particular terms, court must afford them their plain, ordinary, and popular meanings.

[18] Insurance 217 1855

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1855 k. Dictionaries. Most Cited Cases
To afford undefined terms in an insurance policy their plain, ordinary, and popular meanings, courts look to their dictionary definitions.

[19] Insurance 217 2300

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2297 Advertising Injury
217k2300 k. Violation of Privacy Rights.
Most Cited Cases
Insured's alleged sending of unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act constituted "publication," for purposes of commercial general liability policies' "advertising injury" provision, which afforded coverage for liability resulting from insured's written publication of material that violated a person's right of privacy; insured published the advertisements both in the general sense of communicating information to the public and in the sense of distributing copies of the advertisements to the public. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[20] Insurance 217 2300

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2297 Advertising Injury
217k2300 k. Violation of Privacy Rights.
Most Cited Cases
Unsolicited facsimile advertisements allegedly sent by insured in violation of the Telephone Consumer Protection Act constituted "material that violates a person's right of privacy," for purposes of

commercial general liability policies' "advertising injury" provision, which afforded coverage for liability resulting from insured's written publication of material that violated a person's right of privacy; unsolicited facsimile advertisements fell within category of material that violates a person's seclusion. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(C).

[21] Insurance 217 2300

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2297 Advertising Injury
217k2300 k. Violation of Privacy Rights.
Most Cited Cases
"Right of privacy" in commercial general liability policies' "advertising injury" provision, which afforded coverage for liability resulting from insured's written publication of material that violated a person's right of privacy, connoted both an interest in seclusion and an interest in the secrecy of personal information.

Hugh C. Griffin, Arthur J. McColgan, Adam L. Frankel, of Lord, Bissell & Brook, L.L.P., Chicago, Andrew Butz, Joseph S. Crociata and William H. White, Jr., of Bonner Kieurnan Trebach & Crociata, Washington, D.C., for appellants.
Anthony C. Valiulis, Joanne Sarasin, of Much Shelist Freed Denenberg Ament & Rubenstein, P.C., Chicago, for appellee Swiderski Electronics, Inc.
Phillip A. Bock, Robert M. Hatch, of Diab & Bock, L.L.C., Chicago, Brian J. Wanca and Steven A. Smith, of Anderson & Wanca, Rolling Meadows, for appellee Ernie Rizzo, d/b/a Illinois Special Investigations.
Perry M. Shorris, of Bollinger, Ruberry & Garvey, Chicago, for amici curiae American Economy Insurance Company and American States Insurance Company.
Justice GARMAN delivered the judgment of the court, with opinion:
*1 Ernie Rizzo, doing business as Illinois Special Investigations, filed suit individually and on behalf of a class of those similarly situated against Swiderski Electronics, Inc., based on Swiderski's alleged sending of unsolicited facsimile advertisements. Swiderski tendered the defense of the suit to Valley Forge Insurance Company and Continental Casualty Corporation pursuant to insurance policies Swiderski had purchased from them. Subsequently, the insurers sought a declaratory judgment that they had no duty to defend Swiderski against Rizzo's lawsuit (735 ILCS 5/2-701 (West 2002)). The parties filed cross-motions for summary judgment regarding the insurers' duty to defend (735 ILCS 5/2-1005 (West 2002)), and the circuit court of McHenry County granted summary judgment in favor of Swiderski. The appellate court affirmed. 359 Ill.App.3d 872, 296 Ill.Dec. 5, 834 N.E.2d 562. The issue before us is whether the insurers have a duty to defend Swiderski against Rizzo's lawsuit under the insurance policies. We hold that they do and affirm the judgment of the appellate court.

BACKGROUND

Ernie Rizzo operates a private investigation business known as Illinois Special Investigations. On June 19, 2003, Rizzo filed a three-count complaint in the McHenry County circuit court against Swiderski Electronics, Inc. According to the complaint, Swiderski sent Rizzo and numerous other individuals a fax advertisement with information on the sale, rental, and service of various types of electronic equipment. The complaint alleges that, by faxing copies of the advertisement without first obtaining the recipients' permission to do so, Swiderski (1) violated section 227 of the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227 (2000)), (2) unlawfully converted the fax machine toner and paper of those who received the faxes, and (3) violated section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2002)).[FN1] The complaint seeks damages, attorney fees, and injunctive relief on behalf of all individuals who received an unsolicited fax advertisement from Swiderski within the four-year period preceding the filing of the complaint. As yet, no class has been certified.

Swiderski tendered the defense of Rizzo's lawsuit to its primary insurer, Valley Forge Insurance Company, and its excess insurer, Continental Casualty Corporation. Under the Valley Forge policy, Valley Forge has a duty to defend Swiderski against any suit seeking damages caused by "personal and advertising injury." "Personal and advertising injury" includes injury that arises out of one or more of the following offenses:
"a. False arrest, detention or imprisonment;
b. Malicious prosecution;
c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies,

committed by or on behalf of its owner, landlord or lessor;
d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
*2 e. *Oral or written publication, in any manner, of material that violates a person's right of privacy;*
f. The use of another's advertising idea in your 'advertisement'; or
g. Infringing upon another's copyright, trade dress or slogan in your 'advertisement." (Emphasis added.)

The policy defines "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." It does not define "publication," "material," or "privacy." The policy excludes coverage for " '[p]ersonal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.' "

The Valley Forge policy also obligates Valley Forge to defend Swiderski against any suit seeking damages caused by "property damage." The policy defines "property damage" as:
"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

The policy applies to "property damage" only if the damage is caused by an "occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy does not define "accident." Coverage for "property damage" does not apply to " 'property damage' expected or intended from the standpoint of the insured."

The relevant provisions of the policy Continental issued to Swiderski are essentially the same as the provisions of the Valley Forge policy discussed above.[FN2] Like the Valley Forge policy, the Continental policy covers "advertising injury," which is defined as:
"a. Oral, written, televised or videotaped publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
b. *Oral, written, televised or videotaped publication of material that violates a person's right of privacy;*
c. The use of another's advertising idea in your advertisement; or
d. Infringement upon another's copyright, trade dress or slogan in your advertisement." (Emphasis added.)

The Continental policy also covers "property damage" with provisions nearly identical to those contained in the Valley Forge policy.

On October 29, 2003, Valley Forge and Continental informed Swiderski that the claims set forth in Rizzo's complaint were not covered by the policies they issued to Swiderski. Subsequently, on January 9, 2004, the insurers sought a declaration from the McHenry County circuit court that they had no duty to defend or indemnify Swiderski with regard to Rizzo's lawsuit. Thereafter, Swiderski filed a counterclaim against the insurers and a third-party claim against Rizzo, asserting that Rizzo's TCPA claim and conversion claim were covered by the policies.

*3 The parties filed cross-motions for partial summary judgment on the issue of the insurers' duty to defend. On July 23, 2004, after oral argument, the circuit court granted Swiderski's motion on the ground that the insurers had a duty to defend Swiderski under the policies' "advertising injury" provision. Because the court found a duty to defend under the "advertising injury" provision, the court did not rule on whether a duty to defend existed on the basis of the policies' "property damage" provision. The court was not asked to rule on whether the insurers had a duty to indemnify Swiderski.

Subsequently, in an order dated September 9, 2004, the circuit court entered judgment in favor of Swiderski. The order required the insurers to pay the defense costs already incurred in the underlying action, which amounted to $25,222.22. The order also required the insurers to advance future defense costs to Swiderski pending resolution of any appeal. In addition, the circuit court certified the duty-to-defend issue for immediate appeal pursuant to Supreme Court Rule 304(a) (210 Ill.2d R. 304(a)).

The appellate court affirmed the judgment of the circuit court. 359 Ill.App.3d at 891, 296 Ill.Dec. 5, 834 N.E.2d 562. The court observed that almost all prior litigation regarding insurance coverage for TCPA claims has proceeded in federal court, and that

the federal courts are divided as to whether insurance provisions like the provision at issue in this case provide coverage for fax advertising claims under the Act. 359 Ill.App.3d at 879-80, 296 Ill.Dec. 5, 834 N.E.2d 562. After evaluating the federal case law, the appellate court concluded that, pursuant to Illinois' rules of insurance-policy construction, the insurers had a duty to defend Swiderski against Rizzo's lawsuit. 359 Ill.App.3d at 883, 296 Ill.Dec. 5, 834 N.E.2d 562. Specifically, the court held that the insurers owed Swiderski a duty to defend pursuant to the "advertising injury" provision of their policies. 359 Ill.App.3d at 889, 296 Ill.Dec. 5, 834 N.E.2d 562.

Comparing the allegations in Rizzo's complaint with the language of the "advertising injury" provision, the appellate court determined that an average person would reasonably interpret that provision as affording coverage. 359 Ill.App.3d at 885, 296 Ill.Dec. 5, 834 N.E.2d 562. The court rejected the insurers' argument that, in the context of the insurance policies, "publication" requires injurious communication to a third party. 359 Ill.App.3d at 885-86, 296 Ill.Dec. 5, 834 N.E.2d 562. The court reasoned that, given its plain and ordinary meaning, the term "publication" does not convey to a reasonable person an intention to cover only communications sent to third parties. 359 Ill.App.3d at 886, 296 Ill.Dec. 5, 834 N.E.2d 562. The court also rejected the insurers' argument that the "advertising injury" provision covers only violations of secrecy interests, not intrusions upon seclusion. 359 Ill.App.3d at 886-87, 296 Ill.Dec. 5, 834 N.E.2d 562. The court opined that a reasonable person would understand the term "privacy" to encompass the right to be left alone. 359 Ill.App.3d at 887, 296 Ill.Dec. 5, 834 N.E.2d 562. In light of these considerations, the court concluded that sending unsolicited fax advertisements falls potentially within the coverage of the policies' "advertising injury" provision. 359 Ill.App.3d at 887, 296 Ill.Dec. 5, 834 N.E.2d 562. Because the court determined that the insurers had a duty to defend Swiderski pursuant to that provision, it did not consider whether the insurers owed Swiderski a duty to defend under the "property damage" provision. 359 Ill.App.3d at 889, 296 Ill.Dec. 5, 834 N.E.2d 562.

*4 The insurers filed a petition for leave to appeal (210 Ill.2d R. 315), which we allowed. We granted the American Economy Insurance Company and American States Insurance Company leave to file an *amicus curiae* brief. 210 Ill.2d R. 345.

ANALYSIS

I

[1][2] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102, 180 Ill.Dec. 691, 607 N.E.2d 1204 (1992); 735 ILCS 5/2-1005(c) (West 2002). A circuit court's entry of summary judgment is subject to *de novo* review *(General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 153, 293 Ill.Dec. 594, 828 N.E.2d 1092 (2005)), and the construction of an insurance policy, which presents a question of law, is likewise reviewed *de novo (Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill.2d 141, 153, 290 Ill.Dec. 155, 821 N.E.2d 206 (2004)).

II

The issue we must decide is whether the insurers have a duty to defend Swiderski against Rizzo's lawsuit. The insurers argue they do not. Initially, they claim that the "advertising injury" provision in the policies, which affords coverage for liability resulting from an insured's "written * * * publication * * * of material that violates a person's right of privacy," is applicable only where the content of the published material reveals private information about a person that violates the person's right of privacy. According to the insurers, the basis of the TCPA liability alleged in Rizzo's complaint is the mere sending of an unsolicited fax containing no private information. This type of claim, they argue, does not give rise to the "content-based privacy" coverage provided by the policies. As further support for their position, the insurers emphasize that the TCPA's fax-ad prohibitions make no reference to "publication" or "right of privacy," suggesting that the policies, which refer both to "publication" and "right of privacy," were not intended to cover TCPA claims.

The insurers also argue that they have no duty to defend Swiderski under the "property damage" provision of the policies. They point out that the policies expressly exclude coverage for any property damage that is "expected or intended from the standpoint of the insured." According to the insurers, the property damage alleged in Rizzo's complaint, the loss of fax paper and toner, is the expected outcome of sending any fax, which renders the exclusion

applicable. In addition, the insurers argue that the damage that occurs when a fax is sent does not constitute "property damage" within the meaning of the policies. They point out that, under the policies, "property damage" must be caused by an "occurrence," which is defined as an "accident." According to the insurers, under Illinois law, the natural and ordinary consequences of an act do not constitute an accident, and the loss of fax paper and toner are the natural and ordinary consequences of sending a fax.

***5** In response, defendants Swiderski and Rizzo argue that Rizzo's complaint alleges facts potentially within the coverage of the policies, and that, as a result, the insurers have a duty to defend Swiderski against Rizzo's lawsuit. Defendants initially urge us to focus on the plain and ordinary meaning of the language used in the "advertising injury" provision of the policies. They assert that "publication" includes the communication of information to the public, "material" has a broad meaning that encompasses fax advertisements, and one's "right of privacy" includes one's interest in "seclusion," or being left alone. Defendants contend that, based on the plain meaning of the policies' language, a reasonable person would understand that an injury "arising out of * * * written publication, in any manner, of material that violates a person's right of privacy" potentially occurs when one sends fax advertisements to thousands of recipients without first obtaining their permission to do so.

Alternatively, defendants argue that the insurers have a duty to defend Swiderski based on the "property damage" provision of the policies. Defendants contend that injury that occurs to the recipient of a fax when a party sends the fax with the mistaken belief that the fax is welcome qualifies as accidental injury, and thus potentially falls within the policies' definition of "property damage." Relatedly, defendants argue that the policies' exclusion for property damage that is "expected or intended from the standpoint of the insured" is inapplicable, because when a party sends a fax with the mistaken belief the fax is welcome, the party neither intends nor reasonably expects that injury will result.

III

[3][4][5][6][7][8] A court's primary objective in construing the language of an insurance policy is to ascertain and give effect to the intentions of the parties as expressed by the language of the policy. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill.2d 384, 391, 189 Ill.Dec. 756, 620 N.E.2d 1073 (1993). Like any contract, an insurance policy is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. *Central Illinois Light*, 213 Ill.2d at 153, 290 Ill.Dec. 155, 821 N.E.2d 206. If the words used in the policy, given their plain and ordinary meaning, are unambiguous, they must be applied as written. *Crum & Forster*, 156 Ill.2d at 391, 189 Ill.Dec. 756, 620 N.E.2d 1073. However, if the words used in the policy are ambiguous, they will be strictly construed against the drafter. *Central Illinois Light*, 213 Ill.2d at 153, 290 Ill.Dec. 155, 821 N.E.2d 206. Words are ambiguous if they are reasonably susceptible to more than one interpretation *(Outboard Marine*, 154 Ill.2d at 108, 180 Ill.Dec. 691, 607 N.E.2d 1204), not simply if the parties can suggest creative possibilities for their meaning *(Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill.2d 520, 529, 211 Ill.Dec. 459, 655 N.E.2d 842 (1995)), and a court will not search for ambiguity where there is none *(Crum & Forster*, 156 Ill.2d at 391, 189 Ill.Dec. 756, 620 N.E.2d 1073).

***6** [9][10][11][12] To determine whether an insurer has a duty to defend its insured from a lawsuit, a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy. *Outboard Marine*, 154 Ill.2d at 107-08, 180 Ill.Dec. 691, 607 N.E.2d 1204. The allegations must be liberally construed in favor of the insured. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 73, 161 Ill.Dec. 280, 578 N.E.2d 926 (1991). If the facts alleged fall within, or potentially within, the policy's coverage, the insurer is obligated to defend its insured. *General Agents Insurance*, 215 Ill.2d at 155, 293 Ill.Dec. 594, 828 N.E.2d 1092. This is true even if the allegations are groundless, false, or fraudulent, and even if only one of several theories of recovery alleged in the complaint falls within the potential coverage of the policy. *United States Fidelity*, 144 Ill.2d at 73, 161 Ill.Dec. 280, 578 N.E.2d 926. Thus, an insurer may not justifiably refuse to defend a lawsuit against its insured unless it is clear from the face of the underlying complaint that the allegations set forth in the complaint fail to state facts that bring the case within, or potentially within, the coverage of the policy. *General Agents Insurance*, 215 Ill.2d at 154, 293 Ill.Dec. 594, 828 N.E.2d 1092.

IV

We turn first to a comparison of the allegations in Rizzo's complaint regarding the TCPA and the insurance policies' "advertising injury" provision. The complaint alleges that Swiderski violated the TCPA by sending unsolicited fax advertisements to fax machines throughout Illinois. The TCPA makes it "unlawful for any person within the United States * * * to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C) (2000). An "unsolicited advertisement" includes "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission." 47 U.S.C. § 227(a)(4) (2000). The Act creates a private right of action that permits recipients of unwanted fax advertisements to seek injunctive relief and damages, and treble damages may be awarded if a court finds that the sender of a fax acted "willfully and knowingly." 47 U.S.C. § 227(b)(3) (2000).

As mentioned, the "advertising injury" provision relevant to Rizzo's TCPA claim is nearly identical in the Valley Forge policy and the Continental policy. The Valley Forge policy provides, in pertinent part, that "advertising injury" includes injury from "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." The Continental policy provides that "advertising injury" includes "[o]ral, written, televised or videotaped publication of material that violates a person's right of privacy." For present purposes, we need not distinguish between the Valley Forge policy and the Continental policy, as the phrase "written * * * publication * * * of material that violates a person's right of privacy," which appears in both, is central to our inquiry into whether the allegations in Rizzo's complaint fall potentially within the policies' coverage.

*7 [13][14] The essence of a TCPA fax-ad claim is that one party sends another an unsolicited fax advertisement. See 47 U.S.C. § 227(b)(1)(C) (2000). 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. The cases cited to us by both sides overwhelmingly confirm as much. See, *e.g.*, *Park University Enterprises, Inc. v. American Casualty Co. of Reading, Pennsylvania*, 442 F.3d 1239, 1249 (10th Cir.2006) ("Courts have consistently held the TCPA protects a species of privacy interests in the sense of seclusion"); *Resource Bankshares Corp. v. St. Paul Mercury Insurance Co.*, 407 F.3d 631, 639-40 (4th Cir.2005) ("[T]he harm occasioned by unsolicited faxes involves protection of some sort of 'privacy.' Junk faxes cause some economic damage * * * and what might be called *some* kind of harm to privacy * * *. The TCPA's private right of action obviously meant to remedy and prevent these twin harms" (emphasis in original)); *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir.2004) ("[A]n unexpected fax, like a jangling telephone or a knock on the door, can disrupt a householder's peace and quiet * * *. Section 227(b)(1)(C) doubtless promotes this (slight) interest in seclusion, as it also keeps telephone lines from being tied up and avoids consumption of the recipients' ink and paper"); *Melrose Hotel Co. v. St. Paul Fire & Marine Insurance Co.*, 432 F.Supp.2d 488, 500-01 (E.D.Pa.2006) ("It is clear that the TCPA aims in part to protect privacy. * * * Congress took aim at the *intrusive* nature of unsolicited faxes. Much the same way a telemarketing call invades one's right to be left alone, an unsolicited fax intrudes upon the right to be free from nuisance" (emphasis in original)); *Western Rim Investment Advisors, Inc. v. Gulf Insurance Co.*, 269 F.Supp.2d 836, 847 (N.D.Tex.2003) ("The stated purpose of the TCPA * * * is to protect the privacy of individuals from receiving unsolicited faxed advertisements"). Thus, the TCPA can fairly be described as protecting a privacy interest in seclusion.

[15] Turning to the TCPA claim set forth in Rizzo's complaint, we note that it makes no mention of the right of privacy. This, however, is unproblematic, as a violation of privacy in the sense of a violation of seclusion is implicit in a TCPA fax-ad claim, and the complaint clearly alleges that Swiderski "violated 47 U.S.C. § 227 *et seq.* by transmitting [the attached fax advertisement] to [Rizzo] and the other members of the class without obtaining their prior express consent."

[16] Given that the TCPA protects a fax recipient's privacy interest in seclusion, and that Rizzo's complaint implicitly alleges a violation of that interest on behalf of Rizzo and the members of the proposed class, the question we must ask is whether the words in the "advertising injury" provision of the policies issued to Swiderski indicate that Swiderski and the insurers intended the policies to cover the type of injury to privacy that is the subject of Rizzo's TCPA fax-ad claim. Based on the plain, ordinary, and popular meaning of those words, we believe this type of injury falls potentially within the coverage of the

policies' "advertising injury" provision.

*8 [17][18] The policies do not define the terms "publication," "material," or "right of privacy," which is why we must afford them their plain, ordinary, and popular meanings. *Outboard Marine*, 154 Ill.2d at 115, 180 Ill.Dec. 691, 607 N.E.2d 1204. To do so, we look to their dictionary definitions. See, *e.g.*, *Outboard Marine*, 154 Ill.2d at 115-17, 180 Ill.Dec. 691, 607 N.E.2d 1204; *Crum & Forster*, 156 Ill.2d at 393, 189 Ill.Dec. 756, 620 N.E.2d 1073.

Webster's Third New International Dictionary defines "publication" as "communication (as of news or information) to the public," and alternatively, as "the act or process of issuing copies * * * for general distribution to the public." Webster's Third New International Dictionary 1836 (2002). Likewise, Black's Law Dictionary defines "publication" as "[g]enerally, the act of declaring or announcing to the public" and, alternatively, as "[t]he offering or distribution of copies of a work to the public." Black's Law Dictionary 1264 (8th ed.2004).

[19] The insurers have abandoned the argument they made before the appellate court that the conduct alleged in Rizzo's complaint did not constitute "publication." See 359 Ill.App.3d at 885-86, 296 Ill.Dec. 5, 834 N.E.2d 562. However, in the interest of coherently interpreting all the relevant terms of the "advertising injury" provision, we observe that Rizzo's complaint alleges conduct by Swiderski that amounted to "publication" in the plain and ordinary sense of the word. By faxing advertisements to the proposed class of fax recipients as alleged in Rizzo's complaint, Swiderski published the advertisements both in the general sense of communicating information to the public and in the sense of distributing copies of the advertisements to the public.

[20] The definition of "material" is "something (as data, observations, perceptions, ideas) that may through intellectual operation be synthesized or further elaborated or otherwise reworked into a more finished form or a new form or that may serve as the basis for arriving at fresh interpretations or judgments or conclusions." Webster's Third New International Dictionary 1392 (2002). This definition is quite broad and clearly encompasses advertisements, as the information contained in an advertisement is intended to serve as the basis for arriving at a judgment regarding the items advertised. Examining the definition of "material" in isolation, however, is unhelpful. We must consider the connotation of "material that violates a person's right of privacy."

Black's Law Dictionary defines "right of privacy" as "[t]he right to personal autonomy" and, alternatively, as "[t]he right of a person and the person's property to be free from unwarranted public scrutiny or exposure." Black's Law Dictionary 1350 (8th ed.2004). The definition also refers the reader to the entry for "invasion of privacy," which is defined as "[a]n unjustified exploitation of one's personality or intrusion into one's personal activities" and includes "invasion of privacy by intrusion" and "invasion of privacy by disclosure of private facts." Black's Law Dictionary 843 (8th ed.2004). The former is defined as "[a]n offensive, intentional interference with a person's seclusion or private affairs," and the latter as "[t]he public revelation of private information about another in an objectionable manner." Black's Law Dictionary 843 (8th ed.2004). In addition, Webster's defines "privacy" as "the quality or state of being apart from the company or observation of others: seclusion." Webster's Third New International Dictionary 1804 (2004).

*9 [21] These definitions confirm that "right of privacy" connotes both an interest in seclusion and an interest in the secrecy of personal information. Accordingly, the policy language "material that violates a person's right of privacy" can reasonably be understood to refer to material that violates a person's seclusion. Unsolicited fax advertisements, the subject of a TCPA fax-ad claim, fall within this category.

Considering these definitions in conjunction with one another, we believe Rizzo's TCPA fax-ad claim potentially falls within the coverage of the policies' "advertising injury" provision. By faxing advertisements to the proposed class of fax recipients as alleged in Rizzo's complaint, Swiderski engaged in the "written * * * publication" of the advertisements. Furthermore, the "material" that Swiderski allegedly published, advertisements, qualifies as "material that violates a person's right of privacy," because, according to the complaint, the advertisements were sent without first obtaining the recipients' permission, and therefore violated their privacy interest in seclusion. The language of the "advertising injury" provision is sufficiently broad to encompass the conduct alleged in the complaint. To adopt the insurers' proposed interpretation of it-*i.e.*, that it is only applicable where the content of the published material reveals private information about a person that violates the person's right of privacy-would essentially require us to rewrite the phrase "material

that violates a person's right of privacy" to read "material *the content of which* violates a person *other than the recipient's* right of privacy." This we will not do.

The insurers' argument, seconded by *amici,* that the context in which the clause "written * * * publication * * * of material that violates a person's right of privacy" appears should control our interpretation of it is similarly unavailing. As the insurers note, the Valley Forge policy's "advertising injury" provision encompasses injuries that arise out of "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; * * * [t]he use of another's advertising idea in your 'advertisement'; [and] [i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.' " The Continental policy contains similar language. However, just because these types of "advertising injury" appear to involve harm caused by the content of the advertisement involved does not compel us to conclude that injury that arises out of "written * * * publication * * * of material that violates a person's right of privacy" includes only injury that stems from the disclosure of private information. As mentioned, an insurance policy must be construed as a whole such that, if possible, every provision is given effect, because the operative assumption in interpreting a policy must be that every provision was intended to serve a purpose. *Central Illinois Light,* 213 Ill.2d at 153, 290 Ill.Dec. 155, 821 N.E.2d 206. Interpreting the clause "written * * * publication * * * of material that violates a person's right of privacy" to encompass Rizzo's TCPA fax-ad claim, as we have done above, does not, in any way, prevent the policies' alternative definitions of "advertising injury" from being given effect or thwart their respective purposes. Accordingly, we will not limit the clause's application based on a comparison of the surrounding clauses.

***10** We note that it is difficult, due in part to the differences in the policy language at issue, to discern a clear majority approach in cases that have interpreted "advertising injury" provisions. Compare *Resource Bankshares,* 407 F.3d at 641 (insurer had no duty to defend under "advertising injury" provision that covered damages arising from "[m]aking known to any person or organization written or spoken material that violates a person's right to privacy"); *American States,* 392 F.3d at 943 (insurer had no duty to defend under "advertising injury" provision that covered injury arising out of "[o]ral or written publication of material that violates a person's right of privacy"); *New Century Mortgage Corp. v. Great Northern Insurance Co.,* No. 05 C 2370, 2006 WL 2088198 (N.D. Ill. July 25, 2006) (unpublished opinion) (insured's action of sending unsolicited faxes in violation of TCPA did not constitute "advertising injury" under provision covering injury arising out of "oral or written publication of material that violates a person's right of privacy"); *American Home Assurance Co. v. McLeod USA, Inc.,* No. 05 C 5173, 2006 WL 1895704 (N.D. Ill. July 5, 2006) (unpublished opinion) (insurer had no duty to defend under "advertising injury" provision that covered damages resulting from "oral or written publication of material that violates a person's right to privacy"); *Erie Insurance Exchange v. Watts,* No. 1:05-CV-867-JDT-TAB, 2006 WL 1547109 (S.D.Ind. May 30, 2006) (unpublished opinion) (insurer had no duty to defend under "advertising provision" that covered injury arising out of "oral or written publication of material that violates a person's right of privacy"); *Melrose Hotel,* 432 F.Supp.2d at 503 (insurer had no duty to defend under "advertising injury" provision that covered "making known to any person or organization covered material that violates a person's right of privacy"); *St. Paul Fire & Marine Insurance Co. v. Brunswick Corp.,* 405 F.Supp.2d 890, 895 (N.D.Ill.2005) (insurer had no duty to defend under "advertising injury" provision that covered injury caused by "oral, written or electronic publication of material in your Advertisement that violates a person's right of privacy" (emphasis omitted)), with *Park University,* 442 F.3d at 1251 (insurer had duty to defend under "advertising injury" provision that covered injury arising out of "[o]ral or written publication of material that violates a person's right of privacy"); *Hooters of Augusta, Inc. v. American Global Insurance Co.,* 157 Fed.Appx. 201, 208 (11th Cir.2005) (unpublished opinion) (insured's action of sending unsolicited faxes in violation of TCPA constituted "advertising injury" under provision covering harm from "[o]ral or written publication of material that violates a person's right of privacy"), *aff'g* 272 F.Supp.2d 1365 (S.D.Ga.2003); *Western Rim Investment Advisors, Inc. v. Gulf Insurance Co.,* 96 Fed.Appx. 960 (5th Cir.2004) (unpublished opinion), *aff'g* 269 F.Supp.2d 836, 846-47 (N.D.Tex.2003) (insurer had duty to defend under "advertising injury" provision that covered "[o]ral or written publication of material that violates a person's right of privacy"); *Nutmeg Insurance Co. v. Employers Insurance Co. of Wausau,* No. Civ.A. 3:04-CV-1762B, 2006 WL 453235 (N.D.Tex. Feb. 24, 2006) (unpublished opinion) (insurer had duty to

defend under "advertising injury" provision that covered injury arising out of "[o]ral or written publication of material that violates a person's right of privacy"); *Registry Dallas Associates, L.P. v. Wausau Business Insurance Co.*, No. Civ.A. 3:02-CV-2662L, 2004 WL 614836 (N.D.Tex. February 26, 2004) (unpublished opinion) (insurer had duty to defend under "advertising injury" provision that covered injury arising out of "[o]ral or written publication of material that violates a person's right of privacy"); *Prime TV, LLC v. Travelers Insurance Co.*, 223 F.Supp.2d 744, 752-53 (M.D.N.C.2002) (insurer had duty to defend under "advertising injury" provision that covered "oral or written publication of material that violates a person's right of privacy"); *TIG Insurance Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238-39 (Tex.App.2004) (insured's action of sending unsolicited faxes in violation of TCPA constituted "advertising injury" under provision covering damages from "[o]ral or written publication of material that violates a person's right of privacy").

***11** 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. Compare *Resource Bankshares*, 407 F.3d at 642 (fourth circuit); *American States*, 392 F.3d at 943 (seventh circuit), with *Park University*, 442 F.3d at 1251 (tenth circuit); *Hooters of Augusta*, 157 Fed.Appx. at 208 (eleventh circuit); *Western Rim*, 96 Fed.Appx. 960 (fifth circuit). See also *Universal Underwriters Insurance Co. v. Lou Fusz Automotive Network*, 401 F.3d 876, 881, 883 (8th Cir.2005) (insurer had duty to defend TCPA claim under policy that covered "private nuisance" and "invasion of rights of privacy"). In addition, our conclusion is consistent with that reached by the majority of courts that have examined policy language identical to the language at issue here. Compare *American States*, 392 F.3d at 943; *New Century Mortgage*, No. 05 C 2370 (N.D. Ill. July 25, 2006); *American Home Assurance*, No. 05 C 5173 (N.D. Ill. July 5, 2006); *Erie Insurance Exchange*, No. 1:05-CV-867-JDT-TAB (S.D.Ind. May 30, 2006), with *Park University*, 442 F.3d at 1251; *Hooters of Augusta*, 157 Fed.Appx. at 208; *Western Rim*, 96 Fed.Appx. 960; *Nutmeg Insurance*, No. Civ.A. 3:04-CV-1762B (N.D.Tex. Feb. 24, 2006); *Registry Dallas Associates*, No. Civ.A. 3:02-CV-2662L (N.D.Tex. February 26, 2004); *Prime TV*, 223 F.Supp.2d at 752-53; *TIG Insurance*, 129 S.W.3d at 238-39.

We are unpersuaded by the insurers' reliance on *American States*, 392 F.3d 939, *Resource Bankshares*, 407 F.3d 631, *Brunswick*, 405 F.Supp.2d 890, *Melrose Hotel*, 432 F.Supp.2d 488, and *Erie*, No. 1:05-CV-867-JDT-TAB. *American States* was the first federal appellate decision to address whether an "advertising injury" provision covered the sending of unsolicited fax advertisements. *American States*, 392 F.3d at 943. In *American States*, the insurance policy, like the policies at issue here, defined "advertising injury" to include "[o]ral or written publication of material that violates a person's right of privacy." *American States*, 392 F.3d at 940. The district court held that American States had a duty to defend its insured pursuant to the "advertising injury" provision, because an unsolicited fax invades the recipient's "privacy." *American States*, 392 F.3d at 940. On appeal, the Seventh Circuit reversed. *American States*, 392 F.3d at 943.

According to the court, the word "privacy" has many connotations, the two principal meanings being "secrecy and seclusion." *American States*, 392 F.3d at 941. The court criticized the district court for not recognizing the difference between secrecy and seclusion and for not addressing which type of privacy interest the policy covered. *American States*, 392 F.3d at 942. Section 227 of the TCPA, the court explained, "doubtless promotes" a "slight" interest in seclusion, as "an unexpected fax, like a jangling telephone or a knock on the door, can disrupt a householder's peace and quiet, even though it is easy to throw a junk fax, like a piece of junk mail, in the trash without any risk that someone will observe activities that occur inside one's home." *American States*, 392 F.3d at 942. The court went on to clarify, however, that the relevant question in the case was whether the insurance policy covered the sort of seclusion interest affected by fax advertisements. *American States*, 392 F.3d at 942.

***12** In answering this question in the negative, the court relied, in part, on the fact that the plaintiff in the underlying action was a corporation. *American States*, 392 F.3d at 942. According to the court, while businesses have interests protected by section 227 of the Act, those interests cannot accurately be called "privacy" interests, as businesses lack interests in seclusion. *American States*, 392 F.3d at 942. The court also relied on the policy's use of the word "publication." *American States*, 392 F.3d at 942. "Publication," the court reasoned, matters in a "secrecy situation" but is irrelevant in a "seclusion situation." *American States*, 392 F.3d at 942 ("A late-

night knock on the door or other interruption can impinge on seclusion without any need for publication"). The court summarized this rationale by explaining that section 227 of the Act "condemns a particular means of communicating an advertisement, rather than the contents of that advertisement," while the "advertising injury" provision of the insurance policy, which referred to "publication," dealt with informational content. *American States*, 392 F.3d at 943.

The Fourth Circuit relied on *American States* in *Resource Bankshares*. There, the "advertising injury" provision at issue included coverage for damages arising from "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy." *Resource Bankshares*, 407 F.3d at 634. The court acknowledged that "the harm occasioned by unsolicited faxes involves protection of some sort of 'privacy.' " *Resource Bankshares*, 407 F.3d at 639. Then, as in *American States*, the court defined the relevant question as "whether, when read *in context*, a reasonable purchaser of insurance would believe that the sort of privacy interests protected by the policies overlap with the sort of privacy with which the TCPA is concerned." (Emphasis in original.) *Resource Bankshares*, 407 F.3d at 640.

Noting its approval of *American States*, the court held that the policies in question did "not cover the sorts of privacy invasions envisioned by the TCPA's unsolicited fax prohibition." *Resource Bankshares*, 407 F.3d at 640. *American States*, the court reasoned, "put words to the gut instinct" felt when comparing the complaint in the underlying action with the policies. *Resource Bankshares*, 407 F.3d at 641. According to the court, if the complaint alleged any violation of privacy, it was "seclusion" privacy, as the complaint was concerned with the manner of the insured's advertisement. *Resource Bankshares*, 407 F.3d at 641. In contrast, the court reasoned, the policies' "advertising injury" provision was "exclusively concerned with those types of privacy [citation] which, like secrecy, are implicated by *content* of the advertisements." (Emphasis in original.) *Resource Bankshares*, 407 F.3d at 641.

***13** The court stated that "the plainest and most common reading of the phrase ['Making known to any person or organization written or spoken material that violates a person's right of privacy'] 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." (Emphases in original.) *Resource Bankshares*, 407 F.3d at 641. The court also concluded that the context in which the clause at issue appeared supported this interpretation of it. *Resource Bankshares*, 407 F.3d at 641-42. Another clause of the "advertising injury" provision, the court pointed out, provided coverage for damages arising from "making known" disparaging material. *Resource Bankshares*, 407 F.3d at 641. According to the court, because it was difficult to imagine how "making known" disparaging material could harm the recipient of the material, it followed that both clauses containing "making known" focused on harm to third parties. *Resource Bankshares*, 407 F.3d at 641. The court added that, under this interpretation of the clause at issue, all four of the offenses set forth in the policies' "advertising injury" provision shared the common thread of assuming that the victim of the advertising injury was harmed by the sharing of the content of the advertisement, not by the mere receipt of the advertisement. *Resource Bankshares*, 407 F.3d at 641-42.

American States and *Resource Bankshares* as the basis for the three federal district court decisions on which the insurers rely, *Brunswick*, 405 F.Supp.2d 890, *Melrose Hotel*, 432 F.Supp.2d 488, and *Erie Insurance Exchange v. Watts*, No. 1:05-CV-867-JDT-TAB, 2006 WL 1547109 (S.D.Ind. May 30, 2006). The "advertising injury" provision at issue in *Brunswick* applied to injury caused by "oral, written or electronic publication of material in your Advertisement that violates a person's right of privacy." *Brunswick*, 405 F.Supp.2d at 893. Relying on American States, the court held that this provision did not give rise to a duty to defend the insured from the TCPA claim brought against it. *Brunswick*, 405 F.Supp.2d at 895 ("[T]his court concludes that on this point American States is the better reasoned opinion and more likely to be followed by the Illinois Supreme Court [than the appellate court's opinion in the instant case]").

In *Melrose Hotel*, the "advertising injury" provision in question defined "advertising injury offense" to include " 'making known to any person or organization covered material that violates a person's right to privacy.' " *Melrose Hotel*, 432 F.Supp.2d at 496. There, the court held, based on *Resource Bankshares*, that the insurer had no duty to defend the insured pursuant to the "advertising injury" provision. *Melrose Hotel*, 432 F.Supp.2d at 501-03 ("The Court finds persuasive the reasoning in *Resource Bankshares*, which examined language

virtually identical to the Policy language").

***14** Finally, in *Erie,* the "advertising injury" provision before the court applied to "injury arising out of oral or written publication of material that violates a person's right of privacy." *Erie,* slip op. at 5. Relying on *American States,* the court held that the insurer had no duty to defend the insured under the "advertising injury" provision. *Erie,* slip op. at 11-12 ("This court finds the analysis in the *American States* case to be on point in this case").

Of the cases discussed above, *Resource Bankshares, Brunswick,* and *Melrose Hotel* are distinguishable from the instant case in one particularly significant respect: they involved the interpretation of different policy language. As mentioned, the "advertising injury" provision at issue in *Resource Bankshares* covered damages arising from *"[m]aking known to any person or organization written or spoken material* that violates a person's right of privacy." (Emphasis in original and omitted.) *Resource Bankshares,* 407 F.3d at 634. This wording seems to have been an important factor in the court's decision. See *Resource Bankshares,* 407 F.3d at 641-42. *Brunswick* dealt with an "advertising injury" provision applicable to injury caused by "oral, written or electronic publication of material in your Advertisement that violates a person's right of privacy." (Emphasis added.) *Brunswick,* 405 F.Supp.2d at 893. Notably, while the court in *Brunswick* focused most of its analysis on the phrase "violates a person's right of privacy" (*Brunswick,* 405 F.Supp.2d at 894-95), it ultimately observed that, as compared to the policies in this case and *American States,* the addition of the words "in your Advertisement" to the policy at issue "unambiguously demonstrate[d] that to be covered the injury must be a result of the content of the material" (*Brunswick,* 405 F.Supp.2d at 895). Finally, in *Melrose Hotel,* the "advertising injury" provision covered " 'making known to any person or organization covered material that violates a person's right to privacy.' " (Emphasis added.) *Melrose Hotel,* 432 F.Supp.2d at 496. There, the court went so far as to note that courts that had found a duty to defend for TCPA violations under other "advertising injury" provisions had "considered broader language, which could arguably be read to include violations of the right to be left alone, the privacy right protected by the TCPA." *Melrose Hotel,* 432 F.Supp.2d at 503. The "broader language" to which the court referred was identical to the language at issue here: " 'oral or written publication of material that violates a person's right of privacy.' " *Melrose Hotel,* 432 F.Supp.2d at 503-04, quoting *Western Rim,* 269 F.Supp.2d at 840.

This leaves the insurers with *American States* and *Erie,* which addressed policy language identical to the language at issue here. *American States,* 392 F.3d at 940; *Erie,* slip op. at 5. *Erie,* of course, relied on *American States,* which hinged considerably on the proposition that "publication" matters in a "secrecy situation," but not in a "seclusion situation." See *American States,* 392 F.3d at 942. This may very well hold true as a general matter in the realm of privacy law. We believe, however, that relying on this proposition as a basis for interpreting the insurance policy language "publication of material that violates a person's right of privacy" is inconsistent with this court's approach to interpreting insurance policy provisions. Affording undefined policy terms their plain, ordinary, and popularly understood meanings is of central importance to this approach (see, *e.g., Outboard Marine,* 154 Ill.2d at 115, 180 Ill.Dec. 691, 607 N.E.2d 1204; *Central Illinois Light,* 213 Ill.2d at 155-56, 165, 290 Ill.Dec. 155, 821 N.E.2d 206), and doing so here yields the conclusion, as set forth above, that Rizzo's TCPA fax-ad claim potentially falls within the coverage of the policies' "advertising injury" provisions. Accordingly, we decline to follow *American States* and *Erie.*

V

***15** Having determined that the allegations in Rizzo's complaint set forth facts that bring Rizzo's lawsuit potentially within the coverage of the policies' "advertising injury" provision, we need not consider whether the insurers have a duty to defend Swiderski pursuant to the policies "property damage" provision. See *United States Fidelity,* 144 Ill.2d at 73, 161 Ill.Dec. 280, 578 N.E.2d 926 (where underlying complaint alleges several theories of recovery against insured, duty to defend arises even if only one such theory falls potentially within coverage of policy).

CONCLUSION

For the reasons expressed above, we hold that the insurers have a duty to defend Swiderski against Rizzo's lawsuit. Accordingly, we affirm the judgment of the appellate court, which upheld the circuit court's partial grant of summary judgment in favor of Swiderski.

Affirmed.

Chief Justice THOMAS and Justices FREEMAN, FITZGERALD, KILBRIDE, KARMEIER, and BURKE concurred in the judgment and opinion.

FN1. On January 22, 2004, the circuit court dismissed Rizzo's Consumer Fraud Act claim without prejudice. That claim is not at issue in this appeal.

FN2. Given the policies' similarity, the insurers have simply referred to the language of the Valley Forge policy as representative of both policies in the briefs submitted to this court.

Ill.,2006.
Valley Forge Ins. Co. v. Swiderski Electronics, Inc.
--- N.E.2d ----, 223 Ill.2d 352, 2006 WL 3491675 (Ill.)

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TAB 9

The American Heritage® Dictionary

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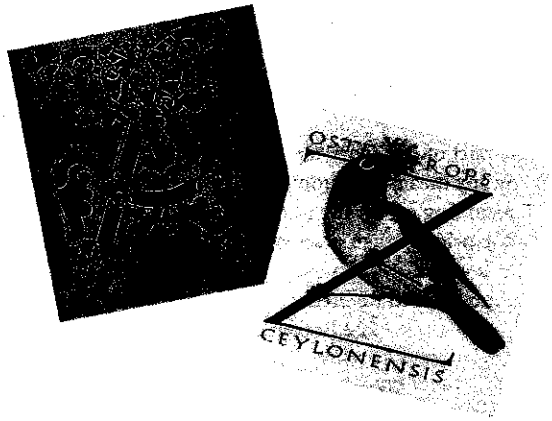

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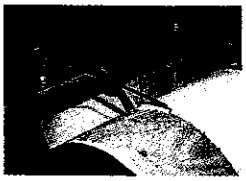
ac•cel•er•a•tion (ăk-sĕl′ə-rā′shən) *n.* **1a.** The act of accelerating. **b.** The process of being accelerated. **2.** *Abbr.* **a** *Physics* The rate of change of velocity with respect to time.

acceleration of gravity *n. Abbr.* **g** The acceleration of freely falling bodies under the influence of terrestrial gravity, equal to approximately 9.81 meters (32 feet) per second per second.

ac•cel•er•a•tor (ăk-sĕl′ə-rā′tər) *n.* **1.** A device, especially the gas pedal of a motor vehicle, for increasing speed. **2.** *Chemistry* A substance that increases the speed of a reaction. **3.** *Physics* A particle accelerator.

accelerator board *n.* A printed circuit board that enhances a computer's performance by substituting a faster microprocessor without replacing the entire motherboard and associated components. Also called *accelerator card.*

accelerator mass spectrometry *n.* Mass spectroscopy in which a particle accelerator is used to disassociate molecules, ionize atoms, and accelerate the ions.


accelerograph

ac•cel•er•o•graph (ăk-sĕl′ər-ə-grăf′) *n.* An accelerometer equipped to measure and record ground motion during an earthquake.

ac•cel•er•om•e•ter (ăk-sĕl′ə-rŏm′ĭ-tər) *n.* An instrument used to measure acceleration. [ACCELER(ATION) + –METER.]

ac•cent (ăk′sĕnt′) *n.* **1.** The relative prominence of a particular syllable of a word by greater intensity or by variation or modulation of pitch or tone. **2.** Vocal prominence or emphasis given to a particular syllable, word, or phrase. **3.** A characteristic pronunciation, especially: **a.** One determined by the regional or social background of the speaker. **b.** One determined by the phonetic habits of the speaker's native language carried over to his or her use of another language. **4.** A mark or symbol used in the printing and writing of certain languages to indicate the vocal quality to be given to a particular letter: *an acute accent.* **5.** A mark or symbol used in printing and writing to indicate the stressed syllables of a spoken word. **6.** Rhythmically significant stress in a line of verse. **7.** *Music* **a.** Emphasis or prominence given to a note or chord, as by an increase in volume or extended duration. **b.** A mark representing this. **8.** *Mathematics* **a.** A mark used as a superscript to distinguish among variables represented by the same symbol. **b.** A mark used as a superscript to indicate the first derivative of a variable. **9.** A mark or one of several marks used as a superscript to indicate a unit, such as feet (′) and inches (″) in linear measurement. **10a.** A distinctive feature or quality, such as a feature that accentuates, contrasts with, or complements a decorative style. **b.** Something that accentuates or contrasts something else, as a touch of color that makes the features of an image stand out. **11.** Particular importance or interest; emphasis: *The accent is on comfort.* See synonyms at **emphasis.** ❖ *tr.v.* (ăk′sĕnt′, ăk-sĕnt′) **-cent•ed, -cent•ing, -cents 1.** To stress or emphasize the pronunciation of. **2.** To mark with a printed accent. **3.** To focus attention on; accentuate: *a program that accents leadership development.* [Middle English, from Old French, from Latin *accentus,* accentuation : *ad-,* ad- + *cantus,* song (from *canere,* to sing; see **kan-** in Appendix I).]

ac•cen•tu•al (ăk-sĕn′chōō-əl) *adj.* **1.** Of or relating to accent. **2.** Based on stress accents: *accentual rhythm; accentual verse.* [From Latin *accentus,* accent. See ACCENT.] **—ac•cen′tu•al•ly** *adv.*

ac•cen•tu•ate (ăk-sĕn′chōō-āt′) *tr.v.* **-at•ed, -at•ing, -ates 1.** To stress or emphasize; intensify: *"enacted sweeping land-reform plans that accentuated the already chaotic pattern of landholding"* (James Fallows). **2.** To pronounce with a stress or accent. **3.** To mark with an accent. [Medieval Latin *accentuāre, accentuāt-,* from Latin *accentus,* accent. See ACCENT.] **—ac•cen′tu•a′tion** *n.*

ac•cept (ăk-sĕpt′) *v.* **-cept•ed, -cept•ing, -cepts** —*tr.* **1.** To receive (something offered), especially with gladness or approval: *accepted a glass of water; accepted their contract.* **2.** To admit to a group, organization, or place: *accepted me as a new member of the club.* **3a.** To regard as proper, usual, or right: *Such customs are widely accepted.* **b.** To regard as true; believe in: *Scientists have accepted the new theory.* **c.** To understand as having a specific meaning. **4.** To endure resignedly or patiently: *accept one's fate.* **5a.** To answer affirmatively: *accept an invitation.* **b.** To agree to take (a duty or responsibility). **6.** To be able to hold (something applied or inserted): *This wood will not accept oil paints.* **7.** To receive officially: *accept the committee's report.* **8.** To consent to pay, as by a signed agreement. **9.** *Medicine* To receive (a transplanted organ or tissue) without immunological rejection. —*intr.* To receive something, especially with favor. Often used with *of.* [Middle English *accepten,* from Latin *acceptāre,* frequentative of *accipere,* to receive : *ad-,* ad- + *capere,* to take; see **kap-** in Appendix I.]

ac•cept•a•ble (ăk-sĕp′tə-bəl) *adj.* **1.** Worthy of being accepted. **2.** Adequate to satisfy a need, requirement, or standard; satisfactory. **—ac•cept′a•bil′i•ty, ac•cept′a•ble•ness** *n.* **—ac•cept′a•bly** *adv.*

ac•cep•tance (ăk-sĕp′təns) *n.* **1.** The act or process of accepting. **2.** The state of being accepted or acceptable. **3.** Favorable reception; approval. **4.** Belief in something; agreement. **5.** *Abbr.* **acpt. a.** A formal indication by a debtor of willingness to pay a time draft or bill of exchange. **b.** A written instrument so accepted. **6.** *Law* Compliance by one party with the terms and conditions of another's offer so that a contract becomes legally binding between them.

ac•cep•tant (ăk-sĕp′tənt) *adj.* Accepting willingly.

ac•cep•ta•tion (ăk′sĕp-tā′shən) *n.* **1.** The usual or accepted meaning, as of a word or expression. See synonyms at **meaning. 2.** Favorable reception; approval.

ac•cept•ed (ăk-sĕp′tĭd) *adj.* Widely encountered, used, or recognized: *an accepted treatment for pneumonia.* **—ac•cept′ed•ly** *adv.*

ac•cept•er (ăk-sĕp′tər) *n.* **1.** One that accepts: *an accepter of fate.* **2.** Variant of **acceptor** (sense 1).

ac•cep•tor (ăk-sĕp′tər) *n.* **1.** also **ac•cept•er** One who signs a time draft or bill of exchange. **2.** *Chemistry* **a.** The reactant in an induced reaction that has an increased rate of reaction in the presence of the inductor. **b.** An atom, molecule, or ion that combines with another atom, molecule, or ion, especially an atom that receives two electrons to form a chemical bond with another atom.

ac•cess (ăk′sĕs) *n.* **1.** A means of approaching, entering, exiting, communicating with, or making use of: *a store with easy access.* **2.** The act of approaching. **3.** The ability or right to approach, enter, exit, communicate with, or make use of: *has access to the restricted area; has access to classified material.* **4.** Public access. **5.** An increase by addition. **6.** An outburst or onset: *an access of rage.* ❖ *tr.v.* **-cessed, -cess•ing, -cess•es** To obtain access to, especially by computer: *used a browser to access a website; accessed her bank account online.* [Middle English *acces,* a coming to, from Old French, from Latin *accessus,* past participle of *accēdere,* to arrive : *ad-,* ad- + *cēdere,* to come; see **ked-** in Appendix I.]

access broker *n.* A former political figure with close ties to an incumbent administration who parlays those ties into a lucrative public relations or lobbying venture.

access code *n.* An alphanumeric sequence that permits access to an electronic network, such as a telephone network or an automated teller machine.

ac•ces•si•ble (ăk-sĕs′ə-bəl) *adj.* **1.** Easily approached or entered. **2.** Easily obtained: *accessible money.* **3.** Easy to talk to or get along with: *an accessible manager.* **4.** Easily swayed or influenced: *accessible to flattery.* **—ac•ces′si•bil′i•ty, ac•ces′si•ble•ness** *n.* **—ac•ces′si•bly** *adv.*

ac•ces•sion (ăk-sĕsh′ən) *n.* **1.** The attainment of a dignity or rank: *the queen's accession to the throne.* **2a.** Something that has been acquired or added; an acquisition. **b.** An increase by means of something added. **3.** *Law* **a.** The addition to or increase in value of property by means of improvements or natural growth. **b.** The right of a proprietor to ownership of such addition or increase. **4.** Agreement or assent. **5.** Access; admittance. **6.** A sudden outburst. ❖ *tr.v.* **-sioned, -sion•ing, -sions** To record in the order of acquisition: *a curator accessioning newly acquired paintings.* **—ac•ces′sion•al** *adj.*

ac•ces•sor•ize (ăk-sĕs′ə-rīz′) *v.* **-ized, -iz•ing, -iz•es** —*tr.* To furnish with accessories: *accessorized my outfit with a matching watch.* —*intr.* To wear or select accessories: *accessorizes according to the latest fashions.*

ac•ces•so•ry (ăk-sĕs′ə-rē) *n., pl.* **-ries 1a.** A subordinate or supplementary item; an adjunct. **b.** Something nonessential but desirable that contributes to an effect or result. See synonyms at **appendage. 2.** *Law* **a.** One who incites, aids, or abets a lawbreaker in the commission of a crime but is not present at the time of the crime. Also called *accessory before the fact.* **b.** One who aids a criminal after the commission of a crime, but was not present at the time of the crime. Also called *accessory after the fact.* ❖ *adj.* **1.** Having a secondary, supplementary, or subordinate function. **2.** *Law* Serving to aid or abet a lawbreaker, either before or after the commission of the crime, without being present at the time the crime was committed. [Middle English *accessorie,* from Medieval Latin *accessōrius,* from *accessor,* helper, from Latin *accessus,* approach. See ACCESS.] **—ac′ces•so′ri•al** (-sə-sôr′ē-əl, -sōr-) *adj.* **—ac•ces′so•ri•ly** *adv.* **—ac•ces′so•ri•ness** *n.*

Usage Note Although the pronunciation (ə-sĕs′ə-rē), with no (k) sound in the first syllable, is commonly heard, it is not accepted by a majority of the Usage Panel. In a recent survey, 87 percent of the Panelists disapproved of it. The 13 percent that accepted the pronunciation were divided on usage: more than half accepted the (k)-less pronunciation for all senses. A few approved of it only in fashion contexts, and a few others approved of it only in legal contexts.

accessory apartment *n.* An apartment within a single-family dwelling. Also called *granny flat, in-law apartment.*

accessory cell *n.* See **subsidiary cell.**

accessory fruit *n.* A fruit, such as the pear or strawberry, that develops from a ripened ovary or ovaries but includes a significant portion derived from nonovarian tissue. Also called *false fruit, pseudocarp.*

accessory mineral *n.* A mineral that is present in a minor amount in rocks and is not considered an essential constituent of the rock.

accessory nerve *n.* Either of the 11th pair of cranial nerves, which convey motor impulses to the pharynx and muscles of the upper thorax, back, and shoulders.

accessory pigment *n. Botany* A pigment that absorbs light energy and transfers it to chlorophyll A.

access road *n.* A road that affords access into and out of an area.

access time *n. Computer Science* The average time lag between a request for information stored on a particular component, such as the hard drive or RAM, and its delivery.

ac•ciac•ca•tu•ra (ä-chä′kə-tŏŏr′ə) *n. Music* An ornament note that is one half step or one whole step below a principal note and is sounded at the same time as the principal note, adding dissonance to a harmony. [Italian, from *acciaccare,* to crush.]

ac•ci•dence (ăk′sĭ-dəns, -dĕns′) *n.* The section of morphology that deals with the inflections of words. [Middle English, from Late Latin *accidentia,* from Latin *accidēns, accident-,* accident. See ACCIDENT.]

ac•ci•dent (ăk′sĭ-dənt, -dĕnt′) *n.* **1a.** An unexpected and undesirable event, especially one resulting in damage or harm: *car accidents on icy roads.* **b.** An unforeseen incident: *A series of happy accidents led to his promotion.* **c.** An instance of involuntary urination or defecation in one's clothing. **2.** Lack of intention; chance: *ran into an old friend by accident.* **3.** *Logic* A circumstance or attribute that is not essential to the nature of something. [Middle English, chance event, from Old French, from Latin

ac•cess (ăk′sĕs) *n.* **1.** A means of approaching, entering, exiting, communicating with, or making use of: *a store with easy access.* **2.** The act of approaching. **3.** The ability or right to approach, enter, exit, communicate with, or make use of: *has access to the restricted area; has access to classified material.* **4.** Public access. **5.** An increase by addition. **6.** An outburst or onset: *an access of rage.* ❖ *tr.v.* **-cessed, -cess•ing, -cess•es** To obtain access to, especially by computer: *used a browser to access a website; accessed her bank account online.* [Middle English *acces*, a coming to, from Old French, from Latin *accessus*, past participle of *accēdere*, to arrive : *ad-*, ad- + *cēdere*, to come; see **ked-** in Appendix I.]