IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| OREGON MUTUAL INSURANCE COMPANY,<br>Appellant,<br><br>v.<br><br>RAIN CITY PIZZA, L.L.C., a Washington limited liability company; EDWARD TALIAFERRO, an individual; KEVIN SONNEBORN, an individual; ROSE CITY PIZZA, L.L.C., an Oregon limited liability company; SEATTLE PJ PIZZA, L.L.C., a Washington limited liability company; PAPA WASHINGTON, L.L.C., a Washington limited liability company; PAPA Washington II, L.L.C., a Washington limited liability company,<br><br>Respondents. | ) | No. 67471-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: January 14, 2013 |

Grosse, J. — A policy exclusion barring insurance coverage for injuries arising directly or indirectly out of "any" action or omission that is alleged to violate statutes prohibiting the unlawful distribution of material is unambiguous to the point that it includes acts committed by parties other than the insured. Thus, when as here, a lawsuit alleges that the insureds were liable for injuries caused by the unlawful transmission of text messages, the policy exclusion applies to deny coverage. Accordingly, we reverse.

FACTS

Seattle PJ Pizza, L.L.C. is a Washington company that operates 21 Papa John's pizza stores in the Seattle and Peninsula areas of Washington State and

is owned by Kevin Sonneborn and Edward Taliaferro. In March and April of 2010, Sonneborn gave a third party marketing company, On Time 4 U, L.L.C., certain lists of Seattle PJ Pizza's customers. Sonneborn compiled call lists of the names and telephone numbers of individuals who had ordered pizza from the Papa John's stores operated by Seattle PJ Pizza. Some of this information came from records of telephone orders and other information came from computer records of orders that were placed online. On Time 4 U used these call lists to send text messages to customers on behalf of Seattle PJ Pizza, advertising Papa John's stores operated by Seattle PJ Pizza.

In May 2010, a class action lawsuit was filed in King County Superior against Sonneborn and Taliaferro, alleging violations of federal and state laws by the unlawful transmission of text messages to advertise pizza products. The lawsuit also named On Time 4 U and Seattle PJ Pizza, as defendants along with the following other pizza businesses owned by Sonneborn and Taliaferro: Rain City Pizza, L.L.C.; Rose City Pizza, L.L.C.; Papa Washington, L.L.C.; and Papa Washington II, L.L.C. Rain City Pizza merged with Seattle PJ Pizza in January 2007 and formerly operated a number of Papa John's stores that are now operated by Seattle PJ Pizza. Rose City Pizza is an Oregon company that operates 12 Papa John's pizza stores in Portland, Oregon, and is owned by Sonneborn and Taliaferro. Papa Washington is a Washington company owned by Sonneborn and his family. Papa Washington II is an inactive Washington company that has no affiliation with Seattle PJ Pizza.

The complaint alleged five counts against the defendants: (1) violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227; (2) violations of RCW 19.190.060 (prohibiting unsolicited commercial text messages); (3) violations of RCW 80.36.400 (prohibiting use of automatic dialing and announcing devices for commercial solicitation); (4) violations of Washington's Consumer Protection Act, chapter 19.86 RCW; and (5) negligence by permitting the sending of the messages. The lawsuit was removed to federal court.

Oregon Mutual Insurance Company (Oregon Mutual) brought an action in King County Superior Court seeking a declaratory judgment that it had no duty to defend its insureds, the defendants in this lawsuit. Oregon Mutual claimed that coverage was barred by the policy's exclusion for claims arising out of the distribution of information in violation of any statute that prohibits the distribution of material or information. Oregon Mutual further contended that the claims alleged against the defendants did not fall within the policy's liability coverage for claims of "personal and advertising injury" and "property damage" because the complaint alleged neither a privacy violation nor an injury caused by an "occurrence" as defined by the policy.

The trial court denied Oregon Mutual's claim on summary judgment, agreeing with the defendants that the exclusion does not apply because it covers only acts or omissions of the defendants and there were no allegations that the defendants (other than Seattle PJ Pizza and Sonneborn) participated in the text messaging campaign. The court further concluded that the complaint

alleged personal and advertising injuries and injuries caused by an "occurrence" that were covered by the policy. Oregon Mutual filed in this court a motion for discretionary review of the court's order. A commissioner of this court granted discretionary review, noting that the challenged order is also likely reviewable as of right under RAP 2.2(a)(3).[1]

ANALYSIS

In disputes over coverage or the duty to defend, the insured bears the burden of proving that coverage or a defense obligation exists, while the insurer bears the burden of proving that an exclusion applies.[2] Insurance policies must be liberally construed in favor of coverage.[3] Exclusions are strictly construed against the insurer.[4]

Oregon Mutual contends that coverage is precluded by the policy exclusion for claims alleging damages arising from the unlawful distribution of materials. We agree.

The policy contains the following exclusion for Business Liability Coverage:

> This insurance does not apply to:
> . . . .
> **s. Distribution Of Material In Violation Of Statutes**

[1] Ruling on Motion for Discretionary Review, entered December 6, 2011.
[2] Mutual of Enumclaw Ins. Co. v. T & G Constr., Inc., 165 Wn.2d 255, 268, 199 P.3d 376 (2008); American Best Food, Inc. v. Alea London, Ltd., 138 Wn. App. 674, 683, 158 P.3d 119 (2007).
[3] Bordeaux, Inc. v. American Safety Ins. Co., 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).
[4] Stuart v. American States Ins. Co., 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998).

> "Bodily injury," "property damage," or "personal and advertising injury" arising directly or indirectly out of any act or omission that violates or is alleged to violate:
> **(1)** The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
> **(2)** The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
> **(3)** Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

The trial court concluded that this exclusion did not apply here, ruling:

> The policy also says that the insurance company has "no duty to defend against a suit seeking damages for bodily injury, . . . to which this insurance does not apply." The insurance policy does not apply to "bodily injury, . . . arising directly or indirectly out of an act or omission that violates or is alleged to violate" such statute as were cited in the underlying lawsuit. Defendants argue, and the insurance company does not dispute, that the uncontested facts establish that the defendants involved in this suit did not do the act or complained of (they sent no messages nor did they direct anyone to send the messages) nor did they omit to do some act, such as fail to supervise those who did send the messages. Defendants argue that the provision should be construed against the insurance company; the insurance company could have said "arising directly or indirectly out of an *alleged* act or omission" just like they said "violates or is alleged to violate" a statute. It [sic] but did not. Therefore, in order for the exclusion to apply there must be *in fact* an act or omission. Ambiguous provisions in the insurance policy are construed against the insurer. The insurer has the burden to prove exclusion applies.

Similarly, the defendants contend that because this exclusion bars coverage for those injuries only "arising directly or indirectly out of *any act or omission* that violates or is alleged to violate" the relevant statutes, it does not apply to the defendants who did not engage in any prohibited act or omission.[5]

[5] (Emphasis added.)

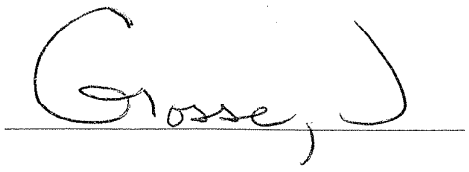
The defendants note that there is no allegation that any of the defendants committed the acts; rather, the complaint only alleges that Sonneborn and On Time 4 U committed the acts. The defendants argue in the alternative that the language is ambiguous about to whose acts or omissions the exclusion applies and must therefore be construed in favor of coverage. Oregon Mutual counters that the policy language is unambiguous as it clearly states that it applies to "any" act or omission, not just those of the defendants. We agree.

The policy language states "any" act or omission and therefore does not limit the acts to those of a particular actor; rather, it applies to any acts that violate the statutes, which would include those committed by someone other than the insured. The additional language barring coverage for injuries "arising directly or indirectly out of any act or omission" is consistent with this interpretation as it contemplates the situation where the insured may be responsible for an act or omission committed by another, such as negligent supervision or vicarious liability, which is what is alleged against the defendants here. Here, at the very least the claims alleged injuries arising indirectly from the violation of statutes prohibiting the transmission of information—the complaint alleges that the defendants were responsible for the injuries caused by the text messages because they negligently allowed them to be sent and/or were vicariously liable for their transmission. Thus, the claims are precisely those to which the exclusion applies. The trial court therefore erred by denying Oregon Mutual's motion for summary judgment.[6]

[6] Because we conclude that the exclusion applies, we need not reach Oregon

Mutual's alternative argument that the policy coverage for personal and advertising injuries or property damage does not extend to the alleged claims.

We reverse.



WE CONCUR: