

OHIO CASE SUMMARIES

A SERVICE OF
GREEN & GREEN, LAWYERS
A Legal Professional Association

Ohio case summaries will be provided on a continuing basis every Wednesday and Friday of each week (excluding holidays). Summaries include brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. To discontinue receiving this service, please call Sean McCormick at 937.224.3333 or send an email to smccormick@green-law.com.

Court of Appeals: Eighth Appellate District

Case Name: *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc. et al.*, 2009-Ohio-2270

Decided: May 14, 2009

Issue(s): General Commercial Liability Policy and Advertisement Injuries

Summary of Opinion: Claimants filed suit against Dandy-Jim alleging multiple violations of the Telephone Consumer Protection Act (TCPA) as a result of several unsolicited fax advertisements for the sale of tires. Claimants sought \$500 for each violation and treble damages for willful or knowing violations. Dandy-Jim was insured under a commercial general liability policy issued by Motorists and sought coverage. Motorists filed a declaratory judgment action against Dandy-Jim, and the claimants, arguing it did not have a legal or contractual obligation to provide coverage.

Subsequently, the claimants moved for summary judgment on the coverage issue, as did Motorists. Claimants argued that Motorists was obligated to defend Dandy-Jim under the “advertising injury” provision of the policy. Alternatively, Motorists argued no coverage existed under this provision. The trial court granted claimants’ motion and Motorists appealed.

Motorists argued that the “advertising injury” provision only provided coverage for intrusions against the secrecy aspect of the right to privacy, not the claimants’ right to seclusion. Specifically, Motorists pointed to a Seventh Circuit Court of Appeals case, interpreting Illinois law, which supported its position that an “advertising injury” provision did not cover claimants’ right to seclusion.

GREEN & GREEN, Lawyers represents select insurance clients in all aspects of insurance litigation, from complex coverage questions to more routine torts. We will see to it that your file will be handled only by a competent, seasoned attorney who will work diligently to obtain the best result possible.

As a service to our clients, we provide weekly summaries of the most recent Ohio Supreme Court and appellate decisions on cases of interest to our insurance clients. No opinion as to the legal import of the cases summarized is intended. Any questions regarding the information contained in this transmission should be directed at any time to one of the attorneys of the firm.

The Eighth District Court of Appeals explained that the cases Motorists relied on contained different language than the “advertising injury” provision at issue. In those cases, the “advertising injury” provision covered damages arising from “making known” to any person written or spoken material that violated an individual’s right to privacy. The court reasoned that this language focused more narrowly on secrecy than the broader “oral or written publication” language at issue. As a result, it reasoned that the language of the policy applied not only to a person’s right to secrecy, but also to his or her seclusion.

Furthermore, Motorists argued that it had no duty of coverage because the language in the advertisements was not objectionable. The court rejected this argument because all unsolicited faxes are considered offensive, regardless of the language.

Additionally, Motorists argued that no “advertising injury” occurred because publication required disclosure to a third party. The court rejected this argument because faxed advertisements are considered publications in the ordinary sense of the word, and by faxing the advertisements to the claimants, Dandy-Jim published the content to the public.

Moreover, Motorists argued that the marginal nature of the faxes did not constitute a violation of the right to privacy. The court rejected this argument because *all unsolicited advertising* is considered an intrusion on one’s privacy, regardless of how many advertisements are actually received.

Finally, Motorists argued that public policy considerations prohibit insuring against punitive damages, and that the treble damages sought by claimants were punitive. The court rejected this argument because the claimants were seeking damages that were provided for under the TCPA. Consequently, the court reasoned that no showing of actual malice was required by the claimants to obtain treble damages under the statute because it was not intended to be punitive; it was intended to liquidate actual damages and encourage victims to file suit.

The court affirmed the judgment of the trial court, holding that Motorists did have a duty to provide coverage under the “advertisement injury” provision of the policy.

GREEN & GREEN, Lawyers represents select insurance clients in all aspects of insurance litigation, from complex coverage questions to more routine torts. We will see to it that your file will be handled only by a competent, seasoned attorney who will work diligently to obtain the best result possible.

As a service to our clients, we provide weekly summaries of the most recent Ohio Supreme Court and appellate decisions on cases of interest to our insurance clients. No opinion as to the legal import of the cases summarized is intended. Any questions regarding the information contained in this transmission should be directed at any time to one of the attorneys of the firm.