In the Missouri Court of Appeals
Eastern District

DIVISION ONE

COLUMBIA CASUALTY COMPANY, Appellant, v. HIAR HOLDINGS, L.L.C., and HMA RIVERPORT L.L.C., and KAREN S. LITTLE, LLC, individually and on behalf of the other members of the certified class, as assignees, Respondents.	)	No. ED98253 Appeal from the Circuit Court of St. Louis County Honorable Mark D. Seigel Filed: October 23, 2012

Columbia Casualty Company appeals the trial court's summary judgment holding Columbia liable to indemnify its insured, HIAR Holdings, for a settlement judgment in favor of Karen S. Little LLC and other plaintiffs for HIAR's violations of the Telephone Consumer Protection Act. We reverse and remand for entry of summary judgment in favor of Columbia.

Background

HIAR operates as the Holiday Inn at Riverport in west St. Louis County. In October 2001, through the services of Sunbelt Communications and Marketing, HIAR

sent approximately 12,500 unsolicited advertising facsimiles (*i.e.*, junk faxes) to recipients in the 314 and 636 area codes. An estimated 10,000 of the faxes were actually received. Little[1] brought a class action under the TCPA seeking injunctive relief and statutory damages ($500 per fax sent). At the time, HIAR carried commercial general liability insurance through Columbia providing coverage for property damage (including loss of use) and advertising injury. HIAR tendered its defense to Columbia, but Columbia refused to defend the suit and denied coverage on grounds that the claim was outside the policy. Little made a formal offer to settle the action for an amount within Columbia's policy limits, but Columbia declined the offer and refused to participate in subsequent negotiations. HIAR and Little ultimately reached a class-wide settlement agreement of $5 million. The trial court held an evidentiary hearing on the reasonableness of the settlement and granted approval. The trial court also approved HIAR's assignment of its claims against Columbia to the plaintiff class, after which the class filed a garnishment action against Columbia seeking the settlement amount plus interest.

In response, Columbia filed a separate petition for declaratory judgment seeking clarification of its duties to defend and indemnify the plaintiffs' claims under HIAR's policy. The garnishment action was stayed pending resolution of the declaratory action, where the trial court declared that Columbia owed HIAR a duty to defend the claims in that they were covered under the definitions of property damage and advertising injury under the policy. The parties subsequently filed opposing motions for summary judgment on the issue of indemnification. The trial court found that Columbia had a duty to indemnify HIAR in the underlying class action and thus granted Little's motion and

[1] The suit was originally filed by Onsite Computer Consultants, Inc. Little was later substituted as the named plaintiff representing the class.

entered judgment in favor of the class for the entire settlement amount plus interest. This appeal follows.

Standard of Review

Summary judgment is appropriate when the pleadings demonstrate 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. Rule 74.04(c)(6). We review a trial court's grant of summary judgment *de novo*. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

Discussion

Columbia asserts nine points on appeal; one issue is dispositive. Subsequent to the trial court's judgment, this court issued its opinion in Olsen v. Siddiqi holding that statutory damages under the TCPA were penal in nature and, as penalties, did not constitute "damages" covered by the subject insurance policy. 371 S.W.3d 93, 98 (Mo. App. 2012). The relevant policy language examined in Olsen is identical to HIAR's policy with Columbia: "[The insurer] will pay those sums that the insured becomes legally obligated to pay *as damages* because of [property damage or advertising injury] to which this insurance applies." Neither policy further defined the term damages, and, as noted in Olsen, "[u]nder Missouri law, unless otherwise bargained for, the term 'damages' does not include fines and penalties." 371 S.W.3d at 97. Relying on Olsen, Columbia submits that the underlying settlement award is a penalty and thus outside the policy's coverage.

Little responds that the settlement amount does not represent TCPA statutory damages (*i.e.*, a penalty, under Olsen) but rather an arbitrary figure negotiated between

HIAR and the class. If the settlement represented statutory damages, the resulting amount would be $6.25 million (12,500 x $500); the actual settlement of $5 million represents $400 per violation and hence does not reflect or comprise TCPA statutory damages.[2] Rather, Little argues, the settlement award is essentially contract consideration, and not a penalty under Olsen.

If that is so, however, then Columbia invokes the policy exclusion relieving Columbia of its duty to indemnify when an insured assumes liability by contract. The policy states in relevant part:

> This insurance does not apply to [property damage or advertising injury] for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability *for damages* that the insured would have in the absence of the contract or agreement.

(emphasis added) In short, Columbia has no duty to indemnify HIAR for its settlement liability unless HIAR would have faced the same liability *for damages* absent the agreement. Here, absent the settlement, HIAR's exposure for TCPA statutory damages was even greater. However, Olsen dictates that those damages are *penalties* outside the meaning of "damages" covered by the policy.[3] So, according to Olsen, the liability that HIAR assumed by virtue of the settlement contract is for something other than "damages" that it would have had absent the agreement. As such, the exception to the exclusion cannot apply. We are left, then, with the exclusion itself, which bars coverage for HIAR's contractual liability.

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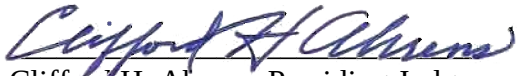
[2] While it is true that, under the TCPA, the mere sending of a junk fax is actionable, regardless of receipt (47 U.S.C. §227(b)(1)(C)), it strikes us that the settlement amount corresponds exactly to the calculation of statutory damages for the faxes actually received (10,000 x $500). In this light, Little's assertion that the settlement figure is wholly unrelated to statutory damages is somewhat dubious.

[3] Little argues that Olsen is not binding here because Olsen examined liability only under the "property damage" section of the policy and not "advertising injury." That distinction is irrelevant here. The central holding in Olsen is that TCPA statutory damages are considered penalties and, as such, are not "damages" as that term is used throughout the policy. This holding necessarily applies to references to "damages" in both categories of coverage.

Conclusion

Following Olsen, we conclude that Columbia's policy does not provide coverage for TCPA statutory damages. Therefore, Columbia had no duty to defend the suit or indemnify HIAR's liability under the settlement agreement.[4] The trial court's judgment is reversed and the case is remanded for entry of summary judgment in favor of Columbia.



Clifford H. Ahrens, Presiding Judge

Sherri B. Sullivan, J., concurs.
Glenn A. Norton, J., concurs in separate opinion.

[4] Little's argument that Columbia is liable for the settlement judgment incurred by HIAR as damages resulting from Columbia's breach of its duty to defend (relying on Schmitz v. Great American Assurance Co., 337 S.W.3d 700 (Mo banc 2011)) is premised on a determination that Columbia *had* a duty to defend, which is premised on a determination that HIAR's policy covered Little's claim in the first place. Given our holding to the contrary, Little's reliance on Schmitz is unavailing. To extricate itself from a duty to defend, an insurer must prove that there is no possibility of coverage. Kirk King, King Construction, Inc., Continental Western Ins. Co., 123 S.W.3d 259, 264 (Mo. App. 2003). By application of Olsen, Columbia is so extricated here. Necessarily, then, where there is no duty to defend, there is no duty to indemnify. Id.

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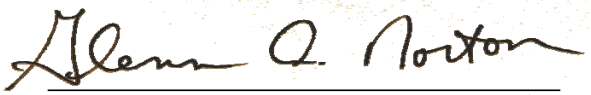
CONCURRING OPINION

I concur in the result of the majority opinion, recognizing that we are bound by our Court's majority opinion in *Olsen v. Siddiqi*, 371 S.W.3d 93 (Mo. App. E.D. 2012). I write separately to state that I agree with Judge Lawrence E. Mooney's dissent in *Olsen*, where he would have held that policy language identical to that in this case provides insurance coverage for losses resulting from receiving unsolicited faxes and that fixed statutory damages under the TCPA are not penal in nature. *Id*. at 98-100. As found by Judge Mooney:

> The fixed statutory amount of damages serves more than purely punitive or deterrent goals; the fixed award is a liquidated sum for actual harm and/or an incentive for aggrieved parties to act as private attorneys general. . . . Moreover,

> *interpreting the TCPA's fixed statutory remedy as penal in nature is counter to the clear admonition of Missouri law to interpret insurance contracts liberally in favor of the insured, to furnish, rather than to exclude, coverage*.

Id. at 99-100. (emphasis added).



GLENN A. NORTON, Judge