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SECOND CIRCUIT REMINDS CONSUMER PRODUCT COMPANIES THAT INSURANCE OPTIONS EXIST FOR BIG DATA BLUNDERS AND PRIVACY FAUX PAS

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Consumer class actions are on the minds of virtually all consumer product manufacturers and service providers. Class actions based on privacy and consumer protection statutes are increasing at a remarkable rate, and can be a challenge to predict, budget, and defend, given the challenge in valuing consumer privacy rights.

Privacy Class Actions on the Rise

For example, Telephone Consumer Protection Act ("TCPA") class actions are known for their difficulty to defend and their often staggering settlement amounts. Their prevalence has increased in recent years, from 1,904 TCPA class actions filed in 2013, to 2,558 in 2014, to 3,710 in 2015. This is an astounding increase from 14 cases in 2007.[1] Similarly, many have taken note of the recent wave of lawsuits based on New Jersey's Truth-in-Consumer Contract Warranty and Notice Act ("TCCWNA") — which penalizes unenforceable consumer contractual provisions — due to the TCCWNA's perceived susceptibility to class certification. And while some believed that the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*,[2] would trim down the prevalence of class actions based on statutory violations, the decision stands to promote further litigation — and, thus, further expense — over how these class action plaintiffs can plead sufficiently "concrete" injuries to establish standing.

Insurance for Consumer Class Actions

Faced with the challenges that come with defending and settling these class action lawsuits, companies have looked to their insurance carriers to provide a defense and indemnity — with mixed results. Often, insurance carriers will disclaim any and all coverage based on an exclusion for statutory violations, and courts are in disarray when it comes to accepting the argument.

Recently, the U.S. Court of Appeals for the Second Circuit in *National Fire Insurance Co. v. E. Mishan & Sons, Inc.*,[3] gave policyholders renewed hope in looking to insurance carriers for coverage of class action lawsuits alleging statutory violations. On June 1, 2016, the Second Circuit found that Emson, Inc.'s insurance carriers owed a duty to defend Emson in two class action lawsuits alleging violations of the TCPA and various state consumer protection statutes.

Emson, a promoter of "As Seen On TV" products, had been facing two putative class action lawsuits accusing the company of sharing its customers' private data — including names, addresses, and credit card information — with telemarketers who allegedly contacted those customers to convince them to enroll in discount programs. The complaints alleged violations of the TCPA and state consumer protection statutes, as well as breach of contract and unjust enrichment.

Emson's insurance carriers filed a declaratory relief action in the Southern District of New York, seeking a declaration that they had no duty to defend Emson based on the exclusions for "knowing and intentional conduct" and injuries arising out of a breach of contract. The district court agreed with the insurance carriers, finding that the class action allegations fell within the policies' exclusion for "knowing and intentional conduct."

The Second Circuit reversed. The court agreed that the consumer protection and breach of contract claims were excluded from coverage, but found that the unjust enrichment claims did not require a showing of intent or knowledge that Emson's actions would violate the rights of another and inflict "personal and advertising injury." Because the unjust

enrichment claim potentially fell within the scope of coverage, the carriers had a duty to defend the class actions in their entirety, including the uncovered consumer protection claims.

Why Class Action Defendants Need To Think About the *Emson* Decision

The *Emson* decision may have far-reaching implications for the treatment of insurance coverage for class action lawsuits alleging many types of statutory violations, including violations under the TCPA, the Video Privacy Protection Act, Federal Credit Reporting Act, the Stored Communications Act and numerous state and federal privacy statutes. While companies continue to profit considerably through their use of Big Data, they are also more likely to face considerable liabilities when hit with these class action lawsuits, and these policyholders too often capitulate to a carrier's quick denial of coverage.

Nonetheless, as *Emson* demonstrates, class action defendants should look to their insurance carriers when faced with these claims, particularly where common law claims such as "unjust enrichment" are also alleged. Notably, the Second Circuit's decision mandates careful consideration when class action plaintiffs make settlement demands within the policy limits, given that in many states insurance carriers can be responsible for a judgment in excess of the limits if the carrier fails to accept a "within limits" demand when coverage exists. In addition, errors and omissions and specialty cyber liability policies may also afford coverage for privacy-related class action claims. Experienced coverage counsel can assist class action defendants in making the greatest use of these resources.

Notes

[1] Source: https://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/.

[2] 578 U.S. ___ (2016).

[3] 2016 WL 3079958, 2016 U.S. App. LEXIS 10151 (2d Cir. June 1, 2016).

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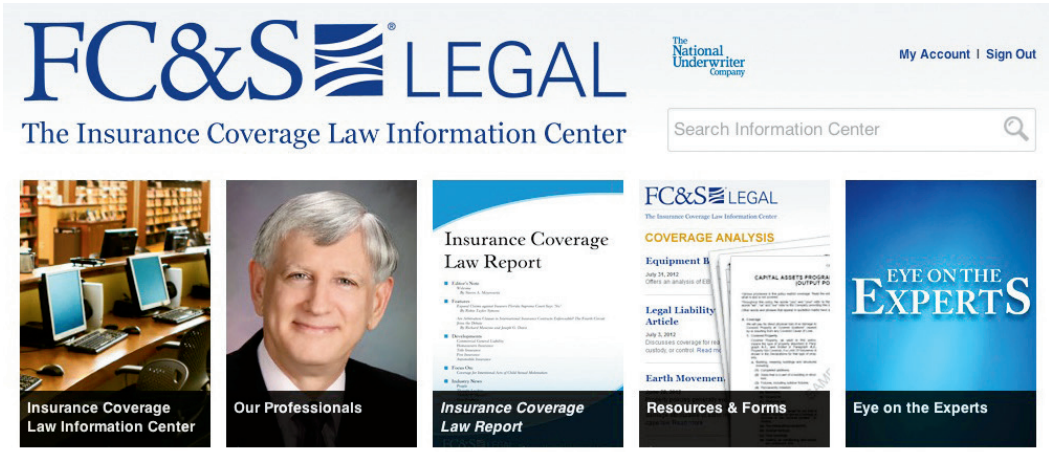

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