

Policyholder Playbook Episode 3: Distinguish the Insurer's Key Cases Based on Policy Language

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PRACTICES Insurance Recovery, Litigation

Lesson From a Landmark Case: Distinguish the Insurer's Key Cases Based on Policy Language

On November 17, 2022, the California Supreme Court issued a landmark decision in which it found coverage for Telephone Consumer Protection Act (TCPA) claims under a commercial general liability policy. See *Yahoo v. Nat'l Union Fire Ins. Co.*, No. S253593 (Cal. Nov. 17, 2022). The decision marks a huge victory for policyholders, as it demonstrates that commercial general liability policies extend to cover a whole host of privacy-related claims. Not surprisingly, the policyholder's briefing that led to the victory is full of plays that should be added to every policyholder attorney's playbook. Featured in this post is one of those plays—distinguishing a whole line of the insurer's cases based on policy language.

In *Yahoo*, the insurer argued, in essence, that other courts had already considered the issue before the California Supreme Court, and that the California Supreme Court should simply adopt the holdings of those courts—not surprisingly, those decisions were pro-insurer. The policyholder, in its reply brief, neatly disposed of the insurer's cases:

"The cases that National Union cites to deny coverage for TCPA claims are inapplicable because none of those cases involves insurance policies where there are separately defined coverages for "personal injury" and "advertising injury," as is the case with the National Union Policies. Instead, almost all of National Union's cases involve the interpretation of "advertising injury" only offenses, which by definition, are limited and focused on the content of the material in the advertisements to trigger coverage. The remainder of National Union's cases involve the interpretation of the standard form combined "personal and advertising injury" coverage, which Yahoo and National Union specifically rejected when National Union issued an endorsement that redefined the meaning of "personal injury" as distinct from "advertising injury."

This play naturally leads to another: by distinguishing pro-insurer cases based on policy language, the policyholder can argue that, if the insurer wanted the result reached in those cases, it should have bargained for the policy language used in those cases. The California Supreme Court almost went there in its decision when, after finding that the relevant policy language was ambiguous, it noted that, "[i]nsurance companies can easily avoid the ambiguous language used here, by revising the language to clarify the scope of the coverage they are providing." *Id.* at 15, n.9.

Quick Overview of the Play

Review the insurer's key cases, and specifically the policy language at issue in those cases (this may require tracking down briefing and/or exhibits). Examine whether you can distinguish the insurer's key cases because they involved different policy language. If you can, consider arguing that the insurer could have bargained for the language used in those cases, and that it cannot receive the benefit of language that it could have, but did not, bargain for.

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