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## Insurers Can't Intervene in Settled TCPA Suit Even Over Allegations of Collusion

Several insurance companies can't intervene in a settled Telephone Consumer Protection Act class action against their insured even though they alleged the company colluded with class counsel during the settlement negotiations (*CE Design Ltd. v. King Supply Co.*, 7th Cir., No. 12-2930, 6/29/15).

Judge Richard A. Posner, writing June 29 for the U.S. Court of Appeals for the Seventh Circuit, said the insurers had a legitimate concern that the parties ''might collude to mulct the insurance company for an excessive recovery, favorable to the class and to class counsel and harmless to the class action defendant.''

But an attorney who represents insurance companies, said this scenario isn't very common.

''It is an issue that seems most likely to arise where the defendant in the class action is small or in a distressed financial state, or the potential liability is large enough to potentially put the company in bankruptcy,'' Wystan Ackerman, partner at Robinson & Cole LLP in Hartford, Conn., told Bloomberg BNA in a July 8 e-mail.

''Where the defendant would have assets sufficient to pay a judgment against it in the class action, it will have an incentive to vigorously defend the case on its own,'' he said. ''In that circumstance, plaintiffs' counsel will have less incentive to accept a settlement proposal under which they will end up trying to collect a judgment against an insurer, where there is a reasonably strong chance the court will find that the insurer is not liable because there is no coverage under the policy.''

Counsel for the TPCA plaintiff, the defendant and the defendant's insurers didn't respond to requests for comment July 8.

**No Obligation to Insurer.** But insurance defense attorney Chris Dunsing, of Chicago-based Langhenry, Gillen, Lundquist & Johnson LLC, said that Posner warned that ''when an insurer denies coverage to its insured for a claim, including for class action claims, the insured is not obligated to act in the insurer's best interests when negotiating a settlement with the claimants.''

The insurance companies here ''ill-advisably refused to take over the defense of the insured to avoid defense costs, where 'expending a few hundred thousand dollars on legal fees to defend against a possible loss of $20 million would have been a reasonable investment,' '' Dunsing told Bloomberg BNA in a July 9 e-mail, quoting Posner.

Even so, he said the insured here may have agreed to a settlement for the policy limits when the prospective damages didn't approach that amount. Doing so may invite ''the insurance company to attack the settlement with claims of collusion or a breach of a policy's cooperation clause.''

''A prudent insured may consider inviting the insurer's participation in any settlement discussions or alternative dispute resolution even after a denial of coverage if only to curtail later challenges to a settlement with the claimant class by the insurer,'' Dunsing said.

The Seventh Circuit's ruling might leave the insurers, Valley Forge Insurance Co., National Fire Insurance Co. of Hartford and Continental Casualty Co., on the hook for most of the $20 million settlement in the case against King Supply Co.

But the Seventh Circuit noted that an Illinois state court recently ruled in a separate action that King Supply's insurance policies don't cover its liability under the TCPA. The plaintiff in the state case is appealing that decision.

**Unwanted Faxes.** In 2009, plaintiff CE Design Ltd. filed a class action complaint under the TCPA, 47 U.S.C. § 227, against King Supply for unwanted faxes.

In 2011, CE Design and its co-plaintiff agreed with King Supply to settle the case for $20 million. The settlement permitted only 1 percent of the judgment, or $200,000, to be executed against King Supply, which was on the verge of bankruptcy.

The insurance companies seeking to intervene had issued commercial general liability and commercial umbrella policies to King Supply, but they disclaimed any obligation to defend or indemnify the company based on policy exemptions for the TCPA.

A federal district court denied their motion to intervene as untimely.

**'Should Have Foreseen the Danger.'** Posner acknowledged the insurers' concerns that ''King Supply sold them down the river by failing to defend against class counsel's $20 million money grab.''

''But they should have begun worrying when the suit was filed rather than almost three years later,'' the Seventh Circuit said.

''The insurers should have foreseen the danger of such a settlement from the outset,'' the court said. ''Had they wished to challenge it on the ground that class counsel and King Supply were conspiring to overcompensate the class, they should have moved to intervene at the outset of the litigation, not nearly three years later, when the settlement had been negotiated and was about to be presented to the district court for approval.''

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In a concurring opinion, Judge David F. Hamilton said he agreed with the court's ''alternative but more important holding'' that the insurers ''lacked the sort of interest in the case that would justify mandatory or permissive intervention.'' Insurers have an interest in the underlying tort suit only if they lose the coverage issue, he said.

Judge Daniel A. Manion also served on the panel.

Bock & Hatch LLC and Anderson + Wanca represented the plaintiffs.

Buck Keenan LLP and DLA Piper US LLP represented the defendant.

Carroll McNulty & Kull LLC represented the insurance companies.

BY KATIE W. JOHNSON AND PERRY COOPER

*The opinion is at http://www.bloomberglaw.com/public/document/CE_Design_Ltd_v_King_Supply_Co_No_122930_2015_BL_206705_7th_Cir_J.*



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