

# SHOULD STATUTORY DAMAGES BE COVERED? MANY COURTS SAY YES

This article was originally published in *Law360* on September 3, 2013.

by Rene L. Siemens and David L. Beck



**Rene L. Siemens**

Litigation

+1.213.488.7277

reynold.siemens@pillsburylaw.com

Mr. Siemens is a nationally recognized insurance coverage practitioner who represents policyholders in negotiations and disputes with their insurers. He also handles complex product liability, mass tort, environmental, and consumer cases.



**David L. Beck**

Litigation

+1.202.663.9398

david.beck@pillsburylaw.com

Mr. Beck is a senior associate in the law firm's Litigation practice and is located in the Washington, DC office. Mr. Beck advises on the resolution of complex business and contract disputes, with particular emphasis in the areas of construction and engineering.

It is often said that liability insurance does not provide coverage for fines and penalties imposed on an insured. Part of the difficulty is determining what constitutes a fine or penalty. Many courts have recently rejected insurance company arguments that "statutory damages" are uninsurable penalties. These courts have found that statutory damages can be remedial in nature and therefore may be covered by insurance.

These decisions are especially important in today's world of online marketing and commerce, where statutory damages liability for privacy violations arising from unsolicited email, text messages and data security breaches is a growing risk for many businesses.

The recent surge in cyberattacks and data security breaches has caused legislatures around the country to create fixed statutory damages remedies (e.g., \$100 to \$1,000 for each violation) for those whose confidentiality has been compromised, as a result of the fact that it can often be difficult or impossible for an affected individual to prove that he or she has suffered a specific amount of actual damage.

Class actions are now routinely filed as soon as a privacy breach is made public, and the complaints usually allege both common law violations, such as negligence and invasion of privacy, and statutory claims under consumer protection laws, such as the Fair and Accurate Credit Transactions Act (FACTA), among others. If the class is large enough, the potential statutory damages alone can total millions or even billions of dollars.

Insurers have often denied coverage for statutory damage claims on the ground that the damages sought are in the nature of fines and penalties not covered by insurance. However, recent case law has reached the opposite conclusion, providing insureds a potential avenue to recovery.

The most recent decision to address the issue is *Columbia Cas. Co. v. HIAR Holding LLC*, No. SC93026 (Mo. Aug. 13, 2013). There, the Missouri Supreme Court held that a class action settlement for \$5 million in statutory damages under the Telephone Consumer Protection Act (TCPA) (\$500 for each violation) was covered under the insured's commercial general liability policy. The TCPA is intended to protect

## Litigation

consumers from unsolicited communications, including faxes, robo calls and even text messages. See *Satterfield v. Simon & Schuster Inc.*, 569 F.3d 946 (9th Cir. 2009).

In *Columbia Cas. Co.*, the insured was sued in a class action when the marketing firm it had hired sent approximately 12,500 junk faxes to potential customers in violation of the TCPA. The insured sought defense and indemnification for the class action pursuant to the “advertising injury” coverage under its commercial general liability policy.

The insurer denied coverage on the grounds that the claims constituted fines and penalties meant to punish the insured for violating the statute.

The insurer argued that to be covered under the policy, “advertising injury” damages must be compensatory damages — compensating the recipients of junk faxes, not punishing the sender. The insurer argued that the statutory damage provision under the TCPA “must be a penalty because it is intended to deter junk faxes and not to compensate actual injury suffered by the junk fax recipient, whose actual damages could be compensated at a nearnothing amount.”

The Missouri Supreme Court disagreed. The court ruled that the TCPA \$500-per-occurrence statutory damages award is remedial and not penal in nature. The court explained that the statutory damages award serves “more than purely punitive or deterrent goals.”

Rather, it “‘represents a liquidated sum for uncertain and hard-to-quantify actual damages,’ including ‘loss of use of equipment and phone lines for outgoing and incoming faxes, the expense of paper and ink, and the resultant inconvenience and annoyance ... [of] unsolicited fax advertisements ... interfer[ence] with company switchboard operations and burdens [on] the computer networks of those recipients who route incoming faxes into their electronic mail systems.’” *Id.* (quoting *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network Inc.*, 401 F.3d 876, 881 (8th Cir.2005)).

Although not cited in *Columbia Cas. Co.*, a similar result was reached by the Illinois Supreme Court earlier this year. In *Standard Mut. Ins. Co. v. Lay*, 2013 IL 114617, 371 Ill. Dec. 1 (IL. 2013), the Illinois Supreme Court was faced with the same issue of whether statutory damages claims under the TCPA could be covered by a commercial general liability insurance policy.

In finding coverage, the court emphasized that the statutory damages could be viewed both as compensation for the annoyance and inconvenience of receiving unsolicited faxes and loss of paper and ink, as well as providing an incentive for aggrieved parties to enforce the statute.

The court explained, “The TCPA is ‘clearly within the class of remedial statutes which are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils.’”

*Id.* at 9 (quoting *Scott v. Association for Childbirth at Home International*, 88 Ill.2d 279, 288, 58 Ill.Dec. 761, 430 N.E.2d 1012 (1981)). Accordingly, the court held that the TCPA “is a remedial and not a punitive statute.”

The decisions by the Supreme Courts of Missouri and Illinois represent a growing trend of case law finding insurance coverage for statutory damages. For example, in *Flagship Credit Corp. v. Indian Harbor Ins. Co.* (5th Cir. June 5, 2012), the Fifth Circuit considered whether statutory damages for violation of the Texas Business and Commerce Code were covered under an insurance policy that provided coverage for loss, where “loss” was defined to exclude “fines, penalties or taxes imposed by law.”

The court found that the term “penalties,” when included within the phrase “fines, penalties or taxes,” was limited to payments made to the government. Therefore, the court held that payments made to third parties, although imposed by statute, were not “penalties” excluded from coverage. See also *Penzer v. Transportation Insurance Co.*, 545 F.3d 1303, 1311 (11th Cir.2008) (finding statutory damages not punitive); *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network Inc.*, 401 F.3d 876, 881 (8th Cir.2005) (accord).

These decisions accurately address the issue of whether statutory damages awards payable to third parties should be covered by insurance. In creating a private right of action and establishing statutory minimum damages for privacy

violations and other similar torts, legislatures are simply providing quantifiable remedies for alleged injuries that are otherwise difficult to quantify.<sup>1</sup>

The fact that the amount of damages for which the insured may be liable to third parties is fixed by statute does not alter the nature of the claims against the insured and, therefore, should not impact potential coverage.

It should be noted that as in any case seeking insurance coverage, the language of the policy matters. More recent commercial general liability forms issued by the Insurance Services Office expressly exclude from coverage damages arising from the TCPA, the Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003, the Fair Credit Reporting Act or similar federal, state or local statute.

Policyholders must be aware of the coverages provided by their policies and seek amendments or additional coverage where appropriate.

---

<sup>1</sup> See, e.g., *Motorists Mut. Ins. Co. v. Dandy-Jim Inc.*, 912 N.E.2d 659 (Ct. App. Oh. 2009) (explaining that the purpose of a statutory damage award “is to ‘liquidate uncertain actual damages and to encourage victims to bring suit to redress violations’”); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (Mass. 2007) (holding that statutory damages are to compensate plaintiffs for hard to quantify losses and are not punitive damages).

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171

**ATTORNEY ADVERTISING.** Results depend on a number of factors unique to each matter. Prior results do not guarantee a similar outcome.

© 2013 Pillsbury Winthrop Shaw Pittman LLP. All rights reserved.

