

STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY

CIVIL DIVISION

BRANCH 10

ISAAC SAWYER,

Plaintiff,

vs.

CASE NO. 2010CV005852

WEST BEND MUTUAL INSURANCE
COMPANY, et al.,

COPY

Defendants.

FEBRUARY 7, 2011

MOTION HEARING

PROCEEDINGS HELD BEFORE

THE HONORABLE TIMOTHY G. DUGAN

PRESIDING JUDGE

APPEARANCES:

CROEN & BARR, LLP, 250 East Wisconsin Avenue, Suite 1550, Milwaukee, Wisconsin 53202, by MR. CHARLES H. BARR, Attorney at Law, appeared on behalf of the Plaintiff.

ANDERSON & WANCA, 3701 Algonquin Road, Suite 760, Rolling Meadows, Illinois 60008, by MR. DAVID M. OPPENHEIM, Attorney at Law, appeared pro hac vice on behalf of the Plaintiff.

JEFFREY L. LEAVELL, S.C. 723 South Main Street, Racine, Wisconsin 53403-1211, by MR. JEFFREY L. LEAVELL, Attorney at Law, appeared on behalf of the Defendant, West Bend Mutual Insurance Company.

Thomas A. Malkiewicz, RMR/CRR - Official Reporter

1 TRANSCRIPT OF PROCEEDINGS

2 THE CLERK: Isaac Sawyer versus
3 West Bend Mutual Insurance Company, et al.
4 10CV005852. Appearances, please.

5 MR. BARR: Good morning, Your Honor.
6 Plaintiff appears by Charles Barr and David
7 Oppenheim. Mr. Oppenheim is admitted
8 pro hac vice.

9 MR. LEAVELL: Good morning, Your Honor.
10 I'm Jeff Leavell. I represent West Bend.

11 THE COURT: All right. We're here on
12 cross motions for summary judgment in this
13 declaratory judgment action. My normal procedure
14 is to tell you what my initial reaction is, give
15 each side an opportunity to argue first. Any
16 objection -- Or whoever's on the short end an
17 opportunity to argue first.

18 As I always mention, I do have an open
19 mind, so much so that in one case in which I gave
20 my initial reaction, the person who was on the
21 short end responded by saying he didn't have
22 anything more to say. I asked the person who was
23 then on the prevailing side, and then argued and
24 then touched on something that we didn't spend
25 time on, and we then spent time on it, and then

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convinced me to change my mind.

So I'm so openminded that even if the other side gives up and you're the prevailing party, you can still convince me to change my mind.

Any objection to that procedure?

MR. OPPENHEIM: No, Your Honor.

MR. LEAVELL: No, Your Honor.

THE COURT: All right. As I understand factually, on March 19th of 2010, the plaintiff, Sawyer, filed this motion against Atlas for violation of the Telephone Consumer Protection Act. There is a federal action that's pending on the claim itself. This is a declaratory judgment to determine whether or not West Bend is obligated to defend Atlas in that lawsuit.

The complaint alleges that the coverage applies for the violation of the Telephone Consumer Protection Act, TCPA, because Atlas sent an unsolicited junk fax advertisement, which caused them to lose the use of their personal property, the fax machine, paper, et cetera; that the use of the fax paper and toner was a physical injury to the personal property and that the plaintiff is entitled to personal and advertising

1 injury coverage because the junk fax constitutes
2 the publication of material that violates the
3 plaintiff's right of privacy.

4 There are cross motions on the issue of
5 coverage, and is that everyone's understanding of
6 where we're at at the moment?

7 MR. OPPENHEIM: Yes, Your Honor.

8 MR. LEAVELL: Yes, Your Honor.

9 THE COURT: All right. I won't
10 reiterate the standard of review for summary
11 judgment. Everybody knows it. It's cited in
12 numerous cases, and we'll proceed to the
13 analysis.

14 Plaintiff alleges that the defendant's
15 actions caused property damage in personal
16 advertising interest.

17 West Bend moves for summary judgment
18 arguing that neither property damage nor personal
19 and advertising injury have been alleged, and
20 there's no duty to defend or indemnify.

21 My initial reaction is that there's no
22 duty to defend or indemnify under the property
23 damage provision. The plaintiff alleges that the
24 defendant sent the fax unsolicited and it caused
25 them to suffer injury to property, including

1 consumption of paper and toner, and the loss of
2 the use of the fax machine.

3 West Bend argues there's no coverage
4 under the allegations, because, one, there's no
5 occurrence causing property damage; two, even if
6 there was an occurrence alleged, there was no
7 property damage; and three, even if the plaintiff
8 alleged property damage, there is an exclusion
9 under the expected and intended injury exclusion.

10 My initial reaction is that there is no
11 occurrence alleged, and even if there were
12 property damage, the expected or intended injury
13 exclusion applies to bar coverage.

14 The parties agree that the policy
15 coverage is provided for property damage that is
16 caused by an occurrence. The policy defines
17 occurrence as an accident including continuous or
18 repeated exposure to substantially the same
19 general harmful conditions. An accident is an
20 event which takes place without one's foresight
21 or expectation as held in American Family Mutual
22 Insurance Company v. American Girl, Inc., 268
23 Wis. 2d 16.

24 That's also the language in
25 Glendenning's, G-L-E-N-D-E-N-N-I-N-G apostrophe

1 S. Limestone and Realty -- excuse me -- Limestone
2 and Ready-Mix Company v. Reimer, R-E-I-M-E-R, 295
3 Wis. 2d 556 defining accident as an unexpected,
4 undesirable event or an unforeseen incident which
5 is characterized by a lack of intent which also
6 quotes from Doyle, D-O-Y-L-E, v. Engelke,
7 E-N-G-E-L-K-E, 219 Wis. 2d 277. And also
8 Kalchthaler, K-A-L-C-H-T-H-A-L-E-R, v. Keller
9 Construction Company, 224 Wis. 2d 387 which
10 defines an accident as an event or change
11 occurring without intent or volition through
12 carelessness, unawareness, ignorance, or a
13 combination of causes and producing an
14 unfortunate result.

15 Additionally, the Court in Stuart,
16 S-T-U-A-R-T, v. Weisflog's, W-E-I-S-F-L-O-G
17 apostrophe S. Showroom Gallery, Inc. at 311 Wis.
18 2d 492, the court citing both American Girl and
19 Doyle stated: A result, though unexpected, is
20 not an accident, rather it is the causal event
21 that must be accidental from -- for the event to
22 be an accidental occurrence.

23 Here the focus must be on the event, not
24 the result under the case law cited, Stuart,
25 American Girl, and Doyle. Here the event is

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sending the fax and/or receiving the fax.

The plaintiff does not allege that the defendant accidentally sent the fax, and obviously the receipt of a fax is not an unexpected event from the standpoint of the insured Atlas. Therefore there's no accident and occurrence that's alleged.

Secondly, contrary to the plaintiff's assertion that there can certainly be negligent acts without there being an occurrence for purposes of the coverage, for instance, in Reimer the plaintiff alleged that the defendant negligently installed cow stalls, stall loops, and neck bars.

The court found that the allegations were insufficient to allege an occurrence because there was no unexpected event, there was only an unexpected result of the defendant's work.

And so for those reasons the Court finds, my initial reaction anyway, is that there's no accident in this particular case. The sending of the fax is the relevant event. It was not accidental.

Moreover, even if the -- there was an occurrence, the exception from coverage for

1 expected or intended injury would also preclude
2 recovery or the duty to defend. The policy does
3 have an expected or intended injury exclusion
4 that states the insurance does not apply to
5 property damage, expected or intended from the
6 standpoint of the insured.

7 And as West Bend argues, the alleged
8 damage, the consumption of paper, toner, and use
9 of the machine are obviously expected
10 consequences of sending a fax and thus coverage
11 would be excluded.

12 The plaintiff, on the other hand, argues
13 that the exclusion does not apply because if the
14 defendant sent the faxes with a mistaken belief
15 that they would be welcome by the recipients, the
16 defendant neither expected nor intended that the
17 property damage would occur.

18 The Court finds persuasive the
19 discussion and analysis in Auto-Owners Insurance
20 Company v. Websold, W-E-B-S-O-L-D, Computing,
21 Inc. at 580 Fed 3d. 543, a Seventh Circuit Court
22 of Appeals decision. At least as to the -- its
23 analysis of the expected or intended injury
24 exclusion.

25 The Court found that while it's true

1 that the one-page fax advertisement consumed a
2 small amount of ink and one sheet of paper from
3 Gortho's, G-O-R-T-H-O apostrophe S., machine,
4 this consequence was both expected and intended
5 by Websold.

6 The Court then held that because the
7 policy expressly excludes damages that is
8 expected or intended, there was no duty to
9 defend.

10 It cited other cases in support of its
11 conclusion. In Resource Bank Shares Corporation
12 v. St. Paul Mercury Insurance Company, 407 Fed
13 3d. 631, a Fourth Circuit decision, that court
14 stated that it's obvious to anyone familiar with
15 a moderate office that receipt is a natural and
16 probable consequence of sending a fax, and
17 receipt alone results in depletion of the
18 recipient's time, toner, and paper.

19 Understanding that Websold was relying
20 on an earlier decision by the Seventh Circuit in
21 American States Insurance Company v. Capital
22 Associates of Jackson County, Inc., 392 Fed 3d.
23 939, that was ultimately rejected by the Illinois
24 Supreme Court in Valley Forge Insurance Company
25 v. Swiderski, S-W-I-D-E-R-S-K-I, Electronic,

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Inc., I believe.

However, the analysis that was rejected by the Illinois Supreme Court pertained to whether privacy rights included the seclusion type privacy, not whether the injury was expected or intended.

Here I find that analysis to be persuasive as to the issue regarding an occurrence, and if there were property damage that it was expected or intended from the standpoint of the insured.

The last analysis is whether or not there is a personal and advertising injury. The plaintiff alleges that the defendant's transmission of unwanted fax advertisements violates the plaintiff's right of privacy.

West Bend argues there's no coverage. One, because the privacy right covered does not encompass the alleged TCPA violation because, A., the policy covers the right to secrecy, not the right to seclusion; B., even if the policy covered a right to seclusion, a business has no such right; and C., the privacy right covered offense applies to a person, not a business. And there was no publication that's alleged and a

1 knowing violation of rights of another exclusion
2 precludes coverage.

3 My initial reaction is that the policy
4 does cover the privacy right allegations that the
5 language of the policy provides that the
6 West Bend will pay those sums that the insureds
7 become legally obligated to pay as damages
8 because of personal and advertising injury, to
9 which this insurance applies.

10 Personal and advertising injury is
11 defined as an injury arising out of one or more
12 of a list of offenses including, E., oral or
13 written publication in any manner of material
14 that violates a person's right of privacy.

15 First, the plaintiff in this case is a
16 person, it's Sawyer, and the argument to the
17 effect that the -- a corporation does not have a
18 right to privacy is belayed in this particular
19 case because the plaintiff specifically is an
20 individual and it is the individual's right that
21 is being violated based upon the allegations in
22 the complaint.

23 The second point is that the right of
24 privacy includes a right of seclusion, and
25 West Bend argues that the privacy does not

1 encompass seclusion but only secrecy.

2 West Bend relies upon the Seventh
3 Circuit decision that I referred to earlier. The
4 Auto-Owners Insurance Company v. Websold, which I
5 will probably call Websold forward at this point.
6 And Websold was rejected by the Illinois Supreme
7 Court.

8 The -- There's a split of authority,
9 apparently, throughout the federal courts on this
10 issue. Websold stood for the proposition that
11 advertising injury applies only to an alleged
12 invasion of secrecy interest, not seclusion
13 interests. Plaintiff cites other cases to the
14 contrary.

15 The policy covers injury arising from
16 oral or written publications in any manner of
17 material that violates a person's right of
18 privacy. On its face the use of the phrase
19 "right of privacy" does not evince a plain
20 meaning that it's limited in the manner of
21 applying only to secrecy and not seclusion.

22 And a right of privacy is a legal claim
23 that one may make for privacy which is gleaned
24 from federal or state law is the argument that's
25 being made.

1 The plaintiff points out that courts
2 have reached different conclusions interpreting
3 the same or similar language shows that the
4 policy provision of the issue is susceptible to
5 more than one interpretation, and the case law in
6 Wisconsin is that if the policy language is
7 susceptible to more than one reasonable
8 interpretation, then the language is ambiguous.

9 There's a variety of case law standing
10 for that proposition. Wildin, W-I-L-D-I-N, v.
11 American Family Mutual Insurance Company, 249
12 Wis. 2d 477; Danbeck, D-A-N-B-E-C-K, v. American
13 Family Mutual Insurance Company, 245 Wis. 2d 186.
14 And courts also state that if there's an
15 ambiguous clause in an insurance policy, the
16 court will construe the clause in favor of the
17 insured. Folkman, F-O-L-K-M-A-N, v. Quamme,
18 Q-U-A-M-M-E, 264 Wis. 2d 617 is one of those
19 cases which also cites Smith v. Atlantic Mutual
20 Insurance Company, 155 Wis. 2d 808.

21 Here then we have an ambiguous policy
22 language and reading through the variety of
23 cases, I think the two that principally stand out
24 in opposition to each other are certainly the
25 Auto Owners/Websold case and the Illinois Supreme

1 Court case in Valley Forge Insurance Company v.
2 Swiderski Electronics, Inc.

3 One of the major positions of the
4 Websold case is both, first of all, the language
5 is different, and the policy, it refers to oral
6 or written publication of material that violates
7 a person's right of privacy. Here the West Bend
8 policy includes the phrase in any manner in
9 relation to oral or written publication.

10 The court's analysis largely depends on
11 the fact that a corporation does not have a right
12 of seclusion and that under those circumstances
13 that the court concluded that the advertising
14 injury provision did not cover claims, first, we
15 noted that businesses generally do not enjoy a
16 common law right to seclusion making it unlikely
17 that the right to privacy provision in a
18 corporate insurance policy was meant to cover
19 seclusion interests.

20 And second, we reason that the use of
21 the word "publication" in the provision made it
22 more probable that the provision only covered
23 claims involving secrecy interests.

24 The court in contrast in Valley Forge
25 applied the similar language that I've discussed

1 earlier regarding interpretation of insurance
2 policies, ambiguities, and the language contained
3 in those policies and that such policies then
4 would be interpreted against the drafter in favor
5 of the insured.

6 The court notes similar to case law in
7 Wisconsin that a court's primary objective in
8 construing the language of an insurance policy is
9 to ascertain and give effect to the intentions of
10 the parties as expressed by the language of the
11 policy.

12 It notes that the essence of the TCPA
13 fax ad claim is that one party sends another an
14 unsolicited fax advertisement. The receipt of
15 that fax implicates a person's right to privacy
16 insofar it violates a person's seclusion, and
17 such a violation is one of the injuries that the
18 TCPA fax ad claim is intended to vindicate. It
19 cites a variety of case law in support of that
20 analysis.

21 The Court then having concluded that the
22 language was ambiguous concludes that you should
23 be looking to the dictionary common usage of the
24 various terms both to right to privacy and for
25 publication. It also concludes that looking at

1 the majority of the federal cases that its
2 conclusion is consistent with the majority of the
3 opinions that hold that there is a duty to defend
4 pursuant to the advertising injury provisions of
5 the policies.

6 It goes on to distinguish the language
7 of some of the cases and notes specifically that
8 for the Websold and its predecessor, American
9 States, where the decision hinged on the
10 proposition that publication materials or matters
11 in a secrecy situation but not in a seclusion
12 situation.

13 The Illinois Supreme Court concludes
14 that we believe, however, that relying on this
15 proposition is a basis for interpreting the
16 insurance policy language publication material
17 that violates a person's right of privacy is
18 inconsistent with this court's approach to
19 interpreting insurance policy provisions
20 affording undefined policy terms their plain,
21 ordinary, and popularly meanings is of central
22 importance to this approach.

23 That is the approach that Wisconsin
24 cases have taken under the circumstances and
25 where I think the Seventh Circuit in Websold and

1 American States deviates in the language as I
2 indicated earlier that they look to the context
3 more in concluding that there was no right to
4 seclusion generally for a corporation and
5 therefore it's unlikely that the right to privacy
6 provisions in a corporate insurance policy was
7 meant to cover the seclusion interest and that
8 the use of the word "publication" made it more
9 probable that the provision only covered claims
10 involving secrecy interest, not seclusion.

11 That analysis deviates from the normal
12 interpretation practices of the Wisconsin courts
13 in interpreting vague language in a policy.

14 The Valley Forge court holds that by
15 faxing advertisements to the recipients, that the
16 sender published the advertisements both in the
17 general sense of communicating information to the
18 public and in the sense of distributing copies of
19 the advertisements to the public. It cites
20 another case, an Ohio case, which is Motorists --
21 and I'm just looking for the rest of the name of
22 the case -- Motorists Mutual Insurance Company v.
23 Dandy-Jim, Inc. at 912 Northeast 2d., 659.

24 In that case the Court of Appeals in
25 Ohio stated that faxed advertisements are an act

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1 of publication in the ordinary sense of the word,
2 that Webster's Third New International Dictionary
3 defines publication as communication, as of news
4 or information to the public and alternatively as
5 the acts of the -- the act or process of issuing
6 copies for general distribution to the public.

7 Likewise, Black's Law Dictionary defines
8 publication as generally the acts of declaring or
9 announcing to the public and alternatively as the
10 offering or distribution of copies of the work to
11 the public by faxing advertisements to the
12 claimants as alleged in the complaint. Dandy-Jim
13 published the advertisements by communicating
14 information to the public and distributing copies
15 of the advertisements to the public.

16 Other cases are cited for the
17 proposition that transmitting an unsolicited fax
18 indeed involves a public act by the sender, but
19 the act is thought to violate the recipient's
20 privacy.

21 The Court in Park University
22 Enterprises, Inc. v. American Casualty Company of
23 Reading, Pennsylvania, 314 Fed. Supp. 2d., 1094,
24 the Court concluded that under the reasonable
25 person in a position of the insured standard,

1 publication could include the transmittal of the
2 material regardless of whether such transmittal
3 is to a third-party.

4 Other courts have held that because an
5 insurance company neglected to define
6 publication, the words must be construed broadly
7 and would include transmitting a facsimile to a
8 recipient.

9 Citing TIG Insurance Company v. Dallas
10 Basketball, 159 Southwest 3d., 234, for the
11 language that publications not limited to
12 utterance or disclosure to third-parties because
13 the policy did not define the term. The focus
14 here is on the policy language and how that
15 language can be interpreted by a reasonable
16 insured, not how it may be defined for the
17 purposes of any other statute.

18 Lastly, the exclusion for knowing
19 violation of rights of another exclusion, my
20 initial reaction is that it does not apply here.
21 The language provides that the personal and
22 advertising injury caused by or at the direction
23 of the insured with a notice, or rather the
24 knowledge that the act would violate the rights
25 of another or would inflict personal advertising

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injury.

The allegations in the complaint allow for the possibility that the defendant faxed the advertisements negligently, that is, without knowledge that the recipient did not consent to the advertisements, and without knowledge that it would inflict a personal and advertising injury, and moreover, leaving open that it was faxed without knowledge potentially of the law, the TCPA itself. The language doesn't state know or should've known, but it says knows.

Those are my initial reactions. It's a split decision. Who would like to go first?

MR. LEAVELL: I volunteer, Your Honor. Because in effect the initial reading you have on the second issue would require us to defend and would oblige you to deny the motion, so if that meets with your approval, I would --

THE COURT: All right. Any objection?

MR. OPPENHEIM: No.

THE COURT: All right. Go ahead.

MR. LEAVELL: All right. Thank you, Your Honor. I understand the Court's initial leaning, and I'll make an effort to turn the aircraft carrier around a bit here.

1 A couple of central points. Number one,
2 both the language, I respectfully submit, and the
3 context of the language in this policy make it
4 clear that this personal injury coverage is
5 applicable to the content of something that is
6 published that offends a personal privacy right,
7 not a business privacy right. And I appreciate
8 that the plaintiff names Isaac Sawyer first, but
9 it's also followed by the phrase, "d/b/a A-1
10 Security Locksmiths".

11 This would be a very different case if
12 this fax had gone to Mr. Sawyer's home and
13 allegedly offended his personal interest in
14 seclusion. This is a business that is the
15 alleged recipient of this fax, and it's a
16 business like all businesses that expects, indeed
17 hopes that people will communicate with it and
18 come and bother its seclusion. And we know that
19 from simple things like Yellow Pages and internet
20 ads.

21 I'm trying to think of a way to
22 demonstrate that, and I looked on the internet
23 this morning and saw that A-1 Security Locksmiths
24 has posted up on the internet under "Bizfind"
25 both its phone number and its fax number. This

1 is not an entity that has an interest in
2 seclusion such that it is offended by the receipt
3 of faxes. It publishes its fax number to the
4 public as a whole inviting them to communicate
5 with the business.

6 THE COURT: Don't we start with it's not
7 an entity at all, it's nothing. It's Mr. Sawyer.
8 It's not a partnership, it's not a corporation,
9 it's not a limited liability corporation. It's
10 nothing. It's Mr. Sawyer saying this is what I
11 do -- do my business under. I want -- It's a
12 catch phrase, catchy little name instead of
13 Sawyer isn't really exciting, I'm going to call
14 myself this. Two Guys With a Truck. And it's
15 Tom and Fred.

16 MR. LEAVELL: Well, Tom and Fred have a
17 personal private life at their home, but when
18 they enter into a business organization and
19 advertise it, and expect the public to walk in or
20 phone in or fax in information that pertains to
21 the operation of the business, it's an entirely
22 different matter.

23 I would agree with your assertion had
24 this plaintiff been merely listed as Isaac
25 Sawyer, but it's Isaac Sawyer d/b/a A-1 Security

1 Locksmiths, and it's A-1 Security Locksmiths as a
2 business that received a fax at a publicly stated
3 fax number by which the business like many
4 invites people to use their fax machine.

5 So I appreciate this is a business, a
6 sole proprietorship that has in the eyes of the
7 law its corporate form is a person, but the
8 interest that's at issue in this case is not the
9 personal interest of Mr. Sawyer. It's his
10 business interest as A-1 Security Locksmiths.
11 And that makes the analysis quite different,
12 particularly in the context of the definitions of
13 the covered personal injury offenses that we see
14 in the policy.

15 And that's why I believe that the
16 Pennsylvania court in Melrose (phonetic) is so
17 significant here. We cited that in our brief.
18 This is a district court case that does an
19 encyclopedic review of the different strains of
20 thought on this personal injury coverage.

21 It notes the Illinois state law decision
22 in Valley Forge at the Court of Appeals level, it
23 notes American States and Websold, and it sides
24 with them on very loose and persuasive language.

25 It does a remarkable job of

1 encapsulating all this case law out there, and it
2 concludes, and this is at page 502, that, quote,
3 "The offenses enumerated in this provision
4 clearly relate to the contents of the covered
5 material. Defamation, disparagement, and
6 misappropriation all focus on the message
7 contained in the covered material.

8 All of these offenses address the
9 message conveyed rather than the method of
10 conveyance. The Travel 100 complaint does not
11 raise any issues regarding the content of the
12 faxes sent. Instead focusing on the depleted
13 resources that resulted from the unauthorized
14 faxes.

15 Although the Travel 100 complaint
16 continues a claim -- contains a claim under the
17 TCPA, that statute addresses the privacy interest
18 in being left alone, which is not the privacy
19 interest addressed in the policy.

20 Accordingly the advertising injury
21 provision does not cover the sending of
22 unsolicited faxes because Melrose's alleged
23 actions do not fall within the scope of the
24 policy's coverage for invasions of privacy,"
25 close quote.

1 Melrose does look very carefully at both
2 strains of thought here, and it looks at the
3 context of the policy which is what Wisconsin law
4 requires us to do. We addressed in our brief
5 that the admonition that policies are to be
6 construed as a whole and that they're to be
7 construed as to give meaning to each word and
8 it's inescapable that comparing the definition 14
9 D. to 14 E. that disparagement and defamation
10 that's covered here pertains to an organization's
11 goods, a business, an organization as well as a
12 person's goods.

13 But in subsection E., material that
14 violates a person's right of privacy is a covered
15 offense here. A person, not an organization.
16 Not a business. And that's the contextual clear
17 intent of this policy language.

18 THE COURT: But the business doesn't
19 exist independent of Mr. Sawyer.

20 MR. LEAVELL: It does. It does in the
21 eyes of the reasonable insured, and here's how.
22 The business has its own address, it has its own
23 phone number, it has its own fax number. It has
24 an existence to the extent it advertises to the
25 public, and reasonable members of the policy

1 buying public recognize that when they are in
2 business.

3 They have to go buy a business liability
4 policy because that is a separate existence from
5 their personal life. They buy personal policies
6 like homeowners policies or personal auto
7 policies to cover the personal side of their
8 life, and in this instance Mr. Sawyer's not
9 chosen to incorporate his business, a choice he
10 made about corporate form, but that doesn't mean
11 he as an objective, reasonable person thought
12 that everything he did as a business was the same
13 thing as conducting his life as a private person.

14 If they were merged in that sense from a
15 policy interpretation sense, there would be no
16 reason at all for him to buy a business policy
17 because he's a person. And if that's
18 dispositive, all he needed to buy was a personal
19 policy, not a business owner's policy, and
20 that -- and that's why this coverage and the
21 context of it is so important not because of
22 the -- whether this guy's a person or whether
23 he's doing business as something but because
24 there are risks involved that policy premiums are
25 paid for, they're different.

1 And if we also know that this business
2 could not have had a privacy invasion as a result
3 of receiving this fax because the fax on its face
4 is a benign advertisement.

5 I brought a copy of it to remind us of
6 what -- what this whole fight is all about. It
7 is a one page, eight and a half by 11-inch fax
8 that advertises Atlas Heating & Sheet Metal
9 Works. It says nothing about Isaac Sawyer, it
10 says nothing about A-1 Security Locksmiths, it
11 says nothing that any reasonable person would
12 construe to be an invasion of their right of
13 privacy.

14 This is a different issue from whether
15 Mr. Sawyer is suing as a person or suing as a
16 business entity. This is a question of whether
17 on its face this could even be said to be, as the
18 policy requires, a written publication of
19 material that violates a person's right of
20 privacy. Nothing in this material violates a
21 person's right of privacy. It's an advertisement
22 of Atlas.

23 THE COURT: But it's not the secrecy arm
24 of privacy isn't violated, and nobody's claiming
25 that. It's the seclusion right of privacy that's

1 being argued as having been violated.

2 MR. LEAVELL: That's true, that's being
3 argued in the face of Wisconsin law statute
4 995.50 that supplies a definition to the right of
5 privacy in the invasion of right of privacy.
6 This statute is not contained in the common law
7 or the statutory law of Ohio or Florida or the
8 other states that are relied upon here by
9 plaintiff.

10 Those states as we pointed out in our
11 reply brief recognize a tort called invasion of
12 seclusion. There's been nothing presented to
13 this court in any of the briefing to suggest that
14 Wisconsin recognizes a tort of seclusion. And I
15 submit to you that as powerful as the dictionary
16 is, the state law defines what is an invasion of
17 privacy. That's what we would expect an
18 objectively reasonable insured who buys the
19 policy to understand the phrase "invasion of
20 privacy" to mean, how their own state law defines
21 it.

22 THE COURT: But they're making a claim
23 under a federal statute that grants them a right
24 of privacy, and a reasonable insurer is hoping to
25 have all privacy invasions insured against, not

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just those limited by the definition in the State of Wisconsin.

MR. LEAVELL: Well, make no mistake, the underlying complaint doesn't allege a privacy violation. It alleges strict liability for violation of the federal law of TCPA, the simple act of the fax being received at the locksmith job.

There's nothing in the plain language of that complaint that alleges anything about privacy being invaded. Nor does it say anything about seclusion being invaded. This is a strict liability claim because the fax got received over at the locksmith's place.

THE COURT: But it's the TCPA that defines what the right is. And uniformly all the cases seem to say that what it creates is a right of privacy and a right of privacy, the secrecy and a right of privacy, well, to seclusion predominantly under its provisions.

MR. LEAVELL: Respectfully, Your Honor, I have to disagree, and we've cited a number of cases, and I already talked about Melrose, the federal court in Pennsylvania. The Seventh Circuit in Websold, which the Court's already

1 addressed, is applying Iowa law. And it cited
2 Iowa rules of policy construction that mimic
3 precisely the rules of policy construction in
4 Wisconsin.

5 And Websold had no trouble concluding
6 that in Iowa, this is not a TCPA violation, is
7 not a seclusion violation that invokes the
8 liability coverage under personal injury
9 coverage, and there are other cases cited in our
10 brief that hold that way. There are other cases
11 going the other way too. We readily acknowledge
12 that.

13 This is a blank slate for you in the
14 sense that there's no compelling Wisconsin
15 precedent on point, but we submit to you that
16 Websold, which has not been rejected by Iowa
17 state Supreme Court, and Melrose, which is still
18 the law in Pennsylvania, are more persuasive on
19 this issue because they look at questions like
20 does a business really have a right to a
21 seclusion when it advertises itself to the public
22 and expects and hopes they come and talk with it
23 or bother it with faxes?

24 And it also -- these cases also go to
25 this issue of publication, and -- and Websold has

1 an excellent discussion on it that says
2 publication is implicated only where the relevant
3 concern is secrecy. One can violate another's
4 right to seclusion without publicizing anything.

5 THE COURT: But the problem that I have
6 with the Websold analysis is it's not looking at
7 the language of the policy, which is ambiguous.
8 It's going beyond that to say that privacy
9 doesn't include seclusion because businesses
10 aren't perceived to have that right.

11 Get back to irrespective of anything
12 else that Mr. Sawyer isn't the business, he's an
13 individual who's operating the business, and so
14 there's no entity other than him personally who's
15 being invaded. But over and above that, it's
16 not -- the court doesn't seem to be looking at
17 the language of the policy, it's looking and then
18 going to what's -- what's the general meaning of
19 an undefined term?

20 And that's what Wisconsin law as I read
21 it to say generally not in this specific areas
22 you get to do whatever you want as the insurer,
23 you can write a policy to exclude everything and
24 anything you want, but you have to be clear and
25 specific in your language, and if you're

1 ambiguous, you get to go back and write it
2 afterwards for other people.

3 But we have to look at what's -- what's
4 the common usage, meaning of the language as used
5 in the policy.

6 MR. LEAVELL: Your Honor, I again have
7 to respectfully disagree.

8 THE COURT: Sure.

9 MR. LEAVELL: And here's what I request
10 of you. Again, a very careful review and reading
11 of Websold because I submit to you that it indeed
12 is actually applying the language of the policy.
13 At page 550 and 551 it discusses the implication
14 of the word "publication" in the defined offense
15 under the policies, definition of personal
16 advertising injury.

17 And what Websold is concluding there at
18 page 550 to 551 is that to give meaning to the
19 word "publication", this could not be a seclusion
20 of facts because publication, the act of
21 publication is irrelevant to the seclusion
22 violation rights if that's the case.

23 And it talks about how one who knocks
24 repeatedly on another's door late at night or
25 takes photographs of them is violating their

1 seclusion right even though no publication has
2 occurred, and that's common sense.

3 So why is Websold looking at the word
4 "publication"? Because that word appears in the
5 definition of the covered offense. It says, oral
6 or written publication of material that
7 violations of -- violates a person's right of
8 privacy.

9 If this covered offense were to have
10 been a seclusion right covered offense,
11 publication as a word is an element wouldn't even
12 be in there because publication is not needed to
13 make out a seclusion right violation.

14 And again, I return to something I
15 mentioned a moment ago, the complaint, the
16 underlying complaint remembering the duty to
17 defend analysis, compare the allegations of the
18 complaint. The allegation of the complaint is
19 not that the act of faxing violated either
20 Mr. Sawyer or A-1's right of seclusion, it is
21 simply that it violated the standard in the TCPA
22 that invokes strict liability for the sending of
23 faxes.

24 It's not an allegation that there's any
25 damage owed for the seclusion violation like one

1 would see in a true seclusion violation case
2 where a plaintiff said I got harassed by my
3 neighbor knocking on my door or taking pictures
4 of me without authorization. And my right to be
5 secluded without interference has been offended
6 and I'm entitled to damages for it.

7 I don't want to try your patience on
8 this, but --

9 THE COURT: Oh, I'm pretty patient.

10 MR. LEAVELL: Okay. Thank you.

11 THE COURT: Go ahead.

12 MR. LEAVELL: On the exclusion, Your
13 Honor, if as the plaintiff argues there is this
14 violation of seclusion at issue here and if
15 Wisconsin recognizes some seclusion right as a
16 right of privacy that can be invaded, and clearly
17 that -- any act that intrudes upon that would be
18 a knowing violation of it. We're construing this
19 from the position of the reasonable insurer, and
20 so if the reasonable insurer is invading
21 someone's privacy, they know that when they do it
22 because they have to recognize the privacy to
23 know they're invading it.

24 And that's what happened here, so
25 plaintiff argues. This fax came through without

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authorization, and their argument is under the TCPA, the law we all must presume to know, that an unauthorized fax is something that invades someone's seclusionary right.

THE COURT: I could buy that if you had the knew or should've known language in there, and so when you say knew it violated, it's not a reasonable standard. It's the insured's knowledge under the circumstance.

And if you had should've known, then I think we get into everybody's presumed to know what the law is, and that you should've known if you were engaged in this conduct what would violate the laws, but by having knew in there, it leaves open that he didn't know it.

MR. LEAVELL: Well, the complaint again is a strict liability complaint. The underlying complaint we're assessing here. It doesn't say he didn't know he was doing this, and -- and it doesn't have to for TCPA liability, and so it's -- it's a simple, strict liability complaint.

And I can only say one's got to be presumed to know the law if one is a business and operates a fax machine that if you're going to be

1 held -- if you're insuring for an invasion of a
2 privacy right that includes a seclusion right,
3 presumably you have to know that you are
4 offending that right when you violate a federal
5 law in a faxing that's unauthorized.

6 THE COURT: Okay. Anything else?

7 MR. LEAVELL: No, Your Honor. We rest
8 on the briefs. I feel that I've done my best to
9 address the issues you've raised, perhaps not
10 persuasively enough, but made --

11 I urge upon the Court the web -- the
12 Melrose case because it makes the very choice you
13 have to make in this decision, which line of
14 thought on the personal injury coverage is the
15 most persuasive.

16 And I submit that Wisconsin's law
17 defining privacy rights is different from the
18 laws in those other states where coverage has
19 been found and that the law on privacy is a
20 reasonable insured's reference source for
21 understanding what's meant by the policy's
22 covered offense of invasion of a person's right
23 of privacy.

24 THE COURT: Thank you. Plaintiff have a
25 response?

1 MR. OPPENHEIM: I do. I'd like to for
2 obvious reasons address the property damage point
3 principally, and then I'll circle back and
4 address a couple points with respect to personal
5 and advertising.

6 THE COURT: Except for the fact I did
7 respond to it because I never took a position on
8 property damage as to whether it actually existed
9 or not.

10 MR. OPPENHEIM: Okay.

11 THE COURT: Because I concluded that
12 there was neither an occurrence nor -- or it was
13 expected from the standpoint of the insured.

14 MR. OPPENHEIM: I should be more clear
15 then. Property damage coverage.

16 THE COURT: Okay.

17 MR. OPPENHEIM: In particular the issue
18 of occurrence. And I think that what is key to
19 remember, and this was the focal point of the
20 other argument as well, is that we are dealing
21 with what West Bend elected to put in its policy.
22 And the -- the policy offers coverage for
23 property damage defined as physical injury to
24 tangible property, including all resulting use of
25 that property.

1 Now, the word "injury" implies some
2 violation of right, and in this case we're
3 dealing with a situation where the same action
4 that leads to the same result in that a fax is
5 received, paper is used, a machine is tied up is
6 injurious if the circumstances of that usage are
7 circumstances that Congress said violates the
8 TCPA, but it's not injurious if it were in other
9 circumstances.

10 So when -- I think Your Honor was
11 absolutely right in focusing on what the causal
12 event here, but I think that the focus on the
13 causal event simply being the transmission of a
14 fax is too narrow because the transmission of any
15 old fax would not have caused any injury, it had
16 to be the transmission of a fax that was an
17 advertisement and that was unsolicited.

18 And so the complaint here leaves open
19 the possibility that the -- that Atlas did not
20 know that it did not have consent to send the
21 fax. And if, in fact, that is the case, then
22 Atlas believed that was doing something that
23 wasn't injurious, it was sending a fax with
24 consent. And therefore there would be no --
25 there was no property damage.

1 So the fact of property damage I think
2 is tied in to the fact that there actually was no
3 consent and that's why if there was a mistaken
4 belief in consent, the injury itself is
5 accidental.

6 Likewise the expected or intended injury
7 talks about property -- is tied to the property
8 damage definition. It's property damage the
9 defining term expected or intended from the
10 standpoint of the insured, and again there's a
11 belief and consent regardless of the fact that
12 the paper and toner obviously is expected to be
13 used, there's not expected to be any injury.

14 I think a good analogy, at least one
15 that's on my mind given the events of the last
16 week or so, is that if I tell my neighbor he can
17 use my snowblower and he goes and takes it from
18 my garage and uses it and returns it, I haven't
19 been injured. And if I tendered a claim to my
20 first party property carrier who issued me a
21 policy with the language of West Bend's policy, I
22 wouldn't have a claim for property damage based
23 on the use of my snowblower because I told my
24 neighbor he could use it.

25 Now, at the same time if my neighbor

1 because the blizzard was -- reduced visibility to
2 the extent that it did went to another -- the
3 garage of another house mistakenly and took
4 someone else's lawn mower -- or snowblower and
5 used it, then I would -- at that point there is a
6 claim for property damage because there was no
7 consent.

8 But I would submit that those facts
9 would be an accidental instance of property
10 damage, one that would be an occurrence under the
11 language of these policies because my neighbor
12 had a good faith belief that he had consent. I
13 told him he could use my lawn mower [sic], but
14 when he went ahead and went to what he thought
15 was my house and -- and took the wrong -- and
16 actually went to the wrong place and took the
17 wrong thing.

18 And that I think is a good analogy here
19 to the extent that Atlas did have a good faith
20 belief it had consent from the recipients of the
21 faxes. And given that the standard in Wisconsin
22 is that where a complaint raises any potential
23 for coverage, there's a duty to defend, this
24 complaint I think raises that potential and
25 therefore triggers a duty to defend under the

1 property damage provision as well as the personal
2 advertising injury provision.

3 As to the notion, briefly, whether there
4 is property damage at all, again, I think we're
5 tied to the definition of what property damage
6 is, which is simply physical injury to tangible
7 property or loss of use. There's no minimal
8 dollar value placed on that definition, and I
9 think as every court that has looked at this has
10 concluded, that standard is met here.

11 THE COURT: All right. Unfortunately
12 I'm going to have to cut you off. We have strict
13 budgetary constraints. We have to end before
14 noon so that my staff doesn't get any overtime.
15 I can have you come back at 1:15 this afternoon
16 to continue and finish, but I can't let you
17 continue at this point. Everybody --

18 MR. OPPENHEIM: May I make one point
19 that will be less than one minute, and then I
20 will be finished?

21 THE COURT: Okay. If that's where
22 you're going to go.

23 MR. OPPENHEIM: Because I believe I'm
24 finished discussing property damage, and the only
25 things that I really wanted to point out with

1 regard to advertising injury is that counsel
2 relied at length on the brethren -- decision out
3 of Pennsylvania, and that decision turned on a
4 difference in policy language from what we are
5 dealing with.

6 In particular the advertising injury
7 provision involved in that case only had four
8 items in the list of -- the grocery list of
9 things that fall within advertising injury, and
10 the court based its analysis on those four items.

11 Here 14 C. involves invasion of the
12 right of private occupancy, which is not a
13 content based offense, it is not a secrecy based
14 offense, so to the extent that the Court finds
15 credible at all the exercise in reading the tea
16 leaves in terms of trying to limit plain language
17 to secret -- secrecy over seclusion, 14 C., I
18 think, is another reason why we can't do that.

19 Thank you, Your Honor.

20 THE COURT: Mr. Leavell? Do you need
21 time to argue?

22 MR. LEAVELL: Could I -- I can be very
23 brief, I think, to address his point.

24 THE COURT: Okay.

25 MR. LEAVELL: Thank you, Your Honor. I

1 appreciate it. Very important to read the
2 provision that says the -- that define a covered
3 offense -- offense here as material that violates
4 a person's right of privacy material. It's not
5 act, it's not conduct. It's material.

6 Nothing about this material violates
7 anyone's sense of privacy, and that's what the
8 court was saying in Melrose just discussed by
9 opposing counsel. The content of the material is
10 inoffensive. No reasonable person could find it
11 offensive. That's why it could never be a
12 privacy right violation under Wisconsin law.
13 Because as we briefed, that's the threshold for
14 privacy right violation. It must be offensive,
15 highly offensive to a reasonable person.

16 This policy definition of covered
17 offense doesn't say any conduct that violates the
18 rights of privacy, and that's what they're
19 complaining about, a TCPA violation is conduct, a
20 fax, not the material contained within the fax.
21 This is not a covered offense. Thank you.

22 THE COURT: All right. The Court is
23 going to affirm my initial reaction for the
24 reasons stated on the record.

25 The only brief thing that I will respond

1 to is that privacy is defined under the Wisconsin
2 statute, and that's not the total defining
3 concept of privacy for the purposes of the
4 policy. If it was going to be limited to that,
5 it could've been defined by a reference to the
6 statute, and the fact of the matter is that
7 privacy has a broader definition as discussed in
8 the variety of cases including both the privacy
9 and the secrecy and seclusion rights, and
10 therefore the policy is ambiguous as to what it
11 intended to cover under the circumstances and
12 therefore that statute doesn't control.

13 So I will affirm my initial reaction for
14 the reasons stated on the record. I will grant
15 the plaintiff's motion for declaratory judgment,
16 finding overall that there is a duty to defend.
17 I don't think I can go as far as a duty to
18 indemnify, however, to the extent that if it's
19 found factually in the underlying case that the
20 plaintiff actually knew that there wasn't
21 permission and consent, there wouldn't be
22 coverage and wouldn't be a duty -- there wouldn't
23 be a duty to indemnify, at least at the moment
24 there's a duty to defend.

25 And I will deny the defendant's motion

1 for declaratory judgment for the reasons stated
2 on the record.

3 If the plaintiff would submit a proposed
4 order under the five-day rule.

5 MR. OPPENHEIM: We will, Your Honor.
6 Thank you.

7 THE COURT: Thank you.

8 MR. LEAVELL: Thank you, Your Honor.

9 MR. BARR: Thank you, Your Honor.

10 * * *