
Insurance Coverage for Statutory and Liquidated Damages and Attorney Fees: Policyholder and Insurer Perspectives

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Andrew L. Margulis, Partner, **Ropers Majeski Kohn Bentley**, New York

William T. Um, Partner, **Jassy Vick Carolan**, Los Angeles

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***INSURANCE COVERAGE FOR
STATUTORY AND LIQUIDATED
DAMAGES AND ATTORNEY FEES***

February 26, 2019

Andrew L. Margulis | William T. Um

Introductions



Andrew L. Margulis
Partner
Ropers, Majeski, Kohn & Bentley
amargulis@rmkb.com
646.454.3242



William T. Um
Insurance Recovery Partner
Jassy Vick Carolan LLP
wum@jassyvick.com
310.870.7048

Agenda

- *Types of cases and trends*
- *Policy language at issue*
- *Recent cases favoring coverage*
- *Liquidated Damages*
- *Penalties v. Damages: Coverage Implications*
- *Impact of exclusions for statutory violations*
- *Coverage for opposing counsels' attorney fees*
- *Audience Q&A*

Types of Cases

- TCPA/FACTA/FCRA: “Damages” per violation (\$500, \$1,000); increased amounts for willful violation; or “actual damages”
- Song Beverly (CA), and similar statutes: “Penalty” of up to \$250 for first violation, \$1,000 each subsequent violation
- Privacy/Data Breach Cases – need to allege “damage”
 - *CA Invasion of Privacy Act - \$5,000 per class member*
 - *Federal Wiretap Act - \$100/day per violation, up to \$10,000 per class member*
 - *Federal Stored Communications Act – minimum statutory “damages” of \$1,000/person*

Policy Language

- CGL Policy: coverage for “damages”

- Professional Liability Policies:
coverage for “Loss,” defined as:
 1. “damages, settlements, judgments”

v.
 2. “monetary settlements and monetary judgments”

Recent Cases—Is the Tide Turning?

- *Standard Mut. Ins. Co. v. Lay*, 989 N.E.2d 591 (Ill. S. Ct., May 23, 2013).
- *Columbia Cas. Co. v. HIAR Holding LLC*, 411 S.W.3d 258 (Mo. 2013).
- *Universal Undwrs. Ins. Co. v. Lou Fusz Auto. Network*, 401 F. 3d 876 (8th Cir. 2005).
- *Maxum Indemnity Co., et al. v. Eclipse Manufacturing Co., U.S.D.C., Northern District of Illinois (Eastern Division)*, Case No. 06 C 4946.
- *Yahoo! Inc. v. National Union*, USDC N.D. CA., 17-cv-489 (2018)
- *But see: ACE American Ins. Co. v. Dish Network, LLC*, 883 F.3d 881 (10th Cir. 2018)
- *And: AXIS Reins. Co. v. Northrup Grumman Corp.*, USDC N.D.CA., 17-cv-8660 (2018)

Liquidated Damages

GENERAL RULE:

Amount of liquidated damage must bear a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced

To Compensate v. To Penalize?

Statutory “damage” amount: to compensate plaintiff or to penalize violator to prevent future violations?

Are amounts in “reasonable proportion” to the probable loss? (EX: TCPA: \$500—cost of ink? Cost of call?)

Taxes, Fines, Penalties

- *Flagship Credit Corp. v. Indian Harbor Ins. Co*, 2012 WL 2299484 (5th Cir. 2012). Addressing statutory damages under Texas Business and Commerce Code
- Policy defined “Loss” to exclude “fines, penalties or taxes imposed by law.”
- Court held that since “fines” and “taxes” are paid to a government, “penalties” only includes amounts paid to government since words were grouped together

Damages ≠ “Damages”?

Bank of the West v. Superior Court, 2 Cal.4th 1254 (1992)

Cal. B&P Code 17200 awards restitution and not “damages” as used in insurance policy

Defense Costs

- CGL v. non-CGL policies
- Duty to defend v. coverage for “Loss”

Exclusion for Statutory Violations

Recent policy exclusion: no coverage for “violation of statutes in connection with sending, transmitting or communicating any material or information”

Interline Brands, Inc. v. Chartis Spec. Ins. Co., 2014 US App. LEXIS 6945 (11th Cir. April 15, 2014.) Upheld exclusion, no coverage available for TCPA violation

Coverage for Opposing Counsels' Attorney Fees

- Coverage in Addition to Policy Limits as “Supplementary Payments” under GL Policy
 - *Does such an Award Qualify as “Costs Taxed” Against the Policyholder when:*
 - (1) awarded pursuant to fee-shifting statute?
 - (2) awarded to class counsel in the absence of a fee-shifting statute?
 - (3) paid as a part of a class action settlement?
- Coverage within Limits as “Damages”?