IN THE SUPREME COURT OF FLORIDA

NO. SC08-2068

MICHAEL PENZER, as assignee of SOUTHEAST WIRELESS, INC.,
Plaintiff/Counter-Defendant/Appellant,

v.

TRANSPORTATION INSURANCE COMPANY,
Defendant/Counter-Plaintiff/Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No.: 07-13827

BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

CICLA (formerly known as the Insurance Environmental Litigation Association) is a trade association of major property and casualty insurance companies.[1] CICLA has filed *amicus curiae* briefs on behalf of insurance companies in numerous state and federal cases throughout the United States. CICLA has previously appeared as *amicus curiae* before Florida courts.[2] CICLA's member companies underwrite a sizeable portion of the general-liability insurance in Florida, as well as nationwide, and will be affected by any ruling in this case.

As an association of insurance companies, CICLA is intimately familiar with the issue before the Court. CICLA'S expertise on this issue uniquely qualifies it to assist the Court in reaching a thorough and balanced decision in this case. As an *amicus,* CICLA will discuss the large body of conflicting case law from other jurisdictions addressing the issue of advertising-injury coverage for liability under

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1 This brief is filed on behalf of the following CICLA member companies: AIG Member Companies; Liberty Mutual Insurance Company; The Travelers Indemnity Company; Arrowpoint Capital Corp.; Chubb & Son, a Division of Federal Insurance Company; TIG Insurance Company; and Selective Insurance Company of America.

2 *See Indust. Indem. Ins. Co. v. Crown Auto Dealerships, Inc.*, 935 F.2d 240 (11th Cir. 1991) (Fla.); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007); *Macola v. Gov't Employees Ins. Co*., 953 So. 2d 451 (Fla. 2006); *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2005); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co*., 845 So. 2d 161 (Fla. 2003); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co*., 711 So. 2d 1135 (Fla. 1998); *Liberty Mut. Ins. Co. v. Lone Star Indus, Inc*., 648 So. 2d 114 (Fla. 1994); *Rushing Co. v. Assurance Co. of Am., Inc.*, 864 So. 2d 446 (Fla. 1st DCA 2003).

the Telephone consumer Protection Act ("TCPA"). CICLA's brief will analyze the well-reasoned cases and the cases with flawed reasoning in an effort to assist the Court in determining which of those cases are worthy of its consideration as persuasive authority. As *amicus curiae*, CICLA will also address the public-policy implications of the Court's decision.

SUMMARY OF ARGUMENT

Advertising-injury coverage is said to be offense-based because the injury complained of must arise from actionable conduct that consists of the elements that make up one of the policy's covered offenses. *See, e.g.*, *Penzer v. Trans. Ins. Co.*, 545 F.3d 1303, 1305-06 (11th Cir. 2008) (stating that policy's advertising-injury coverage applies to "injury *arising out of*" a covered advertising offense) (emphasis added). It is not enough that a given outcome takes place, like libel or slander or an invasion of privacy. The injury must also arise from conduct that satisfies the specific elements of one of the policy's enumerated offenses. If it does not, no coverage exists for the injury.

The offense at issue here consists of these elements: "Oral or written publication of material that violates a person's right of privacy." *Penzer*, 545 F.3d at 1305 & 1306. The policy therefore requires that the claimed injury arise out of an offense consisting of (1) publication of; (2) material that violates a person's right of privacy.

A sizeable body of case law has emerged on both sides of the issue of whether liability under the TCPA for so-called "blast-faxing" is covered under identical or similarly worded offenses. Through this brief, CICLA seeks to assist the Court in deciding which among the sizeable body of cases is worthy of the Court's consideration as persuasive authority and to discuss the public-policy implications of the Court's decision.

In general, CICLA urges the Court that the better-reasoned cases are those that consider the offense elements in their context as a whole, while the cases with flawed reasoning are those that analyze the offense one word at a time, without regard for whether the meaning given to one isolated word or phrase is reasonable when read in conjunction with the remainder of the clause. Even the pro-coverage cases agree that the term "material" refers to "the information contained in an advertisement." *Valley Forge Ins. Co. v. Swiderski Elec., Inc.*, 860 N.E.2d 307, 317 (Ill. 2006). The policy requires that it be the "*material that violates* a person's right of privacy." The pro-coverage decisions fail to apply that requirement because they inquire only into whether "material" is *in any manner* involved.

The better-reasoned decisions are those recognizing, among other things, that in a TCPA case: (1) it is *the means of transmission* – i.e., facsimile – not the advertisement's material content, that allegedly violates the recipient's right of privacy; and (2) the right of privacy allegedly involved in a TCPA case – the right

of seclusion – is not violated by an advertisement's material content; therefore, the policy's reference to "right of privacy" cannot be to the right of seclusion. Instead, the policy refers to the privacy-based right of secrecy, because it is that right of privacy that can be violated by an advertisement's material content. These decisions reach the grounded conclusion that TCPA liability is not within the offense of "[o]ral or written publication of material that violates a person's right of privacy."

As discussed in detail below, the pro-coverage cases each suffer from the same or very similar analytical flaws, while the cases finding no coverage apply reasoning that takes into account not only the meaning of the words in the policy, but the overall context in which they appear. CICLA therefore urges the Court that the latter cases deserve its consideration as persuasive authority.

ARGUMENT

I. THE BETTER-REASONED CASES HOLD THAT A TCPA CLAIM IS NOT WITHIN ADVERTISING-INJURY COVERAGE.

The pro-coverage line of cases each suffer from one or more of several analytical shortcomings: (1) they fail to apply the policy's material-that-violates requirement; (2) they observe that one (undisputed) meaning of the term privacy is the right to be left alone (i.e., seclusion), but they overlook the fact that in a TCPA claim, the right of seclusion is allegedly violated by the means of transmission, not by what the policy actually requires for coverage – a privacy violation by the

advertisement's material content; and (3) they observe that the term publication can mean dissemination to the public, but they overlook the fact that (i) dissemination to more than one person is irrelevant to the alleged privacy interest in seclusion, because each person's alleged right of seclusion is entirely unaffected by additional transmissions. The injury arises out of the transmission to them, not out of the transmission to the general public. For a TCPA claim, therefore, defining publication as dissemination to the public cannot satisfy the policy requirement of "*injury* arising out of" a covered offense; and (ii) dissemination to more than one person is not a necessary element of TCPA liability; therefore, defining publication as dissemination to the general public does not contribute to the conclusion that a TCPA violation is an "offense" within the meaning of the policy.

A. Under the TCPA, the illegal means of transmission, not the advertising material, violates the recipient's alleged right of privacy; therefore, the policy's material-that-violates requirement is unmet.

The Eleventh Circuit's unpublished decision in *Hooters of Augusta, Inc. v. American Global Ins. Co.,* 157 F. App'x 201, 2005 WL3292089 (11th Cir. 2005) is a good starting point for the material-that-violates shortcoming. Analyzing identical policy language, the appellate court agreed with the district court that TCPA liability is within coverage because "the fax advertising [was] a '*publication' that violated* 'a person's right to privacy' for purposes of the policy's

advertising-injury coverage." *Id.* at 203 (emphasis added). The emphasized words show the missing element in the court's reasoning. The policy requires that it be the *material* that violates a right of privacy. But the court skipped that requirement and found coverage, reasoning that "[t]he act of *transmitting* an unsolicited fax . . . is thought to violate the recipient's privacy," without regard to whether the transmitted *material* violated the recipient's right of privacy. *Id.* at 207 (emphasis added).

While the *Hooters* analysis falls short because it erroneously focuses on transmission, other decisions have a similar analytical shortcoming because they focus on the mirror of transmission – receipt. In *Park University Enterprises, Inc. v. American Cas. Co.*, 442 F.3d 1239 (10th Cir. 2006), for example, the Tenth Circuit skipped past the material-that-violates requirement and found a duty to defend by reasoning that "*receiving* the [fax] can result in an invasion of privacy." *Id.* at 1251 (emphasis added); *see also Valley Forge*, 860 N.E.2d at 315 (stating that "*receipt* of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion") (emphasis added); *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F.Supp.2d 836, 847 (N.D. Tex. 2003), *aff'd*, 96 F. App'x 960 (5th Cir. 2004) (reasoning that TCPA plaintiffs "allege that the *receipt* of the unsolicited advertisements violated their right to privacy") (emphasis added). Although transmitting facsimiles can be a TCPA violation, and receipt of

those facsimiles are allegedly a privacy injury, those things do not satisfy the policy requirement that it must be the "material that violates a person's right of privacy" before the insured's conduct qualifies as a covered offense.

The California Court of Appeals recently addressed this very analytical shortcoming. *See ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal.Rptr. 3d 786 (Cal. Dist. Ct. App. 2007).[3] The court recognized that the analysis in *Hooters* – i.e., finding coverage based upon a "*publication* that violates" a person's right of privacy – cannot be sustained because it fails to apply the *material*-that-violates requirement: "[M]aking known written material is not enough to trigger coverage. Coverage requires an additional element, the making known of 'material' that violates a person's right of privacy." *Id.* at 795. The court further recognized that this additional element means that "the *content* of the 'material' violates someone's right of privacy . . . ." *Id.* (emphasis in original). This is so because "the word '*that*' in '. . . material *that* violates . . .' can reasonably be interpreted only to refer to 'material.'" *Id.* at 796 (emphasis added). Therefore, "this particular advertising offense only refers to '*material that violates* an individual's right of privacy,' and does not refer to a '*making known that violates*

[3] The policy language in *ACS* differs slightly from the language involved here in that it uses the term "making known" instead of "publication." Both policies, however, require "material that violates" a right of privacy, and it is the latter requirement that is the point of this discussion. A discussion about the publication requirement appears below.

an individual's right of privacy.'" *Id.* (emphasis added); *see also St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.*, 405 F.Supp.2d 890, 895 (N.D. Ill. 2005) (ruling that "[a]s written, the phrase 'violates a person[']s right of privacy' refers *to the content* of the material published, not from the publishing itself") (emphasis added). In short, *ACS* is the better reasoned and more persuasive authority because it applies all of the policy's required elements.

As the *ACS* court recognized, "material" plainly refers to content. In fact, the Illinois Supreme Court – in a decision finding that an insurer providing identical advertising-injury coverage had a duty to defend an underlying TCPA suit – also concluded that "material" refers to an advertisement's informational content: "This [dictionary] definition [of 'material'] is quite broad and clearly encompasses advertisements, as *the information contained in an advertisement* is intended to serve as the basis for arriving at a judgment regarding the items advertised." *Valley Forge*, 860 N.E.2d at 317 (emphasis added). Thus, the *Valley Forge* court implicitly understood what is plain from the wording of the material-that-violates provision: In an advertising context, the term material cannot be separated from informational content. Yet the *Valley Forge* court concluded that to gain the benefit of a material-that-violates requirement, an insurer must repeat what is plain within the meaning of the phrase, by changing the clause to read publication of "material, the content of which violates . . . ." *Id.* at 318; *see also, Terra Nova Ins.*

Co. v. Fray-Witzer, 869 N.E.2d 565, 574 (Mass. 2007) (applying New Jersey law and using identical reasoning).

But requiring such redundancy cannot withstand reasoned analysis. As a starting point, redundancy is not required under insurance law. The material-that-violates provision is plain as stated because, as the *ACS* court recognized, the phrase "that violates" can reasonably refer back only to "material," a term that cannot be separated from its informational content. Moreover, dislodging the term "material" from its moorings of content cannot, in any event, satisfy the policy in a TCPA context because it is the *means of transmission*, not the advertising material, that violates the statute. The recipients could have received word-for-word identical advertising material by any of multiple other means – like mail, door-to-door delivery, windshield placement, handout, etc. – and have no TCPA claim. It is the means of transmission (an unsolicited fax), not the advertising material, that violates the TCPA and thereby gives rise to an injury to the alleged privacy right of seclusion. The policy, however, provides coverage only for an offense in which the *material* violates the right of privacy. Again, the better-reasoned decisions recognize and account for that fact, making them worthy sources for this Court's consideration. *See, e.g., American States Ins. Co. v. Capital Assocs.*, 392 F.3d 939, 943 (7th Cir. 2004) (stating that the TCPA "condemns a particular *means* of communicating an advertisement, rather than the contents of that advertisement –

while advertising-injury coverage deals with informational content") (emphasis added);[4] *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 641 (4th Cir. 2005) (stating that the underlying TCPA action "is concerned with the *manner* of the advertisement. In contrast, the advertising-injury coverage offense part of the policies is exclusively concerned with those types of privacy [that] . . . are implicated by *content* of the advertisements") (first emphasis added).

Nor is the material-that-violates requirement satisfied just because the TCPA applies only to advertising, as some courts have ruled. *See, e.g., TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238 (Tex. App. 2004) (noting that "[b]ut for the fact that the transmission contained advertising, the plaintiffs would not have been able to make claims under the Act"), *abrogated on other grounds by Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007). While the TCPA indeed applies to advertising fax transmissions, it further provides that it is not the advertising material, but the means of transmitting it, that violates the recipient's rights. The TCPA simply does not regulate advertising content, much less provide that it is the content that violates the recipient's rights (something the policy's material-that-violates provision requires for coverage). In fact, the

[4] The Seventh Circuit decided *American States* under *Erie* as a prediction of Illinois law. The Illinois Supreme Court, in *Valley Forge*, disagreed with *American States* and came to a contrary conclusion. This brief, however, is intended to assist this Court not with identifying controlling law in other jurisdictions, but with identifying sound legal analysis to reach a sound result.

TCPA's legislative history plainly states that the Act is not intended to regulate content at all, but instead is intended to regulate the *manner* in which advertising is transmitted.[5] Indeed, if an advertisement were transmitted by fax in violation of the TCPA, it would matter not if the flyer were printed in a language unknown to the recipient, thus making the advertising content incomprehensible. The transmission and receipt would be as much a TCPA violation in that situation as it would be if the recipient were able to read and understand the material. Neither circumstance would be within coverage, however, because the policy requires that it be the material that violates a right of privacy, and that requirement is not met in a TCPA case.

In sum, no "material that violates a person's right of privacy" is involved in TCPA cases. The only material involved is advertisements for such things as estate sales, bowling facilities, and cellular devices. The underlying plaintiffs allege not that the material violated their alleged right to privacy, but that the means of transmitting it did. The cases that recognize the distinction, and that

[5] *See* S. Rep. No. 102-178 (1991), at 4 ("The reported bill does not discriminate based on the *content* of the message. It applies equally whether the automated message is made for commercial, political, charitable or other purpose. The reported bill regulates the *manner* . . . of speech and the place (the home) where the speech is received. The Supreme Court has recognized the legitimacy of reasonable time, place and manner restrictions on speech when the restrictions are *not based on the content of the message being conveyed*.") (emphasis added).

apply the policy's material-that-violates requirement, are well reasoned and deserve this Court's consideration as persuasive authority.

B. When read in conjunction with the entire clause, the phrase "right of privacy" cannot reasonably mean the seclusion interest in privacy.

A related analytical shortcoming in the pro-coverage cases is isolation of the phrase "right of privacy" from the policy's material-that-violates requirement that modifies it. The Eleventh Circuit's decision in *Hooters* again provides a good starting point for this shortcoming. The *Hooters* court observed what everyone concedes – that "right of privacy" as a standalone term can include "the right 'to be let alone'" or "'the right to seclusion or solitude.'" 157 F. App'x at 205 (citation omitted). But the court overlooked the fact that the term "right of privacy" does not appear in the policy as a standalone term.[6] The policy's material-that-violates requirement modifies "right of privacy" and therefore must inform the latter's meaning. And the *Hooters* court's description of a recipient's right of seclusion in a TCPA context shows on its face the flaw in its reasoning that "right of privacy," *as used in the policy*, might mean "right of seclusion." The court described a recipient's TCPA right of seclusion as the right to be "free from intrusive and

[6] A good example of advertising-injury coverage using a standalone reference to rights of privacy is *Universal Underwriters Ins. Co. v. Lou Fusz Auto Network, Inc.*, 401 F.3d 876, 881-83 (8th Cir. 2005) (finding coverage for TCPA liability under policy providing advertising-injury coverage for unmodified, standalone offense of "invasion of rights of privacy," i.e., the policy had neither a publication nor a material-that-violates requirement).

unsolicited facsimile *transmissions*." *Id.* (emphasis added). Precisely! It is the form of transmission, not the advertising material, that violates a recipient's alleged right of privacy under the TCPA. Therefore, although "right of privacy" can have a standalone meaning of "seclusion," it cannot have that meaning in the insurance policy here because it does not stand alone; it stands in conjunction with an additional requirement that limits its meaning. And because the alleged privacy violation in a TCPA case arises from a prohibited form of transmission, not from the content of the advertising material, a TCPA violation is not an "offense" within the meaning of the policy. *Penzer*, 545 F.3d at 1305-06 (reciting coverage requirement of "injury arising out of" covered offense).[7]

The *Valley Forge* analysis goes further, but ultimately it begs the question because it assumes – incorrectly – that the TCPA provides that the advertising material, rather than the means of its transmission, violates a recipient's alleged seclusion interest. The court first reasoned that "right of privacy" includes an interest in seclusion. 860 N.E.2d at 317. The court extended that reasoning to conclude that the policy requirement of "material that violates a person's right of

[7] Other leading pro-coverage cases make the same analytical misstep. *See, e.g.*, *Park Univ.*, 442 F.3d at 1249 (discussing "right of privacy" in isolation from modifying language and agreeing that "'the plain and ordinary meaning of privacy *includes* the right to be left alone'") (emphasis added) (citation omitted); *Terra Nova*, 869 N.E.2d at 573 (discussing "right of privacy" in isolation from modifying language and stating that "*[o]n its face*, the use of the phrase 'right of privacy' does not evince a plain meaning that is limited in the manner in which the insurers contend") (emphasis added).

privacy" can "be understood to refer to material that violates a person's seclusion." *Id.* On the sole basis that a TCPA violation had occurred, the court therefore concluded that "the 'material' that [the insured] allegedly published, advertisements, qualifies as 'material that violates a person's right of privacy,' . . . ." *Id.* But the court's conclusory analysis obscures what is critically missing from it – that under the TCPA, the means of transmission, not the advertising material, provides the basis for the claim to an alleged intrusion upon seclusion. *See American States*, 392 F.3d at 943 (stating that TCPA "condemns a particular *means of communicating* an advertisement, rather than the contents of that advertisement – while an advertising-injury coverage deals with informational content") (emphasis added); *Resource Bankshares*, 407 F.3d at 641 (stating that underlying TCPA claim "is concerned with the *manner of the advertisement*" as opposed to its content) (emphasis added); *New Century Mort. Corp. v. Great North. Ins. Co.*, No. 05C2370, 2006 WL 2088198, at *6 (N.D. Ill. July 25, 2006) (finding no coverage for TCPA liability under nearly identical coverage, in part because "the policy contemplates injury arising from the content of the advertisement" but in a TCPA case "the injury comes from the means of publication"); *Brunswick Corp.*, 405 F.Supp.2d at 895 (finding no advertising-injury coverage for TCPA liability because under the policy "it is the content of the

material published that creates the injury"). The *Valley Forge* court's analysis required it to assume as true what cannot be sustained.

The cases finding no advertising-injury coverage for TCPA liability are better reasoned because they recognize that the policy's material-that-violates requirement modifies the phrase "right of privacy," and thereby limits its meaning to the privacy interest in secrecy. *See, e.g., American States*, 392 F.3d at 942 (stating that "structure of the policy strongly implies that coverage is limited to secrecy interests"); *Resource Bankshares*, 407 F.3d at 641 (stating that advertising-injury coverage "is exclusively concerned with those types of privacy . . ., which, like secrecy, are implicated by *content* of the advertisements) (emphasis in original); *ACS*, 53 Cal. Rprt.3d at 795 (stating that coverage applies only "to the invasion of 'secrecy privacy' . . ."); *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F.Supp.2d 488, 501 (E.D. Pa. 2006) (stating that "applying multiple definitions to terms that are clear and unambiguous in context would subvert well-established principles of Pennsylvania contract interpretation. The Court finds that the Policy clearly confines the term 'privacy' to interests in secrecy"), *aff'd sub. nom.*, 503 F.3d 339, 340 (3d Cir. 2007) (affirming "essentially for the reasons set forth by the District Court").

In sum, although "right of privacy" can have a standalone meaning of "seclusion," it cannot have that meaning in the insurance policy here because it

stands in conjunction with an additional requirement that modifies, and therefore limits, its meaning. The cases that recognize this distinction, and that apply the policy's material-that-violates requirement in conjunction with the undisputed fact that an alleged TCPA-based privacy injury occurs as a result of a prohibited means of transmission, are well reasoned and deserve this Court's consideration as persuasive authority.

C. The plain meaning of the term "publication" is incompatible with the conclusion that the policy's reference to "right of privacy" might include the right of seclusion.

Another analytical shortcoming in the pro-coverage cases is their failure to recognize that the definition they give to the term "publication" is incompatible with the definition they give to the term "right of privacy" (i.e., right of seclusion). In other words, the pro-coverage TCPA cases define the policy terms in isolation and without due regard for whether those definitions are reasonable when read in conjunction with each other.

In one form or another, the pro-coverage TCPA cases define "publication" as "communicating to the general public." *See, e.g.*, *Hooters*, 157 F. App'x at 208 (defining publication as "'to make generally known'" and similar variations) (citations omitted); *Valley Forge*, 860 N.E.2d at 316 (defining publication as "'communication . . . to the public'" and similar variations) (citations omitted); *Park Univ.*, 442 F.3d at 1250 (defining publication as "making something

generally known" or "communicat[ing] information generally"); *Terra Nova*, 869 N.E.2d at 572 (defining publication as "'communication . . . to the public'" or "'public announcement'") (citations omitted). But general communication is irrelevant to a seclusion interest in privacy. Each person's right of seclusion belongs to that person as an individual. Each person's alleged right of seclusion is unaffected by whether the sender transmits a single additional facsimile to a single additional person (or to tens of thousands). Granted, the lawyers commence TCPA litigation as class actions, but if a class were certified it would mean only that there are enough common elements of proof for the many *individual* fax recipients, not that transmissions to the general public might ever be relevant to establish a violation of any class member's alleged seclusion interest (or to establish a TCPA violation). The Seventh Circuit's decision in *American States* captures this point in a single, insightful observation: "Perhaps automated faxes to hundreds of recipients could be deemed a form of publication, *but this would be irrelevant to the seclusion interest.*" 392 F.3d at 943 (emphasis added). Put another way, "[i]n a secrecy situation, publication matters; otherwise secrecy is maintained. In a seclusion situation, *publication is irrelevant.*" *Id.* at 942 (emphasis added). This reasoning further supports the conclusion that although "right of privacy" can have a standalone meaning of "seclusion," it cannot have that meaning here because the policy's publication element is incompatible with it.

This is so for another reason as well. The policy requires "injury arising out of" a covered offense. *Penzer*, 545 F.3d at 1305 & 1306. But in a TCPA case, the alleged seclusion injury does not *arise out of* a communication to the public. It *arises out of* a transmission to the individual. Public communication is irrelevant. Thus, the injury-arising-out-of requirement provides additional support in the policy language itself for the conclusion that "right of privacy," as used in the offense "publication of material that violates a person's right of privacy," means the privacy right of secrecy, not seclusion. The cases holding to the contrary are flawed because they define the policy terms in isolation, without due regard for whether those definitions are reasonable when read in conjunction with each other.

Finally, the pro-coverage cases not only apply the policy terms in isolation, they lose sight of the elements necessary to establish TCPA liability. Dissemination to the general public is not a necessary element of TCPA liability. Therefore, defining the policy's "publication" requirement as making something generally known does nothing to establish the conclusion that a TCPA violation is an "offense" within the meaning of the policy.

In sum, the plain meaning of the term "publication," as all of the leading pro-coverage cases have interpreted that term, is incompatible with the conclusion that the policy's reference to "right of privacy" might include the right of seclusion. The cases that apply advertising-injury coverage to TCPA liability on

the basis of a seclusion interest in privacy are flawed because they fail to reconcile that contradiction. The better-reasoned cases are those that read the entire coverage clause in its full context and that give meaning to the words in light of how they are used in conjunction with one another. It is the latter cases that deserve this Court's consideration as persuasive authority.

II. PUBLIC POLICY FAVORS A HOLDING THAT NO ADVERTISING-INJURY COVERAGE EXISTS FOR TCPA LIABILITY.

CICLA also urges this Court to consider the public-policy implications of the appellant's position. Expanding advertising-injury coverage to fit TCPA violations will encourage claimants and TCPA violators alike to manipulate the pleadings to allege an injury that is, at best, contrived. The very foundation of the law providing redress for an invasion of one's seclusion is some type of *highly offensive* prying into the physical boundaries or affairs of another person. *See, e.g.*, Restatement (Second) of Torts § 652B (1977) (providing that liability attaches only "if the intrusion would be highly offensive to a reasonable person"). Receiving a wireless phone flyer, a bowling advertisement, or an estate-sale announcement is not "highly offensive" under any standard.

In fact, privacy contentions are not even necessary to sustain a TCPA claim – the elements of a TCPA claim are receipt of an unauthorized advertising fax transmission, period. The injury Congress actually intended to redress was the "shift[ing of] some of the costs of advertising from the sender to the recipient" and

the tying up of the recipient's fax machine "so that it is unavailable for legitimate business messages . . . ." H.R. Rep. No. 102-317 (1991). CICLA urges the Court to consider these public policy implications in conjunction with the many well-reasoned decisions from around the country holding that advertising-injury coverage is inapplicable to claims under the TCPA.

CONCLUSION

For the foregoing reasons, CICLA supports Transportation Insurance Company's position on appeal and urges the Court to follow the many well-reasoned cases from other jurisdictions that have ruled consistent with that position.

Respectfully submitted,

Dated: February 13, 2009 By _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with all requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2) and that this brief uses Times New Roman 14-point font.

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