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 QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE No.: 07-13827

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STATEMENT OF THE CASE AND FACTS

Nature Of The Case

This case involves an insurance coverage dispute. It is before the Court on a certified question from the Eleventh Circuit Court of Appeals. *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008). Finding "no controlling Florida Supreme Court law and no intermediate appellate court decisions on point," the Eleventh Circuit certified the following question to this Court "for determination under Florida law:"

> Does a commercial liability policy which provides coverage for "advertising injury," defined as "injury arising out of … oral or written publication of material that violates a person's right of privacy," such as the policy described here, provide coverage for damages for violation of a law prohibiting using any telephone facsimile machine to send unsolicited advertisement to a telephone facsimile machine when no private information is revealed in the facsimile?

Id. at 1312.

Course Of The Proceedings

This dispute arises from appellee Transportation Insurance Company's ("Transportation") denial of insurance coverage to its insured, Southeast Wireless, Inc. ("Southeast") for a putative class action lawsuit filed by appellant, Michael Penzer ("Penzer") alleging violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. (the "TCPA").

Penzer's Case Against Southeast For TCPA Violations.

In June 2003, Penzer filed a putative class action lawsuit against Nextel South Corporation ("Nextel") in Florida state court, alleging that, in May 2003, Nextel (or one of its authorized agents) sent him an unsolicited facsimile advertisement for wireless telephone services in violation of a federal statute, the TCPA. (R-64, Ex. B).[1] The TCPA makes it "unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." § 227(b)(1)(C) & (b)(3)(A)-(C). The statute also allows for a private right of action and an award of the greater of monetary loss or statutory damages in the amount of $500 per violation. *Id.* The TCPA thus creates a financial penalty for sending *any* unsolicited advertisements via facsimile, without regard to content.

In November 2003, Nextel filed a third-party complaint for indemnity and contribution against Southeast, an authorized Nextel agent, alleging that Southeast had caused the facsimile advertisement at issue to be disseminated and that Nextel had not authorized its transmission (the "Nextel complaint"). (R-64, Ex. C). Shortly thereafter, in December 2003, Penzer filed his own third-party class action complaint against Southeast (the "Penzer complaint"). (*Id*.)

[1] References to the Record transferred from the Eleventh Circuit Court of Appeals will be referred to as "R-(docket entry number) at (page/paragraph)" as these numbers were assigned by the United States District Court for the Southern District of Florida.

The Penzer complaint was a one-count complaint for violation of the TCPA. The complaint alleged that Southeast "used or caused to be used a telephone facsimile machine, computer or other device to send unsolicited advertisements to telephone facsimile machines" owned by Penzer and other putative class members, in violation of the TCPA. (R-1, Ex. D at ¶¶ 23, 26). A copy of the advertisement for wireless telephone services was attached to the complaint. (R-1, Ex. A). The Penzer complaint did not purport to allege a claim for invasion of privacy, nor did it state the elements of such a claim. The only reference to privacy in the complaint was the single conclusory statement: "Thus, the transmission of unsolicited advertisements via facsimile violates a person's right to privacy." (R-1, Ex. D at ¶ 7).

Transportation's Insurance Policy.

Transportation issued a primary Business Account Package Policy (the "Policy") to Southeast, for the policy period October 22, 2002 to October 22, 2003, with a liability limit of $1,000,000 and a general aggregate limit of $2,000,000. (R-1, Ex. C at 1 of 8). The Policy provides certain coverage for "damages because . . . of 'advertising injury' to which this insurance applies." (R-1, Ex. C at 1 of 13). The Policy further provides: "This insurance applies . . . [t]o . . . '[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products or services." (R-1, Ex. C at 1 of 13).

The Policy specifically defines "advertising injury" as "injury arising out of one or more of the following offenses:

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business;
>
> d. Infringement of copyright, title or slogan."

(R-1, Ex. C at 10 of 13).

The Policy also expressly provides that Transportation shall have no duty to defend Southeast against any suit "seeking damages for . . . 'advertising injury' to which this insurance does not apply." (R-1, Ex. C at 5).

Southeast's Notice To Transportation, Transportation's Response, And The *Coblentz* Agreement With Penzer.

Southeast initially gave Transportation notice of the Nextel complaint in December 2003. (R-64 at 6). Notice of the Penzer complaint followed months later, on February 3, 2004. (R-64 at 6). On February 17, 2004, Transportation disclaimed coverage and declined to provide Southeast with a defense to the Nextel and Penzer complaints based on various policy terms, conditions and exclusions. (R-64, Ex. G at 4-21).

On February 10, 2004, only days after forwarding the Penzer complaint to Transportation and before Transportation advised Southeast that it was disclaiming coverage, Southeast began negotiations to enter into a *Coblentz* agreement with Penzer.[2] (R-83-2, Ex. 1 at 2). Southeast and Penzer subsequently entered into the agreement, whereby Southeast stipulated to a $12 million consent judgment and assigned its right to seek insurance coverage for the judgment to Penzer. (R-64, Ex. H). The $12 million judgment represented the alleged total number of unsolicited facsimile advertisements (24,000), multiplied by $500, the per-violation statutory damages established by the TCPA, no actual damages having been alleged or shown. (R-64, Ex. J at 2-3).

Penzer's Case Against Transportation For Insurance Coverage.

Penzer filed this action against Transportation in the United States District Court for the Southern District of Florida. (R-1). The three-count complaint sought a declaration that Transportation was required to defend and indemnify Southeast under the Policy. (R-1 at 12-13). The complaint also alleged a breach of contract claim, and demanded that Penzer be awarded the full amount of the $12 million consent judgment. Penzer alleged that Southeast entered into a

[2] *Coblentz v. American Surety Co. of New York*, 416 F.2d 1059 (5th Cir. 1969). A *Coblentz* agreement is an agreement between a claimant and an insured, whereby the claimant and insured stipulate to a judgment, the insured assigns its rights under its insurance policy to the claimant, and the claimant agrees not to enforce the judgment against the insured.

contract with a third-party to engage in advertising via facsimile and that the third-party sent a total of 24,000 unsolicited facsimile advertisements on Southeast's behalf. Penzer alleged that Southeast's conduct constituted an "advertising injury" under the Policy, for which Transportation should have provided a defense and coverage, because the "transmission of an unsolicited advertisement via facsimile is the publication of written material" and Southeast's transmission of such advertisements "violated Plaintiff Penzer and the Class' right to privacy, as recognized by the TCPA." (R-1 at ¶¶ 38-40).

Transportation answered the complaint and filed its own counterclaim against Penzer, seeking a declaration of its rights and obligations under the Policy. (R-5). The district court stayed the proceedings, pending disposition of the appeal in *Hooters of Augusta, Inc. v. American Global Ins. Co.,* Case No. 04-11077. (R-35). After the Eleventh Circuit issued its unpublished opinion in *Hooters* applying Georgia law, 157 Fed.Appx. 201 (11th Cir. 2005), the district court lifted the stay. (R-44). Penzer and Transportation filed cross motions for partial summary judgment on the issue of insurance coverage under the Policy. (R-58-59, 62-64).

The District Court Opinion In Favor Of Transportation.

Following briefing and oral argument, United States District Court Judge Adalberto Jordan granted Transportation's motion for partial summary judgment, denied Penzer's cross motion, and entered final judgment in favor of

Transportation. *Penzer v. Transportation Ins. Co.*, 509 F.Supp.2d 1278 (S.D. Fla. 2007). The district court held that "the transmission of unsolicited commercial advertisements by facsimile," as alleged in the Penzer complaint, did not constitute "oral or written publication of material that violates a person's right of privacy" within the Policy's definition of "advertising injury," where it was "undisputed that the advertisements did not disclose any private facts about anyone." *Id. a* 1279-80. Because the district court held that the Policy afforded no coverage for the Penzer claim, the court did not consider the proper measure of damages in the event of insurance coverage.

The Eleventh Circuit Certification Opinion.

Penzer timely appealed the district court's final judgment to the United States Court of Appeals for the Eleventh Circuit. Following briefing and oral argument, the Eleventh Circuit concluded that there was "no controlling Florida Supreme Court law and no intermediate appellate court decisions on point." *Penzer*, 545 F.3d at 1311. The federal appellate court therefore certified the following question to this Court "for determination under Florida law":

> Does a commercial liability policy which provides coverage for "advertising injury," defined as "injury arising out of … oral or written publication of material that violates a person's right of privacy," such as the policy described here, provide coverage for damages for violation of a law prohibiting using any telephone facsimile machine to send unsolicited advertisement to a

> telephone facsimile machine when no private information is revealed in the facsimile?

Id. at 1312. Stated another way, the question for this Court is whether the mere transmission of an unsolicited facsimile advertisement constitutes the "oral or written publication of material that violates a person's right of privacy."

SUMMARY OF ARGUMENT

The Court should answer the certified question in the negative.

First, the Policy provision – "oral or written publication of material that violates a person's right of privacy" – interpreted as a whole and in context is clear and unambiguous. It covers secrecy-based invasion of privacy claims arising out of the content of an insured's advertising. The definition of "advertising injury" lists four "offenses," including the provision at issue, and the other three "offenses" all concern the content of an insured's advertising. Applying Florida principles of policy construction, the Policy provision at issue is likewise concerned solely with the content of an insured's advertising.

Interpreting the Policy provision as a whole, rather than separately considering the definition of each of its component words, leads to the same conclusion. The operative phrase "that violates a person's right of privacy" directly follows the word "material" in the Policy provision, not the word "publication." Applying Florida principles of policy construction, the Policy affords coverage where the "material" – that is, the content of the insured's

advertising – "violates a person's right of privacy," and not where, as here, it is the "publication" – or *means* of advertising – that is alleged to result in the violation. Penzer's contrary reading of the Policy would give no meaning to the phrase "of material," in effect, writing this language out of the Policy.

Moreover, the only Florida court to have construed similar policy language, *State Farm Fire & Casualty Co. v. Compupay, Inc.*, 654 So.2d 944, 949 (Fla. 3d DCA 1995), held that the provision encompassed only "actions within the traditional invasion of privacy tort: a publication of personal matter." This Court should reach the same conclusion here, and hold that the Policy does not cover Penzer's TCPA complaint.

Second, even if the Court were to construe the language of the Policy more broadly to afford coverage for other, seclusion-based privacy claims, the Penzer complaint would not be covered because it does not allege a cognizable claim for invasion of privacy of any kind. In *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156 (Fla. 2003), this Court analyzed whether allegations of unwelcome touching and sexually offensive remarks stated a claim for invasion of privacy where the insurance policy at issue provided coverage for the "offense" of "invasion of rights of privacy." The Court held that the allegations did not state a cause of action for invasion of privacy under Florida law, and concluded that there was therefore no coverage for the complaint under the policy, notwithstanding the

fact that the complaint expressly *alleged* an invasion of privacy claim. Applying the same analysis, this Court should reach a similar conclusion here. Because the Penzer complaint's allegations of unsolicited facsimile advertisements do not state a cause of action for "oral or written publication of material that violates a person's right of privacy" as a matter of Florida law, there is no insurance coverage for Penzer's TCPA complaint.

Third, although the courts that have considered the issue under different states' laws are admittedly split, the better-reasoned cases and those more consistent with Florida privacy jurisprudence hold that the policy language at issue, and policy provisions similar to it, do not cover TCPA violations. This Court should reach the same conclusion here.

ARGUMENT

I. The "Plain Language" Of The Policy Only Provides Insurance Coverage For Secrecy-Based Invasion Of Privacy Claims Involving The Publication Of Personal Matter To A Third Party.

A. Florida Principles Of Policy Construction.

Under Florida law, "insurance contracts must be construed in accordance with the plain language of the policy." *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003). "If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and

the [other] limiting coverage, the insurance policy is considered ambiguous." *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). "Ambiguities in insurance contracts are interpreted against the insurer and in favor of the insured." *Garcia v. Federal Ins. Co.*, 969 So.2d 288, 291 (Fla. 2007). "To allow for such a construction, however, the provision must actually be ambiguous." *Id.* The principle that ambiguous policy provisions are to be construed in favor of the insured "does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Swire*, 845 So.2d at 165 (quoting *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla. 1979)). "Notably, simply because a provision is complex and requires analysis for application, it is not automatically rendered ambiguous." *Swire*, 845 So.2d at 165. By the same token, "[t]he lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts." *Id.* at 166 (quoting *State Farm Fire & Casualty Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla. 1998)). Finally, this Court has "consistently held that 'in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.'" *Swire*, 845 So.2d at 166 (quoting *Auto-Owners*, 756 So.2d at 34).

In applying these principles of policy construction, this Court has not hesitated to find, often unanimously, that particular policy provisions were unambiguous and that they did not provide, or specifically excluded, the insurance coverage at issue. *See, e.g.*, *Garcia*, 969 So.2d at 291; *Taurus Holdings, Inc. v. United States Fidelity & Guaranty Co.*, 913 So.2d 528 (Fla. 2005); *Swire*, 845 So.2d at 165; *Siegle v. Progressive Consumers Ins. Co.*, 819 So.2d 732 (Fla. 2002); *Deni Assoc., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So.2d 700 (Fla. 1993).

B. The "Plain Language" Of Transportation's Policy.

The Policy provision at issue in this case is a sub-part of a multi-part Policy provision defining the categories of "advertising injury" covered by the Policy. The Policy defines "advertising injury" as "injury arising out of" certain enumerated "offenses." The four covered "offenses" are:

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business;
>
> d. Infringement of copyright, title or slogan.

(R-1, Ex. C at 10 of 13). The provision at issue in this case is the second of the four "offenses": "Oral or written publication of material that violates a person's right of privacy."

Reading the "advertising injury" provision as a whole, as required by Florida principles of policy construction, leads to the conclusion that the Policy affords coverage only for secrecy-based violations of a person's right of privacy arising from the content of an insured's advertising. Several grounds exist for such a conclusion. *First,* context matters. The other three "offenses" listed within the definition of "advertising injury" – libel and slander, misappropriation of ideas, infringement of copyright – are all claims that arise from the content of the insured's advertising. Where, as here, a policy term is one in a grouping, it is appropriate to look to the other terms – in this case, the other "advertising injury" offenses – in order to interpret it. "Under the doctrine of *noscitur a sociis*, a word is known by the company it keeps, and one must examine the other words used in a string of concepts to derive the drafters' intent." *Aerothrust Corp. v. Granada Ins. Co.*, 904 So.2d 470, 472 (Fla. 3d DCA 2005) (employing *noscitur a sociis* doctrine to interpret insurance policy provision); *see Nehme v. Smithkline Beecham Clinical Laboratories*, 863 So.2d 201, 205 (Fla. 2003) (employing *noscitur a sociis* doctrine to interpret statute). "That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham*

v. United States, 511 U.S. 368, 371, 114 S.Ct. 1669, 1671 (1994). Here, because the other offenses in the "string of concepts" identified in the Policy's definition of "advertising injury" are all concerned with the content of the insured's advertising rather than its mode of transmission, the "right of privacy" offense is similarly limited in scope. *See, e.g., Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 641-42 (4th Cir. 2005) (noting that "four [advertising injury] offenses all share the common thread of assuming that the victim of the advertising injury offense is harmed by the sharing of the content of the ad, not the mere *receipt* of the advertisement" and finding no coverage for TCPA claim because "broadly prohibiting junk fax ads has nothing at all to do with the content of any ads); *St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp.*, Civil No. 06-2759 (FLW), 2007 WL 2571960, *11 (D.N.J. August 31, 2007) (holding that "[c]ontext certainly 'matters,' and [insurer's]… policy language, when read in the context of its other advertising injury offenses, further confirms that [the] policy only provides coverage for violations of content-based disclosures involving the privacy right of secrecy"); *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 147 Cal.App.4th 137, 151-52, 53 Cal.Rptr.3d 786, 796-97 (2d App.Dist. 2007) (holding that "policy definitions of 'advertising injury offenses' provide a context that clarifies the meaning of the [privacy] provision at issue" and concluding that "[a]ll four advertising offenses involve violations of the 'secrecy' right of privacy").

Second, the clause "that violates a person's right of privacy" modifies the term "material" in the Policy provision, not the earlier term "publication." "[U]nder the 'doctrine of the last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to others more remote." *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973); *Prudential Ins. Co. of Am. v. Bellar*, 391 So.2d 737 (Fla. 4th DCA 1980) (applying "last antecedent doctrine" to interpret insurance policy provision). Applying the last antecedent doctrine leads to the conclusion that, in order to trigger coverage under the Policy, it is the "material" – that is, the content of the insured's advertising – that must be alleged to "violate a person's right of privacy," not its mere "publication." *See also ACS*, 147 Cal.App.4th at 150, 53 Cal.Rptr.3d at 796 (applying the "last antecedent rule" to interpret "making known . . . material that violates an individual's right of privacy" and concluding that "coverage applies to liability for injury caused by the disclosure of *private* content to a third party . . . not . . . to injury caused by an unauthorized fax").

Penzer's policy construction argument flies in the face of these established principles. Rather than consider the provision at issue in the broader context of the Policy, or even read the provision itself as a whole, as Florida law mandates, Penzer would have this Court interpret the Policy provision one word at

a time, stopping to consider every possible meaning of every word, without reference to the words that precede them, the words that follow them, or the Policy as a whole. Indeed, Penzer even goes so far as to ridicule what he refers to as the federal district court's "contextual reading" of the Policy provision. Init. Br. at 40. Thus, Penzer attributes no significance to the other "offenses" encompassed within the definition of "advertising injury" (all of which concern claims arising from the content of the insured's advertising), and he analyzes the term "material" entirely independently of the clause that modifies it ("that violates a person's right of privacy"). Init. Br. at 16-26. As a consequence, Penzer interprets the Policy to afford coverage without regard to the content of the insured's advertising – in effect, rewriting the Policy to omit the clause "of material" from the Policy and to provide coverage for any "oral or written publication . . . that violates a person's right of privacy."

The Court should reject Penzer's argument. Florida law sensibly requires that every insurance policy be "construed according to the *entirety* of its terms and conditions." § 627.419(1), Fla. Stat. (emphasis added). "[M]ost, if not all words [have] a range of meanings." *Dep't of Revenue v. Val-Pak Direct Mktg. Sys., Inc.*, 862 So.2d 1, 3 (Fla. 2d DCA 2003) (cited with approval by Penzer). As a consequence, determining the intended meaning of a word usually requires reference to the context in which it is used. Yet that does not make the word or its

meaning "ambiguous." In *Val-Pak*, for example, the issue was whether an advertiser qualified for a statutory sales tax exemption available to certain "publications." The advertiser argued that "the term publication [was] synonymous with printed materials," but the court rejected the argument. In so holding, the court recognized that the term "publication" had a "range of meanings" – including "the action of disseminating information" and "a published work" – but ultimately concluded that "[i]n the context of the statute," its meaning was "clear and . . . unambiguous." *Id.* at 3-4.

"The plain meaning that we seek to discern is the plain meaning of the whole [policy], not of isolated sentences [or words]." *Beecham*, 511 U.S. at 372, 114 S.Ct. at 1671. Here, interpreting the plain language of the Policy provision – "Oral or written publication of material that violates a person's right of privacy" – in context and as a whole leads to the conclusion that only secrecy-based invasion of privacy claims involving the content of the insured's advertising are covered.

C. **The Holding in *Compupay.***

As Judge Jordan recognized, the only Florida court to have interpreted insurance policy language similar to the policy provision at issue here held that it did *not* cover invasion of privacy claims. In *State Farm Fire & Casualty Co. v. Compupay, Inc.*, 654 So.2d 944, the court considered whether allegations of sexual harassment and discrimination gave rise to a duty to defend the insured under a

policy provision providing insurance coverage for "a publication or utterance in violation of an individual's right to privacy." Finding no coverage, the court explained:

> *The clause does not cover causes of action under the broader umbrella of invasion of privacy torts. Thus, the policy covers actions within the traditional invasion of privacy tort: a publication of personal matter.* It does not include coverage for a physical invasion of the complainant's person unaccompanied by the other elements of the cause of action. Moreover, such a holding is consistent with a plain reading of the remainder of the clause which provides coverage for libelous and slanderous publications.

Id. at 949 (emphasis added).

Penzer argues that *Compupay* is "not on point." Init. Br. at 27. According to Penzer: "*Compupay*'s holding was ***not*** that the policy provision in that case could only apply to a claim that the insured publicized private facts, but rather that the plain language of the provision required that the conduct involved not only an invasion of privacy, but also publication." *Id.* at 30 (emphasis in original). In essence, Penzer argues that the policy provision at issue in *Compupay* required "violation of an individual's right to privacy" *and* "publication," and that because the allegations of the underlying complaint in *Compupay* involved only allegations of an unwanted touching, the "publication" element of the policy provision was plainly not satisfied. Thus, Penzer argues, the *Compupay* court's

conclusion that the policy language was only intended to encompass "a publication of personal matter" was dictum.

The Court should reject Penzer's efforts to distinguish *Compupay*. The underlying complaint in *Compupay* alleged that the "Plaintiff was subjected to unwelcome sexual harassment in the form of sexual advances and requests for sexual favors," as well as "unsolicited and offensive physical contact." *Compupay*, 654 So.2d at 949-50. In order to determine whether the allegations constituted "a publication or utterance in violation of an individual's right to privacy," the court turned to Florida invasion of privacy law. The court began its analysis – as this Court would years later in *Ginsberg* – with Florida's first recognition of the tort in *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944). Citing *Cason*, the *Compupay* court defined the right of privacy as "the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze." *Compupay*, 654 So.2d at 948. Importantly, the *Compupay* court went on to state: "Claims based on this tort require the allegation and proof of publication to a third person of personal matter." *Id.* at 949. The court then noted that "[r]ecently," an "exception" to this rule had been created "in cases where the plaintiff's person has been touched in an undesired or offensive manner." *Id.*

Turning next to the provision at issue, the *Compupay* court held, in the language previously quoted, that the policy's reference to "a *publication or utterance* in violation of an individual's right of privacy," conveyed an intent not to cover the "[r]ecent[] . . . exception" but only "actions within the traditional invasion of privacy tort: a publication of personal matter." *Compupay*, 654 So.2d at 949 (emphasis in original).

As the foregoing makes clear, the *Compupay* court did not simply determine that an unwanted touching was not a "publication" and that there was no coverage under the policy for that reason, as Penzer suggests. Rather, the Court reasoned that the policy's express reference to "publication or utterance" indicated an intent to afford coverage only for actions within the "traditional" invasion of privacy tort recognized in *Cason* and its progeny, which required "the allegation and proof of publication to a third person of personal matter." Because the underlying complaint alleged only the "[r]ecent[] . . . exception," it was not covered by the policy, which covered only actions within the "traditional" invasion of privacy tort. This is the holding of *Compupay* and it is not dictum.

The Policy at issue here is substantially the same as the policy at issue in *Compupay* – it covers "oral or written publication of material that violates a person's right of privacy." As the *Compupay* court held, such a policy provides coverage only for "actions within the traditional invasion of privacy tort: a

publication of personal matter." Accordingly, based on the plain language of the Policy as a whole, the Court should conclude that there is no coverage for the Penzer complaint, which does not purport to allege such an action.

II. There Is No Insurance Coverage For The Penzer Complaint Under The Policy Because The Complaint Does Not State A Cognizable Claim Under Florida Law For "Oral Or Written Publication Of Material That Violates A Person's Right Of Privacy."

For the reasons set forth above, the Court should conclude that the Policy provision at issue affords coverage only for secrecy-based privacy claims arising from the content of the insured's advertising, and that the Penzer complaint is not covered. However, even if the Court were to conclude that the language of the Policy could be read to afford broader coverage, the Court should still hold that the Penzer complaint is not covered because it does not state a cause of action for a seclusion-based "violat[ion of] a person's right of privacy."

A. Florida Principles Of Policy Construction.

Under Florida law, the general rule is that an insurance company's duty to defend an insured is determined solely from the allegations in the complaint against the insured. *Amerisure Ins. Co. v. Gold Coast Marine Distrib., Inc.*, 771 So.2d 579, 580-81 (Fla. 4th DCA 2000). If the allegations state facts that bring the injury within the policy's coverage, the insurer must defend, whether the allegations are meritorious or not. *Id.* Conclusory "buzz words" unsupported by

factual allegations are not sufficient to trigger coverage, however. *Id.* To give rise to the duty to defend, a complaint must set forth "allegations [that] state a cause of action" for the "offense" covered by the insurance policy. *Id.* For this reason, mere use of the word "defamation" in a complaint has been held insufficient to give rise to a duty to defend under an insurance policy that provides coverage for "oral or written publication of material that slanders or libels a person." *Id.* Similarly, allegations of "joint efforts to create publicity adverse" to the plaintiff and the provision of "false information" have been held insufficient to give rise to insurance coverage under a policy that provides coverage for "libel and slander" because the allegations did "not amount to a cause of action for defamation." *St. Paul Fire & Marine Ins. Co. v. Naples Comty. Hosp., Inc.*, 585 So.2d 374, 376 (Fla. 2d DCA 1991).

The same analysis has been applied to determine the availability of coverage under policies, like one at issue here, that provide coverage for "invasion of rights of privacy" or "a publication . . . in violation of an individual's right of privacy." *Ginsberg*, 863 So.2d 156; *Compupay*, 654 So.2d 944. In *Allstate Ins. Co. v. Ginsberg*, 235 F.3d 1331 (11th Cir. 2000), the Eleventh Circuit reviewed a summary judgment in favor of Allstate holding that the insurer had no duty to defend its insured under a policy that covered "invasion of rights of privacy" because the "allegations of unwelcome conduct" set forth in plaintiff's complaint

"did not state a cause of action for invasion of privacy" as a matter of Florida law. *Id*. at 1333-34. The Eleventh Circuit began by noting that the "threshold issue" in the case was "whether the acts alleged by [the plaintiff] implicate [the insurer's] duty to defend." *Id.* at 1334. "While [the plaintiff] cast her allegations in the form of an invasion of privacy claim," that characterization was not dispositive. The question whether Allstate had a duty to defend turned on "whether the type of acts alleged by [the plaintiff] f[e]ll within the invasion of privacy tort." *Id.* Finding Florida law unclear, the Eleventh Circuit certified the question to this Court, together with three additional questions regarding the scope of the coverage provided by the policy.

In answering the first certified question from the Eleventh Circuit in *Ginsberg*, this Court similarly focused on whether the complaint's allegations that the insured had subjected the plaintiff to "ongoing and pervasive, sexually offensive, unwelcome conduct" which included "the unwelcome touching of her body and being subjected to unwelcome sexually oriented comments" stated "a cause of action for the common law tort claim of invasion of privacy under Florida law." *Ginsberg*, 863 So.2d at 159. A divided Court held that it did not. But more importantly for purposes of this case, the Court was nearly unanimous in concluding that its determination that the complaint did not state a claim for invasion of privacy as a matter of Florida law rendered the remaining insurance

coverage questions moot. As Justice Anstead wrote: "[T]he initial coverage issue appears to turn on whether [the plaintiff's] allegations state a cause of action for invasion of privacy under Florida law. I would hold that a cause of action has been properly alleged, and I concur only in the majority's conclusion that the other questions posed appear to have been rendered moot by the majority's decision to reject the cause of action alleged here." *Id.* at 163 (Anstead, J. concurring in part and dissenting in part). *See also United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 750-51 (11th Cir. 1991) (holding that a policy providing coverage for "a publication . . . in violation of an individual's right of privacy" was not implicated where complaint alleged discriminatory behavior that was not "within the definition of violation of the right to privacy"); *Compupay*, 654 So.2d. at 948-49 (holding that a policy providing coverage for "a publication or utterance in violation of an individual's right of privacy" was not implicated where complaint alleged sexual harassment and discrimination that was not "within the traditional invasion of privacy tort: a publication of personal matter").

Penzer argues that "Florida law plainly eschews reading policy provisions according to the limitations of tort causes of action;" Init. Br. at 22, but this argument misses the point. Where, as here, insurance coverage is based on the insured's alleged commission of an "offense," in order to determine whether there

is insurance coverage for the claim, the court must determine whether the allegations of the complaint state a cognizable cause of action for the covered "offense." The only way to do so is by reference to the applicable law. That is why this Court in *Ginsberg* began – and ended – its coverage analysis with the question whether allegations of an unwanted sexual touching gave rise to a cause of action for "invasion of rights of privacy" in Florida. The Court's conclusion that no cause of action was stated dictated its conclusion that there was no coverage for the claim. The issue in cases like *Ginsberg* and *Compupay* and this case is not whether the proverbial "man-on-the-street" would *think* that the allegations of the complaint state a claim for the covered "offense," but whether they actually do. (Indeed, a "man-on-the-street" might very well have believed that an unwanted sexual touching was an "invasion of rights of privacy" and that the policy at issue in *Ginsberg* would have provided insurance coverage for the claim – but he would have been wrong.) Otherwise, in *Ginsberg*, this Court's conclusion that Florida did not recognize a cause of action for invasion of privacy based on an unwanted sexual touching would not have been dispositive of the coverage question.

The Florida cases on which Penzer relies for the proposition that "tort law principles do not control judicial construction of insurance contracts" address a different issue. Init. Br. at 22, 36-37. *Prudential Property & Casualty Ins. Co. v. Swindal*, 622 So.2d 467 (Fla. 1993), *State Farm Fire & Casualty Co. v. CTC Dev.*

Corp., 720 So.2d 1072, and *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779 (Fla. 2004), involved interpretation of the terms "bodily injury . . . which is expected or intended," "accident," and "bodily injury by accident." The question in each case was whether the conduct (or injury) alleged was accidental (and therefore covered) or intentional (and therefore not covered). In each case, the Court declined to apply tort law principles to define the policy term at issue. The question presented here is markedly different. In this case, the coverage question is whether the Penzer complaint states a cause of action for the covered "offense" of "oral or written publication of material that violates a person's right of privacy." To answer this question, the Court must both interpret the policy language *and* compare the allegations of the complaint to the law defining the "offense" to determine whether the covered "offense" has been stated. The latter inquiry, which requires the Court to consider the applicable law, distinguishes this case (and *Ginsberg* and *Compupay* and other "offense"-based "advertising injury" cases like them) from *Swindal*, *CTC*, and *PCR*.[3]

Thus, to determine whether the Policy affords coverage for the Penzer complaint, this Court must consider whether the factual allegations of the

[3] *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179 (11th Cir. 2002), on which Penzer relies; Init. Br. at 37, is not to the contrary. In that case, the court held that a claim for trade dress infringement stated the covered "offense" of "misappropriation of advertising ideas or style of doing business," according each term its "ordinary meaning." *Id.* at 1187-88.

complaint state a claim for the covered "offense" – in this case, "oral or written publication of material that violates a person's right of privacy."

B. The Florida Right Of Privacy.

"This Court has previously acknowledged Prosser's paradigm of the four general categories of invasion of privacy." *Jews for Jesus, Inc. v. Rapp*, 33 Fla. L. Weekly S849, 2008 WL 4659374, *3 (Fla. 2008) (citations omitted). The four categories are "(1) appropriation – the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion – physically or electronically intruding into one's private quarters; (3) public disclosure of private facts – the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye – publication of facts which place a person in a false light even though the facts themselves may not be defamatory." *Ginsberg*, 863 So.2d at 162. In *Rapp*, the Court specifically "decline[d] to recognize false light as a viable cause of action in this state." *Rapp*, 2008 WL 4659374 at *15. The only category at issue here is the second: "intrusion – physically or electronically intruding into one's private quarters." *Id*. at n.7; *Ginsberg*, 863 So.2d at 162.

This Court last addressed the "seclusion" category of invasion of privacy in *Ginsberg*, in which it held that allegations of unwelcome conduct including touching in a sexual manner and sexually offensive comments did not

state a cause of action for invasion of privacy based on seclusion. Notably, the *Ginsberg* analysis began with *Cason*, in which "this Court first recognized invasion of privacy as a distinct cause of action in Florida." *Ginsberg*, 863 So.2d at 160. In *Cason*, the Court held that "allegations that the book [by author Marjorie Kinnan Rawlings] published an intimate character sketch of the plaintiff could constitute a prima facie case of invasion of the plaintiff's right to privacy." *Id.* Describing *Cason*, the *Ginsberg* Court stated: "Plainly, the focus of the tort was the holding up of information about a person for 'public gaze.'" *Id.*

Continuing its review of Florida's invasion of privacy law, *Ginsberg* "affirm[ed]" the description of the "seclusion" category set forth in *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1252 n.20 (Fla. 1996): "intrusion – physically or electronically intruding into one's private quarters." Importantly, the Court went on to clarify that the *AHCA* description of the cause of action was not broad enough to include the unwelcome sexual conduct alleged by the plaintiff in *Ginsberg*, stating:

> The intrusion to which this refers is into a "place" in which there is a reasonable expectation of privacy and is not referring to a body part. . . . *[T]his is a tort in which the focus is the right of a public person to be free from the public gaze.*

Id. at 162 (emphasis added).

Ginsberg is central to the question now before this Court. Here, the Penzer complaint alleged that Southeast "used or caused to be used a telephone facsimile machine, computer or other device to send unsolicited advertisements to telephone facsimile machines" owned by Penzer and other putative class members.[4] (R-1, Ex. D at ¶¶ 23, 26). The only "intrusion" upon seclusion alleged in the complaint was the transmission of an unwanted and unsolicited facsimile advertisement for wireless telephone services. Clearly, such an "intrusion" does not set forth a cognizable cause of action for invasion of privacy under *Ginsberg*, because it does not expose the recipient of the facsimile advertisement to the "public gaze." Accordingly, under the longstanding privacy law of this state, the Penzer allegations do not state a cause of action for "violat[ion of] a person's right of privacy."

Indeed, even if this Court were to recede from *Ginsberg* and follow the minority view set forth there, the Penzer allegations would fail to state a seclusion-based invasion of privacy claim. An unwanted or unsolicited facsimile advertisement for wireless telephone services does not intrude upon "the most

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[4] The complaint also conclusorily stated that "the transmission of unsolicited advertisements via facsimile violates a person's right to privacy." (R-1, Ex. D at ¶ 7). As set forth above, however, the mere use of conclusory "buzz words" is insufficient to give rise to insurance coverage, where the complaint does not otherwise state a cause of action for the covered "offense." In short, Penzer cannot transform the transmission of an unsolicited facsimile advertisement into a privacy violation through the simple expedient of calling it one.

private parts of one's person;" *Ginsberg*, 863 So.2d at 165 (Anstead, J., concurring and dissenting), nor does it threaten the recipient's "personal security;" *id.*, any more than it subjects its recipient to the "public gaze."

The allegations of the Penzer complaint likewise fail to state a claim under the Florida Constitution. Penzer argues that "Florida's Constitution expressly guarantees a fundamental 'right of privacy,'" Init. Br. 23, but he overlooks the fact that the constitutional "right of privacy" applies only to "*governmental* intrusion." Fla. Const. Art. 1, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life."). The Florida Constitution recognizes the "right to be let alone," but only *by the government*, not private parties like Southeast.

The allegations of the Penzer complaint also fail the Restatement standard. Section 652B of the Restatement (Second) of Torts defines "Intrusion Upon Seclusion" as:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, *if the intrusion would be highly offensive to a reasonable person*.

(emphasis added). A facsimile advertisement for wireless telephone services, even if unsolicited, is not "highly offensive to a reasonable person" – either because of its commercial content or the fact that it was sent. As this Court has long

recognized, the right of privacy "must be restricted to 'ordinary sensibilities' and cannot extend to the hypersensitive plaintiff." *Rapp*, 2008 WL 4659374 at *4 (quoting *Cason*, 20 So.2d at 251). The receipt of an unwanted or unsolicited facsimile advertisement for wireless telephone services may well be an annoyance, but it does not meet this standard.[5]

Thus, whether this Court interprets the Policy to provide insurance coverage only for claims "within the traditional invasion of privacy tort: a publication of personal matter," as in *Compupay*, or more broadly to include "intrusion – physically or electronically intruding into one's private quarters," the Penzer complaint does not state a cause of action for the "offense" of "oral or written publication of material that violates a person's right of privacy," and there is therefore no coverage for it under the Policy.

III. Courts Construing Similar Policy Language Have Concluded That TCPA Claims Are Not Covered And This Court Should Reach The Same Conclusion.

Penzer urges the Court to follow the Eleventh Circuit's unpublished decision in *Hooters*, which held as a matter of Georgia law that policy language like that at issue here afforded coverage for a TCPA claim. Penzer asserts that "only ***one court*** has disagreed with *Hooters*: the district court's decision here;"

[5] This Court has not expressly adopted (or rejected) Section 652B. *See Forsberg v. Housing Authority of City of Miami Beach*, 455 So.2d 373, 376 (Fla. 1984) (Overton, J., concurring) (citing Restatement (Second) of Torts §§ 652B – 652E).

Init. Br. 15, leaving the misimpression that virtually every court to consider the question has found coverage for TCPA claims. That is not the case, however.

In fact, the courts that have considered insurance policies with language the same or similar to the Policy at issue here are almost equally divided on the question, with the better-reasoned cases concluding, as the district court did here, that TCPA claims are not covered, because such claims concern only the *means* of advertising and not its content. *See American States Ins. Co. v. Capital Assoc. of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004) (Easterbrook, J.) (holding that a TCPA claim was not covered under a policy that provided coverage for "advertising injury" defined to include "oral or written publication of material that violates a person's right of privacy" because the 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.") (Illinois law); *Ace Mortgage Funding, Inc. v. Travelers Indem. Co. of Am.*, No. 1:05-cv-1631-DFH-TAB, 2008 WL 686953 (S.D. Ind. March 10, 2008) (declining to follow *Hooters* and holding that a TCPA claim was not covered under a policy that provided coverage for "advertising injury" defined to include "oral or written publication of material that violates a person's right of privacy," but recognizing that "[c]ourts have split" on the issue) (Indiana law); *see also St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, No. 07-35549, 2008 WL 5077281 (9th Cir.

Nov. 25, 2008) (rejecting argument that "policy language is ambiguous simply because 'a person's right of privacy' can have more than one meaning" and holding that a TCPA claim was not covered because "[the claimant] alleged a violation of the privacy right of seclusion, while St. Paul's policy only covered advertising injuries that violated the privacy right of secrecy) (Washington law); *Resource Bankshares Corp.*, 407 F.3d at 641 (holding that a TCPA claim was not covered under a policy that provided coverage for "advertising injury" defined to include "Making known to any person or organization written or spoken material that violates a person's right of privacy" because "the advertising-injury offense part of the policies is exclusively concerned with those types of privacy . . . which, like secrecy, are implicated by the *content* of the advertisements") (Virginia law); *St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp.*, 2007 WL 2571960 (holding that a TCPA claim was not covered under an insurance policy that provided coverage for "advertising injury" defined to include "Making known to any person or organization covered material that violates a person's right of privacy" because the "clear and unambiguous" policy language required "disclosure of private content to a third party" for coverage to be triggered) (New Jersey); *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F.Supp.2d 488 (E.D. Pa. 2006) (holding that a TCPA claim was not covered under a policy that provided coverage for "advertising injury" defined to include "Making known to any person or

organization covered material that violates a person's right to privacy" because "read in context, the definition of 'privacy' in the Policy is confined to matters of secrecy, not seclusion") (Pennsylvania law); *St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.*, 405 F.Supp.2d 890 (N.D. Ill. 2005) (holding that a TCPA claim was not covered under a policy that provided coverage for "advertising injury" defined to include "oral, written or electronic publication of material in your Advertisement that violates a person's right of privacy" and following *American States* because it is "the better reasoned opinion") (Illinois law); *ACS Sys., Inc.*, 147 Cal.App.4th 137, 53 Cal.Rptr.3d 786 (holding that a TCPA claim was not covered under a policy that provided coverage for "advertising injury" defined to include "Making known to any person or organization written or spoken material that violates an individual's right of privacy" because "the coverage applies to liability for injury caused by the disclosure of private *content* to a third party – to the invasion of 'secrecy privacy'" – and "does not apply to injury caused by receipt of an unauthorized advertising fax, because in that case no disclosure of private facts to a third party has occurred") (California law).[6]

[6] After the federal decisions predicting Illinois law in *American States* and *Brunswick*, the Illinois Supreme Court ruled to the contrary in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307 (Ill. 2006). Accordingly, Penzer has argued that this Court should not rely on *American States.* Init. Br. 39-40. However, Judge Easterbrook's analysis in *American States* remains well-reasoned and persuasive and continues to be cited with approval outside Illinois. *See, e.g.*,

Penzer argues that the Policy in this case is distinguishable from the policy language at issue in many of the cases finding no coverage because the Policy at issue here provides coverage for "*publication* of material that violates a person's right of privacy" as opposed to "*making known* material that violates a person's right of privacy." Init. Br. 46-49. However, this is a distinction without a difference. "Publication" is defined as "the act or process of publishing;" *see Merriam-Webster Online Dictionary*, Merriam-Webster Online, 2 February 2009 at http://www.merriam-webster.com/dictionary/publication; and "publish" is defined as "to make generally known." *See id*. at http://www.merriam-webster.com/dictionary/publish. In short, the word "publication" and the phrase "making known" mean the same thing. The fact that one policy may use the term "publication" and another the phrase "making known" does not affect the scope of coverage.

Penzer's reliance on *Hooters* is also misplaced for another reason. *Hooters* was decided under Georgia law, not Florida law, and contrary to Penzer's assertion, the laws of the two states are not comparable in at least one important respect: the scope of the right of privacy. In *Hooters*, the court noted that "the statutory notion of being free from intrusive and unsolicited facsimile transmissions is at least arguably embodied in the common law right of privacy

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ACS Sys., Inc. (California law); *Ace Mortgage Funding*, 2008 WL 686953 (Indiana law).

under Georgia law." 157 Fed.Appx. at 205. The court therefore concluded that the policy provision at issue could reasonably be read to encompass the TCPA claim against the insured. In contrast, Florida privacy law is more limited. The focus of the seclusion-based right of privacy in Florida is "the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze." *See supra* at 28. For this reason, the *Ginsberg* Court held that an unwanted sexual touching did not constitute a seclusion-based invasion of privacy. *Id.* In contrast, Georgia *does* recognize a seclusion-based right of privacy that would make an unwanted sexual touching actionable. *See Troncalli v. Jones*, 237 Ga.App.10, 514 S.E.2d 478 (1999) (holding that unwanted sexual touching was an "unreasonable intrusion" that could constitute an invasion of privacy). Thus, unlike Georgia law, Florida privacy law does not "arguably embody" the TCPA claim alleged by Penzer's complaint, and there is therefore no coverage for it under the Policy, even under the rationale expressed in *Hooters.*

CONCLUSION

The Court should answer the certified question in the negative. Understood in context, the Policy is clear and unambiguous. Like the other "advertising injury" offenses enumerated in the Policy, it affords coverage for claims arising from the content of an insured's advertising – specifically, those secrecy-based privacy claims which involve the publication of personal facts to a

third party. Moreover, even if the Policy could be read to afford broader coverage, the Penzer complaint would not be covered because it fails to state a cognizable seclusion-based privacy claim as a matter of Florida law. This Court should therefore rule, with the courts of California, Indiana, New Jersey, Pennsylvania, Virginia, and Washington, that TCPA claims, like Penzer's, are not covered under insurance policies, like the Policy at issue here, that provide coverage for "advertising injury."

Respectfully submitted,

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