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

APPELLANT'S INITIAL BRIEF

MARC A. WITES
Florida Bar No. 24783
WITES & KAPETAN, P.A.
4400 North Federal Highway
Lighthouse Point, Florida 33064
Tel: (954) 570-8989
Fax: (954) 354-0205

DOUGLAS S. WILENS
Florida Bar No. 0079987
STUART A. DAVIDSON
Florida Bar No. 0084824
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
120 East Palmetto Park Road
Suite 500
Boca Raton, Florida 33432
Tel: (561) 750-3000
Fax: (561) 750-3364

Attorneys for Appellant Michael Penzer

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STATEMENT OF THE CASE AND THE FACTS[1]

A. Nature of the Case

This case comes before the Court on a certified question from the United States Court of Appeals for the Eleventh Circuit. *Penzer v. Transp. Ins. Co*., 545 F.3d 1303 (11th Cir. 2008)(the "*Penzer* Court").

B. Statement of the Facts

This is an insurance coverage dispute arising from Appellee Transportation Insurance Company's ("Transportation") refusal to defend and indemnify its insured, Southeast Wireless, Inc. ("Southeast"), regarding claims brought by Appellant Michael Penzer ("Penzer") against Southeast in Florida state court. (R 108 at 3). Transportation denied coverage to Southeast for Penzer's claims that Southeast had violated a federal privacy statute known as the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 *et seq.* (the "TCPA") by mass disseminating 24,000 unsolicited facsimile advertisements to class members.

1. The State Court Litigation

In June 2003, Penzer filed a putative class action in Florida state court against Nextel South Corporation ("Nextel"), alleging that Nextel (or one its

[1] The Record transferred from the Court of Appeals will be referred to as "R[docket entry number]-[page]" as these numbers were assigned by the United States District Court for the Southern District of Florida.

agents) had violated the TCPA.[2] (R. 108 at 2). Penzer alleged that Nextel (or one of its agents) sent 24,000 unsolicited commercial advertisement facsimiles, advertising Nextel's wireless telephone services, to class members. (*Id.* at 3). Penzer alleged that Nextel did not ask for recipients' permission to send them these transmissions, and did not give them the option of whether to receive such fax advertisements in the future. (*Id.* at 2). Penzer requested actual or statutory damages under the TCPA. (*Id.*).

Nextel subsequently filed a third-party complaint against Southeast, Nextel's authorized agent, which was responsible for sending the faxes at issue. (*Id.* at 2). Nextel sought indemnification and contribution from Southeast for any liability that might be assessed against it in Penzer's state court case. (*Id.*). Nextel alleged

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[2] 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." 47 U.S.C. § 227(b)(1)(C). An unsolicited advertisement is defined as "any material advertising the commercial availability of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(5). Persons who violate the TCPA can be held liable for damages equal to the greater of "actual monetary loss" or $500 per violation. 47 U.S.C. § 227(b)(3)(A)-(C). One who is found to have willfully or knowingly violated the TCPA can be held liable for treble damages. *Id.*

Furthermore, "[t]he stated purpose of the TCPA ... is to protect the privacy of individuals from receiving unsolicited faxed advertisements." *W. Rim Invest. Advisors, Inc. v. Gulf Ins. Co.,* 269 F. Supp. 2d 836, 847 (N.D. Tex. 2003), *aff'd,* 96 Fed. Appx. 960 (5th Cir. 2004); *see also* TCPA, Congressional Findings, 1991 PL 102-243, Sec. 2, ¶¶ (9) and (10).

that Southeast had paid Sunbelt, a fax advertising company, to transmit facsimiles advertising Nextel's services, without obtaining Nextel's authorization. (*Id.*).[3] Penzer filed his own third-party class action complaint against Southeast in December 2003. (*Id.*).

Southeast notified its commercial liability insurer, Transportation, of the claims against it, and demanded a defense and indemnification. (*Id.* at 2-3). Transportation disclaimed coverage based on the policy's coverage provisions and exclusions, and refused to provide a defense. (*Id.* at 3).

The policy issued by Transportation to Southeast provides coverage for "advertising injury", which the policy defines as follows:

> 1. "**Advertising injury"** means 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; or
>
> d. Infringement of copyright, title or slogan.

(R. 1, Exh. C at 10 of 13) (emphasis supplied). The policy excludes coverage for:

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[3] Nextel also named Sunbelt, but did not serve process on it. (R. 108 at 2).

p. "Personal injury" or "advertising injury":

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(3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

****

q. "Advertising injury" arising out of:

(1) Breach of contract, other than misappropriation of advertising ideas under an implied contract[.]

(R. 1, Exh. C at 5-6 of 13).

After Transportation disclaimed coverage, in April 2004, Southeast and Penzer agreed to settle the state court litigation pursuant which Southeast assigned to Penzer its rights to pursue coverage from Transportation, in accordance with *Coblentz v. Am. Sur. Co.*, 416 F.2d 1059, 1063 (5th Cir. 1969).[4] Penzer agreed to release Southeast from liability and Southeast consented to the entry of a $12 million judgment and assigned Penzer its rights to pursue coverage from Transportation. (R. 108 at 3). The $12 million judgment represented the number of unsolicited advertisements sent to class members, 24,000, multiplied by the statutory damages of $500 per incident. (*Id.*). The state court granted final approval to the settlement in August 2004. (*Id.*).

[4] Florida courts and the Eleventh Circuit have endorsed the use of *Coblentz* agreements to resolve disputes such as this. *See Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260-61 (11th Cir. 2007); *Chomat v. N. Ins. Co.*, 919 So.2d 535, 537 (Fla. 3d DCA 2006); *Ahern v. Odyssey RE Ltd.*, 788 So.2d 369, 372 (Fla. 4th DCA 2001).

2. The District Court Litigation

Thereafter, Penzer filed an action in The United States District Court for the Southern District of Florida (the "district court") in September 2004, seeking a declaratory judgment that Transportation was obligated to provide a defense and indemnify Southeast against Penzer's TCPA claims in the state court action. (R. 108 at 3). Penzer alleged that the claims he asserted against Southeast fell under the "advertising injury" provision of the policy Transportation issued to Southeast, which covers injuries "arising out of . . . [o]ral or written publication of material that violates a person's right of privacy[.]" (R. 108 at 3).[5]

Southeast answered Penzer's complaint, and filed a counterclaim seeking a declaration that it had no duty to defend or indemnify Southeast for alleged violations of the TCPA. (R. 5). Transportation alleged that Penzer's TCPA claims were not covered under the "advertising injury" provisions of its policy, and that, even if the claims came within the policy's "advertising injury" provisions, coverage was still not available, due to contractual exclusions or public policy. (R. 5 at 25-31). In Transportation's counterclaim, it also asserted claims against third-party defendants Southeast and Nextel, both of whom were defendants in the state

[5] Penzer initially alleged the claims were also covered under the "property damage" provisions of the policy, but subsequently withdrew that claim. (R. 108 at 3).

court case. (R. 5 at 35). Transportation voluntarily dismissed its claims against Nextel in November 2006. (R. 61).

Penzer and Transportation filed cross-motions for summary judgment as to the issue of coverage under the policy on November 7, 2006. (R. 58-60; 62-64).

On July 16, 2007, the district court entered its Order on Motions for Summary Judgment as to Coverage. (R. 108 at 1). The district court granted summary judgment in favor of Transportation, holding that "the transmission of unsolicited commercial advertisements by facsimile" is not "oral or written publication of material that violates a person's right to privacy" because the "advertisements did not disclose any private facts about anyone." (*Id.*).

3. The Eleventh Circuit's Decision

Penzer timely appealed the district court's Order to the Eleventh Circuit on August 10, 2007. (R. 111). On October 23, 2008, the *Penzer* Court issued its opinion, holding that neither the policy's exclusions nor public policy barred coverage, and certifying to this Court the question of whether Penzer suffered an injury for which there is coverage under the policy. *Penzer*, 545 F.3d at 1303.

In certifying the issue of coverage to this Court, the *Penzer* Court expressly rejected much of the district court's opinion, and noted the infirmities of the reminder. At the outset, the *Penzer* Court questioned the district court's reliance on the Seventh Circuit Court of Appeals' opinion in *American States Ins. Co. v.*

Capital Assoc., Inc., 392 F.3d 939 (7th Cir. 2004) for the finding that the policy language at issue was unambiguous. The *Penzer* Court recognized that "[t]he district court failed to acknowledge that *American States* has been significantly undermined" because "the Illinois Supreme Court expressly declined to follow the Seventh Circuit's prediction of Illinois law in *American States*, finding instead that TCPA claims were covered under the policy." *Penzer*, 545 F.3d at 1307 n.3.

Next, the *Penzer* Court questioned the district court's conclusion, based on a Fourth Circuit Court of Appeals decision, that because ***some*** of the policy's "advertising injury" offenses were content based that those offenses ***not*** including a content requirement must also be, *ipso facto*, content based. Specifically, the *Penzer* Court recognized that "other courts have come to the opposite conclusion regarding the identical provision." *Id.* at 1308. The *Penzer* Court also found infirm the district court's analysis of Florida law to reach its interpretation of the policy, finding that the two cases on which it relied – *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 928 (Fla. 1979) and *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082 (Fla. 2005) - do not support the district court's conclusion and address principles of law inapplicable to the instant case, respectively. *Penzer*, 545 F.3d at 1307 n.4.

The *Penzer* Court then recognized that the district court's holding on this point "is also placed in doubt by the wide divergence in case law interpreting 'right

of privacy' as used in th[e instant policy] and similar provisions," (*id*. at 1308) noting the vast majority of cases which have, in fact, ***found*** "advertising injury" coverage of TCPA claims for unsolicited facsimile. *Id*. 1308 n.5. Distinguishing those cases with the minority view, the *Penzer* Court recognized the difference, pointing out that, unlike the policy at issue here, "[m]any of the coverage denial cases construe policy language that uses the words 'making known to any person or organization' in place of 'publication.'" *Id*.

In discussing the Eleventh Circuit's prior decision in *Hooters of Augusta, Inc. v. American Global Ins. Co*, 157 Fed. Appx. 201 (11th Cir. 2005), the *Penzer* Court disputed the district court's opinion that *Hooters* "unpersuasive because it applied Georgia, not Florida, law [recognizing that g]eneral principles of Florida and Georgia law, however are similar in this area." 545 F.3d at 1308 (internal citation omitted).

Further undermining the district court's efforts to distinguish *Hooters*, the *Penzer* Court pointed out that "[t]he *Hooters* court ***did note*** [] that the tighter wording of the policies involved in various cases denying coverage for TCPA claims seemed to have been a significant factor in the courts' decisions, that is 'publication' of such material [which is the operative language here] "does not suggest the focus on secrecy that 'making known' does" – [the operative language in the cases denying TCPA coverage]. *Id*. at 1309 (emphasis added).

Finally, the *Penzer* Court repeatedly questioned, and in part outright rejected, the district court's reliance on *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So.2d 944 (Fla. 3d DCA 1995), which the *Penzer* Court recognized involved "only the *physical* invasion of the complainant's person." *Penzer*, 545 F.3d at 1309 (emphasis in original). The *Penzer* Court found that "*Compupay* does not appear to be directly on point … as the case involved a different type of conduct, and [thus] the court had no occasion to consider whether the publication of unsolicited material into a recipient's private domain violates that person's right to privacy based on interests in seclusion." *Id*. at 1309.

Moreover, the *Penzer* Court rejected the district court's efforts to bolster its reliance on *Compupay*, rejecting the district court's conclusion that this Court's decision in *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156, 161 (Fla. 2003) renders *Compupay* binding on the instant case. The *Penzer* Court reached the opposite conclusion, finding that "*Ginsberg*, however, neither affirmed *Compupay* nor discussed the applicability of its holding outside of the context of the duty to defend claims of sexual harassment." *Penzer*, 545 F.3d at 1309 n.6.

C. Question Certified

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 facsimile advertisement[s] to a facsimile telephone machine when no private information is revealed in the facsimile?

D. Standard of Review

This Court's review of a certified question on the issue of coverage under, and the interpretation of, an insurance policy is *de novo*. *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1226-27 (Fla. 2004); *Coleman v. Fla. Ins. Guar. Ass'n, Inc.*, 517 So.2d 686, 690 (Fla. 1988).

SUMMARY OF THE ARGUMENT

Employing Florida's long-standing principles for interpreting insurance policy provisions, which require courts to construe undefined terms according to their plain and ordinary dictionary definitions, Penzer's TCPA claims fit squarely within the advertising injuries covered under the Transportation policy. First, Southeast's broad dissemination of facsimile advertisements falls within the commonly understood meaning of "publication." Second, facsimile advertisements fall within the commonly understood meaning of "material." Finally, sending unsolicited facsimile advertisements violates a person's "right of privacy," as that term is commonly understood. Because these terms are susceptible to a reasonable interpretation providing for coverage, they must be construed liberally in favor of coverage.

Utilizing the very same principles of policy interpretation that this Court employs, federal courts of appeal in the Eleventh, Fifth and Tenth Circuits, along with the Illinois Supreme Court and the Massachusetts Supreme Judicial Court, have found that ***identical*** policy provisions afforded insurance coverage for ***identical*** TCPA claims. The district court reached its contrary conclusion by discounting longstanding Florida principles of interpretation that require that policy terms be interpreted as an "ordinary person" would understand them, not according to technical legal meanings or tort law concepts. Indeed, perhaps the best evidence that an ordinary person would read the provision at issue here to find coverage is that many federal circuit court and state supreme court judges have found that ***identical*** policy provisions afforded coverage for ***identical*** TCPA claims.

The district court erred by rejecting the Eleventh Circuit's well-reasoned analysis in *Hooters*, which found coverage under an indentical policy provision for an identical TCPA violation under Georgia law. As the Eleventh Circuit noted in *Penzer*, "[g]eneral principles of Florida and Georgia law, [sic], are similar in this area." 545 F.3d at 1308.

The district court likewise erred by relying on the minority view set forth by the Seventh and Fourth Circuits. As recognized by the *Penzer* Court, the Seventh Circuit case relied on by the district court is no longer good law, because the

Illinois Supreme Court subsequently rejected the Seventh Circuit's attempt to predict Illinois law, and the Fourth Circuit decision concerned inapposite policy provisions. The district court also erred in relying on *Compupay,* which, as the *Penzer* Court held, is not on point because it involved different policy provisions, different underlying conduct, different arguments, and questionable reasoning.

This Court should reach the same conclusion that numerous other state supreme and federal circuit appeals courts have reached: disseminating unsolicited facsimile advertisements falls squarely within the meaning of "written publication of material that violates a person's right of privacy."

The Eleventh Circuit's question should be answered in the affirmative.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Florida's Rules of Interpreting Insurance Policy Provisions Compel a Finding of Coverage

Penzer's state court action alleged that Southeast violated the TCPA by disseminating 24,000 unsolicited commercial advertisements by facsimile. (R. 1, Exh. D at 7). The policy's advertising injury provisions afford coverage for injuries resulting from "[o]ral or written publication of material that violates a person's right to privacy." Numerous federal circuit and state supreme courts have found that identical policy provisions provided coverage for such TCPA fax advertisement claims, indicating that an ordinary person would certainly

understand the same and, at worst, that there is an ambiguity in the policy that mandates a finding a coverage. The same result is required under Florida law.

A. Florida Law Concerning Interpretation of Insurance Policies

Florida law requires that an insurance policy be read liberally in favor of coverage, and that any ambiguities be resolved in favor of the insured. Under Florida law, "courts should read each policy as a whole" and should not "reach results contrary to the intentions of the parties." *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So.2d 161, 165-66 (Fla. 2003). Insurance policy "terms are to be taken and understood in their plain and ordinary sense." *Goldsby v. Gulf Life Ins. Co.*, 158 So. 502 (Fla. 1935).

Insurance policy provisions "must be read in light of the skill and experience of ordinary people, and given their everyday meaning as understood by the 'man-on-the-street[.]'" *Thomas v. Prudential Prop. & Cas. Co.*, 673 So.2d 141, 142 (Fla. 5th DCA 1996). Ambiguous terms "should be construed liberally in favor of the insured and strictly against the insurer." *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla. 1998). Florida's liberal construction of policy provisions favors a finding of coverage. "[T]he reason supporting this principle is that insurance policies are prepared by experts employed by insurance companies." *Bethel v. Sec. Nat'l*, 949 So.2d 219, 223 (Fla. 3d DCA 2006).

B. The Eleventh Circuit's Decision In *Hooters* Is Highly Persuasive

In *Hooters*, 157 Fed. Appx. at 201, an Eleventh Circuit panel, including Chief Judge Edmondson, Judge Marcus and Judge Pryor, evaluated "advertising injury" provisions ***identical*** to the coverage provision at issue here,[6] based on claims ***identical*** to those asserted by Penzer. In a thorough (albeit unpublished) opinion, the Eleventh Circuit concluded that, under Georgia law, this provision covered unsolicited fax ads sent in violation of the TCPA. Notably, the rules of insurance contract interpretation analyzed under Georgia law in *Hooters* are equally applicable in Florida, *i.e*., reading policy language according to the plain and ordinary layman's understanding rather than from the perspective of an insurance expert.

The thoughtful analysis employed in *Hooters* gives it particular persuasive power.[7] Numerous courts have therefore followed it, including the Tenth Circuit, in *Park Univ. Enters., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1249 (10th Cir. 2006), which, after canvassing relevant case law, found the thorough, reasoned analysis of

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[6] The identical policy language at issue in *Hooters* defined advertising injury to mean "oral or written publication of material that violates a person's right of privacy." *Hooters*, 157 Fed. Appx. at 205.

[7] Under Eleventh Circuit Rule 36-2, an unpublished opinion is not binding precedent, but "it is persuasive authority." *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000); *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1138 n.4 (11th Cir. 2004). Further, under Rule 36-2, a panel does not choose not to publish; all opinions are unpublished unless the panel affirmatively decides otherwise.

Hooters "persuasive," and found coverage under the identical provision at issue here. *Park Univ.,* 442 F.3d. at 1243, 1249 n.6 (policy defined advertising injury to mean "oral or written publication of material that violates a person's right of privacy."). Indeed, a Westlaw search reveals that *Hooters* has been cited with approval on nine occasions (including twice by states' highest courts), while a tenth decision, *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F. Supp. 2d 488, 503 (E.D. Pa. 2006), *aff'd* 2007 WL 2772061 (3d Cir. Sept. 25, 2007), noted its agreement with *Hooters*, but found no coverage because the policy there was identical to the policy in *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631 (4th Cir. 2005), which the *Hooters* court found was distinguishable.

By contrast, only ***one court*** has disagreed with *Hooters*: the district court's decision here. Tellingly, while noting the district court's finding that Hooters was unpersuasive, the *Penzer* Court explained that "[g]eneral principles of Florida and Georgia law, however, are similar in this area." 545 F.3d at 1308.

In short, *Hooters* is no less persuasive because it was decided under Georgia law. This Court has embraced the very insurance contract interpretation principles relied on in *Hooters* to find coverage for ***indentical*** TCPA claims under ***identical*** and strikingly similar policy provisions (as have courts in Illinois, New Jersey,

Kansas, North Carolina and Texas).[8] Indeed, there is not at a single relevant interpretative principle under Florida law that differs from Georgia's approach.[9]

C. Transportation Had a Duty to Indemnify Southeast for Penzer's Claim Under the TCPA

The policy Transportation issued to Southeast provides coverage for "advertising injuries" arising from the "oral or written publication of material that violates a person's right of privacy." (R. 1, Exh. C at 10 of 13). As such, to determine whether the provision affords coverage for claimed violations of the

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[8] *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960 (5th Cir. 2004), *aff'g* 269 F. Supp. 2d 836 (N.D. Tex. 2003) (Texas law) (policy defined advertising injury to mean "oral or written publication of material that violates a person's right of privacy."); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (Mass. 2007) (New Jersey law) (same); *Home Assur. Co. v. McLeod USA, Inc.*, 475 F. Supp. 2d 766, 772 (N.D. Ill. 2007) (Illinois law) (same); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744, 752 (M.D.N.C. 2002) (North Carolina law) (same); *Nutmeg Ins. Co. v. Employers Ins. Co.*, No. CIV.A. 3:04-CV-1762B, 2006 WL 453235 at *3 (N.D. Tex. Feb. 24, 2006) (Texas law) (same); *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 237 (Tex. Ct. App. 2004) (Texas law) (same); *Registry Dallas Assocs., L.P. v. Wausau Bus. Ins. Co.*, 2004 WL 614836, at *1 (N.D.Tex. Feb. 26, 2004) (Texas law) (same); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307, 311 (Ill. 2006) (Illinois law) (underlying policy provision defining advertising injury to mean "oral or written publication, in any manner, of material that violates a person's right of privacy," and excess policy including the definition "oral, written, televised or videotaped publication of material that violates a person's right of privacy.").

[9] *Hooters* should not be ignored because the panel "deliberately chose not to publish" it. Neither Transportation nor Penzer knows why the panel did not publish its opinion, but its decision does not imply that the panel thought its reasoning was infirm. The opinion's length and depth reveal the panel's care and attention. *Hooters* should not be lightly discarded.

TCPA's prohibition against sending unsolicited fax advertisements, this Court looks to whether these acts were: (1) written publication (2) of material (3) that violates a person's right of privacy.[10] In construing such terms, this Court gives terms their plain and ordinary meaning, and construes any ambiguity in favor of coverage. This Court should conclude, as have the Eleventh, Fifth and Tenth Circuits, and the highest courts in Illinois and Massachusetts when confronted with identical policy language, that all three of these elements are met here.

1. Disseminating Unsolicited Fax Advertisements Is "Written Publication of Material" Within the Meaning of the Policy

The first step in the Court's coverage analysis in this case is to determine whether transmission of unsolicited fax advertisements was a "publication." The policy does not define the term "publication," (R. 1, Exh. C at 10-13 of 13), so it must be understood in its "plain and ordinary sense" for which "one looks to the dictionary." *Garcia v. Fed. Ins. Co.*, 969 So.2d 288, 292 (Fla. 2007) (citing *Beans v. Chohonis*, 740 So.2d 65, 67 (Fla. 3d DCA 1999)). If the "language is subject to differing interpretations, the term should be construed liberally in favor of the insured and against the insurer." *CTC*, 720 So.2d at 1076.

[10] Transportation did not dispute below that the "offense" at issue here (*i.e.*, the transmission of unsolicited fax advertisements) was "committed in the course of advertising [Southeast's] goods, products or services" and was committed in the "coverage territory" of the "United States of America" during the October 22, 2002 to October 22, 2003 policy period.

In *Hooters*, the Eleventh Circuit held that the disseminating facsimile advertisements "amounted to an act of 'publication' in the ordinary sense of the word." 157 Fed. Appx. at 208. The Eleventh Circuit found that the dictionary definition encompassed at least **four** definitions: "to make generally known," "to make public announcement," "to place before the public: disseminate," and "to produce or release for publication; specifically: print." *Id*. Faxing thousands of unsolicited advertisements "squarely fits at least the third" definition, as well as the fourth, and, arguably, also fit the other two definitions. *Id.* The Eleventh Circuit, therefore had no trouble concluding that transmitting fax advertisements is "publication." *Id.* Numerous other courts also have concluded that fax advertisements fall within the plain meaning of "publication." *See Park Univ.*, 442 F.3d at 1250; *Terra Nova*, 869 N.E. 2d at 415; *Valley Forge*, 860 N.E.2d at 316-17; *W. Rim*, 269 F. Supp. 2d at 46-47.[11]

While this Court has not addressed whether the term "publication" in an insurance contract includes the dissemination of advertisements by facsimile, at least one Florida court has recognized that the term "publication" "has a range of meanings." *Dep't of Revenue v. Val-Pak Direct Mktg. Sys.*, 862 So.2d 1, 3-4 (Fla. 2d DCA 2003). While that court's analysis involved statutory construction – and

[11] Because the Fifth Circuit affirmed *W. Rim* "for essentially the reasons stated by the district court[,]" it is proper to look to the district court's reasoning as "descriptive of the Fifth Circuit's determination." *Park*, 442 F.3d at 1249 n.6.

thus it had no occasion to determine the extent of the plain meaning of the term, read in favor of the insured – the court nevertheless noted that "[i]n some contexts, publication is a noun denoting the action of disseminating information." *Id.* That definition plainly encompasses transmitting facsimile advertisements.

This Court construes insurance policy provisions according to their plain, dictionary definition, and chooses the meaning that is most favorable to the insured. As numerous other courts have recognized, Southeast's dissemination of facsimile advertisements was a "publication" as that term is commonly defined. This Court should therefore conclude that Southeast's actions were "publications" within the meaning of the policy.

2. Commercial Advertisements are "Material" Within the Meaning of the Policy

Southeast's facsimile advertisements easily fit within the plain dictionary definition of "material." The policy Transportation issued to Southeast does not define the term "material." Numerous other cases have found facsimile advertisements to fall squarely within the plain meaning of this term. For example, in *Valley Forge*, the court found the dictionary definition was "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." 860 N.E.2d at 367. Other courts have reached similar conclusions. *See, e.g., Park Univ. Enters. v. Am. Cas. Co. of Reading*, 314 F.

Supp. 2d 1094, 1108 (D. Kan. 2004), *aff'd*, 442 F.3d 1239 (10th Cir. 2006) ("[A]dvertising content, as well as the paper containing it, may constitute 'material.'"); *W. Rim*, 269 F. Supp. 2d at 847. This Court should similarly conclude that Southeast's written fax advertisements were "material" within the meaning of the policy.

3. The Transmission of Unsolicited Fax Advertisements Is Written Publication That Violates Recipients' "Right of Privacy" Within the Meaning of the Policy

Transportation also chose not to define the phrase "right of privacy" in its policy. (R. 1, Exh. C at 10-13 of 13). Under an ordinary interpretation of the phrase, resolving ambiguities in favor of coverage, this Court should find - like the Eleventh Circuit in *Hooters*, the Fifth and Tenth Circuits, and the highest courts of Illinois and Massachusetts - that transmitting unsolicited fax advertisements violates the recipient's "right of privacy."

In *Hooters*, the Eleventh Court "conclude[d] that facsimile transmissions in violation of the TCPA amount to violations of 'privacy' for the purposes of the insurance policy at issue." 157 Fed. Appx. at 207. The insurer in *Hooters* argued that a fax transmission in violation of the TCPA does not violate a privacy right because it "would not constitute a ***common-law tort*** for invasion of privacy under Georgia law." *Id.* (emphasis added). The court rejected the insurer's interpretation, because the phrase is susceptible to more than one interpretation and, under

Georgia law, which is virtually identical to Florida law on questions of insurance coverage, such phrases must be construed in favor of the insured. As the *Hooters* court explained:

> [I]t is at least as reasonable to interpret ”privacy” more broadly to include aspects of privacy protected by other sources of law, including state privacy statutes and federal law. Indeed, the statutory notion of being free from intrusive and unsolicited facsimile transmissions is at least arguably embodied in the common law right to privacy under Georgia law. An essential element of the right to privacy, Georgia's courts have recognized, is ”the right 'to be let alone,’” or ”the right to seclusion or solitude.” [Citation omitted.] Notably, the insurance policy contains no language explicitly limiting the scope of the term “privacy” or, for that matter, alerting non-expert policyholders that coverage depends on the source of law underlying the relevant privacy right. Following the Georgia rule and interpreting ambiguous terms in favor of the insured, we are constrained to reject American Global’s suggestion that its construction of the meaning of privacy is the only reasonable one under Georgia law, as opposed to a broader interpretation that encompasses violations of privacy rights established by federal statutes such as the TCPA. We are hard pressed to say that a layman could not reasonably read the notion of privacy as broadly as the district court did.

Id. at 205. As a result, the Eleventh Circuit was “satisfied that the term ‘privacy’ can be reasonably read as extending beyond a particular, narrow and more technical definition of privacy and encompassing a broader layperson’s notion of privacy as protected by various provisions of state or federal law.” *Id.* at 207. The Eleventh Circuit was not alone in finding violations of “a person’s right of privacy” can reasonably be interpreted to include unsolicited facsimiles. *See, e.g.*, *Terra Nova*, 869 N.E.2d at 416-17.

Under Florida law, the same result follows. Florida law plainly eschews reading policy provisions according to the limitations of tort causes of action. *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779, 786-87 (Fla. 2004) (rejecting argument that decision on tort law supplied definition of policy term because in first case "we employed principles of tort law . . . Here, on the other hand, we are called upon to interpret an insurance policy."); *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So.2d 467, 470 (Fla. 1993) ("Florida law has long followed the general rule that tort law principles do not control judicial construction of insurance contracts."). Instead, under Florida law, policy provisions are interpreted as a layperson would view them, in Florida law's parlance, as a "man on the street" would understand them. *Travelers Indem.*, 889 So.2d at 799 (citing *Braley v. Am. Home Assurance Co.*, 354 So.2d 904, 905 (Fla. 2d DCA 1978)). There can be no question that the interpretation of the "ordinary person" or "man on the street" in Florida would be no different then such person (much less a judge) in Georgia, Illinois, New Jersey, Kansas and Texas.

Thus, applying Florida law, "right of privacy" is susceptible to more than one interpretation, and "it is at least as reasonable" to interpret it to include TCPA violations (*Hooters*, 157 Fed. Appx. at 205; *CTC*, 720 So.2d at 1076 (phrases with multiple meanings are construed in favor of the insured, if "language is subject to differing interpretations, the term should be construed liberally in favor of the

insured and against the insurer.")) and, therefore, the term must be construed in favor of the insured, as including TCPA violations.

Moreover, Florida law compels this conclusion even more strongly than the Georgia law applied in *Hooters*. This Court made clear in *Swindal* that a court should ***not*** look to tort law concepts to determine the scope of coverage. However, even if the Court were to look to Florida's invasion of privacy tort, Florida tort law recognizes "Intrusion, i.e., invading plaintiffs' physical solitude ***or seclusion***" as an invasion of privacy tort. *Ginsberg*, 863 So.2d at 161 (emphasis added).

In addition, Florida's Constitution expressly guarantees a fundamental "right of privacy," (FLA. CONST. art I, § 23 (2005)), which "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So.2d 612, 634-35 (Fla. 2003). These protected privacy rights include "a person's general right to privacy - his right to be let alone by other people [.]" *Id.* at 635. Thus, it would be eminently reasonable for a "man on the street" in Florida to understand the term "right of privacy" to include the right to be free from unsolicited facsimile advertisements, just as numerous other state courts have found regarding laypersons in their states.

To the extent the Court finds that "right of privacy" is susceptible to only one interpretation, it need look no further than the dictionary to find the "plain and

ordinary" meaning. *Garcia*, 969 So.2d at 292. The dictionary definitions of "privacy" and "right of privacy" encompass the right not to have one's seclusion invaded. The term "privacy," according to Webster's, is "the quality or state of being apart from the company or observation of others: seclusion." Webster's Third New Int'l Dictionary 1804 (2004). In Black's Law Dictionary, the listing for "right of privacy" contains the definitions "the right to personal autonomy" and "[t]he right of a person and the person's property to be free from unwarranted public scrutiny or exposure" and refers readers to the listing for "invasion of privacy." Black's Law Dictionary 1350 (8th ed. 2004). In turn, "invasion of privacy" is defined as including "invasion of privacy by disclosure of private facts" ***as well as*** "invasion of privacy by intrusion." *Id.* at 843. Thus, the dictionary definitions of "invasion of privacy" encompass unwanted intrusions. It is unsurprising then, that courts have repeatedly found that "[t]he plain and ordinary meaning of privacy includes the right to be left alone, unburdened by unsolicited facsimiles." *Park Univ.*, 442 F.3d at 1249; *see also Valley Forge*, 860 N.E.2d at 317 (finding the dictionary definition of "'right of privacy' connotes both an interest in seclusion and an interest in the secrecy of personal information. . . Unsolicited fax advertisements, the subject of a TCPA fax-ad claim, fall within [seclusion]."). [12] The same is true under Florida law.

[12] *See also Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network*, 401

To find, as Transportation suggests, that coverage under its policy requires that the unsolicited fax advertisement reveal "private information" would require this Court to ignore the meaning that an "ordinary person" would attach to the policy language, ignore that numerous courts have found identical policy language to implicate coverage under identical facts, ignore that, at worst, the divergence between the district court's view and the majority of courts that have found coverage shows that there is an ambiguity that mandates a finding of coverage, and instead *rewrite* the policy, such that "publication of material that violates a person's right of privacy" actually means "publication of material *the contents of which* violates a person's right of ~~privacy~~ *secrecy*." Transportation could have inserted these words into its policy, or defined terms to unambiguously limit coverage as it argued to the district court and the *Penzer* Court, but it did not. As such, its overly-restrictive interpretation based solely on tort law concepts should be rejected. *See Terra Nova*, 869 N.E. 2d at 417-18 ("[H]ad [the insurers] wished their policies to pertain only to violations created by the content of material, it was incumbent on them to draft explicit policies to that effect."); *Valley Forge*, 860 N.E. 2d at 317-18 ("To adopt the insurers' proposed interpretation of it -- *i.e.*, that

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F.3d 876, 881 (8th Cir. 2005) (finding unsolicited fax advertisements fell under provision covering "private nuisance" and "invasion of privacy"); *W. Rim*, 269 F. Supp. 2d at 847 (finding an unsolicited fax advertisement is "material that violates a person's right to privacy").

it is only applicable where the content of the published material reveals private information about a person that violates the person's right of privacy -- would essentially require us to rewrite the phrase 'material that violates a person's right of privacy' to read 'material *the content of which* violates a person *other than the recipient's* right of privacy.' This we will not do.").

Said another way, for Transportation to prevail, it must show that the policy language is unambiguous, *i.e*. that the ***only*** reasonable interpretation of the coverage provision precludes coverage. However, as this Court has frequently noted:

> If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and [] another limiting coverage, the insurance policy is considered ambiguous . . . Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy.

Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 34 (Fla. 2000). Here, there can be no question that Penzer's reading of the policy language is reasonable or, at worst, the policy language is ambiguous. Thus, properly analyzed under Florida legal principles for interpreting insurance policy provisions, this Court should find that Southeast's unsolicited fax advertisements were materials that violated persons' (recipients') right of privacy, just as federal courts of appeal and state courts of last resort have repeatedly affirmed.

II. The District Court Erred in Holding Coverage Was Not Available Under the Policy

Despite this overwhelming precedent, the district court rejected the Eleventh Circuit's reasoning in *Hooters*, as well as the decisions of the vast majority of other courts that have reached the same conclusion. The district court offered several rationales for its decision. Each will be addressed below.

A. The Florida Third District Court of Appeal's Decision in *Compupay* Does Not Support the District Court's Decision Here

The district court first justified its construction of the policy by referencing the decision of Florida's Third District Court of Appeal in *Compupay*, 654 So.2d at 944. It is true that "[i]n the absence of any Florida Supreme Court decisions close enough on point," federal courts look "to decisions of the Florida intermediate appellate courts and follow them unless there is some really persuasive indication that the Florida Supreme Court would go the other way." *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1325 (11th Cir. 2004). However, as found by the *Penzer* Court, *Compupay* is not on point, as it involved a completely different type of conduct and a wholly different policy provision. *Penzer*, 545 F.3d at 1309.

1. *Compupay* Is Not On Point

In *Compupay*, an employer sought coverage from its insurer for sexual harassment and discrimination claims brought by a former employee. 654 So.2d at 945. The insurance policy provided coverage for "the publication or utterance of a

libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy [.]" *Id.* at 948. The court rejected Compupay's argument that sexual harassment is "disparaging material" because "the clause requires 'the *publication or utterance* of . . . defamatory or disparaging material'" which the employee did not allege. *Id.* (emphasis in original).

The insured claimed that, despite the language of the policy requiring "publication or utterance," since unwanted touching is an invasion of privacy, it should be covered under the policy. *Id.* at 948-49. Specifically, the insured argued that the employee's "allegations of offensive and undesired touching state a cause of action for invasion of privacy, bringing the claim within coverage under the personal injury clause." *Id.* at 949.

In addressing this argument, the Third DCA first noted that there are invasion of privacy torts that involve publication, citing to the publication of private facts tort recognized in *Cason v. Baskin*, 20 So.2d 243, 248 (1944) as an example. *Id.* at 948-49.[13] While the court acknowledged that some courts had

[13] In *Cason*, this Court first recognized an independent invasion of privacy cause of action. *Ginsberg*, 863 So.2d at 160. By 1980, ***four categories*** of cognizable claims for invasion of privacy under Florida law had developed: "(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

permitted claims of unwanted touching to proceed as invasion of privacy tort claims, the cause of action's viability was irrelevant to the coverage provision at issue which required publication. The court found that Compupay's "argument fails because it ignores the clear and unambiguous language in the personal injury clause." *Id.* By way of further explanation, the court continued:

> The clause clearly states that coverage is available for "a *publication or utterance* in violation of an individual's right to privacy . . . ." (Emphasis added). 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 inconsistent with a plain reading of the remainder of the clause which provides coverage for libelous and slanderous publications. Once again, in determining the issue of coverage, we note that we may consider only the facts alleged in the complaint as viewed against the policy provisions. We may not ratify the insured's version of the facts, or the theory of plaintiff's case. Ode's complaint lacks any factual allegations of publication which would bring the claim within this provision.

Id. (emphasis in original).

The district court here quoted three sentences from this paragraph for the proposition that the court in *Compupay* expressly held that a clause covering "publication or utterance in violation of an individual's right to privacy" ***only applies*** to a publication of a personal matter. It thus concluded that a "written

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in the public eye--publication of facts which place a person in a false light even though the facts themselves may not be defamatory." *Id.* at 162.

publication of material that violates a person's right to privacy" does not extend to unsolicited facsimiles that violate a person's right to seclusion. (R. 108 at 8).

As the *Penzer* Court appeared to acknowledge, 545 F.3d at 1309, the district court erred in reading these statements as precedent for this case. Read in its context – in the middle of an explanation that the policy provision required publication – *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. The *Compupay* court was ***rejecting*** the insured's argument that the court should look to tort causes of action rather than the plain language of the policy. That reasoning was consistent with this Court's guidance that policy terms should be interpreted according to their plain meaning, and not by resorting to tort law definitions. *See Swindal*, 622 So.2d at 470. The *Compupay* court had no occasion to consider whether only a ***subspecies*** of one tort cause of action could ever be covered under the provision, only whether the provision covered a claim that did not allege publication in connection with an invasion of privacy. Thus, the district court erred in construing *Compupay* as precedent for this case, because *Compupay* did not, and could not, decide whether coverage would be available where, as here, the underlying claims alleged ***both*** publication ***and*** violations of rights of privacy.

Compupay is also inapposite because it did not address the policy provisions at issue in this case. Transportation's policy differs from the policy in that case in significant ways. *Cf. Hooters*, 157 Fed. Appx. at 208 (recognizing significance of differences in policy language). First, the policy in *Compupay* covered "the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy" while the policy here covers "[o]ral or written publication of material that violates a person's right to privacy[.]" As this Court has recognized, *Compupay*'s holding was limited to the "specific language of the insurance policy at issue in that case[.]" *Ginsberg*, 863 So.2d at 162. Second, the *Compupay* provision covered "personal injuries" while the policy here covers "advertising injury". Penzer's state court claims alleged that Southeast's advertising (via unsolicited facsimiles) violated his privacy.

Thus, *Compupay* is not on point as it did not address, and could not decide, the issue in this case. The district court erred in construing and relying on *Compupay* as precedent for this case. *See Penzer*, 545 F.3d at 1309 & n.6.

2. The Statements Relied On by the District Court Were Dicta

The broad statements in *Compupay* cited by the district court here were *dicta* that no Florida court would regard as dispositive of the issues here.[14] The court in *Compupay* did not address whether there might be a situation with publication in addition to an invasion of privacy other than revealing private facts, such as here. The court did not rule on whether coverage would be available in that situation, because it did not have those facts before it. This Court regards statements that are not necessary to a court's holding as *dicta* that should not be relied on as precedent in addressing different factual scenarios. *See, e.g., R.J.L. v. State*, 887 So.2d 1268, 1280 (Fla. 2004) (declining to follow statement of U.S. Supreme Court and certain holdings of Florida Supreme Court as *dicta*); *Puryear v. State*, 810 So.2d 901, 904-05 (Fla. 2002) (regarding statement in prior decision as non-precedential dicta because it was not necessary to the holding); *Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.*, 969 So.2d 962, 968 (Fla. 2007) (approving decision that receded from prior "broad dicta").

Thus, the district court erred in relying on *Compupay*'s statement that the

[14] The district court acknowledged that the statement it quoted from *Compupay* may have been *dicta* but opined that it was "persuasive dicta." (R. 108 at 9, n.4). When construed as the district court understood it, *Compupay* conflicts with the holdings of this Court as well as several other Circuits and the highest courts of several states. Thus, *Compupay* is decidedly unpersuasive as applied to the facts of this case.

policy provision in ***that*** case "does not cover causes of action under the broader umbrella of invasion of privacy torts." As the court there explained, the employee who sued Compupay did not allege publication, and that issue was dispositive as to coverage. *Compupay*, 654 So.2d at 948-49. In rejecting the insured's argument that the claim should be covered because the cause of action stated a claim for a violation of privacy tort, even though there was no publication, the court made a broad statement that the policy provision did not reach the "broader umbrella" invasion of privacy tort claims, but rather only where such claims involve publication. *Id.* at 949. However, the exclusion of all other types of privacy violations, such as the situation here, was not necessary to the court's holding. The court was not confronted with a situation where an alleged invasion of the privacy right of seclusion involved publication. Thus, the court's broad statements are *dicta*, and cannot be regarded as a holding of a Florida appellate court with respect to the issue raised in this case.

The district court here also misread this Court's decision in *Ginsberg*, 820 So.2d at 162. According to the district court, "any doubts about the binding nature of this holding in *Compupay* . . . have been erased by the Florida Supreme Court, which has read *Compupay* as a decision regarding insurance . . ." But, as the *Penzer* Court found, "*Ginsberg*, however, neither affirmed *Compupay* nor

discussed the applicability of its holding outside of the context of the duty to defend claims of sexual harassment." *Penzer*, 545 F.3d at 1309 n.6.

To the contrary, *Ginsberg* rejected and distinguished those portions of *Compupay* it addressed, and persuasively indicates that this Court should reach ***a different*** conclusion with respect to the claims at issue here. In that case, the Eleventh Circuit asked this Court to answer certified questions, the first of which was "Do pleadings of unwelcome conduct including touching in a sexual manner and sexually offensive comments state a cause of action for the Florida common law tort claim of invasion of privacy?" *Ginsberg*, 863 So.2d at 158-59. This Court answered "no." *Id.* at 160.

This Court rejected the appellees' contention that *Compupay* stood for the proposition that Florida courts recognize a privacy violation tort cause of action for unwanted touching, based on its discussion of that issue. *Id.* at 161-62. In doing so, this Court explained that "*Compupay* is not a decision directly addressing the issue[.]" *Id.* at 162. This Court first noted that, in *Compupay*, "the district court, basing its decision on the specific language of the insurance policy at issue in that case, found that the policy did not cover causes of action under the broader umbrella of invasion of privacy torts." *Id.* It then rejected the court's discussion of

the invasion of privacy tort by discrediting the sources cited in *Compupay*. *Id.*[15]

Thus, in finding that *Compupay* was not on point, this Court did not find that *Compupay* was "binding" with respect to all policy provisions or all potential injuries. Rather, this Court's discussion was limited to dismissing *Compupay* as inapposite, because it dealt with whether coverage for unwanted touching was available under a specific policy provision, and because its statement of the law regarding invasion of privacy torts was incorrect. The district court erred in construing *Ginsberg* as an affirmance of the "binding" nature of *dicta* in *Compupay*. If anything, *Ginsberg* shows that this Court would not regard statements in *Compupay* as binding with respect to issues that were not directly before that court, and that it would decline to follow that court's decision, to the extent it conflicted with this Court's precedent.[16]

Thus, the statements in *Compupay* relied on by the district court were *dicta*, and should not be regarded as precedential authority for the issue raised here.

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[15] This Court also identified the categories of invasion of privacy torts it ***does*** recognize, among which is "intrusion – physically or electronically intruding into one's private quarters;" which is implicated by Penzer's TCPA claims. *Id.* at 162.

[16] The district court stated that *Ginsberg* showed *Compupay* was "not a tort case." (R. 108 at 9). Penzer agrees that *Compupay* is an insurance case, but disputes that insurance contracts should be read using tort law principles.

3. If the Statement Quoted By the District Court Was a Holding, and Was On Point, A Different Ruling is Warranted Here

The district court additionally erred because, even if *Compupay* could have decided the issue raised in this case, although neither the claims nor the policy language in this case was presented to that court, there is a "persuasive indication that the Florida Supreme Court would go the other way." *KMS Restaurant*, 361 F.3d at 1325. *Compupay*, like the district court here, did not apply Florida's well established principles of reading policy provisions according to their plain and ordinary meanings rather than in accordance with tort law concepts.

This Court has explicitly ***rejected*** the use of tort law principles to interpret policy provisions: "Florida law has long followed the general rule that tort law principles do not control judicial construction of insurance contracts." *Swindal*, 622 So.2d at 470 (quoting *Gulf Life Ins. Co. v. Nash*, 97 So.2d 4, 9-10 (Fla. 1957)). This Court reaffirmed this concept in *CTC*, where it rejected precedent that the policy term "accident" should be construed according to tort law principles:

> In this case, we conclude that the term "accident" within a liability policy is susceptible to varying interpretations and should be construed in favor of the insured. Rather than defining the term most favorably to the insured, this Court in its 1953 *Gerrits* opinion adopted a more restrictive definition -- *a definition that was improperly derived from tort law* . . . We therefore recede from *Gerrits* and its outmoded definition of "accident" in liability policies.

720 So.2d at 1076 (emphasis added).

The Eleventh Circuit, applying Florida law, reached a similar conclusion in *Hyman v. Nationwide Mut. Ins. Co.*, 304 F.3d 1179 (11th Cir. 2002). Construing a different prong of the "advertising injury" coverage at issue in the policy here, the court explained:

> We are unconvinced by Nationwide's argument that "misappropriation" covers only injuries actionable under the common law tort of "misappropriation." There is no indication in the policy that the phrase was intended to be so limited, and the ordinary meaning of the term misappropriation encompasses a wider spectrum of harms.

Id. at 1189 (citations omitted).

Thus, even were this Court to adopt the district court's understanding of *Compupay*, this Court still should not follow that decision. According to the district court's reading of the case, *Compupay* determined policy coverage by looking to tort principles, concluding that since the provision required "publication" and only the tort of "publication of private facts" requires publication, only that claim was covered under the policy in that case. This Court, however, rejects interpreting policy provisions through the lens of tort law. Rather, such provisions should be interpreted according to the plain and ordinary "dictionary" meaning of the words used in the policy, and terms subject to multiple interpretations should be construed in favor of the insured. *Garcia*, 969 So.2d at 292 (citing *Beans*, 740 So.2d at 67); *CTC*, 720 So.2d at 1076. For this additional reason, the district court erred in relying on *Compupay*.

B. Reading the Phrase "as a Whole" or "in Context" Does Not Change the Result

The district court also erred in its alternative reasoning, that even if its reading of *Compupay* was incorrect, the policy phrase as a whole, and/or in context, limited its coverage to claims alleging the publication of private facts. The district court admitted that "[t]he terms 'publication,' 'material,' and 'right of privacy' in Transportation's advertising injury coverage can [] each be defined individually and separately, so that when those individual definitions are collectively aggregated, the disputed phrase can mean what the plaintiffs assert." (R. 108 at 10). The district court, however, chose to read the provision in a manner more favorable to the insurer, which, according to the district court, put the provision "in context." (*Id.*).

The district court erred first because, as noted above, under Florida law, if given the choice between two interpretations to which a provision is susceptible, a court must choose the reading that is more favorable to the ***insured***, not the ***insurer***. *CTC*, 720 So.2d at 1076. Given that the district court admitted the provision was susceptible to a reading that afforded coverage, it should have construed the policy in accordance with that reading.

Ignoring this principle of Florida law, the district court adopted the reasoning of *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631 (4th Cir. 2005), which is inapposite to the policy in this case, and *American*

States, which has been effectively abrogated due to its conflict with Illinois law. Indeed, the district court quoted *American States* at length for the proposition that "[t]he language reads like coverage of the tort of 'invasion of privacy,' where an oral or written statement reveals an embarrassing fact, or . . . brings attention to a private figure, or casts someone in a false light through publication of true but misleading facts." (R. 108 at 11-12). While the Seventh Circuit may have ***believed*** the *Illinois* Supreme Court would construe policy terms in accordance with tort law concepts, ***this*** Court eschews reading policy provisions through the lens of tort of law, in favor of the plain reading the district court rejected.

Indeed, the very court whose law *American States* attempted to predict, *rejected* the reasoning relied on by the district court here as inconsistent with Illinois' principles of interpreting insurance policy provisions. *Valley Forge*, 860 N.E. 2d at 323. While *American States* may have correctly understood privacy tort law, "relying on this proposition as a basis for interpreting the insurance policy language . . . is inconsistent with this court's approach to interpreting insurance policy provisions." *Id*. Instead, using the same analysis called for under Florida law, "[a]ffording undefined policy terms their plain, ordinary, and popularly understood meanings" the Illinois court – contrary to the "prediction" in *American States* – concluded that the policy provisions like those at issue here provided coverage for TCPA unsolicited fax advertisement claims. *Id.* Thus, *American*

States conflicts with the principles of both Illinois and Florida law. "[F]ailing to acknowledge that *American States* has been significantly undermined," (*Penzer*, 545 F.3d at 1307 n.3), the district court erred in adopting its reasoning.

The district court also relied on *Terra Nova Ins. Co. v. Metropolitan Antiques, LLC*, 2006 WL 280967 (Mass. Super Ct. 2006), the only other case in which an appellate court found TCPA violations were not covered by the policy language here, but that decision has been ***reversed***.[17] *See Terra Nova*, 869 N.E.2d at 576.[18]

Moreover, the district court's "contextual reading" reasoning is in reality just another way of saying that an insurance policy provision should be read in

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[17] The district court appears to have been unaware of this reversal, which was issued less than a week before the district court entered its order. *See* R. 108 at 6 (citing mid-level court decision in *Terra Nova*).

[18] Two other federal courts of appeal have addressed whether TCPA claims were covered under "advertising injury" provisions, but both involved legally significant variations in the policy terms. In *Universal Underwriters*, 401 F.3d at 881-82, the Eighth Circuit held that coverage existed for TCPA violations under a policy provision covering "public nuisances" or "invasions of privacy." On the other hand, in *Resource Bankshares*, 407 F.3d at 631, the Fourth Circuit found these claims did not fall within a provision covering "making known to any person or organization written or spoken material that violates a person's right to privacy." *Cf. Hooters*, 157 Fed. Appx. at 208 (distinguishing *Resource Bankshares* based on the differences between the St. Paul policy and the policy language at issue in *Hooters* and here.). A California state intermediate appellate court has also found coverage was not available under the same St. Paul policy language as was at issue in *Resource Bankshares*. *See ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786 (Cal. Ct. App. 2007).

accordance with technical legal definitions rather than according to the understanding of the "man on the street." That argument was rejected by the Eleventh Circuit in *Hooters*, and by the Tenth Circuit in *Park University*. *Hooters*, 157 Fed. Appx. at 207; *Park Univ.*, 442 F.3d at 1250 ("Such an approach, however, would construe the language of the contract from the vantage of an insurer or an attorney, rather than the insured."). Given that Florida law requires courts to read insurance provisions from the vantage of a "man in the street," this Court should reject the district court's "contextual reading" reasoning.

This Court should read the terms of the policy according to their plain and ordinary meaning, and reject the district court's reasoning that is founded in *American States*, which has been discredited, and is also inconsistent with Florida's principles for interpreting insurance policy provisions.

C. The District Court Erred In Reading Additional Terms Into the Operative Provision Based on the Contents of Other Provisions

The district court's second alternative reasoning for reading a narrow meaning into the policy provision — that because "clauses within an insurance policy should be read together," the meaning of surrounding, non-modifying provisions should be read into the provision at issue here — finds no basis in Florida law, and should also be rejected by this Court. *See Penzer*, 545 F.3d at 1307 n.4 ("The authority relied on by the district court does not support this conclusion, as noted by Penzer."). The district court cited *Excelsior Ins. Co. v.*

Pomona Park Bar & Package Store, 369 So.2d at 942 for this proposition, and, in conjunction with *Resource Bankshares*, concluded that since the other clauses in the "advertising injury" section of the policy covered "content-based" injuries, a "content-based" requirement should be read into the provision at issue here. (R. 108 at 12). This reasoning, like the "context" reasoning discussed above, is yet another attempt to read policy terms according to their technical, legal meanings rather than according to their plain and ordinary ones.

As found by the *Penzer* Court, neither *Pomona Park* nor the principles it relied on supports the district court's reasoning. *Penzer*, 545 F.3d at 1307 n.4. *Pomona Park* unremarkably held that when a policy is written such that one provision is modified by other provisions, coverage is determined by reading those provisions together. It did not purport to limit a provision's coverage by importing meanings from other provisions in the policy that did not modify the provision at issue, as the district court did here.

In *Pomona Park*, the insured was in the business of selling alcoholic beverages, and was sued for serving alcohol to a minor. 369 So.2d at 940. The policy exclusion at issue applied:

> (h) to bodily injury or property damage for which the insured or his indemnitee may be held liable
>
> (1) as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or
> (2) if not so engaged, as an owner or lessor of premises used for such

> purposes, if such liability is imposed
> (i) by, or because of the violation of, any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage, or
> (ii) by reason of the selling, serving or giving of any alcoholic beverage to a minor or to a person under the influence of alcohol or which causes or contributes to the intoxication of any person; but part (ii) of this exclusion does not apply with respect to liability of the insured or his indemnitee as an owner or lessor described in (2) above;

Id. Pomona Park argued that "(h)(1) and (h)(2) are disjoined and the qualifying clauses (i) and (ii) do not apply to those described in (h)(1)[.]" *Id.* at 941. Therefore, it argued, the court should delete (h)(1) from the policy because, as an entity in the business of selling alcoholic beverage, it had no coverage rights under the policy, which would make the exclusion repugnant. *Id.* The court rejected the insured's reading of provision (h), ruling, quite sensibly, that clauses (i) and (ii) in fact modified the entire (h) provision. *Id.*

In rejecting the insured's argument, the court stated (as quoted by the district court here), "Pomona Park's argument is misconceived in focusing exclusively on exclusion (h)(1) and representing that it completely eliminates bar operators from coverage. Rather, the provisions of paragraph (h) should be construed together." *Id.* This statement implies no more than that since (i) and (ii) modified both (h)(1) and (h)(2), provision (h)(1) could not be correctly understood without also reading (i) and (ii). Here, on the other hand, (a), (b), (c) and (d) are separate "offenses" each of which in itself can be a source of an "advertising injury." (R. 1, Exh. C at

10 of 13). Thus, *Ponoma Park* provides no basis for reading meaning from the "disjointed" paragraphs (b), (c) and (d) into paragraph (a) to give it a different meaning from its plain and ordinary meaning, and in a manner that is less favorable to the insured.

The *Penzer* Court also found that *Fayad*, 899 So.2d 1082, which, according to the district court, employed similar reasoning, also did not import the meanings of separate, non-modifying, policy provisions into another provision. *Penzer*, 545 F.3d at 1307 n. 4. In *Fayad*, the policy defined an exclusion for "earth movement" as "earthquake, including land shock waves or tremors before during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting." 899 So.2d at 1088. The insurer argued that "earth sinking, rising or shifting" should include man-made blasting activities. *Id.* However, reading the definition, the court found that like the previous events described in the clause, "earth sinking, rising or shifting" could reasonably be understood to refer to natural, not man-made, events. *Id.*

The court based its conclusion on the principle that "any exclusion must be strictly construed against the drafter and . . . any ambiguity in policy language must be construed in favor of the insured." *Id.* at 1090. The court also found support for its conclusion in the rule (which the district court here stated was "closely related" to its own rationale) that general words that follow specific words "are

construed as applying to the same kind or class as those that are specifically mentioned." *Id.* at 1088-89. The district court here did not read general words in a single provision to be limited by specific words preceding them in the same provision. To the contrary, the district court construed separate coverage provisions to import meaning into a coverage provision they did not modify. Moreover, unlike the district court here, *Fayad* adopted the meaning of the policy that favored the insured. Thus, neither *Fayad*, nor the principle it discusses, support the district court's conclusion.

In fact, *Valley Forge* rejected a similar argument. As here, the insurer in that case argued an identical policy provision should be read as limited to revealing private information because neighboring provisions in the policy were limited to "content-based" offenses. *Valley Forge*, 860 N.E.2d at 318. The court found that construing the policy as a whole did not support the insurer's argument, because "[i]nterpreting the clause 'written … publication … of material that violates a person's right to privacy' to encompass Rizzo's TCPA fax-ad claim . . . does not, in any way, prevent the policies' alternative definitions of 'advertising injury' from being given effect or thwart their respective purposes." *Id.* It is equally true here that reading all of the "advertising injury" provisions in the policy together does not support restricting paragraph (a) to only publications of private facts, because

reading it to include TCPA fax-ad claims does not prevent paragraphs (b), (c) or (d) from being given effect.

Numerous courts have rejected similar arguments that the provision here only applies when the "contents" of the "material" violates a person's right to privacy and, as such, is limited to claims based on the publication of private facts. *See, e.g., Terra Nova*, 869 N.E.2d at 574 ("[H]ad Terra Nova and Royal wished their policies to pertain only to violations of privacy created by the content of material, it was incumbent on them to draft explicit policies to that effect."); *Valley Forge*, 860 N.E.2d at 317-18 ("To adopt the insurers' proposed interpretation of it . . . would essentially require us to rewrite the phrase . . . to read "material *the contents of which* violates a person *other than the recipient's* right to privacy. This we will not do.") (emphasis in original); *W. Rim*, 269 F. Supp. 2d at 847 (rejecting similar argument). This Court should reach the same conclusion.

In sum, Florida law does not support reading a "content-based" requirement into the policy provision here. Like the district court's first two rationales, the third rationale for its decision does not support its conclusion.

D. TCPA Insurance Cases Finding No Coverage Are Based On Different Policy Language And, At Worst, Illustrate An Ambiguity That Mandates Coverage Here

The *Penzer* Court found that "[t]he district court's holding that only content-based invasions of privacy, and not TCPA-based seclusion violations, are covered

is also placed in doubt by the wide divergence in case law interpreting 'right of privacy' as used in this and similar provisions." *Penzer*, 545 F.3d at 1308. After citing ten "cases which allowed advertising injury coverage for TCPA claims for unsolicited facsimiles (*id*. at 1308 n.5), the *Penzer* Court then cited the eight cases that have held otherwise, pointing out that "[m]any of the coverage denial cases construe policy language that uses the words 'making known to any person or organization' *in place of* 'publication.'" *Id*. (emphasis added).

Specifically, of the cases finding no coverage for TCPA claims, five of the eight decisions involve a St. Paul policy provision that is materially different from the provision at issue here, and covers "*making known* to any person or organization covered material that violates a person's right to privacy." (Emphasis added).[19] The Eleventh Circuit and other courts have found that policy language distinguishable from the instant provision, which is identical to the provision in *Hooters*. *See Hooters*, 157 Fed. Appx. at 208 (finding that "[t]he insurance contract in this case, however, refers to "[o]ral or written publication" of such material, which does not suggest the focus on secrecy that "making known" does."); *Valley Forge*, 860 N.E.2d at 322; *Melrose*, 432 F. Supp. 2d at 503

[19] *Melrose Hotel*, 432 F. Supp. at 488; *Res. Bankshares*, 407 F.3d at 631; *ACS Sys.*, 53 Cal. Rptr. 3d at 786; *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, No. C06-1056RSL, 2007 WL 564075 (W.D. Wash. Feb. 16, 2007); *St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp.*, No. 06-2759, 2007 WL 2571960 (D.N.J. Aug. 30, 3007).

(agreeing with *Hooters* court that "the phrase 'making known' suggests a focus on secrecy not present in those policies which define advertising injury offense to include 'oral or written publication of material that violates a person's right of privacy.'").

Similarly, *St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.*, 405 F. Supp. 2d 890 (N.D. Ill. 2005) involved a provision covering injuries caused by the "oral, written or electronic publication of material in your Advertisement that violates a person's right of privacy." That court's analysis turned on the addition of the words "in your Advertisement," which led it to conclude that only "content-based" offenses were covered. *See Valley Forge*, 860 N.E. 2d at 322 (distinguishing *Brunswick*).[20]

Of the two remaining cases involving the policy language at issue here, one of those cases is *American States*, 392 F.3d at 939, which, as held in *Valley Forge*, 860 N.E.2d at 307, is "inconsistent with [Illinois'] approach to interpreting insurance policy provisions", the state whose principles it purported to apply. *See also Am. Home Assur. Co. v. McLeod USA, Inc.*, 475 F. Supp. 2d 766, 772 (N.D. Ill. 2007) (reconsidering summary judgment for insurer because it was based on *American States*, and *Valley Forge* required judgment for insured). In the other

[20] *Brunswick* also involved Illinois law, and relied primarily on *American States*. If, as Transportation contends, *Brunswick* is not distinguishable, the Illinois Supreme Court's invalidation of *American States* equally invalidates *Brunswick*.

case, *Erie Ins. Exch. v. Kevin T. Watts, Inc.*, No. 1:05-cv-867, 2006 WL 3755329 (S.D. Ind. Dec. 19, 2006), the court based a prior decision on *American States*, but then acknowledged that "*American States* was an incorrect interpretation of Illinois law" and decided the case based on an exclusion under Indiana law. *Id.* at *3.

Ultimately, the majority of decisions on coverage of TCPA unsolicited fax ad claims under "advertising injury" provisions are in accord with *Hooters*[21] - and compel a finding of coverage. And, to the extent that a minority of courts have declined to find coverage under materially different policy language, this divergence of decisions shows only that at worst there is an ambiguity in the instant policy that militates in favor of coverage.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's certified question should be answered in the affirmative, and the case should be returned to the Eleventh Circuit for the issuance of instructions to the district court to enter judgment in favor of Penzer as to coverage.

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[21] *See, e.g., Park Univ.*, 442 F.3d at 1239; *Hooters*, 157 Fed. Appx. 201; *Universal Underwriters*, 401 F.3d at 881; *W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960 (5th Cir. 2004), *aff'g* 269 F. Supp. 2d 836 (N.D. Tex. 2003); *Terra Nova*, 869 N.E.2d at 565; *Valley Forge*, 860 N.E.2d at 307; *Am. Home*, 475 F. Supp. 2d at 772 (finding coverage and noting majority of courts agree with holding in *Hooters*); *Nutmeg*, 2006 WL 453235 at *1; *Prime TV*, 223 F. Supp. 2d at 752.

Respectfully submitted by:

MARC A. WITES
Florida Bar No. 24783
WITES & KAPETAN, P.A.
4400 North Federal Highway
Lighthouse Point, Florida 33064
Tel: (954) 570-8989
Fax: (954) 354-0205

DOUGLAS S. WILENS
Florida Bar No. 0079987
STUART A. DAVIDSON
Florida Bar No. 0084824
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, Florida 33432
Tel: (561) 750-3000/Fax: (561) 750-3364

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2008, I served a true and correct copy of the foregoing Appellant's Initial Brief by Fedex overnight mail upon:

Laura Besvinick
Hogan & Hartson L.L.P.
1111 Brickell Avenue, Suite 1900
Miami, FL 33131

Alan M. Burger
McDonald Hopkins, LLC
505 S Flagler Drive, Ste 300
West Palm Beach, Florida 33401

Arthur J. McColgan II
Ryan M. Henderson
Walker Wilcox Matousek, LLP
225 West Washington St., Suite 2400
Chicago IL 60606

Marc A. Wites

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).

Marc A. Wites