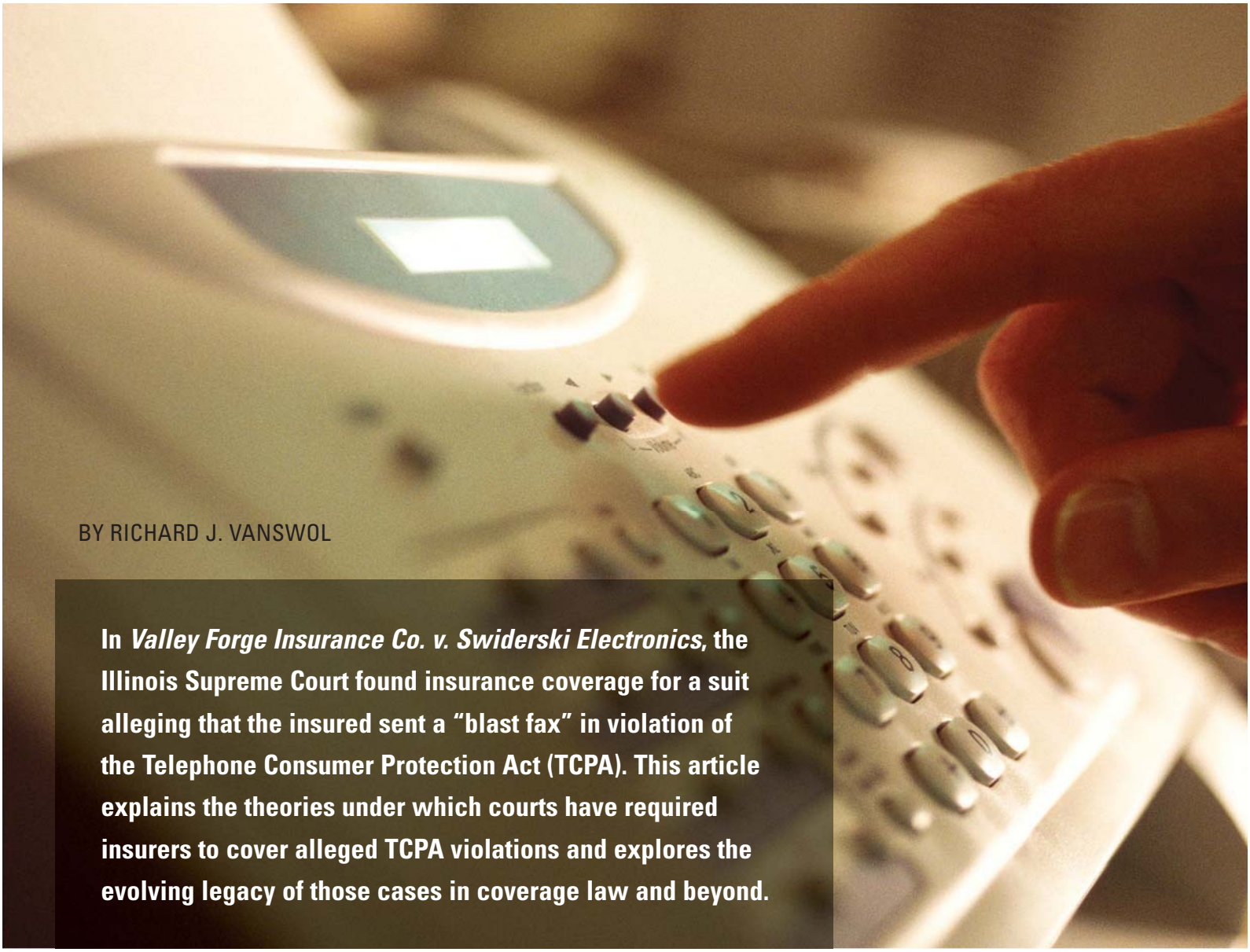

BY RICHARD J. VANSWOL

In *Valley Forge Insurance Co. v. Swiderski Electronics*, the Illinois Supreme Court found insurance coverage for a suit alleging that the insured sent a "blast fax" in violation of the Telephone Consumer Protection Act (TCPA). This article explains the theories under which courts have required insurers to cover alleged TCPA violations and explores the evolving legacy of those cases in coverage law and beyond.

The Debate Over Insurance Coverage for Alleged 'Blast Fax' Violations

THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 ("TCPA") PROVIDES THAT it is generally unlawful to send so-called "blast faxes," or unsolicited advertisements sent to fax machines.[1] The TCPA also creates a private right of action for violations of this law, allowing plaintiffs to seek an injunction and either actual monetary losses or $500 in damages, whichever is greater. If the court finds that the defendant knowingly or willfully violated the TCPA, it has discretion to award treble damages.[2]

1. 47 U.S.C. § 227(b)(1)(C).
2. *Id.* at § 227(b)(3).

R.J. VANSWOL *is a partner who practices in the areas of insurance coverage and insurance litigation defense at Purcell & Wardrope, Chtd., in Chicago.*

rjv@pw-law.com

Defendants in such TCPA actions have often turned to their liability insurance carriers to pay their defense costs and to indemnify them for any judgment or settlement. Illinois courts have held that these insurance policies may provide coverage for alleged violations of the TCPA.[3] Although the issue of coverage for TCPA violations may seem narrow, this line of cases has come to include decisions with much wider implications for Illinois law. This article will explore Illinois courts' evolving analysis of issues affecting potential coverage for TCPA claims.

The risks covered by liability insurance

A typical general liability insurance policy provides that the insurer will pay the amount the insured becomes legally obligated to pay as damages because of covered injury or damage, and that the insurer will defend the insured against a suit seeking these damages. If the underlying complaint alleges facts within or potentially within the policy's coverage, Illinois courts hold that the insurer has a duty to defend its insured.[4]

TCPA coverage actions have primarily concerned coverage for two particular risks covered by such policies. The first is "personal and advertising injury," which includes injury caused by one or more of the offenses enumerated in a list of torts such as false arrest, malicious prosecution, wrongful eviction, defamation, and – most importantly for TCPA cases – invasion of privacy.[5] The second is "property damage," generally defined as physical injury to tangible property, including all loss of use of that property, or loss of use of tangible property that is not physically injured.[6]

Early decisions' competing approaches to potential TCPA coverage

The U.S. Court of Appeals for the Seventh Circuit tackled the question of whether Illinois law would find coverage for alleged TCPA violations in *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*[7] Writing for the court, Judge Easterbrook noted that no pertinent Illinois cases had interpreted the scope of coverage for "oral or written publication of material that violates a person's right of privacy" under American States' definition of "personal and advertising injury."[8] In fact, the court noted a general dearth of state and federal appellate case law on the issue.

The court predicted that the Illinois Supreme Court would find no coverage under an invasion-of-privacy theory because the corporate recipient lacked an interest in seclusion and because an unsolicited fax did not constitute "publication" in connection with such an interest.[9] The court also predicted that Illinois courts would find no coverage for alleged blast faxes as "property damage," saying that to the extent an unsolicited fax used the recipient's ink and paper, that usage was foreseeable and came

TAKEAWAYS >>

- The Telephone Consumer Protection Act of 1991 ("TCPA") prohibits the sending of unsolicited advertisements via fax machine. Under the TCPA, plaintiffs can seek an injunction and either actual monetary losses or $500 in damages, whichever is greater. Treble damages are also available if the court finds that the defendant knowingly or willfully violated the TCPA.

- In *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, the Illinois Supreme Court held that TCPA violations are potentially covered by general liability insurance policies, thus triggering an insurer's duty to defend.

- While courts may see a general decline in the number of TCPA cases as parties rely less on faxes and more on emails, this shift could lead to an increase in disputes over coverage for violations of the "CAN-SPAM" Act.

3. See, *e.g.*, *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352 (2006).
4. See, *e.g.*, *id.* at 363.
5. See *Lexmark International, Inc. v. Transportation Insurance Co.*, 327 Ill. App. 3d 128, 131, 137 (1st Dist. 2001).
6. *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795, 800 (1st Dist. 2009).
7. *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004).
8. *Id.* at 940.
9. *Id.* at 942–43.

DESPITE NUMEROUS ATTEMPTS, CHALLENGERS HAVE NOT CHANGED *SWIDERSKI'S* ESSENTIAL RULING THAT TCPA VIOLATIONS ARE POTENTIALLY COVERED UNDER A LIABILITY POLICY'S INSURING AGREEMENT.

within the policy's exclusion for expected or intended damage.[10] The court therefore found that American States had no duty to defend the suit against its insured.

However, when the Illinois Supreme Court took up the issue of "personal and advertising injury" coverage for blast faxes in 2006, it disagreed with *Capital Associates*. In *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, the court interpreted "personal and advertising injury" coverage as applying to TCPA claims because the statute was intended to protect recipients against intrusion on their right of seclusion.[11]

The *Swiderski* court held that coverage for "violation of a person's right of privacy" was broad enough that it potentially encompassed a fax sender's intrusion on a recipient's seclusion, as the policy did not require publication of *content* that violated the plaintiff's privacy rights.[12] It also held that sending a fax to a proposed class of recipients constituted "publication" because doing so communicated with the public and distributed copies of an advertisement to the public.[13]

Having found a duty to defend based on "personal and advertising injury," the *Swiderski* court did not reach the question of whether an alleged TCPA violation constituted "property damage."[14] That question came before the Illinois Appellate Court in *Insurance Corp. of Hanover v. Shelborne Associates*.[15]

The parties in *Shelborne* did not dispute that the underlying suit alleged property damage in the form of toner, paper, and the use of the claimants' fax machines. However, the insurer contended that it had no duty to defend because it covered "property damage" only if caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[16] It also pointed to an exclusion for injury or damage "expected or intended from the standpoint of the insured," similar to the exclusion the court invoked in *Capital Associates*.[17]

However, the insured asserted that it believed its faxes were authorized, in which case any property damage would have been unintentional, even if the insured intended to send the faxes. Because the court in a declaratory judgment action could not rule on factual issues that would affect the underlying suit, the court said it could not resolve the question of whether Shelborne intentionally or negligently sent unsolicited fax advertisements, and the potential for coverage meant that the insurer had a duty to defend.

While most TCPA coverage cases have involved general liability policies, it is worth noting that courts have also had occasion to consider other lines of coverage such as professional liability policies. In *Landmark American Insurance Co. v. NIP Group, Inc.*, the court held that an insurance broker's alleged sending of blast faxes at least potentially arose out of its performance of professional services.[18]

Attempts to limit the scope of coverage

The decade following *Swiderski* saw insurers in a number of state and federal cases try to limit the reach of the Illinois Supreme Court's decision. The principal arguments have been that the recipient has no legally cognizable privacy interest, that a different state's law should apply, that punitive damages are uninsurable, and that the settlement between the insured and the underlying plaintiffs was improper and collusive.

Scope of privacy interests. Insurers have argued that only individuals and not corporations have a right of privacy for purposes of "personal and advertising injury," but courts have rejected this distinction.

In *Pekin Insurance Co. v. XData Solutions, Inc.*, the insurer argued that the reasoning of *Swiderski* should be limited to claims brought by "natural" persons because the underlying suit in *Swiderski* was brought by an individual.[19] The *XData* court found no support for this distinction in *Swiderski*, noting that the court had declined to follow the seventh circuit's privacy analysis from *Capital Associates* and that the class of plaintiffs in *Swiderski* may well have included corporations. The court also noted that the TCPA itself provides a right of action for "a person or entity."[20]

The same issue came before the U.S. District Court for the Northern District of Illinois in *Maxum Indemnity Co. v. Eclipse Manufacturing Co.*, where the court concluded that the plain and ordinary meaning of "person" included business entities.[21] The argument that only natural persons have privacy interests has therefore been unavailing in the context of coverage for alleged TCPA violations as constituting "personal and advertising injury."

Which state's law applies. Some decisions have avoided the rule of *Swiderski* by applying the law of another state. In deciding what law applies to interpret and enforce an insurance

10. *Id.* at 943.
11. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 365 (2006).
12. *Id.* at 369.
13. *Id.* at 367.
14. *Id.* at 379.
15. *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795 (1st Dist. 2009).
16. *Id.* at 800.
17. *Id.*
18. *Landmark American Insurance Co. v. NIP Group, Inc.*, 2011 IL App (1st) 101155, ¶ 61.
19. *Pekin Insurance Co. v. XData Solutions, Inc.*, 2011 IL App (1st) 102769, ¶ 11.
20. *Id.* at ¶ 20 (citing 47 U.S.C. § 227(b)(3)).
21. *Maxum Indemnity Co. v. Eclipse Manufacturing Co.*, 848 F. Supp. 2d 871, 883 (N.D. Ill. 2012).

policy, courts consider factors such as the location of the subject matter, the place the policy was delivered, the domiciles of the insurer and insured, and the place of performance. Courts will particularly focus on the location of the risk if it can be confined to a single state, or the state where the insured has its "nerve center" if the policy insures risks in numerous states.[22]

In *Auto-Owners Insurance Co. v. Websolv Computing, Inc.*, the parties stipulated that Iowa law applied to their dispute, and the seventh circuit said the trial court should have honored that stipulation.[23] The court then predicted that Iowa courts would find no coverage based on substantially the same reasoning the court had employed in *Capital Associates*, repeatedly citing to the earlier seventh circuit decision.

Other examples include *Ace Rent-a-Car, Inc. v. Empire Fire & Marine Insurance Co.*, where a federal court predicted that alleged TCPA violations did not trigger coverage for advertising injury or property damage under Indiana law;[24] *G.M. Sign, Inc. v. Pennswood Partners, Inc.*, where the court held that TCPA violations did not constitute property damage under Pennsylvania law;[25] and *Windmill Nursing Pavilion, Ltd. v. Cincinnati Insurance Co.*, where the court concluded that a policy validly excluded coverage for alleged TCPA violations under Ohio law.[26]

However, the Illinois Supreme Court's decision in *Bridgeview Health Care Center, Ltd. v. State Farm Fire & Casualty Co.* limits Illinois courts' efforts to predict and apply the law of other states.[27] The court noted there was no need for a choice-of-law analysis unless there was an outcome-determinative conflict between the laws of two states. It then said that where a federal district court had predicted the law of a state but no state appellate court had ruled, the federal court's "*Erie* guess" did not suffice to establish a conflict.[28] Under *Bridgeview*, the mere possibility of a conflict of laws is not sufficient to warrant a choice-of-law analysis.

Punitive damages. Illinois law holds that punitive damages for one's own misconduct are uninsurable as a matter of public policy.[29] The basis for this rule is that punitive damages serve to punish the wrongdoer and deter future wrongdoing rather than to compensate the plaintiff, and that allowing coverage for such damages would undermine the goals of punishment and deterrence. Relying on that principle, insurers have argued that the liquidated damages of $500 per fax under the TCPA are punitive and uninsurable, prevailing on this argument in the Illinois Appellate Court in *Standard Mutual Insurance Co. v. Lay*.[30]

However, the Illinois Supreme Court reversed the fourth district's decision in *Lay*.[31] The court held that the purpose of the TCPA was remedial rather than penal, providing a remedy for consumers when a fax sender has forced them to bear its advertising costs in the form of their toner and paper.

The court stated that liquidated damages under the TCPA were not purely punitive but served, at least in part, to create an incentive to enforce the statute because the actual losses associated with individual violations were small. The fact that the TCPA contemplates treble damages for willful violations further suggested that the baseline of $500 in liquidated damages served goals other than punishment and deterrence.

When *Lay* came back to the appellate court on remand, the fourth district again expressed concern that if liability for telemarketing abuses can be covered by insurance, the responsible company has no incentive to stop, and the purpose of the TCPA is unfulfilled.[32] However, the court followed the supreme court's holding and reversed the trial court's award of summary judgment to the insurer.

Collusive settlements. As cases like *Pekin v. XData* illustrate, liability insurance policies often have conditions stating that there is no coverage when insureds voluntarily make a payment, assume an obligation, or incur an expense.[33] These provisions serve to prevent the possibility of collusion with the plaintiff. But *XData* also shows that when a court finds that an insurer has breached its duty to defend the insured, the court will find that the insured does not breach this condition or forfeit coverage by settling the case without the insurer's consent.

COURTS MAY SEE FEWER TCPA CASES AS PARTIES RELY LESS ON FAXES AND MORE ON EMAILS, ALTHOUGH THE SHIFT COULD LEAD TO MORE DISPUTES OVER COVERAGE FOR VIOLATIONS OF THE 'CAN-SPAM' ACT.

The fact that an insured is not required to obtain the insurer's consent to a settlement does not necessarily preclude the insurer from contesting the reasonableness of the settlement.[34] The reasonableness of the settlement depends on whether the insured has settled an otherwise covered loss in reasonable anticipation of personal liability and whether its decision conforms to the

22. *Liberty Mutual Fire Insurance Co. v. Woodfield Mall, LLC*, 407 Ill. App. 3d 372, 383 (1st Dist. 2010).
23. *Auto-Owners Insurance Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 546–47 (7th Cir. 2009).
24. *Ace Rent-a-Car, Inc. v. Empire Fire & Marine Insurance Co.*, 580 F. Supp. 2d 678 (N.D. Ill. 2008).
25. *G.M. Sign, Inc. v. Pennswood Partners, Inc.*, 2015 IL App (2d) 121276-B.
26. *Windmill Nursing Pavilion, Ltd. v. Cincinnati Insurance Co.*, 2013 IL App (1st) 122431.
27. *Bridgeview Health Care Center, Ltd. v. State Farm Fire & Casualty Co.*, 2014 IL 116389.
28. *Id.* at ¶¶ 16–17.
29. *Beaver v. Country Mutual Insurance Co.*, 95 Ill. App. 3d 1122, 1124 (5th Dist. 1981).
30. *Standard Mutual Insurance Co. v. Lay*, 2012 IL App (4th) 110527, ¶¶ 27–37.
31. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617.
32. *Standard Mutual Insurance Co. v. Lay*, 2014 IL App (4th) 110527-B, ¶ 23.
33. *Pekin Insurance Co. v. XData Solutions, Inc.*, 2011 IL App (1st) 102769, ¶ 30.
34. *Central Mutual Insurance Co. v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, ¶ 51.

standard of a prudent uninsured.

The court in *XData* specifically held that there was no evidence of collusion and that the settlement amount was reasonable, computing the insured's potential liability based on the number of faxes that the insured sent.[35] However, courts have not always come to the same conclusion. In *Central Mutual Insurance Co. v. Tracy's Treasures, Inc.*, the court remanded for a hearing on whether the insured's settlement was reasonable in light of possible motions and third-party claims the insured could have brought, as well as whether a prudent uninsured would have agreed to the amount of the settlement, or whether there was evidence of bad faith, collusion, or fraud.[36]

The end of TCPA coverage cases?

While the above arguments have addressed the application of *Swiderski*, they have not changed its essential ruling that TCPA violations are potentially covered under a liability policy's insuring agreement. However, several other factors may be converging to spell the end of TCPA coverage cases.

Exclusions. Decisions finding that alleged TCPA violations constitute "personal and advertising injury" or "property damage" have increasingly led insurers to add exclusions for injury or damage resulting from TCPA violations, and courts have found those exclusions are enforceable.[37]

Deductibles. Even without such exclusions, an insurer may be able to avoid indemnifying its insured on the basis that a separate deductible applies to each separate claimant, such that the insured has to bear the cost of each plaintiff's liquidated damages.[38]

Award reductions. Moreover, some recent decisions have reduced the amount at issue in TCPA class actions. In *Holtzman v. Turza*, the seventh circuit affirmed the district court's plan to distribute 2/3 of each $500 award to the plaintiffs who brought claims, pay the remaining 1/3 to their attorneys, and return to the defendant any funds intended for fax recipients who did not participate in the litigation.[39]

Class action limits. The United States Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, which held that Article III standing requires a concrete and particularized injury even in the context of a statutory violation,[40] may lead to new challenges to named plaintiffs' standing and to class certification in TCPA actions, although such challenges have largely been unsuccessful in federal district courts in Illinois.[41]

Fewer faxes. Courts may also see a general decline in the number of TCPA cases as parties rely less on faxes and more on emails, although this shift could just lead to an increase in disputes over coverage for violations of the "CAN-SPAM" Act.[42]

But even if TCPA claims and TCPA coverage disputes prove to have been a brief chapter in legal history, cases like *Swiderski*, *Lay*, and *Bridgeview* have reshaped and clarified the law in much broader ways. These decisions will continue to play significant roles in future cases concerning issues such as what statutory damages are insurable, whether an insured must obtain an insurer's consent in settling a suit, how broad privacy interests are in scope, and whether a conflict of law exists with the law of another state. Whether or not the courts continue to decide TCPA coverage cases at their recent pace, familiarity with these cases will still prove to be important for lawyers practicing in numerous areas of Illinois law. IBJ

35. *Pekin Insurance Co.*, 2011 IL App (1st) 102769, ¶ 33.
36. *Central Mutual Insurance Co.*, 2014 IL App (1st) 123339, ¶¶ 59–85.
37. See, *e.g.*, *G.M. Sign, Inc. v. State Farm Fire & Casualty Co.*, 2014 IL App (2d) 130593.
38. See *First Mercury Insurance Co. v. Nationwide Security Services, Inc.*, 2016 IL App (1st) 143924, ¶¶ 27–29.
39. *Holtzman v. Turza*, 828 F.3d 606, 608–09 (7th Cir. 2016).
40. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).
41. See, *e.g.*, *Aranda v. Caribbean Cruise Line, Inc.*, 202 F. Supp. 3d 850, 853–58 (N.D. Ill. 2016); but see *Legg v. PTZ Insurance Agency, Ltd.*, –F.R.D.–, 2017 WL 3531564 at *4-5 (N.D. Ill. Aug 15, 2017).
42. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701 *et seq.*

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