

# Recent Developments in the Law

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## LETTER

### *June 2005 Special Issue Copyright Awards*

In order to keep you abreast of recent developments in the law, Saunders & Schmieler's *S&S Recent Developments in the Law* reports on the significance of current decisions of major import in the jurisdictions of Maryland, the District of Columbia, Virginia, and the federal Fourth Circuit.

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### *Recent Developments in the Law*

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## MARYLAND COURT OF APPEALS

**Innkeepers' Duty of Care -- Protect Invitees from Foreseeable and Preventable Assault:** *Corinaldi v. Columbia Courtyard, Inc.*, 2005 WL 1017366 (May 3, 2005).

**Holding:** Innkeeper has duty to take affirmative action to protect guests (and their invitees) from an assault by a third party if the innkeeper, in the exercise of due care, knew or should have known that the assault was imminent, well enough in advance of the assault to have prevented it.

**Case Summary:** On January 13, 2001, after an argument at a birthday party, Andre Corinaldi was shot through a closed door in a Howard County Courtyard by Marriott hotel. His parents sued the hotel, alleging that the hotel negligently caused or contributed to their son's death. The trial court granted summary judgment for the hotel and the decedent's parents appealed.

The main issue on appeal was whether the hotel "had a duty to take affirmative action to protect the decedent, an invitee of a guest of the hotel, from the criminal actions of an unknown third party." Generally, "there is no duty to protect a victim from the criminal acts of a third person in the absence of a statute, contract, or other relationship between the party in question and the third person." In this case,

the issue was whether there was a relationship which imposed a duty to protect the victim, rather than a duty to control the conduct of the third person.

In the context of a hotel, the relationship between innkeeper and guest is sufficient to give rise to a duty. At early common law, the innkeeper was an insurer for the safety of the guests and thus, was strictly liable for any injury to the guests; the duty later came to be one of reasonable care. The court analogized innkeepers to property owners, noting that a property owner owes the same duty to a guest of an invitee as it does to the invitee himself, and thus, an innkeeper owes the same duty to an invitee of a guest as to the guest himself. In other words, the innkeeper's duty flows through the guest to people the guest invites to the hotel.

The plaintiffs here asserted that the hotel had knowledge of events on the premises prior to and leading up to the assault, which should have caused the hotel to foresee the danger of imminent harm to hotel guests; there was evidence on the record that someone from the birthday party had reported to the front desk that one of the partygoers had a gun, but that almost ten minutes elapsed before the hotel attendant called the police. The court concluded that the hotel had a duty like that of a common carrier, a duty to protect from assault by a third party if the hotel knew or should have known that the assault was imminent well enough in advance to have prevented the assault.

#### HOTEL OWES SAME DUTY OF CARE TO INVITEES OF GUESTS AS TO GUESTS THEMSELVES

Plaintiffs argued that several facts should have given the hotel sufficient knowledge of the danger developing on the premises: there was a large group of teenagers congregating near a hotel doorway, the hotel desk attendant was notified that a partygoer had a gun, other hotel guests had complained about the party, a hotel employee had asked the partygoers to reduce their noise level, and the hotel manager had instructed the desk attendant to ask all the partygoers to leave. The most important fact, in the court's view, was that the hotel attendant was advised, relatively late in course of events, that a partygoer had a gun, but that almost ten minutes passed before the attendant phoned police. The court believed that the knowledge that a gun was present at the party was sufficient to make harm foreseeable to the hotel, and that, had police been called immediately, the harm might have been prevented. For that reason, the court overturned the lower court's grant of summary judgment for the hotel and remanded the case for further proceedings.

**Commentary:** The Court of Special Appeals' analysis in this case is dangerous precedent, and should be corrected by the Court of Appeals. The Restatement (Second) of Torts § 314A has been the law of Maryland since 1993 and was held applicable in *Corinaldi*; it provides that, like a common carrier, an innkeeper has a duty to protect its guests from "unreasonable risk of physical harm," and bases reasonableness on a notion of foreseeability that is much more expansive than previous courts' rulings allowed. Until *Corinaldi*, the question of the reasonableness of risk to a guest/passenger was a question of proximate cause: liability could only be assigned to a defendant whose negligence was the proximate cause of a foreseeable harm to the plaintiff.

Historically, Maryland courts have rejected the "foreseeability" test the *Corinaldi* court seems to espouse. In *Nigido v. First Nat'l Bank of Baltimore*, 288 A.2d 127 (1972), the Court of Appeals found that even if a bank robbery were foreseeable, it would be impossible to foresee that a customer would be shot during the course of a bank robbery. Again in *Tucker v. KFC Nat'l Management Co.*, 689 F. Supp. 560 (D. Md. 1988), the court held that the defendant's alleged negligence in failing to post a security guard at a KFC store was not the proximate cause of injuries the plaintiff sustained when a fight broke

out between himself and another patron. Lastly, Judge Chasanow of the U.S. District Court for the District of Maryland held in *Kay Jewelers et al. ats Bias* (an unreported case from 1995) that the plaintiff had failed to prove that the alleged negligence of a mall's security guards was the proximate cause of death for an individual who was killed by a third-party as both were exiting the mall.

In effect, the *Corinaldi* court asserts that the hotel shooting in question could have been foreseeable to the hotel management because the management had heard a report that a gun was on the premises and that this foreseeability alone could be the trigger for the owner's liability. The danger inherent in *Corinaldi* is that, because of ostensibly unforeseeable developments, a property or business owner may be deemed to have a duty to protect invitees, a duty that arises quickly and may require the business to take drastic steps rapidly in order to shield itself from liability. This low standard for foreseeability represents a significant and unwarranted burden on business owners, and should not be imposed, especially because it does not account for the proximate cause of harm to the plaintiff, which has traditionally been the factor determinative of premises liability in Maryland. The importance of foreseeability, and maintaining a reasonable threshold for what is foreseeable, is embodied in the Maryland Court of Special Appeals' holding in *Moore v. Jimel, Inc.*, 809 A.2d 10 (Md. App. 2002). There, the court found that a bar had no duty to protect a patron from sexual assault where there was no evidence of any prior crime having been committed on the premises. The *Corinaldi* court distinguished *Moore* by arguing that an owner's knowledge of "current events" can give rise to foreseeability just as surely as an owner's knowledge of prior similar crimes. While that proposition may be true in the abstract, courts must remain careful in their determinations about what facts give rise to foreseeability, and thus, to a legal duty.

While "preventability" is ultimately a component of liability under the *Corinaldi* holding, it is hard to imagine that a jury, finding a particular crime to be foreseeable under this standard, would not also find that the crime could have been prevented by some action of the business owner. Indeed, at the end of the *Corinaldi* opinion, the court states that if the jury found a duty arose solely out of the foreseeability of a criminal act, "it could also find that this duty was breached, proximately causing decedent's death." This is simply impermissible speculation, not only about what should be foreseeable, but about what can and should be done as a result of what the court determines to be foreseeable. Would calling 911 be enough to prevent harm? Or would an employee have to throw him- or herself in front of a bullet to prevent a criminal from harming a guest?

The *Corinaldi* holding, because it lowers the threshold for creation of a duty of care, and then replaces proximate cause with simple foreseeability as the measure of an owner's liability, is an undue departure from Maryland's law on premises liability, and should be corrected by the Court of Appeals.

## COURT OF APPEALS OF MARYLAND

### **Arbitration Clause Enforcement in Mortgage Disclosure Agreement:**

*Walther v. Sovereign Bank*, 2005 WL 900551 (April 20, 2005).

**Holding:** Binding arbitration clause in "Direct Loan Note & Truth in Lending Disclosure" was not unconscionable and bank did not waive right to arbitrate by responding to complaint filed in court.

**Case Summary:** The case arose out of a dispute between the Walthers, who had signed a secondary mortgage loan agreement with Empire Funding Corporation, and Sovereign Bank, who was assigned the mortgage note by Empire. As part of the mortgage note, the Disclosure Agreement provided that the parties would submit to arbitration to resolve any "claim, dispute or controversy arising from or relating to [the] agreement or the relationships which result from [the] agreement." The arbitration clause went

on to state that certain remedies (foreclosure, self-help, provisional or ancillary remedies) were exempted from arbitral proceedings, and that the parties acknowledged "they had a right . . . to litigate disputes through a court, but that they preferred to resolve any disputes through arbitration. The parties acknowledge that they are waiving their right to jury trial by consenting to binding arbitration." The parties also waived their rights to class-action lawsuits.

In spite of this arbitration clause, the Walthers filed a "Class Action Complaint and Demand for Jury Trial" alleging that Empire had violated the Maryland Secondary Mortgage Loan Law by charging "illegal fees." Sovereign Bank (assignee of the mortgage note) filed a "Petition to Compel Arbitration and Motion to Dismiss or to Stay Proceedings," in which Sovereign stressed that the claims were subject to mandatory arbitration, and that the Walthers had explicitly waived their rights both to class-action suit and to jury trial. In response, Walther asserted that no one explained to him the importance of the agreement he was signing and that the loan officer told him that the form was a usual and standard loan agreement. Walther said in an affidavit that he would not have signed the document, had he realized how the arbitration clause would affect his rights.

ARBITRATION  
CLAUSE IN  
SECONDARY  
MORTGAGE HELD  
ENFORCEABLE

The trial court granted Sovereign's motion to compel arbitration, which Walther appealed. The Court of Special Appeals affirmed, stating that the Walthers were "legally responsible for reading the contents of any loan they signed," and that the arbitration clause was fully enforceable. Furthermore, Sovereign had not waived its right to arbitrate because of its court filing.

After discussing the Federal Arbitration Act and its Maryland counterpart, the Court of Appeals stated that there is a clear public policy favoring arbitration and agreements to arbitrate because arbitration is understood to be an expedient and cost-effective way to resolve many disputes. Whether an arbitration agreement is valid and enforceable depends on principles of contract, and an arbitration agreement may be unenforceable on the same grounds as a contract would be, such as in a case of unconscionability. An unconscionable agreement -- according to one venerable definition -- is one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Walther asserted the arbitration agreement was unconscionable in three respects: there was no meaningful choice about the arbitration clause; the clause is unreasonably favorable to the lender; and the clause requires borrowers to pay excessive fees to have their claims heard.

The Court was unreceptive to the plaintiffs' arguments. The Court was unwilling to agree that plaintiffs "should not be held to an agreement that they signed but did not take the time to read."

The plaintiffs also asserted that the contract was an "adhesion contract," offered by a party in a superior bargaining position on a take-it-or-leave-it basis, without an opportunity for negotiation. The Court, looking at the substance of the provision, was unmoved; the Court looked at the actual substance of the provision and found that the provision was not substantively unconscionable.

The Court considered four arguments about the substantive unconscionability of the clause: whether the clause was sufficiently mutual, whether the waiver of the right to file class-action suits was improper, whether the failure to disclose arbitration fees concealed the significance of the arbitration clause, and whether requiring waiver of the "fundamental" right to a jury trial was unfair. On each matter, the Court stressed that, in effect, the plaintiffs' failure to take action to comprehend the agreement they signed was

to blame for any difficulties they faced later.

Lastly, the Court determined that the bank did not waive the right to arbitration under the disputed clause by virtue of filing a motion in court. The Court found that the bank's act of filing in court was simply an act designed to "compel the parties to adhere to the terms of their agreement to arbitrate 'any claim, dispute, or controversy.'" To summarize its view of the bank's actions, the court said that absent "an order from the court, [the bank] could not very well successfully invite an unwilling adversary to an arbitration which it had already failed to initiate and at which it, most likely, would refuse to appear."

Two of the justices filed a dissenting opinion in the case. Essentially, they argued that the "lack of mutuality of the contract" was so clear as to require reversal of the Special Appeals Court's ruling against the plaintiffs. The dissent devoted much discussion to "mutuality of remedy," evaluating whether the arbitration clause provided a fair way for both parties to resolve any problems that might arise under the contract. To the dissenting justices, the fact that the bank preserved the judicial procedures only available to it, such as foreclosure proceedings, rendered the clause unconscionable because it meant the bank had it "both ways," but the mortgagors were unable to retain any right to bring any action in a court.

## **MARYLAND COURT OF SPECIAL APPEALS**

### **Interpreting Insurance Contracts:**

*Mutual Fire Insurance Co. of Calvert County v. Ackerman*, 2005 WL 840484 (April 13, 2005).

**Holding:** Summary Judgment in favor of the purchaser was improper because of the factual issue of whether the use of the house was principally for dwelling purposes should have been left for the jury. The policy also was ambiguous as to whether arson was vandalism within the meaning of the exclusion.

**Case Summary:** Phyllis Morss and then later her estate ('the estate'), was the owner of a property that had been rented out to tenants for many years. On September 24, 1999, Mutual Fire Company of Calvert County ("Mutual Fire") issued to the Morss' estate, a "Dwelling Property" insurance policy for a one year period. The policy covered "loss of house by fire." On September 18, 2000, as the policy was set to expire, the house was intentionally set on fire by unknown vandals. The house suffered extensive fire damage as a result. The estate filed a claim under the policy which was denied by Mutual Fire because the property was not "'used principally for dwelling purposes' as required under the policy because the property had been 'vacant for months, with no utility service'" and "arson was considered excluded from coverage because the house had been vacant for 30 days prior to the loss." The estate sold the property to O'Brien and assigned to him any rights under the Mutual Fire insurance policy. O'Brien and the estate filed a complaint in the Circuit Court for St. Mary's County that alleged Mutual Fire had breached its contract in denying coverage.

On O'Brien's motion for summary judgment, the court concluded that "the house had retained its character as a dwelling and arson did not constitute vandalism under the policy language." Based on the parties' stipulated damages, the court awarded damages of \$76,746.00. Mutual Fire appealed.

Because the parties agreed on the terms of the policy and disagreed only on the interpretation of the policy, the Court of Special Appeals reviewed the appeal as a question of law where "the extent of the insurer's liability rests on the construction of the disputed language rather than on the language itself."

The court stated that "in interpreting an insurance contract, we examine the policy as a whole. Absent evidence of a special technical meaning, words are accorded their usual, ordinary, and accepted meanings. A word's ordinary meaning is the meaning that a reasonably prudent layperson would give to

the term. If a reasonable layperson could infer two different meanings from the language used, the language is ambiguous."

ARSON IS NOT A  
FORM OF  
VANDALISM FOR  
POLICY EXCLUSION  
PURPOSES

The court then proceeded to interpret the language of the policy. Under the "Coverages" section, the policy provided that "the dwelling on the Described Location, used principally for dwelling purposes" was covered. Mutual Fire argued that since the property was in very poor condition and was being used in connection with drug activity and because the utilities had been turned off, the property was not being, "used principally for dwelling purposes." The court stated that because "dwelling" and "dwelling purpose" were not defined in the policy, the terms should be given their "usual, ordinary, and accepted meanings."

A dwelling is defined by *Random House* as "a building or place of shelter to live in, place of residence, abode, home." Blacks Law Dictionary defines purpose as "the reason for which something exists or is done, made, used, etc."

The Circuit Court in this case stated that "as long as the property is intended to be used as a dwelling and has not been converted into . . . a commercial office or . . . retail space, . . . it remains a dwelling unit." The Court of Special Appeals disagreed and stated that there was "a material dispute of fact on the issue of whether the property was used principally for dwelling purposes." In support, the court noted that the estate's representative testified that he "would have had to put in a new septic system, spent three, four weeks working on the inside of [the house] to make it halfway livable again." The estate also concluded that to rent the property, \$10,000 in repairs would have been necessary. Regarding the house's condition, the representative testified, "it had pretty [much] been trashed and gone through. There wasn't much to keep an eye on." There also was evidence of drug activity on the property as well as evidence that the residential property would be turned into commercial property.

O'Brien's long term plans were to turn the residential property into commercial property. O'Brien testified that within a mile radius of the property, only four out of forty properties were used residentially. The court concluded that based on these facts, a trier of fact could have decided that the house was not being used for dwelling purposes at the time of the fire.

The second issue the court dealt with was whether the policy exclusion precluded coverage for loss as a result of vandalism. Mutual Fire argued that arson is a form of vandalism. The court, using the same analytical method described above to give policy terms a meaning, held that "a reasonably prudent layperson" could consider arson to be separate from, and not included in, the term vandalism." The court also looked to the punishments for arson and vandalism under the Criminal Law Article. Surveying criminal penalties for arson and vandalism, the court noted that arson is a felony punishable by up to thirty years in prison whereas vandalism is a misdemeanor punishable by up to 3 years in prison; this comparison lent support to the court's conclusion that arson and vandalism could be viewed as separate and distinct types of conduct.

**Asbestos - Mesothelioma Requirements for Survival Action and Wrongful Death Plaintiffs:**  
*Benjamin v. Union Carbide Corp.*, 2005 WL 1017430 (May 3, 2005).

**Holding:** For a survival action, the knowledge of the decedent governs inquiry notice; for a wrongful

death action, the knowledge of the decedent's beneficiaries triggers inquiry notice.

**Case Summary:** The plaintiffs had tried to pursue survival and wrongful death actions, alleging that the decedent died of mesothelioma in 1997, as a result of his exposure to asbestos products manufactured by the defendants. The circuit court entered summary judgment in favor of the defendant, finding that actual express knowledge of the diagnosis of mesothelioma and asbestos exposure was sufficient for the causes of action to accrue, and thus, that the plaintiffs' actions were barred by the applicable (3-year) statute of limitations.

The decedent's wife, the lead plaintiff in the lawsuit against the asbestos products manufacturer, stated in an affidavit that she routinely attended medical appointments with her husband during the spring of 1997, when he was diagnosed with mesothelioma. However, she also stated that only in 2002 did she learn, after her daughter told her about an advertisement, that asbestos exposure was causally linked to mesothelioma. The appeals court reviewed the plaintiff's deposition testimony about several medical appointments she and her husband had attended together and concluded that, based on the wife's recollection of conversations with doctors, she had "no express knowledge of a causal connection between mesothelioma and asbestos," and that "there is no evidence that [she] had express knowledge that the decedent had been exposed to asbestos during his lifetime."

Plaintiffs presented expert testimony to show that it would have been "unlikely for an average consumer to have actual knowledge of the relationship between asbestos exposure and mesothelioma prior to 1997." The question of whether the average consumer would have such knowledge was critical to the determination of when the plaintiff knew or should have known there was a potentially legally recognizable injury.

#### INQUIRY NOTICE REQUIREMENTS DIFFER FOR WRONGFUL DEATH AND SURVIVAL ACTIONS

The court devoted much attention to the distinctions between the survival action and the wrongful death action. The survival action is "commenced by the personal representative of the deceased victim, seeking recovery for the injuries suffered by the victim and prosecuted just as if the victim were still alive." On the other hand, the wrongful death action is "brought by the relatives of the victim and seeking recovery for their loss by virtue of the victim's death." The distinction is significant because of the limitations requirement that a suit be brought within a certain number of years from the date when the claimant discovered the facts from which it was known or should have been known that a particular occupational disease was the proximate cause of death. For the survival action, the suit must be brought within 3 years of discovery of such facts - but not later than 10 years from the date of death; the wrongful death limitation functions essentially identically. The critical question is when the plaintiffs' causes of action against the asbestos product manufacturers actually accrued - became "ripe" for suit. Generally, a cause of action accrues at the time of the wrong, but courts have recognized exceptions to this rule, especially where the "wrong" is not readily apparent. The relevant exception in this case is the so-called "discovery" rule, according to which a potential plaintiff may be exposed to certain facts which trigger an obligation to make an inquiry into the circumstances surrounding the potential injury. In other words, in order to determine whether a claimant was or should have been on notice of a possible wrong, one must evaluate the knowledge the potential claimant has that should cause him to inquire

further into his possible claim, and one must also evaluate the sufficiency of the additional knowledge the claimant might discover as a result of a reasonable investigation.

It is on this understanding of the discovery rule, and, by extension, any duty to inquire, that the court based its decision. The court began by noting that in an action of a living injured plaintiff, the injured plaintiff's knowledge is determinative. By extension, because a survival action is brought for the injury to a deceased person on his behalf, the deceased person's knowledge can be determinative. However, if the decedent did not have the knowledge to trigger the discovery rule discussed above (i.e. if the decedent did not have knowledge that should lead him to inquire into the cause of his injury), the decedent's personal representative is the determinative party for accrual of the cause of action. Lastly, in a wrongful death action, it is the beneficiaries, themselves, who are on "inquiry" notice, and the decedent's knowledge about the cause(s) of his injury are not imputed to the beneficiaries.

In this particular case, the court found that the survival action was barred by the statute of limitations. The court found that because he had discussed his workplace exposure to asbestos and his diagnosis of mesothelioma with his physicians during his lifetime, the decedent would have been on inquiry notice before he died. Conversely, because the decedent's wife apparently did not know of her husband's workplace exposure to asbestos, nor, apparently of his specific diagnosis with mesothelioma, she did not possess sufficient knowledge to trigger an inquiry obligation. Thus, the survival action was properly disposed of on limitations grounds, but the wrongful death action was incorrectly disposed of at the summary stage in the lower court.

The last noteworthy aspect of this case is the court's extensive treatment of the wrongful death cause of action - how the action was first conceived and how it should be pursued in the present day. The action for wrongful death did not exist until the mid-nineteenth century; prior to that time, actions seeking compensation for personal injuries abated at the death of the injured person. In 1852, Maryland passed an act which gave a right of action, under certain circumstances, to "designated relatives of a deceased person . . . when death has been caused by a wrongful act or by negligence."

The *Benjamin* case allowed the court to interpret the wrongful death statute to mean "that the decedent must have been able to maintain a compensable action as of the time of death," in other words, the decedent must have been the victim of such conduct as would have given him a right to recover, had his death not ensued. This interpretation highlights the relationship between the survival action and the wrongful death action; it anchors the wrongful death action, though, in some wrongful act for which the decedent himself might have recovered, but acknowledges the effects the wrongful act has on the decedent's family.

**UNITED STATES COURT OF  
APPEALS FOR THE  
FOURTH CIRCUIT**

**Insurance Coverage for Alleged Violations of the Telephone Consumer Protection Act**

(47 U.S.C. § 227 (2003)) - *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.* - No. 04-1962; 2005 WL 1109601 (May 11, 2005).

**Holding:** General commercial liability policies did not obligate insurer to defend insured in class- action suit alleging insured had sent unsolicited advertisements via facsimile in violation of the TCPA.

**Case Summary:** After the initiation of a class-action suit against it in Indiana, Resource Bankshares (Resource) sought a declaratory judgment in Virginia to the effect that the class-action suit triggered the "duty to defend" under its insurance policies. The class-action suit was brought as a result of Resource's

practice of sending unsolicited fax transmissions, containing some advertising content, to selected recipients.

The US District Court for the Eastern District of Virginia held that one of Resource's policies did obligate the insurer to defend the suit. The Court of Appeals reversed (in part) and held that neither policy obligated the insurer to defend the suit.

The statute triggering the class action suit was the Telephone Consumer Protection Act of 2003; it prohibits, among other things, the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." To enforce this provision, the act also creates a private right of action in state courts designed to allow recovery of the actual monetary losses from a violation, or to receive \$500 in damages for each violation - or both. Additionally, if the court finds that the defendant willfully or knowingly violated the above-mentioned section of the TCPA, the court may, in its discretion, award up to triple damages.

In the Indiana class-action suit, there was no assertion that the received faxes were libelous or divulged a trade secret, simply that the mere receipt of the faxes was harmful. Two provisions in Resource's policies were at issue. The first provision was the property damage provision, indicating that the insurer would "pay amounts any protected person is legally required to pay as damages for . . . property damage." "Property damage" included both loss of use of property and physical damage to property, but to trigger coverage under this provision, the property damage must have arisen out of an "event," which the policy defined -- with some elaboration -- as "an accident." The other provision that Resource claimed triggered coverage was the "advertising injury offense" provision, which covered damages for, among other things, "making known to any person or organization written or spoken material that violates a person's right of privacy."

TELEPHONE  
CONSUMER  
PROTECTION ACT  
VIOLATIONS DO NOT  
TRIGGER DUTY TO  
DEFEND

Resource notified its insurer of the class-action suit and claimed coverage, which was denied on June 4, 2002. On August 7, 2002, a US District Court in North Carolina held that, under North Carolina law, both the property damage and advertising injury clauses of the insurance contract in that case triggered coverage for a suit alleging TCPA violations. (*Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744 (M.D.N.C. 2002)). Resource notified its carrier of the *Prime TV* decision and argued that the policy in *Prime TV* was materially identical to Resource's own policy; the insurer still denied coverage, which led Resource to file the declaratory judgment action. The District Court recognized that several other courts had found provisions like the "advertising injury" provision in Resource's policy to provide coverage for TCPA violations, and thus granted the declaratory judgment in part, requiring the insurer to defend Resource against the class-action suit. The Court of Appeals quickly dismissed the contention that the "property damage" provision of Resource's policy should trigger the duty to defend. The Court noted that "Resource is entitled to coverage for 'property damage' liability only for actions that are reasonably termed an 'accident.'" Courts in Virginia view an event as an accident if that event "creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." Resource argued that it intended to fax advertisements only to recipients who wanted them, and that any other transmissions were inadvertent. The Court was not persuaded by this "accidental fax" argument; the Court noted that Resource failed to submit any evidence to indicate that

prior consent had been received for transmission of any advertisements. Accordingly, because the "property damage" provision depended on the triggering event being an "accident," and Resource's fax transmissions were not accidental, the provision did not obligate the insurer to defend Resource in the class-action.

Resource's other coverage claim was based on the "advertising injury" provision in its policy, and, more specifically, on the "right to privacy" aspect of that provision. The Court of Appeals noted that the class-action complaint did not implicate the plaintiffs' privacy interest, but that instead, the District Court had held that the complaint implied an allegation of a privacy violation. The Court of Appeals noted that one of the aims of the TCPA was to protect the privacy of the potential fax recipient, but also commented upon the different meanings that "privacy" has in the law. The Court of Appeals cited a Seventh Circuit case, *American States Ins. Co.*, 392 F.3d 939, 943 (7th Cir. 2004), to develop two main conceptions of privacy that applied with the TCPA. The first type of privacy is "secrecy," while the other is "seclusion." "Seclusion" deals with the manner in which one deals with others; here, the TCPA seems meant to protect a fax recipient's prerogative to remain "secluded" from receipt of unsolicited faxes. "Secrecy," on the other hand, touches upon an individual's interest *in the content* of a communication, not the *manner* in which the communication is made. The Court stressed that the policy provision was triggered if the insured "ma[de] known . . . written or spoken material that violates a person's right to privacy," and that an unsolicited fax ad with no private information or content could not reasonably make known material that violated a person's right to privacy. The ultimate question was whether, "when read in context, a reasonable purchaser of insurance would believe that the sort of privacy interests protected by the policies overlap with the sort of privacy with which the TCPA is concerned." The Court concluded that the reasonable purchaser would not conclude that the privacy interests involved were identical.

The Court also analyzed the "privacy provision" in the context of the other provisions in the "advertising injury" section of the policy; the other provisions involved libel and slander, disparaging statements, and unauthorized use of advertising material. On this analysis, the "privacy provision," considered in context, was much more clearly about the *content* of the insured's advertising, not the manner in which the advertising is delivered. The Court emphasized repeatedly that "context matters" and suggested that, had the "privacy provision" been located in a section of the policy relating to a matter other than advertising injury (such as a private nuisance provision), the insurer's duty to defend might have been triggered.