COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-225

ADDISON AUTOMATICS, INC.

vs.

THE NETHERLANDS INSURANCE COMPANY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The dispute in this case is whether the defendants, two Massachusetts insurance companies, are obligated to pay a multi-million dollar settlement between their insured, Precision Electronic Glass, Inc. (Precision), and the plaintiff, Addison Automatics, Inc. (Addison), for Precision's alleged violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(C). Notably, Precision's insurance policies with the insurers contained exclusions for conduct in violation of the TCPA. On cross motions for summary judgment, a Superior Court judge determined, inter alia, that the TCPA exclusions were unenforceable because the insurers failed to provide

[1] Excelsior Insurance Company, Precision Electronic Glass, Inc. (Precision), and Philip Rossi. Neither Precision nor Rossi participated in this appeal.

Precision with sufficient notice of the exclusions and that the insurers were otherwise obligated to indemnify and pay the judgment against Precision.[2] Because we conclude that the insurers provided Precision with both timely and sufficient notice of the TCPA exclusions, we reverse.[3]

Background. The insurers both operate under the umbrella of Peerless Insurance Company (Peerless) and maintain their principal places of business in Massachusetts. Precision's principal place of business is in New Jersey. At all relevant times, the Netherlands Insurance Company (Netherlands) was Precision's primary insurer, while the Excelsior Insurance Company (Excelsior) provided Precision with umbrella liability coverage.

In April 2005, the vice president of underwriting at Peerless sent an agency bulletin to its commercial line agents introducing mandatory policy endorsements for the exclusion of all acts in violation of statutes that govern e-mails, fax, phone calls, or other methods of sending materials or

[2] The settlement between Precision and Addison was approved by the judge in the underlying suit and judgment entered against Precision in the amount of $15,875,500.

[3] The parties raise several other claims on appeal and cross appeal. As discussed infra, we need not and thus do not reach those issues.

information.[4] The bulletin provided that the mandatory endorsements "expressly state [Peerless's] intent not to cover liability arising out of any action or omission that violates the . . . TCPA," and directed the exclusion endorsements to be attached to all new policies, effective May 1, 2005, and all renewal policies, effective July 1, 2005. Accordingly, on March 12, 2006, when renewal policies were issued to Precision for the 2006-2007 term, the declarations pages for both policies listed the form number and endorsements for the TCPA exclusions.

Turning to the policies most relevant to this case, on March 2, 2007, ten days prior to issuing Precision renewal policies for the 2007-2008 term, the insurers provided Precision with two packages of documents: one for the primary policy and one for the umbrella policy. Contained in each package were slip notices addressing the important changes to the policy, the declarations pages, the endorsements, and the policy itself.

In the package addressing the primary policy issued by Netherlands, there was a total of fifty-three pages preceding the declarations pages and endorsements. The first was a cover page, and the remaining fifty-two pages were slip notices. The

[4] The bulletin provided that Peerless was introducing the exclusion endorsements "[i]n light of burgeoning claim activity in the area of unsolicited faxes and given the intentionally intrusive nature of unsolicited faxes, e-mails and telephone calls as well as the statutory efforts to prohibit such actions."

slip notice addressing the TCPA exclusion was on page fifty-one of the package. At the top of the form, it stated, in bold and capital letters, "Important Notice to Policyholders," and provided immediately under, also in bold and capital letters, "Exclusion - Violation of Statutes That Govern E-Mails, Fax, Phone Calls or Other Methods of Sending Material or Information." The body of the notice provided:

> "This notice does not form a part of your insurance contract. The notice is designed to alert you to coverage changes when the exclusion for violation of statutes that govern e-mails, fax, phone calls or other methods of sending material or information is attached to this policy. . . . Please read your policy, and the endorsement attached to your policy, carefully. . . . [C]overage is excluded for 'bodily injury,' 'property damage' or 'personal and advertising injury' arising directly or indirectly out of any action or omission that violates or is alleged to violate the Telephone Consumer Protection Act (TCPA)."

The notice also informed the policyholder that the form number for the exclusion endorsement in the primary policy was CG0067-0305.[5]

Then, on the declarations page addressing commercial general liability coverage, under the heading "Forms and Endorsements," the form number CG0067-0305 was listed next to the line item "Exclusion - Violation of Statutes." This form number referred the policyholder to the endorsement for the TCPA

[5] The notice also included the form number for the exclusion in the umbrella policy. See infra.

exclusion included within the policy. At the top of the page within the policy where the TCPA exclusion was located, a heading stated, in bold and capital letters, "This Endorsement Changes the Policy. Please Read It Carefully." The page was further titled, in bold and capital letters, "Exclusion - Violation of Statutes That Govern E-Mails, Fax, Phone Calls or Other Methods of Sending Material or Information." The body of the exclusion expressly excluded from coverage any "bodily injury," "property damage," or "personal and advertising injury arising directly or indirectly out of any action or omission that violates or is alleged to violate" the TCPA.

In the package addressing the umbrella policy issued by Excelsior, there were only twenty pages preceding the declarations pages and endorsements: the cover page and nineteen slip notices. The notice addressing the TCPA exclusion was the nineteenth slip notice and was the same form that was included in the primary policy. The slip notice also provided the form number for the TCPA exclusion endorsement in the umbrella policy, which was 14-257-0305. On the declarations page of that policy, under "Forms and Endorsements," the form number 14-257-0305 was listed next to the line item "Exclusion - Violation of Statutes," and referred the policyholder to the TCPA exclusion within the policy. The page of the umbrella policy with the TCPA exclusion contained the same heading and

title as the one on the primary policy, and also clearly excluded from coverage acts or omissions in violation of the TCPA.

In January 2008, Precision initiated a faxing campaign, wherein over 31,000 advertising faxes were sent to various entities on Precision's behalf. Addison, an Illinois corporation, received one of the advertising faxes. Addison filed a class action suit against Precision for sending such fax advertisements and using the recipients' fax machines, toner, and paper supplies without their consent in violation of the TCPA. The insurers denied coverage and refused to defend Precision in the underlying class action. Subsequently, Precision and Addison entered into a settlement agreement. The settlement was ultimately approved by a judge of the United States District Court for the Northern District of Illinois, who found that the settlement was made in reasonable anticipation of liability and was prudent, fair, and reasonable. Judgment was entered against Precision in the settled amount of $15,875,500 for Precision's violation of the TCPA.

In November 2011, Addison filed this action for declaratory judgment seeking a declaration that, under the policies, the insurers were required to defend Precision in the underlying suit and indemnify and pay any judgment entered against

Precision.[6] After the settlement agreement was approved in the class action, both parties moved for summary judgment. Following a hearing, a Superior Court judge, applying New Jersey law,[7] determined that the insurance policies "clearly indicate[d] that conduct alleged to violate the TCPA [was] not covered," but concluded that the TCPA exclusions were unenforceable because the insurers failed to provide sufficient notice of them to Precision.[8] The judge determined that the class action was otherwise covered by the policies and accordingly denied the insurers' motion for summary judgment.[9] Following that decision, the parties filed several additional motions for summary judgment. On March 29, 2019, final judgment entered declaring the insurers liable for paying up to the applicable policy limits, which a second judge determined to be $7,373,500, as

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[6] Addison also claimed that the insurers acted in bad faith in denying Precision coverage and refusing to defend it in the underlying class action.

[7] The judge followed Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 411-412 (2007), where the Supreme Judicial Court, in accordance with "various choice-influencing considerations," applied New Jersey law to interpret an insurance policy issued in New Jersey to a New Jersey company. In Terra Nova Ins. Co., all agreed that New Jersey law applied. Id. at 412. The same is true here.

[8] The judge assumed arguendo that notice of the exclusions was timely.

[9] The judge allowed the insurers' motion for summary judgment on Addison's bad faith claim.

well as the contractual postjudgment interest. The judge denied Addison's request for prejudgment interest. Addison and the insurers appealed.

Discussion. We review a ruling on cross motions for summary judgment de novo "to determine whether, viewing the evidence in the light most favorable to the unsuccessful opposing party and drawing all permissible inferences and resolving any evidentiary conflicts in that party's favor, the successful opposing party is entitled to judgment as a matter of law." Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 448 (2018). Here, because Precision is a New Jersey corporation and the policies were issued there, we apply New Jersey law. See Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 411-412 (2007).

1. Timeliness of notice. Under N.J.A.C. 11:1-20.2(c), "notice of the amount of the renewal premium and any change in contract terms shall be given to the insured in writing not more than 120 days nor less than 30 days prior to the due date of the premium."[10] Here, the insurers provided the information

[10] Although, based on the declarations pages from the 2006-2007 policies, it appears that the TCPA exclusions were included in the 2006-2007 policies, we do not have the full 2006-2007 policies in the record on appeal. The only information in the record concerning notice of the TCPA exclusions is from 2007. As a result, we assume, for the purpose of evaluating notice, that the insertion of the TCPA exclusions in the 2007-2008

concerning the 2007-2008 renewal policies, including the TCPA exclusions, on March 2, 2007. The premium due date was May 15, 2007. Accordingly, notice of the TCPA exclusions was given seventy-four days prior to the premium due date and was within the time limit permitted by the regulation.

Addison contends that notice should have been given at least thirty days prior to the expiration of the policies, as required by N.J.A.C. 11:1-20.2(b), which addresses the notice requirements for nonrenewal of an insurance policy. Addison argues that because the TCPA exclusions materially changed the terms of the policies, the renewals should be treated as nonrenewals under the regulation. That argument is unavailing. While other jurisdictions, applying their own statutes, have considered renewal polices with terms differing from the preceding policy to be nonrenewals, see, e.g., State Farm Mut. Auto. Ins. Co. v. Arms, 477 A.2d 1060, 1065 (Del. 1984), New Jersey has not. The terms "renewal" and "nonrenewal" are not defined by the regulation, but the appellate division of the New Jersey Superior Court, in an unpublished decision, discussed the applicability of subsection (c) to renewal policies that contain changes in contract terms, specifically exclusion endorsements. See Nova Dev. Group, Inc. vs. J.J. Farber-Lottman Co., N.J.

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policies constituted a change in contract terms requiring notice.

Super. Ct. App. Div., Nos. A-5531-08T2 & A-5532-08T2 (March 1, 2010). Though the case is unpublished and nonbinding, it provides some guidance as to how the New Jersey courts interpret their State's regulation. See Terra Nova Ins. Co., 449 Mass. at 412. As a result, because subsection (c) specifically governs renewal policies with changes in contract terms, and it requires notice at least thirty days prior to the premium due date, rather than thirty days prior to the expiration of the policy, the insurers here provided timely notice to Precision of the TCPA exclusions.

2. Sufficiency of notice. In Bauman v. Royal Indem. Co., 36 N.J. 12, 26 (1961), the New Jersey Supreme Court held that, when an insurer issues a renewal policy with terms altering its insureds' level of coverage, the insurer has a duty to "call the lessened coverage to the attention of the insureds so that they might suitably protect themselves." Absent such a notification, the court stated that an insured is "justly entitled" to assume that the terms of the policy remain the same. Id. at 25. In that instance, the changes to the policy will not be given effect, and the insurer will be bound by any greater coverage afforded in the earlier policy. Id. at 25-26. In Bauman, the court observed that notice could be provided to an insured in a "simple fashion," by, for example, "attach[ing] to the renewal policies or forward[ing] with them, slip notices to the effect

that there had been language alterations and that the renewal policies were not intended to provide any coverage" for the particular exclusions. Id. at 26. Notably, this was the precise action taken by the insurers here.

Subsequently, in Skeete v. Dorvius, 184 N.J. 5, 8-9 (2005), the New Jersey Supreme Court addressed the adequacy of notice to an insured regarding the alteration of coverage in a renewal policy. In Skeete, the insurer, in response to a "statutory overhaul," added a step-down provision to the renewal of its insured's automobile policy. Id. at 7-9. The provision reduced coverage for persons not listed as the "named insured" on the policy from the policy limits of $100,000 for each person or $300,000 for each accident to $15,000 and $30,000, respectively. Id. at 6-7. The insurer notified the insured of this change by sending her three separate packages of documents over a two-week period. The first two packages were sent on May 25, 1999 and together totaled 113 pages. Included with the May 25 packages was a cover letter, which stated that there were important policy changes in light of a newly enacted statute, as well as a three-page notice outlining the changes. Id. at 7. There was also a declarations page included with the first package, but it failed to reflect or inform that the step-down provision had been added to the renewal policy. Id. In several places throughout the May 25 packages, the relevant reduction in

coverage was noted, but it was done so mostly in the body of the text, without clear headings indicating that anyone who was not the named insured would be limited to the new $15,000/$30,000 limits on coverage. Skeete v. Dorvius, 368 N.J. Super. 311, 315-316 (2004), aff'd 184 N.J. 5 (2005). The third package of documents was sent on June 9, 1999 and contained seventy-eight pages. It also included a cover letter that stated that there were changes made to the policy, but again, did not state the nature of those changes. Id. at 316. The June 9 package also included a declarations page, but it too failed to reflect that nonnamed insureds would be limited to the new $15,000/$30,000 limits on coverage. Id. at 317. The New Jersey Supreme Court in Skeete ultimately concluded that the insurer had provided insufficient notice of the step-down provision because its "presentation as part of an essentially undifferentiated passel of two hundred documents" would not put the "average policyholder" on notice of the change. Skeete, 184 N.J. at 8-9. Because the declarations page is recognized by New Jersey case law as "the one page of the policy tailored to the particular insured," where an insured can reasonably expect to find changes in coverage, see Lehrhoff v. Aetna Cas. & Sur. Co., 271 N.J. Super. 340, 347 (App. Div. 1994), the court was concerned about the insurer's failure to include the change on the declarations sheet. Skeete, 184 N.J. at 9. The court however stated that

not "every single policy change must be reflected on the declarations sheet," especially where that may be impractical because the change "involves a large scale statutory overhaul." Id. The court emphasized that notification of policy changes need not be in any particular form, so long as the changes are "fairly conveyed to the policyholder." Id.

Here, the facts are distinguishable from those in Skeete, and we conclude that, under the circumstances of this case, notification of the TCPA exclusions was sufficient to fairly put Precision on notice. While the insurers sent Precision two packages of documents on March 2, 2007, the packages were not an "undifferentiated passel of . . . documents": one package addressed the primary policy and its changes, and the other addressed the umbrella policy and its changes. Contrast Skeete, 184 N.J. at 9. As proposed by Bauman, each package included slip notices that preceded the declarations pages and the policy, and one of the slip notices in each package conveyed the insurers' decision to exclude from coverage acts or omissions in violation of the TCPA. See Bauman, 36 N.J. at 26. Unlike Skeete, where the information reflecting the changes in the policy was "bur[ied] . . . in a few unremarkable paragraphs" throughout the packages, Skeete, 185 N.J. at 8, here, the TCPA exclusions were brought to the insured's attention in bold and capital headings in several places throughout the packages.

Each slip notice addressing the TCPA exclusion was labeled as an important notice and stated in the heading that acts in violation of statutes that govern e-mails, faxes, and phone calls, inter alia, would be excluded from coverage. In addition, the heading on both of the exclusion endorsements also reiterated that the endorsement changed the policy by excluding acts in violation of statutes governing e-mails, faxes, phone calls, inter alia, and that the endorsement should be read carefully by the policyholder. Moreover, the exclusions here were included on the declarations pages. Although the exclusions were listed in a way that would require the insured to match the form number from the slip notice to the form number on the declarations pages because the endorsements were labeled only as "Exclusion - Violation of Statutes," specification is not necessarily required on the declarations sheet for notice to be adequate. See id. at 9.

The court in Skeete was primarily concerned with whether the information conveyed to the insured would adequately notify the "average policyholder" of changes made to his or her policy. See Skeete, 185 N.J. at 8. There, the insured was an individual consumer with a personal automobile insurance policy, which New Jersey case law recognizes "is a bulky document, arcane and abstruse in the extreme to the uninitiated, unversed and, therefore, typical policyholder." Lehrhoff, 271 N.J. Super. at

346. The same is not true of Precision, a New Jersey corporation that does business nationwide, which purchased commercial insurance policies from the insurers. Put more plainly, Precision is not the "average policyholder."

In sum, we conclude that, under the circumstances here, where the insurers provided Precision, a corporate entity, with a package addressing each policy and its changes ten days prior to issuance of the policies and seventy-four days prior to the premium due date and where those packages contained slip notices addressing the TCPA exclusions, several headings conspicuously noting the exclusions, and the exclusions were included on declarations pages, notice was timely and sufficient to fairly convey to Precision that any act or omission in violation of the TCPA would not be covered by the renewal policies. Given our disposition of these issues, we need not reach the other claims raised by the parties on appeal and cross appeal.

Conclusion. The judgment is reversed, and the matter is remanded for entry of a new declaration consistent with this

memorandum and order.

So ordered.

By the Court (Rubin,
Desmond & Shin, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: January 7, 2022.

[11] The panelists are listed in order of seniority.