Damages in the Age of Regulation: The Murky Void Between Compensation and Punishment

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I. INTRODUCTION

The modern era's capacity to share information through social media and other web-based applications has had incalculable repercussions throughout post-industrial societies. Among them is the opportunity to defame, annoy, and invade one another's privacy with unprecedented abandon. At the same time, local, state, and federal laws have increasingly provided statutory recourse to persons aggrieved – or, as the case may be, not really aggrieved – by such misconduct, often creating remedies that are not wholly compensatory, yet not necessarily punitive, in nature. A critical issue for liability insurers and their insureds, as a result, will be to understand the new exposures created by these risks, regulated by these laws, and addressed (whether successfully or not) by specific policy language. Below, the author addresses the extent to which these statutory remedies constitute covered damages or loss under general and professional liability policies, as well as the industry's attempt to curb its exposure through new endorsements and other limiting language.[1] The intent is not to canvas the existing rulings, but instead to highlight the basic points of contention and identify significant precedent to facilitate further debate and analysis.

II. BACKGROUND: AN ALPHABET SOUP OF REGULATION

A generation ago, the Eagles famously observed that residents of the Hotel California can check out any time they like, but they can never leave. The same notion of residence in perpetuity can be said of most statutes, which similarly arrive with great flourish yet remain long after they have overstayed their welcome. Legislators live to pass laws, not to repeal them. As a result, regulation tends to increase over time, redundancy and irrelevance aside, like the stacked newspapers and empty pizza boxes in a hoarder's dining room.

There is nothing novel about regulation, of course. But the explosion in the dissemination of personal information made possible by modern technology, from fax machines to cellular phones and of course to the internet, has made it easier than ever to create havoc, real or perceived, with very little (and sometimes with no) effort. Much of that havoc involves the disclosure of personal information. As a result, the federal and state governments have reacted with a slew of new statutes and regulations creating new remedies for persons aggrieved by such transgressions or, at a minimum, for lawyers who are certain their clients would feel aggrieved if properly informed.

Many of these new, and even some not-so-new, statutes create financial remedies of uncertain character. In particular, statutory remedies often impose financial burdens on transgressors that have no direct relationship to a victim's injury. Indeed, some require no injury at all as a condition of liability. While it would be impossible to catalogue all these laws, a sampling of them provides a foundation for analyzing insurance coverage questions for the obligatory suits brought under them.

Most prominently, largely because of the ease of recovering money under it, the Telephone Consumer Protection Act prohibits unsolicited phone calls and fax transmissions, and allows the prevailing plaintiff to recover actual monetary loss or $500, whichever is greater. 47 U.S.C. § 227(b)(3)(B).

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Under an older, more ubiquitous statute, UCC section 9-625 mandates notice of loan defaults and allows, in the event of a violation, recovery of an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price. U.C.C. § 9-625(c)(2).

Also at the federal level, the Fair and Accurate Credit Transactions Act (FACTA), which is part of the Fair Credit and Reporting Act (FCRA), regulates the truncation of credit card information, and violations will support recovery of actual damages or damages of not less than $100 and not more than $1,000. 15 U.S.C. § 1681n(a)(1).

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM") regulates unsolicited commercial email, and allows for statutory damages of $250 per unlawful message, not to exceed $2,000,000. 15 U.S.C. § 7706(f)(3).

The HIPAA statute (Health Insurance Portability and Accountability Act of 1996) requires health care providers to develop procedures that ensure the confidentiality of medical information, and permits statutory damages of $100 per violation, not to exceed $25,000 annually or for violations of an identical prohibition. 42 U.S.C. § 1320d–5(d)(2)B).

Similarly, the Federal Wiretap Act permits statutory damages of the greater of $100 a day for each day of violation or $10,000. 18 U.S.C. § 2520(c)(2)(B).

Under the Federal Stored Communications Act, the court may assess as damages the sum of the actual damages suffered by the plaintiff and any profits made by the violator, but in no case less than $1,000. 18 U.S.C. § 2707(c).

Under California's Unruh Civil Rights Act, "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the Act]" is liable for actual damages and any amount that may be determined by a trier of facts up to three times the actual damages, but in no case less than $4,000. Cal. Civ. Code § 52(a).

Louisiana's PPO Act requires a Preferred Provider Organization to give notice to a medical provider of discounts, and the failure to comply with the act subjects a group purchaser to damages payable to the provider of double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorney fees. La. R.S. § 40:2203.1(G).

A pair of California statutes regulating private information is also notable. The Lanterman Petris Short Act prohibits the unauthorized disclosure of confidential information, and a willful and knowing release of confidential information will entitle the aggrieved party to $10,000 or three times the actual damages, whichever is greater. Cal. Welf. & Inst. Code § 5330(a). The negligent release of confidential information entitles a plaintiff to recover both $1,000 and actual damages. Cal. Welf. & Inst. Code § 5330(b).

Not to be outdone, Alaska's Genetic Privacy Act prohibits disclosure of a person's DNA analysis without written and informed consent, and renders a person violating the act liable for damages of $5,000 or, if the violation resulted in profit, $100,000. Alaska Stat. § 18.13.020.

Similarly, under California's Confidentiality of Medical Information Act, a plaintiff can recover "nominal" damages of $1,000 (whether or not injured), actual damages, and an administrative fine or civil penalty ranging from $2,500 to $25,000 per violation. Cal. Civ. Code § 56.36(b)(1).

And under California's Song-Beverly Credit Card Act, any person who seeks a consumer's personal information in connection with a credit card transaction is subject to a civil penalty not to exceed $250 for the first violation and $1,000 for each subsequent violation. Cal. Civ. Code § 1747.08(e).

It is also noteworthy that most, if not all, of these statutes allow a prevailing plaintiff to recovery his, her, or its attorneys' fees, raising an additional layer of complexity for the defendants' insurance coverage inquiry as well as an incentive to bring suits.

Although addressing a wide range of behaviors, what these laws have in common is that their monetary remedies do not necessarily correspond to the victims' injury, but are instead set by statute without regard to the extent – or, in some cases, without any requirement – of actual injury. To make matters worse, the pre-set monetary relief, being tied to the statutory violation rather than the victim's injury, fits perfectly with the commonality and typicality requirements for certifying a class action, because the class members have no unique injuries to quantify. As a consequence, actions under these statutes are a plaintiffs' attorney's dream and a defendant's worst nightmare. Whether they should also interrupt the sleep habits of the defendants' insurer is the subject to which we now turn.

III. THE COVERAGE GRANT: ARE STATUTORY DAMAGES AWARDED BECAUSE OF A COVERED INJURY?

The first foundational question is whether statutory monetary remedies constitute "damages" within the meaning of a standard general liability policy. A related question is whether such damages are "loss" as defined in a professional liability policy. Dispensing with the spoiler alert, the answer is "probably," but the issue is not without controversy.

The insuring agreement of a typical CGL policy reads something like this:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

As a result, the policy does not cover all monetary relief, but only covers relief awarded "as damages." As if those two words had not been the subject of enough controversy, there is yet another layer of nuance contained within that sentence: to be covered, damages must be awarded "because of 'bodily injury' or 'property damage.'"[2] It would be an understatement to say there is something less than unanimity in the understanding of what damages are awarded "because of" a covered injury.[3]

For insurers, the template for arguing against coverage for statutory damages is *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of America*, 581 F. Supp. 2d 677 (W.D. Pa. 2008). There, the District Court

[2] Or, of course, "because of 'personal and advertising injury'" in the case of Coverage B.

[3] Constraints of space prevent this article from addressing two other foundational issues that would merit separate discussions on their own. The first is the extent to which the violation of a statute *that was motivated by* privacy concerns is, *a fortiori*, an "invasion of privacy" or other covered offense. The other is the extent to which a legislature's characterization of a remedy as "damages," a "penalty," "restitution," or a "fine" impacts whether it is viewed as "damages" for purposes of insurance coverage.

addressed coverage for a class action brought under FACTA, which prohibits a person accepting credit cards from printing a receipt displaying more than five digits of the credit card number. Violations of that prohibition, as noted above, permit an award of actual damages "or" an amount between $100 and $1,000. The court held the statutory damages awarded under FACTA fell outside the insuring agreement, because they did not represent *compensation for an injury*. Proof of an injury is not an element of a FACTA violation: the violation itself is actionable. Noting that the term "damages" "generally has been interpreted to refer to awards of compensation," or "compensation for a legal injury sustained," the court held that relief under FACTA was not covered because it did not represent payment for an injury:

> "Statutory" damages are distinguished from the legal meaning of "damages,' generally. * * * * In this case, the damages sought in the allegations of the Complaint are not damages for actual sustained injury, but rather, are sought pursuant to the provisions of FACTA, which prescribe statutory damages where no actual damage is alleged. [Cite.] However, the plain meaning of the term "damages" is "compensation for a loss or injury sustained by the plaintiff."

Because the damages sought in the FACTA class action would have been awarded because the statute was violated, not because anyone was injured, they were not damages within the meaning of the insuring clause.

Travelers prevailed in similar fashion in *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Prop. Cas. Co. of America*, 197 Cal. App. 4th 424 (2011). There, the underlying plaintiff sued Ulta Salon, on behalf of the general public, for civil penalties and injunctive relief, claiming Ulta's products contained inadequate health warnings required by California's Proposition 65.[4] The Court of Appeal held there was no duty to defend because the suit was not brought to recover damages for "bodily injury." Indeed, there was not even an allegation that Ulta's products had injured anyone. As the court put it:

> [B]ecause the *Deubler* complaint neither alleged any facts giving rise to a claim for damages because of bodily injury nor did it allege any bodily injury (or property damage), Ulta did not become legally obligated to pay damages for bodily injury, and the policy was not triggered.

Likewise, a California trial court judge held, in *Arch Ins. Co. v. Michaels Stores, Inc.*, No. 37-2011-00097053-CU-IC-CTL, 2013 WL 8752285 (Cal. Super. Ct. Dec. 20, 2013), that a statutory award under the Song-Beverly Credit Card Act for requesting credit card customers' personal information was not "damages" within the meaning of the act. The court began by noting that "[t]he common understanding of 'damages' means compensation recovered by a party for a loss or detriment it has suffered through the acts of another." Citing previous trial decisions characterizing the goal of the act as deterrence, not compensation, and observing that the act only permitted civil penalties and not damages, the court concluded that the relief sought was a penalty, not damages. The court acknowledged that the amount of penalty was based in part on the degree of harm to the consumer, but reasoned that "the mere fact that an award of damages takes into account the harm suffered does not, by itself, make the award compensatory." Finally, the court rejected the argument that the plaintiffs could have sued for common law invasion of privacy, and therefore the suit potentially sought covered damages. Because no common

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[4] Under Proposition 65, a person who discharges certain toxic substances "is liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per day for each violation in addition to any other penalty established by law." (Cal. Health & Safety Code §25249.7(b)(1).)

law invasion of privacy claims were then being asserted, the insured could not secure a defense by speculating over unpleaded claims.

Finally, a very recent ruling, *ACE American Ins. Co. v. DISH Network LLC*, No. 1:13-cv-00560-REB-MEH, 2016 WL 1182743 (D. Colo., Mar. 28, 2016), found no coverage for an underlying TCPA and Telemarketing Act suit by the federal and state governments. Starting with the observation that "damages" are sums paid to a person as compensation for an injury, the court characterized the $500 statutory award, "[d]espite the use of the word 'damages' in the TCPA," to be a financial penalty designed to incentivize enforcement of the act, similar to punitive damages. The $500 sum recoverable under the TCPA is expressly not a form of "actual damages," but is assessed each time the statute is violated. Because punitive damages are uninsurable in Colorado, ACE had no obligation to cover the underlying action.

Insurers making similar arguments in other cases, however, were less successful. In *Hartford Cas. Ins. Co. v. Corcino & Associates*, No. CV 13–3728 GAF (JCx), 2013 WL 5687527 (C.D. Cal., Oct. 7, 2013), the court addressed coverage for a class action by patients of Stanford Hospital whose medical records had been posted online by a vendor, leading to a suit under California's Confidentiality of Medical Information Act and Lanterman Petris Short Act. Hartford argued the suits sought no damages "because of" personal injury, because the statutory remedies were imposed for disclosing confidential medical information and not for harm to the patients. The court disagreed, reasoning that "the LPS and CMIA were enacted to create effective remedies for breaches of an individual's right to medical privacy," and as such "fall squarely within the Policy's coverage."

Similarly, in *Western Rim Investment Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N.D. Tex. 2003), the insurer argued that the statutory damage award under the TCPA ($500 per unsolicited fax) was not "actual damages," because the fixed sum was an alternative to "actual damages." The court agreed with the insured that the underlying claimants sought damages because their privacy had been invaded, and merely chose "to seek . . . damages in the amount of $500 for each advertising injury instead of actual damages because this is an option provided to them under the TCPA."

The Missouri Supreme Court reached the same conclusion in *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W. 3d 258 (Mo. 2013). In *HIAR*, another TCPA case, the court rejected the reasoning of an earlier Missouri decision, *Olsen v. Siddiqi*, 371 S.W. 3d 93 (Mo. App. 2012), which had concluded the fixed $500 award under the TCPA could not be damages "because of" a personal injury, because it was awarded as an *alternative* to "actual damages" and therefore was not, by definition, compensation. In *HIAR*, the Missouri Supreme Court followed *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc*, 401 F.3d 876 (8th Cir. 2005) to hold the $500 liquidated awards must be covered damages because they "are not damages in the nature of fines or penalties."

Finally, in *Standard Mut. Ins. Co. v. Lay*, 989 N.E. 2d 591 (Ill. 2013), the court held the $500-per-violation TCPA award, if not trebled, is a liquidated sum representing harm, or at least an incentive for aggrieved parties to bring suit, and not a penalty.

In short, where the term "damages" is undefined in a policy,[5] courts are divided on whether a statutory award that does not compensate someone for covered damages is imposed "because of" the covered injury or because the insured violated the statute. Those courts finding coverage tend to classify remedies in a binary sense: that is, remedies are either compensatory or punitive, and everything that is

[5] Which is the case with the vast majority of general liability policies, including ISO forms.

not a penalty is covered. Other courts have recognized that remedies come in three flavors: compensatory, punitive, and statutory, and statutory damages are not automatically "compensatory" simply because they are not penalties.[6] This latter group of decisions recognizes that an award does not automatically represent compensation by default merely because it not entirely deterrent or punitive.

With so much disagreement in the case law, one would think the insurance industry would amend its policies to clarify their intent regarding coverage for statutory damages. And, indeed, it has, and we will turn to that subject below in discussing the courts' treatment of policy exclusions.

IV. Exclusions

If an underlying liability falls within the insuring clause, the next question is whether an exclusion applies. Below, we address decisions involving two types of exclusions. The first is the common CGL exclusion for – or, conversely, the omission from the definition of "loss" in professional liability policies of -- fines and penalties. The second consists of more recent efforts to create specific exclusions for statutory remedies that too-frequently manifest themselves in the form of consumer class actions in which thousands of class members seek precisely the same award. As we shall see, the insurance industry has had some success with the latter group of exclusions, but they are far from airtight. And finally, we will consider the role of public policy in limiting coverage for statutory remedies.

A. Fines and Penalties

Many CGL policies exclude liability arising from the "willful violation of a penal statute or ordinance." By most measures, courts applying such exclusions to statutory damages have been few and far between. In the same vein, courts interpreting professional liability policies have generally been loath to conclude that statutory damages fall outside the definition of "loss" because they are "fines or penalties."

In *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N.D. Tex. 2003), discussed above, the court considered whether damages awarded under the TCPA "arise out of the willful violation of a penal statute or ordinance," and concluded they did not. The TCPA is a civil statute that awards a private litigant money for the violation a law, whereas a "penal" law is one that involves a criminal offense. Therefore, although the policy would not cover violations of the Texas Fax Law, which makes it a misdemeanor to transmit a junk fax, the TCPA is not "penal" because its violation is not a crime. *See also Acuity v. Superior Marketing Systems, Inc.*, No. 02 CH 8643, 2003 WL 24004567 (Ill. Cir. Ct. May 30, 2003) (exclusion does not apply because the insured is liable under the TCPA even if it did not "willfully or knowingly" violate the Act.)

Courts addressing coverage under professional liability policies tend to arrive at the same conclusion. In *Flagship Credit Corp. v. Indian Harbor Ins. Co.*, 481 Fed. Appx. 907 (5th Cir. 2012), the Fifth Circuit questioned Indian Harbor's obligations to cover a class action brought by auto loan consumers, who claimed Flagship gave inadequate notice of default and sought UCC remedies tied to the amount of the service charge or the amount financed. Because the requested relief bore no relationship to any injury, Indian Harbor argued the relief was not "loss," because that term excepted "fines, penalties or taxes." Applying the cannon of construction *noscitur a sociis* (similar to "*ejusdem generis*"), the court interpreted "penalties" to contemplate amounts paid to the government, because it appeared sandwiched between "fines" and "taxes," two other remedies that are paid only to a government.

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[6] Professional liability policies generally do not cover "damages" *per se* but cover "loss," meaning monetary awards *other than* "fines or penalties." Because that coverage limitation turns on the meaning of a "fine" or "penalty," it is discussed in the following section addressing the exclusion of such awards.

To the same effect is *Evanston Ins. Co. v. Gene by Gene, Ltd.*, --- F.Supp.3d ---, 2016 WL 102294, *4 (S.D. Tex. Jan. 6, 2016), which involved an underlying class action under the Alaska Genetic Privacy Act. Citing *Flagship*, the court concluded an award of "actual and statutory damages of $5,000" per violation did not involve "taxes, criminal or civil fines, or attorney's fees or penalties imposed by law" under primary and excess professional liability policies. Because "[f]ines, penalties, and taxes are 'limited to payments made to the government' and do not include statutory damages that make up the monetary portion of a judgment," the suit sought "loss" under the professional liability policies in question.

In *Williams v. SIF Consultants of Louisiana, Inc.,* 133 So. 3d 707 (La. Ct. App. 2014), the court found coverage for a class action brought against a medical services company for failing to disclose discounts under PPO plans. Because the statute authorized an award equal to twice the fair market value of the medical service provided, or alternatively between $50 per day and $2,000, the insurers argued the relief constituted "fines, penalties, taxes, [or] punitive, exemplary or multiplied damages," and hence was not covered under their errors and omissions policies. The court noted that the policy did not exclude "statutory damages" and, since the statute did not label the award a "penalty," the exclusionary provisions "do not include a monetary amount that is a statutory damage or a damage punitive in nature."

Likewise, in *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W. 3d 258 (Mo. 2013), the Missouri Supreme Court held the $500 award for nonwillful TCPA violations is a form of "damages," not a form of deterrence. Following the Eighth Circuit's decision in *Lou Fusz*, the court reasoned that the treble damages option of $1,500 for willful violations indicated a standard $500 award was not a penalty for purposes of HIAR's CGL policy. Instead, $500 represented liquidated damages and was remedial, not punitive.

Similarly, in *Navigators Ins. Co. v. Sterling Infosystems, Inc.*, 2015 NY Misc. LEXIS 2764 (Sup. Ct., July 28, 2015), the court found that statutory damages awarded under FCRA for providing inaccurate credit information were covered by Sterling's errors and omissions policy, and did not represent excluded "fines, penalties, forfeitures or sanctions." The court observed that statutory damages under FCRA are a substitute for hard-to-prove compensatory damages, and the availability of punitive damages under FCRA undermined the notion that the basic statutory award was a form of punishment.

On the other hand, in *Health Net, Inc. v. RLI Ins. Co.*, 206 Cal. App. 4th 232 (2012), the California Court of Appeal found that awards sought under ERISA for mishandling health plans were "penalties" outside the coverage of a professional liability policy. In that case, the policy defined "damages" not to include "civil or criminal fines or penalties imposed by law." The underlying suits sought $100 per day from the plan administrators for failing to furnish certain information, which the insured characterized as a liquidated damage award. In addition to the fact that the Department of Labor referred to the amount as a "civil penalty," the court noted, "it appears that a plan administrator may be required to pay this amount *not* in order to compensate the beneficiary for the loss suffered by not being furnished the required information, but, instead, in order to penalize the plan administrator for failing to comply with the duty to disclose."[7] *See also Wellcome v. Home Ins. Co.*, 849 P.2d 190, 193 (Mont. 1993) (holding that litigation sanctions imposed on insured attorney for trial misconduct were "fines," although not "statutory penalties," and therefore excluded from errors and omissions policy).

[7] The *Health Net* court also agreed an award of the plaintiffs' attorneys' fees was not covered as "damages," because it "d[id] not compensate a plaintiff for the injury that brought the plaintiff into court."

B. Specific Exclusions

Faced with decisions like *HIAR* that construed liquidated statutory sums to be “damages,” or at least finding them not to be “fines or penalties,” the insurance industry has responded with specific endorsements, whether standardized in ISO forms or unique language, to limit coverage for statutory awards under laws regulating internet communications, privacy, and related concerns. Those efforts have met with mixed results, but overall the rulings have been more favorable to insurers.

For instance, ISO has adopted, within the newer CGL forms, an exclusion for “Recording And Distribution Of Material Or Information In Violation Of Law.” Applicable to both Coverage A and Coverage B, that exclusion applies to suits arising from conduct that violates the TCPA, the CAN-SPAM Act, FCRA, FACTA, or any other law that “addresses, prohibits, or limits the printing, dissemination, disposal, collection, recording, sending, transmitting, communicating or distribution of material or information.”

In *MDC Acquisition Co. v. North River Ins. Co.*, 898 F. Supp. 2d 942 (N.D. Ohio 2012), the court addressed an “Unsolicited Communications” exclusion in a Travelers policy, which applied to injury “arising out of unsolicited communications by or on behalf of the [sic] any insured,” including violations of “the Telephone Consumer Protection Act and any amendments” to it. In an underlying class action, the insured had been sued under the Junk Fax Prevention Act of 2005, an amendment to the TCPA. The court found it would be “absurd” to think a suit under the Junk Fax act, an amendment to the TCPA, did not involve unsolicited communications. As a result, Travelers had no duty to defend or indemnify the insured.

Similarly, in *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962 (11th Cir. 2014), the Eleventh Circuit applied Florida law to find no coverage for a TCPA case under a CGL policy. In that case, the Chartis policy excluded injury resulting from “any act that violates any statute, ordinance or regulation of any federal, state or local government . . . [that] applies to the sending, transmitting or communicating of any material or information, by any means whatsoever.” Despite the insured’s argument that the exclusion was so broad as to be ambiguous, in that it failed to identify which statutes it contemplated, the court held a policy is not ambiguous simply because it is broad or nonspecific. Indeed, the court noted, the insured likely would have been *more* confused, not better informed, if the policy listed every law, ordinance and code that was excluded, especially since statutes are constantly being enacted, amended, and renamed.

The insurer fared less well in *Evanston Ins. Co. v. Gene by Gene, Ltd.*, --- F.Supp.3d ---, 2016 WL 102294 (S.D. Tex., Jan. 6, 2016). There, an insured that maintained a genetic genealogy website had been sued under the Alaska Genetic Privacy Act for publishing the class members’ DNA on its website without consent. The insured’s professional liability insurers disputed coverage, citing an exclusion for “Electronic Data and Distribution of Material in Violation of Statutes,” but the court ruled for the insured. The exclusion in question applied to violations of the TCPA, the CAN-SPAM Act, and “any other statute, law, rule, ordinance, or regulation that prohibits or limits the sending, transmitting, communication or distribution of information or other material.” The court concluded that the focus of the exclusion was on laws similar to the TCPA and CAN-SPAM Act, since “any other statute” followed the reference to those laws. Because the underlying action involved the disclosure of individuals’ DNA, not the transmission of annoying communications, the exclusion was inapplicable.

Finally, a pair of decisions from California underscores the importance of the specific wording of such exclusions and the nature of the statute that was allegedly violated. In *Big 5 Sporting Goods Corp. v. Zurich American Ins. Co.*, No. 13–56249, 2015 WL 8057228 (9th Cir., Dec. 7, 2015), the Ninth Circuit affirmed a ruling that two exclusions barred coverage for a class action accusing Big 5 of violating the state's Song-Beverly Act, which prohibits merchants from requesting personal information – such as ZIP code information – in credit card transactions. Zurich's policies contained a "Statutory Violation Exclusion," which applied to violations of "any statute, ordinance or regulation that prohibits or limits the sending, transmitting, communicating, or distribution of material or information." Hartford's policy included a "Right Of Privacy Created By Statute" exclusion, and the court found both exclusions applicable. In rejecting Big 5's argument that it faced potential liability under the common law for violation of privacy, the court observed there was no common law right to maintain the privacy of one's ZIP code, and therefore the right to ZIP code privacy was, indeed, "created by statute." The court also rejected the argument that the complaint could have been amended to assert a common law privacy claim, and therefore potentially sought covered damages. Because no such right existed at common law, the court found no reason to think the plaintiffs might amend their complaint as Big 5 suggested.

By contrast, in *Hartford Cas. Ins. Co. v. Corcino & Assocs.*, No. CV 13–3728 GAF (JCx), 2013 WL 5687527 (C.D. Cal., Oct. 7, 2013), the court found the same Hartford exclusion inapplicable to a class action arising from the online posting of patients' medical information in violation of two state statutes. The Hartford exclusion applied to the violation of privacy rights created by statute – obviously aimed in part at TCPA claims, but not limited to them – but excepted "liability for damages that the insured would have in absence of" the statute. Although no common law privacy claims were asserted, and thus the insured faced no liability it would have had in the absence of the statute, the court held the statute was not implicated in the first place, because the right to medical privacy existed prior to, and independently of, the statutory remedies. Because the exclusion applied to privacy "rights" created by statute, not to privacy "remedies" created by statute, it did not apply to the statutory privacy claims at issue.

C. Public Policy

Finally, a number of cases have addressed whether public policy precludes coverage for statutory TCPA awards, for the same reason punitive damages are uninsurable. Those cases have generally agreed that the $500 TCPA award is a fixed or liquidated sum in lieu of actual damages, but is not punitive *per se. See, e.g., Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 182 Ohio App. 3d 311 (2009) (reasoning malice is not an element of a TCPA claim); *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008) (TCPA requires no intent, except for treble damages); *Standard Mut. Ins. Co. v. Lay*, 989 N.E. 2d 591 (Ill. 2013) ($500 award, if not trebled, is a liquidated sum for actual harm, or an incentive for aggrieved parties to bring suit, and thus serves more than purely punitive or deterrent goals); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E. 2d 565 (Mass. 2007) (declining to find "punitive damages" exclusion applicable absent evidence that Congress intended TCPA remedies to be punitive); *but see Kaplan v. Democrat & Chronicle*, 698 N.Y.S.2d 799 (App. Div. 1999) (outside the insurance context, court held TCPA plaintiff need not show actual damages, as statute is punitive).

On the other hand, as noted above, United States District Judge Robert Blackburn of Colorado has recently held that Colorado's prohibition of coverage for punitive damages relieved DISH Network's insurers from having to defend an underlying TCPA suit brought by the federal government and four states. *See ACE Amer. v. DISH Network*, *supra.*

V. LESSONS

Those of a certain age will remember the Slinky, a toy made from a compressed spring whose leading end could be stretched a great distance from the device's trailing end. At some point, however, the tension became unsustainable, and the trailing end would snap back, sometimes with a vengeance.

Liability insurance innovations tend to follow a similar course. As new and different liability exposures come into focus, policyholders tend to have early success, with court rulings frequently placing coverage well out in front of what the insurers assumed they were covering. In due course, however, insurers respond with new policy language that closes the gap, sometimes abruptly.

Where statutory damages are concerned, insurers may have been caught flatfooted in not anticipating the exposures created by the perfect storm of cyber ubiquity, government regulation, class action litigation, and imprecise policy language. Courts that view remedies in a binary fashion have generally agreed that statutory awards are covered, if only because they are not punitive. Courts with a more nuanced appreciation of insurance principles, however, have been more willing to recognize a nether world of relief that is not quite punitive, yet not quite compensatory, either.

Insurers creating specific (and often nonstandard) exclusions in response to these challenges have largely succeeded, but insureds have had notable successes there, too. The key for both sides is to focus intensively on the wording of the exclusionary language and the nature of the statutory scheme, including its legislative history and intended goals, as there can be no "one-size-fits-all" analysis where an unsettled array of policy revisions is superimposed over a kaleidoscope of legislative schemes.

The good news for practitioners, of course, is that there will *always* be new governmental regulations, which will beget new lawsuits, which will beget new insurance claims, which will beget new policy language, and the circle will continue unbroken.