2016 IL App (2d) 150530-U
No. 2-15-0530
Order filed May 2, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CE DESIGN LTD., and PALDO SIGN AND DISPLAY COMPANY, Plaintiffs-Appellants, v. CONTINENTAL CASUALTY COMPANY, VALLEY FORGE INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INC., Defendants-Appellees, (Addison Automatics, Inc., plaintiff, v. King Supply Company, LLC, defendant).	)	Appeal from the Circuit Court of Lake County. No. 11-MR-2098 Honorable Diane E. Winter, Judge, Presiding.

JUSTICE Burke delivered the judgment of the court.
Presiding Justice Schostok and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants properly received regulatory approval for use of the Violation of Statutes exclusion in all of their policies; pursuant to *G.M. Sign, Inc. v. State Farm Fire and Casualty Company*, 2014 IL App (2d) 130593, defendants had no duty to defend because the exclusions also preclude coverage for plaintiffs' conversion claims; and because defendants did not breach their duty to defend, they were not estopped from raising policy defenses to indemnity coverage. Order granting summary judgment to defendants and denying plaintiffs' cross-motion for summary judgment affirmed.

¶ 2 The underlying lawsuit in this appeal is a federal class action brought by plaintiffs, CE Design Ltd., Paldo Sign and Display Company, and Addison Automatics, Inc., against defendant, King Supply Company, LLC, a Texas corporation, asserting claims under the federal Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227 *et seq.* (2000)) (count I), common-law conversion (count II), and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2010)) (count III). King tendered the suit to its insurers, defendants Continental Casualty Company, Valley Forge Insurance Company, and National Fire Insurance Company of Hartford, Inc. (collectively, insurers), and insurers disclaimed coverage. Plaintiffs entered into a settlement agreement in federal court with King, in which King was obligated to pay the first $200,000, and its insurers were to pay the remaining balance of $20 million.

¶ 3 Plaintiffs filed a declaratory judgment action in the circuit court of Lake County seeking a determination that insurers had a duty to defend and indemnify King in the underlying class action suit.[1] The court granted insurers' motion for summary judgment and denied plaintiffs' cross-motion for summary judgment, finding that insurers had no duty to defend or indemnify King because each primary policy contained a "Distribution of Material in Violation of Statutes" exclusion (Violation of Statutes exclusions), and each umbrella policy contained the "Do Not

[1] Insurers originally filed a declaratory judgment action against plaintiffs in Texas seeking a declaration that they had no duty to defend or indemnify King in connection with the federal litigation. The Texas court dismissed plaintiffs for lack of personal jurisdiction. Plaintiffs then filed the present suit in Illinois. Neither Addison Automatics nor King are parties to this appeal.

Call" exclusion, which precluded coverage for King's alleged violations of the TCPA, the Consumer Fraud Act, and for common law conversion. The court also rejected plaintiffs' argument that insurers did not obtain the necessary approval to use the Violation of Statutes exclusions from the Texas Department of Insurance (TDI), where the policies were issued. On appeal, plaintiffs contend: (1) the Violation of Statutes exclusions were not properly part of the primary policies and therefore the exclusions were unenforceable; (2) even if the exclusions were enforceable, it does not apply to the conversion claims; and (3) having breached their duty to defend, insurers are estopped from contesting their duty to indemnify. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The underlying complaint alleged that King transmitted unsolicited advertisements to: (1) CE Design around January 30, 2009, and February 8, 2009; (2) Paldo Sign on two occasions, including January 31, 2009; and (3) Addison Automatics, Inc. on five occasions, including February 22, 2009. The complaint alleged that the faxes sent to plaintiffs were "part of [King's] work or operations to market [King's] goods or services," that "Plaintiffs had not invited or given permission to [King] to send the faxes," and that King's faxes did not include a proper "opt-out notice," as required by the TCPA. Additionally, the complaint alleged that King faxed "the same or similar" unsolicited faxes to "Plaintiffs and 143,254 other recipients, a total of 669,917 times, without first receiving the recipients' express permission or invitation." The complaint asserted that every allegedly unsolicited advertisement faxed by King to plaintiffs or to the putative class members violated the TCPA.

¶ 6 King tendered the suit to insurers for defense and indemnity under the policies. King had the following insurance policies: (1) a primary commercial general liability insurance policy issued by Valley Forge covering a policy period from March 20, 2008, to March 20, 2009 (2008-

2009 Primary Policy); (2) a primary commercial general liability insurance policy issued by National Fire covering a policy period from March 20, 2009, to March 20, 2010 (2009-2010 Primary Policy) (collectively, the Valley Forge and National Fire policies will be referred to as the Primary Policies); (3) an umbrella liability insurance policy issued by Continental Casualty covering a policy period from March 20, 2008, to March 20, 2009; and, (4) an umbrella liability insurance policy issued by Continental Casualty covering a policy period from March 20, 2009, to March 20, 2010 (the 2008-2010 Continental Casualty umbrella policies collectively referred to as the Umbrella Policies). Because of the dates of the unsolicited faxes, all four policies are at issue in the case. Insurers are each underwriting companies controlled by CNA Financial.

¶ 7 Insurers disclaimed coverage on several grounds, including "pursuant to the 'Violation of Statutes' and 'Do Not Call' exclusions contained in the CNA policies." By letter to King, insurers explained that the exclusions expressly excluded coverage for claims arising out of a statute that prohibits or limits the sending, transmitting, communicating, or distribution of material or information, including but not limited to the TCPA.

¶ 8 Without insurers' knowledge, King and plaintiffs entered into a settlement agreement on September 27, 2011. The agreement expressly stated that "King will not notify its insurers about this settlement." It further provided that "[i]f King (or its agents, representatives, or attorneys) do notify its insurers, then Plaintiffs have the right *** to cancel this settlement" and that plaintiffs may cancel the settlement if insurers file any action against King or plaintiffs sooner than one week after entry of the final approval order by the district court.

¶ 9 King agreed to a $20 million consent judgment, allocated as: $15,650,415 for TCPA claims; $3,349,585 for conversion claims; and, $1 million for all other claims. The agreement contained a covenant in which plaintiffs agreed not to enforce any consent judgment in excess of

$200,000 against King, and to seek recovery of the remaining settlement amount from insurers' policies. On September 30, 2011, the federal court issued an order certifying the settlement class, preliminarily approving the class action, and approving the class notice.

¶ 10 On December 1, 2011, plaintiffs filed a declaratory judgment action in the circuit court of Lake County, seeking a determination that the Primary and Umbrella Policies provided "property damage" liability coverage and/or "personal and advertising injury" liability coverage to King in connection with the underlying suit. On May 15, 2014, insurers moved for summary judgment requesting the court find that they never had a duty to defend King in the underlying suit and did not have a duty to indemnify plaintiffs for the agreement negotiated between them and King. Plaintiffs filed a cross-motion for summary judgment.

¶ 11 Insurers' argued that the exclusionary provisions of both the Primary and Umbrella Policies expressly precluded coverage. The exclusions at issue in the Primary Policies are identical and state in relevant part:

> "This insurance does not apply to *** 'Bodily injury' or 'property damage' arising directly or indirectly out of any action or omission that violates or is alleged to violate: [t]he Telephone Consumer Protection Act (TCPA *** or *** [a]ny statute, ordinance or regulation *** that prohibits or limits the sending, transmitting, communication or distribution of material or information."

¶ 12 In the 2008-2009 Primary Policy issued by Valley Forge, the Violation of Statute exclusion is found on a form endorsement added to the policy; while in the 2009-2010 Primary Policy issued by National Fire, the Violation of Statute exclusionary language is contained within the policy itself.

¶ 13 The Violation of Statute exclusion is contained in the Umbrella Policies themselves, in a section under "Exclusions," entitled "Do Not Call." Plaintiffs do not argue the validity of the "Do Not Call" provisions of the Umbrella Policies.

¶ 14 Plaintiffs argued to the trial court, and argue on appeal as well, that the Violation of Statute exclusions in the Primary Policies do not apply in this case. Specifically, plaintiffs claimed that no competent evidence existed that insurers obtained the required approval from the TDI for the Violation of Statute exclusion form attached to the 2008-2009 Valley Forge policy. Because insurers did not obtain the requisite approval from the TDI, plaintiffs surmised that this exclusion was void. Taking this argument a step further, plaintiffs contended that, since no valid exclusion existed in the 2008-2009 Valley Forge policy, then the Violation of Statute exclusionary language in the 2009-2010 National Fire policy was an addition to the policy that reduced coverage without the required "clear notice" to the insured, which plaintiffs argued rendered the Violation of Statute exclusionary language in that policy unenforceable.

¶ 15 The court found that competent evidence undisputedly established that insurers properly received regulatory approval for use of its Violation of Statutes exclusion in all of the Primary Policies. Relying on *G.M. Sign, Inc. v. State Farm Fire and Casualty Company*, 2014 IL App (2d) 130593, the trial court found that insurers had no duty to defend King or indemnify plaintiffs because each policy contained a Violation of Statutes or Do Not Call exclusion, which precludes coverage for each cause of action asserted against King in the underlying suit. The trial court also held that, since insurers never had a duty to defend King, they were not estopped from denying coverage. Plaintiffs timely appeal.

¶ 16 II. ANALYSIS

¶ 17 A. Standard of Review

¶ 18 When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶28; *Allen v. Meyer*, 14 Ill. 2d 284, 152 (1958). However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769 (1993). Pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)), summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). Where a case is decided through summary judgment, our review is *de novo*. *Pielet*, 2012 IL 112064, ¶ 30.

¶ 19 Ordinarily, in a declaratory judgment action where the issue is an insurer's duty to defend, a court looks first to the allegations of the underlying complaint and compares them to the insurance policy's relevant provisions. *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 154 Ill. 2d 90, 108 (1992). Refusal to defend is unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not potentially fall within the policy's coverage. *Id*. at 108. In determining whether there is a duty to defend, the allegations in the underlying complaint must be construed liberally, and any doubts must be resolved in favor of coverage. *Scudder v. Hanover Insurance Company*, 201 Ill. App. 3d 921, 925 (1990). An insurer cannot refuse to defend its insured once the duty is triggered. *Home Insurance Co. v. United States Fidelity & Guaranty Company*, 324 Ill. App. 3d 981, 995 (2001). Rather, the insurer must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage. *Id*. at 995-96. If the insurer fails to take either of these steps

and is later determined to have wrongfully denied coverage, the insurer will be estopped from raising policy defenses to coverage. *Employers Insurance of Wausau v. Ehlco Liquidating Trust,* 186 Ill. 2d 127, 150-51 (999). However, the estoppel doctrine applies only if the insurer has wrongfully denied coverage. *Id* at 150.

¶ 20 The words of a policy should be given their plain and ordinary meaning and the court should not search for an ambiguity where there is none. If the facts alleged in the complaint do not bring the case potentially within the policy's coverage, no duty to defend exists. *U.S. Fidelity & Guaranty Company v. Wilkin Insulation Company,* 144 Ill. 2d 64, 73 (1991). Although complaints are to be construed liberally, the "general rules which favor the insured must yield to the paramount rule of reasonable construction which guides all contract interpretations." *Travelers Insurance Companies v. P.C. Quote, Inc.*, 211 Ill. App. 3d 719, 724 (1991). An insurer has no duty to defend if the underlying complaint alleges facts that, if true, would exempt the insured from coverage. *American Family Mutual Insurance Company v. Chiczewski*, 298 Ill. App. 3d 1092, 1094 (1998).

¶ 21 B. Exclusions

¶ 22 We first address plaintiffs' argument that insurers failed to establish that they received proper approval by the TDI for the 2008-2009 Valley Forge policy. The parties agree that Texas law applies to the exclusion issue. For the exclusion to be valid, it must be approved by the TDI. See Tex. Ins. Code Ann §2301.006(a) (insurer may not use form unless it has been filed with and approved by commissioner).

¶ 23 Insurers had a contract with the Insurance Services Office (ISO) to seek approval for their forms. Insurers presented Katherine Wilson, Vice President in the Commercial Insurance Department at Continental Casualty, to testify at the deposition regarding insurers' relationship

with ISO. Wilson testified that CNA Financial had the contract with ISO that covered Valley Forge. Valley Forge was an underwriter for CNA, and it wrote the 2008-2009 policy at issue here.

¶ 24 Insurers also presented Charles Lord, Underwriting Consulting Director at Continental Casualty, who works for Wilson. Lord handled the approval of the forms used in insurers' general liability lines of insurance. The majority of his deposition explained insurers' use of ISO's form and policy approval process. He testified that ISO sought and received approval in 2005 for the exclusion at issue on behalf of Valley Forge.

¶ 25 Plaintiffs argue that these witnesses had no personal knowledge of, and could not substantiate the facts that they testified to. We disagree. Both witnesses appeared as representatives of insurers under Illinois Supreme Court Rule 206 (eff. Feb. 16, 2011). Rule 206 does not require personal knowledge but allows an organization to designate a representative deponent who "shall testify as to matters known or reasonably available to the organization." Ill. S. Ct. R. 206(a)(1). As such, both witnesses could relate the information that was reasonably available to the corporation.

¶ 26 The trial court succinctly outlined the approval process for the exclusionary language included in the 2009-2010 National Fire policy, as explained by Lord in his deposition. As part of its process, ISO periodically sends detailed "circulars" with information about forms and policies which ISO has filed for state approval. In October 2006, ISO mailed a circular informing its clients that it was incorporating the Violation of Statutes exclusion language into the commercial general liability coverage policies. By May 2007, ISO announced that these changes had been approved, with no effective date for Texas. Unlike in other states, when obtaining form or policy approval in Texas, ISO does not establish the effective use date.

Neither party explained why ISO handled Texas differently than other states. Insurers themselves must make a filing with TDI to determine the effective use date. Insurers filed a document with TDI called a "SERFF" document. This document lists several companies, including National Fire, Valley Forge, and Continental Casualty, and states in the filing description: "The captioned companies as subscribers to [ISO] had the captioned revisions filed on their behalf. *** At this time we wish to adopt these revisions to be applicable to all policies written on and after October 1, 2008." The SERFF document shows its status as "approved."

¶ 27 The trial court noted that plaintiffs did not challenge any of the facts regarding the particular approval process and did not contend that the exclusionary language in the 2009-2010 primary policy was improperly approved. The court observed that the major difference between the approval process for the exclusion language and the approval process for the 2008-2009 exclusion form is that insurers failed to produce the SERFF documents corresponding to the approval process for the exclusion form.

¶ 28 Plaintiffs present several arguments on appeal in support of their contention that, because of this lack of SERFF documentation, insurers failed to present enough evidence to show approval from TDI for the 2008-2009 Violation of Statutes exclusionary form. Plaintiffs first assert that the 2008-2009 exclusionary form was never submitted for TDI approval. But the September 2004 ISO circular announcing the submission of multistate forms for approval contains a sample Violation of Statutes exclusionary form identical to the one included in the 2008-2009 Valley Forge policy. The June 2005 ISO circular states that Texas approved the Violation of Statutes exclusion form. Accordingly, the uncontested evidence shows that TDI approved the Violation of Statutes exclusion form which is at issue here.

¶ 29 However, plaintiffs assert ISO failed to obtain authorization of this particular 2008-2009 Violation of Statutes exclusionary form on behalf of Valley Forge. Plaintiffs point out that the ISO master agreement does not contain specific references to Valley Forge and that the ISO circulars themselves do not refer to Valley Forge. The ISO agreement expressly includes all affiliates and subsidiaries of CNA and it has been in effect since 1993. Because Valley Forge is an underwriting company controlled by CNA, ISO obtains form and policy approval for the CNA affiliates, its circulars are ISO's method of updating its clients on that process, and ISO's circulars show it submitted the exclusion form to TDI and received approval from them, it can reasonably be inferred that ISO obtained TDI approval of the particular exclusionary form on behalf of Valley Forge.

¶ 30 Plaintiffs last maintain that TDI requires a separate approval for an effective date for any new forms. Plaintiffs believe that insurers could not properly use the form until "both" approvals were obtained. In his deposition, Lord states that "ISO does not establish an effective date for the state of Texas. *** [T]he insurer chooses to establish its effective date." The trial court noted that the ISO documents announcing TDI approval of the exclusion form instructs ISO clients to select an effective date and make an additional filing with TDI. Insurers acknowledge they cannot find the SERFF documents to show this second filing took place, and they failed to produce any other documentary evidence of a second filing. Plaintiffs therefore conclude that Texas law voids the exclusion form.

¶ 31 Plaintiffs do not support their argument with any Texas authority—statutory, regulatory, or caselaw—which has voided a form for failing to obtain a second TDI approval. The cases plaintiffs rely on deal with an insurance form's complete lack of TDI approval, which do not support their assertion. Plaintiffs cite *Pine Oak Builders, Inc. v. American Lloyds Insurance*

Company, 292 S.W. 3d 48 (Tex. App. 2006), *aff'd in part and rev'd in part on other grounds* 279 S.W. 3d 650 (2009). In that case, the plaintiff argued the defendant's endorsement was invalid because the defendant failed to obtain preapproval of the exclusion from the Texas Commissioner of Insurance, as required by the Texas Insurance Code. Following the plaintiff's assertion, the court stated the following:

> "A form without such approval is void. *Commercial Union Assurance Company v. Preston*, 282 S.W. 563, 565 (1926); see also *Urrutia v. Decker*, 992 S.W. 2d 440-44 (Tex. 1999) (discussing *Commercial Union*)." *Id*. at 60.

¶ 32 Because the *Pine Oak* court gave no explanation for the statement "[a] form without such approval is void," the trial court in the present case researched the Texas Supreme court case of *Urrutia*, which was cited in *Pine Oak*, and found a "more nuanced approach" to plaintiffs' reliance on the position that a form's complete lack of TDI approval is void. In *Urrutia*, the court stated:

> "Insurers doing business in this state are required to use policies and endorsements approved by our State Board of Insurance. Insurers who do not use board-approved policies and endorsements may be subject to penalty. Furthermore, these insurers may not be able to enforce agreements written on unapproved forms. This Court has said that an unapproved endorsement or clause that conflicts with an approved provision in a standard form policy is unenforceable." (Internal citations omitted.) *Urrutia*, 992 S.W. 2d at 443.

¶ 33 Distinguishing itself from the holding in the 1926 *Commercial Union* case, also cited by *Pine Oak*, the Texas Supreme Court stated: "[T]his case is different from *Commercial Union*. Here the [provisions at issue], while lacking board-approval, do not conflict with any approved

standard form policy or provision." *Id*. at 443. The Texas Supreme Court held the unapproved form enforceable, emphasizing that "the liability insurance [in this case] was *voidable* because it did not have board approval. It was not *void*, however." (Emphases added.) *Id*.

¶ 34 In *Mutual Life Insurance Company of New York v. Daddy$ Money, Inc.*, 646 S.W. 2d 255 (Tex. App. 1982), another case relied on by plaintiffs, the court nullified an endorsement written on an unapproved form; but followed *Urrutia* and *Commercial Union* by requiring a conflict between the approved and unapproved provisions. The trial court observed that no such conflict existed in the present case.

¶ 35 Based on the Texas Supreme Court's holding, the trial court reasoned that a form's complete lack of TDI approval merely makes that form voidable, not void as plaintiffs argue. We agree with the trial court's logic. Thus, where the policy is voidable, the insured may elect to rescind it, but if he or she accepts the insurance, it is under the agreed terms. See *Urrutia*, 992 S.W. 2d at 443.

¶ 36 In sum, the uncontested evidence shows that TDI approved the filing of the Violation of Statute exclusion form in the 2008-2009 primary policy on behalf of Valley Forge. The only item missing is the ISO-suggested second approval of the form's effective date. However, even assuming the lack of this secondary approval makes the entire form unapproved, the form is voidable, not void, and there is no evidence of rescission. Accordingly, we find plaintiffs' argument lacks merit, and the trial court was correct in enforcing the exclusion in the 2008-2009 policy.

¶ 37 Plaintiffs rely on a determination that the 2008-2009 exclusion is unenforceable to support their claim that the exclusion in the 2009-2010 policy is a reduction in coverage

requiring notice. Since we find the 2008-2009 exclusion valid, it is not a reduction in coverage, and plaintiffs' argument regarding the 2009-2010 policy fails.

¶ 38 C. Conversion Claims

¶ 39 Plaintiffs next contend that, even if the exclusions are enforceable, they do not apply to the conversion claims, as there is the possibility that those claims are based on conduct that does not violate the TCPA.

¶ 40 In *G.M. Sign*, 2014 IL App (2d) 130593, we found that the insurer had no duty to defend its insured because the policies' Violation of Statutes exclusions precluded coverage for the TCPA count and for the conversion and Consumer Fraud Act counts. *Id.* ¶¶ 28-30.

¶ 41 Plaintiffs argue that *G.M. Sign* does not control because the ruling was based on a "very different factual scenario." Plaintiffs ask this court to reconsider *G.M. Sign* in light of the unique fact pattern in that case and recent decisions in other districts regarding the duty to defend.

¶ 42 We disagree that the fact scenario in *G.M. Sign* is materially different from the present case. In *G.M. Sign*, the underlying suit alleged violations of the TCPA, the Consumer Fraud Act, and common law conversion. Each count incorporated the same factual allegations. The insured tendered the complaint to its insurer, who disclaimed coverage based on a policy exclusion nearly identical to the Violation of Statutes exclusion in the Primary Policies. *Id.* ¶ 8. The insured entered into a consent judgment with G.M. Sign and agreed to a $4.9 million settlement, which provided that G.M. Sign would not execute on the judgment against the insured personally but would satisfy it from the insurer's insurance proceeds. *Id.* ¶ 11. The insured did not advise the insurer of the settlement until after it had been negotiated and finalized. *Id.* ¶¶ 14, 46. The plaintiffs did file an amended complaint in the underlying suit with the admitted purpose of pleading "into possible insurance coverage available under [the insured's] insurance policies."

Other than the exception of seeking to file an amended pleading after settling with the insured, the facts of *G.M. Sign* are the same as this case. *Id.* ¶¶ 12, 45.

¶ 43 The plaintiffs made two arguments why the conversion and Consumer Fraud Act counts fell within potential coverage. First, the plaintiffs asserted that those counts had different elements and sought different damages from the TCPA count. Second, plaintiffs argued that the other counts were premised on different facts than the TCPA count and were broad enough to include faxes that did not violate the TCPA. *Id.* ¶ 27. We rejected the plaintiffs' arguments.

¶ 44 We stated that the exclusion at issue "excludes coverage for 'property damage' or 'advertising injury' 'arising directly or indirectly' out of any action or omission that violates or is alleged to violate the TCPA." *Id.* ¶ 28. We reasoned that the elements of the causes of action alleged should not be compared, but one should ask whether "but for" the insured's act of sending faxes, the plaintiff would have suffered injury. *Id.* ¶ 29. We found that to what extent the legal "elements" of the alleged causes of action may differ was a meaningless measure with respect to the Violation of Statutes exclusion. *Id.*

¶ 45 Regarding the different facts argument, we stated that "[a]lthough the alternative counts selectively incorporated only those factual allegations that contained no reference to the TCPA, to the faxes being advertisements, or the lack of any established business relationship between [the insured] and the class members, they nevertheless were based on the same facts as the TCPA count." *Id.* ¶ 30. Thus, we held that the alternative counts arose from the same conduct that was the basis of the TCPA claim, and based on the exclusion, the defendants had no duty to defend or indemnify the insured in the underlying suit. *Id.* ¶ 38. We concluded therefore that the insured was not estopped from raising policy defenses because its denial of coverage was not wrongful. *Id.*

¶ 46 The same conclusion applies in the present case. Similar to *G.M. Sign*, plaintiffs' underlying federal complaint against King alleged violations of TCPA, common law conversion, and the Consumer Fraud Act. Each count in the underlying complaint incorporates the underlying complaint's general factual allegations, which allege that every unsolicited facsimile advertisement sent by King to plaintiffs or to class members violated the TCPA. The Violation of Statutes exclusions in both the primary and umbrella policies explicitly state the policies do not apply to actions arising out of violations of the TCPA. Thus, as in *G.M. Sign*, the conversion and the Consumer Fraud Act counts in plaintiffs' underlying federal complaint against King arose from the same conduct that was the basis for the TCPA claim. See also *Illinois Casualty Company v. West Dundee China Palace Restaurant, Inc.*, 2015 IL App (2d) 150016 (reaffirming *G.M. Sign* that the laws exclusion from coverage applied to claims for conversion and violation of Consumer Fraud Act). Accordingly, count II of plaintiffs' federal complaint did not trigger insurers' duty to defend.

¶ 47 Plaintiffs heavily rely on *Illinois Tool Works, Inc. v. Travelers Casualty & Surety Company*, 2015 IL App (1st) 132350, to support the proposition that "vague, ambiguous allegations against an insured should be resolved in favor of finding a duty to defend." We find their reliance misplaced. *Illinois Tool Works* involved multiple toxic tort claims alleging exposure to hazardous chemicals manufactured by the insured, Illinois Tool Works (ITW), and others. *Id.* ¶ 4. Although some of the suits alleged that exposure to ITW's product resulted in an injury, the complaints failed to allege when the exposure or injury occurred. *Id.* ¶ 23. No one disputed whether the alleged injuries would be covered. The dispute concerned whether the insurers had a duty to defend because some of the complaints did not allege when the injuries occurred and therefore, what policies were potentially triggered. *Id.* ¶¶ 5, 10. The First District

Appellate Court found the insurers had a duty to defend because "the time the injury occurred is a factual uncertainty that, until resolved, gives rise to a duty to defend." *Id*. ¶ 29. Here, unlike in *Illinois Tool Works*, there is no coverage because a policy exclusion applies.

¶ 48 We further note that plaintiffs neglect to cite a number of cases from other jurisdictions that have found the Violation of Statutes exclusion to be clear, unambiguous, and to preclude coverage for TCPA violations and for causes of action which arise out of the same conduct as the insured's alleged fax blasting in violation of the TCPA, including claims of conversion, the Consumer Fraud Act, and other state consumer fraud or consumer protection statutes. See, *e.g.*, *Emcasco Insurance Company v. CE Design, Ltd.*, 784 F.3d 1371, 1384-85 (10th Cir. 2015) (quoting *G.M. Sign*, and holding that statutory-violation exclusion applies not when conversion and the statutory consumer fraud claims share same elements but when property damage (paper, toner, and use of fax machine) arises out of same actions (sending of faxes) violating or allegedly violating TCPA); *American Casualty Company of Reading, Pennsylvania v. Superior Pharmacy, LLC*, 86 F. Supp. 3d 1307, 1312-15 (M.D. Fla. 2015) (applying Florida law, conversion allegations arose out of the alleged TCPA violations and fell within the violation of statutes exclusion).

¶ 49 D. Indemnification

¶ 50 Applying the same reasoning of *G.M. Sign*, since insurers did not breach their duty to defend, they were not estopped from raising policy defenses to indemnity coverage. See *G.M. Sign*, 2014 IL App (2d) 130593, ¶ 38*; Employers Insurance of Wasau*, 186 Ill. 2d at 150. Moreover, in Texas, an insurer who wrongfully breaches its duty to defend is not estopped from raising policy defenses. See *Hargis v. Maryland American General Insurance Company*, 567

S.W. 2d 923, 927 (1978); *Hartford Casualty Company v. Cruse*, 938 F. 2d 601, 605 (5th Cir. 1991). Thus, if we were to apply Texas estoppel law, it would not change the outcome.

¶ 51 III. CONCLUSION

¶ 52 Based on the preceding, the order granting summary judgment to insurers and denying plaintiffs' cross-motion for summary judgment is affirmed.

¶ 53 Affirmed.