

recover economic loss suffered in attempting to secure the benefits of an insurance policy as an element of damages for breach of the implied covenant of good faith and fair dealing. The court, however, found no evidence of economic loss in the record. The insureds' claim for time expended did not, in the court's view, seek compensation for economic loss. // DiMugno

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## Liability Insurance/ Intentional Acts

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### Homeowners Insurer Required to Defend Murder Conspiracy

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*Insured's "False Imprisonment" of Victim Was Not Necessarily Intentional*

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*Northern Security Ins. Co. v. Connors*, \_\_\_ A.3d \_\_\_, 2011 WL 1219252 (N.H., March 31, 2011)

#### Case at a Glance

The Supreme Court of New Hampshire has required an insurer to defend a suit against its insured for conspiracy to commit murder. The court reasoned that the policy covered false imprisonment, and there was no proof that the insured appreciated the object of the conspiracy.

#### Summary of Decision

According to the complaint in a civil action filed in the Rockingham County (New Hampshire) Superior Court, five men spent two years plotting the entrapment, torture and murder of Jack Reid, a handyman who was suspected of stealing personal property from one of them. The five lured Reid to the home of Michael Connors, where they struck him in the head and chest with a blunt object until he was dead. Prior to the murder, the five had sent Connors a package containing a stun gun, handcuffs and pepper spray, and had advised him that they needed to use his property for an unspecified purpose. After Reid's murder, his survivors sued Connors (as well as

the murderers) for civil conspiracy, wrongful death, and intentional and negligent infliction of emotional distress. Connors's insurer, Northern Security, disputed coverage, but the trial court imposed a duty to defend and the New Hampshire Supreme Court affirmed.

The focus of the appeal was an endorsement to Connors's policy that amended the definition of "bodily injury" to include "personal injury" offenses, including false imprisonment. As to the personal injury offenses, the policy's exclusions were inapplicable. The Supreme Court rejected Northern Security's arguments that the suit alleged intentional acts and did not allege an "occurrence." First, the "occurrence" definition ("accident") could not be read literally in the context of the personal injury offenses, which contemplated coverage for conduct that was not strictly accidental. Second, by its express terms, the intentional act exclusion did not apply to the personal injury offenses. Third, Connors steadfastly denied knowing that the object of the conspiracy was to murder Reid, and he only thought he had received a package of "steak knives" from the conspirators for unknown reasons. Finally, while there would have been no coverage if the false imprisonment was inextricably tied to Reid's murder – because the gravamen of the case would have been murder, not false imprisonment – it was not clear that Connors's alleged conduct was, in fact, part and parcel of the wrongful death claim. Although the policy also contained a physical abuse exclusion, it was not raised in the trial court and was therefore not presented for appeal.

#### Comment

It is difficult to disagree with the *Connors* court's analysis of coverage in the abstract, but its application of that analysis to the facts of the case seems oddly misaligned. It is widely recognized that personal injury offenses such as false imprisonment are intentional torts by their nature, and therefore that insureds are given a wider latitude in arguing their conduct was accidental or the claimant's injuries unintended. It also appears that Connors did not know Reid was going to be killed at his home. That said, the court's conclusion that Connors was owed a defense under the policy's "false imprisonment" coverage seems like a stretch. So far as the opinion

reveals, the underlying complaint contained no cause of action for false imprisonment, there were no pleaded facts indicating that Reid had been falsely imprisoned, and it is not clear who could recover damages for false imprisonment since Reid was dead. The complaint simply alleged that Reid had been lured by Connors's home and beaten to death. While it may be true that Connors played no role in Reid's murder, that does not mean he was sued for false imprisonment. // Barnes

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## Liability Insurance/ Treble Damages

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### Statutory Treble Damage Awards for Sending Faxes Are Not Punitive Damages Excluded from Coverage

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*\$500 per Claimant Deductible Applied to Coverage  
for Sending "Junk" Faxes*

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*Alea London Limited v. American Home Services, Inc.*, 638 F.3d  
768 (11th Cir. [Ga.] 2011)

#### Case at a Glance

A trial court committed no error in concluding that a seller of windows and siding charged with sending "junk faxes" was subject to a liability policy's \$500 "per claimant" deductible for all "Advertising Injury Liability" with respect to statutory damages awards of \$500 per individual violation under the federal Telephone Consumer Protection Act. The placement of the deductible in a block schedule that included other types of coverage did not create an ambiguity that precluded application of the deductible.

Treble damages awards under the Telephone Consumer Protection Act were not awards of punitive or exemplary damages excluded from coverage under an insured's advertising injury liability insurance. The non-punitive \$500 award was directly linked in the statute to the treble damages. Given the relatively small amount of statutory damages available, trebling appeared to be a mechanism to encourage victims of unsolicited junk faxes to file suit, rather than punitive

or exemplary damages.

A liability policy covering damages the insured became obligated to pay, and requiring the insurer to defend lawsuits and investigate and settle claims did not cover attorney's fees incurred by the insured with respect to claims that it sent unsolicited "junk" faxes. The insurer was not liable for supplementary payments except those specifically covered, and, while the policy included defense expenses, investigatory expenses, and costs, it notably did not include any supplementary payment for attorney's fees.

#### Summary of Decision

American Home Services (AHS) sold and installed windows, siding and gutters. AHS hired a third-party marketing firm to send advertisements via fax. The marketing firm sent approximately 300,000 fax advertisements for AHS, including one to FastSigns. FastSigns filed suit against AHS in Georgia state court alleging that the unsolicited fax advertisements violated the federal Telephone Consumer Protection Act (TCPA). The TCPA created a private right of action in state court under which a party could sue to recover its actual monetary loss or \$500 in damages per violation, whichever was greater. If the violation was willful or knowing, the TCPA allowed the court at its discretion to award treble damages.

FastSigns asked for class certification of its TCPA claims, \$500 in statutory damages for each violation, and the TCPA's trebling of each award for AHS's alleged willful and knowing violations. FastSigns also sought to recover its litigation costs and attorney's fees under Georgia law. At the outset of the state lawsuit AHS requested that its insurer Alea London Limited provide a defense and indemnity for any damages. Alea hired counsel to defend AHS under a reservation of rights and defended AHS for six years in the state lawsuit.

Alea filed a declaratory judgment action in federal district court in Georgia against AHS and FastSigns seeking a declaration that it did not have to indemnify AHS because the policy did not cover the claims in the lawsuit. Even if the policy covered the claims, Alea asserted, the insurer did not have to pay any damages award up to \$500 per individual because that amount fell within the policy's per-claimant deductible. Finally, Alea asserted that any award increasing the