

# Client Alert

January 2016

## Texas Federal Court Limits Reach of Liability Policies' Broadly Worded "Spam" Exclusion

On January 6, 2016, the United States District Court for the Southern District of Texas held in *Evanston Insurance Co. v. Gene by Gene Ltd.*, No. 14-cv-01842 (S.D. Tex. Jan. 6, 2016), that an exclusion for unlawful distribution of information applied only to "spam" claims and did not bar coverage for claims that a DNA analysis company wrongfully published personal information online.

### Background

Gene by Gene Ltd. ("Gene by Gene") owns and operates [www.familytreedna.com](http://www.familytreedna.com), a genetic genealogy website, where customers test their genetic information to learn more about their ancestry and connect with other matching users. In May 2014, one of Gene by Gene's users, Michael Cole, sued the company in an Alaskan federal court (the "Cole lawsuit") on behalf of other users. Cole claimed that Gene by Gene had improperly published his and others' DNA test results on the company's website and transmitted that information to third parties without consent. Cole maintained that these actions violated Alaska's Genetic Privacy Act.

Evanston Insurance Company ("Evanston") insured Gene by Gene under various professional liability and excess liability insurance policies. Gene by Gene sought a defense and indemnity from Evanston for the Cole lawsuit. Evanston denied Gene by Gene's claim on the ground that an exclusion for "Electronic Data and Distribution of Material in Violation of Statutes" (the "Distribution Exclusion") barred coverage. Evanston filed a declaratory judgment action seeking a declaration that it did not have a duty to defend or indemnify Gene by Gene against the Cole lawsuit. Gene by Gene counterclaimed that Evanston owed defense and indemnity coverage and had violated the Texas Insurance Code by delaying payment of defense costs to Gene by Gene. Gene by Gene then moved for summary judgment.

### Holding

The district court granted summary judgment to Gene by Gene, finding that Evanston owed a duty to defend and indemnify Gene by Gene in connection with the Cole lawsuit. The court further found that Evanston violated Texas law by delaying payment of Gene by Gene's defense costs. The Evanston professional liability policies provided coverage for claims of "personal injury," defined as "oral or written publication of material that violates a person's right of privacy." The district court held that the Cole lawsuit alleged "personal injury" and rejected Evanston's argument that the policies' "Distribution Exclusion" barred coverage.

The Distribution Exclusion had three parts and excluded coverage for: (1) violation of the Telephone Consumer Protection Act of 1991 ("TCPA"); (2) the CAN-SPAM Act of 2003; and (3) "any other statute, law, rule, ordinance, or regulation that prohibits or limits the sending, transmitting, communication or distribution of information or other material." According to Evanston, the third paragraph of the exclusion barred coverage for the claims that Gene by Gene had violated the Alaska Genetic Privacy Act by publishing and transmitting personal DNA information. In response, Gene by Gene argued that the Distribution Exclusion's third paragraph must be read in context with the paragraphs applying to the TCPA and the CAN-SPAM act. Accordingly, Gene by Gene maintained that the third paragraph of the exclusion applied only to claims under

statutes regulating unsolicited emails, telephone calls or faxes. *Gene by Gene* also argued that Evanston's broad reading of the exclusion language would render the policy's "personal injury" coverage illusory because all invasion of privacy claims would necessarily violate some "law."

The district court agreed with *Gene by Gene* that the only reasonable reading of paragraph 3 of the exclusion was that it applied narrowly to claims of unsolicited communications to consumers. The court therefore held that Evanston owed a defense and indemnity because the claims that *Gene by Gene* had unlawfully published and transmitted the DNA information of its customers did not constitute unsolicited communications and were not within the scope of the exclusion. The court also granted *Gene by Gene* summary judgment on its claim that Evanston had violated the Texas Insurance Code by failing to make a payment toward *Gene by Gene*'s defense within 60 days as required by the statute.

### **Implications**

*Gene by Gene* reiterates the importance of closely reading policy terms while remaining mindful of the context of the terms as well as how they fit with the coverage the policy is intended to provide. In this case, the insurer interpreted exclusionary language out of context and in doing so attempted to apply the exclusion in a manner that engulfed the very type of claims the policy was designed to cover. Policyholders should be mindful, therefore, of carriers seeking to extend an exclusionary provision beyond its reasonable and ordinary scope. The decision also serves as a reminder that policyholders should not be dissuaded when their carrier takes a contrary position on policy meaning. As *Gene by Gene* reiterates, where the policyholder and carrier both present reasonable interpretations of policy language, courts typically will side with the policyholder under the rules of construction governing policy ambiguities.

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