THE
NATIONAL LAW REVIEW

Return To Sender: Court Holds TCPA Liability For A Text Sent By A Marketing Firm Cannot Be Resolved On Summary Judgment

Thursday, March 21, 2019

Federal courts continue to struggle to identify the "sender" of a fax for purposes of TCPA liability. The latest example is from the Southern District of New York. *See Bais Yaakov of Spring Valley v. Education Testing Service*, No. 13-cv-4577, 2019 U.S. Dist. LEXIS 43985 (S.D.N.Y. March 18, 2019). The defendant entered into a distribution agreement with a third party marketing and distribution firm. Under the agreement, the marketing and distribution firm had exclusive rights to market and sell one of the defendant's products. It was required to comply with all applicable laws, including the TCPA, but the agreement otherwise made no mention of the manner of marketing and did not mention faxes at all. The agreement further provided that the marketing and distribution firm and the defendant were independent contractors and disclaimed any agency relationship. But the court ultimately held that whether the defendant could be liable for a fax sent by the marketing and distribution firm was a question of fact that could not be resolved on summary judgment.

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Liability as a "sender" for a fax sent by a third party is currently the subject of a circuit split. Which is par for the course in TCPAWorld – everything is a circuit split. But unlike some TCPAWorld circuit splits, this one is more subtle and not necessarily outcome determinative. The Seventh Circuit follows what it describes as an "agency" approach "to determine whether an action [i.e. sending a fax] is done 'on behalf' of a principal." *See Bridgeview Health Care Ctr. v. Clark*, 816 F.3d 935 (7th Cir. 2016). The Sixth and Eleventh Circuits apply a multi-factor test that, while technically not a true "agency" test, has many elements in common with it. *See Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016); *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245 (11th Cir. 2015). The Seventh Circuit approach applies the federal common law of agency; the Sixth and Eleventh Circuits apply a multi-factor test to determine "on whose behalf" a fax was sent. Neither test is a strict liability standard. As further proof of the similarity between the two tests, the *Bais Yaakov* court cited several district court decisions from the Sixth Circuit, and one from the Eleventh, when discussing the Seventh Circuit test.

The Southern District of New York ultimately adopted the multi-factor test used in the Sixth and Eleventh Circuits. It could not, however, decide whether the defendant was the sender on summary judgment. Weighing in the defendant's favor, it did not design the fax, determine the recipients, draft the fax, pay for the fax, engage the company that physically sent the fax, or have any contact with the recipients of the fax (other than being sued). But on the other hand, the defendant contracted with the marketing and distribution firm to market its product, expected the third party to market its product, knew that the third party was planning to engage in a fax campaign, and *reviewed and approved* the fax before it went out. The court thus found evidence from which a jury could conclude that the defendant was not the sender, and evidence from which a jury could conclude that it was the sender.

The case is a reminder of the careful balance that companies must strike when they engage third-party marketing firms. Exercise too little control and it is difficult to prevent the marketing firm from running afoul of the TCPA. But exercise too much control and the company itself could be liable, not just the marketer.

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