A New TCPA Low?: Dismissed Fax Blast TCPA Case Sought to Hold an Attorney Liable for a Fax he Didn’t Send or Even Know About

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- Consumer Protection
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If you’re searching for rock bottom in TCPAWorld, we may have just hit it.

Imagine a TCPA suit against a lawyer—call him Scott—whose only crime was agreeing to speak at a seminar. Scott was informed that emails promoting the seminar would be sent. Unbeknownst to him, however, the folks promoting the seminar hired a third-party to send faxes about it. The faxes barely mentioned Scott’s name and got the name of Scott’s firm wrong. Nice touch. Nonetheless, when a recipient of the fax filed a TCPA class action, Scott was personally named in the suit as a Defendant.

Insane no?

Luckily, the Court put an end to that insanity with the common sense—but surprisingly lengthy—ruling in Innovative Accounting Sols., Inc. v. Credit Process Advisors, Inc., File No. 1:15-CV-793, 2020 U.S. Dist. LEXIS 33437 (W.D. Mich. Feb. 27, 2020). The issue in the case is a quirky and hard-to-apply FCC ruling suggesting...
that anyone whose goods or services are promoted in a fax are automatically deemed a “sender” of the fax. The rule defines a “sender” of the fax as: “the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.”

That terrible tricky “or” suggests that a sender can include anyone whose goods or services are advertised in the fax advertisements—and knowledge that the fax was sent is apparently not a requirement. (!).

Luckily for Scott the Sixth Circuit Court of Appeals had held that the definition of “sender” is limited to individuals that participated in the sending of the fax. Unluckily for Scott, the Sixth Circuit Court of Appeals has also held that the definition of “sender” is not limited to individuals that participated in sending the fax.

Wait. What?

Yeah. Just when you thought TCPAWorld couldn’t get any more screwed up you realize that the Sixth Circuit Court of Appeal has issued diametrically opposed rulings on who the “sender” of a fax is. Compare Health One Medical Center, Eastpointe PLLC v. Mohawk, Inc., 889 F.3d 800 (6th Cir. 2018), on the one hand, with Siding & Insulation Co. v. Alco Vending, Inc., 822 F.3d 886 (6th Cir. 2016), and Imhoff Investment, LLC v. Alfoccino, Inc., 792 F.3d 627 (6th Cir. 2015), holding more or less the opposite, on the other.

While the Innovative Accounting Court was inclined to follow Health One and dismiss the poor innocent lawyer—how often can one say that sincerely?—from the case, the Plaintiff urged that the Court could not follow the Health One decision because the earlier panel decisions had to be followed since Health One was not decided en banc.

Pause.

Notice that the Plaintiff is fully aware in making this argument that Scott had nothing to do with the transmission of the fax and did not even know it was being sent. The dude literally just agreed to speak at a seminar and ended up sued in a TCPA class action. (As a guy who speaks at a lot of conferences this hits way to close to home for me.) Yet the Plaintiff still urges the court to hold the guy liable for a crime he didn't commit. This is simply gross rock bottom nonsense (IMO).

Back to the analysis—the Court actually walks through a six part test and another vicarious liability review just to make sure that a guy who did not know faxes were being sent can’t yet be held liable for faxes that he didn’t know were being sent. Unsurprisingly the Court concludes—nope.

Judgment for Scott.

And while Scott’s removal from the case is all well and good there is yet one more gut punch at the end of this story. The Court refused to award Scott the recovery of any of the attorney’s fees he incurred defending the lawsuit. That’s just awful.

On the plus side, I know who I’m using as local counsel next time I have a suit out Ann Arbor way...