Does My Fax Violate the TCPA? The Bullet Point – Volume 1, Issue 12

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc., 6th Cir. No. 16-3741.

This was an appeal of the district court's decision to deny class certification in a case involving junk faxes under the Telephone Consumer Protection Act (TCPA). The defendant sent a one-page fax advertising a drug to more than 50,000 physicians. The fax was successfully transmitted to 75% of the physicians. The plaintiff was a company that employed one of the physicians and sued under the TCPA. The Sixth Circuit Court of Appeals affirmed the decision of the district court to deny class certification.

Here, the plaintiff claimed that all of the faxes violated the TCPA and that it did not have to distinguish between whether they were each unsolicited or solicited, because both were prohibited under the statute. The district court and the Sixth Circuit disagreed, finding that since no fax logs existed anymore there was no way to identify each of the individuals who actually received the fax and were proper claimants. Likewise, the court found that many members had consented to receiving the fax and to determine who consented and who did not was an individualized inquiry not proper for class certification.

The Bullet Point: The TCPA restricts telemarketing and prohibits calls and texts to cellphones using automatic dialing, messaging systems, or artificial or prerecorded voices — unless the call is made for emergency purposes or with prior express consent (written consent is often required and is always preferred). The TCPA also bans unsolicited advertisements via fax. A fax is "unsolicited" if it is sent to persons who have not given their "prior express invitation or permission" to receive it.

The FCC also made explicit that faxes submitted by a conventional fax machine and converted into emails for the recipient are subject to TCPA, requiring in most cases prior express consent or an existing business relationship even though the transmission was converted into an email. Conversely, and critically, the FCC also provided a boon to businesses that contact customers and prospects via fax: fax messages that begin as emails (e.g., desktop faxing) are not subject to the TCPA.

Similarly, the FCC was given rule making authority under the TCPA and passed the “Solicited Fax Rule” which required opt-out notices to be provided with solicited faxes. After the passage of the Solicited Fax Rule, both unsolicited and solicited faxes were required to include opt-out notices that, among other things, were “clear and conspicuous,” informed recipients that a sender was required to comply with an opt-out request “within the shortest reasonable time,” and included a telephone number recipients could call to exercise their opt-out rights.

The Solicited Fax Rule was recently struck down by the D.C. Circuit Court of Appeals. As a result, a company who sends faxes that would be covered by the TCPA cannot be liable to any individual who solicited the fax.

Christiana Trust v. Barth, 9th Dist. Lorain No. 16CA10959, 2017-Ohio-6924.

This was an appeal of a trial court’s decision to grant judgment to the plaintiff-bank on its complaint for foreclosure. On appeal, the borrower argued, among other things, that the bank failed to prove its ability to enforce the promissory note because no evidence was presented that the allonge attached to the note was “permanently affixed” to it. The trial court and the Ninth District Court of Appeals disagreed, noting that the allonge was not required to be “permanently affixed” to the note and that evidence was presented that it was attached to the note via a paperclip.

The Bullet Point: Traditionally, an allonge is a separate piece of paper to put endorsements on when there was no more room on the note itself for endorsements. To be effective, the allonge must be “affixed” to the note. The Uniform Commercial Code does not identify what it means to be “affixed.” However, in recent years, courts have found that an allonge does not have to be stapled to the note to be considered affixed. Rather, being held together by a paperclip or other paper holder is sufficient. Moreover, there is no requirement that the allonge be “permanently” affixed to be effective.

While these distinctions may appear trivial, considering the volume of documents that institutions must process, the more flexibility recognized by courts the better.

Robinson v. Vehicle Acceptance Corp., 8th Dist. Cuyahoga No. 105006, 2017-Ohio-6886.

This was an appeal of the trial court’s decision to grant summary judgment to the defendant, a company that loans money to retail vehicle sellers in exchange for an assignment of a number of payments due under the retail installment contract. The plaintiff’s car loan was assigned to the company under this arrangement.

The company then got an injunction against one retail vehicle seller who had been calling its customers and threatening repossession even though the loans had been assigned to the company. One of these customers was plaintiff and eventually, the retail vehicle seller actually repossessed plaintiff's vehicle and sold it even though it had no interest in the vehicle. In response, plaintiff filed suit against the company, alleging various violations of the Consumer Sales Practices Act and fraud. The trial court ultimately granted the company summary judgment and the Eighth District Court of Appeals affirmed the decision on appeal.

In so ruling, the court noted that an assertion that is true cannot form the basis of a violation of the Consumer Sales Practices Act. Likewise, to recover under the Consumer Sales Practices Act for a loss, "the violation must be the proximate cause of the loss." In this case, the plaintiff's loss was the result of the retail vehicle seller's actions, not the company's alleged Consumer Sales Practices Act violations.

The Bullet Point: This is an example of a critical concept under the law, proximate cause. Unless a plaintiff can show the actions of a defendant was a direct cause of an injury, proximate cause cannot be established and the plaintiff has no case. Under Ohio law, proximate cause is "that cause which contributes to produce the result in a natural and continued sequence, without which the asserted injury would not have happened." For a consumer to have a legitimate Consumer Sales Practices Act claim, the loss must have been proximately caused by the violation of the act. When the loss is attributable to something (or someone) else, then there is no viable claim under the Consumer Sales Practices Act.

The concept of proximate cause is an essential point of consideration for any lawsuit. Regardless of whether you are a plaintiff or defendant, businesses must consider whether proximate causation can be established.

Woodville Ent., LLC v. Kokosing Mat., Inc., 6th Dist. Sandusky No. 16CAS13, 2017-Ohio-5844.

This was an appeal of the trial court's decision to grant arbitration and stay litigation. The dispute centers on two 2008 agreements, a master agreement and an operating agreement, between the parties regarding an asphalt company and operation. The master agreement contained an arbitration clause. The parties' relationship deteriorated and plaintiff filed suit. Defendant moved to compel arbitration and stay the case. The trial court agreed and granted the motion. Plaintiff appealed.

On appeal, plaintiff contended that arbitration cases involving multiple contracts differ from cases involving "single" contracts. The Sixth District Court of Appeals disagreed, noting that there is nothing precluding arbitration when the arbitration is only in one of multiple contracts between the parties.

The Bullet Point: There is a strong presumption in favor of arbitration and arbitration may be ordered even if there are multiple agreements or contracts between parties and the arbitration clause is contained only in one of the agreements when it is a broad arbitration clause. Accordingly, if contracts have arbitration provisions, businesses should not be shy about enforcing them.

Orser v. City of Perrysburg, 6th Dist. Wood No. WD-16-038, 2017-Ohio-5843.

This was an appeal of the trial court's order to dismiss a declaratory judgment action against the City of Perrysburg. Plaintiff sought an order to prevent the demolition of a historic building. The court initially granted a temporary restraining order. However, before the order was entered the building was demolished. Thereafter, the City moved to dismiss the complaint arguing that it was "moot" because the building had been demolished. The trial court eventually dismissed the complaint finding it was moot and that plaintiff failed to establish a concrete injury as required to maintain a declaratory action.

The Sixth Appellate District affirmed on appeal. In so ruling, the court found that plaintiff alleged a speculative, generalized grievance rather than a concrete injury in fact which was insufficient to establish his standing to sue under Ohio's declaratory judgment act.

The Bullet Point: "Standing requires demonstration of a concrete injury in fact, rather than an abstract or suspected injury." This means that an individual must show he has suffered or will suffer a specific injury. A generalized grievance or injury is insufficient to establish a concrete, particularized injury as required to have standing to maintain an action.

The concept of "injury-in-fact" combines with "proximate cause" to provide businesses critical tools to defend themselves. Plaintiffs cannot simply rely upon vague assertions of how they may be damaged. They must show they have been damaged or, in certain circumstances almost certainly will be damaged. Just as importantly, they must show that a specific party is the direct cause of any damages. When considering filing or defending a suit businesses must be able to demonstrate that both of these critical elements exist.

SCOTUS Cases

Cyan, Inc. v. Beaver Cnty. Emp. Retirement Fund, No. 15-1439 (cert granted June 27, 2017).

In 2014, Beaver County Employees Retirement Fund filed a covered class action against Cyan Inc. in a California Superior Court, alleging violations under the Securities Act of 1933. Cyan Inc. moved to dismiss the claims, arguing that the Securities Litigation Uniform Standards Act of 1998 prevented state courts from exercising subject matter jurisdiction over the claims regarding the Securities Act of 1933. Below, the Superior Court rejected Cyan Inc.'s motion to dismiss.

The Preview Point: Whether the Securities Litigation Uniform Standards Act of 1998 precludes state courts from retaining concurrent jurisdiction over claims brought exclusively under the Securities Act of 1933.

Digital Realty Trust, Inc. v. Somers, No. 16-1276 (cert granted June 26, 2017).

After Paul Somer filed several reports to senior management alleging securities violations by Digital Realty, the company fired him. Mr. Somers failed to report his concerns to the SEC prior to his termination. Mr. Somers filed suit against Digital Realty alleging, among other things, a violation of Section 21F of the Securities Exchange Act of 1934. Digital Realty filed a motion to dismiss the Section 21F claim on the basis that Mr. Somers failed to report the allegation to the SEC and, therefore, was not a whistleblower within the meaning of the statute.

Below, the district court followed the Second Circuit's approach holding that Section 21F affords protection to individuals who disclose suspected violations, irrespective of whether the corresponding disclosures are to the SEC. The Ninth Circuit affirmed.

The Preview Point: Does the anti-retaliation provision regarding whistleblowers in Section 21F shield individuals who have failed to report the purported misconduct to the SEC?

Epic Systems Corp. v. Lewis, No. 16-285 (cert granted Jan. 13, 2017).

Epic Systems Corp. (Epic) entered into an arbitration agreement with its employee, Jacob Lewis, under which the parties agreed that: (1) individual arbitration would solve any employment dispute, and (2) Mr. Lewis waived his right to benefit from or participate in any representative, class, or collective proceeding. Subsequently, Mr. Lewis sued Epic Systems Corp. on behalf of other employees alleging a violation under the Fair Labor Standards Act (FLSA) because Epic failed to pay the employees over time wages.

While Epic moved to dismiss the action in light of the arbitration clause, the district court denied the motion holding that the provision was unenforceable because it precluded the employees from entering into "concerted activities" under section 7 of the National Labor Relations Act (NLRA). The Seventh Circuit affirmed adding that the provision was also unenforceable under the savings clause of the Federal Arbitration Act (FAA). Specifically, because the waiver of representative proceedings was void under the NLRA, the arbitration agreement was not enforceable under the FAA.

The Preview Point: Does the NLRA nullify an arbitration agreement requiring individual arbitration to solve employee disputes under the FAA?

Sixth Circuit Cases

Kassem v. Ocwen Loan Servicing, LLC, No. 16-1636 (6th Cir.)

The Kassems defaulted on their loan obligation with Bank of America (BOA), which caused BOA to initiate foreclosure against them. The loan servicer, Ocwen, later informed the Kassems that a foreclosure sale had been scheduled. In response, the Kassems asserted, among other things, that the foreclosure was impermissible in light of a purported defective chain-of-title, relying upon Mich. Comp. Laws Section 600.3204: “If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title must exist before the date of the sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.” Specifically, four letters sent by Ocwen and BOA identify four different entities as being either the creditor, owner, or investor.

Below, the Eastern District of Michigan granted summary judgment in favor of BOA because the Kassems lacked standing (in the common-law-of-contracts sense) to raise assignment defects absent a demonstration that the corresponding defect would cause prejudice upon the sheriff’s sale. The mere fact that the Kassems did not know who holds the note did not establish prejudice.

The Preview Point: Whether an individual who is a non-party to the assignment possesses standing to attack the assignment’s validity.

Deyke v. Cooper-Standard Automotive, No. 16-2740 (6th Cir.)

Douglas Deyke notified Cooper-Standard’s CFO and general counsel of a suspicious corporate account in China coined “public relation expenses” that was purportedly used to provide illegal payoffs to Chinese government officials in violation of the Foreign Corrupt Practices Act. On September 13, 2012, the general counsel fired Deyke. In response, Deyke filed a suit wrongful termination under the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Cooper-Standard filed a motion to dismiss contending that Deyke was not a whistleblower under the corresponding statute because he only reported the alleged securities violation internally.

The district court granted Cooper-Standard’s motion because the anti-retaliation protections of the Act “only apply to a person who reports a suspect violation to the [Securities and Exchange] Commission.”

The Preview Point: Under the anti-retaliation provision of the Dodd-Frank Act, 15 U.S.C. section 78u-6, does an individual who did not provide information regarding a securities violation to the Securities and Exchange Commission constitute a whistleblower?

Todaro v. Reimer, Arnovitz, Chernek & Jeffrey Co., No. 16-4763 (6th Cir.)

Reimer, Arnovitz, Chernek, & Jeffrey Co., (RACJ) represented Huntington Bank (HB) in a foreclosure action against Tina Taodaro. Huntington bought the underlying property at a sheriff’s sale, after which RACJ sent Ms. Taodaro a Notice to Vacate property and issued a writ of possession. While the lower court initially stayed the execution, RACJ left a Notice to Leave Premises on the door of the property. Then RACJ filed an eviction for forcible entry, notwithstanding the stay order. Moreover, HB continued collection efforts claiming that the debt owed survived the transfer of collateral because the fair market value failed to cover the corresponding debt. In light of these actions, Ms. Taodaro filed an action against RACJ alleging the following violations under the Fair Debt Collection Practices Act (FDCPA): 15 U.S.C. sections 1692d, 1692f, 1692e. In response, RACJ filed a motion to dismiss contending that the FDCPA was inapplicable because Ms. Taodaro challenged the eviction proceedings, not the underlying foreclosure, which were filed for possession.

The Northern District of Ohio agreed with RACJ holding that only the eviction proceedings were at issue and, therefore, the FDCPA did not apply. RACJ only sought to retain possession of the underlying property.

The Preview Point: Whether an eviction proceeding that seeks to gain possession of the underlying property constitutes a debt collection under the FDCPA.

Serafino v. City of Hamtramck, No. 16-4763 (6th Cir.)

Craig Serafino, a former officer for the City of Hamtramck, was part of a collective bargaining agreement. On July 1, 2013, Michigan Governor Rick Snyder appointed Cathy Square as Hamtramck's Emergency Manager, due to the city's financial crisis. In light of the financial predicament, Ms. Square made changes to Craig Serafino and other retired officer's health care benefits to reduce the city's expenses: (1) a higher deductible; (2) a more expensive co-pay structure for expensive drugs; and, (3) cancellations regarding the city's contributions to Health Reimbursement Arrangements. Mr. Serafino, on behalf of similarly situated individuals, filed a class action alleging, among other things, a breach of contract claim. The City of Hamtramck filed a motion to dismiss because the CBA did not confer vested health insurance benefits on the retirees.

Below, the Eastern District of Michigan agreed with the City of Hamtramck because the corresponding language in the relevant agreements did not establish a vested right to health insurance benefits regarding the retirees.

The Preview Point: Does a retiree's insurance agreement confer a vested right to healthcare benefits at a certain threshold for the remainder of the retiree's life?

Gerboc v. Contextlogic, Inc., No. 16-4734 (6th Cir.) (oral argument scheduled for Aug. 1, 2017).

Mr. Gerboc and other constituents purchased portable Bluetooth speakers from Contextlogic's website, wish.com, for $27.00. Contextlogic advertised that the speakers were priced at $300.00, establishing a savings of nearly 91%. Mr. Gerboc later filed a class action against Contextlogic, alleging that the company's advertising practices were unfair, deceptive, and intentionally designed to mislead consumers by including a false reference point in violation of Ohio's Consumers Sales Practice Act (CSPA). In response, Contextlogic filed a motion to dismiss arguing among other things, that the failure to allege actual damages warranted dismissal.

The district court ruled that Mr. Gerboc's claim could not proceed as a class action because a plaintiff must allege actual damages. Mr. Gerboc did not allege that he was entitled to a 91% discount; rather, he only asserted that Contextlogic unlawfully made a fictitious price comparison.

The Preview Point: Does a consumer class action under CSPA fail to plead to actual damages when the retailer fails to provide an advertised discount?

Hardin v. Finkelstein, No. 16-6542 (6th Cir.) (oral argument scheduled for Aug. 1, 2017).

Mr. Finkelstein sent Mr. Hardin several correspondences regarding an oversight of a previous judgment with no response. A written order setting aside the judgment was issued, and the court entered a default judgment against Mr. Hardin. Mr. Finkelstein then executed post-judgment remedies and sent Mr. Hardin a letter providing a judgment lien was registered in Jefferson County property records. Mr. Hardin filed an action against Mr. Finkelstein under the Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. 1692e(11) because the motion and order to set aside judgment, the default judgment, as well as the judgment lien failed to state that the communication was for a debt collector. Mr. Finkelstein filed a motion to dismiss alleging, among other things, the actions at issue fell within the formal pleading exception.

The Eastern District of Tennessee granted the motion to dismiss relying on White v. Sherman Financial Group LLC, 2013 WL 5936679 at *8-9 (E.D. Tenn. 2013), which held that a civil warrant and affidavit fell within the formal pleading exception to the FDCPA, and were not required to contain the necessary disclosures.

The Preview Point: Does a motion to set aside judgment and the corresponding order, a default judgment, and judgment lien constitute formal pleadings made in connection with a legal action under the exception of 15 U.S.C. section 1692e(11)?