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Agent's acts on faxes lets defendant off

Uesco Industries v. Poolman of Wisconsin

Presenting the Illinois Appellate Court with an important question about respondeat superior liability under the Telephone Consumer Protection Act, Poolman of Wisconsin, the defendant in a junk-fax case, argued it was not liable for a fax that a third party, Business to Business Solutions (B2B), sent to Uesco Industries on Poolman's behalf in March 2006 — because B2B allegedly exceeded the scope of its authority.

Uesco manufactures overhead cranes. And Poolman presented evidence that its instructions to B2B were to fax advertisements "only to small electric motor repair and service companies," Justice Mathias W. Delort recounted.

Section 217 of the junk-fax statute "codifies the common law respondeat superior doctrine," Delort noted. But a regulation issued by the Federal Communications Commission (FCC) says: "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements."

Based on the FCC regulation, a Cook County judge ruled that Poolman is vicariously liable for B2B's conduct in sending a fax to Uesco as part of an advertising campaign.

The problem with this decision, the appellate court explained, is that the trial judge "did not consider the application of Section 217 of the act, which, by its plain language, requires courts to consider whether the agent acted within the scope of its authority or, instead, as a rogue."

Based on "compelling evidence" that Poolman's owner intended "to limit the scope of B2B's authority," the appellate court concluded, "as a matter of law that, for the fax advertising campaign in March 2006, B2B exceeded the scope of its authority when it sent fax advertisements to persons or companies other than those that service and repair small electric motors." *Uesco Industries v. Poolman of Wisconsin*, 2013 IL App (1st) 112566 (June 17, 2013).

Here are highlights of Delort's opinion (with omissions not noted in the text):

The plain language of the act assigns direct liability to "any person" who sends an unsolicited fax advertisement. 47 U.S.C. Section 227(b)(1)(C).

Section 217 of the act, titled, "Agents' acts and omissions; liability of carrier," codifies the common law respondeat superior doctrine:

"In construing and enforcing the provisions of this chapter, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier or user as well as that of the person." 47 U.S.C. Section 217.

There is nothing in the plain language of the act nor its legislative history suggesting Congress intended to impose liability on a party that did not send an unsolicited fax or authorize a third party to send an unsolicited fax on its behalf. See *Bridgeview Health Care Center v. Clark,* No. 09 C 5601, 2013 WL 1154206 (N.D.Ill. March 19, 2013).

The FCC implemented this prohibition by promulgating 47 C.F.R. Section 64.1200(a)(3). This regulation defines a "sender" 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." Thus, the FCC has also ruled that the act incorporates vicarious liability.

FCC regulations also state that under the act, "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." As such, the act "creates a form of vicarious liability making an entity liable when a third party sends unsolicited communications on its behalf in violation of the act." *Bridgeview*, 2013 WL 1154206, at *4.

The circuit court in this case, federal courts in the Northern District of Illinois and courts in other jurisdictions have relied upon the FCC's interpretation to conclude that a defendant cannot escape liability simply by hiring an independent contractor to transmit unsolicited facsimile advertisements on its behalf.

Our concern in this case arises from the circuit court's application of the FCC regulations. The court found, "the fax was still sent on defendant's behalf. Nothing in the act or its regulations exempts defendant from liability because B2B, mistakenly or otherwise, sent a fax to someone outside of defendant's desired target group."

In other words, without expressly finding an agency relationship existed between defendant and B2B, the court found defendant liable for sending the fax advertisements despite evidence demonstrating that B2B exceeded the scope of its authority.

The circuit court relied on the FCC's interpretation of the act that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the act's rule banning unsolicited facsimile advertisements."

The court, however, did not consider the application of Section 217 of the act, which, by its plain language, requires courts to consider whether the agent acted within the scope of its authority or, instead, as a rogue.

Section 217 of the act requires a determination of whether B2B exceeded the scope of its authority by sending fax advertisements to companies other than those that repair and service small electric motors.

Vicarious liability

The acts of an agent beyond the scope of his authority cannot be imputed to his principal.

The parties in this case do not dispute the facts regarding the relationship between defendant and B2B. They do, however, dispute the legal standard for imposing vicarious liability.

The *Bridgeview* case is instructive as it presents similar factual circumstances and legal issues. There, the defendant, the owner of a business that sells and repairs hearing aids, hired B2B to send fax advertisements on its behalf. Similar to this case, the defendant dealt with salesman [Kevin] Wilson, who was identified as [the nephew of B2B's owner, Caroline Abraham]. See *Bridgeview Health Care Center v. Clark,* No. 09–CV–05601, 2011 WL Wil4585028 (N.D.Ill. Sept.30, 2011).

Shortly after the defendant decided to hire B2B, he received by fax a form from Wilson titled, "Tell us what to write in your free ads." The defendant completed and returned the form to Wilson. A few days later, Wilson sent the defendant a

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number of sample advertisements from which the defendant chose a design and made handwritten changes.

After additional revisions, the defendant requested that the advertisement include the words "toll free" before his business' telephone number and approved the advertisement. The defendant faxed a check to B2B and B2B then created a records data base for the defendant of 7,433 potential recipients.

According to Abraham, B2B sent 6,112 fax advertisements for the defendant. B2B's computer records listed the transmission of 4,849 successful faxes, including to the plaintiff's fax number.

The plaintiff filed a class-action lawsuit seeking recovery on behalf of itself and a class of similarly situated persons that received an unsolicited fax advertisement in violation of Section 227(b)(1)(C) of the act. The plaintiff moved for summary judgment.

In a declaration, the defendant admitted he authorized B2B to send approximately 100 fax advertisements, but denied authorizing any advertisements outside of the 20-mile radius of Terre Haute, Ind. At issue was "whether defendant's authorization of B2B to send any facsimiles on his behalf creates liability under the act for all of the facsimiles that B2B ultimately sent."

The plaintiff argued that once an agency relationship is established, the act confers strict liability for all the faxes ultimately sent.

The defendant asserted the act does not abrogate traditional rules of agency and, therefore, the act makes an entity liable only for faxes sent on the entity's behalf that were within the agent's authority.

The *Bridgeview* court agreed with the defendant, finding he presented sufficient evidence to partially defeat the plaintiff's summary judgment motion. The court pointed to the following evidence in its decision:

"Defendant has produced evidence to show that he did not do business outside the 20-mile radius of Terre Haute, let alone 200 miles away. Defendant has also declared that the business has had a toll-free number since 2001, not to garner business beyond the Terre Haute area, but for a separate purpose: To avoid long distance charges between defendant's home in nearby Illinois and the stores in Indiana.

"Both of these undisputed facts tend to demonstrate that defendant would have been unlikely to authorize a facsimile advertising campaign far beyond the usual scope of his business, casting doubt on plaintiff's argument that the addition of 'toll free' and 'no shipping' language indicates an intent to distribute the advertisement more broadly.

"Plaintiff further points to Abraham's testimony that B2B never expanded the geographic range to which facsimiles were sent without the customer's permission. And Abraham also testified that while she had no recollection of any geographic business limits set by defendant, local businesses typically wanted local advertising campaigns.

"Based on these facts, a reasonable jury could find that defendant did not authorize B2B to send facsimiles beyond the 20-mile radius of Terre Haute." Id. The court, however, limited its ruling and granted the plaintiff summary judgment "with respect to the facsimiles sent within the 20-mile radius of Terre Haute."

Defendant in this case has presented more compelling evidence of his intention to limit the scope of B2B's authority than the defendant in *Bridgeview,* specifically for the first fax advertising campaign in March 2006.

As the parties do not dispute these facts, we find as a matter of law that, for the first fax advertising campaign in March 2006, B2B exceeded the scope of its authority when it sent fax advertisements to persons or companies other than those that service and repair small electric motors.

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