

IN THE SUPREME COURT OF OHIO

BOEHM, KURTZ & LOWRY, : Supreme Court Case No. 08-2448
 :
 :
 Plaintiff-Appellee, :
 :
 :
 vs. : On appeal from the Hamilton County
 : Court of Appeals, First Appellate District
 :
 :
 INTERSTATE INSURANCE SERVICES :
 AGENCY, INC., :
 :
 : Appellate Case No.: C080186
 :
 Defendant-Appellant. :

**MEMORANDUM IN OPPOSITION TO REQUEST FOR JURISDICTION
OF PLAINTIFF-APPELLEE BOEHM, KURTZ & LOWRY**

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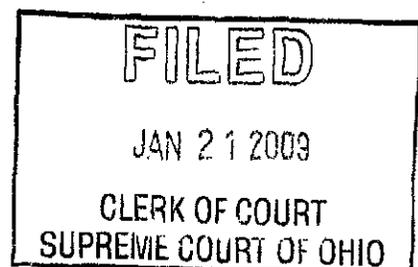


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I. STATEMENT OF THE CASE

This is a request for discretionary review by Interstate Insurance Services Agency, Inc. (“Interstate”) after a successful appeal by Boehm, Kurtz & Lowry (“BK&L”) of the trial court’s decision granting Interstate’s Motion for Summary Judgment and declining to rule on the Motion for Class Certification.¹ The Court of Appeals for the First Appellate District reversed and remanded to the trial court with instructions to proceed with the merits of the action.²

II. STATEMENT OF FACTS

A. The Junk Fax Prevention Act is a Consumer Protection Statute That Bars General Advertising via Facsimile.

This claim arises from an advertising practice that has long been illegal. Under a federal statute in effect for over fifteen years, it is unlawful to send advertisements via facsimile unless the recipients have specifically consented to receiving such ads.³ This statute is commonly referred to as the Junk Fax Prevention Act (“JFPA”).

Plaintiff BK&L is a Cincinnati law firm. From April 2004 through August 2005, BK&L received ten advertisements (the “Advertisements”), via its facsimile machine, for various insurance

1 *Order Granting Defendant's Motion for Summary Judgment.* The trial court’s Order is before this Court as Exhibit A of the Appendix of Interstate’s *Memorandum in Support of Jurisdiction*.

2 *Decision.* The appellate court’s Decision is before this Court as Exhibit B of the Appendix of Interstate’s *Memorandum in Support of Jurisdiction*.

3 47 U.S.C. 227(b)(1)(1992)(“it is unlawful for any person * * * to send an unsolicited advertisement to a telephone facsimile machine”); *Jemiola v. XYZ Corp.*, 126 Ohio Misc.2d 68, 2003-Ohio-7321, 802 N.E.2d 745, at ¶ 11 (“The [JFPA] prohibits the transmittal of fax advertisements without first obtaining the ‘prior express invitation or permission of the recipient.’”) (*internal citations omitted*).

products offered by Interstate Insurance. The Advertisements appeared in a document called the “Fax News” that was little more than a pretext to send advertisements to thousands of fax machines in the Greater Cincinnati area. BK&L had no relationship with Interstate Insurance or the “Fax News” and had never consented to receiving such ads via its office fax machine. In 2005, BK&L filed this class action under the JFPA on behalf of all recipients of the Advertisements.

B. The Trial Court Dismissed the Class Representative’s Claim as Barred by the Doctrine of Laches.

Just a few days before the hearing on BK&L’s Motion for Class Certification, Interstate moved for summary judgment on the class representative’s claim on equitable grounds. Specifically, Interstate acknowledged that it had been advertising via facsimile for many years, and, therefore, BK&L could have filed suit against it as early as 1995. Because BK&L did not file suit until 2005, Interstate claimed various witnesses and documents were no longer available. Absent this evidence, Interstate argued its defense was made more difficult, and BK&L’s claim should be dismissed for not suing earlier. The trial court agreed and dismissed BK&L’s claim based on *laches*.

C. The Trial Court Denied any Possibility of Relief to the Proposed Class By Declaring the Motion for Class Certification to be Moot.

Although the JFPA provides statutory damages, these damages are minimal,⁴ and an individual plaintiff can hardly justify a lawsuit to recover them. Consequently, BK&L brought the action on behalf of the entire class of persons who received the Advertisements from Interstate

⁴ 47 U.S.C. 227(b)(3)(B) (“A person or entity * * * may bring * * * an action to recover for actual monetary loss * * * or to receive \$500 in damages for each such violation, whichever is greater”).

Insurance. Despite strenuous opposition,⁵ BK&L eventually discovered the list of fax numbers to which Interstate and Fax News had been routinely sending these unsolicited advertisements. BK&L then filed a Motion for Class Certification.

The motion was hotly contested. Interstate filed both a Memorandum in Opposition and a Sur-Reply to Plaintiff's Motion for Class Certification. The briefs on the Motion spanned nearly one hundred pages. The trial court heard oral argument in December of 2007. The trial court then requested proposed findings of fact and conclusions of law, which both parties submitted in January of 2008.

Despite these efforts, the trial court never ruled on the substance of the Motion for Class Certification. Instead, in the same decision in which the court dismissed the class representative's individual claim as barred by *laches*, the court refused to allow the substitution of a new representative and then declared the Motion for Class Certification "moot * * * as no proper Plaintiff exists to move forward with such Motion to Certify."⁶

BK&L appealed both aspects of the trial court's decision. The Court of Appeals for the First Appellate District reversed the trial court's decision on the issue of *laches*, finding "Interstate did not demonstrate it was materially prejudiced by any delay on BK&L's part"⁷ as there was adequate evidence available for a defense. The court of appeals also reversed the trial court's determination

5 BK&L filed a *Motion to Compel Defendant [the Fax News] to Produce Documents in Compliance with Subpoena* to compel the production of the list of fax numbers. Although both Interstate and the Fax News formally opposed this motion, the trial court granted it.

6 *Order Granting Defendant's Motion for Summary Judgment*, p. 1.

7 *Decision*, p. 5, ¶ 12.

that the Motion for Class Certification was moot and directed the trial court to resolve the Motion on its merits.⁸

III. THIS CASE DOES NOT INVOLVE MATTERS OF PUBLIC OR GREAT GENERAL INTEREST

This case does not involve matters of public or great general interest. First, the unusual procedural posture and legal issues involved in the appeal make this case *sui generis*. This request for discretionary review involves only a summary judgment motion granted on the basis of *laches*. Because the doctrine of *laches* has long been established in Ohio, any decision of this Court will serve only as an application of its well-worn principles to the particular facts of this case. Given the unusual facts of this case, no party will be affected by this decision beyond the litigants themselves. Moreover, *laches* is such an infrequent and atypical defense that little notice will likely be paid to any decision involving it.

The peculiarity of this case extends beyond the defense relied on by Interstate Insurance. The cause of action is derived from an obscure federal statute, the Junk Fax Prevention Act (“JFPA”), that has infrequently been the basis of suit in Ohio courts. Moreover, as a federal statute concerning communications, responsibility for interpreting the JFPA falls largely on the Federal Communications Commission (“F.C.C.”). The F.C.C. has performed this duty well and issued nearly a dozen different regulations spanning from 1992 to 2008. These extensive regulations provide attorney generals, courts, and private attorneys a comprehensive resource for interpreting and implementing the JFPA. In fact, this Court has already considered the F.C.C.’s interpretations of the JFPA and found them to be an excellent resource:

⁸ *Decision*, pp. 5-6, ¶ 13.

* * * [W]e must follow the FCC's commentary unless it is at odds with the regulation it explains. We find the agency's interpretation to be perfectly in line with the regulation * * *. We defer to and agree with the positions of the FCC on these matters.⁹

In sum, it is neither the responsibility of nor a necessity for this Court to provide guidance in regard to the JFPA. This is the task of the F.C.C., and the F.C.C. has performed it more than capably.

While ignoring the unusual defense and procedural posture involved in this case, Interstate argues this matter is of great general interest because the appellate decision will "cripple business-to-business relationships and affiliations" by overturning the whole of agency law.¹⁰ This is unlikely, as there are no agency relationships involved in this case. Neither Interstate nor BK&L argued, raised, or even discussed agency principles at the trial or appellate level. It is hardly appropriate to take the issue up for the first time before this Court.

In summary, this appeal will likely be of little interest beyond the litigants themselves. The legal principles involved are not especially difficult or uncertain. The appeal involves a routine application of the *laches* doctrine, the principles of which have long been settled in Ohio. The merits of the action involve a federal statute that is largely the domain of the F.C.C., and the F.C.C. has published extensive regulations that provide a comprehensive resource for interpreting and implementing the statute. For these reasons alone, this Court should decline to grant discretionary review.

⁹ *Charvat v. Dispatch Consumer Serv's.*, 95 Ohio St.3d 505, 2002-Ohio-2838, 769 N.E.2d 829, at ¶ 38, 45.

¹⁰ *Memorandum in Support of Jurisdiction of Defendant-Appellant, Interstate Insurance Agency, Services, Inc.*, p. 1.

IV. ARGUMENT

Interstate's Proposition of Law No. 1:

A business may properly obtain consent for TCPA purposes through a third party or agent. If the business may legally obtain consent itself, it may legally utilize a third party to obtain that consent as well.

A. The Appellate Decision Does Not Imperil the Existence of Agency Law in Ohio.

Interstate's spirited defense of agency law in Ohio is oddly misplaced as this case involves no agency relationships. Interstate does not contend it called the recipients of Interstate's facsimile advertisements to obtain their consent. On the contrary, Interstate's proprietor, Rick Niklas, has acknowledged that Interstate made no effort whatsoever to obtain permission from the recipients of its advertising campaigns. This fact did not go unnoticed by the court of appeals: "Richard Niklas, a partner of Interstate, stated in his deposition that Interstate had never sought nor received permission to send its advertisements by facsimile."¹¹ BK&L has never contended that a true agent of Interstate could not obtain consent from recipients of Interstate's facsimile advertisements. On the contrary, this is precisely what Interstate should have done to comply with the JFPA.

This case involves no such agency relationship. Interstate paid an independent company, Cincinnati Fax Publishing, Inc. ("CFPI"), to send multiple advertisements via facsimile to thousands of fax machines in the Cincinnati area. Interstate and CFPI were completely separate businesses. They did not share employees, office space, or cooperate in any way. Interstate did not dictate the manner in which CFPI sent the advertisements; to which fax numbers it sent them; or exercise any other sort of control over CFPI. CFPI supplied the fax numbers, supplied the equipment to transmit

11 *Decision*, p. 5, ¶ 11.

the fax advertisements, and transmitted the ads itself.

The relationship between CFPI and Interstate was even set forth in an express, written contract that required Interstate to indemnify CFPI for “any claim” associated with the advertisements:

Advertiser will indemnify, defend, and hold harmless the publisher from any claim or loss, expense, or liability arising out of the publication of any advertising copy * * *.¹²

In short, agency law cannot be stretched to cover the independent, contractual relationship that existed between Interstate and CFPI. Given these circumstances, the parties never even addressed – much less argued – agency principles at the trial or appellate level.

Interstate’s agency argument is also belied by the corporate history of the “Fax News.” From 1995 to 2003, the “Fax News” was owned and operated by a corporation called “Fax News, Inc.” In 2003, Fax News, Inc. ceased operations and transferred its assets to a corporation called Cincinnati Fax Publishing, Inc.

The shares of Cincinnati Fax Publishing, Inc. were solely owned by LaCedra Jones. Ms. Jones acknowledged that Cincinnati Fax Publishing, Inc. made no effort to obtain the consent of recipients before sending them facsimile advertisements:

Q. Okay. Did Cincinnati Fax News Publishing, Inc. ever make any – ever communicate with its subscribers in an effort to obtain their consent to send them ads?

A. Not that I am aware of.¹³

12 Fax Advertising Agreement, p. 1.

13 Deposition of LaCedra Jones, p. 84 (*exchange between counsel omitted*).

BK&L brought suit in regard to advertisements transmitted in 2004 and 2005. In short, the entity that Interstate claims acted as its agent in obtaining consent for the Advertisements, *i.e.*, the Fax News, Inc., did not even exist at the time the Advertisements were sent.

B. The Appellate Court Did Not Err in its Analysis of the Junk Fax Prevention Act.

Setting aside the red herring of agency law, Interstate is seeking jurisdiction primarily to undo two aspects of the appellate decision. First, Interstate challenges the appellate court's conclusion that Interstate bears the burden of proving it obtained the "prior, express invitation or permission"¹⁴ of the recipients of its fax advertisements. Second, Interstate seeks to reverse the appellate court's conclusion that Interstate cannot obtain permission for its advertisements via the "Fax News." As demonstrated below, both of these conclusions could have been lifted directly from the F.C.C.'s regulations interpreting the JFPA. The court of appeals considered these regulations, heeded this Court's instruction to afford them "controlling weight,"¹⁵ and reached the correct result.

1. As an Advertiser, Interstate Insurance Was Responsible for Complying with the Junk Fax Prevention Act.

As the appellate court found, the advertiser – which the JFPA refers to as the "sender"¹⁶ – is

14 The phrase "prior express invitation or permission" is taken from the JFPA's definition of "unsolicited advertisement." 47 U.S.C. 227(a)(4) ("The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.")

15 *Charvat v. Dispatch Consumer Serv's.*, 95 Ohio St.3d 505, 2002-Ohio-2838, 769 N.E.2d 829, at ¶ 37.

16 47 CFR 64.1200(f)(8) ("The sender * * * means 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."). Somewhat confusingly, the federal regulations

responsible for complying with the JFPA. This point was addressed by the F.C.C. in one of its earliest interpretations of the JFPA: “We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.”¹⁷ This point has been repeatedly emphasized by the F.C.C., including in its lengthy and comprehensive discussion of the JFPA in 2006:

The Commission takes this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent. In most instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules, including the failure to honor opt-out requests.¹⁸

As the advertiser, Interstate was responsible for complying with the JFPA.

then refer to the entity that actually transmits the fax advertisement as a “facsimile broadcaster.” 47 CFR 64.1200(f)(6) (“The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.”) To allay any confusion, this Memorandum uses the term “advertiser” in lieu of “sender.”

17 10 FCC Rcd. 12391 at 12407, Title 47, C.F.R., Part 64.

18 71 FR 25967 at 25971, Title 47, C.F.R., Part 64. The 2006 regulations included detailed discussions of several key issues in JFPA cases including the burden of proof; the necessity and language of opt-out disclosures; and many other issues. The 2006 order also made clear that its requirements must be applied to evaluate any claim of consent, regardless of when it occurred:

Senders who claim they obtained a consumer's prior express invitation or permission to send them facsimile advertisements prior to the effective date of these rules will not be in compliance unless they can demonstrate that such authorization met all the requirements adopted herein.

71 FR 25967 at 25972, Title 47, C.F.R., Part 64.

2. **As the Advertiser, Interstate Has the Burden of Proving it Obtained the Prior, Express Invitation or Permission of the Recipients.**

The F.C.C. has gone far beyond simply placing the duty to comply with the JFPA on advertisers. It has assigned them the burden of proof and defined the quantum of evidence necessary to satisfy this burden:

Senders that claim their facsimile advertisements are delivered based on the recipient's prior express permission must be prepared to provide clear and convincing evidence of the existence of such permission * * *. In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.¹⁹

At the time Interstate sent the initial fax advertisements in this dispute, the F.C.C. had concluded that a recipient's "prior, express invitation or permission" had to be in writing:

Congress determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission to do so before transmitting any faxes to them. * * * [T]he permission to send fax advertisements must be provided in writing, include the recipient's signature and facsimile number, and cannot be in the form of a "negative option."²⁰

In *Jemiola*,²¹ an Ohio trial court reached the same conclusion by reviewing the legislative history of the JFPA:

The House Report on the [JFPA] discusses the phrase "prior express invitation or permission" and makes clear that advertisers have a duty

19 71 FR 25967 at 25972, Title 47, C.F.R., Part 64; *see also Jemiola v. XYZ Corp.*, 126 Ohio Misc.2d 68, 2003-Ohio-7321, 802 N.E.2d 745, at ¶ 17 ("An advertiser has the burden of proof with regard to the issue of 'prior express invitation or permission.'")

20 68 F.C.C. Rcd 44144 at ¶¶ 132, 134 (2003)(*internal citations omitted*).

21 126 Ohio Misc.2d 68, 2003-Ohio-7321, 802 N.E.2d 745.

to “establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission.” U.S. House Rep. 102-317, at 13. * * * Hence, a fax advertiser has an obligation to obtain prior express consent from the recipients of its advertisements and to keep and maintain records of such consent.²²

The JFPA was amended in 2005 to allow “prior express invitation or permission” to be “in writing or otherwise.”²³ The F.C.C. promptly issued new regulations to implement this standard:

Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent.²⁴

The F.C.C. also made clear that it remained the advertiser’s burden to prove the recipients had consented to receiving the facsimile advertisements:

Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified. * * * [T]he burden of proof rests on the sender to demonstrate that permission was given. We strongly suggest that senders take steps to promptly document that they received such permission.²⁵

In summary, the court of appeals concluded that “Interstate was a sender under the act” and, therefore, was required to prove it obtained the “prior express permission or invitation” from the recipients of its facsimile advertisements.²⁶ These conclusions were uncontroversial and find ample

22 *Jemiola*, 2003-Ohio-7321 at ¶ 18.

23 47 U.S.C. 227(a)(2)(B)(5).

24 71 FR 25967 at 25972, Title 47, C.F.R., Part 64.

25 71 FR 25967 at 25972, Title 47, C.F.R., Part 64.

26 *Decision*, p. 5, ¶ 11.

support in the F.C.C.'s regulations implementing the JFPA. There will be no hue-and-cry from the public or "miscarriage of justice" if this Court allows these conclusions to stand.²⁷

3. **Permission to Send Facsimile Advertisements Cannot Be Transferred from One Party to Another.**

The court of appeals also correctly concluded that Interstate's "permission could have been received by Interstate alone."²⁸ Once again, this conclusion could have been lifted, via direct quotation, from the regulations that implement the JFPA. For example, in the 2006 regulations, the F.C.C. plainly stated that "*the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.*"²⁹ In this case, Interstate complains that it should be permitted to rely on the business relationship between the "Fax News" and its purported subscribers to establish implied permission. The regulations addressed this point in no uncertain terms:

* * * [W]e conclude that the EBR [established business relationship] exemption applies only to the entity with which the business or residential subscriber has had a "voluntary two-way communication. It would not extend to affiliates of that entity, including a fax broadcaster* * *. While the fax broadcaster may transmit an advertisement on behalf of an entity that has an EBR with the recipient, it is not permitted to use that same EBR to send a fax advertisement on behalf of another client."³⁰

27 *Memorandum in Support of Jurisdiction of Defendant-Appellant, Interstate Insurance Agency, Services, Inc.*, p. 1.

28 *Decision*, p. 5, ¶ 11.

29 71 FR 25967 at 25972, Title 47, C.F.R., Part 64. (*emphasis provided*).

30 71 FR 25967 at 25969, Title 47, C.F.R., Part 64.

Despite their independence, Interstate stridently contends its relationship with that the “Fax News” should be regarded as principal/agent such that it can effectively purchase any consent purportedly obtained by the “Fax News.” The F.C.C. has squarely rejected this argument even for companies that are close enough to be regarded as affiliates:

The Commission believes that to permit companies to transfer their [express or implied permission] to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.³¹

The practical effect of these regulations is clear. The proprietors of the “Fax News” could not obtain permission from persons to send them the “Fax News” and then transfer such permission to anyone to whom they could sell an advertisement. On the contrary, the JFPA and its regulations are clear that the “sender” of a facsimile advertisement must obtain permission directly from the recipients of its ads. Interstate was the “sender”; it was therefore required to obtain permission from the recipients. The appellate court made no error in reaching these conclusions.

**Interstate’s Proposition
of Law No. 2:**

A Trial Court must have discretion to determine if a class wide mechanism for proof exists pursuant to Civil Rule 23, requiring individual examinations into predominance and superiority, and wholly premised on the evidence before it.

Interstate’s second proposition of law can hardly be disputed but finds no purchase in this case. The court of appeals did not remove the trial court’s discretion to consider the evidence or weigh the various Rule 23 criteria in resolving the class certification issue. It did not even address these issues. Instead, it reversed the trial court’s decision not to rule on the Motion for Class Certification and directed it to resolve the Motion on its merits:

31 71 FR 25967at 25973, Title 47, C.F.R., Part 64.

Because we conclude that the trial court should not have granted summary judgment [thereby dismissing the entire lawsuit], BK&L's motion for class certification is no longer moot * * *. We therefore reverse the judgment of the trial court and remand this cause for further proceedings consistent with the law.³²

Under these circumstances, Interstate's concerns about the resolution of the class certification motion are premature. The trial court has yet to even rule on this issue. The decision of the court of appeals did not interfere with the trial court's discretion; it merely instructed the trial court to decide whether a class should be certified "consistent with the law." While this Court will likely have an opportunity to review the trial court's decision on the Motion for Class Certification, this issue is far from ripe at this point.

V. CONCLUSION

For all of the foregoing reasons, Boehm, Kurtz & Lowry respectfully requests that this Court deny Interstate Insurance Services Agency, Inc.'s Request for Discretionary Review.

32 *Decision*, pp. 5-6, ¶ 13-14.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by ordinary U.S. Mail, postage prepaid this 20th day of January, 2009.

Felix J. Gora, Esq.

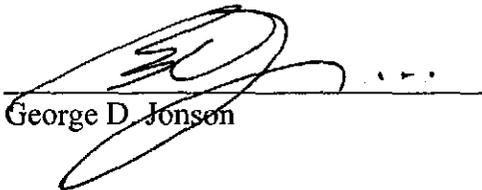
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