

Kirsch v. First Chartered, Cunningham, Hartwell

Case numbers: SC 204SC001187-1199, 1214, 1215, 1217

Overview

Cause of action

This is a case of 16 faxes sent to me on my home fax machine on the dates listed on the complaints (2/13/02 through 9/6/02) which in violation of the TCPA.

Prayer for relief

I am asking for \$2,500 in damages for each fax which is \$500 less than the amount I am entitled to under federal law (TCPA). I am also asking for the first 13 claims to add First Chartered Investments Inc as a Defendant.

Summary of the case

To prove my case, I must show 7 things:

1. venue and jurisdiction are proper
2. I sent a demand letter
3. the faxes qualify as unsolicited advertisements as defined in 47 U.S.C. § 227(a)(4), i.e., commercial advertisement sent without my express consent
4. the fax were sent on behalf of the Defendants
5. each of the Defendants are liable
6. each fax has at least 2 violations (\$1,000 minimum)
7. treble damages are permitted under the statute and should be granted

Facts

1. Hartwell and Cunningham are the officers/owners of First Chartered Investments, Inc. aka Chartered Financial & Investment Corporation [3,4]
2. Hartwell and Cunningham are married [email admission]
3. Cunningham, in his capacity of an officer of First Chartered, entered into a contract with fax.com on or before March, 2002 [1, 5, 6, 9]
4. fax.com is in the business of sending illegal faxes for advertisers
5. 16 faxes were sent between 2/13/02 through 9/6/02 advertising Defendant's business [1]
6. The faxes were sent without my express consent [plaintiff stipulation]
7. The faxes were commercial advertisements for home loans [1]
8. Fax.com supplied the phone numbers used
9. The faxes were transmitted by fax.com [5, 9]
10. None of the faxes identify the fax broadcaster (fax.com) [1]
11. I sent a demand letter to First Chartered on 8/26/03 via certified mail to the address of the agent for service [2]
12. The company was served with a complaint alleging TCPA violations on 3/22/02 [6]
13. The Defendants were sent an FCC citation for illegal faxing on 8/8/02 [7]
14. Defendants relationship with fax.com lasted until on or after October 1, 2003, more than 1 year after the FCC citation! [8]
15. Plaintiff filed a case for 10 faxes on 9/24/03 [court record].
16. Default judgment for \$5,000 for 10 faxes was granted on November 21, 2003 [court record]
17. Defendant moved to vacate the default judgment on April 1, 2004 which was granted [court record]
18. These 16 cases, filed on May 18 and May 24, 2004, are a refiling of the original case of 10 faxes plus 6 more than I subsequently discovered [court record]

Argument

1) Venue and jurisdiction

The venue is proper because I received the fax at my home and I can bring an action based on where the damage occurred. My home in Los Altos Hills is in the judicial district of this court.

Jurisdiction is proper because the TCPA, although a federal law, specifically requires an action to be brought in state court. The amount of the damage being sought is within the jurisdictional limits of this court based on the amount for the claim and because it is a pure money judgment demand.

2) Demand letter

I have sent the Defendant a demand letter on 8/26/02, but he has not responded.

These suits are a refiling of an original case filed on 9/24/03.

Prior to trial, settlement talks were held via email. Defendant agreed to settle, but never paid.

3) Faxes qualify as unsolicited advertisements per 47 U.S.C. § 227(a)(4)

The faxes meet the definition of “unsolicited advertisements” because they: (1) advertise commercial services and (2) were sent to me without my express permission or consent. Examination of the faxes shows they qualify under because they are commercial advertisements of a service. My own testimony is evidence that the fax was sent without my consent. I cannot prove a negative. My statement under oath now causes the burden to shift to the Defendant to prove with preponderance of the evidence that my statement is incorrect.

4) Defendants sent the faxes

Defendant Cunningham has admitted in court he used fax.com to send the faxes. In addition, Defendant’s name and phone numbers and Broker ID# are on the faxes. The faxes advertise services rendered by the Defendants. I have fax.com internal documents showing that Defendants are customers of fax.com. Defendant’s attorney admitted they used fax.com.

5) Each of the Defendants are liable

Officers are personally liable if they directed or were meaningfully involved in the wrongful conduct. In this case, it was one of the officers, who is married to the other officer, that sent the faxes. In a small company such as this, and in view of the marital relationship between the officers and the probable dollar amount of the expenditure relative to other expenditures, as well as the importance of advertising to the income of the business, it is more likely than not that both officers knew that a prime source of the leads was from faxes.

Cunningham certainly knew: he placed the order and admitted to me who he placed it with. His wife would know because she's head of the company.

Even though fax.com sent the faxes, under agency law, Defendants are liable since fax.com was an agent for Defendants and Defendants ratified their actions by accepting leads.

In addition, by FCC interpretation of the TCPA, the sender is defined to be the advertiser who benefits from the transmission. The fax broadcaster is also defined to be the sender if it demonstrates a high degree of involvement (such as supplying the fax numbers).

6) Each fax has at least 2 TCPA violations (requiring a \$1,000 minimum remedy)

Junk faxes are illegal under the TCPA 47 USC 227(b) and CFR 64.1200. The minimum penalty is \$500 per violation per 47 U.S.C. § 227(b)(3). Each of these faxes has two violations: (1) for sending an unsolicited advertisement to a fax machine which is a violation of 47 U.S.C. § 227(b)(1)(C) and (2) for violating the identification requirements 47 C.F.R. § 68.318(d) because they fail to identify the fax broadcaster which is counted as violation in 47 U.S.C. § 227(b)(3) because fax.com supplies the list that is used and thus qualifies as "high degree of involvement requirement".

7) Treble damages are permitted and should be granted

Trebling is available under this statute only if the action was willful or knowing, i.e., it was not by accident or without his knowing that these faxes were being sent (the Defendant's *awareness of the law is not relevant* to the trebling decision; only whether the faxes were deliberately sent with Defendant's knowledge).

Trebling would not be appropriate, for example, if the faxes were:

- (a) sent by accident (e.g., a wrong number dialed)
- (b) the Defendant could show that they absolutely had no idea that the marketing subcontractor was utilizing fax advertising.

These faxes qualify for trebling because 1) they were sent pursuant to a contract with fax.com, 2) because it is clear the Defendants knew illegal faxes were being sent out since they were served with a lawsuit on 3/20/02 alleging TCPA violations, and 3) anytime you advertise via fax, about 30% of the calls are demands to be taken off the fax list so if you take calls, as Defendant did, it's impossible not to know immediately what is going on.

These faxes warrant trebling because 1) the Defendant continued faxing after having been served with a TCPA complaint from another plaintiff and 2) even after the official citation from the FCC 4 months after the small claims complaint, Defendants continued to fax for at least 1 year (per Klein affidavit). 3) Defendants continued to ratify their decision by accepting business resulting from the faxes for a year after the

FCC citation. Therefore it is clear that these Defendants have absolutely no respect for following the law.

In addition, the company has engaged in a pattern of deception and disrespect for the law. For example, at Cunningham's appeal,

- he showed no remorse
- argued with the judge as the judge was trying to explain why he lost
- tried to deceive the judge with testimony "i did not send the fax."

Subsequently, in order to avoid having to pay judgments, they changed the name of the company and claimed that the new company was completely unrelated to the old company even though the only thing that had changed was the company name.

Prayer for relief

The intent of Congress was to put an end to junk faxes and civil cases were intended to be the primary enforcement mechanism. Congress required a minimum remedy that would be high enough to dissuade fax advertisers and high enough to allow cases to be brought.

I am asking the court for two things:

1. award me \$2,500 plus court costs (service and filing fees) due to small claims \$2,5000 limitations (2 violations =\$1K; tripling is \$3K per fax).
2. to amend the first 13 complaints to add First Chartered Investments, Inc. Reason for not including them was due to the name change game they were playing at the time; every time we'd ask, they'd have a different company name. Reason my request to amend should be allowed is (1) the exact same people would be in this court (since the other 3 cases today did name the company) (2) the named defendants are the 2 principals of the company and would be the people who would normally defend this case and (3) it will save my having to re-file another 13 cases and go through this whole process again just to name the company (4) the arguments and defenses would be exactly the same (5) the Defendants were notified of the request months ago and have plenty of time to prepare their case. Therefore, denying the motion would delay justice and serve no useful purpose. The first 10 faxes in this case were first filed over a year ago on 9/24/03 (case 203SC000413).The intent of Congress was to put an end to junk faxes and civil cases were intended to be the primary enforcement mechanism. Congress required a minimum remedy that would be high enough to dissuade fax advertisers and high enough to allow cases to be brought.

Defendants

First Chartered Investments Inc

is the sender of the faxes. This is unambiguous because the the CA Dept of RE number on the faxes belongs to First Chartered Investments Inc. However, since Defendants keep moving assets and changing company names, they are not being named at this time.

Hartwell, Katrina Marie

is liable as the sender of the faxes because Hartwell is the President, Corporate Secretary, and owner of First Chartered Investments. She clearly had knowledge of the fax advertisements being sent since this was a primary source of sales for the company. Hartwell is the DESIGNATED OFFICER associated with the firm. She was also personally notified by the FCC of the violations which continued even after notification.

Charles William Cunningham

is liable as the sender of the faxes because Cunningham is the CFO and actually placed the order with Jimmy Jimmy Horvat at fax.com to send the faxes. Cunningham also examined the faxes and commented as to the source of each of them to the Plaintiff during phone discussions.

TCPA relevant sections

47 U.S.C. § 227(a)(2)

The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or

(B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

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.

47 U.S.C. § 227(b)(1)(C)

It shall be unlawful for any person within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine;

47 U.S.C. § 227(b)(3)

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State -

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 C.F.R. § 68.318(d)

Telephone facsimile machines; Identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted page.

The meaning of “Willfully or knowingly”

In *Fenerty v Cedar Mortgage Company* (small claims in Santa Clara County), the judge wrote:

The law does not require a finding by the court that the defendant maliciously caused the unsolicited advertisement, but only that the act was willful or knowing. The defendant only has to intend to send (or cause to be sent) via fax the unsolicited advertisement.

The FCC states that it has not expressly defined "willfully or knowingly" for this statute, but in other contexts has decided the word "willful" means "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act." "Willful" has been interpreted simply that "the acts or omissions are committed knowingly. It is not pertinent whether or not the [...] acts or omissions are intended to violate the law."

It is no defense to the Defendant that it hired an outside advertising business. The violation of law is imputed to the person causing and benefiting from the unsolicited advertising.

Exhibits

1 The faxes

Shows that they were all from First Chartered. They were sent by fax.com.

2 Demand letter

Shows I sent a demand letter before bringing suit.

3 First Chartered broker record

Shows Katrina and Charles are principals.

4 First Chartered Statement of Information from California Secretary of State

Shows Katrina is CEO and Secretary and Charles is the CFO.

5 Who's calling list

Internal document from fax.com shows First Chartered was a customer of fax.com and that "Chuck Cunningham" was the contact (Line 52).

6 San Mateo Superior Court record (3/20/02)

Shows they were sued for TCPA violations before sending any of the faxes in this case. This proves that most the faxes were sent willfully and knowingly since they were served on 3/22/02 with a TCPA claim, before all but 2 of the faxes in this case were sent.

7 FCC citation (8/8/02)

Shows that they were notified by the FCC during the time period the faxes were sent to me, yet still continued to fax me.

8 Mark Klein affidavit (9/1/04)

Shows that for at least a year after the FCC citation were still sending junk faxes and still trying to plead innocence in court. This further justifies treble remedy. Includes an email and a copy of the fax dated 9/15/2003 that was sent by First Chartered more than 1 year after the FCC citation.

9 Letter from Plaintiff's counsel (May 26, 2004)

Admits Defendant used fax.com to send the faxes.