Published on *The National Law Review* https://natlawreview.com

Clearing Things Up: Seventh Circuit Court of Appeals Clears up Difference Between Claim Lacking Merit and Court Lacking Jurisdiction

Article By:

Alexander J. Toney

Although it may seem odd, when it comes to Article III standing, Courts sometimes struggle with the difference between lacking jurisdiction to consider an issue on the merits, on the one hand, and facing a justiciable claim lacking merit on the other. Well, the Seventh Circuit just cleared up that distinction—and in rather brusque fashion.

In a recent junk-fax case, the defendants moved for dismissal under Rule 12(b)(1) arguing that the fact they had consent to send the challenged faxes deprived the court of jurisdiction to hear the case since Plaintiff did not suffer an Article III harm. While it may sound odd to ask a court to adjudicate a merits issue while announcing the lack of jurisdiction to hear the case, the district court bought the argument. Acting swiftly on appeal, however, the Seventh Circuit straightened that out in *Craftwood II, Inc. v. Generac Power Sys.*, No. 18-2883, 2019 U.S. App. LEXIS 9504, at *2 (7th Cir. Apr. 1 2019).

The teed up question for the Seventh Circuit: If a defendant can establish an affirmative defense under the TCPA, is the plaintiff deprived of standing to sue?

With typical acerbity, Judge Easterbrook gave the right answer: “No.”

Judge Easterbrook pointed out that “[t]he difference between a jurisdictional and a substantive characterization of a defense matters not just because federal courts must raise jurisdiction on their own . . . but because different procedures apply to jurisdictional and substantive issues.” *Id.* Put another way, a plaintiff’s failure on the merits does not deprive the trial court of jurisdiction to say that the plaintiff has failed on the merits.

The Court went on to explain why the case could not be disposed of even under Rule 12(b)(6). The plaintiffs had plausibly alleged that they received unsolicited fax advertisements, and were under no obligation to plead around every defense the defendants might raise. *Id.* at *4. The Court also noted that the nature of the business relations between plaintiffs and defendants was a question of fact that precluded granting a motion to dismiss. *Id.* at *5.

Despite the fact that this holding had resolved the case, Easterbrook couldn’t pass up the opportunity to ding the defendants for their defective notice (which clearly needed a proofread), set

forth below:

The information in this facsimile message is privileged and confidential information, intended for the addressee If you have received this message in error, or if the recipient of this communication does not desire to receive future communications from the sender. The recipient must notify the sender of the same with a return fax to 830-916-0736 or call Toll Free 1-877-325-2526

Id. at *6. Judge Easterbrook quipped: “Beyond the oddity of telling the recipient of an unwanted fax that it ‘must’ do something is the omission of two bits of information that the statute insists be included: that the recipient has a legal right to avoid future fax ads and that the sender must comply with an opt-out request ‘within the shortest reasonable time’ as determined by federal rules (30 days).” *Id.*

This *dicta* might be considered by some to be piling on. But, even if the analysis weren’t essential to the resolution of the case, it remains a helpful reminder to the rest of us to tick every box when raising a § 277(b) defense.

At the end of the day, the Court reached a sensible conclusion: “We have resolved dozens of fax-ad suits on the merits without suspecting that we were violating Article III of the Constitution. This suit is no more constitutionally suspect than they.” *Id.* at *4.

Well, that clears things up a bit.

National Law Review, Volume IX, Number 98