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

Devastating TCPA Fine Levied Against Small Roofing Company

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David Randall Associates, Inc. has provided commercial roofing services in eastern Pennsylvania, New Jersey, and mid-state Delaware for the past 25 years. Last Friday, the company was hit with a $22,405,000 TCPA fine in a class action alleging it sent over 44,000 unlawful fax advertisements to roofing prospects without their permission. The award will be divided among those fitting this class description and their lawyers:

All persons or entities with whom David Randall Associates did not have an established business relationship, who were successfully sent one or more unsolicited faxes during the period March 29, 2006 through May 16, 2006, stating, “ROOF LEAKS??? REPAIRS AVAILABLE. Just give us a call and let our professional service technicians make the repairs!” and “Call: David Randall Associates, Inc. TODAY.”

The facts giving rise to liability in City Select Auto Sales, Inc. v. David Randall Associates, Inc. were not uncommon. In the Spring of 2006, Business to Business Solutions solicited Raymond Miley, III, the president of David Randall, to market David Randall’s roofing services through B to B’s fax advertising services. Mr. Miley then delegated to his administrative assistant, April Clemmer, the responsibility of communication with B to B. Ms. Clemmer sent the text of the advertisement to B to B along with a list of zip codes to be solicited for business. B to B then apparently added language falsely stating that a “person” using the recipient’s business phone “supplied the fax number and permission to send faxes” and sent out 12,000 faxes advertising David Randall’s services.

The response to the faxes was swift. The company immediately received multiple complaints concerning the unsolicited nature of the advertisements. Several of the complaints stated that the opt-out hotline list was ineffective or unavailable, and suggested that the faxes violated the law.
Ms. Clemmer forwarded the list of annoyed recipients to B to B and asked that they receive no more faxes.

B to B apparently removed the names as requested. B to B continued to add language to future faxes. One stated that the fax was a charitable appeal and exempt from most faxing regulations. Another threatened to report to the State Bar Association and to file criminal and civil charges against anyone who “Fax Baits” or attempts extortion. All told, David Randall ordered three more rounds of blast faxes. Each round produced more complaints. Some people even threatened to pursue legal

action. Others promised to contact the Federal Communications Commission. Many of the complainers said the hotline for removal remained unavailable.

After that fourth blast, City Select Auto Sales sued. David Randall tried to bring in B to B as an additional defendant, but it was nowhere to be found. B to B's principals did not answer the third party complaint and the Court entered default judgment against them.

David Randall chose a feisty litigation strategy. It fought pro hac vice admission requests, tried to take (and maybe did take) the deposition of plaintiffs' counsel and filed a motion to compel. Despite the fight, a class was eventually certified and the case came for hearing on plaintiff's motion for summary judgment.

David Randall argued that it had a pre-existing business relationship with at least 183 (out of 44,000) of the asserted class members and that certain class members, "voluntarily and prominently publicized" their fax numbers for public distribution on their websites. The New Jersey Federal District Court judge agreed that fax advertisements are not prohibited if the unsolicited ad is from a sender with an established business relationship or the sender obtained the fax number through an internet website which is controlled by the recipient and manifests a desire to be contacted.

However, even if the information was obtained through a website, the Court ruled that summary judgment for the class was appropriate because David Randall failed to place a proper opt-out notice on all faxes. In particular, the faxes did not clearly and conspicuously notify the recipient that it may opt out from receiving any future unsolicited advertisements. They did not state that the sender's failure to comply with the request for removal within 30 days would violate the law. They did not contain a cost free mechanism, including a domestic phone number and fax number, for the recipient to transmit its request for removal.

The facts here are not unique. The results are not surprising. Here is how David Randall could have avoided this mess:

1. David Randall should have conducted some, any due diligence on Business to Business Solutions.

2. David Randall should have reviewed the actual fax B to B was sending. This would have surely led to questions. Why was B to B adding that extra language regarding charitable contributions and making threats to those challenging the legality of the advertisement?

3. The company should have listened to complaints it was receiving about the faxes. Had David Randall investigated the complaints made after the first blast, it would not have sent the following three and its liability would have been closer to six rather than 22 million dollars.

4. David Randall should have consulted with counsel prior to launching into a new marketing platform. While TCPA cases related to autodialing have exploded in recent years, blast fax cases were routinely filed in the early 2000s. Had the company inquired, competent counsel could have helped.

5. Before sending faxes, David Randall should have made sure that it contained the proper out-out language.

All that is easy to say in hindsight. My speculation is that none of this was done because no one at David Randall knew the TCPA even existed. It is hard to say why such a case was not resolved sooner, but readers might use this one as an example of why competent TCPA counsel can save a company a lot of trouble if consulted before a call or fax campaign begins.

National Law Review, Volume V, Number 91