

EXHIBIT 1

2004 WL 3121796
2004 WL 3121796 (D.Md.)

United States District Court, D. Maryland.
STATE FARM FIRE AND CASUALTY-COMPANY, an Illinois Corporation Plaintiff,

v.

VALUE ASSET LEASING, INC. A Maryland Corporation formerly known as Ihire, Inc.
and Ihire Inc.Com Hire, LLC A Delaware Limited Liability Company David J.
McFayden, Defendants.
No. 04-CV-03894.
2004.

Complaint for Declaratory Judgment

Richard E. Schimel, Federal Bar # 02843, 7201 Wisconsin Avenue, 600 Bethesda Gateway Building, Bethesda, Maryland 20814-4849, (301) 654-0896, Attorneys for Plaintiff

Comes now the Plaintiff, State Farm Fire and Casualty Company, an Illinois corporation, by and through its attorneys, Buoy and Noble, P. C., and sues the Defendants, Value Asset Leasing, Inc., a Maryland corporation, formerly known as I Hire, Inc. and IHIRE INC. COM, iHire, LLC, a Delaware Limited Liability Company, and David J. McFayden, seeking declaratory relief pursuant to 28 U. S. C. <section> 2201 (a), and as grounds therefore states as follows:

Jurisdiction and Venue

1. Plaintiff State Farm Fire and Casualty Company is a corporation which was and is incorporated in the State of Illinois. Its principal place of business is its national headquarters, which is located in Bloomington, Illinois.
2. Defendant Value Asset Leasing, Inc., formerly known as I Hire, Inc. and IHIRE INC. COM, is a corporation which was and is incorporated in the State of Maryland. Its principal places of business are located at 38 South Market Street, Suite 200, Frederick, Maryland 21701, 11498 Archer Circle, Monrovia, Maryland 21770 and 110 North Public Square, Suite 2-2, Angola, Indiana 46703.
3. iHire LLC is a Delaware Limited Liability Company. Its principal place of business is located at 1209 Orange Street, Wilmington, Delaware 19801.
4. David J. McFayden is the President of Value Asset Leasing, Inc. and ihire LLC. He is a resident of Frederick, Maryland.
5. There is complete diversity of citizenship between the Plaintiff and the Defendants to support federal jurisdiction pursuant to 28 U. S. C. <section> 1332.
6. This litigation requests this honorable Court to interpret the liability coverage of a Business Policy issued by the Plaintiff to Defendant Value Asset Leasing, Inc. f/k/a I Hire, Inc. in order to establish whether the Plaintiff owes a duty to defend and/or to indemnify each of the Defendants with respect to lawsuits which have been filed in various state courts against the Defendants for multiple alleged violations of the Telephone Consumer Protection Act (TCPA), as well as other statutory and common-law torts. The maximum statutory recovery for each TCPA violation is \$1,500. Each of the lawsuits allege multiple TCPA violations. One of the lawsuits seeks to

establish a class certification. The cost of defending each of these lawsuits and the potential liability for judgments which could be rendered against each of the Defendants, for which the Plaintiff is potentially liable under the terms of its insurance contract with the Defendant, far exceeds the \$75,000 jurisdictional amount required for federal diversity jurisdiction under 28 U.S.C. <section> 1332.

7. Venue lies in this Court pursuant to 28 U.S.C. <section> 1391(a)(1) because the Defendants reside or conduct business in Frederick County, Maryland, which is serviced by the Northern District of the United States District Court for the District of Maryland.

I Hire, Inc.'s Business Practices

8. Value Asset Leasing, Inc., formerly known as I Hire, Inc. and IHIRE INC.COM is in the business of matching advertising employers seeking staff to individuals who are seeking jobs in the employers' respective fields.

9. Defendant Value Asset Leasing, Inc. leases its assets to Defendant Ihire LLC.

10. Ihire LLC operates the iHireJobNetwork, which is comprised of numerous job-search websites, each specifically tailored to a particular profession. These websites include:

Professional & Administrative

iHireAccounting.com

iHireHumanResources.com

iHireLegal.com

iHireSecretarial.com

Construction & Real Estate

iHireBuildingTrade.com

iHireConstruction.com

iHireRealEstate.com

Banking & Insurance

iHireBanking.com

iHireInsurance.com

Sales & Marketing

iHireMarketing.com

iHireRetail.com

iHireSalesPeople.com

Health Care & Social Service

iHireDental.com

iHirePhysicians.com
iHireRadiology.com
iHirePharmacy.com
iHireNursing.com
iHireMentalHealth.com
iHireSocialServices.com
iHireTherapy.com
iHireMidLevelPractitioners.com
iHireMedTechs.com
iHireMedicalSecretaries.com
iHireNutrition
Accomodation & Food Services
iHireChefs.com
iHireHospitality.com
iHireHospitalityServices.com
Information Technology
iHireNetworkAdministrator.com
iHireProgrammers.com
Science & Technology
iHireChemists.com
iHireEngineering.com
iHireManufacturingEngineering.com
iHireQualityControl.com
Education
iHireElementaryTeachers.com
iHireSecondaryTeachers.com
iHireSchoolAdministrators.com
Law Enforcement & Security
iHireLawEnforcement.com
iHireSecurity.com

11. iHire LLC attempts and has in the past attempted to generate business by

scanning job postings in newspapers and on the Internet.

12. Upon locating a business prospect, iHire LLC faxes and has in the past faxed an advertisement to solicit business.

13. iHire LLC deliberately reviews and has in the past reviewed job postings in newspapers and on the Internet to identify potential employers to whom it send unsolicited facsimiles in a deliberate and intended manner.

14. When one sends a facsimile transmission to a third party, the recipient machine uses paper and ink to produce the transmission at the "receiving" end.

15. Accordingly, as a result of sending a transmission facsimile, tangible property, namely paper and toner, becomes altered from its original material dimensions, and the recipients suffer a permanent loss of facsimile paper and toner.

Lawsuits Filed Against I Hire. Inc.

16. Prior facsimile solicitations by I Hire, Inc., iHire LLC and Value Asset Leasing, Inc. are the basis for lawsuits filed against it in several different state courts. The lawsuits which have been filed to date are as follows:

Exhibit #1: FCC Enforcement Company v. iHire, Incorporated In the Northwest Phoenix Justice Court of the State of Arizona In and For the County of Maricopa Case No.: CV03-05442RB

Exhibit #2: Stop Junk Faxing, Inc. v. iHire, L.L.C. In the County Court for Denver County, Colorado Case No.: Unassigned

Exhibit #3: US Fax Law Center, Inc. v. iHire, Inc. In the United States District Court for the District of Colorado (removed from the County Court for Arapahoe County, Colorado) Case No.: 04-B-0344 (CBS)

Exhibit #4: US Tax Law Center, Inc. v. iHire, LLC In the District Court for Arapahoe County, Colorado Case Number: 2004-CV-1976

Exhibit #5: Mark T. Tischhauser, P.A. v. Value Asset Leasing, Inc. d/b/a iHire, Inc. In the County Court of the Thirteenth Judicial District in and for Hillsborough County, Florida, Small Claims Division Case No.: 04-12752

Exhibit #6: Canter and McDaniel CPAs P.A. v. iHire LLC In the County Court for Pinellas County, Florida Case No.: 522004SC007234XXSCDC

Exhibit #7: Doctor's RX US, Inc. V. iHire LLC In the County Court of the Thirteenth Judicial District in and for Hillsborough County, Florida, Small Claims Division Case No.: 04-20271-H

Exhibit #8: Williams Insurance Services, Inc. V. iHire LLC In the County Court for Pinellas County, Florida Case No.: 04005981SCSPC

Exhibit #9: CE Design, Ltd. v. Donald McFayden and I Hire, Incorporated In the Circuit Court of Cook County, Illinois Law Department, Chancery Division Case No.: 03CH17552

Exhibit #10: First Title of Indiana, Inc. v. Value Asset Leasing, Inc. f/k/a iHire, Incorporated d/b/a in the State of Indiana as IHIREINC.COM, INCORPORATED In the Marion County Superior Court for the State of Indiana, Civil Division Case No.: 49D12C403PL000506

Exhibit #11: Stephanie H. Klein; Esquire v. iHire, LLC In the District Court for the County of Delaware Commonwealth of Pennsylvania Case No.: CV-0000127-04

Exhibit #12: David L Smith and Associates, LLP and Toby Copeland v. Value Asset Leasing, Inc. F/k/a iHire, Incorporated a/k/a IHIREINC.COM, etal. In the District Court for Dallas County, Texas, 116th Judicial District Case No.: 04-10247-F

Exhibit #13: Chumley's Beer House, LLC v. iHireChefs.com, Inc. In the Washington Township of Marion County, Indiana Small Claims Court Case No.: 49K 0411-SC-05234

Exhibit #14: Garelli & Associates, PC v. iHire, LLC In the Circuit Court for the Eighteenth Judicial Circuit of Du Page County, Wheaton, Illinois Case No.: 20041001184.

17. Those lawsuits allege, inter alia, that said facsimile transmissions constitute violations of 47 U.S.C. <section> 227, more commonly known as the Telephone Consumer Protection Act (TCPA).

The Telephone Consumer Protection Act

18. TCPA was enacted in response to what Congress perceived to be the growing problem of the use of automated telephone equipment to make unsolicited telephone calls and faxes.

19. The purpose of TCPA was to address telemarketing practices that were made possible by technological changes that resulted in a substantial increase in unsolicited commercial telephone calls and faxes, and the resulting expense and disruption imposed on the recipients.

20. TCPA imposes restrictions on the use of such equipment, and made it illegal "to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. <section> 227(b) (1) (C).

21. TCPA also created a private right of action in 47 U.S.C. <section> 227(b) (3), which states:

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 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.

I Hire, Inc.'s Liability Insurance Coverage

22. At the time of the filing of these lawsuits, IHire, Inc. was insured under a Business Policy issued by State Farm Fire & Casualty Company in the State of Maryland. Value Asset Leasing, Inc. and IHire, LLC are also insured under said policy. As an officer of IHire, Inc. and iHire LLC, David J. MacFayden is also entitled to coverage under the subject insurance policy. A copy of that insurance contract, designated Policy # 90-E7-0856-5, is attached hereto as Exhibit # 15.

23. This is a Form FP-6103 Policy, which provides coverage for "advertising injury." Under this policy, "advertising injury" is defined to include "oral or written publication of material that violates a person's right of privacy."

24. COVERAGE L-BUSINESS LIABILITY coverage applies "to advertising injury caused by an occurrence committed in the coverage territory during the policy period. The advertising injury must be committed in the course of advertising your [the insured's] goods, products or services."

25. The policy also provides liability coverage for "property damage" which is defined in the policy to include "physical injury to or destruction of tangible property."

26. In order for liability coverage to exist, the property damage must be "caused by an occurrence which takes place in the coverage territory during the policy period."

27. There is a Business Liability Exclusion for property damage which is "expected or intended from a standpoint of the insured."

28. Maryland's substantive law applies to the interpretation of the subject insurance contract.

Advertising Injury Coverage

29. The TCPA is intended to protect statutorily-identified privacy rights of United States Residents. Specifically, 47 U.S.C. <section> 227(b)(1)(C) makes it 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."

30. Furthermore, U.S.C. <section> 227(c)(1) contemplates the protection of "subscriber privacy rights to avoid receiving telephone solicitations to which they object."

31. Accordingly, assuming that a TCPA violation constitutes the violation of a right of privacy, it is therefore, by definition, an "advertising injury."

32. In order for advertising injury coverage to exist, the advertising injury must be committed "in the course of advertising your [the insured's] goods, products or services."

33. Advertising involves the widespread distribution of promotional material to the public at large.

34. Accordingly, the mere one-on-one solicitation of customers by the Defendants through facsimile transmissions does not meet that definition.

35. Therefore, it follows a fortiori that any "advertising injury" committed by the Defendants through their alleged violations of the TCPA did not occur

"in the course of advertising your [I Hire's] goods, products or services."
(emphasis added)

"Occurrence"

The term "occurrence" is defined in the policy to be "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which resulted in... property damage."

37. The deliberate solicitation of business by I Hire, Inc. did not constitute an "occurrence" as that term is defined in the policy.

38. Insurance is designed to provide protection from fortuitous losses, which are losses that occur by chance or accident. The fortuity doctrine precludes insurance coverage not only where offending conduct has been intentional, but also where the insured is, or should be, aware of ongoing progressive loss or known loss when the policy is purchased. Implicit in the concept of insurance is that the loss occur as a result of a fortuitous event not one planned, intended, or anticipated.

39. Advertising injury coverage and property damage coverage only exist under the Defendants' State Farm policy when the advertising injury or property damage is caused by an "occurrence."

40. The Defendants' actions did not constitute an occurrence, and therefore neither advertising injury nor property damage coverage exist for the claims set forth in the lawsuits filed against the Defendants set forth above.

The "Expected or Intended" Exclusion

41. Under Exclusion #1, State Farm's insurance policy does not apply to property damage which is "expected or intended from the standpoint of the insured."

42. The dictionary definition of the word "expect" is "to look forward to the probable occurrence or appearance."

43. The dictionary definition of the word "intend" is "to have in mind some purpose or design."

44. The actions taken by the Defendants in attempting to develop a client base through unsolicited facsimile transmissions constitutes property damage which was "expected or intended from the standpoint of the insured."

45. It is an absolute certainty that the means by which the Defendants have chosen to solicit business caused permanent loss of facsimile paper and toner by TCPA "victims."

46. Accordingly, while this property damage may not have been the intended objective of the Defendants' actions, the result was most assuredly expected, since every facsimile transmission involves the use of the recipient's paper and toner.

Conclusion

47. For the reasons stated above, the Plaintiff does not owe a duty to defend or indemnify to the Defendants as to any of the fourteen (14) lawsuits attached hereto, or any lawsuits which may be filed in the future on the same theories of liability.

WHEREFORE, Plaintiff State Farm Fire and Casualty Company prays for the following relief:

A. a declaration pursuant to 28 U. S. C. <section> 2201 (a) that State Farm Fire and Casualty Company owes no duty to defend or indemnify Defendants Value Asset Leasing, Inc., a Maryland corporation, formerly known as T Hire, Inc. and IHIRE INC. COM, iHire, LLC, a Delaware Limited Liability Company or David J. McFayden under Policy # 90-E7-0856-5 for any of the lawsuits attached to the Complaint, or any future lawsuits based upon alleged violations of the Telephone Consumer Protection Act (47 U. S. C. <section> 227); and

B. a judgment for the costs of this proceeding; and

C. such other and further relief as may be just and proper.