CONTRIBUTED CONTENT & PRESENTATIONS

Blog Entry: The Sturm Und Drang of 12(b)(6) Motions

DECEMBER 12, 2016

Source: Array

No one likes to be slammed. Slamming, according to the FCC, “is the illegal practice of switching a consumer’s traditional wireline telephone company for local, local toll, or long distance service without permission.” Kimber Baldwin Designs, LLC claimed that it was slammed by Silv Communications, Inc. and sued it in the Southern District of Ohio, asserting claims under the Federal Telecommunications Act, Ohio’s Telecommunications Fraud statute, and for common law fraud and unjust enrichment.

The factual allegations in Kimber’s pleadings - and yes, they are only allegations - paint a grim picture. Kimber had a telephone account with Cincinnati Bell. Someone then called Kimber on Silv’s behalf and “falsely indicated that the purpose of the call was to confirm details regarding the business for inclusion in an unspecified ‘directory.’” The caller then asked the recipient “to confirm the name, address, and telephone number of the business, which she did,” and “then repeated back the business details and asked [her] to confirm the accuracy of the information.” She confirmed. The caller then asked her “to provide personal information, including her date of birth and Social Security number.” The recipient answered, though not as to her SSN.

Soon after, Kimber started noticing “unauthorized charges” of $40.94 on its monthly Cincinnati Bell bills. After spending awhile trying to figure out what was happening, it contacted Silv, which was identified on its phone bill under the heading “Third Party Telecom Billing.” Silv told Kimber that the charges would be removed, but they continued to appear. And then, according to Kimber, this:

[Kimber] called Defendant again …. During that call, [Kimber] informed Defendant that they had “slammed” Plaintiff in violation of federal law, that it had previously unsuccessfully demanded the removal of all charges from its bill on numerous occasions, and that Defendant must immediately return its service to Cincinnati Bell. In response, Defendant’s representative stated that it had obtained proper consent to switch the long distance telephone service and played a recording that it alleged was a conversation between Defendant and [Plaintiff]. Instead of playing the actual conversation - which mostly consisted of Defendant’s representatives requesting verification of publicly - available identification information about the business for purposes of updating an unspecified “directory” - Defendant played an audio file featuring a male voice reading a series of long, scripted questions at very high rate of speed, which rendered the questions largely unintelligible. Most of the questions called for a yes or no answer, after which the voice of [Plaintiff’s employee] would abruptly interject, “Yes,” in a stilted, unnatural, and robotic fashion. Plaintiff claims that the recording actually contained replays of the same recorded “Yes” over and over again.

Finally, months later, the charges disappeared, but Silv never reimbursed Kimber. A lawsuit followed. Silv moved to dismiss for failure to state a claim, Kimber amended its complaint, and Silv moved to dismiss that, too. Among its arguments was that certain factual allegations in the amended

complaint were inconsistent with those in the original complaint and the latter bound Kimber and the court as judicial admissions. Silv also contended, among other things, that Ohio's voluntary payment doctrine barred Kimber's unjust enrichment claim, that the allegations supporting Kimber's fraud claim lacked sufficient particularity, and that Kimber failed adequately to plead damages. All told, a hefty motion to dismiss.

One-by-one, on December 5, 2016, the court rejected Silv's arguments, noting that it was required to take as true all well-pleaded factual allegations in Kimber's amended complaint. Kimber's pleading survived in full.

And hence the title of this post. The storm of being sued sometimes impels defendants to seek shelter under the umbrella of 12(b)(6). Motions are filed and attack points divulged. Vigorous briefing ensues. Hopes are raised, but also sometimes dashed. And if they are, strategies that might have been held in reserve for the summary judgment stage may no longer be tenable, having lost their *oomph* through pre-discovery revelation. Now don't get me wrong: I'm not second guessing anyone here, and these comments are not directed to the *Kimber* case. They're directed, instead, to 12(b)(6) generally, and to that pesky conundrum defense lawyers frequently face: "To file, or not to file?" The answer is constantly being rewritten.

By the way, Kimber moved to certify a nationwide class and Ohio subclass. That motion has been briefed and remains pending. We'll keep you posted.

The case is *Kimber Baldwin Designs, LLC v. Silv Communications, Inc.,* United States District Court, Southern District of Ohio, case no. 1:16-cv-448.