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BY JUNK FAXES: AN ANALYSIS OF PRIVACY, SPAM,
DETECTION AND BLACKMAIL

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THE DUTY TO DEFEND ADVERTISING INJURIES CAUSED BY JUNK FAXES: AN ANALYSIS OF PRIVACY, SPAM, DETECTION AND BLACKMAIL

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I. INTRODUCTION

This paper deals with insurance coverage of a firm that engaged in sending out junk faxes, or spam. In part II, we offer a legal analysis of a lawsuit involving this matter. Part III is devoted to a philosophical and economic analysis of the issue.

II. LEGAL ANALYSIS

A. BACKGROUND

In the recent case of *American States Insurance Company v. Capital Associates*,¹ the Seventh Circuit Court of Appeals considered whether there was a duty, under the terms of a policy of insurance

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1. *Am. Sts. Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004).

covering advertising injuries, for the firm to defend an action filed against the insured for sending unsolicited advertising to fax machines. The case is important because it concerns an issue of first impression in the United States.² The precedential authority of the opinion is greatly enhanced because its author, Judge Frank H. Easterbrook,³ is widely regarded as an influential scholar and judge who has authored numerous scholarly articles on the right of privacy.⁴

This case arose when the insured, Capital Associates, sent an unsolicited advertisement to the fax machine of JC Hauling.⁵ That act of the insured violated the *Telephone Consumer Protection Act*,⁶ which makes it unlawful “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”⁷ The insurer, American States Insurance Company, had previously issued a policy to Capital Associates covering advertising injury.⁸ The aggrieved recipient of the fax, JC Hauling, filed a class action against the insured, Capital Associates, on behalf of all parties who received the junk fax.⁹ Capital Associates then tendered the claim to American States and demanded a defense under the advertising injury coverage.¹⁰ American States, believing the claimed advertising injury was not covered by the policy, quickly filed a federal suit seeking a declaratory judgment from the federal

2. The court said “Ours is the first federal appellate decision on the subject” *Id.* at 943.

3. Circuit Judge, United States Court of Appeals for the 7th Circuit. Senior Lecturer in Law, University of Chicago Law School. Judge Easterbrook is the author of numerous law review articles. See www.law.uchicago.edu/faculty/easterbrook/ (accessed May 7, 2006).

4. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 S. Ct. Rev. 309 (1981). See also Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Geo. L. J. 2381, 2387 (1996) (crediting Judge Easterbrook with the perception that “[w]hen disclosure will diminish the quantity or quality of information generated, prohibiting disclosure may have a positive net effect.” *Id.*)

5. *Am. Sts. Ins. Co.*, 392 F.3d at 940.

6. 47 U.S.C. § 227(b)(1)(C) (2000).

7. *Id.*

8. *Am. Sts. Ins. Co.*, 392 F.3d at 940.

9. *Id.*

10. *Id.*

district court that the policy did not require either a defense or indemnity.¹¹

B. DISCUSSION

The policy of insurance defined an advertising injury as “[o]ral or written publication of material that violates a person’s right of privacy.”¹² Another clause in the policy excluded any injury that was “expected or intended from the standpoint of the insured.”¹³ In its request for declaratory judgment, American States contended that the sending of an unsolicited telephone fax does not result in an advertising injury and that even if it does, the injury caused to the receiving party is expected or intended from the standpoint of the insured.¹⁴ The federal district court trial judge found that the unsolicited fax violated the corporate recipient’s right of privacy and declared that American States must defend Capital Associates.¹⁵ American States quickly appealed to the Seventh Circuit Court of Appeals. The learned trial judge failed to enlighten the litigants with his definition of the parameters of the term “privacy” as used in the policy.¹⁶ He discussed privacy in a generic sense but failed to discuss the seclusion or secrecy interests that form the basis of Judge Easterbrook’s opinion.

Recall that the terms of the coverage concerned whether the unsolicited telephone fax violated JC Hauling’s right of privacy. Judge Easterbrook commenced the inquiry into the case by exploring the meaning of the word “privacy” as used in the policy.¹⁷ He wrote that the right of privacy is generally regarded as protecting two principal interests. They are secrecy and seclusion.¹⁸ A wish on the part of an individual to conceal a past criminal conviction, a divorce, a drug rehabilitation, his movie rental records, a bankruptcy, or a loathsome disease from business associates or social friends is asserting a secrecy-

11. *Id. See Am. Sts. Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 2003 U.S. Dist. LEXIS 25532 (S.D. Ill. Dec. 9, 2003).

12. *Am. Sts. Ins. Co.*, 392 F.3d at 940.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 942.

17. *Id.* at 941.

18. *Id.* (citing Richard S. Murphy, *Property Rights as Personal Information: An Economic Defense of Privacy*, 84 Geo. L. J. 2381 (1996)).

styled right of privacy.¹⁹ On the other hand, a person who wants to keep his telephone number and street address private to avoid solicitors ringing his doorbell or calling on his home telephone is asserting a privacy interest in the sense of seclusion.²⁰ It is also true that it is possible to combine the two interests.²¹ For example, in two well-known cases the courts have discovered a privacy right to engage in sexual activity with a person of the same sex²² and to have an abortion.²³

American States argued that the language of its advertising coverage should be interpreted by the court to deal with a secrecy interest in privacy rather than a seclusion interest.²⁴ If that is so American States is off the duty-to-defend hook because the fax to JC Hauling clearly did not disclose any embarrassing secret information about the recipient such as a long ago criminal conviction,²⁵ and, as a consequence, did not trigger a duty to defend. Nor did the fax direct public attention to a true but misleading fact as in *Lovgren v. Citizens First National Bank of Princeton*.²⁶ Judge Easterbrook said that the language of the advertisement coverage might also be read to cover improper disclosures of things such as social security numbers, credit and bank records, or other personal information that could be used to aid identity theft, citing *Reno v. Condon*.²⁷ In *Reno*, the Supreme Court decided that the Commerce Clause powers of Congress allowed it to forbid states from selling personally-identifying information such as driver's license numbers.²⁸ But JC Hauling did not claim that Capital Associates published any information of that sort about it and

19. *Id.* See also, Murphy *supra* n. 5 at 2386.

20. *Am. Sts. Ins. Co.*, 392 F.3d at 941.

21. *Id.*

22. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003). See also N. Stephan Kinsella, *Supreme Confusion, Or, A Libertarian Defense of Affirmative Action*, <http://www.lewrockwell.com/kinsella/kinsella11.html> (last updated July 4, 2003).

23. *Roe v. Wade*, 410 U.S. 113 (1973).

24. *Am. Sts. Ins. Co.*, 392 F.3d at 941.

25. See *Gates v. Discovery Commun., Inc.*, 34 Cal. 4th 679 (Cal. 2004) (holding that the plaintiff was able to proceed with the cause of action even though the newspaper published truthful information about his criminal convictions).

26. 126 Ill. 2d 411, 418 (Ill. 1989).

27. *Am. Sts. Ins. Co.*, 392 F.3d at 941. See also *Reno v. Condon*, 528 U.S. 141 (2000).

28. *Reno*, 528 U.S. at 148.

the district judge did not so find.²⁹ The district judge had merely stated, without elaborating, that the *Telephone Protection Act*³⁰ was understood to protect privacy.³¹ In doing so, he cited a case concerning Congress's intent to protect the seclusion interest of telephone subscribers: *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*³² The *International Science & Technology* case used the term "privacy" in the sense of seclusion from a knock on the door or a ringing telephone.³³ But in this case the trial judge failed to even consider the different privacy interests of secrecy and seclusion and to properly apply them to the facts of the case and the operative contractual terms of the policy.³⁴

On appeal, Judge Easterbrook wrote that the key issue in the case was whether the insurance policy covered the sort of seclusion privacy interest affected by faxed ads.³⁵ He discussed two areas of inquiry that the court should consider in reaching a decision about the policy coverage. First, do corporations like JC Hauling really have an interest in seclusion?³⁶ The court thought not. The court opined that corporations are usually open for business and that a successful business practice generally encourages telephone calls and any other communications that might alert them to all sorts of business opportunities.³⁷ Importantly, most state and federal cases have held that corporations lack privacy interests.³⁸ The *Morton Salt* case involved a demand from the Federal Trade Commission that Morton Salt turn over a statement of "prices, terms, and conditions of sale of salt . . .".³⁹ Morton Salt objected on Fourth Amendment grounds, claiming an expectation of privacy in the maintenance of the requested business records.⁴⁰ In ruling that the federal agency could obtain the records, the U.S. Supreme Court declared that it was well-settled that

29. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

30. 47 U.S.C. § 227(b)(1)(C) (2000).

31. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

32. 106 F.3d 1146 (4th Cir. 1997).

33. *Am. Sts. Ins. Co.*, 392 F.3d at 942. *See also* 106 F.3d at 1150.

34. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See, e.g., U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

39. *Id.* at 637.

40. *Id.* at 651.

“corporations can claim no equality with individuals in the enjoyment of a right to privacy.”⁴¹ Judge Easterbrook was unconvinced that JC Hauling had an expectation of privacy in this situation.⁴² A point in his favor in this regard is that one can convincingly argue that JC Hauling had less of an expectation of privacy than Morton Salt because no information of any kind was sought from JC Hauling.

Secondly, Judge Easterbrook wrote that the language of the policy strongly suggests that the coverage is limited to only a secrecy interest.⁴³ This is so because the terms of the policy indicate that it covers a “publication” that violates a right of privacy.⁴⁴ Here, the facts indicate that the unsolicited fax published no embarrassing facts or other information about JC Hauling that would violate a secrecy interest.⁴⁵ In a secrecy situation, publication matters because it will reveal the secret information protected by the privacy interest.⁴⁶ In a seclusion situation, publication of the private information is irrelevant because it is the unwelcome intrusion of the knock on the door or the ringing telephone that disturbs the recipient, rather than the content of the message.⁴⁷ The unsolicited fax to JC Hauling was more analogous to seclusion privacy than to secrecy privacy interests covered by the policy. To summarize up to this point, the federal statute’s language, “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine,” prohibits the means of communicating the message, in this case the ad itself; the actual content is all but entirely irrelevant.⁴⁸ But the advertising injury coverage spelled out in the policy, “ ‘publication’ ” of material “that violates a [person’s] right of privacy” more reasonably deals with the content of the communication that might contain information that violates a secrecy interest.⁴⁹

So it appears fairly certain that the federal statute’s drafters and the policy of insurance intended to use the key deciding term “privacy”

41. *Id.* at 652.

42. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 943 (citing 47 U.S.C. § 227(b)(1)(C) (2000)).

49. *Id.* at 942.

in altogether different ways.⁵⁰ The federal statute is intended to protect a seclusion interest by regulating the method of the communication of the advertisement to telephone users; it does not address its content.⁵¹ The American States insurance policy terms were contractually intended to cover the content of the message rather than its means of communication.⁵² The appellate court ruled that the advertising injury clause of the kind found in American States' policy does not cover the normal consequences of junk fax advertising.⁵³

But that was not the end of the inquiry. What of the policy clause excluding harm that is "expected or intended from the standpoint of the insured?" That question gave little pause to Judge Easterbrook. He quickly resolved the question about the meaning of the clause that excluded injury that "is 'expected or intended from the standpoint of the insured,' " in favor of American States.⁵⁴ He said that senders may be unclear about whether unsolicited faxes violate the federal law but they all must know that unsolicited faxes deplete the recipient's property, such as electricity, ink and paper, consume the attention of employees and tie up fax lines.⁵⁵ This knowledge triggers the policy's exclusion of injury that "is expected or intended from the standpoint of the insured."⁵⁶ This is so because the sender is surely aware that every junk fax invades the target's interest in labor hours, office supplies and maintaining an open fax line which can generate business prospects.⁵⁷ The appellate court ruled that American States did not have a duty to defend Capital Associates.⁵⁸ We think that this part of the case was properly decided.

C. CONCLUSION

So the practical question becomes: How do we deal with this drafting issue and avoid the quicksand of privacy law when writing

50. *Id.* at 942-43.

51. *Id.* at 943.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* Easterbrook states that Illinois law "requires insurers to defend when coverage is a close issue." The court did not think this was a close issue. *Id.*

advertising clauses in insurance policies? Easy. We cloak our language in terms of contract rather than privacy. Recall that Judge Easterbrook's opinion appears to be grounded in privacy law. But was it? No; we think the astute observer will notice that what Judge Easterbrook was doing, while discussing the parameters of privacy law, was really interpreting the implied contract between *American States* and *Capital Associates*.⁵⁹ We believe that *American States* was actually a contracts case, the terms of which dealt with privacy.

Now to turn to some backwoods-lawyer homespun advice on how to avoid this issue in the future. The best way is to draft the coverage clause in a contractual manner that spells out the particular type of privacy, secrecy and/or seclusion, and for that matter, any other interests of the insurer covered by the policy. This approach ensures that the often-confusing privacy rights issues confronted in *American States* never arise. Why is this so? Because it is well settled that parties may contract away their privacy interests in voluntary contract. When the contract governs the rights and duties concerning the use of private information, the contract has been found enforceable.⁶⁰ This is so because the privacy information is secured, protected, or waived in a voluntary transaction.⁶¹ Perhaps the leading case on this point is *Snepp v. United States*,⁶² involving a promise by a CIA agent not to publish any information about the Agency's intelligence-gathering activities.⁶³ Perhaps thinking that his information was so valuable to the public that the agreement was not enforceable, Snepp quit the CIA and published a book.⁶⁴ The Supreme Court said that the agreement was enforceable and that Snepp had to give his book profits to the CIA.⁶⁵ So the principles of contract law that surely apply to voluntary transactions

59. For more on this, see *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 801-02 (N.D. Ohio 1965). Here, a physician who gave a patient's health information to an insurance company was found liable on an implied contracts theory. *Id.*

60. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (enforcing confidentiality agreement does not offend the First Amendment); see *Anderson v. Strong Meml. Hosp.*, 151 N.Y. Misc. 2d 353 (1991) (breach of promise to not disclose HIV status of patient is actionable).

61. See generally Steven A. Bibas, Student Author, *A Contractual Approach to Data Privacy*, 17 Harv. J. L. & Pub. Policy 591, 605 (1994) (proposing that people can voluntarily contract away privacy issues).

62. 444 U.S. 507 (1980).

63. *Id.* at 507-08.

64. *Id.* at 507.

65. *Id.* at 515-16.

govern the terms of the coverage rather than the misty law of privacy. We so recommend.

III. PHILOSOPHICAL AND ECONOMIC ANALYSIS

This section of the paper will be devoted to a philosophical and economic analysis of several of the issues raised in the previous section. The perspective taken will be that of libertarianism.⁶⁶ This is the view that just law consists solely of enactments requiring that no one violate the person and legitimately-owned property of anyone else. Property is first carved out of nature through homesteading,⁶⁷ and then owes its legitimacy to any voluntary act such as trade, gifts, purchase, gambling, etc.⁶⁸

A. PRIVACY AND PROPERTY RIGHTS

How does this philosophy impact the issue of privacy? Libertarianism asks of all acts, to determine if they should be legal: do

66. Walter Block, *Libertarianism vs. Libertinism*, 11:1 J. of Libertarian Stud., 117 (Fall 1994); Walter Block, *Defending the Undefendable* (Fleet Press Corp 1976); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism* (2d. ed., Open Court 1989); Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Kluwer Academic Publishers 1989); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 Rev. of Austrian Econ. 88 (1990); N. Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12:2 J. of Libertarian Stud. 313 (Fall 1996); N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11:2 J. of Libertarian Stud. 132 (Summer 1995); N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 St. Mary's L. J. 1419 (1994); N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, 17 Reason Papers 61 (Fall 1992); Murray N. Rothbard, *The Ethics of Liberty* (N.Y. U. Press 1998); Larry J. Sechrest, *Rand, Anarchy, and Taxes*, 1:1 J. of Ayn Rand Stud. 87 (Fall 1999); Aeon J. Skoble, *The Anarchism Controversy in Liberty for the 21st Century: Essays in Contemporary Libertarian Thought* 77-96 (Tibor R. Machan & Douglas B. Rasmussen eds., Rowman and Littlefield 1995); Edward Stringham, *Market Chosen Law*, 14:1 J. of Libertarian Stud. 53 (Winter 1998-1999); Patrick Tinsley, *Private Police: A Note*, 14:1 J. of Libertarian Stud. 95 (Winter 1998-1999).

67. Hans-Hermann Hoppe, *The Ethics and Economics of Private Property* (available at <http://www.mises.org/etexts/hoppe5.pdf> (accessed May 7, 2006)); John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government* § 27 (originally published 1689) (available at <http://www.gutenberg.org/dirs/etext05/trgov10h.htm> (accessed May 7, 2006)).

68. See generally Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Collier Macmillan 1978).

