Who's Liable For Vendor's CAN-SPAM Violation?

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The CAN-SPAM act sets legal rules for commercial E-Mail and includes various provisions that apply to "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." [See CAN-SPAM Act, 15 USC Section 7701 et seq.]

CAN-SPAM provisions have an impact on numerous practices, including false or misleading header information, deceptive subject lines and opting out of receiving future emails.

Often companies employ a third party service to manage and/or operate email and other electronic marketing efforts on their behalf. If this occurs, what happens when someone sues the company for a violation of the CAN-SPAM Act? Is the company liable or can the company look to the third party responsible for sending emails or other electronic communication on its behalf?

According to a recent report, the Ninth Circuit Court of Appeals held that a marketing company had a duty to defend the company for which it handled electronic communications subject to CAN-SPAM because the "contract between the company and its vendor included an express indemnification for breaches of the CAN-SPAM Act."

This highlights the importance for companies who use such vendors to include clear indemnity obligations in the contract between the parties and other provisions related to transfer of risk.

Of course, contract provisions can be worthless if the company you deal with doesn't have the necessary assets, insurance or other resources to back up its obligations. As such, due diligence in this regard is advisable, as well as further contractual provisions related to insurance policies, coverage limits and other matters to ensure that indemnification for such violations is meaningful.

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