

A Court in NY Just Reined in the Definition of “Advertisements” Under the TCPA

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At the time this is published, all the rage in the TCPA realm right now is talking about the Supreme Court’s recent decision in Facebook. And it was clearly a critical and much needed decision. But there are still other important TCPA decisions being rendered, even if they aren’t getting a lot of attention right now. In fact, given what will be the inevitable decline in—if not demise of—ATDS claims given Facebook, staying on top of do-not-call rules and cases will be more important than ever.

Enter *Katz v. Focus Forward LLC*, 2021 U.S. Dist. LEXIS 66861 (S.D.N.Y. April 6, 2021), which addresses the meaning of “unsolicited advertisement” under the TCPA. Yes, *Katz* is a fax case, but *don’t gloss over it* because it has important implications for do-not-call claims as well.

Background and claims

In *Katz*, the defendant Focus Forward sent a fax to Katz seeking participants for market research studies and offering a \$150 “honorarium” to participants. The faxes did not offer to sell anything nor did they otherwise promote Focus Forward’s services (market research services). Yet the plaintiff sued, claiming the faxes were an “unsolicited advertisement” under the fax provisions of the TCPA, and sought to represent a nationwide putative class.

Focus Forward moved to dismiss, arguing that the faxes, even though unsolicited, were not “advertisements” because the faxes did not offer or promote “the commercial availability or quality of any property, goods, or services.” Instead, they were simply seeking participants for a market research survey, and that the \$150 “honorarium” offers were in exchange for the participants’ time.

The plaintiff opposed, relying on the Third Circuit’s recent decision in *Fischbein v. Olson Research Grp., Inc.*, 959 F.3d 559 (3d Cir. 2020). In *Fischbein*, the Third Circuit examined a nearly identical situation, in which the sender of the fax offered money in exchange for the recipient’s willingness to participate in a market research survey. The *Fischbein* court reasoned that a fax offering to *buy* services is as “commercial” as a fax attempting to *sell* services, and “a fax seeking a response to a survey is seeking a service,” so “[a]n offer of payment in exchange for participation in a market survey is a commercial transaction,” and therefore an advertisement. In other words, a fax is an advertisement even if you’re not trying to *sell* anything and are trying to *get* something from the recipient, provided the sender offers money in exchange.

As applied to *Katz*, the plaintiff pretty much just tried to convince the court to adopt and follow the Third Circuit’s decision in *Fischbein*. Fortunately, the district court didn’t bite and rejected the Third Circuit’s decision as “unpersuasive.” The key portion of the district court’s analysis is below:

The Faxes, like those at issue in *Fischbein*, are requests for information which “do not advertise the ‘commercial availability or quality’ of anything. Instead, **they seek to obtain something**—the [plaintiffs survey responses].” Because the Faxes seek to obtain something, they are “communicating the exact opposite of availability—[they are] stating a need for something not readily available to the sender.” Moreover, the mere fact that Defendant will profit from survey responses does not mean the Faxes are “transaction-oriented sales mechanisms,” and does not transform them into advertisements. Accordingly, the Faxes are not facially “advertisements” under the TCPA.

After rejecting Katz’s (and the Third Circuit’s) attempt to “create[e] a new definition of ‘advertisement,’” the court held that Focus Forward’s faxes were not advertisements, and granted its motion to dismiss.

Why is *Katz* important?

Katz is important for two reasons. First, it is an important rebuke of the Third Circuit’s decision in *Fischbein*. The Court’s decision in *Fischbein*—which was 2-1 with a compelling dissent—represented a radical departure from prior decisions regarding the definition of an “advertisement” and significantly expanded the definition. So, if you are of those relatively few entities for which the fax provisions of the TCPA are relevant, this decision is inherently impactful.

But *more importantly*, while *Katz* was a fax case, it is very important to other emerging issues under the TCPA, and specifically do-not-call claims. Since *Fischbein*, numerous plaintiffs have already started to argue that the same expanded definition of an “advertisement” should also apply to the definition of “advertisements” and “solicitation” under the do-not-call provisions of the TCPA.

Now, the definition of a “telephone solicitation” is a little bit different under the DNC rules, because it requires the call to be for the purpose of “encouraging the *purchase*” of property, goods, or services. But some plaintiffs are already trying to twist the already distorted logic of *Fischbein* into arguing that this definition includes calls where the *caller* is the one trying to “purchase” the property, goods, or services from the called party. Even worse, the DNC regulations also use the same definition of an “advertisement” as the fax provision when discussing the type of prior express written consent necessary for telemarketing calls.

This is clearly a silly argument because the DNC rules were designed to regulate telemarketing—*i.e.*, a caller attempting to *sell* something to the called party. But bad arguments have a way of gaining traction under the TCPA (see *Marks v. Crunch San Diego*).

Consider: If the average person looks up a new doctor online and calls to schedule an appointment, is that person making a solicitation or introducing an “advertisement”? Clearly not. What if a person calls a restaurant to make a reservation for a table? Obviously, no one would reasonably think of that as telemarketing or an “advertisement” either. The callers are trying to *obtain* something *from* the called party and not sell anything. Yet, because the callers would be “offering” their money in exchange, these calls are at least an “advertisement” under the distorted logic of *Fischbein*. And the calls are still encouraging the “purchase” of a good or service, even though it is the *callers* who are trying to make the purchase. See why *Fischbein* is not only wrong, but dangerous?

These aren’t just ridiculous hypotheticals.

TCPA defendants are already seeing these arguments made. For example, there has been an explosion of cases over the past year against real investment investors and brokers who contact homeowners *not* in an attempt to sell any property to them, but rather in an attempt to *buy* from the homeowners. All of these plaintiffs are uniformly trying to argue that these calls are “solicitations” and subject to the TCPA’s DNC rules and regulations.

The court’s decision in *Katz* is an important-and well-reasoned-repudiation of the Third Circuit’s decision in *Fischbein*. And as DNC claims continue to surge, this issue will begin to gain larger significance to TCPA litigation nationwide.

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