

## Blog Entry: New Year, New TCPA Decision

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Source: Array

January 3, 2017. The first business day of the new year. America's engine revs up again. The scent of fresh coffee fills the air. Court is in session, and a new TCPA decision is issued.

The Northern District of Ohio may well have the distinction of rendering this year's first, and it likely prolonged one defendant's holiday cheer.

Plaintiff was a chiropractic clinic in West Palm Beach. It claimed to have received "at least two" unsolicited faxes urging it to buy various products from Defendant Vitaminerals ("VM"), including "BioFreeze," a topical analgesic manufactured by Defendant Hygenic Corporation. BioFreeze was "prominently featured in the faxes," but other healthcare products sold by VM were also listed.

Plaintiff sued, alleging violations of the Telephone Consumer Protection Act and common law conversion, and sought certification of a plaintiff class consisting of

each person that was sent one or more telephone facsimile messages promoting the commercial availability of BioFreeze or the commercial availability or quality of property, goods, or services offered by "VM Medical/Vitaminerals," but not stating on its first page that the recipient may make a request to the sender not to send any future ads and that failure to comply with such a request within 30 days is unlawful.

Hygenic moved to dismiss for failure to state a claim, and the court granted it - *with prejudice* - apparently deeming Plaintiff's pleading irremediably defective.

Why? Here's the Court's recitation:

The issue raised by Hygenic's Rule12(b)(6) Motion is whether the Amended Complaint sufficiently states a claim pursuant to which Hygenic may be held liable under the TCPA as a "sender" of the faxes *despite the absence of any factual allegations* indicating that it either transmitted the faxes, authorized Vitaminerals to do so, or even knew of the faxes. In other words, the issue is whether the TCPA imposes strict liability on a manufacturer whose product is featured in an unsolicited fax *despite the lack of any involvement* by the manufacturer in the transmittal of the fax. (Emphasis added.)

When you put it that way, what more needs to be said?

Plenty. The Court rejected Plaintiff's arguments that Hygenic was at fault because "the faxes were sent on its behalf" and Hygenic "benefitted from the advertisements because the ads promoted its product, BioFreeze." And it batted down Plaintiff's assertion "that the fact that VM sells BioFreeze creates a 'reasonable inference' that VM and Hygenic have a business relationship." The faxes, it found, were ads for VM, not Hygenic: "VM's faxes urge the recipient who wishes to purchase BioFreeze at a special price to contact VM; they include VM's Ohio address and its toll-free number;

and they list healthcare products not manufactured by Hygenic that VM purports to sell ... Thus, the faxes hold out VM as a seller of products ... [and] VM ... fits the bill of 'sender'" as defined in the TCPA.

As for Plaintiff's contention that Hygenic is liable simply because it manufactured one of the products appearing in the ad? "Absurd," the court declared. "If such a broad reading of Plaintiff's definition of 'sender' were applied by courts, entities could engage in 'sabotage liability.'" What is sabotage liability?

By way of illustration, it would allow a rabid Tampa Bay Buccaneers fan - with a rhino helmet, red face paint, and an undying devotion to the organization - to trigger per se liability for the organization under the TCPA by gratuitously, and without directive from or notice to the organization, promoting season ticket sales via fax. The same could be true of a random individual in Boston, mind brewing with *scienter*, who works to implicate the New York Yankees by advertising their season tickets. Universal liability for complete inaction was not contemplated by Congress in passing the TCPA and does not appear to have been contemplated by the FCC in crafting and interpreting its regulations.

*Rhino helmets? Red face paint? Brains foaming with scienter? Who said the TCPA was dry and technical?*

The court proceeded to dismiss Plaintiff's Amended Complaint against Hygenic. But why *with* prejudice? Because that pleading was Plaintiff's third against Hygenic (twice in Ohio, once before that in Florida), from which the court deduced that Plaintiff "lacks sufficient factual support for such a claim, not because it did not artfully plead."

And so Hygenic ushered in 2017 extricated from this case. But not VM. It remains a defendant. And if discovery between Plaintiff and VM were to reveal that Hygenic authorized VM to transmit the faxes at issue, then Plaintiff could seek leave to amend its complaint yet again in an effort to join Hygenic in this lawsuit.

The case is *Comprehensive Health Care Systems of Palm Beaches, Inc. v. Vitaminerals VM/Orthopedics, Ltd. et al.*, United States District Court, Northern District of Ohio, case no. 5:16CV2183.