CLIENT ALERTS & INSIGHTS

TCPA Fax Class Action Doomed: Fax Number on Business Card Constitutes Consent

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Since the enactment of the Telephone Consumer Protection Act ("TCPA"), the FCC has long held that persons who knowingly and voluntarily release their telephone numbers have provided prior express consent to be called. But what about faxes? Despite conventional belief, faxes are still a popular way of communicating and advertising products or services, particularly with respect to healthcare and pharmaceutical products. But the fax provisions of the TCPA are a little bit different that the provisions dealing with telephone calls.

To summarize (and overly-simplify) the fax provisions, the TCPA generally prohibits sending *unsolicited* fax advertisements unless the sender has an established business relationship with the recipient. Even when unsolicited fax advertisements may be sent, the faxes must have "opt-out" language that meets some particular requirements. Failure to comply with these provisions may result in liability of up to $1,500 *per fax* sent in violation of the statute. These damages can quickly rack up even when one person files suit, and can be particularly crippling in class action litigation.

In contrast, *solicited* faxes are not subject to these same requirements. A fax is deemed solicited when recipients give their "prior express invitation or permission, in writing or otherwise," for the fax. As a best practice, consent should always be obtained in writing. But that's not always possible as a practical matter. Fortunately, a recent decision by the Third Circuit emphasizes a commonsense approach in determining when a fax is solicited. *Physicians Healthsource, Inc. v. Cephalon, Inc.*, No. 18-3609, 2020 U.S. App. LEXIS 9782 (3d Cir. March 30, 2020).

In *Physicians Healthcare*, a doctor of the plaintiff-healthcare group met with the representatives of the defendant-pharmaceutical provider to discuss various pharmaceutical drugs. In the meeting, the doctor provided his business card to the defendant's representatives, and the business card contained his fax number. The defendant then sent several fax advertisements to the plaintiff.

The plaintiff sued, claiming that the faxes were unsolicited under the TCPA, and that even if they were solicited, the faxes failed to comply with the solicited fax rules. Boiled down, the issue was whether the doctor's act of providing his business card with his fax number gave the defendant "prior express invitation or permission" to send the faxes; *i.e.*, whether that act made the faxes solicited.

The district court answered "yes," entering summary judgment in favor of the defendant. The Third Circuit affirmed. The Third Circuit noted that it is well established that a consumer's "voluntary provision" of a telephone number constitutes "prior express consent" to receive telephone calls at that number. While the portion of the TCPA dealing with faxes is phrased a little differently, instead requiring "prior express invitation or permission," the Third Circuit held that there was no functional difference between these expressions-what mattered is that the doctor knowingly and voluntarily

provided his business card to the defendant for the purpose of communication, and that the business card contained the faxes. And boom. The faxes were therefore solicited.

The plaintiff alternatively argued that even if the faxes were solicited, they did not comply with the FCC's solicited fax rules. Frankly, it's odd that plaintiffs continue to talk about the former "solicited fax" rules, because those rules were held invalid back in 2018 and the FCC formally eliminated them in 2019. So, the Third Circuit made short work of that spurious argument as well, and affirmed judgment in favor of the defendant. Defense win!

The outcome of *Physicians Healthcare* is a commonsense outcome for what it means to provide consent (or to be "solicited" in the TCPA-fax lingo) for a communication. But companies that engage in fax advertising-or engage third-party vendors for fax advertising-should always try to follow best practices to avoid litigation in the first place, including careful consideration to where faxes are sent, the contents of the fax, and (if applicable) the type of consent or permission necessary, relative to the TCPA's requirements to ensure compliance.

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