



“Pretext” Theory as Applied to Unsolicited TCPA Fax Advertisement Claims

IN SHORT

The Situation: The United States Court of Appeals for the Third Circuit recently considered a "pretext" theory as applied to unsolicited fax advertisement claims under the Telephone Consumer Protection Act ("TCPA").

The Result: The court held the plaintiff did not state a claim for a TCPA junk fax violation even though the plaintiff claimed that the fax was a "pretext" to providing other advertising when the recipient visited the website identified in the fax.

Looking Ahead: This ruling may help defendants confronted with TCPA claims asserting that a non-advertisement fax was really a "pretext" for other types of advertising.

The plaintiff in the case, a professional corporation, had received via fax a satisfaction survey from the defendant. *Robert Mauthe, M.D., P.C. v. National Imaging Assocs., Inc.*, No. 18-2119 (3d Cir. 2019). The plaintiff claimed that it did not have an established business relationship with the defendant. The plaintiff also claimed that the fax was an unsolicited fax advertisement because it contained the defendant's name, promoted the quality of its services, and referred its recipient to a website to which the plaintiff could send responses to questions in the survey. The plaintiff also asserted that the fax was "a pretext to increase awareness and use of Defendant's healthcare management services and to increase traffic to" the defendant's website. The district court had dismissed the plaintiff's claim.

The TCPA provides that it is "unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement[.]" 47 U.S.C. § 227(b)(1)(C). An unsolicited advertisement, in turn, means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5).



The Third Circuit has made clear that plaintiffs cannot cry 'pretext' based on something as innocuous as providing a website address.



Relying on an earlier decision, the Third Circuit explained that "[t]o be an ad, the fax must promote goods or services to be bought or sold, and it should have profit as an aim." (Quotation and citation omitted.) The Third Circuit also explained that "[t]hough an advertisement need not be as explicit as 'buy this product from us,' at a minimum for the sending of the fax to violate the TCPA it must directly or indirectly inform the recipient that the sender or some other entity sells something of value." Moreover, "the fax either must (1) notify a potential buyer that he or she can purchase a product, goods, or services from the sending entity or perhaps another seller ... or (2) induce or direct a willing buyer to seek further information through a phone number, an email address, a website, or equivalent method for the purpose of making a purchase ..." The Court further explained:

Thus, the fax must convey the impression to its recipient that a seller is trying to make a sale to him. We believe it is important to limit the TCPA to promotion of the sale of goods or services lest any unsolicited fax that a commercial entity sends that contains a phone number or website address conceivably could become an 'unsolicited advertisement,' a result that would be inconsistent with the statutory definition of that term.

In affirming the dismissal of the TCPA claim, the Third Circuit rejected the plaintiff's assertion that the complaint alleged that the defendant sold healthcare management services: "We fail to see how such allegation had any relevance on how the fax would be perceived by its recipients—a recipient's outside knowledge that a sender sells something does not transform every fax sent by such sender to a recipient with such knowledge into an advertisement." The court also noted that the fax explicitly informed the plaintiff that it should visit the website to complete the satisfaction survey, not to make a purchase, and the fax "did not contain information that would induce a potential buyer to visit the website." Moreover, "asking a recipient in a survey whether a sender's services meet a standard is not the same thing as claiming the services meet that standard."

Finally, the court considered—and rejected—the plaintiff's pretext theory, i.e., that "the fax was a pretext for commercial solicitation:"

To support this contention, [plaintiff] alleges that when [plaintiff] visited the website listed in the fax, he was subjected to numerous advertisements about defendant's services. We fail to see how this circumstance established that the fax survey sent to him was a pretext for more advertising. By Mauthe's theory, any fax sent by defendant, for any purpose, as long as it contains defendant's website address, could become a "pretext" to more advertising. We will not adopt a standard under the TCPA which effectively would construe the inclusion of a website address in a fax as de facto advertising.

We want to make clear that we do not suggest that we endorse the pretext theory of liability under TCPA. We think that in almost all cases, a recipient of a fax could argue under the pretext theory that a fax from a commercial entity is an advertisement. The pretext theory, unless closely cabined, would extend TCPA's prohibition too far. (Emphasis in original.)

In so ruling, the Third Circuit has made clear that plaintiffs cannot cry "pretext" based on something as innocuous as providing a website address.

TWO KEY TAKEAWAYS

1. This decision places limits on the "pretext" theory that plaintiffs' counsel often assert in cases.
2. Despite this favorable ruling, entities that use faxes as a means to communicate with clients must remain aware of their obligations under the TCPA.



J. Todd Kennard
Columbus



William F. Dolan
Chicago

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[Current Trends:
Discovery of
Electronically](#)



[IRS Summons for
Law Firm Client
Data Is](#)



[Jones Day Global
Privacy &
Cybersecurity](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. One Firm WorldwideSM

Disclaimer: Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2019 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113