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Great News!: Third Circuit Court of Appeals Flat Rejects TCPA "Pretext" Theory– Holds Satisfaction Survey not Advertisement

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It sometimes seems that identifying "advertising" content in a text, call or fax remains as ephemeral in TCPAWorld as identifying obscenity was to the late Justice Potter Stewart.

It is true that many messages may have a "dual purpose"; content that appears to be informational but is really driven to make sales. And with $500.00 a call on the line, TCPA Plaintiffs are quick to cry "pre-text" no matter how innocuous the content of a message from a business might be.

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Indeed, the TCPAWorld climate has grown so inhospitable to business messages that a recent petition to the FCC by the Insights Association actually asks to clarify that: (1) communications are not presumptively "advertisements" or "telemarketing" under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations; (2) the presence in a communication, or some other ancillary document or webpage, of a marginal element that might arguably be considered advertising does not convert the communication into a "dual-purpose" communication; (3) survey, opinion, and market research firms are not subject to the Commission's vicarious liability regime as articulated in Dish Network; and (4) survey, opinion, and market research studies do not constitute goods or services vis-à-vis the survey respondent, and are not transformed into goods or services merely because they include some nominal inducement to participate." The FCC has not yet ruled on the IA petition but, interestingly enough, the Third Circuit Court of Appeal essentially just did.

IA is going to like the results.

In *Mauthe v. Nat'l Imaging Assocs.*, No. 18-2119, 2019 U.S. App. LEXIS 11232 (3rd Cir. April 17, 2019) the Third Circuit Court of Appeal held squarely that a fax containing a survey regarding a customer's experience with a business is not a solicitation or advertisement, even if it makes reference to the quality of the services offered by the business or references a website where the businesses' products and services are promoted. In reaching that conclusion the Court expressly rejects the "pretext" argument—i.e. that the fax was sent in the hopes of drumming up business even though it did not contain an advertisement— stating: "[w]e 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."

This is big news so let's break it down.

The Plaintiff in *Mauthe* had received a satisfaction survey relating to the quality of the Defendant's services, via fax. The fax had asked Plaintiff whether he agreed that the Defendant's services were "easy to access," "effective," "convenient," "provider friendly," and "efficient." Despite these facts, the Court refused to bite on Plaintiff's "pretext" argument. The fax sought Plaintiff's opinion on its services and nothing more— "the fax asked if the recipient agreed with those descriptions of defendant's services… [but] 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." Thus, the Court determined, the fax was not advertising under the statutory definition. (Unrelated—would you

agree that TCPAWorld.com content is insightful, timely, and useful? Just a survey.)

The *Mauthe* fax also relayed the Defendant's website information, where the Plaintiff alleged he encountered advertisements for the Defendant's goods and services. This, Mauthe argued, surely demonstrates that the fax was merely a "pretext" to drive traffic to the Defendant's website. The Third Circuit panel was unimpressed. By that theory, the court reasoned, "any fax sent by defendant, for any purpose, as long as it contains defendant's website address, could become a 'pretext' to more advertising." But the Court wasn't done yet. So as to be express as possible, the court relays:

> 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.

And just for good measure:

> 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.

Wow! That is exactly the relief sought in the IA petition, and very welcome news for survey senders who often worry that their requests for feedback on their services will be treated as *de facto* advertisements. And while *Mauthe* does not offer TCPAWorld a bright line test to identify advertisements, per se, it does give a very clear statement that *not everything* is an advertisement.

Most importantly, under *Mauthe,* the inclusion of a website or branding element alone is not enough to convert an informational, transactional, or survey message into a piece of telemarketing "by pretext." This appears to be the flip side to the same "common sense" coin first recognized in *Chesbro*—just as common sense dictates that a non-telemarketing message might *sometimes* be sent for the ultimate goal of selling a good or service, common sense also dictates that a business sometimes sends messages for purposes other than marketing. Nice win!

One last note, the Third Circuit Court of Appeal appears to enunciate a new class action pleading standard that I've need seen before—suggesting that a Plaintiff must identify specifically other individuals receiving a challenged transmission to state a claim.

Here's the language: "However, even though the complaint makes generalized class action allegations, it does not specifically identify a single recipient of the fax that Mauthe received without solicitation, by a recipient other than Mauthe. If the complaint had included explicit factual allegations of other identified individuals receiving this fax survey without solicitation that circumstance might have been material to our analysis here, but it did not make such explicit allegations. Thus, the theory of liability based on a nonobvious promotion of defendant's services through the sending of multiple faxes is a mere conclusory statement rather than a factual allegation."

This seems to suggest that the Court would not accept Plaintiff's conclusion that the faxes were sent as a "pretext" because Plaintiff does not specifically identify anyone else other than himself who received the fax. That is very interesting as I am unaware of any other decisions requiring a Plaintiff to specifically identify other class members facing the same conduct before accepting "general" class allegations as true. I'll keep an eye on this for you TCPAWorld.