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Equipment Failure: Eastern District of Pennsylvania Denies Certification to TCPA Class Involving Unsolicited Faxes Because TCPA Applies Only to Standalone Fax Machines

In *Fischbein v. IQVIA, Inc.*, a case involving alleged violations of the Telephone Consumer Protection Act (TCPA), the federal district court in the Eastern District of Pennsylvania denied plaintiff Richard E. Fischbein's motion for summary judgment on his burden on both ascertainability and predominance requirements.

Fischbein's class action suit alleged that the defendant, IQVIA, Inc., a research and analytics company, sent unsolicited advertisements to Fischbein and more than 25,000 other healthcare professionals in exchange for points that could be redeemed for rewards.

IQVIA argued that the proposed class was not ascertainable, because there was no way to determine whether putative class members received the faxes at issue on traditional, stand-alone fax machines. Fischbein, however, argued that the TCPA applies to all faxes, no matter how received.

The court held that the plain language of the TCPA – which prohibits the use of a facsimile machine to send an unsolicited advertisement – clearly distinguishes between a facsimile machine and the type of equipment that receives it, limiting receipt of the advertisement to a "telephone facsimile machine." The receiving equipment must "(1) receive the facsimile transmission, (2) have the capacity to print the fax 'onto paper'" (quoting TCPA § 227(a)(3)). Accordingly, the court held that individuals who receive unsolicited advertisements on a stand-alone fax machine, which, under the TCPA, is a "telephone facsimile machine," are not protected by the TCPA.

While relying solely on the plain language of the statute, the court noted that numerous courts have interpreted the TCPA differently. The court cited *Counseling, Inc. v. Amerifactors Fin. Grp., LLC*, whose reasoning the court followed, and a declaratory ruling in *In the Matter of Amerifactors Fin. Grp., LLC*, bolstered its holding. The court also cited its recent holding in *McLaughlin Chiropractic Assocs. v. McKesson Corp.* – that district courts should interpret the TCPA "as courts traditionally do under ordinary principles of statutory construction, rather than an agency's interpretation."

Because receipt of an unsolicited fax advertisement on a "telephone facsimile machine" is not limited to stand-alone fax machines, the court found that Fischbein could not demonstrate that there was a reliable and administratively feasible mechanism for identifying class members on stand-alone fax machines. Yet, based partly on the testimony of Fischbein's class members that health care providers received faxes by way of a traditional, stand-alone fax machine, the court found that the finding could not be accomplished through declarations of potential class members. Fischbein's proposed method of identifying class members, as Fischbein suggested, because the Third Circuit has held that "[a]ffidavits to identify class members or a method to weed out unreliable affidavits, will not be accepted as a method for determining class membership." As a result, Fischbein could not establish ascertainability.

For similar reasons, Fischbein failed to satisfy Rule 23(b)'s predominance requirement. The court found that the type of equipment on which each proposed plaintiff received the faxes at issue was not a predominant factor in the claims.

Although the Third Circuit has not yet addressed whether the TCPA's protection applies to faxes received via online fax services, *Fischbein* arms defendants in the Third Circuit with well-developed arguments in matters involving unsolicited faxes.

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