



Jul 19, 2024

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Authors:
[Julia E. Browning](#)

Fourth Circuit Revives Claim that Faxes Promoting Free Webinars are “Unsolicited Advertisements” Under the TCPA

Last month, the Fourth Circuit in [Family Health Physical Medicine, LLC v. Pulse8, LLC, et al.](#) revived Family Health’s putative class action, finding that it plausibly alleged facts sufficient to state a claim that the defendant’s fax invitation to attend a free webinar was an “unsolicited advertisement” under the Telephone Consumer Protection Act of 1991 (the TCPA).

In doing so, the Fourth Circuit revisited its recent holding in [Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC](#) that an “unsolicited advertisement” does not include offers or solicitations with no commercial component or purpose. Under that reasoning, a fax promoting a free webinar would seem not to fall within the TCPA’s definition of an “unsolicited advertisement.” However, because Family Health’s complaint alleged that the webinar was being used to market Pulse8’s healthcare coding technology, the court drew a reasonable inference that Pulse8 sent the fax hoping to persuade recipients to use its products. As a transmission of “information with a commercial nexus to the sender’s business,” the fax was therefore plausibly alleged to qualify as an advertisement.

To survive a motion to dismiss, the Fourth Circuit continued, Family Health was not required to plead facts alleging the specific products or services that were promoted. Rather, it was reasonable to infer that a company that invites you to a free webinar intends to promote its products during the event. Nor did the Fourth Circuit find the complaint deficient because it lacked allegations about Pulse8’s motive or purpose, given that “[u]nlike neighboring sections of the same statute, the TCPA’s definition of ‘unsolicited advertisement’ makes no ‘reference to the sender’s purpose.’” Ultimately, the Fourth Circuit applied the test it adopted in *PDR*: whether the fax itself, directly or indirectly, indicates to a reasonable recipient that the sender is promoting or selling some

good, service, or property.

In addition, that Family Health could not accept the invitation to attend the free webinar without providing its contact information was further evidence that the fax was an advertisement because Pulse8 then had the ability to send future advertising and sales promotions to Family Health.

Finally worth noting is that Pulse8's offer in the fax of the chance to win a gift card upon completion of a survey was not alone sufficient to qualify the fax as an "unsolicited advertisement." Family Health did not allege that the gift card was a good produced by Pulse8, nor that Pulse8 is in the business of selling Amazon gift cards or buying survey data. As a result, the mere chance to win a gift card did not automatically convert the fax into an "unsolicited advertisement."

This decision, which is consistent with principles adopted in the Second, Sixth, and Seventh Circuits, provides important lessons for TCPA practitioners, namely, that faxes with a commercial nexus to the sender's business, regardless of the sender's motive, will likely be considered "unsolicited advertisements" subject to the TCPA.

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