

Telephone and Texting Compliance News: Litigation Update — Third Circuit Shreds Informational Fax Case

January 31, 2023 | Article | By [Joshua Briones](#), [Esteban Morales](#)

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The Third Circuit delivered bad news to Dr. Robert Mauthe while he was making his latest litigation round through the appellate court. The case is *Mauthe v. Millennium Health LLC*, No. 20-2265, 2023 U.S. App. LEXIS 1267 (3rd Cir. Jan. 19, 2023) and was filed after the defendant, a company operating labs that provide drug testing and medication monitoring services, allegedly sent Dr. Mauthe (a customer) a one-page fax about a free educational seminar.

The free seminar would “highlight national trends in opioid misuse and abuse...and discuss the role of medication monitoring as a valuable tool that provides objective, actionable information during the care of injured workers.” *Millennium Health*, 2023 U.S. App. LEXIS 1267 at *2. The fax did not discuss specific services offered by the defendant or include pricing information, discount offers, coupons, or product images. Nor did the actual seminar promote goods, services, or property for sale. The sender also did not follow up with registrants or attendees. Nonetheless, Dr. Mauthe sued under the TCPA’s fax provisions claiming the fax was an unsolicited advertisement.

Though the defendant was unsuccessful in having the case dismissed at the pleading stage, the district court limited discovery to “whether the fax was an advertisement or a pretext, i.e., whether it was part of a larger advertising scheme.” *Id.* at *4. And discovery confirmed that the fax did not violate the TCPA.

“[N]o reasonable recipient...could view [the fax] as promoting the purchase or sale of goods, services or property,” explained the Third Circuit. *Id.* at *6. The fax:

- did not discuss goods, services, or property;
- did not contain testimonials, product images, or coupons; and
- did not contain contact information to purchase a product or service sold by the defendant

Id.

Nor was the fax a “pretext” for advertising, assuming that test even applied. This was so because the seminar, in fact, did not advertise products, services, or property. *Id.* at *7. As a result, concluded the Third Circuit, summary judgment in favor of the defendant was the correct result.

The case serves as an unfortunate reminder that professional plaintiffs continue to target even innocuous faxes. While consent remains the best protection, senders can also safeguard by providing enterprising plaintiffs little to work with — here, for example, the fax did not include pricing and was simply informational. Faced with a professional plaintiff with a substantial history of TCPA litigation (which the court noted), the Third Circuit had no trouble tossing this case.

Authors



Joshua Briones, Member / Managing Member, Los Angeles Office

Joshua Briones is a commercial litigator who defends consumer class actions for Mintz. He's represented clients in a wide range of industries, including financial services, life sciences, manufacturing, and retail, in cases involving false advertising, unfair trade practices, and other claims.



Esteban Morales, Member

Esteban Morales is a Mintz litigator who handles class action defense and financial services litigation for companies of all sizes. He defends clients targeted in class action suits, and the results include dismissals at the pleading stage. Esteban practices in Mintz's Sports Law Practice.

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