Published on *The National Law Review* https://natlawreview.com

Survey Fax Neither Unsolicited Advertisement nor Pretext

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Does a "faxed invitation to participate in a market research survey in exchange for money constitute an 'advertisement' [or the pretext of one] under the Telephone Consumer Protection Act…and [its] implementing regulations…[?]" In a case of first impression in the courts of the Second Circuit, Judge Paul A. Crotty says "NO."

In *Bruce E. Katz, M.D., P.C. d/b/a Juva Skin and Laser Center v. Focus Forward LLC*, 2021 U.S. Dist. LEXIS 66861, Case No. 20-cv-2897 (PAC), United States District Court for the Southern District of New York, April 6, 2021, the plaintiff professional corporation received two faxes from the defendant, a firm that "conducts market research through surveys to collect information for its clients." The faxes sought "participants for market studies" and invited the "recipients to share their opinions with Defendant in exchange for a $150 'honorarium.'" As Judge Crotty's opinion noted from the start, the faxes "do not offer to sell anything to the recipients, nor do they promote the quality of Defendant's market research services."

Nevertheless, the plaintiff brought a class action, contending that the faxes were "unsolicited advertisements" in violation of the TCPA. The plaintiff's leading legal theory was that the faxes were advertisements because "they are Defendant's offers to 'buy' a service from Plaintiff" and then "sell[] the data collected from this service to its clients…." Further, the faxes "promot[ed] a service to be bought [(answering surveys)] with profit as its aim." Thus, promoting a service to be bought = unsolicited advertisement.

As expected, defendant moved to dismiss, arguing that the faxes were "neither facially 'advertisements' nor a pretext for later advertisements." After reviewing the statutory and regulatory definitions of "advertisement," the Court unequivocally agreed.

As to whether the faxes were "facially" advertisements, Judge Crotty declined to adopt a new definition of the term that "any material advertising the availability of a commercial transaction is an "advertisement.'" Rather, there must be "'material advertising the commercial availability or quality of property, goods or services.'" Requests for information which seek survey responses are "'communicating the exact opposite of availability – [they are] stating a need for something not readily available to the sender.'" Further, the fact that Defendant will "profit from survey responses…does not transform them into advertisements." Citing among other authorities the *Exclusively Cats* decision which TCPAWorld analyzed a year ago, Judge Crotty "joined the bulk of authority faithful to the statute's text and the FCC's regulations" in finding that the faxes were not

facially advertisements under the TCPA.

Although not pled by the plaintiff, the Court also addressed whether the faxes were pretexts for unsolicited advertisements – a point that defendant had addressed in moving to dismiss. Judge Crotty first noted that the plaintiff had failed to adequately plead that theory. In any case, despite the pleading defect, the Court found that plaintiff would have no basis for claiming pretext because it did not "suggest that Defendant intended to use the Faxes to advertise anything for sale to Plaintiff nor to level future targeted advertising at Plaintiff based on its responses to survey questions."

So in this decision of first instance in the Second Circuit, the words of the statute and regulation and the weight of precedent prevailed. Since any amendment would be futile, case dismissed with prejudice.

National Law Review, Volume XI, Number 98