

Second Circuit Holds Fax Surveys Offering \$ for Participating Are Not Unsolicited Advertisements Under the TCPA

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TCPAWorld has seen this question before. Does an unsolicited faxed invitation to participate in a market research survey in exchange for money constitute an “unsolicited advertisement” under the Telephone Consumer Protection Act of 1991 (the “TCPA”)?

Last year a 2-1 decision of the United States Court of Appeals for the Third Circuit, in *Fischbein v. Olson Research Group*, said such a fax [constituted such an advertisement](#).

Now comes the neighboring Second Circuit in *Bruce Katz, M.D, P.C., d/b/a Juva Skin and Laser Center v. Focus Forward, LLC*, 2022 U.S. App. LEXIS 383, Case No. 21-1224-cv, United States Court of Appeals for the Second Circuit, January 6, 2022, and answers the question with a resounding “no.”

Focus Forward sent the Katz professional corporation two faxes, one addressed to “Nurse Practitioners” and the other to “Nurses and Physicians Assistants.” Each explained that Focus was “currently conducting a market research study” and “offer[ed] an honorarium of \$150 for [the recipient’s] participation in a . . . telephone interview.” Katz brought a TCPA class action alleging violations of the TCPA because the faxes contained an “unsolicited advertisement.” Focus argued that they did not and the District Court agreed, dismissing the case. Katz appealed, urging the Second Circuit to follow the logic of its brethren in the Third.

But his plea fell on deaf ears with Judges Cabranes, Lohier and Lee. For starters “[i]n interpreting the TCPA, ‘[w]e begin with the language of the statute. If the statutory language is unambiguous, we construe the statute according to the plain meaning of its words.’ According to the statute, ‘unsolicited advertisements’ are only those materials ‘advertising the commercial availability or quality of any property, goods, or services.’ Faxes that seek a recipient’s participation in a survey plainly do not advertise the availability of any one of those three things, and therefore cannot be ‘advertisements’ under the TCPA.”

The panel dismisses the idea – albeit raised by neither party – that money could constitute “property” for purposes of the TCPA, noting, among other reasons, “[i]t would be a strange for the statute to speak of the ‘purchase or rental of, or investment in’ money.”

As for the argument that the Katz faxes might advertise the availability of a “service” (i.e., of the recipient’s participation in the survey), the Court observes that “contorts the ordinary meaning of the statute too far.” The recipient may or may not participate in the survey and the sender does not know what will happen in that regard. Thus, “the faxes... cannot reasonably be construed as advertising the availability of such a service.”

The Court shoots down the logic of the Third Circuit majority’s reliance on “an encyclopedia definition of what constitutes a ‘commercial transaction’ to argue that ‘an offer of payment . . . transforms the . . . market surveys into advertisements,’ rather than focusing on the definition of ‘advertisement’ that the TCPA and FCC regulations provide.”

The panel finds that in doing so “the opinion ‘effectively rewrit[es]’ the statute to prohibit communications that advertise ‘the availability of *an opportunity* . . . to exchange goods or services.’ But the statute does not prohibit communications advertising the availability of such ‘an opportunity.’ Nor does it prohibit communications advertising the availability of transactions that are ‘commercial in character,’ as the *Fischbein* majority suggests. It specifically prohibits communications advertising the “availability . . . of any *property, goods, or services*.” As the *Fischbein* dissenter explained, faxes seeking survey participation from a recipient “communicat[e] the exact opposite of availability—... stating a need for something not readily available to the sender.”

Finally, the Court *sua sponte* dispenses with the prospect that the surveys offered were a “pretext” for some other advertisement, even though the argument was not raised by either party.

So in this case, no cause for complaint under the TCPA.

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