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Telephone and Texting Compliance News: Litigation Update — Amerifactors Alive and Well in the Ninth Circuit; Trim v. Reward Zone's Aftershocks

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Amerifactors Alive and Well in the Ninth Circuit

Despite changes in technology, fax-based TCPA class actions and related jurisprudence continue to march on. And just last month, the US Court of Appeals for the Ninth Circuit issued a gem of a decision (albeit unpublished) with major class action ramifications — *True Health Chiropractic, Inc. v. McKesson Corp.*, Nos. 22-15710 and 22-15732, 2023 U.S. App. LEXIS 28346 (9th Cir. Oct. 25, 2023). In *McKesson*, the Ninth Circuit was tasked with reviewing a grant of summary judgment for the plaintiff and the district court's decertification of a class.[1] While the appeals court affirmed the summary judgment decision, victory proved to be fleeting for the plaintiff.

The Ninth Circuit first concluded that the district court did not err in granting summary judgment for the plaintiff on the issue of consent because neither a registration form nor an end-user license agreement established the plaintiff's consent. "Nothing about the form would suggest to a reasonable consumer that, upon submitting the form, he or she had agreed to receive faxed advertisements." Nor did the end user license agreement explicitly discuss consent for faxed advertisements.[2]

The real eye-opener came in the second half of the opinion, affirming the

decertification of the class. Back in 2019, the Federal Communications Commission issued its *Amerifactors* declaratory ruling, concluding that the TCPA does not apply to faxes received through an online fax service (such as a fax delivered as an email). *In re Amerifactors Fin. Grp., LLC Pet. For Expedited Declaratory Ruling*, 34 FCC Rcd. 11950 (2019). While litigants have debated its application and force within the class action context, the defendants in *McKesson* notched a huge victory for defendants facing TCPA fax class actions with the Ninth Circuit holding that (1) the declaratory ruling was binding and (2) it resulted in the inability to certify a class.

With respect to the binding nature of the ruling, the Ninth Circuit explained:

First, it does not matter that *Amerifactors* was issued by the Commission's Consumer and Governmental Affairs Bureau, rather than the full Commission [because] Congress authorized the Commission to "delegate any of its functions" [and o]rders issued on delegated authority "have the same force and effect" as orders of the full Commission…. *Amerifactors* is one such order….

Second, *Amerifactors* is a "final order" under the Hobbs Act. Orders of the Commission are final for the purposes of the Hobbs Act "if they impose an obligation, deny a right, or fix some legal relationship…."…And the ruling fixes a legal relationship by clarifying that an online fax service is not a "telephone facsimile machine" and "thus falls outside the scope of the TCPA's statutory prohibition."[3]

Not only was the ruling binding, it also "applies retroactively."[4]

Having concluded that the district court was bound by *Amerifactors*, the Ninth Circuit made swift work of the certification issue because the plaintiff "had no viable methodology for distinguishing class members who had received faxes on a stand-alone fax machine and those who had received them through an online fax service."[5] Defendants facing TCPA class actions premised on faxes are wise to keep this decision in their pocket.

***Trim v. Reward Zone*'s Aftershocks**

Not to be outdone, district courts continued to deliver notable TCPA decisions, with the District of Arizona concluding in *Howard v. Republican Nat'l Comm.*, No. CV-23-00993, 2023 U.S. Dist. LEXIS 198558 (D. Az. Nov. 6, 2023) that a text message with a link to a video does not necessarily qualify as a call using an artificial or prerecorded voice.

The case stemmed from a text message allegedly sent by the National Republican Committee. The plaintiff described the message as including a "video file that was automatically downloaded" to his phone, while the defendant described it as a text message with "a link to a website, as well as [a] link preview thumbnail for the website."[6]

Relying on the Ninth Circuit's recent decision in *Trim v. Reward Zone USA LLC*, 76 F.4th 1157 (9th Cir. 2023), the district court explained that the term "prerecorded voice" has been interpreted in this jurisdiction as "requir[ing] audible sounds."[7] Although the plaintiff "alleged that the video [in the text] automatically downloaded to his phone," based on a screenshot in the complaint, "Plaintiff had to actively press play on the link to watch the video."[8] The text message thus "provided a conscious choice of whether to engage with the audible component" which, the court concluded, "is different from what the TCPA intended by 'make a call' using a 'prerecorded voice.'"[9] With that, the court held that the plaintiff did not state a claim under 47 U.S.C. § 227(b)(1)(A)(iii) (addressing calls to cell phones using artificial/prerecorded voices) or 47 U.S.C. § 227(b)(1)(B) (addressing calls to residential lines using artificial/prerecorded voices).

Endnotes

[1] *McKesson*, 2023 U.S. App. LEXIS 28346 at *2.

[2] *Id.* at *3-4.

[3] *Id.* at *5-6.

[4] *Id.* at *6.

[5] *Id.* at *6-7. 1

[6] *Howard*, 2023 U.S. Dist. LEXIS 198558 at *1-2.

[7] *Id.* at *11.

[8] *Id.* at *12.

[9] *Id.*

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