

The FCC Should Clarify That Transmitting *Solicited* Faxes Does Not Give Rise to Liability Under the TCPA

Background

- Anda's generic drug business requires it to maintain regular communications with thousands of small pharmacies to convey pricing (including weekly specials) and other important information. Fax is the preferred means of communication for Anda's customers, who are predominantly small pharmacies. Anda's customers request the fax advertisements because they find them helpful in identifying savings for purchasing certain pharmaceutical products.
- In enacting the Telephone Consumer Protection Act and subsequent amendments, Congress sought to address the problem of *unsolicited* and *unwanted* fax and telephone advertisements. In contrast, Congress recognized that where a customer or potential customer has *expressly consented* to receive a commercial communication, there is no need to regulate such routine business interactions.
- After the Commission eliminated the "established business relationship" rule for fax advertisements in 2003—which for several years had allowed businesses to send messages based on *implied* consent—Congress stepped in to reinstate the EBR rule in the Junk Fax Prevention Act (which amended the TCPA). Congress sensibly required that when a business sends a fax in reliance on implied consent (based on an established business relationship), it must include a notice that tells recipients how they can opt out of receiving further fax advertisements. But Congress imposed no such notice requirement in connection with faxes sent to customers who expressly consented to receive them. Indeed, it would make no sense to require "opt out" notices on faxes sent to such customers, because they already made an express decision to "opt in."
- In implementing the JFPA, the Commission proposed to require opt-out notices only for unsolicited faxes. But despite the lack of any prior notice, despite Congress's clear distinction between solicited and unsolicited faxes, and despite a footnote in the Commission's order indicating that the notice requirement did not apply to faxes sent with express consent, the Commission's final rule inexplicably extended the requirement to include an opt-out notice to *all* faxes, including those sent to customers who had already given express consent.
- The upshot of this unauthorized extension of the opt-out notice requirement is that companies that neglect to include an opt-out notice on solicited faxes—or that include a notice that departs from the Commission's template in minor, insignificant respects—may be exposed to class action lawsuits that seek to impose massive liability, because the TCPA authorizes private rights of action not only for violations of the statute, but for violations of the Commission's rules promulgated pursuant to the TCPA.
- Anda is defending against such a lawsuit in a state court in Missouri, where a purported class of plaintiffs is seeking over \$100 million in damages for alleged deficiencies in an opt-out notice on faxes. Plaintiffs' lawyers recently filed another complaint on behalf of another

purported class in Florida. The plaintiffs in these cases claim that it makes no difference whether Anda sent the faxes in question with the express consent of the recipients; in their view, Anda should be held strictly liable for any technical errors in the opt-out notice even if Congress never intended to require such notices for solicited faxes and even if such notice serves in legitimate purpose in such circumstances.

- These lawsuits seeking enterprise-crippling damages threaten Anda's ability to continue serving its customers, and in turn endanger the tens of thousands of pharmacies—many of which cannot afford to keep significant amounts of generic pharmaceuticals in stock—that rely on Anda to fill orders of any size on short notice.

FCC Petition

- While Anda is defending itself in court and has argued that the TCPA (as amended) may not be interpreted to impose liability in connection with solicited faxes, Anda also filed a petition with the Commission in November 2010 seeking clarification of the statutory authority it relied on in extending the opt-out notice requirement to solicited faxes.
 - Critically, the Commission identified several statutory provisions in adopting its do-not-fax rules, and it failed to make clear which statute (whether the JFPA or more general authority) it viewed as the basis for the notice rule for solicited faxes. Section 553 of the Administrative Procedure Act requires the Commission to identify the specific authority underlying each rule it adopts.
 - The petition argued that the Commission could not have relied on the JFPA in establishing rules for solicited faxes, because that statute expressly limits its requirements to unsolicited faxes. In particular, the JFPA required opt-out notices only in connection with faxes sent pursuant to an EBR—i.e., those sent based on *implied* consent. The JFPA did nothing to disturb the longstanding deregulatory treatment of faxes sent with *express* consent.
 - Courts may be reluctant or unable to determine what authority the Commission relied on in adopting the opt-out notice requirement for solicited faxes. The Commission is in the best position to clarify its own rule, and it has a legal obligation to do so. Indeed, the Commission has taken the position that it is the only entity entitled to determine the validity of its rule under the TCPA.
- Anda's petition languished at the Commission for 19 months, and during that period the Commission was unwilling even to assign it a docket number or issue a public notice seeking comment on the petition.
 - Anda first met with Commission staff on January 31, 2011, and urged the agency to move swiftly in opening a proceeding on the pending petition. The staff expressed concerns about opening a proceeding that could give rise to an appealable order and expose the Commission to judicial scrutiny.

- After months of inaction, Anda met with staff for a second time on September 12, 2011, and reiterated its request that the Commission release a public notice and then grant the relief sought in the petition. Anda also reminded the Commission of its obligation under its own rules to docket all petitions for declaratory rulings expeditiously and to “seek comment on the petition via public notice.” 47 C.F.R. § 1.2(b).
- On January 11, 2012, the 8th Circuit invited the Commission to file an amicus brief in a case where a private party brought suit under the rule at issue, and where both the trial court and appellate court acknowledged some confusion as to the rule’s origin and application. This invitation prompted a third meeting between Anda and Commission staff on January 26, 2012. Anda again urged the Commission to move forward with a public notice on the pending petition as required under its rules, and to seize the opportunity in its amicus brief to clarify that Section 227(b) was *not* the basis for the rule requiring opt-out notices on solicited faxes.
- But the Commission’s amicus brief, submitted to the 8th Circuit on February 24, 2012, made a precarious situation even worse.
 - The brief reasserted the validity of the opt-out notice rule and opines that it applies to *all* faxes, even those sent with express consent.
 - The brief also asserted that the court cannot consider whether the rule for solicited faxes was adopted pursuant to Section 227(b) or whether it would result in a constitutional violation. Rather, in the Commission’s view, a party facing private litigation and seeking to challenge the rule or to clarify its statutory basis must file a petition with the Commission. Of course, that is precisely what Anda did more than a year earlier, to no avail. The Commission’s brief failed to mention Anda’s pending petition.
- Given the increasingly urgent need for action, Anda had no choice but seek mandamus at the D.C. Circuit. Anda’s mandamus petition asked the court to compel the Commission to follow its own procedures, release a public notice seeking comment on Anda’s petition, and ultimately resolve the issues raised therein in an expeditious manner. The D.C. Circuit indicated its interest in Anda’s mandamus petition by ordering the Commission to respond by May 24, 2012.
- Shortly before the Commission’s brief was due in the mandamus proceeding, the Consumer and Governmental Affairs Bureau released an eight-paragraph Order dismissing Anda’s petition on May 2, 2012. The Order ignored the widespread uncertainty surrounding the Commission’s rule and concluded instead that there is “no controversy to terminate or uncertainty to remove.” The Order also speculated that the JFPA “could” have been the statutory basis for the rule, but disregarded the numerous statutory and constitutional arguments militating against such an interpretation. And because the Order was issued by the staff, and not by the full Commission, it is insulated from court review.

- On May 14, 2012, Anda filed an Application for Review urging the full Commission to reverse the Bureau's order and to grant the relief sought in the Petition. Now that Anda has waited for over a year-and-a-half for resolution of these issues, the Commission should take action on the Application for Review and resolve the issues raised therein as quickly as possible. Such action is critical to prevent legitimate businesses from being hit with potentially catastrophic, enterprise-threatening damages based solely on a misreading of the JFPA.