Opting Out of Common Sense: Nack v. Walburg

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As TCPA litigation continues to evolve, one of the newest tricks of the trade for savvy plaintiffs' lawyers is to allege a violation of the TCPA based solely on a fax sender's failure to include an opt-out notice that complies with the detailed statutory requirements. This sort of claim is appealing in the class action context because it has the potential to present unique issues for defendants mounting a Rule 23 challenge. But it also seems inconsistent with the purpose of the TCPA, which was meant to limit unsolicited commercial advertisements. What happens if someone ***solicits*** a fax, only to sue the sender when that fax does not contain an opt-out notice? That's the sort of slippery slope that could turn the cottage industry of fax-spam litigation into big business. Surely it cannot be that an enterprising citizen could recover $500 to $1,500 per fax by calling businesses, requesting advertising materials by fax, and then suing each time those faxes did not contain adequate opt-out notices.

But that is the inescapable (and to my mind, illogical) conclusion of the Eighth Circuit's **decision last week** in *Nack v. Walburg*, Case No. 11-1460. The district court in *Nack* granted summary judgment for the defendant after the plaintiff brought suit under the TCPA based on receipt of a single fax advertisement without adequate opt-out language. It was undisputed that the plaintiff consented to the fax. But the Eighth Circuit reversed the grant of summary judgment, holding that the Hobbs Act precludes it from rejecting the FCC's plain-language interpretation of its own regulation.

To its credit, the Eighth Circuit expressed skepticism about the propriety of the rule (particularly as applied to the facts at hand), but held that the plain language of the regulation "requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax" and that this plain-language interpretation "is consistent with the FCC's proffered interpretation of its own regulation." Thus, the Eighth Circuit held that "we must defer to the FCC's plain-language interpretation of its own regulation unless the regulation is 'contrary to unambiguous statutory language' or 'application of the regulation is arbitrary or capricious.'" The Eight Circuit held that either argument would require "a direct challenge to the validity of the regulation," so the court was precluded from considering those arguments at this stage by the Hobbs Act.

The defendant also argued (for the first time on appeal) that, if the regulations are interpreted as urged by the FCC, then they are unconstitutional. Although the Eighth Circuit has previously held that the TCPA is

constitutional, the Eighth Circuit acknowledged that the analysis would "not necessarily be the same if applied to the agency's extension of authority over solicited advertisements." However, the court held that the issue was not properly preserved and therefore it was not ruled upon.

Begrudging though it may be, the Eight Circuit's decision opens the door for a fresh round of TCPA lawsuits based on the opt-out theory and potentially a new trend of professional plaintiffs actively *soliciting* fax advertisements in hopes of stumbling into a claim. Let's hope the courts, the FCC, or the legislature can inject some common sense into these proceedings before ignorant businesses are faced with what the Eighth Circuit called, "a class-action complaint seeking millions of dollars even though there is no allegation that [it] sent a fax to any recipient without the recipient's prior express consent."

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