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## Seventh Circuit Throws FCC “Guidance” In Trashcan

Client Bulletins

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### **When it comes to the Telephone Consumer Protection Act (TCPA), the Federal Communications Commission (FCC) often has a lot to say.**

Unfortunately, the FCC’s pronouncements are often vague, ambiguous, and conflicting. And defendants staring down the barrel of a TCPA class action often have no way to combat the FCC’s broad pronouncements. Under something called the Hobbs Act, courts frequently treat FCC proclamations as gospel, regardless of whether the FCC’s statements are ambiguous, internally contradictory, or even contradictory with the plain language of the TCPA. In *Ambassador Animal Hosp., Ltd. V. Elanco Animal Health Inc.*, the Seventh Circuit said “no more,” at least when the FCC attempts to contradict the plain language of the TCPA, and threw the FCC “guidance” in the trashcan.

Elanco Animal Health Inc., the defendant in this case, is an animal health products and services company. The company sent allegedly unsolicited faxes to Ambassador Animal Hospital, inviting its veterinarians and owner to RSVP for two free dinner programs. The faxes listed the topics of the dinner programs and indicated that both programs had been approved for continuing education credits. The faxes also included the trademarked “Elanco” logo and a notice encouraging recipients to consult their state or federal regulations or ethics laws about restrictions on accepting industry-provided educational and food items.

Ambassador Animal Hospital, the plaintiff, filed a putative class action suit, alleging that Elanco violated the Telephone Consumer Protection Act (TCPA) by sending the unsolicited faxes. The plaintiff argued that the free dinner programs were used to market or sell Elanco’s animal health goods and services. The crux of the case revolved around whether the two faxes Elanco sent to Ambassador fell within the TCPA’s definition of an unsolicited advertisement. The TCPA defines an unsolicited advertisement as any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.

The Seventh Circuit affirmed that the faxes did not constitute unsolicited advertisements. The court reasoned that to be an unsolicited advertisement under the TCPA, the fax itself must indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property. The court found that none of the features of the faxes transformed Elanco’s invitations to free dinners and continuing education programs into advertisements for a good, service, or property. An easy and straightforward outcome given the nature of the faxes.

But wait, there’s more! For those in the TCPA realm, you may recall that in 2006, the FCC issued a declaratory ruling finding that offers of “free” consultations and seminars still constituted “unsolicited advertisements” under the TCPA because such “free” seminars, in practice, were effectively pretexts to later advertise commercial products of services. But the Seventh Circuit didn’t care what the FCC had to say on this issue. Because the statutory text of the TCPA, and its definition of an

advertisement, was clear and unambiguous, and because the FCC's ruling "conflicts with the statutory text," the Seventh Circuit concluded that the FCC's thoughts were entitled to no deference or legal weight. Great win!

The Seventh Circuit's decision is not a silver bullet against overreaching FCC orders. An important part of the court's reasoning was based on the plain language of the TCPA, and there are other portions of the TCPA that are more ambiguous, and for which courts may still be likely to grant deference to the FCC. But it highlights a change in attitude towards the FCC's long history of attempting to re-write the statutory text of the TCPA and is a decision worth keeping in mind for corporate defendants (because there are a lot of other FCC orders for which similar challenges can be made!). As the legal landscape continues to evolve, staying informed and proactive is the best defense.

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