

Give Up the Pretext: Reducing the TCPA Risk of Faxed Research Invitations Based on the Latest Court Cases

July 31, 2019

By Russell F. Anderson

Insights Association

How should a company using faxes for market research purposes respond to recent court decisions?

The 3rd Circuit recently provided an extremely helpful decision in *Mauthe v. Optum Inc.*, 925 F.3d 129 (3d Cir. 2019). As noted by the Insights Association, the court in *Mauthe* broadly held that faxed invitations to participate in legitimate market research are non-commercial under the Telephone Consumer Protection Act (TCPA). As a result, market research organizations could send such invitations without prior consent and without providing an opt-out and not risk the potential \$1,500 per fax penalties provided under the TCPA. The 3rd Circuit noted that it was narrowing the scope of the “pretext” argument:

“We want to make clear that we do not suggest that we endorse the pretext theory of liability under the TCPA. We think that in almost all cases, a recipient of a fax could argue under the pretext theory that a fax from a commercial entity is an advertisement. The pretext theory, unless closely cabined, would extend TCPA’s prohibition too far.”

Unfortunately, on the heels of the *Mauthe* case, a federal district court in Mississippi decided not to follow this new helpful precedent. In *Advanced Obstetrics & Gynecology, P.C. v. IQVIA, Inc.*, No. 3:18-cv-00197-NBB-JMV (N.D. Miss. 2019), a Mississippi-based federal district court denied a defendant’s motion to dismiss a TCPA claim.

In the case, IQVIA sent the plaintiff doctor’s practice a fax inviting him to participate in an online research study, and the plaintiff subsequently sued IQVIA for violating the TCPA. The defendant cited the *Mauthe* case as persuasive authority, but the court distinguished the case from *Mauthe* in two ways. First, *Mauthe* was reviewed under the standard of a summary judgment motion whereas IQVIA was under review on a motion to dismiss – a lower threshold for the plaintiff. Second, the fax in *Mauthe* specifically stated that it was not an attempt to sell the plaintiff anything, whereas the fax in IQVIA contained no such language.

In the absence of a declaratory ruling by the FCC (as requested by M3 and vigorously supported by the Insights Association in 2017), it seems that more of these cases will continue to percolate through the industry and courts. For example, a new class action suit was filed as recently as April in Michigan against a

pullcom.com  @pullmancomley

BRIDGEPORT
203.330.2000

HARTFORD
860.424.4300

SPRINGFIELD
413.314.6160

WAKEFIELD
401-360-1533

WATERBURY
203.573.9700

WESTPORT
203.254.5000

WHITE PLAINS
914.705.5355

Give Up the Pretext: Reducing the TCPA Risk of Faxed Research Invitations Based on the Latest Court Cases

research firm.

Ultimately, this issue may be resolved by the U.S. Supreme Court. A petition for certiorari was filed in March to the Supreme Court in another informational fax case based on the “pretext” theory – *Enclarity Inc., et al. vs. Fulton*, Docket No. 18-1258 (U.S. Mar. 29, 2019).

Until a resolution is reached, since faxes continue to be used to solicit participation in market research (especially of medical professionals), what steps can be taken to reduce the risk if/when a suit occurs?

1. **Cover Your Bases** – As noted in *Advanced Obstetrics & Gynecology*, it doesn’t hurt to describe why your organization is sending the fax in the first place. If your fax describes what it is doing, it makes it harder for a plaintiff’s lawyer to misconstrue the purpose. The fax should explicitly say – “***This is not an attempt to sell you anything***” – as was the case in *Mauthe*. In addition, the faxed invitation should expand on the purpose – for example, “***this is an invitation to participate in independent survey research and you will not receive any advertising for any good or service as a result of your participation.***” In addition, provide a compliant opt-out mechanism to make the burden of proof more difficult for a prospective plaintiff’s attorney.

2. **Distinguish Between Pre-textual and Legitimate Research** – If a claim does come, providing immediate historical perspective (and a copy of the *Mauthe* decision) to the presiding judge becomes especially important. In the original 1992 FCC Rules implementing the TCPA, the FCC in Note 41 specifically explained that market research is non-commercial:

“We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.”

In implementing the Junk Fax Act of 2005 in connection with the TCPA, the FCC then elaborated on this exemption by noting:

“Finally, the Commission concludes that any surveys that serve as a pretext to an advertisement are subject to the TCPA’s facsimile advertising rules. The TCPA’s definition of “unsolicited advertisement” applies to any communication that advertises the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey.”

Ensuring that the presiding judge understands the larger history and the distinction between “advertising under the guise of research” (also known as “sugging” or, in the political arena, a “push poll”) and legitimate market research is essential for setting the tone to gain dismissal of these cases. Ultimately, it’s important for judges in these cases to understand early on that the “real pretext” is the application of the law to legitimate market research.

Give Up the Pretext: Reducing the TCPA Risk of Faxed Research Invitations Based on the Latest Court Cases

My thanks to Pullman & Comley's summer associate, Snigdha Mamillapalli, for her excellent research assistance.

Professionals

Russell F. Anderson

Practice Areas

Market Research

This publication is intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. This report may be considered attorney advertising. To be removed from our mailing list, please email unsubscribe@pullcom.com with "Unsubscribe" in the subject line. Prior results do not guarantee a similar outcome.