

## The Sixth Circuit Further Defines “Advertisement” Under the Telephone Consumer Protection Act



By **Joel Gottesman** on July 13, 2015  
Posted in **Telephone Consumer Protection Act**

Last month, in a case of first impression, the Sixth Circuit Court of Appeals issued an opinion finding that unsolicited faxes intended strictly for informational



purposes were not "advertisements" and therefore not actionable under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. 227 et. seq.

*Sandusky Wellness Center v. Medco Health Solutions*, No. 14-4201 (6th Cir. June 3, 2015) concerns Sandusky Wellness Center, a healthcare provider, and Medco Health Solutions, a pharmacy benefit manager that acts as an intermediary between employers, health plan sponsors and drug companies. Services provided by Medco include keeping and updating a list of medicines, known as a formulary, that are available through a given healthcare plan.

In June 2010, Medco faxed to Sandusky part of its formulary. This fax, titled "Formulary Notification," informed Sandusky that many of its patients had adopted Medco's formulary and, therefore, encouraged Sandusky to prescribe plan-preferred lipid-lowering agents to reduce medication costs for its patients. Three months later, Medco sent another fax to Sandusky titled "Formulary Update" informing Medco that prescribing plan-preferred respiratory fluoroquinolone medication would lower medication costs for its patients. Neither of these faxes contained a direct solicitation or appeal to a consumer, including pricing or ordering information.

In response to these faxes, Sandusky, on behalf of itself and a proposed class, brought suit against Medco claiming that they were "unsolicited advertisements" in violation of the TCPA.

Sandusky sought the statutory penalty under the TCPA of \$500 per offense for each member of the proposed class. The district court for the Northern District of Ohio disagreed and granted summary judgment for Medco, finding that the primary purpose of the faxes was informational rather than promotional. In its granting of summary judgment for Medco, the district court denounced Sandusky's suit as little more than "frivolous litigation" and warned Sandusky "not to file similar fruitless litigation in the future."

On appeal, the Sixth Circuit affirmed the district court's finding for Medco. In doing so, the Sixth Circuit examined whether the two faxes at issue qualified as advertisements under the TCPA. The court found that they did not because the faxes "*lack[ed] the commercial components inherent in ads*" such as an appeal for the sale of a commercial product resulting in profit to an entity. The court found support for its position from the Ninth Circuit and District Court of New Jersey, respectively, which previously ruled that faxes containing information for a "Business Leadership Award" and faxes containing drug reclassification information both lacked the ability for purchase, an essential trait of an advertisement.

Put more affirmatively, the Sixth Circuit found that to be an advertisement, a "*fax must promote goods or services that are for sale, and the sender must have profit as an aim.*" Medco and its faxes had neither. An advertisement needn't overtly promote the sale of a product or service, but need at least be an indirect

commercial solicitation or pretext for a commercial solicitation. The faxes at issue were neither.

A copy of the court opinion can be found here:

<http://www.ca6.uscourts.gov/opinions.pdf/15a0110p-06.pdf>

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