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TCPA - Ninth Circuit Affirms Decertification of "Junk Fax" Class

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Takeaway: In *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710, 2023 WL 7015279, at *1 (9th Cir. Oct. 25, 2023), the Ninth Circuit affirmed the district court's decertification of a "junk fax" class, finding that individual facts predominated because Plaintiff presented no viable methodology for distinguishing between putative class members who received faxes on stand-alone fax machines and those that received faxes through an online fax service (presumably via e-mail). This follows the Federal Communication Commission's determination in 2019 that faxes sent through an online fax service do not violate the TCPA. Thus, *True Health* appears to sound the death knell for "junk fax" class actions, at least in the Ninth Circuit. Absent some unique methodology to separate persons who received faxes via an online service from those who received them through a stand-alone fax machine, any junk fax TCPA class action should be unable to satisfy Rule 23's predominance requirement.

The Ninth Circuit's affirmance likely signals the end of longstanding litigation between True Health Chiropractic, Inc. ("True Health") and McKesson. In May 2013, True Health filed a putative class action against McKesson alleging that McKesson violated the TCPA by sending unsolicited "junk faxes." The district court denied class certification in 2016, but that decision was reversed by the Ninth Circuit in 2018. *True Health Chiropractic, Inc. v. McKesson Corp.*, 13-CV-02219-HSG, 2016 WL 8925144, at *1 (N.D. Cal. Aug. 22, 2016), *aff'd in part, rev'd in part,* 896 F.3d 923 (9th Cir. 2018).

In 2019, however, the FCC determined that the TCPA did not apply to faxes received through an online fax service. *In re Amerifactors Fin. Grp., LLC Pet. for Expedited Declaratory Ruling*, 34 FCC Rcd. 11950, 11950–51 (2019). The FCC reasoned that faxes to online fax services do not trigger the harms the TCPA sough to address (rendering the fax machine unavailable and requiring the involuntary use of the recipient's paper and ink).

Relying on *Amerifactor*, McKesson moved to decertify the class. In 2021, the district court decertified the class because True Health offered no methodology to show "via class-wide, common proof that each purported class member received the faxes at issue via a means other than an 'online fax service'" and thus could not satisfy the predominance requirement of Rule 23(b)(3). *True Health Chiropractic, Inc.*, 2021 WL 4818945, at *1–2. The district court rejected True Health's reliance on expert testimony about the general use rate of online fax services, finding that an "expert's opinions about probability" cannot constitute class-wide proof. *Id.* It noted that McKesson had included declarations from telephone providers who services more than 60% of the class confirming they had no mechanism to determine whether recipients received a fax online. *Id.*

True Health appealed, but did not challenge the district court's ruling that it had no viable methodology to identify persons that received the fax through an online fax service. *True Health Chiropractic, Inc.*,

2023 WL 7015279, at *2. Instead, True Health challenged the validity of the FCC's *Amerifactors* ruling, asserting that it was not a final order of the FCC. The Ninth Circuit disagreed, finding *Amerifactors* to be a valid, final order. *Id.* Thus, it affirmed the district court's decertification order. *Id.*