

### Third Circuit Serves Those Who Stand and Wait

#### Cross-Office Business Trial Team Scores Appellate Win Defeating Putative Junk Fax Class Action

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After nearly two years, the U.S. Court of Appeals for the Third Circuit affirmed the District Court for the Eastern District of Pennsylvania’s grant of summary judgment in favor of Sheppard Mullin client, Millennium Health LLC, an accredited drug testing laboratory, in a putative class action alleging violations of the Telephone Consumer Protection Act (“TCPA”).

#### Background on the Case

The plaintiff – a physician “who appreciates the opportunity presented by the damages remedy created by the TCPA for junk faxes” – alleged Millennium violated the statute’s prohibition on unsolicited fax advertisements by sending him a single, one-page fax inviting him to a free webinar. In May 2020, the District Court agreed with Millennium that no reasonable recipient could consider such a terse informational message an “advertisement” itself or the educational webinar a “pretext” for advertising.

On January 19, 2023, the Third Circuit agreed and affirmed the District Court’s ruling in a precedential opinion. In doing so, it adopted an objective standard and held no reasonable recipient of the fax could view the free educational seminar fax as an unsolicited advertisement. While the court declined either to adopt or reject the Federal Communication Commission’s pretext theory, it additionally concluded that, even if the pretext theory were a valid basis for liability, “nothing about the free seminar would lead a reasonable recipient of Millennium Health’s fax to believe that it was an advertisement for goods, services, or property.” In a lengthy concurring opinion, Judge Peter Phipps further argued the Third Circuit should have simply rejected the pretext theory outright as basis for TCPA liability.

The Sheppard Mullin litigation team that represented Millennium was handled by Paul Werner, David Poell, and Hannah Wigger. Paul argued on summary judgment and appeal.

The case is *Robert W. Mauthe, M.D., P.C. v. Millennium Health LLC*, No. 20-2265, --- F.4th --- (3d Cir. Jan. 19, 2023).

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## Practice Areas

Class Action Defense

Healthcare

Litigation

Telephone Consumer Protection Act (TCPA)

## Industries

Healthcare