January 22, 2015

Day Pitney Wins Dismissal of Putative Class Action under TCPA

Day Pitney secured the dismissal with prejudice of a putative class action brought against its clients Boehringer Ingelheim Corporation and Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer") under the federal Telephone Consumer Protection Act ("TCPA").

Plaintiff Physicians Healthsource, Inc. ("PHI") is a serial plaintiff that has brought dozens of actions throughout the country alleging violations of the TCPA, many of which have survived motions to dismiss and led to expensive litigation and settlements. It commenced the action against Boehringer in the United States District Court for the District of Connecticut, alleging that Boehringer violated the TCPA by sending PHI and similarly situated class members an "unsolicited advertisement" to attend a dinner meeting to discuss female sexual dysfunction. At the time of the fax, Boehringer was developing a drug that had been colloquially described as "female Viagra," but the drug had not been approved by the FDA and was not commercially available. (Boehringer has since discontinued its efforts to obtain approval of the drug.) The firm moved on behalf of Boehringer to dismiss the complaint. It argued that the fax was inviting the recipient to a purely educational program, and was not intended to advertise a "commercially available" product and, indeed, could not have done so, given that the FDA had not approved the drug.

Judge Stefan Underhill heard oral argument on the motion to dismiss and, on January 12, granted the motion to dismiss. He agreed that the invitation was to an educational program, and that the plaintiff had failed to plead facts indicating that the program was a pretext to pitch the unapproved drug in development or other Boehringer products or services. He further agreed with the firm's position that, even if the dinner had the business purpose to make it more likely that doctors would prescribe the drug in the event it were later approved by the FDA, that potential future economic benefit did not convert the fax into a prohibited "advertisement."

Tom Goldberg and Bryan Orticelli prepared the motion to dismiss and supporting briefs, and Tom argued the motion before Judge Underhill.

The case was covered in the *Connecticut Law Tribune*. For the article, click here.