D.C. Circuit Limits FCC Jurisdiction on Fax Advertisements

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On March 31, 2017, the United States Court of Appeals for the District of Columbia issued a decision in *Bais Yaakov of Spring Valley et.al. vs. FCC* (No. 14-1234), holding that the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on faxes sent with the recipient's consent (i.e., "solicited" faxes). The decision also vacated the FCC's October 30, 2014 Fax Advertisement Waiver Order insofar as it attempted to enforce the rule and grant retroactive waivers to certain parties of the opt-out notice requirement. This decision is a big win for defendants in a recent wave of class action cases based on a failure to include opt-out notices on solicited faxes. These defendants – nearly 150 of whom had received retroactive waivers from the FCC – now will not face liability for faxes sent with the recipient's permission.

The opinion is based on the Court's statutory interpretation of the Junk Fax Protection Act of 2005 (the "Act"). After examining the relevant language of the Act, which prohibits the sending of *unsolicited* fax advertisements, and contains an exception allowing certain unsolicited fax advertisements, provided they contain an appropriate opt-out notice, the Court found that the text of the Act provided a "clear answer" to the question of the FCC's jurisdiction with regard to solicited fax advertisements. In particular, according to the Court of Appeals: "Congress has not authorized the FCC to require opt-out notices on solicited fax advertisements. And that is all we need to know to resolve this case." As such, the Court of Appeals did not need to give deference to the FCC's decision, pursuant to *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n. 9 (1984).

The Court rejected the FCC's reasoning that its authority to regulate solicited faxes derived from its authority to define the phrase "prior express permission" in the Act. The FCC had reasoned that because it reasonably defined the term "prior express permission" to mean that such permission lasted only until revoked, it was also within the FCC's authority to require that all fax advertisements contain a means to revoke that permission. The Court found this argument illogical and unpersuasive.

The Court further rejected the FCC's view that it could take any action, so long as Congress had not prohibited such action. "That theory has it backwards … The FCC may only take action that Congress has *authorized*." (emphasis in original).

Finally, the Court rejected the FCC's position that requiring opt-out notices for all fax advertisements was "good policy." The Court stated: "The fact that the agency believes its Solicited Fax Rule is good policy does not change the statute's text."

After the decision was released, both Chairman Pai and Commissioner O'Rielly (both of whom dissented from the order) praised the decision and pledged that future FCC decisions would adhere

to the limits of the Commission’s statutory authority.

In sum, this is good news for companies facing TCPA class actions based on the failure to include opt-out language in fax communications. The D.C. Circuit Court of Appeals has confirmed that if a fax recipient has consented to receive the fax in question, the FCC may not require companies to include specific language in the facsimile (*i.e.*, an opt-out provision). Moreover, because the ruling concludes that the FCC has no jurisdiction over solicited faxes, other regulations applicable to such faxes would be foreclosed as well.