

D.C. CIRCUIT HOLDS THAT FCC LACKS AUTHORITY TO REQUIRE OPT-OUT NOTICES FOR SOLICITED FAXES, VACATES FCC ORDER

Date: 4 April 2017

Class Action Litigation Defense Alert

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INTRODUCTION

The U.S. Court of Appeals for the District of Columbia Circuit, in a 2-1 split decision, has issued an opinion that the Federal Communications Commission (the "FCC") lacked authority under the Telephone Consumer Protection Act ("TCPA") to regulate facsimiles that were sent with the recipient's consent. [1] This opinion found that an FCC rule issued in 2006 (the "2006 Order") requiring a sender to include an opt-out notice on faxes that were solicited by the recipient was unlawful and vacated the FCC order implementing the rule. [2]

BACKGROUND

The TCPA, enacted into law in 1991 and codified at 47 U.S.C. § 227, [3] prohibits the use of a fax machine to send an "unsolicited advertisement" [4] under certain circumstances. An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." [5] Prior to 2006, courts regularly held that faxes sent with "prior express invitation or permission" were not prohibited by the TCPA or subject to regulations promulgated thereunder. [6]

The TCPA contains an exception that allows certain unsolicited fax advertisements. The statute permits unsolicited fax advertisements where (1) "the unsolicited advertisement is from a sender with an established business relationship with the recipient"; (2) the sender obtained the recipient's fax number through "voluntary communication" with the recipient or "the recipient voluntarily agreed to make" his information available in "a directory, advertisement, or site on the Internet"; and (3) the unsolicited advertisement "contains a notice meeting the requirements under paragraph (2)(D)." [7] Paragraph (2)(D), in turn, provides, among other things, that the notice must be "clear and conspicuous" and "on the first page of the unsolicited advertisement," must state that the recipient may opt out from "future unsolicited advertisements" and must include a "cost-free mechanism" to send an opt-out request "to the sender of the unsolicited advertisement." [8]

Congress has authorized the FCC to issue regulations to implement the TCPA. [9] In 2006, the FCC amended the rules concerning facsimile transmissions and included a requirement that "a facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include" an opt-out notice

(the "Solicited Fax Rule"). [10] However, the 2006 Order also contained a footnote stating that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements." [11] Plaintiffs have used this ambiguity of the 2006 Order to bring class action lawsuits seeking millions of dollars based on the defendant's failure to include a compliant opt-out notice on facsimiles transmitted with prior express permission.

One such lawsuit against Anda, Inc. ("Anda") was filed in 2008 in Missouri state court for alleged violations of the FCC's Solicited Fax Rule.[12] Anda, a pharmaceutical company, as part of its business, sent faxes to small pharmacies conveying pricing information and weekly specials. [13] Though many of the class members had provided prior express consent to receive faxes from Anda, the class action lawsuit nevertheless sought over \$150 million in damages because Anda's fax advertisements did not include an opt-out notice that complied with the Solicited Fax Rule's requirements. [14] In 2010, Anda sought a declaratory ruling from the FCC clarifying that the Act does not require an opt-out notice on solicited fax advertisements. [15] In response, the FCC issued an order that adhered to its rule requiring opt-out notices on solicited faxes as well as unsolicited faxes but said that it would waive application of the rule to businesses that sent solicited faxes before April 30, 2015.[16] The challenge to the D.C. Circuit followed.

D.C. CIRCUIT OPINION

Petitioners challenged the Solicited Fax Rule to the D.C. Circuit, arguing *inter alia* that the rule, by regulating solicited faxes, exceeded the FCC's authority under the TCPA, which they argued only extended to unsolicited faxes. [17]

On March 31, 2017, the D.C. Circuit held that the FCC exceeded its authority in promulgating a rule regulating solicited faxes.[18] In holding that the FCC had exceeded the authority granted to it under the TCPA, the D.C. Circuit relied upon language of the TCPA itself, which makes it unlawful for a person or entity "to send, to a telephone facsimile machine, an *unsolicited* advertisement" and defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person's prior express invitation or permission, in writing or otherwise.*" [19] The majority reasoned that this language indicated that Congress had drawn a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements. [20]

The Court of Appeals placed great weight on the fact that in the class action, Anda stood to face damages of up to \$150 million for failing to include opt-out notices on faxes that the recipients had given Anda permission to send. [21] The Court of Appeals was not persuaded by the argument of the FCC and the dissenting panelist, who seemed to suggest that the agency may take an action (here, requiring opt-out notices on solicited fax advertisements) so long as Congress *had not prohibited* the agency action in question. [22] Rather, the majority found "the FCC's reasoning on this point difficult to follow" and was inconsistent with the principles of administrative law. [23] Accordingly, the majority concluded that requiring an opt-out notice on faxes sent with the prior express invitation of the recipient exceeded the scope of authority given to the FCC under the TCPA. [24]

The FCC previously had granted several waivers to applicants seeking retroactive relief from the 2006 Solicited Fax Rule as to fax advertisements sent before April 30, 2015. [25] Following the order granting petitions for retroactive waivers, TCPA class action plaintiffs challenged the FCC's decision to grant retroactive waivers in a

petition before the D.C. Circuit. [26] In a footnote, the D.C. Circuit dismissed the waiver petitions as moot in light of its finding that the Solicited Fax Rule was unlawful. [27]

IMPACT

Shortly after the release of the D.C. Circuit's opinion, newly named Chairman to the FCC, Ajit Pai, issued the following statement:

Today's decision by the D.C. Circuit highlights the importance of the FCC adhering to the rule of law. I dissented from the FCC decision that the court has now overturned because, as I stated at the time, the agency's approach to interpreting the law reflected "convoluted gymnastics." The court has now agreed that the FCC acted unlawfully. Going forward, the Commission will strive to follow the law and exercise only the authority that has been granted to us by Congress.[28]

The Opinion may have a significant effect on TCPA fax lawsuits moving forward. In TCPA class action lawsuits, plaintiffs typically seek to certify classes based on violations of the opt-out notice regardless of whether a fax was solicited in order to avoid the inherently individualized question of consent. Following the elimination of the opt-out notice requirement for solicited faxes, the question of whether fax recipients gave consent or otherwise solicited the faxes at issue may impact the ability of plaintiffs to obtain class certification.

Notes:

[1] *Bais Yaakov of Spring Valley et al. v. F.C.C. and U.S.*, No. 14-1234 (D.C. Cir. filed Mar. 31, 2017)(Dkt. No. 1668739) (hereinafter the "Opinion").

[2] *Id.*, slip op. at 10–11.

[3] See Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227). In 2005, Congress passed the Junk Fax Prevention Act, which amended the 1991 Act. See Pub. L. No. 109–21, 119 Stat. 359 (codified at 47 U.S.C. § 227).

[4] 47 U.S.C. §§ 227(a)(5), (b)(1)(C).

[5] *Id.* at § 227(a)(5).

[6] See *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) ("[T]he essential question of fact that each potential plaintiff must prove is whether a specific transmission to its machine was without express invitation or permission on its part."); see also *G.M. Sign, Inc. v. Franklin Bank, S.S.B.*, No. 06-CV-949, 2008 WL 2410427, at *2 (N.D. Ill. June 11, 2008) (referring to lack of permission or consent as "an element of the prima facie case for a TCPA claim").

[7] 47 U.S.C. § 227(b)(1)(C)(i)–(iii).

[8] 47 U.S.C. § 227(b)(2)(D).

[9] *Id.*

[10] See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,971–72 (May 3, 2006) (now codified at 47 C.F.R. § 64.1200(a)(4)(iv)) (the "2006 FCC Order").

[11] 2006 Order, 21 F.C.C.R. at 3810, n.154.

[12] *Id.*, slip op. at 6–7.

[13] Opinion, slip op. at 6.

[14] *Id.*

[15] *Id.*, slip op. at 6 (citing Anda Petition for Declaratory Ruling, CG Docket No. 05-338 (Nov. 30, 2010)).

[16] Order, Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission, 29 FCC Rcd. 13,998 (2014). Commissioners Pai and O'Rielly dissented in relevant part, Commissioner Pai stating that the FCC's statutory approach reflected "convoluted gymnastics." *Id.* at 14,018 (Pai, concurring in part and dissenting in part).

[17] See Opinion, slip op. at 4.

[18] *Id.*

[19] Opinion, slip op. at 7–10 (citing 47 U.S.C. §§ 227(a)(5),(b)) (emphasis in original).

[20] *Id.*, slip op. at 9.

[21] *Id.*, slip op. at 7.

[22] *Id.*, slip op. at 9.

[23] *Id.*, slip op. at 8, 9.

[24] *Id.*, slip op. at 9, 10–11.

[25] *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, FCC 14-164, 2014 WL 5493425 (Oct. 30, 2014).

[26] Opinion, slip op. at 11 n.2.

[27] *Id.*

[28] Statement of FCC Chairman Ajit Pai, *On the Latest D.C. Circuit Rebuke of FCC Overreach*, FC News from the Federal Communications Commission (Mar. 31, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344186A1.pdf.

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