

DC Circuit Invalidates FCC Fax Rule Effectively Closing the Door to TCPA Class Actions Based on Alleged Violations

Amundsen Davis Class Action Alert

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The D.C. Circuit Court of Appeals held that the Federal Communications Commission ("Commission") overstepped its authority in 2006 when it implemented the Solicited Fax Rule, which requires all fax advertisements — even those which were sent with express consent — to include prescribed language instructing the recipients how to "opt-out" of receiving future fax advertisements. Although the Commission was within its authority to require *unsolicited* fax advertisements to include "opt-out" language, the statute does not permit it to require opt-out notices on faxes sent with the prior express permission of the recipient. *Bais Yaakov of Spring Valley, et al. v. Federal Communications Commission, et al.*, 2017 WL 1192909 (D.C. Cir. Mar. 31, 2017). Hundreds of defendants have been sued under the Telephone Consumer Protection Act (TCPA), and have been potentially on the hook for millions of dollars in class-wide damages, by plaintiffs who had agreed to receive the faxes and had based their claims solely on the absence of compliant opt-out language. This ruling will close the door on such claims.

The ruling arose out of a **petition** that Amundsen Davis recommended and filed in 2010. This was the *first* challenge to the Solicited Fax Rule filed before the Commission. In addition, Amundsen Davis appeared as an amicus to challenge the Solicited Fax Rule in an appeal pending before the Eighth Circuit Court of Appeals. The Eighth Circuit declined to resolve the issue on the merits because the defendant had failed to seek relief from the Commission and the Commission had not addressed the challenge to its rule. *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). Thereafter, more than one-hundred and fifty other defendants in TCPA lawsuits filed petitions contesting the basis of the Solicited Fax Rule. In October 2014, the Commission granted the petitioners retroactive relief; but, declining to invalidate its regulation, issued a ruling that the Solicited Fax Rule was within the purview granted to it by Congress. On appeal, that decision was rejected by the D.C. Circuit in *Bais Yaakov of Spring Valley, et al. v. Federal Communications Commission, et al.*

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