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D.C. Circuit Limits the FCC's Rulemaking Authority Under the TCPA ... and the FCC Chairman Agrees

On March 31, 2017, the D.C. Circuit held that the Federal Communications Commission (FCC) lacked authority under the Telephone Consumer Protection Act, as amended by the Junk Fax Prevention Act (collectively, the TCPA), to issue a rule, known as the "Solicited Fax Rule," requiring businesses to include opt-out notices on solicited fax advertisements. *Bais Yaakov of Spring Valley, et. Al. v. Federal Communications Commission and United States of America*, No. 14-1234 (D.C. Cir. Mar. 31, 2017). Following this ruling, FCC Chairman Ajit Pai issued a [statement](#) praising the ruling, reiterating his earlier criticism that the FCC's approach to interpreting the law in the Solicited Fax Rule reflected "convoluted gymnastics." The decision in *Bais Yaakov* and Chairman Pai's statement may have implications beyond the Solicited Fax Rule, as other FCC interpretations of the TCPA arguably deviate from the statutory text in a manner similar to the Solicited Fax Rule. Accordingly, *Bais Yaakov* may signal an opportunity for TCPA defendants to pursue new challenges to the FCC's rulemaking authority in opposition to questionable agency interpretations.

Statutory and Regulatory Background

Bais Yaakov dealt with the TCPA's prohibition on the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The TCPA 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." 47 U.S.C. § 227(a)(5). It contains an exception that allows certain 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" their information available to the public via "a directory, advertisement, or site on the internet"; and (3) the unsolicited advertisements contains an opt-out notice that meets the requirements of paragraph (2)(D). 47 U.S.C. § 227(b)(1)(C)(i)-(iii). Other provisions of the TCPA are directed at

other forms of prohibited electronic advertising, such as automated dialing machines, which have also been construed to apply to sending text messages. See 47 U.S.C. § 227(b)(1)(A); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003).

Congress authorized the FCC to issue regulations to implement the TCPA. 47 U.S.C. 227(b)(2). In 2006, the FCC issued the Solicited Fax Rule, requiring businesses to include opt-out notices for solicited fax advertisements as well as unsolicited fax advertisements. 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) (codified at 47 C.F.R. § 64.1200(a)(4)(iv)). The Solicited Fax Rule requires a sender of a fax advertisement to include an opt-out notice even where the advertisement is sent to a recipient from whom the sender “obtained permission.” 71 Fed. Reg. at 25,972.

Facts and Procedural History

The petitioner in the *Bais Yaakov* case, Anda, sells generic prescription drugs. *Bais Yaakov, slip op.* at 6. As a part of its business, it faxes advertisements to small pharmacies. *Id.* In 2008, Anda was sued in a class action in Missouri state court for alleged violations of the Solicited Fax Rule. *Id.* Many of the plaintiff pharmacies admitted that they had “expressly given permission to Anda for Anda to send fax advertisements to plaintiffs,” but argued that the faxes nonetheless violated the Solicited Fax Rule, and therefore subjected Anda to a private action for more than \$150 million in statutory penalties under the TCPA. *Id.* at 6-7.

In 2010, Anda and several other businesses facing similar lawsuits filed a petition seeking a declaratory ruling from the FCC clarifying that the TCPA does not require an opt-out notice on solicited fax advertisements, meaning those faxes that are sent with the recipient’s prior express permission. *Id.* at 6. In response, the FCC adhered to its interpretation of the TCPA as providing the FCC with the authority to require opt-out notices on solicited faxes as well as unsolicited faxes. *Id.* at 7. Then-Commissioner and now-Chairman Pai dissented, arguing that the plain text of the TCPA limited the FCC’s power to require opt-out notices to unsolicited (and not solicited) fax advertisements. *Id.* Shortly thereafter, Anda and other companies filed a petition for review with the D.C. Circuit. *Id.*

Ruling and Analysis

In a 2-1 decision, the D.C. Circuit found that the TCPA did not authorize the FCC to require opt-out notices for solicited faxes. *Bais Yaakov, slip op.* at 7-8. After reviewing the statutory text, the Court noted that it requires an opt-out notice for **unsolicited** fax advertisements, but contains no similar opt-out notice requirement for **solicited** fax advertisements. *Id.* at 8. Because the text of the TCPA “provides a clear answer to the question presented in the case,” the Court concluded that Congress “drew a line in the text of the statute” between unsolicited and solicited faxes, and declared that it is “the Judiciary’s job to respect the line drawn by Congress, not to redraw it as we might think best.” *Id.* at 8-9 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984)).

The Court rejected the FCC’s (and the dissent’s) argument that it could require opt-out notices on solicited faxes because Congress had not “prohibited the agency action in question” and “did not define the phrase ‘prior express invitation or permission’ in the Act.” *Id.* at 9. The majority reasoned that this “has it backwards,” because the FCC “may only take action that Congress has authorized” and the plain language of the TCPA “does not require (or give the FCC authority to require) opt-out notices on solicited fax advertisements.” *Id.* It noted that the FCC can “reasonably define” statutory phrases like “prior express invitation or permission” within “statutory boundaries,” but cannot exceed those boundaries in contravention of the statutory language. *Id.* at 10. The fact that the FCC “believes its Solicited Fax Rule is good policy does not change the statute’s text.” *Id.*

Although the *Bais Yaakov* case addresses only the Solicited Fax Rule, its reasoning—and Chairman Pai’s agreement with the ruling—may signal an opportunity to challenge other controversial and arguably extra-textual agency interpretations of the FCC on which plaintiffs and their counsel have come to rely in other cases. As one example, in August 2006, the FCC changed its definition of “sender” to mean “the person or entity on whose behalf a facsimile unsolicited advertisement is sent **or** whose goods or services are advertised or promoted in the unsolicited

advertisement.” 47 C.F.R. § 64.1200(f)(10) (emphasis added). This two-part definition has led some courts to conclude that a defendant whose goods and services were advertised in an unsolicited fax would be “strictly liable for transmission of the unauthorized faxes,” even if the unsolicited faxes were not sent on its behalf, and perhaps even if the unsolicited faxes were sent without its knowledge or involvement. *Siding and Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 897 (6th Cir. 2016). This “strict liability” construction seems manifestly at odds with the statutory text, which requires the “use” of a “telephone facsimile machine, computer, or other device” to “send ... an unsolicited advertisement[.]” 47 U.S.C. § 227(b)(1)(C). The suggestion that a defendant could be “strictly liable” for the transmittal of faxes it did not authorize, direct, transmit, or even know about cannot easily or readily be squared with this language, and seems like just the sort of “convoluted gymnastics” Chairman Pai criticized in connection with the Solicited Fax Rule. Defendants and their counsel should therefore be alert to new and additional opportunities to challenge overreaching FCC rules expanding the scope and reach of the TCPA.

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