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Northern District Of Illinois Is Botching TCPA Fax Rule

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Law360, New York (July 24, 2017, 11:58 AM EDT) -- In 2006, the Federal Communications Commission enacted the so-called solicited fax rule under the Telephone Consumer Protection Act. This rule required certain byzantine language to appear at the bottom of every single fax advertisement informing recipients how to opt out of receiving future faxes, even if those faxes were requested (i.e., solicited) by the recipients. What is more, violations of this regulation are punishable by between $500 and $1,500 per fax in statutory damages.

So for years, plaintiffs lawyers made millions (actually, tens, if not hundreds, of millions) of dollars bringing junk fax class actions under the TCPA on the basis that solicited fax transmissions lacked the FCC's required opt-out language. Eventually, the solicited fax rule came to a head before the United States Court of Appeals for the D.C. Circuit in a consolidated appeal captioned Bais Yaakov of Spring Valley v. Federal Communications Commission. This appeal presented the limited issue of whether the TCPA permitted the FCC to enact the solicited fax rule in light of the fact that the TCPA itself only applies to unsolicited faxes.

On March 31, 2017, the D.C. Circuit held that the FCC could not regulate solicited faxes via the TCPA:

> The text of the Act provides a clear answer to the question presented in this case. ... Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements. Unsolicited fax advertisements must include an opt-out notice. But the Act does not require (or give the FCC authority to require) opt-out notices on solicited fax advertisements.

Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078, 1082 (D.C. Cir. 2017). In other words, the D.C. Circuit eliminated the solicited fax rule, finding it "unlawful to the extent that it requires opt-out noticed on solicited faxes."

While the D.C. Circuit's holding seems clear on its face, at least two recent opinions from the Northern District of Illinois have inexplicably disregarded that holding. See James L. Orrington, II, D.D.S. PC v. Scion Dental Inc., No. 17-CV-00884, 2017 WL 2880900, at *2 (N.D. Ill. July 6, 2017); Physicians Healthsource, Inc. v. Allscripts Health Sols. Inc., No. 12 C 3233, 2017 WL 2391751, at *3 (N.D. Ill. June 2, 2017).

Instead, these courts are opting to follow a 2013 Seventh Circuit decision that stated in dicta:

> Even when the [TCPA] permits fax ads—as it does to persons who have consented to receive them, or to those who have established business relations with the sender—the fax must tell the recipient how to stop receiving future messages. 47 U.S.C. § 227(b)(1)(C)(iii), (2)(D).

Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 683 (7th Cir. 2013).

The issue with following Turza, to the exclusion of Bais Yaakov, is twofold. First, Turza concerned the

application of the TCPA's "established business relationship" exception, which, by statute, requires specific opt out language. See 47 U.S.C. § 227(b)(1)(C)(iii), (2)(D). Indeed, both sections the Seventh Circuit cited to pertain solely to "unsolicited faxes." The Seventh Circuit thus never actually considered the solicited fax rule or a solicited fax. More importantly, the section of the TCPA to which it cited above is the established business relationship exception, which by its own terms does not apply to solicited faxes (rather, per the text of the statute, an established business relationship provides an exception for TCPA liability if certain statutory requirements are met).

The question then becomes: Where, if not in the statute, did the Seventh Circuit's language regarding solicited faxes come from? There is no citation to the FCC's regulation, but since the TCPA itself makes no mention of solicited faxes, it could only plausibly have been from the FCC's solicited fax rule. The Seventh Circuit cannot, of course, create its own TCPA regulations out of whole cloth.

That, however, seems to be the implication of at least two Northern District of Illinois courts. For example, the Scion Dental court held "under binding Seventh Circuit precedent, opt-out notices are still required under the TCPA, even for solicited faxes." ("The Seventh Circuit's prior holding in Turza, however, did not even mention the FCC rule, but relied exclusively on the statute, itself, when it stated that opt-out notices are required on solicited faxes."). The Seventh Circuit's failure to specifically cite the solicited fax rule hardly seems reason to believe the Seventh Circuit was not relying on that rule. Reasoning otherwise would in fact be assuming that the Seventh Circuit intended to create its own regulation wholesale.

The second crucial issue in following Turza is that the Bais Yaakov appeal is indeed binding on the Seventh Circuit. The above district courts both stated that because the Bais Yaakov appeal was a D.C. Circuit appeal, it is not controlling in the Seventh Circuit. (See Allscripts: "Given the vertical hierarchy of the federal courts, we are bound to follow Turza and are not at liberty to opt for Bais Yaakov.").

That, however, ignores that Bais Yaakov was a consolidated appeal. It was not simply an appeal stemming from the U.S. District Court for the District of Columbia. Rather, it was a consolidation of three appeals (one in the Eighth Circuit and two in the D.C. Circuit) that were consolidated before the D.C. Circuit by the Judicial Panel on Multidistrict Litigation. Decisions arising in this context are binding nationwide. See, e.g., Peck v. Cingular Wireless LLC, 535 F.3d 1053, 1057 (9th Cir. 2008) (noting that where multiple appeals are assigned to a single appellate court via the judicial panel on multidistrict litigation, that appellate court becomes the sole venue for addressing the appealed issue) (citing 28 U.S.C. § 1267).

This exact outcome was recently reached by the Sixth Circuit on July 11, 2017, in Sandusky Wellness Center v. ASD Specialty. In reviewing an order denying a motion for class certification, the Sixth Circuit held:

> Once the Multidistrict Litigation Panel assigned petitions challenging the Solicited Fax Rule to the D.C. Circuit, that court became "the sole forum for addressing ... the validity of the FCC's rule[ ]." ... And consequently, its decision striking down the Solicited Fax Rule became "binding outside of the [D.C. Circuit]."

This view stands in direct contrast to the view of the Allscripts and Scion Dental cases, which place the Seventh Circuit's dicta above the D.C. Circuit's controlling decision.

At the end of the day, it would be extremely anomalous if the FCC cannot require opt-out language on solicited faxes, but the Seventh Circuit can. The superficial urge to follow the Seventh Circuit here to the exclusion of the D.C. Circuit, while understandable, appears to quite clearly be wrong. The Sixth Circuit has already determined that the Bais Yaakov opinion is binding nationwide. It seems only a matter of time before the Seventh Circuit reaches the same conclusion. In the meantime, defendants must be extremely cognizant to raise in the Seventh Circuit that the Bais Yaakov decision stemmed from a consolidated appeal, which gives the D.C. Circuit's opinion a controlling nature it would not otherwise have.

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