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The Widespread Impact of The FCCs 2014 Ruling Relating to Fax Advertising

by Julie D. Miller, Joseph P. Kincaid, and Michael A. McCaskey



The Telephone Consumer Protection Act ("TCPA") has long been a hot bed for consumer protection based class actions, with potentially devastating results to small businesses. The TCPA had also been subject to amorphous interpretation as to whether faxes or other solicitations were compliant with the provisions of the Act. Recently counsel for Swanson, Martin & Bell, LLP filed a petition with the Federal Communications Commission ("FCC") on behalf of its client facing such a putative TCPA class action. As part of its defense, the firm met with FCC representatives in Washington, D.C., to discuss the client's circumstances and to emphasize why relief from the FCC was necessary in this case. Approximately one month later, the FCC issued its ruling on the pending petitions, which eventually led to the dismissal of the class action lawsuit against the client.

The landmark ruling clarified the opt-out notice requirements for solicited facsimiles. Specifically, the FCC granted a retroactive waiver of compliance with the opt-out notice requirements for "solicited" faxes. The retroactive waivers provide fax senders "temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the FCC's] rules." While the retroactive waivers were only granted to pending petitioners, the FCC granted a six month window to file a petition to be granted a similar waiver. If a business has previously sent faxes without an allegedly non-compliant opt-out notice in the past four years, a petition to the FCC for a similar retroactive waiver should be filed as soon as possible in order to shield clients from liability under the TCPA.

The TCPA's Opt-Out Notice Requirements

Congress enacted the Telephone Consumer Protection Act ("TCPA") to, among other purposes, protect consumers against unsolicited fax advertisements. The law requires unsolicited faxes – faxes sent to recipients who did not request them or do not have a prior business relationship with the sender – to include an opt-out notice. Under the TCPA, the language of the opt-out notice is regulated by the FCC's rules. Specifically, the FCC shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if

- (i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;
- (ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile

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machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful; ...

(iv) the notice includes (I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and (II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement...;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such request at any time on any day of the week.

Despite the clear language enacted by Congress, the FCC promulgated Section 64.1200(a)(4)(iv) imposing the opt-out notice requirement on fax advertisements “sent to a recipient that has provided prior express invitation or permission.”

Numerous Parties Petitioned the FCC for Relief From Opt-Out Requirements

This expansion beyond the explicit language of the TCPA has subjected countless businesses to putative class action lawsuits for alleged violations of the TCPA’s fax opt-out provisions. A violation of the TCPA gives a private right of action to recipients for \$500 per fax under strict liability, and potentially for treble damages. This low burden of proof attracts class action lawsuits around the country in the hopes of a large settlement.

Prior to the FCC’s expansion of the opt-out notice requirements, defendants in class actions relating to opt-out notices could fight class allegations by asserting the defense of consent. See *Chapman v. First Index*, 2014 U.S. Dist. LEXIS 27556, *5-8 (N.D. Ill. Mar. 4, 2014); *Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012). However, applying the FCC’s rules to all faxes essentially eradicates this defense.

The validity of Section 64.1200(a)(4)(iv) was called into question, with courts suggesting both that it exceeds the authority conferred upon the FCC by Congress under Section 227(b) and that it violates the First Amendment. See, e.g., *Raitport v. Crown K kosher Meat Mkt. Inc.*, 2013 U.S. Dist. LEXIS 130459, *1 (D.N.H. Sept. 12, 2013) (noting Section 64.1200(a)(4)(iv) is a “doubtful proposition of law – that the Federal Communication Commission can, by regulation, govern specific business activity that Congress did not regulate by statute (and, implicitly did not authorize the FCC to regulate) – the sending of ‘solicited’ facsimile advertisements. Congress surely intended to protect citizens from the impositions associated with unwanted, unwelcome, ‘unsolicited’ facsimile advertisements, but likely did not think it necessary to protect citizens from ‘solicited’ facsimile advertisements – ones they invited and affirmatively wished to receive.”) See also, *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013) (“[I]t is questionable whether the regulation ... properly could have been promulgated under the statutory section that authorizes a private cause of action.”). However, a party cannot challenge the validity of the FCC’s rules in the court system without first petitioning for relief from the FCC. In the wake of the uncertainty, many businesses facing putative class actions filed petitions with the FCC for relief from the opt-out requirements on solicited faxes.

Swanson, Martin & Bell, LLP filed a petition with the FCC on behalf of its client facing a putative TCPA class action. In addition, the firm met with FCC representatives in Washington, DC to discuss the client’s circumstances, and to emphasize why relief from the FCC was necessary in this case. Approximately one month later, the FCC issued its ruling on the pending petitions.



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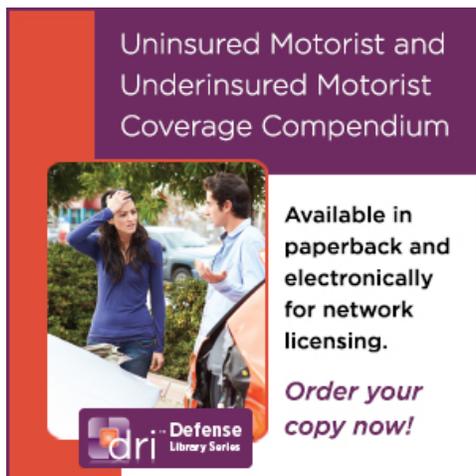
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The FCC Ruling Applies Opt-Out Requirements to All Faxes

After reviewing over a dozen petitions and conducting numerous ex-parte meetings with petitioners, the FCC issued a ruling on October 30, 2014. The FCC clarified that the TCPA and the related rules promulgated by the FCC require all fax advertisements, both solicited and unsolicited, to contain specific opt-out notice language.

If a business has previously sent fax advertisements in the past four years or might send fax advertisements in the future, the faxes must have compliant opt-out language by April 30, 2015. Based on the language of the TCPA, below is an example of an opt-out notice that likely would be found to be compliant with the TCPA:

If you no longer wish to receive faxes from [COMPANY], you may request that we not send faxes to your telephone fax machine(s). In order for your request to be valid, (i) the request must clearly identify the fax number(s) to which the request relates; (ii) the request must be communicated to us by calling [TOLL FREE NUMBER] or by sending a fax to [FAX NUMBER]; and (iii) you must not have subsequently provided express permission, whether written or unwritten, to us to transmit faxes to the fax number(s) identified in the request. Our failure to comply with a proper request within 30 days is unlawful.

All opt-out language should be reviewed by an attorney familiar with the sender's business practices, and should be placed conspicuously at either the top or bottom of the first page of faxes.

With reinstatement of the consent defense in the FCC ruling, Swanson, Martin & Bell LLP reached a favorable settlement in the underlying class action facing its client.

Relief Is Still Possible Through the FCC, but Requires Immediate Action

All is not lost, however, for those who have previously sent non-compliant faxes. In the order, the FCC "recognize[d] that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether [the FCC's] requirement for opt-out notices applied to them." The FCC granted a retroactive waiver of compliance with the opt-out notice requirements for "solicited" faxes. The retroactive waivers provide fax senders "temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the FCC's] rules."

While the retroactive waivers were only granted to pending petitioners, the FCC has granted a six month window to file a petition to be granted a similar waiver. If a client or business previously sent faxes with an allegedly non-compliant opt-out notice in the past four years, one should consider filing a petition to the FCC for a similar retroactive waiver in order to protect the client from potential liability under the TCPA.

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