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Supreme Court Denies Petition Seeking Review of D.C. Circuit Fax Decision Holding that FCC Exceeded Its Authority

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The Supreme Court today denied the petition for certiorari filed by the class action plaintiffs in *Bais Yaakov of Spring Valley v. FCC*, thus leaving in place the D.C. Circuit's ruling that "although the [Telephone Consumer Protection Act] requires an opt-out notice on unsolicited fax advertisements, the Act does not require a similar opt-out notice on solicited fax advertisements . . . [nor does it] grant the FCC authority to require opt-out notices on solicited fax advertisements." 852 F.3d 1078, 1082 (D.C. Cir. 2017). Our summary of the briefing on the petition is available [here](#).

As we've discussed previously, the D.C. Circuit's ruling (binding nationwide pursuant to the Hobbs Act) makes it much tougher for plaintiffs in TCPA fax suits to certify a class. The plaintiffs' bar has typically sought to certify classes based on violations of the opt-out notice requirement for solicited faxes, because a class defined in such a way side-stepped the inherently individualized issue of whether the fax was solicited or not. With the opt-out notice requirement for solicited faxes eliminated, plaintiffs' attorneys have a much tougher challenge. Indeed, in *Alpha Tech Pet, Inc. v. Lagasse, LLC*, No. 16 C 513, 2017 U.S. Dist. LEXIS 182499 (N.D. Ill. Nov. 3, 2017), a district court relying on the D.C. Circuit's decision found that individualized issues of consent precluded certification of a class of fax recipients where certification could not be premised on whether the faxes included an opt-out notice. The plaintiff in *Alpha Tech* has appealed that decision, arguing (among other things) that the D.C. Circuit's decision is not binding in the Seventh Circuit. Given the significance of this issue for the plaintiff's bar, we can expect to continue to see collateral challenges like this to the repeal of the FCC's solicited fax rule notwithstanding that the D.C. Circuit's decision in *Bais Yaakovis* now final.

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