

SCOTUS Declines Cert in *Bais Yaakov* (a Groundbreaking Fax Blast TCPA Case)

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On February 20, 2018, the Supreme Court denied the petition for certiorari filed by the class action plaintiffs in *Bais Yaakov of Spring Valley v. FCC*, thereby leaving in place the D.C. Circuit's 2017 determination that the FCC had overstepped its authority when it previously promulgated a rule requiring businesses to include opt-out notices on *solicited* fax advertisements—the very same requirement as is needed when sending *unsolicited* fax advertisements. This development provides yet another powerful tool for companies faced with defending Telephone Consumer Protection Act (TCPA) claims.

From the defense bar's perspective, the D.C. Circuit's ruling will make it much tougher for plaintiffs in TCPA fax blasting suits to certify a class, because defendants will now be able to largely focus on demonstrating that individualized issues of consent predominate over any alleged common issues (*i.e.*, making it a highly individualized issue whether the fax advertisements were solicited). Put differently, certification can no longer be premised primarily on the much clearer topic of whether the fax advertisements at issue included a TCPA complaint opt-out notice.

TIP: Defendants faced with fax blasting TCPA class action claims should both early and aggressively pursue evidence demonstrating that the fax recipients consented to the receipt of such advertisements (*i.e.*, that the faxes were *solicited*)—a critical roadblock to plaintiff's counsel's hopes of certification.

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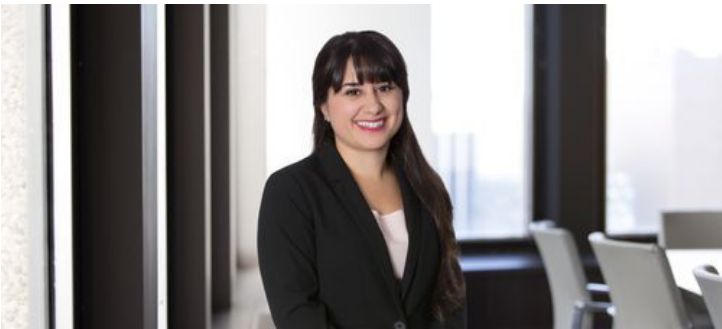
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