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In this issue

Litigating Facsimile Advertising

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To the surprise of many observers, facsimile marketing has emerged in recent years as a significant area of legal risk for companies, including media companies, that communicate with customers and potential customers through this medium.[1] As the *Wall Street Journal* noted in a 2006 article, a plaintiff-friendly federal statute has led to "a string of large judgments and settlements," with one attorney characterizing a proliferation of fax marketing class actions as "powerball for the clever."[2] Indeed, a state appellate court recently noted that although Congress did not intend federal telemarketing law to create "a cottage industry for litigation[,] . . . this is precisely what has transpired."[3]

For the most part, this phenomenon has occurred in state trial courts and resulted in settlements and unpublished orders, with the occasional reported decision. As a result, fax marketing can easily be overlooked as a key compliance risk area. But the liability trend has not escaped the attention of insurers. Following extensive litigation in recent years over insurance coverage for claims under the Telephone Consumer Protection Act (TCPA),[4] insurance policies now often contain express exclusions for such claims.[5]

Congress amended the TCPA through the Junk Fax Prevention Act of 2005 (JFPA) to ensure that companies can, in many circumstances, send marketing faxes to their existing and former customers.[6] Nonetheless, a lasting legacy of the statute has been a wave of litigation by an increasingly organized plaintiffs bar.[7] Indeed, the then Association of Trial Lawyers of America (now the American Association for Justice) added a new litigation group in 2005 that "focuses on . . . lawsuits under the TCPA."[8] This article offers an overview of the nuts and bolts of litigation over fax marketing, principally as a primer for defense counsel new to the topic.

Legislative History and Purpose

The term *junk fax*, like *junk mail* or e-mail *spam*, describes unwanted advertising communications through a particular medium—here, the facsimile machine. However, the law governing faxes is more restrictive than provisions specific to mail, e-mail, or voice telemarketing in that it bans fax marketing absent permission or a prior relationship and provides a private right of action against violators.

The stronger enforcement mechanism is due in large part to the state of technology in 1991 when Congress first enacted legislation. Although the fax machine was considered an "office oddity during the mid-1980s," by the late 1980s it had become "a primary tool for business to relay instantaneously written communications and transactions."[9] In the world before e-mail, facsimile transmissions offered senders a means of instant communication for a fraction of the cost of mail.

Early facsimile machines were slow, receiving and printing transmissions a few lines at a time onto expensive rolls of waxy paper.[10] Unwanted "junk faxes" did more than fill postal boxes with easily discarded advertisements. As Congress observed, commercial faxes tied up the dedicated telephone lines of recipients, preventing other transmissions from getting through, and chewed up expensive paper and ink.[11] Thus, facsimile marketing "shifts some of the costs of advertising from the sender to the recipient" and also "occupies the recipient's facsimile

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legitimate business messages while processing and printing the junk fax."[12]

Because states were unable to regulate interstate transmissions themselves, Congress passed the TCPA to "provide interstitial law preventing evasion of state law by calling across state lines."[13] The statute created a private right of action for statutory damages of $500 per violation of the ban on unsolicited facsimile advertisements, with treble damages available for "willful" violations, but created this right of action through unusual language. The statute provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State."[14] State and federal courts have split over the meaning of this clause, including both where TCPA actions may be prosecuted and what substantive law governs the claim.

Federal Jurisdiction

In a series of decisions between 1997 and 2000, six different federal appeals courts (the Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits) concluded that district courts lack federal question jurisdiction over TCPA claims in light of the statute's text and a congressional intent to authorize a private right of action only in state court.[15] Those six decisions included a single dissent, from then Circuit Judge Alito.[16] This dissent aside, the issue appeared resolved. Indeed, in 2004, the Sixth Circuit affirmed sanctions against defendant for removing a TCPA case to federal court, noting in an unpublished order that the party "did not have an arguable basis for removal" because "state courts' maintenance of exclusive jurisdiction over private rights of action under the TCPA and federal courts' concomitant lack of jurisdiction to hear such private claims are well-settled."[17]

The landscape became much less settled in 2005, when the Seventh Circuit split with its sister circuits. In *Brill v. Countrywide Home Loans, Inc.*, a unanimous panel found federal jurisdiction over a putative TCPA class action.[18] The opinion, by Judge Easterbrook, relied on two rationales. First, the court found diversity jurisdiction satisfied under the recently enacted Class Action Fairness Act (CAFA), codified at 28 U.S.C. § 1332(d), which provides federal jurisdiction in certain class actions where there is minimal diversity and $5 million in aggregated potential class claims.[19] Second, *Brill* found federal question removal proper "because the claim arises under federal law," explaining that two intervening Supreme Court decisions, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* and *Breuer v. Jim's Concrete of Brevard, Inc.*, had undermined the rulings of the other circuits.[20]

Brill's reliance on *Breuer* and *Grable & Sons*, however, appears misplaced because neither decision involved the TCPA and neither appears to undercut the reasoning of the line of federal appeals cases rejecting federal question jurisdiction under that statute. In *Breuer*, the underlying statute expressly permitted actions in either federal or state courts, unlike the TCPA's provision of jurisdiction only in state court, and the question was whether statutory language under the Fair Labor Standards Act that a case "'may be maintained . . . in any Federal or State court of competent jurisdiction'" provided plaintiff with an "'absolute choice of forum,'" i.e., whether removal was barred despite the fact that plaintiff "could have begun his action in the District Court."[21] In *Grable & Sons*, meanwhile, the court held permissible federal question jurisdiction over a state claim absent a federal cause of action, but only where there are "substantial questions of federal law" and a federal interest in uniformity and where such jurisdiction is "consistent with congressional judgment about the sound division of labor between state and federal courts."[22] This is the opposite situation as presented by the TCPA, which has uniformly been interpreted as a measure enacted in the states' interest.[23]

Since *Brill*, courts outside the Seventh Circuit (including panels of the Second, Fifth, and Tenth Circuits) have followed the *Brill* holding that federal diversity jurisdiction over TCPA class claims under the CAFA is proper (assuming that the minimal diversity and amount-in-controversy prerequisites are met), while either ignoring or disagreeing with *Brill*'s invitation to revisit earlier decisions rejecting federal question jurisdiction under the TCPA.[24]

As a result, the standard for when a defendant may remove a state-filed TCPA action to federal court varies by circuit and is likely to be permissible outside the Seventh Circuit only in the rare cases where a single plaintiff has received enough faxes from a single defendant for potential aggregate statutory damages to reach the jurisdictional minimum,[25] or in class actions pursuant to the CAFA. This is important because state courts are widely viewed as significantly more friendly to TCPA plaintiffs than federal courts. Indeed, one plaintiff-oriented lecturer urges TCPA litigants to "keep TCPA cases out of federal court."[26] This advice is largely followed. In one case, for example, a TCPA class plaintiff went so far as to twice dismiss and refile an action in Illinois state court in an apparent effort, ultimately unsuccessful after a third removal, to avoid the federal forum.[27]

Governing Law

Beyond jurisdiction, a court's interpretation of the statutory language that a plaintiff "may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State,"[28] determines the governing substantive law for a private claim. Although the Supremacy Clause would typically resolve the question of whether state or federal law controls in the case of a conflict, many courts read this clause as permitting states to limit the private action.

The Fourth Circuit, in an early decision, summarized this view:

> The clause in 47 U.S.C. § 227(b)(3) "if otherwise permitted by the laws or rules of court of a State" does not condition the substantive right to be free from unsolicited faxes on state approval. . . . Rather, the clause recognizes that states may refuse to exercise the jurisdiction authorized by the statute. Thus, a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights. To that extent, the existence of a *private* right of action under the TCPA could vary from state to state.[29]

The Second Circuit has followed this reasoning, noting that "[t]o the extent that a state decides to prevent its courts from hearing private actions to enforce the TCPA's substantive rights, the existence of a private right of action under the TCPA could vary from state to state."[30]

As an alternative, some state courts read the language as requiring states to enact enabling legislation for private TCPA actions, i.e., an "opt in" model.[31] After some fits and starts, state courts have now almost unanimously rejected the necessity for such enabling legislation, concluding that the statutory language merely provides states an

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option to limit private TCPA actions.[32] A notable exception is Texas, where in 2006 the Texas Supreme Court read the clause as an opt in.[33] As a result, the court concluded that "because Texas did not otherwise permit a cause of action for the receipt of unsolicited fax advertisements until September 1, 1999, and the faxes at issue in this case were sent before that date, plaintiffs have no actionable claim."[34] A final possible reading of the clause, and one often urged by TCPA plaintiffs, is that it merely acknowledges that state procedural rules apply in state court (an "acknowledgment" approach) without having any independent legal significance.[35]

State statutes of limitations have also occasionally been applied to bar claims under the federal statute.

The majority "opt out" approach, however, leads to the logical conclusion that states can choose an intermediate path that falls short of barring such claims but somehow restricts the measure of recovery from the full amount authorized under the TCPA. The result would be that a TCPA claim could vary from state to state, as predicted by the Second and Fourth Circuits. This appears to be the evolving trend.

For example, in *U.S. Fax Law Center, Inc. v. iHire, Inc.*, the Tenth Circuit recently considered whether TCPA claims in federal court under diversity jurisdiction can properly be assigned by a facsimile's actual recipient to a consumer organization to prosecute in its own name.[36] The court found that Colorado, rather than federal, law on assignment of claims governed because the TCPA, by its *if otherwise permitted* language, incorporates state law: "Congress expressly directed that federal courts apply substantive state law to determine which persons or entities may bring TCPA claims in federal court."[37] As the court concluded, "the TCPA itself directs that Colorado law govern the matter of assignability."[38] Because Colorado law barred the assignment of personal claims, plaintiff lacked standing in the action. A court in Arizona reached the same result under its state's law on assignment of claims.[39]

In New York, state law bars class actions under statutes that provide minimum statutory penalties unless the relevant statute specifically provides for class recovery.[40] This limit was "designed to discourage . . . recovery of a statutory minimum by each class member [that] results in 'annihilatory punishment,'"[41] and is a matter of "state policy."[42] New York courts apply this restriction to TCPA actions.[43] The Second Circuit recently held, in *Bonime v. Avaya, Inc.*, that the provision is fully applicable in TCPA cases brought in federal court under CAFA diversity jurisdiction, thus foreclosing the claims pursuant to state law even in diversity actions in federal court.[44]

State statutes of limitations have also occasionally been applied to bar claims under the federal statute. Although the statute of limitations under the TCPA is four years under the federal catch-all provision,[45] the Nevada Supreme Court applied a two-year state statute of limitations for claims involving statutory penalties, citing the law's *if otherwise permitted* language as incorporating state limits.[46] Texas similarly applied a shorter state statute of limitations.[47] Most states, however, look to the federal statute of limitations, principally because of the "difficulties that confront state courts and litigants compelled to identify an analogous state cause of action in order to select a limitations period," particularly in the absence of a shorter state statute specific to fax marketing claims.[48]

Although the issue has not yet arisen, an interesting test case could come in a state that has specifically adopted legislation after enactment of the TCPA that provides a shorter limitations period.[49] In Connecticut, for example, a statute authorizing lawsuits "for transmission of unsolicited facsimile or telephone messages" provides that actions must be brought within two years and provides for damages of $500, without the treble damages provision of the TCPA.[50] Under the majority opt out analysis, these limits would presumably apply to TCPA claims arising from Connecticut.

Finally, if the TCPA expressly incorporates state law, the question of which state's law applies naturally arises. A choice of law analysis would appear appropriate where claims may arise under another state's law, although such an analysis would be counterintuitive for litigation under a federal statute. In what appears to be the first such decision, the Connecticut Supreme Court in *Weber v. U.S. Sterling Securities, Inc.* considered a putative class action where "the fax complained of was both sent and received in New York," with no Connecticut interest.[51] The court held that New York substantive law applied, including its restriction on TCPA class claims, and dismissed the class action.[52]

The bottom line for litigators is that a private claim under the TCPA may be limited by state law in those jurisdictions that construe the statute as providing state opt-out authority. This posture is the opposite of the more typical situation where state tort actions, such as defamation, are limited by federal law. Litigants thus face the challenge of making a careful assessment, often without clear or controlling authority on point, as to the potential applicability of state limitations on a TCPA claim.

No Preemption

Determining what law applies to advertisements sent by facsimile is further complicated by the fact that the TCPA expressly permits states to adopt stricter regulation of intrastate facsimile marketing, stating that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits . . . the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements."[53]

The most prominent example of such a state law is California. There, legislators reacted to passage of the federal JFPA, which in certain situations permits facsimile marketing based on an "established business relationship" (EBR), by rejecting the EBR defense and enacting a stricter statute requiring "'prior express invitation or permission.'"[54]

Following passage of the California statute, and California's apparent intent to enforce it against those who sent facsimiles into the jurisdiction, the U.S. Chamber of Commerce brought a lawsuit against the California attorney general. The lawsuit sought a declaratory ruling that the state law was preempted vis-à-vis interstate transmissions and that application of the statute to these faxes would violate the Commerce Clause.[55] The court agreed, finding interstate application of the California law to be unconstitutional

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LITIGATION TIPS

Although every situation is different, defendants in TCPA actions may be well-advised to consider various tactics for dealing with these distinct claims.

- ***Quickly investigate an EBR or permission.*** When a plaintiff asserts a single claim, or even a handful of claims, it is often advisable to investigate quickly whether the faxes were indeed sent and, if so, based on what relationship. If there is a provable EBR or express permission defense, many TCPA plaintiffs will drop the claim.
- ***Ensure compliance going forward.*** Any violations of the TCPA after actual notice of a claim may be deemed willful and thus qualify for treble damages. As such, it should be a top priority for inside or outside counsel to audit company fax marketing practices after receiving a TCPA claim to ensure compliance with the law and its regulations.
- ***Consider removal.*** Federal court is almost universally considered a more favorable forum for TCPA defendants than state courts, particularly in the handful of jurisdictions in which regular TCPA plaintiffs have developed a body of case law that may be at odds with majority positions. Where there is a legitimate basis for federal jurisdiction, defendants should consider removing a state court action.
- ***Check for state limitations.*** In jurisdictions that construe the TCPA as authorizing states to opt out of the full authorization for private actions, or those that have not yet decided the issue, defendants should review state law for potentially applicable restrictions on the federal cause of action.
- ***Manage discovery.*** Where a TCPA claim reaches discovery, defense attorneys are often in the unusual position of bearing a burden of proof on liability, i.e., having to prove the principal defense of an EBR or permission. This discovery burden is enormous in class actions, where the burden is on defendants to show that faxes were not unsolicited due to permission or an EBR (for liability) and to establish a record showing that recipients are differently positioned (i.e., that common questions do not predominate). It is typically to the defendant's advantage to produce all records sufficient to show the existence of business relationships or express permission from facsimile recipients, as well as the difficulty of class adjudication.
- ***Consider equitable defenses where appropriate.*** Although there are few statutory defenses to TCPA actions, in some cases where plaintiffs have collected faxes through an entire statutory limitations period before bringing suit or have engaged in other similar conduct, equitable defenses such as estoppel or waiver may be appropriate.
- ***Know your opposing counsel.*** Many TCPA plaintiffs' firms handle a high volume of claims and, as a result, tend to use form pleadings. As a result, checking into other cases by a plaintiff and its law firm may provide a road map of what is to come.
- ***Look for opportunities to resolve actions.*** As a practical reality, it may make little economic sense to litigate a TCPA action to conclusion. Look for opportunities to make early motions or to settle claims.

but leaving the state law intact with regard to intrastate transmissions.[56]

The result seems clearly correct, and stricter state restrictions on interstate faxes should not give rise to private causes of action. However, because litigants occasionally still assert such claims, this can be an area of legal exposure.

Stating a TCPA Claim

To state a claim under the TCPA, a plaintiff must demonstrate that (1) an "advertisement" (2) was sent to plaintiff's "telephone facsimile machine" and (3) was "unsolicited." An unsolicited fax is one sent without prior express invitation or permission or an EBR; and after 2005, it requires a number of elements, as described below.[57]

Advertisement—*Advertisement* is defined by statute as "any material advertising the commercial availability or quality of any property, goods, or services."[58] Courts have concluded that certain materials that do not promote a commercial product or service, such as a notice of a clinical research study, a networking fax from a college to fellow members of a chamber of commerce, or notices of job openings, are not advertisements.[59] But courts have generally been hesitant to find unsolicited faxes permissible as a matter of law if there is any significant commercial content or purpose. For example, a New York appellate court recently held that informational faxes from a law firm, which included the firm name and contact number and "indirectly advertise the commercial availability and quality" of the sender's legal services, were advertisements.[60] In another recent decision, a federal judge considered whether a "one-page newsletter" fax that included 20 to 25 percent advertising was an advertisement, and denied a motion to dismiss a TCPA claim.[61]

In 2006 comments accompanying TCPA regulations that courts have already looked to for guidance,[62] the Federal Communications Commission (FCC) clarified that purely "transactional" communications, such as contracts or invoices, are not considered facsimile advertisements.[63] The FCC, however, generally considers "free" subscriptions, catalogs, or consultations to be advertisements because they "are often part of an overall marketing campaign to sell property, goods, or services."[64] But the agency goes on in the regulations to explain that purely informative materials, "such as industry news articles," are not advertisements.[65] The commission explained that it would consider trade newsletters on a case-by-case basis:

> An incidental advertisement contained in . . . a newsletter does not convert the entire communication into an advertisement. Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. The Commission emphasizes that a newsletter format used to advertise products or services will not protect a sender from

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> liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. The Commission will review such newsletters on a case-by-case basis.[66]

As a result, the regulations likely permit incidental advertising content in informational newsletters delivered by facsimile.

Sent to a telephone facsimile machine—The FCC construes a "sender" of a facsimile in commonsense fashion to be "the person or entity on whose behalf the advertisement is sent," which is typically "the entity whose product or service is advertised or promoted in the message."[67] In light of fax identification lines and phone records that typically demonstrate who physically sent a transmission, and the content of a fax that shows whose products or services it relates to, there has been relatively little legal dispute over this element of a claim. Instead, these seem to be quintessentially factual issues.

The statute defines *telephone facsimile machine* broadly to include "equipment" with the "capacity" to transcribe images or text from a telephone line onto paper.[68] Although lawmakers in 1991 obviously considered 1980s and early 1990s technology, and the resulting costs for recipients arising from unwanted faxes,[69] when enacting the law, today's facsimile transmissions to fax servers or computers would similarly appear to meet the TCPA definition of a telephone facsimile machine, at least as long as they were connected to a printer. One court has, in a novel reading, suggested that "[p]ersons who receive transmissions [through computers] only print them out on a fax machine if they so elect" and that "[s]uch an elective printing would constitute consent."[70] This theory, which would limit TCPA claims to recipients who automatically print all incoming faxes and interject a fact-specific analysis into any class claim, has not been adopted in other decisions. Indeed, courts have generally not considered changes in technology in interpreting TCPA actions by private litigants.

Express invitation or permission—Where courts find that a recipient invited a fax, such as by signing a form providing consent to be contacted or by orally asking to be contacted, the transmission is not unsolicited.[71] The FCC has made clear that "[p]rior express invitation or permission may be given by oral or written means, including electronic methods," and may "take many forms, including e-mail, facsimile, and internet form."[72] Nonetheless, the FCC has cautioned that the burden of proving permission falls squarely on a defendant: "Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified. In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given." Moreover, "[w]hether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent."[73]

Established business relationship—As discussed below, the EBR element has been controversial and, like express permission, is viewed by the FCC as akin to an affirmative defense, with the burden of proof resting on the defendant.[74] The FCC in 2006 regulations emphasized that "an entity that sends a facsimile advertisement on the basis of an EBR should be responsible for demonstrating the existence of the EBR" as well as its validity.[75] As a result, a TCPA defendant is frequently in the position of needing to prove its innocence; but proof may be difficult when fax recipients wait several years before filing suit, during which time memories may have faded, employees may have left the company, and documents may be lost in the normal course of business.

EBR Defense

Although the existence of an EBR exception to the TCPA's ban on unsolicited facsimile marketing was clarified by the JFPA, previously unsettled law regarding the defense will continue to have real-world consequences in some existing TCPA cases as well as lawsuits in certain jurisdictions filed until mid-2009.

The EBR defense has a tortured history. The statute itself barred commercial faxes "to any person without that person's prior express invitation or permission."[76] The FCC, however, provided in implementing regulations that "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient."[77] As a result, marketers relied on the regulations to send faxes to their customers.

In state court litigation, however, TCPA plaintiffs argued that the statutory language trumped the regulations and successfully convinced some judges to disregard the FCC regulation as contrary to the statute's requirement for prior express invitation or permission before sending a marketing fax.[78] As one federal court noted, surveying the authority, "[m]any of the courts rejecting the established business relationship defense found the FCC's incorporation of this defense into the unsolicited fax provision of the statute to be at odds with the plain language of the statute."[79] Defendants thus found themselves in the surprising and uncomfortable position of facing the possibility of significant liability for statutory damages for conduct that fully complied with the relevant federal regulations.

FCC proposed regulations in 2003 to eliminate the EBR exception to the general ban on fax marketing.[80] Companies, not surprisingly, objected to this change and argued that it would disrupt communications among business partners. The FCC ultimately delayed its proposed regulation several times, and in fact a rule abolishing the EBR exception never actually took effect.[81] Prompted by imminent demise of the EBR defense, Congress through the JFPA amended the statute to permit fax marketing based on an established business relationship, with certain additional limitations.[82]

Although the JFPA did not specifically address whether an EBR exception applied prior to the law's effective date of July 9, 2005, the trend appears to be for courts to conclude that the law "provides support for the . . . position that Congress always intended for the 'established business relationship' exception to apply to facsimile advertisements."[83] Indeed, the first federal appeals court to consider the issue recently found the regulatory EBR exception applicable to faxes sent between 2001 and 2005.[84] In *Gene & Gene LLC v. BioPay LLC*, the Fifth Circuit rejected an argument against application of the EBR exception, noting that "applicable regulations incorporated an established business relationship exemption until this exemption was codified in the current version of the statute by the JFPA."[85]

Under the JFPA, an EBR is defined as a prior or existing relationship formed

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> by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[86]

Once established, "the EBR will permit an entity to send facsimile advertisements to a business or residential subscriber until the subscriber 'terminates' it by making a request not to receive future faxes."[87]

In addition to such a business relationship, a facsimile sender must demonstrate, in order to qualify for an EBR defense under the regulations, (1) that it obtained the facsimile number either through "the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement," or through "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution," and (2) the recipient has not otherwise opted out of receiving such marketing faxes.[88]

The first requirement only applies to those business relationships formed after the JFPA went into effect on July 9, 2005.[89] If an EBR existed prior to this time, the FCC presumes that the sender already had the recipient's facsimile number.[90]

Damages

The TCPA authorizes private actions to recover "actual monetary loss . . . or to receive $500 in damages" for each separate violation.[91] Because actual damages associated with receiving a single unauthorized fax (seven cents in paper and ink, according to a court decision in 2001[92]) are a tiny fraction of the statutory damages, TCPA litigation in practice focuses on statutory damages.

Where a defendant "willfully or knowingly" violated the TCPA, the court may, "in its discretion," award treble damages.[93] Although the TCPA does not define *willingly and knowingly*, the FCC has interpreted similar language in the Federal Communications Act as what a defendant "knew or should have known."[94] Relying on this rationale, courts have similarly interpreted the provision as "requir[ing] only that the sender have reason to know, or should have known that his conduct would violate the statute."[95]

The Ohio Supreme Court recently adopted a significantly lower threshold for enhanced damages under the TCPA, involving simply "'knowledge of the facts that constitute the offense,'" which would seemingly apply to almost all fax transmissions:

> For an award of treble damages under the TCPA, the term "knowingly" requires that liability be imposed even without [a sender's] knowledge that the conduct violated the statute. To establish a "knowing" violation of the TCPA for an award of treble damages, a plaintiff must prove only that the defendant knew of the facts that constituted the offense. Such knowledge of the "facts that constitute the offense" does not mean that the individual must know that certain conduct actually violates a law because it "constitutes" an offense. We hold that to establish a *knowing* violation of the TCPA for an award of treble damages, a plaintiff must prove only that the defendant knew that it acted or failed to act in a manner that violated the statute, not that the defendant knew that the conduct itself constituted a violation of law.[96]

As a result, exposure to damages may be higher in Ohio than some other jurisdictions that have followed the majority position.

Where the result of statutory damages in a class case is truly excessive, a court may reduce it. For example, a federal court in Texas considered the case of a fax broadcaster who was liable for $2.34 billion in statutory damages and reduced the award to $459,375.[97] Although that court did not expressly frame the issue as a due process challenge, the award of statutory or liquidated damages so disproportional to actual harm suffered by a plaintiff would certainly implicate constitutional concerns.[98]

Constitutional Challenges

Facial constitutional challenges to the fax marketing provisions of the TCPA have been widely litigated and almost entirely unsuccessful. Federal and state courts, with few exceptions, have rejected the most frequent arguments that the TCPA infringes on First Amendment rights[99] or violates the due process and equal protection components of the Fifth and Fourteenth Amendments.[100]

The result in First Amendment challenges is perhaps unsurprising as commercial speech receives less First Amendment protection than other forms of constitutionally protected speech. Legislation that regulates commercial speech, like the TCPA, is evaluated under the test established by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[101] Where a restriction on nonmisleading commercial speech about lawful activities "directly advances" a "substantial" government interest and is narrowly tailored to be no "more extensive than is necessary to serve that interest," the regulation will be upheld.[102]

At least two federal appeals panels have rejected First Amendment challenges to the TCPA's fax marketing provisions after concluding that there was a "reasonable fit" between the statute and the government's "substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient."[103] However, as technology evolves and to the extent that it continues to undermine the rationale for the TCPA, i.e., to the extent that faxes cease to cause costs or lost telephone availability, there may come a day when the act no longer advances a substantial government interest, at least as that interest has been articulated to date.

For defendants facing potential class actions and significant potential liability exposure, a due process argument against unconstitutionally excessive damages may seem appropriate given the disparity between actual harm and statutory damages under the TCPA. The most persuasive time for a successful due process challenge, however, is likely after class certification and a liability determination for an amount far in excess of actual harm.[104] In short, it is a theory that defendants hope they never need to argue.

Class Actions

Perhaps the greatest number of decisions under the TCPA relate to class certification, which is also, by virtue of the aggregation of statutory damages, clearly where the most is at stake for litigants. Although congressional history indicates that lawmakers likely intended the statutory penalty to encourage small claims

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cases in state court,[105] the law does not restrict class actions; and class lawsuits are therefore presumptively available where appropriate under the Federal Rules of Civil Procedure and analogous state rules.

In *Gene & Gene*, the Fifth Circuit recently became the first federal appeals court to consider a class certification ruling under the TCPA, although it relied on several frequently cited district court cases as "instructive."[106] Defendant had sent over 4,000 faxes advertising its services to recipients in Louisiana between 2001 and 2005. Because there was no dispute that the faxes were sent or that they were advertisements and because the Fifth Circuit recognized the EBR defense established by the FCC regulations for those years, the key issue to be resolved was one of permission: "The distinction between consenting and non-consenting recipients was the primary issue before the district court in the class-certification phase."[107]

Defendant admitted that it had purchased customer databases and culled some facsimile numbers from these databases (without permission or an EBR) but also provided evidence that it collected facsimile numbers that were submitted to its own website, provided to its employees at trade shows, and culled from its customer lists.[108] On this record, defendant argued that "there is no class-wide basis by which to distinguish those fax recipients who had consented to receiving faxes from those who had not consented, which suggests that the determination of consent, or the lack thereof, would require hundreds of mini-trials."[109]

The Fifth Circuit agreed. The court found that because plaintiff could not articulate a theory as to how the determinative proof could be determined on a classwide basis, common issues did not predominate under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and the district court therefore abused its discretion in certifying a class.[110]

The *Gene & Gene* analysis is likely to be widely cited in TCPA class actions but in fact tracks what district courts had already been doing. In cases involving distinct issues of EBR or permission for individual recipients, classes are generally denied.[111] In cases where individual recipient permission is not an issue either because a court did not recognize the EBR defense or because as a factual matter it was not relevant, courts have tended to certify classes.[112] It is apparent from a survey of the TCPA class certification cases that this issue (the existence of individualized or common questions of permission) is the key factor in most judicial analysis of TCPA class certification motions. Indeed, a federal judge recently noted this body of law: "The most frequent bone of contention, in this jurisdiction as in others, revolves around the issue of consent. In nearly every case, defendants oppose certification on the basis that TCPA claims are inherently individual due to the statutory requirement that only "unsolicited" faxes may give rise to a claim."[113]

Defining the Class

In an effort to avoid this problem, some TCPA plaintiffs have proposed class definitions to include only recipients of unsolicited faxes. Courts have rejected this approach because it defines the class in such a way that the key issue on liability determines membership in the class, thus improperly triggering a preliminary merits determination.[114] One class plaintiff, however, successfully avoided this problem by taking discovery on 306,000 facsimile advertisements sent to potential customers in the Atlanta area and then proposing a class that specifically excluded every recipient for which defendant claimed an EBR based on its records of knowledge.[115] The trial court certified the class, and this decision was upheld on appeal.[116]

Beyond questions about the predominance of common issues, some courts have also considered the legislative history and purpose of the TCPA as part of determining whether class actions are appropriate. For example, one state court in Illinois, a jurisdiction that has become a hotbed of TCPA litigation, concluded that because "Congress believed that allowing an individual to file an action in small claims court to redress the nuisance of unsolicited faxes and to recover a minimum of $500 in damages was an adequate incentive to address what is, at most, a minor intrusion into an individual's daily life," it would be unfair and contrary to congressional intent "[t]o engraft on this statutory scheme the possibility of private class actions, with potential recoveries in the millions of dollars."[117] Other courts have been troubled by the tendency of TCPA plaintiffs and their attorneys to file dozens of similar lawsuits and have questioned the typicality of the plaintiff or the adequacy of counsel.[118]

Fax marketing class actions also raise for litigants a host of practical issues that are not specific to litigation under the TCPA, ranging from the timing of dispositive and class motions to managing class discovery, securing court approval of class settlements, and providing adequate notice to class members.

Endnotes

1. For example, one legal publisher has apparently settled a TCPA claim for an agreed judgment in excess of $18 million. *See* Notice of Pendency and Proposed Settlement of Class Action and Fairness Hearing, Goldstein v. Juris Publ'g, Inc., No. 04 20066 CA 06 (Fla. Cir. Ct.). Reported judgments also include significant recoveries. *See, e.g.*, Penzer v. Transp. Ins. Co., 509 F. Supp. 2d 1278 (S.D. Fla. 2007) ($12 million); Covington & Burling v. Int'l Mktg. & Research Inc., No. CIV.A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. Apr. 17, 2003) ($2,288,000); Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468 (Ga. Ct. App. 2000) ($11.8 million); *see also* 2007 WL 3144679 ($3 million, Oklahoma car dealership); 2002 WL 31275294 ($6.5 million, Illinois car dealership); 2001 WL 1825341 ($1,735,000, Dallas Cowboys football team). The FCC also imposed fines against one company in excess of $5.3 million for fax advertising. *In re* Fax.com, Inc., FCC Case File No. EB-02-TC-120 (Notice of Forfeiture adopted by the FCC on Aug. 2, 2002).

2. Walter Olson, *Rumpelstiltskin, LLP*, Wall St. J., July 29, 2006, at A11.

3. Omerza v. Bryant & Stratton, No. 2006-L-092, 2007 WL 2822000, at *4 (Ohio Ct. App. Sept. 28, 2007) (unpublished).

4. TCPA, Pub. L. No. 102-243, 105 Stat. 2394.

5. *See generally* Michael J. Rust & Pamela S. Webb, *The Unsettling Fax About Coverage Claims Under the Telephone Consumer Protection Act*, 35 Brief 13 (Winter 2006) (discussing TCPA coverage litigation and policy exclusions).

6. Pub. L. No. 109-21 (codified at 47 U.S.C. § 227).

7. A specialized TCPA reporter was founded and is maintained by a plaintiff-oriented TCPA firm. *See* www.tcpalaw.com/about.htm. The site publishes hundreds of TCPA decisions not otherwise reported.

8. *New Litigation Groups Bring Total to 72*, 41 Trial 11 (Oct. 2005).

9. H.R. Rep. No. 102–317 (Nov. 15, 1991).

10. David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buff. L. Rev. 1001 (Fall 1997).

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11. H.R. REP. NO. 102-317; *see also* S. REP. NO. 102-178 (Oct. 8, 1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 ("[U]nsolicited calls placed to fax machines . . . often impose a cost on the called party.").

12. H.R. REP. NO. 102-317.

13. Van Bergen v. Minn., 59 F.3d 1541, 1548 (8th Cir. 1995); *see also* S. REP. NO. 102-178, at 3 ("States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls."); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 515 (3d Cir. 1998) ("Federal legislation was necessary in order to prevent telemarketers from evading state restrictions."); Chair King, Inc. v. Hous. Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997) ("By creating a private right of action in state courts, Congress allowed states, in effect, to enforce regulation of interstate telemarketing activity."); Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997) ("[T]he dominant reason that Congress created a private TCPA action at all was out of solicitude for states which were thwarted in their attempts to stop unwanted telemarketing. . . . Thus, although Congress created the private TCPA action, it was from the beginning a cause of action in the states' interest.").

14. 47 U.S.C. § 227(b)(3).

15. Murphy v. Lanier, 204 F.3d 911, 912 (9th Cir. 2000); Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd., 156 F.3d 432, 436–37 (2d Cir. 1998); *ErieNet*, 156 F.3d at 517–18; Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1289 (11th Cir. 1998); *Chair King*, 131 F.3d at 510; *Int'l Sci. & Tech. Inst.*, 106 F.3d at 1152.

16. *ErieNet*, 156 F.3d at 521 (Alito, J., dissenting).

17. Dun-Rite Constr., Inc. v. Amazing Tickets, Inc., No. 04–3216, 2004 WL 3239533, at *2 (6th Cir. Dec. 16, 2004).

18. 427 F.3d 446 (7th Cir. 2005).

19. *Id.* at 449.

20. *Id.* at 450–51 (citing Grable & Sons Metal Prods., Inc. v. Darue Eng'g Mfg., 545 U.S. 308 (2005); Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003)).

21. *Breuer*, 538 U.S. at 694, 697 (citations omitted).

22. *Grable & Sons Metal Prods.*, 545 U.S. at 312–14.

23. *See supra* note 13.

24. Gene & Gene LLC v. BioPay LLC, No. 07-30195, 2008 WL 3511766, at *3 (5th Cir. Aug. 14, 2008); U.S. Fax Law Ctr., Inc. v. iHire, Inc., 476 F.3d 1112, 1116–18 (10th Cir. 2007); Gottlieb v. Carnival Corp., 436 F.3d 335, 343 (2d Cir. 2006); Margulis v. Resort Rental, LLC, No. 08-1719, 2008 WL 2775494, at *1 n.1 (D.N.J. July 14, 2008); Hirz v. Travelcomm Indus., Inc., No. 1:07-cv-1833, 2008 WL 1700438, at *1 (N.D. Ohio Apr. 1, 2008); Watson v. NCO Group, Inc., 462 F. Supp. 2d 641, 646–47 (E.D. Pa. 2006); Clean Air Council v. Dragon Int'l Group, No. 1:CV-06-0430, 2006 WL 2136246, at *2–4 (M.D. Pa. July 28, 2006); Brodeur v. Swan Fin. Corp., No. 4:05CV2418, 2006 WL 950208, at *3 (E.D. Mo. Apr. 11, 2006); *see also* Boydston v. Asset Acceptance LLC, 496 F. Supp. 2d 1101, 1109 (N.D. Cal. 2007) (holding that "neither *Grable & Sons* nor *Breuer* implicitly overrule appellate court decisions holding that private claims under the TCPA do not confer federal question jurisdiction").

25. *E.g.*, *Gottlieb*, 436 F.3d at 343 n.10 ("In order to meet the amount-in-controversy requirement, a single plaintiff would have to receive either 150 faxes from a single defendant, assuming $500 in statutory damages per fax, or 50 faxes from that defendant, assuming treble damages.").

26. Joseph R. Compoli, Jr., *Junk Faxes: Combining Causes of Action Under Federal and State Laws*, 2 ANN. 2007 AAJ-CLE 1829 (July 2007); Joseph R. Compoli, Jr., *Junk Faxes: High-Tech Serial Theft in the Modern Office, and Your Right to Sue the Offender*, 2006 ATLA-CLE 325 (Feb. 2006).

27. G.M. Sign, Inc. v. Franklin Bank, S.S.B., No. 06 C 0949, 2006 WL 1132386, at *1 (N.D. Ill. Apr. 19, 2006).

28. 47 U.S.C. § 227(b)(3).

29. Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1156 (4th Cir. 1997) (dicta).

30. Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd., 156 F.3d 432, 438 (2d Cir. 1998).

31. Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P., 329 F. Supp. 2d 789, 795 (M.D. La. 2004) (discussing approaches). *See generally* Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?* 33 CONN. L. REV. 407 (Winter 2001).

32. *See, e.g.*, Kaufman v. ACS Sys., Inc., 110 Cal. App. 4th 886, 898 (2003) (holding that "a person may file a TCPA action in state court as long as the state has not prohibited it"); Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 910 (Mo. 2002) (holding that a "[s]uit may be brought unless a state does not otherwise permit such a suit"); Zelma v. Market U.S.A., 778 A.2d 591, 593–98 (N.J. Super. Ct. 2001) (agreeing with *International Science* that the statute allows a state "to enact a law barring TCPA actions in the courts of that state"); Edwards v. Direct Access, LLC, 124 P.3d 1158, 1160 (Nev. 2005) ("[A] state, on behalf of its courts, can refuse to accept jurisdiction over this federally created cause of action."); Aronson v. Fax.com, Inc., 51 Pa. D&C 4th 421, 430 (Pa. Ct. Com. Pl. 2001) (reading § 227(b)(3) as "giving the states the ability to opt out"); Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 470–71 (Ga. Ct. App. 2000) (adopting the analysis of *International Science*). Other courts have held that states need not opt in, without squarely considering whether a state could opt out. *See, e.g.*, Adler v. Vision Lab Telecomms., Inc., 393 F. Supp. 2d 35, 37–38 (D.D.C. 2005); Lary v. Flasch Bus. Consulting, No. 2020803, 2003 WL 22463948, at *2–5 (Ala. Civ. App. Oct. 31, 2003); Condon v. Office Depot, Inc., 855 So. 2d 644, 645–48 (Fla. Dist. Ct. App. 2003); Schulman v. Chase Manhattan Bank, 268 A.D.2d 174, 176–79 (N.Y. App. Div. 2000).

33. Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707, 716–18 (Tex. 2006).

34. *Id.* at 718.

35. *See, e.g.*, *Accounting Outsourcing, LLC*, 329 F. Supp. 2d at 795; R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc., 857 A.2d 1, 11 (Md. 2004); Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350, 354–55 (Colo. Ct. App. 2005).

36. 476 F.3d 1112, 1115 (10th Cir. 2007).

37. *Id.* at 1118.

38. *Id.*

39. Martinez v. Green, 131 P.3d 492, 495 (Ariz. Ct. App. 2006).

40. N.Y. C.P.L.R. § 901(b).

41. Lennon v. Philip Morris Cos., 734 N.Y.S.2d 374, 380 (N.Y. County 2001) (McLaughlin, *Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, Book 7B, CPLR C901:7, at 327–28 (citation omitted)).

42. *Lennon*, 734 N.Y.S.2d at 380.

43. *See* Rudgayzer & Gratt v. Cape Canaveral Tour, 22 A.D.3d 148, 149 (N.Y. App. Div. 2005) ("The issue presented is whether this class action may be maintained for alleged violations of the federal Telephone Consumer Protection Act (47 USC § 227 et seq.) in light of CPLR 901(b). We hold that it may not."); *see also* Giovanniello v. Carolina Wholesale Office Mach. Co., 29 A.D.3d 737, 738 (N.Y. App. Div. 2006) (same); Weber v. Rainbow Software, Inc., 21 A.D.3d 411, 411 (N.Y. App. Div. 2005) (same); Giovanniello

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v. Hispanic Media, 21 A.D.3d 400, 400 (N.Y. App. Div. 2005) (same); Ganci v. Cape Canaveral Tour & Travel, Inc., 21 A.D.3d 399, 400 (N.Y. App. Div. 2005) (same); Bonime v. Bridge 21, Inc., 21 A.D.3d 393, 393 (N.Y. App. Div. 2005) (same); Bonime v. Disc. Funding Assocs., Inc., 21 A.D.3d 393, 393 (N.Y. App. Div. 2005) (same); Rudgayzer & Gratt v. LRS Commc'ns, 6 Misc. 3d 20, 24 (N.Y. Sup. Ct. 2004) (same).

44. Bonime v. Avaya, Inc., —F.3d—, 2008 WL 4755795, *4 (2d Cir. Oct. 31, 2008); *see also* Giovanniello v. Carolina Wholesale Office Mach. Co., No. 06 Civ. 10235, 2007 WL 2363614, *2–3 (S.D.N.Y. Aug. 20, 2007); Giovanniello v. New York Law Pub. Co., No. 07 Civ. 1990, 2007 WL 2244321, *3-4 (S.D.N.Y.), reconsideration denied, 2007 WL 4320757 (S.D.N.Y. Dec. 11, 2007); Holster v. Gatco, 485 F. Supp. 2d 179, 185 (E.D.N.Y. 2007).

45. 28 U.S.C.A. § 1658(a) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.").

46. Edwards v. Emperor's Garden Rest., 130 P.3d 1280, 1286–87 (Nev.), *cert. denied*, 127 S. Ct. 438 (2006).

47. Chair King, Inc. v. GTE Mobilnet of Hous., Inc., 135 S.W.3d 365, 390–91 (Tex. App. 2004), *rev'd on other grounds by* 184 S.W.3d 707 (Tex. 2006).

48. Zelma v. Konikow, 879 A.2d 1185, 1189 (N.J. Super. App. Div. 2005) ("It is apparent that the attempt to select the most appropriate existing limitation period for TCPA claims will insert complex legal issues in otherwise relatively uncomplicated cases. Equally important, the unnecessary complexity will bring no real benefit to a state, like New Jersey, that has not adopted a specific limitation period for TCPA actions based on a balancing of the interests implicated."); *see also* Sznyter v. Malone, 155 Cal. App. 4th 1152, 1164–68 (2007); Stern v. Bluestone, 47 A.D.3d 576, 582 (N.Y. App. Div. 2008).

49. Conn. Gen. Stat. § 52-570c(d).

50. *Id.*

51. 924 A.2d 816, 827 (Conn. 2007).

52. *Id.*

53. 47 U.S.C. § 227(e).

54. *See* U.S. Chamber of Commerce v. Lockyer, No. 2:05-CV-2257MCEKJM, 2006 WL 462482, at *3–4 (E.D. Cal. Feb. 27, 2006) (discussing federal and state statutes) (citation omitted).

55. *Id.* at *1.

56. *Id.* at *9.

57. 47 U.S.C. § 227(b)(1)(C). Plaintiffs sometimes seek recovery of statutory damages for technical violations of the TCPA regulations, such as a failure to include sufficient information in a fax header. Such actions are not authorized by the text of the statute, which bars unsolicited facsimile advertisements and permits "an action based on a violation of this subsection," rather than technical requirements provided for in another subsection of the law. 47 U.S.C. §§ 227(b)(3), 227(d). Such technical claims saw initial success in some state trial courts, particularly in Ohio. *See, e.g.*, Yavitch & Palmer Co., LPA v. U.S. Four, Inc., No. 2004 CVF 028885, 2005 WL 3244052, at *4–5 (Ohio Mun. Ct. Oct. 5, 2005) (awarding $6,000 for multiple violations of the TCPA in single facsimile). *But see* Ferron & Assocs., L.P.A. v. U.S. Four, Inc., No. 05AP-659, 2005 WL 3550760, at *3–4 (Ohio Ct. App. Dec. 29, 2005) (no cause of action for violation of header regulations). However, courts now uniformly reject such claims on the basis that, as a U.S. District Court for the Southern District of New York decision concluded, "The TCPA empowered citizens to sue for relief from the problem created by the *receipt* of unsolicited fax advertisements, not for deficiencies in the faxes received." Klein v. VisionLab Telecomms., Inc., 399 F. Supp. 2d 528, 538–40 (S.D.N.Y. 2005) (emphasis in original); *see also* Boydston v. Asset Acceptance LLC, 496 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007); Kopff v. Battaglia, 425 F. Supp. 2d 76, 90–91 (D.D.C. 2006); Adler v. Vision Lab Telecomms., Inc., 393 F. Supp. 2d 35, 38–39 (D.D.C. 2005); USA Tax Law Ctr., Inc. v. Office Warehouse Wholesale, LLC, 160 P.3d 428, 432–35 (Colo. Ct. App. 2007).

58. 47 U.S.C. § 227(a)(5).

59. Phillips Randolph Enters., LLC v. Adler-Weiner Research Chi., Inc., No. 06 C 5111, 2007 WL 293928, at *2 (N.D. Ill. Jan. 30, 2007) (research study); Ameriguard, Inc. v. Univ. of Kan. Med. Ctr. Research Inst., Inc., No. 06-0369-CV-W-ODS, 2006 WL 1766812, at *1 (W.D. Mo. June 23, 2006) (clinical research study), *aff'd*, 222 F. App'x 538 (8th Cir. 2007); Lutz Appellate Servs., Inc. v. Curry, 859 F. Supp. 180, 181 (E.D. Pa. 1994) (job openings); Omerza v. Bryant & Stratton, No. 2006-L-092, 2007 WL 2822000, at *4–6 (Ohio Ct. App. Sept. 28, 2007) (networking fax).

60. Stern v. Bluestone, 47 A.D.3d 576, 580 (N.Y. App. Div. 2008).

61. Holtzman v. Turza, No. 08 C 2014, 2008 WL 2510182, at *3–4 (N.D. Ill. June 19, 2008).

62. *Id.*

63. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,972–73 (May 3, 2006).

64. *Id.* at 25,973.

65. *Id.*

66. *Id.*

67. *Id.* at 25,971.

68. 47 U.S.C. § 227(a)(3).

69. *See* Sorkin, *supra* note 10.

70. *E.g.*, Levine v. 9 Net Ave., Inc., No. A-1107–00T1, 2001 WL 34013297, at *5 (N.J. Super. Ct. App. Div. June 7, 2001) (unpublished).

71. *E.g.*, Travel 100 Group, Inc. v. Mediterranean Shipping Co., 889 N.E.2d 781, 790 (Ill. App. Ct. 2008) (consent form); Stoneman v. Turner Med. Prods., No. 88206, 2007 WL 1083869, at *2 (Ohio Ct. App. Apr. 12, 2007) (oral consent).

72. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. at 25,972.

73. *Id.*

74. *Id.* at 25,967.

75. *Id.* ("Should a question arise . . . as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient.").

76. TCPA, Pub. L. No. 102-243, 105 Stat. 2394, 2396.

77. *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8779 n.87 (FCC 1992); *see also In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 F.C.C.R. 12391, 12408 (FCC 1995) (prior rule making "makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions").

78. Leckler v. CashCall, Inc., 554 F. Supp. 2d 1025, 1031 (N.D. Cal. 2008) (discussing cases); Weitzner v. Iridex Corp., No. 05 CV 1254 (RJD), 2006 WL 1851441, at *4 (E.D.N.Y. June 29, 2006) (collecting cases); Jemiola v. XYZ Corp., 802 N.E.2d 745, 749 (Ohio Ct. Com. Pl. 2003) ("Consent may not be inferred from the mere distribution or publication of a fax number, or the existence of a previous business relationship between an advertiser and the recipient, in the absence of specific evidence of 'prior express invitation or permission' to send advertisements by fax."). *But see* Carnett's, Inc. v. Hammond, 610 S.E.2d 529, 531 (Ga. 2005) (giving effect to FCC regulations).

79. *Weitzner*, 2006 WL 1851441, at *4.

80. *In re* Rules & Regulations

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Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14127 (FCC 2003).

81. Gene & Gene LLC v. BioPay LLC, No. 07-30195, 2008 WL 3511766, at *1 n.2 (5th Cir. Aug. 14, 2008).

82. 47 U.S.C. § 227(b)(1)(C) (added by Pub. L. No. 109-21 (2005)).

83. Blitz v. Agean, Inc., No. 05 CVS 441, 2007 WL 2570255, at *4 n.5 (N.C. June 25, 2007) (unpublished).

84. *Gene & Gene*, 2008 WL 3511766, at *2 & n.5.

85. *Id.* at *1 n.3. Although the question was presented to the D.C. Circuit recently in a challenge to regulations issued under the JFPA, the court declined to reach the issue on procedural grounds. Biggerstaff v. FCC, 511 F.3d 178 (D.C. Cir. 2007).

86. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,968–69 (May 3, 2006).

87. *Id.* at 25,969.

88. 47 U.S.C. § 227(b)(1)(C). The FCC has indicated that "a facsimile number obtained from a recipient's own directory, advertisement, or internet site" will be deemed to be voluntarily made available to the public "unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question." 71 Fed. Reg. 25,967, 25,968.

89. 47 U.S.C. § 227(b)(1)(C).

90. 71 Fed. Reg. 25,967, 25,968 ("[T]he Commission adopts a presumption that, if a valid EBR existed prior to July 9, 2005, the sender had the facsimile number prior to that date as well.").

91. 47 U.S.C. § 227(b)(3)(B).

92. Texas v. Am. Blast Fax, Inc., 164 F. Supp. 2d 892, 900–01 (W.D. Tex. 2001).

93. 47 U.S.C. § 227(b)(3)(C).

94. *See In re* Intercambio, Inc., 3 F.C.C. 7247, 7251 (FCC 1988).

95. Stern v. Bluestone, 47 A.D.3d 576, 581 (N.Y. App. Div. 2008); *see also Am. Blast Fax*, 164 F. Supp. 2d at 899.

96. Charvat v. Ryan, 879 N.E.2d 765, 770 (Ohio 2007) (citation omitted) (emphasis in original).

97. *Am. Blast Fax*, 164 F. Supp. 2d at 900–01 (W.D. Tex. 2001).

98. *E.g.*, Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 777–78 (N.D. Ill. 2008) (discussing due process issue).

99. *E.g.*, Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 660 (8th Cir. 2003) (upholding constitutionality of the TCPA against First Amendment challenge); Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 57 (9th Cir. 1995) (same); Holtzman v. Caplice, No. 07 C 7279, 2008 WL 2168762, at *3–6 (N.D. Ill. May 23, 2008) (same); *Centerline Equip.*, 545 F. Supp. 2d at 772–77 (N.D. Ill. 2008) (same); Phillips Randolph Enters., LLC v. Rice Fields, No. 06 C 4968, 2007 WL 129052, at *3–4 (N.D. Ill. Jan. 11, 2007) (same); Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P., 329 F. Supp. 2d 789, 817 (M.D. La. 2004) (same); *Am. Blast Fax*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000) (same); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997) (same).

100. *See, e.g.*, *Accounting Outsourcing*, 329 F. Supp. 2d at 804–10; Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296 (Cal. Ct. App. 2003).

101. 447 U.S. 557 (1980).

102. *Id.* at 566.

103. *Am. Blast Fax*, 323 F.3d at 655; *see also Destination Ventures*, 46 F.3d at 57.

104. *Holtzman*, 2008 WL 2168762, at *7 (facial due process challenge of fines as "excessive" is "premature"); *see also Rice Fields*, 2007 WL 129052, at *2–3.

105. Kim v. Sussman, No. 03 CH 07663, 2004 WL 3135348, at *2 (Ill. Cir. Ct. Oct. 19, 2004).

106. No. 07–30195, 2008 WL 3511766, at *5 (5th Cir. Aug. 14, 2008).

107. *Id.* at *2.

108. *Id.*

109. *Id.*

110. *Id.* at *8.

111. *See, e.g.*, Levitt v. Fax.com, No. WMN-05-949, 2007 WL 3169078, at *4–7 (D. Md. May 25, 2007); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1169–70 (S.D. Ind. 1997); Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403–04 (E.D. Pa. 1995); Livingston v. U.S. Bank, N.A., 58 P.3d 1088, 1091 (Colo. Ct. App. 2002); Carnett's, Inc. v. Hammond, 610 S.E.2d 529, 532–33 (Ga. 2005); Damas v. Ergotron, Inc., No. 03 CH 10667, 2005 WL 1614485, at *4 (Ill. Cir. Ct. July 6, 2005); Blitz v. Agean, Inc., No. 05 CVS 441, 2007 WL 2570255, at *4–7 (N.C. Super. Ct. June 25, 2007) (unpublished); Blitz v. Xpress Image, Inc., No. 05 CVS 679, 2006 WL 2425573, at *6–10 (N.C. Super. Aug. 23, 2006); Intercont'l Hotels Corp. v. Girards, 217 S.W.3d 736, 738–39 (Tex. App. 2007); Kondos v. Lincoln Prop. Co., 110 S.W.3d 716, 721–22 (Tex. App. 2003).

112. *See, e.g.*, Sadowski v. Med1 Online, LLC, No. 07 C 2973, 2008 WL 2224892, at *4 (N.D. Ill. May 27, 2008) (class certified where "no evidence" of predominant individual issues existed); Hinman v. M & M Rental Ctr., Inc., 545 F. Supp. 2d 802, 807 (N.D. Ill. 2008) (class certified where "broadcasts at issue were sent *en masse* to recipients identified on a singular 'leads' list obtained from a singular source"); Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642, 647 (W.D. Wash. 2007) (class certified where there was "no need for individual evidence on the permission issue"); Travel 100 Group, Inc. v. Empire Cooler Serv., Inc., No. 03 CH 14510, 2004 WL 3105679, at *3 (Ill. Cir. Ct. Oct. 19, 2004) ("The manner in which the Defendant identified these recipients will not require individualized inquiry.").

113. Saf-T-Gard Int'l, Inc. v. Wagener Equities, Inc., Nos. 07 C 0890, 07 C 891, 2008 WL 2651309, at *2 (N.D. Ill. June 3, 2008).

114. *See, e.g.*, *Sadowski*, No. 07 C 2973, 2008 WL 489360, at *3–4 (N.D. Ill. Feb. 20, 2008); G.M. Sign, Inc. v. Franklin Bank, S.S.B., No. 06 C 949, 2007 WL 4365359, at *3 (N.D. Ill. Dec. 13, 2007); Top Craft, Inc. v. Int'l Collection Servs., 2008 WL 2579217, at *2 (Mo. Ct. App. June 30, 2008); Cicero v. U.S. Four, Inc., No. 07AP-310, 2007 WL 4305720, at *7 (Ohio Ct. App. Dec. 11, 2007); Kennard v. Elec. Data Sys. Corp., No. 296-93-98, 1998 WL 34336245, at *4–5 (Tex. Dist. Ct. Oct. 23, 1998) (unpublished).

115. Am. Home Servs., Inc. v. A Fast Sign Co., 651 S.E.2d 119, 120–21 (Ga. Ct. App. 2007).

116. *Id.*

117. Kim v. Sussman, No. 03 CH 07663, 2004 WL 3135348, at *2 (Ill. Cir. Ct. Oct. 19, 2004); *see also* Levine v. 9 Net Ave., Inc., No. A-1107–00T1, 2001 WL 34013297, at *4 (N.J. Super. Ct. June 7, 2001) (*But see* ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844, 850 (Ariz. Ct. App. 2002).

118. *See, e.g.*, Bernstein v. Am. Family Ins. Co., No. 02 CH 6905, 2005 WL 1613776, at *3–4 (Ill. Cir. Ct. July 6, 2005).

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