Telephone Consumer Protection Act
(Junk Faxes, Spam Texts, Robocalls, Telemarketing Abuse)

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The Telephone Consumer Protection Act ("TCPA") protects consumers and businesses against harassment, annoyance, and loss from abusive use of the telephone system. In particular, it prohibits or regulates (1) unsolicited fax advertising, (2) automated or prerecorded "robocalls" to cell phones, (3) spam text messages and (4) telemarketing abuses, including telemarketing "robocalls." Violations can result in substantial damages, of **$500 to $1,500 per call.**

I. Conduct prohibited or regulated by Telephone Consumer Protection Act

The TCPA, 47 U.S.C. §227 ("TCPA"), was enacted in 1991, P.L. 102-243, 105 Stat. 2395, and has been amended on several subsquent occasions, including in 2005 by the Junk Fax Prevention Act, P.L. 109-21, 119 Stat. 362. It is administered by the Federal Communications Commission ("FCC"), which has issued implementing regulations. 47 C.F.R. §64.1200; 47 C.F.R. §68.318. "The TCPA grants the FCC the authority to 'prescribe regulations to implement the requirements of [§ 227(b)].'" *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1003 (N.D. Ill. 2010) (quoting 47 U.S.C. § 227(b)(2)). Congress has delegated the FCC with the authority to make rules and regulations to implement the TCPA" and therefore its orders have the force of law. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (citing *Chevron v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843-44 (1984); 47 U.S.C. §227(b)(2))

It should be noted that FCC regulations are subject to direct review by the U.S. Court of Appeals for the District of Columbia Circuit for 30 days, after which they are incontestable, the only issue being whether they were violated. *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2010), relying on the Administrative Orders Review Act or Hobbs Act, 28 U.S.C. §2342(1); 47 U.S.C. § 402(a). Before seeking relief from the Court of Appeals, a party aggrieved by the FCC's final order must petition the FCC for reconsideration, also within 30 days. 47 U.S.C. §405(a). *See Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360 (6th Cir. 2012), as to the scope of these statutory provisions.

The TCPA and FCC regulations prohibit or regulate several different abuses:

1. Unsolicited advertising faxes.

The TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. §227(b)(1)(C).

a. "Advertisement"

An "advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services". 47 U.S.C. §227(a)(4). If the fax contains information about the sender's products and services, it is likely to be held to be an advertisement. *Addison Automatics v. Rossi,* 10 C 6903, 2011 U.S.Dist. LEXIS 144861

(N.D.Ill., Dec. 15, 2011).

Communications offering free seminars may be "advertisements" if goods or services are promoted at the seminar. The FCC has held:

> [The FCC] concludes that facsimile messages that promote goods and services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the 'quality of any goods or services.' Therefore, facsimile communications regarding such free goods and services, if not purely 'transactional,' would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 & the Junk Fax Prevention Act of 2005, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3814; 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006) ("2006 TCPA Report and Order"). See *Stonecrafters, Inc. v. Almo Distributing New York, Inc.*, 07 C 5105, slip op. at 2 (N.D. Ill. July 23, 2008); *Addison Automatics, Inc. v. RTC Group, Inc.*, 12 C 9869, 2013 WL 3771423 (N.D.Ill., July 16, 2013). However, a fax offering a free seminar at which nothing is attempted to be sold may not be covered. *Dang v. XLHealth Corp.,* 1:09-CV-1076-RWS, 2011 U.S. Dist. LEXIS 12166 (N.D.Ga., Feb. 7, 2011).

Unsolicited faxes listing job openings or similar opportunities may not be covered, as they do not offer goods or services for sale. *Lutz Appellate Servs. v. Curry*, 859 F. Supp. 180 (E.D.Pa. 1994) (job openings); *Friedman v. Torchmark Corp.*, 12cv2837, 2013 WL 1629084 (S.D.Cal., April 16, 2013). A fax offering an opportunity to participate in a research study which is not a pretext for sale was held not to violate the TCPA in ; *Phillips Randolph Enters., L.L.C. v Adler-Weiner Research Chi., Inc.,* 526 F. Supp. 2d 851 (N.D.Ill. 2007). A fax inviting the recipient to apply for an "Asian Business Leadership Award" was held not to be an advertisement in *N.B. Indus. v. Wells Fargo & Co.*, No. C 10-03203 LB, 2010 U.S. Dist. LEXIS 126432; 51 Comm. Reg. (P & F) 1304 (N.D.Cal., Nov . 30, 2010), citing the 2006 TCPA Report and Order, *aff'd mem.*, No. 10-17934, 465 Fed. Appx. 640; 2012 U.S. App. LEXIS 357 (9th Cir. Jan. 6, 2012). A fax inviting participation in a clinical trial for a new drug has been held to be not covered, such drugs not being commercially available by definition. *Ameriguard, Inc. v. University of Kan. Med. Ctr. Research Inst.*, No. C 06-369, 2006 U.S. Dist. LEXIS 42552, 2006 WL 1766812, at *1 (W.D. Mo. June 23, 2006), *aff'd mem.*, No. 06-2912, 222 Fed. Appx. 530; 2007 U.S. App. LEXIS 6118 (8th Cir., March 15, 2007).

In *Stern v. Bluestone*, 12 N.Y.3d 873, 911 N.E.2d 844, 883 N.Y.S.2d 782 (2009), the court held that an "Attorney Malpractice Report," which consisted of a short essay about various topics related to attorney malpractice, was an "informational message" and not an "advertisement" even though the sender was an attorney who brought legal malpractice cases and his contact information appeared on the fax. The court stated (12 N.Y.3d at 875-6):

> In 2006, when it amended its rules implementing the TCPA and the Junk Fax Prevention Act of 2005 (Pub L 109-21, 119 US Stat 359, amending 47 USC

§227), the Federal Communications Commission (FCC) elaborated on what constitutes an "unsolicited advertisement" (see 71 Fed Reg 25967 [2006], codified at 47 CFR § 64.1200 [*In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 & the Junk Fax Prevention Act of 2005*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006)]). With respect to "informational messages" via facsimile, the FCC stated that

> "facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in such 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" (id. [71 Fed Reg] at 25973 [emphasis added]).

We conclude that Bluestone's "Attorney Malpractice Report" fits the FCC's framework for an "informational message," and thus the 14 faxes are not "unsolicited advertisement[s]" within the meaning of the TCPA. In these reports, Bluestone furnished information about attorney malpractice lawsuits; the substantive content varied from issue to issue; and the reports did not promote commercial products. To the extent that Bluestone may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, "[a]n incidental advertisement" of his services, which "does not convert the entire communication into an advertisement" (id.).

A similar fax sent by chiropractors to lawyers was held to be outside the definition of an advertisement in *Holmes v. Back Doctors, Ltd.*, 695 F. Supp. 2d 843 (S.D.Ill. 2009). *See also*, on this issue, *G.M. Sign, Inc. v. MFG.com, Inc*., 08 C 7106, 2009 U.S. Dist. LEXIS 35291, 2009 WL 1137751, *2 (N.D. Ill. Apr. 24, 2009); *Sadowski v. OCO Biomedical, Inc*., 08 C 3225, 2008 U.S. Dist. LEXIS 96124, 2008 WL 5082992, *2 (N.D. Ill. Nov. 25, 2008) (fax promoting "implant training course" for which admission was charged and at which products were promoted was an advertisement); *Green v. Time Ins. Co.*, 629 F. Supp. 2d 834, 837 (N.D. Ill. 2009).

In *Holtzman v. Turza*, 11-3188 and 11-3746, at 9 (7th Cir., August 26, 2013), the Seventh Circuit held that the FCC statement about "incidental" advertisements could be ignored becasue it "appears not in the regulation but in the explanation the agency gave when adopting the regulation." "It does not elaborate on the meaning of the word 'advertisement' in the statute or regulation. Instead it discusses the meaning of 'informational communication', a phrase that does not appear in either §227 or the regulation. It seems to be a species of untethered legislative history – and the Supreme Court has told us that, although legislative history may assist in understanding an ambiguous text, a freestanding declaration untied to an adopted text must be ignored."

On the other hand, a fax advertising a free seminar on hypertension treatment sent on behalf of a drug company that sold drugs for the treatment of hypertension, and which contained information about the drugs, raised an issue of fact as to whether it was an

advertisement. *St. Louis Heart Center, Inc. v. Forest Pharmaceuticals*, 4:12cv2224, 2013 WL 1076540 (E.D.Mo., March 13, 2013).

The Sixth Circuit has held that calls asking that people listen to a free radio program are not advertisements. *Leyse v. Clear Channel Broadcasting, Inc.*, 12a0307p.06; 2012 U.S. App. LEXIS 18706; 2012 FED App. 0307P (6th Cir., Sept. 6, 2012):

> The FCC argues that the "2003 TCPA [Report and] Order [*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC Release 03-153, 18 FCC Rcd 14014; 2003 FCC LEXIS 3673; 29 Comm. Reg. (P & F) 830 (July 3, 2003)] makes clear that neither telephone messages containing general promotional announcements for broadcast stations nor messages inviting the recipient to listen [*14] to specific broadcasts are 'unsolicited advertisements.' Both are thus permitted under the rules." (Id. at 7.) The key principle underlying the FCC's conclusion is "the idea that over-the-air broadcasts inherently are not commercial." (Id. at 8.) That principle underlies the distinction the FCC drew between an "over-the-air broadcast and a paid-for service" because that principle is the [**9] only rationale that explains why the Commission treated differently two telephone messages concerning the same programming: a telemarketing message that promotes a free broadcast show is deemed not to address the commercial availability or quality of the programming (and is within the Commission's statutory discretion to exempt it from TCPA restrictions), but a promotion for programming—even the very same programming—provided by a paid-for service is deemed a commercial advertisement that is barred under the statute. . . . In light of that rationale, it follows directly that the exemption covers both specific and general promotions for broadcast programming provided without charge to the listener.

On the other hand, in *Chesbro v. Best Buy Stores, L.P.*, 697 F.3d 1230 (9th Cir. 2012), the Ninth Circuit held that the following two calls were advertisements:

First call:

> Hello, this is Andrea from Best Buy Reward Zone calling for (Recipient's first and last name) to remind you that your Reward Certificates are about to expire. (Certificate amount) dollars in Reward Certificates were mailed to you on (Mail date) and they will expire if not used by (Expiration Date). If you do not have your reward certificates, you can re-print them online at myrewardzone.com. Thank you for shopping at Best Buy. (697 F.3d at 1232)

Second call:

> This is a very important message regarding the Best Buy Reward Zone program. We're making some changes to increase the security of the program and be more environmentally friendly. Please listen to the entire message and then go to MyRewardZone.com for details and to update your membership.
>
> The following changes take effect October 31st, 2009:
>
> • First, to help reduce paper use, reward certificates will only be available by logging onto MyRewardZone.com.

> • Second, reward certificates will no longer be transferable.
>
> • Lastly, for the following three conditions, points will be cashed out to the $5 level and the remaining points will be forfeited:
>
> • You will need to provide an e-mail address at MyRewardZone.com. Members who haven't provided an e-mail address will no longer be eligible to participate in the program.
>
> • Reward Zone is becoming an annual program, which means that points no longer roll over from year-to-year[.]
>
> • You will need to make 1 purchase every 12 months to remain in the program[.]
>
> For full details and to make sure you're ready for these changes, go to MyRewardZone.com.
>
> If you would like to hear this message again, press 9.
>
> Thank you for your time — and for being a valued Reward Zone program member. (697 F.3d at 1233)

The Ninth Circuit agreed with the FCC interpretation that dual-purpose communications are covered:

> The FCC has determined that so-called "dual purpose" calls, those with both a customer service or informational component as well as a marketing component, are prohibited. See 2003 Report and Order at 14097-98 ¶¶ 140-142. The FCC explains:
>
> > The so-called "dual purpose" calls described in the record—calls from mortgage brokers to their clients notifying them of lower interest rates, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers—would, in most instances, constitute "unsolicited advertisements," regardless of the customer service element to the call. The Commission explained in the 2002 Notice that such messages may inquire about a customer's satisfaction with a product already purchased, but are motivated in part by the desire to ultimately sell additional goods or services. If the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement.
>
> Id. ¶ 142 (footnote omitted).
>
> Neither party argues that the interpretation set forth in the 2003 Report and Order is unreasonable or otherwise not entitled to this court's deference. We agree that our deference is due. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952-54 (9th Cir. 2009) (affording deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to the FCC's interpretation, as set forth in its 2003 and 2004 Reports, of what constitutes a "call").

The court concluded:

> We approach the problem with a measure of common sense. The robot-calls urged the listener to "redeem" his Reward Zone points, directed him to a website where he could further engage with the RZP, and thanked him for "shopping at Best Buy." Redeeming Reward Zone points required going to a Best Buy store and making further purchases of Best Buy's goods. There was no other use for the Reward Zone points. Thus, the calls encouraged the listener to make future purchases at Best Buy. Neither the statute nor the regulations require an explicit mention of a good, product, or service where the implication is clear from the context. Any additional information provided in the calls does not inoculate them. See 2003 Report and Order ¶ 142. (697 F.3d at 1234-35)

b. "Unsolicited"

An advertisement is "unsolicited" if it "is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. §227(a)(4).

c. "Established business relationship" exception

There is an "established business relationship" exception, which exists if (a) the sender has an "established business relationship" with the recipient **and** (b) the sender obtained the fax number through voluntary communication from the recipient or from a directory or web site **and** (c) the fax includes a prescribed notice explaining how to opt out of future faxes and stating that failure to honor an opt out request is unlawful.

An "established business relationship" requires "a prior or existing relationship formed 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." 47 C.F.R. §64.1200(f)(5). The consent or business relationship must be with the business on whose behalf the fax is sent and cannot be transferred, even to an affiliate:

> In addition, we conclude that the EBR exemption applies only to the entity with which the business or residential subscriber has had a "voluntary two-way communication." It would not extend to affiliates of that entity, including a fax broadcaster which is retained to send facsimile ads on behalf of that entity. While the fax broadcaster may transmit an advertisement on behalf of an entity that has an EBR with the recipient, it is not permitted to use that same EBR to send a fax advertisement on behalf of another client. We find that, unlike the national do-not-call registry, which allows consumers to avoid most unwanted telemarketing calls by registering a telephone number once every five years, the Junk Fax Prevention Act requires a consumer to opt-out of unwanted fax advertisements from each entity with which the consumer has an EBR. We believe that to permit companies to transfer their EBRs to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, ¶20, 21 FCC Rcd 3787, at 3794-3795, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006) ["2006 Report and Order"]. See also, *Sengenberger v. Credit Control Services, Inc.*, No. 09 C 2796, 2010 U.S. Dist. LEXIS 43874, 2010 WL 1791270, at *6 (N.D. Ill. May 5, 2010).

All three conditions must be met for the "established business relationship" exception to apply, including the prescribed notice. *Holtzman v. Turza*, 08 C 2014, 2010 U.S. Dist. LEXIS 80756, *14 (N.D. Ill. Aug. 3, 2010), later opinion, 2011 U.S. Dist. LEXIS 97666 (N.D. Ill., Aug. 29, 2011).

The fact that a business has published its fax number on a web site or directory is not sufficient to allow faxes to be sent to it. "While facsimile numbers may be compiled on behalf of or by a sender from sources where they have been voluntarily made available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement or internet site . . . . senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in the recipients own directory, advertisement or Web site does not alone entitle a sender to transmit a facsimile advertisement to that number." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, Clarification,* CG Docket Nos. 02-278 and 05-338; FCC release 08-239, 73 FR 64556, at 64557, ¶6, (Oct. 30, 2008). *Accord, Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620, at *7, n.3 (N.D. Ill. Oct. 14, 2009); *Eclipse Manufacturing Co. v. M & M Rental Center, Inc.*, 06 C 1156, 2006 U.S. Dist. LEXIS 39943, at *13, n. 4 (N.D. Ill. May 26, 2006); *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.D.C. 2007). The TCPA does not permit advertisers to simply obtain fax numbers from the Internet and send "junk faxes" to them.

In order for an opt out notice to be considered proper it must meet certain qualifications:

> **(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 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; (iii) the notice sets forth the requirements for a request under subparagraph (E); (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; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses; (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 a request at any time on any day of the week; and (vi) the notice complies with the requirements of subsection (d) of this section...**

47 U.S.C. § 227(b)(2)(D).

d. Burden of proof

The FCC has determined that "a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission." *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). The FCC has consistently adhered to this position. *Virtual Auto Loans,* EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.,* 1:10-cv-253, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp*., 07 C 4705, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 U.S. Dist. LEXIS 41766, 2008 WL 2224892, * 3-4 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to "opt-out"); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative propositions that it did not give permission or did not have a business relationship with sender). This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

e. Requirement of notice on faxes sent with permission

The FCC regulations require solicited fax advertisements, or fax advertisements "sent to a recipient that has provided prior express invitation or permission," to be accompanied with an opt-out notification. 47 C.F.R. §64.1200(a)(3)(*iii*). The Seventh and Eighth Circuits have held that noncompliance is actionable. *Holtzman v. Turza*, 11-3188 and 11-3746, at 3 (7th Cir., August 26, 2013); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). The Eighth Circuit decision was followed in *A Aventura Chiropractic Center, Inc. v. Med Waste Management LLC,* No. 12–21695–CIV., 2013 WL 3463489 (S.D.Fla., July 3, 2013).

f. Proof of receipt not needed

The TCPA makes it unlawful to *send* an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C. § 227(b)(C). Plaintiff need not identify the fax numbers that successfully received a transmission. Rather, to prevail on a claim under the TCPA, a plaintiff must show that the defendant: "'(1) used a telephone facsimile machine, computer or other

device to send a facsimile; (2) the facsimile was unsolicited; and (3) the facsimile constituted an advertisement.'" *Hinman v. M & M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 805 (N.D. Ill. 2008); *accord*, *Eclipse Mfg. Co. v. M & M Rental Ctr., Inc.*, 521 F. Supp. 2d 739, 745 (N.D. Ill. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Targin Sign Systems, Inc. v. Preferred Chiropractic Center, Ltd.*, 679 F. Supp. 2d 894, 898-899 (N.D. Ill. 2010); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 263 P.3d 767, 778-79 (Kan. 2011); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 65128, 2010 WL 2635781, at *3 (N.D. Ill. June 28, 2010); *Saf-T-Gard Int'l, Inc. v. Wagener Equities, Inc.*, 251 F.R.D. 312, 314-15 (N.D. Ill. 2008); *A Fast Sign Co. v. American Home Services, Inc.,* S11G1708, 2012 Ga. LEXIS 854, 734 S.E.2d 31 (Ga. Sup. Ct., Nov. 5, 2012); *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 338-42 (Tex. Ct. App. 2011); *Collins v. Locks & Keys of Woburn, Inc*., No. 2007-04207-BLS2, at 9, 2009 TCPA Rep. 1936 (Mass. Super. May 11, 2011); *see Fun Servs. of Kan. City, Inc. v. Love*, No. 11-0244-CV-W-ODS, 2011 U.S. Dist. LEXIS 52011, 2011 WL 1843253, *2 (W.D. Mo. May 11, 2011) (holding "[a] violation occurs when the prohibited fax is sent").

In any event, a transmission log is sufficient proof of receipt. *Holtzman v. Turza*, 11-3188 and 11-3746 (7th Cir., August 26, 2013).

g. War dialing

The use of automated equipment to serially dial phone numbers and determine whether the equipment on the receiving end is a fax (known as "war dialing") is prohibited by FCC regulations. *Baltimore-Washington Tel. Co. v Hot Leads Co.*, 584 F Supp 2d 736 (D.Md. 2008).

h. Parties responsible

The party on whose behalf an advertisement is faxed is responsible for any TCPA violations, without regard to technical agency law. *Glen Ellyn Pharmacy, v. Promius Pharma, LLC*, No. 09 C 2116, 2009 U.S. Dist. LEXIS 83073, *7-12 (N.D. Ill. Sept. 11, 2009); *United States v Dish Network, LLC*, 2010-1 CCH Trade Cases ¶76910 (C.D.Ill. 2010); *Addison Automatics, Inc. v. RTC Group, Inc.*, 12 C 9869, 2013 WL 3771423 (N.D.Ill., July 16, 2013); *Worsham v. Nationwide Ins. Co.*, 138 Md. App. 487, 772 A.2d 868, 878 (2001) (independent contractor status of the fax broadcaster does not shield the person on whose behalf the fax was sent from liability); *Hooters of Augusta v. Nicholson*, 245 Ga. App. 363, 537 S.E.2d 468, 472 (2000) ("[W]e conclude that an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor", citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* FCC Release No. 95-310, CC Docket No. 92-90, 10 FCC Rcd 12391; 1995 FCC LEXIS 5179; 78 Rad. Reg. 2d (P & F) 1258 (August 7, 1995), ¶¶34-35. In FCC Release No. 95-310, the FCC held that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements . . . .")

The FCC's regulations also provide that "[a] facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section . . . if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions." 47 C.F.R. §64.1200(a)(3)(vii). A "facsimile broadcaster" is defined as "a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee." 47 C.F.R. § 64.1200(f)(6). The FCC considers that a "fax broadcaster that serves as 'more than a mere conduit for third party faxes' is liable under the TCPA.'" *In the Matter of Fax.com, Inc.,* 19 F.C.C. Rep. 748, 755 n. 36 (2004).

For example, in *State of Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1089-90 (W.D. Tex. 2000), the court rejected the defendant's invocation of the fax broadcaster exception and concluded that because the company's "business center[ed] around using a fax machine to send unsolicited advertisements—the precise conduct outlawed by the TCPA," the company "[wa]s more than a common carrier or service provider [because it] maintain[ed] and use[d] a database of recipient fax numbers, actively solicit[ed] third party advertisers and presumably review[ed] the content of the fax advertisements it sen[t] . . . [and was therefore] more than a mere conduit for third party faxes."

Other relevant facts include whether the broadcaster counseled customers how to bypass "spam filters," "do not call lists," and "do not fax lists"; advised the customers how to use their electronic fax service to reduce their advertising costs and shift the cost to recipients; assisted customers at issue in generating a fax list of working fax numbers; allowed customers to use their services when defendants knew or should have known that the representations by their customers that there was a preexisting or established business relationship between the customers and recipients of the faxes or that the recipients had opted in to receiving the faxes were false; allowed faxes to be sent even though it knew that the faxes contained opt-out information that was illegible or too small to survive fax transmission; and advised customers how to used defendants' technology and skill to over-ride and circumvent the wishes of recipients who did not want to receive unwanted commercial offers and solicitations. *Merchant & Gould, P.C. v. Premiere Global Servs.,* 749 F. Supp. 2d 923, 937 (D.Minn. 2010).

2. Robocalls to cell phones.

The TCPA prohibits calls using an artificial or recorded voice or placed with an autodialer ("robocalls") to "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" without the express consent of the "called party." This prohibition is not limited to telemarketing calls; debt collection calls are covered. *Brown v Hosto & Buchan, PLLC*, 748 F. Supp. 2d 847 (W.D.Tenn. 2010). The FCC has expressly rejected the argument that debt collection calls are not covered. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, FCC Release 07-232, 23 FCC Rcd 559, 565; 2008 FCC LEXIS 56; 43 Comm. Reg. (P & F) 877 (Jan. 4, 2008) ("ACA Declaratory Ruling"), at ¶11.

The phrases "cellular telephone service" and "any service for which the called party is charged for the call" are alternative; it is not essential that the cellular consumer be charged for the call. *Smith v. Microsoft Corp.*, 11-CV-1958 JLS (BGS), 2012 U.S. Dist. LEXIS 101197 (S.D.Cal., July 20, 2012).

a. Predictive dialers covered

The FCC has determined that the standard type of predictive dialing equipment used by debt collectors and telemarketers is covered by the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*CG Docket No. 02-278, FCC Release 03-153, 18 FCC Rcd 14014; 2003 FCC LEXIS 3673; 29 Comm. Reg. (P & F) 830 (July 3, 2003), ("2003 TCPA Report and Order"); ACA Declaratory Ruling, ¶12. A predictive dialer is equipment that dials numbers and predicts when a collection or sales agent will be available to take calls. The equipment the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers. In most cases, telemarketers or debt collectors program the numbers to be called into the equipment, and the dialer calls them at

rate to ensure that when a consumer answers the phone, a debt collector or sales person is available to take the call. *See 2003 TCPA Order,* 18 FCC Rcd at 14091, ¶131.

Defendants dispute this, but the FCC determinations were not appealed within the time prescribed and are no longer subject to attack, *CE Design, Ltd. v Prism Bus. Media, Inc.*, *supra,* 606 F.3d 443 (7th Cir. 2010); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013), and courts regularly hold that predictive dialers are covered. *Meyer v. Portfolio Recovery Associates, LLC,* No. 11-56600, 2012 U.S. App. LEXIS 21136, *11-13 (9th Cir., October 12, 2012); *Vance v. Bureau of Collection Recovery LLC*, 10 C 6324, 2011 U.S. Dist. LEXIS 24908 at *6 -7 (N.D.Ill., March 11, 2011); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1010-1011 (N.D. Ill. 2010); *Kazemi v. Payless Shoesource, Inc.*, No. C 09-5142 MHP, 2010 U.S. Dist. LEXIS 27666 (N.D. Cal. Mar. 12, 2010); *Hicks v. Client Services, Inc.,* 07-61822, 2008 U.S. Dist. LEXIS 101129, *10 (S.D. Fla. Dec. 10, 2008); *Rivas v. Receivables Performance Management,* 08-61312, 2009 U.S. Dist. LEXIS 129378, *12 (S.D. Fla. Sep. 1, 2009); *Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723 (N.D.Ill. 2011).

It is sufficient to allege that the call had characteristics of an autodialed call, such as a delay prior to a live person coming on the line. *Connelly v. Hilton Grand Vacations Co.*, 12CV599 JLS (KSC), 2012 U.S. Dist. LEXIS 81332, *13 (S.D.Cal., June 11, 2012):

> According to Hilton, "Plaintiffs' Complaint provides little information beyond the unsupported conclusion that 'Hilton Grant Vacations used an 'automatic telephone dialing [system]' as prohibited by [the TCPA].'" (MTD 18, ECF No. 6 (quoting (Compl. ¶ 13, ECF No. 1))) Although this allegation by itself might be insufficient, Plaintiffs supplement it with allegations that support a reasonable inference that Hilton used an automatic system. *Knutson v. Reply!, Inc*., 2011 U.S. Dist. LEXIS 7887, at *5 (S.D. Cal. Jan. 26, 2011) (citing *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 2010 U.S. Dist. LEXIS 137257, at *13 (N.D. Cal. Dec. 29, 2010)) [*13] ("While it may be difficult for a plaintiff to know the type of calling system used without the benefit of discovery, the court [may] rel[y] on allegations about the call to infer the use of an automatic system."). Here, Plaintiffs allege that "[t]he calls had a delay prior to a live person speaking to Plaintiffs or did not even transfer to a live person (resulting in silence on the other end of the phone), indicating that Hilton Grant Vacations placed the calls using an automatic telephone dialing system." (Compl. ¶ 13, ECF No. 1) The Court finds that these allegations "allow[] the court to infer the calls were randomly generated or impersonal." Id. at *6.

b. "Called party"

The "called party" is the person subscribing to the number called at the time the call is placed. *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012). Note that the term appears in connection with who can give consent, rather than who may sue.

Generally, the cases permit the subscriber to sue. *Harris v. World Financial Network National Bank*, 10-14867, 2012 U.S. Dist. LEXIS 46882 (E.D.Mich., April 3, 2012); *Breslow v. Wells Fargo Bank, N.A.*, No. 11-22681-Civ-SCOLA, 2012 U.S. Dist. LEXIS 58677; 23 Fla. L. Weekly Fed. D 222 (S.D.Fla. April 26, 2012); *Kane v. Nat'l Action Fin. Servs.,* Case No. 11-cv-11505, 2011 U.S. Dist. LEXIS 141480 (E.D.Mich., Nov. 7, 2011)*; Fini v. Dish Network, LLC*, 6:12cv690-ACC-TBS (M.D.Fla., March 6, 2013); *Tang v. Medical Recovery Specialists, LLC*, No. 11 C 2109, 2011 WL 6019221, at *3 (N.D. Ill. Jul. 7, 2011) (finding

"called party" was actual recipient); *D.G. v. William W. Siegel & Assocs.*, 791 F.Supp.2d 622, 625 (N.D.Ill. 2011).

The decisions also allow the person who carries and regularly uses a cell phone to sue, even though they are not the subscriber. *Page v. Regions Bank*, 917 F.Supp.2d 1214 (N.D.Ala. 2012); *D.G. v. William W. Siegel & Assocs.*, 791 F. Supp. 2d 622 (N.D.Ill. 2011)*; Cellco P'ship v. Wilcrest Health Care Mgmt.,* No. 09-3534 (MLC), 2012 U.S. Dist. LEXIS 64407 (D.N.J., May 8, 2012); *Fini v. Dish Network, LLC*, 6:12cv690-ACC-TBS (M.D.Fla., March 6, 2013); *Swope v. Credit Management, LP*, 4:12CV832, 2013 WL 607830 (E.D.Mo., Feb. 19, 2013); *Breslow v. Wells Fargo Bank, N.A.*, 857 F.Supp.2d 1316, 1320 (S.D.Fla. 2012).

The primary user of a telephone may very well be a "subscriber" even if their name isn't on the bill. *Soppet* defined "subscriber" as (the person who pays the bills **or needs the line in order to receive other calls**). Cellular customer agreements often refer to other "subscribers" on the contracting subscribers plan. Section 227(c) is entitled "Protection of Subscriber Privacy Rights" and expressly provides a cause of action to any person who "receives" more than one telephone call, which implies that the recipient is the subscriber.

Someone who casually picks up the phone of another is probably not entitled to sue. *Leyse v. Bank of Am., Nat'l Ass'n*, 09 Civ. 7654 (JGK), 2010 U.S. Dist. LEXIS 58461, 2010 WL 2382400 (S.D.N.Y. June 14, 2010); see *Kopff v. World Research Group LLC*, 568 F. Supp. 2d 39 (D.D.C. 2008) (administrative assistant who picks up fax addressed to business does not have claim; business has claim).

c. What constitutes "consent"

The FCC has determined that consumers who provide their cell phone numbers to a business as contact information expressly consent to the use of robocalls, either by that business or its collection agent. *ACA Declaratory Ruling*, ¶9: " Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, *e.g.,* as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." However, businesses which "capture" incoming numbers or obtain them through skip-tracing do not qualify. 23 F.C.C.R. 559, fn. 34 (2008) ("The Commission also noted, however, that if a caller's number is 'captured' by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.") *Castro v. Green Tree Servicing,* 10cv7211, 2013 WL 4105196 (S.D.N.Y., Aug. 14, 2013) (placing call from cell phone to creditor is not consent).

In *Meyer v. Portfolio Recovery Associates, LLC,* No. 11-56600, 2012 U.S. App. LEXIS 21136, *7-9 (9th Cir., October 12, 2012), the court originally held that the number must be obtained at the time of application. The opinion was amended on December 28, 2012 to instead provide that "Pursuant to the FCC ruling, prior express consent is consent to call a particular telephone number in connection with a particular debt that is given before the call in question is placed. Id. at 564–65. PRA did not show a single instance where express consent was given before the call was placed. Id. at 565." The court also held that obtaining numbers via skip tracing is not sufficient:

> PRA also argues that the class is overbroad because it may include debtors who provided express consent to be contacted on their cellular telephones but whose telephone numbers were obtained via skip-tracing. But PRA does not point to a single instance where a cellular telephone number that had been given by the debtor to the original creditor was also found by PRA via skip-tracing, and the evidence before the district court suggested that cellular telephone numbers PRA found via skip-tracing were unlikely to have been given to PRA by the debtors. Specifically, PRA's securities filing shows that PRA's practice was to first attempt to contact debtors via the information received from creditors and only resort to skip-tracing if the debtors could not be reached using such information. Given this record, it was reasonable for the district court to find that cellular telephone numbers obtained via skip-tracing had not been given to the creditors in the course of the underlying consumer transactions.

Consent exists if a reasonable person in the position of the consumer would clearly understand that he is consenting to a communication of the type made. Thus, while furnishing a cell phone number in connection with a hotel reservation might constitute consent for communications concerning the reservation or payment for the hotel stay, it does not constitute consent for subsequent promotional calls. *Connelly v. Hilton Grand Vacations Co.*, 12CV599 JLS (KSC), 2012 U.S. Dist. LEXIS 81332 (S.D.Cal., June 11, 2012):

> Regarding the booking of reservations, Hilton has failed to explain how the mere registration of a cellular telephone number at the time of booking a hotel reservation constitutes prior express consent for the telephone calls at issue here. "Express consent is '[c]onsent that is clearly and unmistakably stated.'" *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (quoting *Black's Law Dictionary* 323 (8th ed. 2004)). Unlike the HHonors Program application, Hilton points to no evidence that in booking a hotel reservation Merritt agreed to Hilton's terms and conditions, including the possibility that contact information might be used to make special offers or promotions by telephone. Without more, the Court cannot conclude that one who provides a contact telephone number in booking a hotel reservation is "clearly and unmistakably" consenting to receive promotional calls. Id.

Another recent case holds that consent must be to robocalling rather than live calls, at least outside the specific context of billing and collections. *Thrasher-Lyon v. CCS Commercial, LLC,* No. 11 C 04473, 2012 U.S. Dist. LEXIS 125203 (N.D.Ill., Sept. 4, 2012):

> . . . Plaintiff's claim does not involve a debtor-creditor or other relationship where providing a phone number "reasonably evidences" express consent to be called, even with automated equipment, about a debt. This is obvious with respect to Thrasher-Lyon's provision of the number to Ferguson and the police at the scene of the accident; she would have had no reason to believe that debt collection would be an outgrowth of those interactions. Nor was her interaction with Farmers (in whose shoes CCS now stands) sufficient to reasonably evidence express consent to be robo-called about a subrogation claim. Thrasher-Lyon did not voluntarily provide her number to Farmers in the first instance, let alone for the purposes of receiving a loan or other service. She simply verified that the number Farmers already had obtained from the police report (and already used) was the "best" ,and only, number at which to reach her. Missing from this case are any facts from which it could be inferred [*12] that Thrasher-Lyon's verification

of her phone number was tantamount to giving permission to being robocalled about a purported debt—one she didn't even know about at the time she disseminated or confirmed her number. This is in marked contrast to the 2008 FCC ruling and the creditor-debtor cases on which CCS relies.

A common theme of those cases is the plaintiff's provision of contact information in connection with the knowing creation of a debt by voluntarily opening an account or otherwise contracting to pay for some service. See *Osorio v. State Farm Bank, F.S.B.*, F. Supp. 2d , 2012 U.S. Dist. LEXIS 70466, 2012 WL 1671780 (S.D. Fla. May 10, 2012) (number provided on credit card application); *Cavero v. Franklin Collection Serv., Inc.*, No. 11-22630-CIV, 2012 U.S. Dist. LEXIS 11384, 2012 WL 279448 (S.D. Fla. Jan. 31, 2012) (number listed on an account for telephone and internet service); *Mitchem v. Ill. Collection Serv., Inc.,* No. 09 C 7274, 2012 WL 170968 (N.D. Ill. Jan. 20, 2012) (billing number provided to doctor when receiving treatment); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 748 (W.D. Tex. 2011) (number provided with student loan application); *Greene v. DirecTV, Inc.*, No. 10 C 00117, 2010 U.S. Dist. LEXIS 118270, 2010 WL 4628734 (N.D. Ill. Nov. 8, 2010) [*13] (number provided to fraud alert service); *Cunningham v. Credit Mgmt., L.P.*, No. 09-CV-1497, 2010 U.S. Dist. LEXIS 102802, 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010) (number provided in connection with internet services account). Under the FCC's reasoning, consent to be contacted about a debt or bill can be reasonably inferred from the provision of contact information in connection with the voluntary establishment of a commercial relationship by means of a transaction creating a debt.

Here, however, it would be a stretch to call Farmers a "creditor" of Thrasher-Lyon, and stranger still to view getting into a car crash as the equivalent of applying for a loan or contracting for services. Thrasher-Lyon did not affirmatively make contact with Farmers or CCS in order to obtain a service and provide her number as part of the process and sought no relationship with either company. She did not give up her phone privacy in exchange for a benefit such as a loan or cable television. Moreover, there is no evidence in the record that Thrasher-Lyon had incurred a debt to Farmers at the time she gave out her number or when the robocalls were placed. Evidence that Farmers paid Ferguson's claim does not suffice. Farmers did [*14] not reduce its subrogation claim to judgment, so when CCS began dunning her with robo-calls, it was on the basis of nothing more than Farmers' opinion that Thrasher-Lyon was responsible for the accident and Ferguson's expenses. Farmers might be correct, but that remained to be determined at the time the robocalls began and provides no basis from which consent to be robo-called can be inferred.

The FCC's creditor rule, which goes beyond the plain language of the TCPA to mitigate a burden on creditors that was likely not intended by the statute, is binding on this Court, but CCS seeks to expand the FCC's ruling well beyond its moorings in a voluntary transaction giving rise to a debtor-creditor relationship. The Court rejects CCS's argument that it can avail itself of the FCC's creditor rule before a debt even exists. CCS's argument is inconsistent with the rationale behind the 2008 FCC order that envisions an individual who voluntarily makes contact with a provider of services, whether medical, financial, or otherwise, and takes on debt as a result. Nothing in the FCC's rulings suggests that it was intended to apply outside the context of a debtor-creditor relationship.

> Accordingly, [*15] the Court does not find the FCC's creditor rule, or the cases applying it, applicable or instructive in the very different factual context of this case.
>
> CCS insists that it would be "bizarre" to interpret the statute to require "elaborate" consent using "magic words," but there is nothing bizarre about giving effect to all of the words in the statutory language. It is what courts are required to do. Bizarre would be to read "express consent" as "implied consent." In ordinary parlance, there is no such thing as "implied express consent"—that is an oxymoron. Giving out one's phone number, at least outside of the special relationship sanctioned by the FCC, is not "express" consent to besiegement by automated dialing machines. One "expresses" consent by, well, expressing it: stating that the other party can call, or checking a box on form or agreeing to terms of service that explicitly permit automated telephone contact. See *Satterfield v. Simon & Schuster*, 569 F.3d 946, 955 (9th Cir. 2009) ("Express consent is consent that is clearly and unmistakably stated.") (citation omitted). "Express" connotes a requirement of specificity, not "general unrestricted permission" inferred from the act [*16] of giving out a number, as CCS urges. Agreeing to be contacted by telephone, which Thrasher-Lyon effectively did when she gave out her number, is much different than expressly consenting to be robo-called about a debt she did yet know Farmers believed she owed.

See also, *Travel Travel Kirkwood, Inc. v. Jen N.Y., Inc.,* 206 S.W.3d 387, 392 (Mo.App. 2006) ("If consent is not manifested by explicit and direct words, but rather is gathered only by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties, it is not express consent. Rather, it is merely implied consent.").

In *Roberts v. PayPal Inc.*, 2013 U.S. Dist. Lexis 76319 (N.D. Cal. May 30, 2013), the court held that a business is not liable under the TCPA for sending an unsolicited text message to a customer's cellphone when the customer had provided his cellphone number to the business. In that case, the plaintiff had added his cellphone number to a PayPal account that he had established years before, and promptly received a text from the company promoting its mobile services. PayPal moved for summary judgment on the grounds that Section 227(b)(1) exempts from the prohibition calls made with the "prior express consent of the called party." PayPal argued that Mr. Roberts expressly consented when he provided his cellphone number. The court agreed, holding that individuals who voluntarily provide their number thereby provide "express consent." Because Mr. Roberts had voluntarily provided his cellphone number to the business, the PayPal court ruled that he had thereby expressly consented. It is unclear from the decision, however, whether the plaintiff had been made aware of the possibility that he might receive text marketing messages.

In *Pinkard v. Wal-Mart Stores Inc.*, 2012 U.S. Dist. Lexis 160838 (N.D. Ala. 2012), plaintiff began receiving text messages from Walmart after having provided her number when filling a prescription. The Pinkard court observed that the TCPA itself does not define "express consent." Instead, it relied on the 1992 FCC interpretation for the proposition that a person who provides a phone number to a business thereby expressly consents to receiving text messages.

Consent may be revoked by the called party. A contrary decision was reversed by the Third Circuit in *Gager v. Dell Financial Services, LLC*, No. 12-2823, 2013 WL 4463305 (3rd Cir. August 22, 2013), rev'g, , *Gager v. Dell Fin. Servs., LLC,* 3:11-cv-2115, 2012 U.S. Dist. LEXIS 73752 (M.D.Pa., May 29, 2012). The Third Circuit concluded:

1. The FCC ruling in *SoundBite Communications, Inc.,* CG Docket No. 02-278, FCC 12-143, 2012 FCC LEXIS 4874, 27 FCC Rcd. 15391 (Nov. 26, 2012), that a consumer may "fully revoke[]" her prior express consent by transmitting an opt-out request to the sending party" was entitled to deference. *Id.* at 15397 ¶ 11 n.47; *see also id.* at 15394 ¶ 7 (stating that a consumer may "request that no further text messages be sent"); *id.* at 15398 ¶ 13 (noting that a consumer may opt out of receiving voice calls after prior express consent has been given); *id.* at 15398 ¶ 13 (suggesting that, after a consumer has received text messages, she may then send a request for those messages to stop at any time); *id.* ¶ 15 (same).

2. The common law concept of "consent" shows that it is revocable. "[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999). Under the common law understanding of consent, the basic premise of consent is that it is "given voluntarily" and may be "withdrawn," citing Restatement (Second) of Torts § 892 ("Consent is a willingness in fact for conduct to occur."), Restatement (Second) of Torts § 892A, cmt. i (1979) ("[C]onsent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.").

3. The TCPA is a remedial statute that was passed to protect consumers from unwanted automated telephone calls. *See* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972; *see also Satterfield*, 569 F.3d at 954 (discussing TCPA"s purpose of curbing calls that are a nuisance and an invasion of privacy); *SoundBite*, 27 FCC Rcd. at 15391-92 ¶ 2 (discussing TCPA"s purpose of protecting consumers against unwanted contact from automated dialing systems). Because the TCPA is a remedial statute, it should be construed to benefit consumers. *See Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011) (construing the FDCPA broadly to effect its purpose).

4. There is no indication in the legislative history that Congress intended for the statute to limit a consumer"s rights by imposing a temporal restriction on the right to revoke prior express consent.

5. The restriction on robocalls to cell phones includes debt collection calls. The exemption in 47 C.F.R. § 64.1200(a)(2)(iii), (iv) to calls "made to any person with whom the caller has an established business relationship" and calls "made for a commercial purpose [that do] not include or introduce an unsolicited advertisement or constitute a telephone solicitation" apply only to autodialed calls made to land-lines. *See* 47 C.F.R. § 64.1200(a)(2). The only exemptions in the TCPA that apply to cellular phones are for emergency calls and calls made with prior express consent. *See id.*; 47 C.F.R. § 64.1200(a)(1)(iii). Unlike the exemptions that apply exclusively to residential lines, there is no established business relationship or debt collection exemption that applies to autodialed calls made to cellular phones.

6. Callers have a continuing responsibility to check the accuracy of their

records to ensure that they are not inadvertently calling mobile numbers. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd. 19215, 19219-20 ¶ 11 (Sept. 21, 2004) (declining to extend safe harbor provisions to calls made erroneously or inadvertently to wireless numbers); *see also Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1322 (S.D. Fla. 2012) ("[C]ompanies who make automated calls bear the responsibility of regularly checking the accuracy of their account records[.]");

7. A contract provision authorizing automated phone calls may not preclude revocation of consent; "the ability to use an autodialing system to contact a debtor is plainly not an essential term to a credit agreement."

Other cases following the lower court opinion in *Gager* and stating that consent once given cannot be revoked include *Chavez v. The Advantage Group*, No. 12-cv-02819-REB-MEH (D.Colo., Aug. 5, 2013); and *Saunders v. NCO Financial Systems, Inc*., 12-cv-1750 (BMC), 2012 U.S. Dist. LEXIS 181174 (E.D.N.Y., December 21, 2012). The latter decision appears to have been influenced by the Court's perception that the case was manufactured. The *Chavez* decision justified its conclusion as follows:

> Plaintiff argues further that she revoked her consent by orally telling defendant on several occasions not to continue calling her. Several courts have considered this issue, arriving at varying conclusions regarding whether oral revocation is sufficient under the TCPA. Compare Kenny v. Mercantile Adjustment Bureau, LLC, 2013 WL 1855782 at *6 (W.D.N.Y. May 1, 2013) (finding that provisions of FDCPA, requiring written revocation of consent, control), and Saunders v. Nco Financial Systems, Inc., 910 F.Supp.2d 464, 468-69 (E.D.N.Y. 2012) (finding that express consent given under TCPA cannot be withdrawn under any circumstances), with Gutierrez v. Barclays Group, 2011 WL 579238 at *3-4 (S.D. Cal. Feb. 9, 2011) (oral revocation sufficient). The courts that have found oral revocation sufficient have done so largely based on the lack of any provision to the contrary in the TCPA. See, e.g., Beal v. Wyndham Vacation Resorts, Inc., ___ F.Supp.2d ___, 2013 WL 3870282 at *15 (W.D. Wis. June 20, 2013); Adamcik v. Credit Control Services, Inc., 832 F.Supp.2d 744, 749-53 (W.D. Tex. 2011);[6] Gutierrez, 2011 WL 579238 at *4. I find the stricter statutory interpretation more persuasive, as articulated most eloquently by the district court in Saunders:
>
> > I see nothing in the TCPA that gives a consumer two bites at the apple. That is, there is no provision in the TCPA, unlike the FDCPA, that allows withdrawal of a voluntarily-given, prior express consent to call a cell phone number. Nothing compels a consumer to list his cell phone number with his counterparty when he opens an account, or to open an account at all, but if that is the number he chooses to provide, then he cannot complain about being called at that number.
> >
> > It is not as if we are dealing with a fundamental constitutional right where a waiver may, under limited circumstances, be withdrawn. This is a narrow statutory right not to receive automated calls on a cellphone. A consumer that voluntarily gives it up need not have an opportunity to change his mind later; he has withdrawn from the protection of the statute.

> > He is no worse off than all other consumers were before passage of the statute, because he has opted out of the statute. Nor is there anything unduly harsh about this conclusion; the consumer, if he is a debtor, remains protected from harassment by the FDCPA.
> >
> > I recognize that . . . other district courts have ruled otherwise, some holding that consent can be withdrawn as long as the request to withdraw is in writing, and others holding that an oral direction to withdraw is sufficient. I respectfully disagree with both lines of cases. The reason there is a split among these authorities is because the statute provides for neither result, so those courts that wish to permit withdrawal of consent are forced to apply their own policy preferences. If Congress wishes to change the statute, it can — it has shown in the FDCPA that it knows how to provide for withdrawal of consent when it wants to — but I do not think it is for the courts to read a substantive right into a statute when it is quite conspicuously missing.
>
> Saunders, 910 F.Supp.2d at 468-69 (internal citations omitted). See also Gager v. Dell Financial Services, LLC, 2012 WL 1942079 at *3-6 (M.D. Pa. May 29, 2012).

I therefore find and conclude that plaintiff gave prior express consent to defendant to contact her cell phone number in connection with the debt incurred as a result of the services provided to her at Parkview. Moreover, that consent was not (and could not be) effectively withdrawn. Defendant therefore is entitled to summary judgment as to plaintiff's TCPA claims.[7]

The notion that consent cannot be revoked is inconsistent with the ordinary legal concept of "consent." *See Restatement 2d, Torts*, § 892A, comment i ("The consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct. This unwillingness may be manifested to the actor by any words or conduct inconsistent with continued consent or it may be apparent from the terms of the original consent itself, as when a specified time limit expires."). The FCC has held that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CC Docket No. 92-90, FCC Release Number 92-443, 7 FCC Rcd 8752, 8769, 1992 FCC LEXIS 7019, 57 FR 48333; 71 Rad. Reg. 2d (P & F) 445 (Oct. 16, 1992) ("1992 Report and Order"). *CE Design Ltd. v. Prism Business Media, Inc*., 2009 U.S. Dist. LEXIS 70712, 2009 WL 2496568 * (N.D. Ill 2009)("[A]n EBR may be terminated by the recipient's request to terminate future communications."), aff'd, 606 F.3d 443 (7th Cir. 2010). The decisions holding that consent is revocable expressly rely on the common-law meaning of "consent." *Adamcik v. Credit Control Servs*., *supra*, 832 F.Supp.2d 744 (W.D. Tex. 2011).

In the case of debt collection calls, the Fair Debt Collection Practices Act gives the consumer the right to direct a debt collector (as defined in the FDCPA) in writing to cease communication. 15 U.S.C. §1692c. There is no reason why exercise of this right would not apply to robocalls.

The better view is that revocation may be oral. *Adamcik v. Credit Control Servs*., 832 F.Supp.2d 744 (W.D. Tex. 2011); *Gutierrez v. Barclays Grp*., 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, *4 (S.D. Cal. Feb. 9, 2011); *Beal v. Wyndham*

Vacation Resorts, Inc., ___ F.Supp.2d ___, 2013 WL 3870282 at *15 (W.D. Wis. June 20, 2013). Some cases require, at least in the case of calls by debt collectors, written notice in accordance with the Fair Debt Collection Practices Act, 15 U.S.C. §1692c(c). *Moore v. Firstsource Advantage, LLC*, 07-CV-770, 2011 U.S. Dist. LEXIS 104517, *30-31 (W.D.N.Y. Sept. 15, 2011) ; *Moltz v. Firstsource Advantage, LLC*, 08-CV-239S, 2011 U.S. Dist. LEXIS 85196, 2011 WL 3360010, *5 (W.D.N.Y. Aug. 3, 2011); *Cunningham v. Credit Mgmt., L.P.*, 3:09-cv-1497-G (BF), 2010 U.S. Dist. LEXIS 102802, 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010) (magistrate judge); *Starkey v. Firstsource Advantage, LLC*, 07-CV662A, 2010 U.S. Dist. LEXIS 60955, 2010 WL 2541756, at *6 (W.D.N.Y. Mar. 11, 2010) (magistrate judge). Of course, written notice by means providing proof of receipt is preferable from the standpoint of proof.

Two cases hold that consumers who "opt out" of text messaging may be sent a final "confirmatory text message" confirming receipt of a recipient's unsubscribe request. *Ibey v. Taco Bell Corp*., 12-CV-0583-H (WVG), 2012 U.S. Dist. LEXIS 91030 (S.D. Cal. June 18, 2012) (consumer sent a text message in response to the defendant's invitation to complete a survey; a short time later, he sent a "STOP" message, requesting that defendant cease sending him text messages; defendant sent the plaintiff a message confirming that he had successfully opted out of the program; consumer sued; court held that since plaintiff had "voluntarily provided his phone number by sending the initial text message," the defendant's "single, confirmatory text message did not constitute unsolicited telemarketing" and therefore was not "an invasion of privacy contemplated by Congress in enacting the TCPA"). *Accord, Ryabyshchuk v. Citibank (South Dakota) N.A.*, 11-cv-1236-IEG (WVG), 2012 U.S. Dist. LEXIS 156176 (S.D.Cal., October 30, 2012).

The FCC has now adopted this interpretation. In *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, FCC 12-143, 2012 FCC LEXIS 4874 (November 29, 2012), the FCC determined to "allow organizations that send text messages to consumers from whom they have obtained prior express consent to continue the practice of sending a final, one-time text to confirm receipt of a consumer's opt out request . . . ."

This ruling expressly confirms that consent to receive autodialed calls may be revoked, finding that prior consent "can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer." (Par. 7) The ruling also suggests that revocation can be oral. (Par. 13)

In *Mais v. Gulf Coast Collection Bureau*, 11-61936-Civ., 2013 WL 2491052 (S.D.Fla., June 10, 2013), and *Lusskin v. Seminole Comedy, Inc*., 12-62173-Civ., 2013 WL 3147339 (S.D.Fla., June 19, 2013), both by the same judge, the court decided that the FCC position was too pro-business and in effect deemed the statutory requirement of "express consent" to be satisfied by mere implied consent. In *Mais*, the consumer's wife had provided his cell phone number on a hospital admission form when the wife was hospitalized; the consumer later received collection calls. In *Lusskin*, the consumer provided his cell phone number to a comedy club when purchasing a ticket; he later received text messages promoting other events at the club. The court certified the issue for interlocutory appeal in *Mais.*

In neither of these cases did the consumer provide his own cell phone number in a credit transaction. The most obvious purpose for requesting the number in *Mais* was as an emergency contact, and the obvious purpose for requesting the number in *Lusskin* was in the event a performance for which the ticket was purchased was cancelled.

d. Payment arrangements irrelevant

Robocalls to a cell phone are prohibited even if the consumer does not pay for incoming calls (either on a per call basis or by purchasing a "bucket" of time). *Buslepp v. Improv Miami, Inc.*, 12-60171-CIV-COHN/Seltzer, 2012 U.S. Dist. LEXIS 62489 (S.D.Fla., May 4, 2012).

e. Burden of proof

As in the case of faxes, the caller has the burden of showing where the number came from. "To ensure that creditors and debt collectors call only those consumers who have consented to receive autodialed and prerecorded message calls, we conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent. The creditors are in the best position to have records kept in the usual course of business showing such consent, such as purchase agreements, sales slips, and credit applications. Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent." ACA Declaratory Ruling, ¶10.

> Whether Plaintiffs gave the required prior express consent is an affirmative defense to be raised and proved by a TCPA defendant, however, and is not an element of Plaintiffs' TCPA claim. See 23 F.C.C.R. 559, 565 (Dec. 28, 2007) ("[W]e conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent."); *Ryabyshchuk v. Citibank (South Dakota) NA*, 2011 U.S. Dist. LEXIS 136506, at *14-15 (S.D. Cal. Nov. 28, 2011) (Gonzalez, C.J.) ("[T]he FCC recognized the heavy burden a consumer might face in trying to prove that he did not provide prior express consent."); *Gutierrez v. Barclays Grp.,* 2011 U.S. Dist. LEXIS 12546 (S.D. Cal. Feb. 9, 2011). Thus, Plaintiffs' complaint need not allege the absence of consent, and "[a]ccordingly, a motion for summary judgment—rather than a motion to dismiss—is the proper place for the [defendant] to establish that the [Plaintiffs'] claim fails due to the presence of prior express consent." *Ryabyshchuk*, 2011 U.S. Dist. LEXIS 136506, at *14-15.

Connelly v. Hilton Grand Vacations Co., 12CV599 JLS (KSC), 2012 U.S. Dist. LEXIS 81332, *9, 56 Comm. Reg. (P & F) 231 (S.D.Cal., June 11, 2012)

f. Persons liable

Creditors are liable for improper robocalling by their collection agents. "Similarly, a creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call." ACA Declaratory Ruling, ¶10.

In *In the Matter of The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, FCC 13-54, CG Docket No. 11-50 (FCC May 9, 2013), the FCC held that "while a seller does not generally "initiate" calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." The FCC concluded:

> Our conclusion that a seller does not necessarily *initiate* a call that is placed by a third-party telemarketer on the seller's behalf does not end our inquiry. For even when a seller does not "initiate" a call under the TCPA, we conclude that it may be held vicariously liable for certain third-party telemarketing calls. In particular, we find that the seller may be held vicariously liable under federal common law principles of agency for TCPA violations committed by third-party telemarketers. In this regard, we explain below that a seller may be liable for violations by its representatives under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification. . . . (Par. 28)

> Federal statutory tort actions, such as those authorized under the TCPA, typically are construed to incorporate federal common law agency principles of vicarious liability where, as here, the language of the statute permits such a construction and doing so would advance statutory purposes. . . .(Par. 29, citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (holding that Fair Housing Act imposes vicarious liability for racial discrimination according to traditional agency principles, as outlined in HUD regulations); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-574 (1982) (holding that "general principles of agency law," including "apparent authority theory," may establish a basis for liability in private antitrust actions under 15 U.S.C. § 15); *American Telephone and Telegraph Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427-1440 (3d Cir. 1994) (general agency principles, including apparent authority, apply to determine liability in private damages action for alleged false designation of origin under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)); and *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp.2d 789, 794-95, 805-06 (M.D. La. 2004) (liability in private TCPA action under section 227(b)(3) for violation of prohibitions against unsolicited fax advertisements may be predicated on agency doctrines of vicarious liability, because to construe the statute otherwise would effectively allow "an end-run around the TCPA's prohibitions").

The FCC did not distinguish between the various types of TCPA violations:

> To be clear, and contrary to the partial dissent's contention, we do not find that the statute necessarily provides for a single standard of third-party liability for prerecorded call violations and do-not-call violations. Instead, we leave open the possibility that we could interpret section 227(c) to provide a broader standard of vicarious liability for do-not-call violations. We simply observe that, in light of our current rules, which do treat these provisions analogously, we could not come to such a conclusion in a declaratory ruling proceeding, but only after notice and comment rulemaking. Thus, it may well be that the Commission could ultimately decide that "on behalf of" liability goes beyond agency principles. However, creating such a new interpretation is not appropriate for a Declaratory Ruling. For that reason, the relevant question is not whether the terms of a statute trump a rule, which they do, but whether the Commission should adhere in a Declaratory Ruling to the interpretation of the statute evinced by its prior rules and orders. This *Declaratory Ruling* properly adheres to those prior determinations.

Note that the ruling did not discuss liability for faxing.

Prior to the FCC ruling, there were a number of decisions addressing vicarious liability.

A business which hires another to conduct a robocalling or spam text message campaign is liable for it. *In re: Jiffy Lube International, Inc., Text Spam Litigation*, 3:11-md-2261-JM-JMA, 2012 U.S. Dist. LEXIS 31926, *7-11 (S.D.Cal., March 9, 2012):

> Heartland argues that it cannot be held liable because Plaintiffs have not alleged that Heartland sent the text messages at issue, but only "engaged" TextMarks to send the messages. Plaintiffs respond by asserting that the law recognizes liability for any party responsible for the text messages, regardless of which entity physically sends the messages.
>
> It does not appear that the Ninth Circuit has explicitly decided this issue, but case law and a reasonable reading of the statute indicate that Heartland should not be allowed to avoid TCPA liability merely because it hired a different firm to send advertisements to its customers.
>
> First, at least one previous Ninth Circuit case implicitly accepted that an entity can be held liable under the TCPA even if it hired another entity to send the messages. In *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009), discussed by the parties with regard to other issues, the Ninth Circuit reversed a district court's grant of summary judgment that held there was no issue of material fact as to whether the equipment used by the defendants fit the description contained in the TCPA. The defendants in that case were Simon & Schuster and ipsh!net, a marketing company hired by Simon & Schuster to promote a new book released by Stephen King. Ipsh!net later engaged another firm to physically send the text messages. Despite the fact that Simon & Schuster seemed to play no role in physically sending the messages, the Ninth Circuit did not question whether it could be held liable.
>
> In *Account[ing] Outsourcing, LLC v. Verizon Wireless*, 329 F. Supp.2d 789, 805-806 (M.D. La. 2004), the Middle District of Louisiana heard a void-for-vagueness challenge to § 227(b)(1)(C), which is similar to the provision examined here, but applies to facsimile transmission. The court, accepting the United States' argument, cited the "rule of statutory construction that makes explicit vicarious liability unnecessary," and held that "congressional tort actions implicitly include the doctrine of vicarious liability." Id. (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (in Fair Housing Act case, explaining that the Supreme Court "has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules")). The court also decided that "[i]nterpreting the TCPA to exempt either fax broadcasters or advertisers would effectively allow advertisers to make an end-run around the TCPA's prohibitions." Id. at 806. The Northern District of California has recognized that in fax cases like *Account[ing] Outsourcing*, "courts have held both advertisers and advertisement broadcasters subject to liability under the TCPA." *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165, 1170 (N.D. Cal. 2010).

A court dismissed a TCPA claim against Taco Bell on the ground that an advertiser is not vicariously liable under the statute for text message campaigns carried out on its behalf unless the advertiser controls the manner and means of the campaign. In *Thomas v. Taco Bell Corp.*, 879 F.Supp.2d 1079 (C.D.Cal. 2012), plaintiff alleged that Taco Bell was vicariously liable for a text message marketing campaign conducted by the Chicago Area Taco Bell Local Owners Advertising Association, a non-profit association of local Taco Bell restaurant owners.

The court reasoned that the TCPA is silent regarding vicarious liability and that it should presume that Congress intended to use traditional standards of vicarious liability, including agency and alter ego doctrines. The court rejected plaintiff's argument that the TCPA's provision applying to cellular phones, 47 U.S.C. §227(b)(1)(A)(iii), employs a broader standard of liability that a party can be held liable if text messages are sent on its "behalf." Instead, it required that plaintiff show "that Taco Bell controlled or had the right to control them and, more specifically, the manner and means of the text message campaign they conducted." It held that it was not enough that Taco Bell paid the Association's expenses, that Taco Bell was a member of the Association, and that its field marketing manager was a member of the Association's board.

On the other hand, in *Martin v. Cellco P'ship*, 12 C 5147, 2012 U.S. Dist. LEXIS 149891, 2012 WL 5048854 (N.D.Ill., October 18, 2012), the court rejected Verizon's claim that "it cannot be held liable for automated dunning calls placed by Vantage and Chase to Plaintiff's cell phone." The court rejected Verizon's reliance on *Thomas v. Taco Bell Corp*., *supra*, "because that case was decided on summary judgment." In addition:

> [T]he Thomas court addressed Taco Bell's liability in the context of a tort-based vicarious liability analysis. However, as noted by Plaintiff, the Federal Communications Commission ("FCC") has ruled that a creditor is responsible for calls made on its behalf. In In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, [Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278 , FCC Release 07-232; 2008 FCC LEXIS 56; 43 Comm. Reg. (P & F) 877], 23 FCC Rcd. 559 ¶ 10 (Jan. 4, 2008) ("2008 TCPA Order"), the FCC stated that:
>
> > Similarly, a creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor placed the call.
>
> Verizon contends that the 2008 TCPA Order is inapplicable because it did not address the issue of vicarious liability in the context of this matter. But the 2008 TCPA Order appears to impose a strict liability standard on creditors who farm their debts out to third-party debt collectors. See, e.g., *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012) (stating that as between a bill collector and a creditor, "[i]ndemnity may be automatic under ¶ 10 of the 2008 TCPA Order, which states that calls placed by a third-party collector on behalf of a creditor are treated as having been made by the creditor itself"). The paragraph in which this statement is made addresses the concept of prior express consent and states that "[t]o ensure that creditors and debt collectors call only those customers who have consented to receive autodialed and prerecorded message calls, we conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent." (2008 TCPA Order, ¶ 10.) It then goes to make the statement quoted above. On the current record, the Court can discern no reason why the statement in the 2008 TCPA Order is inapplicable to the instant case.

Another case held that a national franchisor was not liable for the action of a franchisee and a telemarketer hired by the franchisee for making robocalls to potential customers. *Anderson v. Domino's Pizza*, No. 11-cv-902 RBL, 2012 U.S. Dist. LEXIS 67847 (W.D.Wash. May 15, 2012), later opinion, 2012 U.S. Dist. LEXIS 98482 (W.D.Wash. July 16, 2012). The court rejected arguments that Domino's Pizza should be liable because (1) it held a

national franchise convention where the telemarketer was allowed to advertise its services to franchisees, (2) the telemarketers used the system which Domino's Pizza required franchisees to use to take orders to make the automated calls, and (3) the franchise agreements allowed Domino's to review and disapprove all advertising campaigns. The court held that the "mere fact that Domino's requires franchisees to participate in marketing campaigns does not somehow mean that any franchisee's illegal use of an [automatic dialer] is imputed to the franchisor."

In *Hurst v. Mauger*, 11 C 8400, 2013 WL 1686842 (N.D.Ill., April 16, 2013), the court found no liability on the part of Plimus for text messages sent by Mauger. The text messages advertised "4000 Satellite Channels On The Internet For Free" and included a link to a website hosted by Plimus that allowed consumers to purchase a "Satellite TV for PC" product from Plimus. The relationship between Plimus and Mauger was as follows:

> A Customer wishing to purchase a product offered for sale through the Plimus System clicks on a "buy now link" provided by Plimus to the Seller [Mauger], and that the Customer is then directed to a checkout page hosted by Plimus. . . . Once there, the Customer provides payment information to Plimus so that Plimus can process the payment with a credit card issuer or other financial intermediary. . . . If the payment is approved, Plimus sends the Customer an email confirming payment and providing a link to download the digital product, which the Vendor [Mauger] provides to Plimus when creating an account. . . . Plimus then collects the payment from the financial intermediary and passes it through to the Seller after taking a standard commission. . . . Plimus' commission is a flat 75¢ on any Products sold for $4.99 or less, and ranges from 4.5% to 15% on any Products sold for $5.00 or more. . . .
>
> Further, Plimus is responsible under the Agreement for charging Customers, processing sales transactions and Customers' payments, delivering an electronic invoice/receipt to Customers in the name of Plimus, and "effect[ing] delivery of digital titles and/or relevant license keys and/or product activation codes to Customers through the Internet and/or other networks." . . . The Seller is responsible for providing all technical information to Customers. . . .Under the Agreement, Plimus provides no "warranty, maintenance, technical or product support services, except for download and fulfillment services when applicable." (SAF Ex. A1 § 2.4). . . .
>
> With respect to Mauger specifically, it is undisputed that Mauger signed up for Plimus' payment processing services on April 3, 2011, to sell a product called "Internet TV Software" (Product). . . . It is also undisputed that after approving the account, Plimus sent Mauger a link to a "buy now page" on which consumers could provide their payment information. . . . In addition, it is undisputed that the Product sold for $19.99, and that Plimus took a standard commission of 10% on each sale, until Mauger's account was suspended by Plimus on January 12, 2012. . . .

The legal standard applied by the court was as follows:

> Under a plain meaning analysis, courts have found that "on behalf of" liability under the TCPA arises for a defendant when a marketer is either "a representative of" the defendant, or has acted "for the benefit of" the defendant. United States v. Dish Network, L.L.C., 667 F.Supp.2d 952, 963 (C.D.Ill.2009); see also Worsham v. Nationwide Ins. Co., 772 A.2d 868, 878–79 (Md.App.Ct.2001) (indicating that

a defendant is liable under § 227(c)(5) of the TCPA when the defendant "direct[s] or authorize[s] [an independent contractor] to conduct [ ] solicitations via a common script created or approved by [the defendant]"); Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 472 (Ga.App.Ct.2000) (stating that "an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor"); Thomas v. Taco Bell Corp., 879 F.Supp.2d 1079, 1084 (C.D.Cal.2012) (indicating that TCPA liability can arise "vicariously, such as, if [a party] was in an agency relationship with the party that sent the text message," and stating that, to establish an agency relationship, a plaintiff "must demonstrate that ... Taco Bell controlled or had the right to control [the marketer] and, more specifically, the manner and means of the text message campaign they conducted").

Some courts distinguished, based on statutory language, between different violations, holding that there is "on behalf of" liability for some violations but that agency principles must be satisfied for others. In *Mey v. Pinnacle Security, LLC*, No. 5:11CV47, 2012 U.S. Dist. LEXIS 129267 (N.D.W.Va., Sept. 12, 2012), the court held that with respect to the TCPA's prohibition against automated calls to cell phones, liability cannot be based on the theory that "even if Pinnacle did not directly place the Call, it was made on Pinnacle's behalf." "[T]his Court cannot ignore the obvious difference in language between §277(c)(5) [do not call violations] and §227(b)(3) [all other violations]. With regard to the right of action created under subsection (c), Congress specifically provided for strict "on behalf of" liability, but in creating a right of action for violations of subsection (b), it notably made no mention of such strict liability. In interpreting such statutory construction, the United States Supreme Court has clearly held that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' *Russello v. United States*, 464 U.S. 16, 23 (1983)." However, the court further held that the recipient of an automated call to a cell phone could establish liability under agency law, but in order to do so "must show that the actual caller 'acted as an agent' of Pinnacle, 'that [Pinnacle] controlled or had the right to control them and, more /specifically, the manner and means of the [solicitation] campaign they conducted.'" Plaintiff had not proved that was the case.

This position has now been rejected by the FCC. In *Mey v. Monitronics International, Inc.*, 5:11cv90, 2013 WL 4105430 (N.D.W.Va., Aug. 14, 2013), the court applied the FCC's May 9, 2013 Declaratory Ruling and found that it was sufficient for plaintiff to allege that a telemarketer, acting on behalf of Monitronics and another seller, placed 19 calls to a residential number on the Do Not Call list.

In *Mey v. Honeywell Intern., Inc.*, CIV.A. 2:12-1721, 2013 WL 1337295, *5 (S.D.W.Va., March 29, 2013), the court held plaintiff stated a claim against Honeywell for TCPA telemarketing violations of its dealers, on the ground that a partnership or joint venture was alleged, and "congressional tort actions implicitly include the doctrine of vicarious liability, whereby employers are liable for the acts of their agents and employees. In Meyer, the Supreme Court applied the doctrine of vicarious liability to the Fair Housing Act, despite the Congress's silence on the subject. In this case, Congress did not explicitly apply the doctrine of vicarious liability to the TCPA. Nevertheless, given the Supreme Court's ruling in Meyer, this court finds that persons of common intelligence would know that the TCPA applies to advertisers."

In *Addison Automatics, Inc. v. RTC Group, Inc.*, 12 C 9869, 2013 WL 3771423 (N.D.Ill., July 16, 2013), a fax case, the court held that even if it were necessary to allege agency, the complaint is sufficient where it alleges that company A sent a fax promoting a free

seminar at the premises of company B at which the latest products of company B were to be described.

3. Spam text messages to cell phones.

47 U.S.C. § 227 applies to text messages; these are treated the same as recorded and autodialed calls to cell phones. *Lozano v Twentieth Century Fox Film Corp.*, 702 F.Supp.2d 999 (N.D.Ill. 2010); *Kazemi v. Payless Shoesource, Inc.*, C 09-5142 MHP, 2010 U.S. Dist. LEXIS 27666, 2010 WL 963225 (N.D. Cal. Mar. 12, 2010); *Abbas v. Selling Source, LLC*, 09 C 3413, 2009 U.S. Dist. LEXIS 116697, 2009 WL 4884471, at *3 (N.D. Ill. Dec. 14, 2009); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) ("a text message is a 'call' within the meaning of the TCPA."); *Connelly v. Hilton Grand Vacations Co.*, 12CV599 JLS (KSC), 2012 U.S. Dist. LEXIS 81332; 56 Comm. Reg. (P & F) 231 (S.D.Cal., June 11, 2012); *Buslepp v. Improv Miami, Inc.*, 12-60171-CIV-COHN/ Seltzer, 2012 U.S. Dist. LEXIS 62489 (S.D.Fla., May 4, 2012); *Buslepp v. B&B Entertainment, LLC*, 12-60089-CIV-COHN /Seltzer, 2012 U.S. Dist. LEXIS 61880 (S.D.Fla., May 3, 2012); *Scott v. Merchants Ass'n Collection Services*, No. 12-23018-CIV-O'SULLIVAN, 2012 U.S. Dist. LEXIS 147987 (S.D.Fla., October 15, 2012); *In re: Jiffy Lube International, Inc., Text Spam Litigation*, 3:11-md-2261-JM-JMA, 2012 U.S. Dist. LEXIS 31926 (S.D.Cal., March 9, 2012); *Pimental v. Google Inc.*, C-11-02585-YGR, 2012 U.S. Dist. LEXIS 28124 (N.D.Ill., March 2, 2012).

4. Telemarketing calls.

a. General

Until the 2012 amendments to the FCC regulations, 47 C.F.R. Part 64, [CG Docket No. 02-278; FCC 12-21], 77 FR 34233 (June 11, 2012), which generally took effect on July 11, 2012, telemarketing robocalls to both landlines and cell phones were prohibited unless the consumer has given **permission** to the company making the call, or has an **established business relationship** with the company. An established business relationship for the purpose of telemarketing rules (not other rules) consisted of a transaction within the last 18 months or an application or inquiry not resulting in a transaction within the last 3 months.

Under the 2012 regulations, all telemarketing robocalls are prohibited unless the consumer has given **express written consent**. Express written consent includes checking a box on a computer screen stating that the person consents to receiving recorded telemarketing calls. **A consumer cannot be required to agree to receiving robocalls in order to purchase a good or service.** The consumer must be clearly and conspicuously informed that the consequences of consenting is that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller. It must relate to a designated telephone number. The caller has the burden of proving consent.

In addition, the 2012 FCC regulations require that all robocalls include an interactive opt-out mechanism at the beginning of the message, and that when a consumer chooses to opt-out, the number must be added to the caller's do-not-call list and the call must be immediately disconnected. If a robocall leaves a message on the consumer's voicemail, it must include a toll-free number for the consumer to call to opt-out. This enables consumers to remove their numbers from lists – even if they have previously given their permission to receive robocalls. Under the former rule, consumers could be required in all cases to call back.

Telemarketers must state their names, the name of the business on behalf of

which the call is being made, and the telephone numbers or addresses of those businesses.

Telemarketing calls cannot be made before 8:00 a.m. or after 9:00 p.m. in the recipient's time zone.

The telemarketing restrictions do not apply to debt collection calls, calls made to a wireless customer by his or her own carrier if no charge is made, calls made for political purposes, calls by or on behalf of tax-exempt non-profit organizations, and informational messages such as school closings. However, such calls to ***cell phones*** are subject to the separate restrictions on calls to cell phones.

b. Debt collection robocalls to land lines

As noted, debt collection robocalls are ***not*** considered telemarketing calls. Furthermore, debt collection calls to a landline issued to the debtor are treated as made pursuant to an established business relationship. "The Commission first adopted rules implementing the TCPA in 1992. Under these rules, calls delivering artificial or prerecorded messages to residences were prohibited, absent the express consent of the called party. Exempted from this prohibition were certain categories of calls that the Commission determined did not adversely affect consumers' privacy rights. . . . [T]he Commission concluded that an express exemption for debt collection calls to residences was unnecessary as such calls fall within the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement and for established business relationships. . . ." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, FCC Release 07-232, 23 FCC Rcd 559; 2008 FCC LEXIS 56; 43 Comm. Reg. (P & F) 877, at ¶4 (Jan. 4, 2008).

One case held that debt collection calls erroneously directed to a non-debtor's landline violated the TCPA, *Watson v NCO Group, Inc.,* 462 F Supp 2d 641 (E.D.Pa. 2006), but other courts hold that all debt collection calls to a landline are exempt. *Meadows v Franklin Collection Serv.*, No. 10-13474 , 2011 U.S. App. LEXIS 2779, 414 Fed. Appx. 230 (11th Cir. 2011).

Debt collection calls to a **cell phone** are subject to the restrictions on robocalls to cell phones (point 2, above).

c. "Do Not Call Registry"

The TCPA also constitutes one of the statutory basis for the "National Do Not Call Registry." 47 U.S.C. §227(c). *FTC v Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003). A consumer can register home and cell phone numbers with the National Do-Not-Call Registry (www.donotcall.gov); telemarketers have 31 days to remove the consumer from their call sheets.

In addition, a consumer can make a do-not-call request directly to the telemarketer. The telemarketer must maintain an internal "do not call" list and comply with the request for five years, after which the request has to be repeated.

d. Exclusions from coverage

Tax-exempt non-profit organizations, political campaigns, and healthcare-related

calls covered under the Health Insurance Portability and Accountability Act are not covered. "[T]he National Do-Not-Call List does not apply to calls that do not fall within the definition of 'telephone solicitation' as defined in section 227(a)(3). These include surveys, market research, and political or religious speech calls." *2003 TCPA Report and Order,* 18 FCC Rcd at 14039-40, ¶37.

5. Robocalls to emergency telephone numbers and hospitals

The statute prohibits robocalls to emergency telephone numbers (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency) or to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment.

A "do not call" list of emergency telephone numbers is being developed by the FCC.

6. Tying up business phone lines

The TCPA makes it unlawful to place robocalls to two or more telephone lines of a multi-line business simultaneously.

II. Technical and procedural standards

The TCPA and FCC regulations also prescribe technical standards for both equipment and calls.

For example, the sender of a fax must "clearly mark[], in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 C.F.R. §68.318(d).

All robocalls "shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual." 47 C.F.R. §64.1200(b).

Automatic dialing systems must "automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls." 47 U.S.C. §227(d)(3)(B).

III. Truth in Caller ID

The TCPA was amended in 2010 to make it unlawful to "knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value," except for law enforcement purposes or pursuant to court order. 47 U.S.C. §227(e).

IV. Remedies

1. General

There are statutory damages of $500 per violation of the fax and robocall restrictions. Damages may be increased to $1500 for a wilful violation. Injunctive relief is also authorized. 47 U.S.C. §227(b)(3) provides:

> **Private right of action.**
>
> **A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State-**
>
> **(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,**
>
> **(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or**
>
> **(C) both such actions.**
>
> **If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.**

Actual damages are not necessary. 47 U.S.C. § 227(b)(3), *Ambrose v. Prime Time Ent*., 2005 TCPA Rep. 1348, 2005 WL 646147 (Ohio C.P. Feb. 23, 2005) ("No actual damages are required in order to have a cause of action as provided by the TCPA"), *US Fax Law Ctr., Inc. v. iHire, Inc*., 374 F. Supp. 2d 924, 2005 TCPA Rep. 1464 (D. Colo. 2005) *aff'd* 476 F.3d 1112, 2007 TCPA Rep. 1520 (10th Cir. 2007) (permitting TCPA claims, but dismissing negligence and conversion claims for lack of actual damages).

There is a different private right of action for "do not call" violations. A person who has received "more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed" by the FCC may bring suit for actual damages or "up to $ 500 in damages for each such violation." 47 U.S.C. §227(c)(5) provides:

> **(5) Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--**
>
> > **(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,**
> >
> > **(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or**

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Under this provision, damages are awarded on a per-call basis, not a per-violation basis, even if there are multiple violations per call. "[T]he term 'each such violation' must refer to 'telephone call . . . in violation of the regulations,' and damages are awardable on a per-call basis." *Charvat v GVN Mich., Inc.*, 561 F.3d 623, 632 (6th Cir. 2009). However, "When a first call violating these requirements is followed by a second call also violating the regulations, the statute authorizes damages for both violations." *Id.*, 561 F.3d at 630-31.

The truth-in-caller ID amendment did not include a private right of action for statutory damages. If actual damages result, the violation may be actionable under 47 U.S.C. §207, and if committed by a debt collector, it probably violates the Fair Debt Collection Practices Act, 15 U.S.C. §§1692d, 1692e.

2. Meaning of "willful or knowing"

"The Federal Communications Commission has interpreted 'willful or knowing' under the Telecommunications Act (of which the TCPA is a part), as not requiring bad faith, but only that the person have reason to know, or should have known, that his conduct would violate the statute." *State of Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 899 (W.D. Tex. 2001). *Accord, Adamcik v. Credit Control Servs.*, 832 F. Supp. 2d 744 (W.D.Tex. 2011); *Covington & Burling v. International Mktg. & Research, Inc.*, No. Civ. A. 01-0004360, 2003 D.C. Super. LEXIS 29, 2003 WL 21384825, at *8 (D.C. Super. Apr. 16, 2003).

Some courts have held that "a plaintiff need only show that a defendant willfully or knowingly made the prerecorded calls or sent the unsolicited communications which resulted in a violation of the TCPA and that knowledge of the law is unnecessary." *Charvat v. Ryan*, 116 Ohio St.3d 394, 879 N.E.2d 765, 770-771 (2007).

In *Sengenberger v. Credit Control Services, Inc.*, No. 09 C 2796, 2010 U.S. Dist. LEXIS 43874, 2010 WL 1791270, at *6 (N.D. Ill. May 5, 2010), the district court held that defendants willfully and knowingly violated the TCPA because they "intentionally made the contested phone calls to Plaintiff." The *Sengenberger* court pointed out that "courts have generally interpreted willfulness to imply only that an action was intentional." *Id.,* citing *Smith v. Wade*, 461 U.S. 30 (1983). In addition, the court noted that "the Communications Act of 1943, of which the TCPA is a part, defines willful as 'the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision[ ], rule or regulation.'" *Id.*, quoting 47 U.S.C. § 312(f). *Accord, Stewart v. Regent Asset Management Solutions, Inc.,* 1:10-CV-2552- CC-JFK, 2011 U.S. Dist. LEXIS 50046 (N.D.Ga., May 4, 2011), adopted 2011 U.S. Dist. LEXIS 58600 (N.D. Ga., May 31, 2011).

3. Technical and procedural standards

Cases are divided as to whether the technical and procedural standards are actionable. Compare *Sengenberger v. Credit Control Services, Inc.*, No. 09 C 2796, 2010 U.S. Dist. LEXIS 43874, 2010 WL 1791270 (N.D.Ill. May 5, 2010) (finding liability for such a violation) with *Kopff v Battaglia,* 425 F Supp 2d 76 (D.D.C. 2006) (fax identification regulations in 47 C.F.R. §68.318 were issued pursuant to 47 U.S.C. §227(d), for which there was no private right of action); *Adler v. Vision Lab Telcoms., Inc.,* 393 F. Supp. 2d 35 (D.D.C. 2005) (no claim for transmission of unidentified faxes; regulations prohibiting unidentified faxes were promulgated under § 227(d), but private right of action exists only under § 227(b)); *Cunningham v. Credit Mgmt., L.P.*, 3:09-cv-1497-G (BF), 2010 U.S. Dist. LEXIS 102802, 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010) (magistrate judge) (no private claim for § 227(d) violations); *Zaller, LLC v. Pharmawest Pharm., Ltd.*, Civil No. CCB-11-789, 2011 U.S. Dist. LEXIS 129087 (D.Md. Nov. 8, 2011) (no private right of action); *Holmes v. Back Doctors*, 695 F.Supp.2d 843, 854-55 (S.D. Ill. 2010) (concurring "with the vast majority of courts that have addressed whether a private right of action exists under 47 U.S.C. § 227(d) . . . and have concluded that it does not").

4. Subject matter jurisdiction

Suits for violations may be brought in federal court notwithstanding the "court of that State" language. *Mims v. Arrow Financial Services, LLC*, U.S. ; 132 S. Ct. 740, 751-53 (2012) (holding that the TCPA's permissive grant of jurisdiction to state courts does not deprive federal district courts of federal-question jurisdiction over private TCPA suits); *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446 (7th Cir. 2005). Suit may also be brought in a state court, at least if the state has not "opted out" of hearing TCPA suits. *Italia Foods, Inc. v. Sun Tours, Inc.*, No. 110350, 2011 Ill. LEXIS 1091; 2011 IL 110350 (June 3, 2011); *Adler v Vision Lab Telcoms., Inc.*, 393 F.Supp. 2d 35 (D.D.C. 2005); *Portuguese Am. Leadership Council of the United States, Inc. v Investors' Alert, Inc.,* 956 A.2d 671 (D.C.App. 2008); *Mulhern v MacLeod*, 441 Mass 754, 808 NE2d 778 (2004); *R. A. Ponte Architects v Investors' Alert, Inc.,* 382 Md. 689, 857 A.2d 1 (2004).

5. Personal jurisdiction

By analogy to debt collection cases, defamation cases, and others involving illegal communications, the place into which the illegal communication was transmitted should be able to exercise personal jurisdiction over the persons responsible for the communication. TCPA cases which support this conclusion include *Creative Montessori Learning Center v. Ashford Gear, LLC*, 09 C 3963, 2010 U.S. Dist. LEXIS 92072 (N.D.Ill., Sept. 2, 2010). Debt collection cases include *Pelaez v. MCT Group, Inc.*, 2:1-cv00733-KJD-LRL, 2011 U.S.Dist. LEXIS 13899 (D.Nev. Feb. 10, 2011); *Brink v. First Credit Resources*, 57 F.Supp.2d 848 (D.Ariz. 1999); *Pope v. Vogel*, 97 C 1835, 1998 WL 111576, 1998 U.S. Dist. LEXIS 2868 (N.D. Ill. March 5, 1998); *Flanagan v. World Wide Adjustment Bureau, Inc.,* 6:95CV00776, 1996 U.S.Dist. LEXIS 8257 (M.D.N.C., May 3, 1996); *Murphy v. Allen County Claims & Adjustments,* 550 F.Supp. 128 (S.D.Ohio 1982); *Lachman v. Bank of Louisiana in New Orleans*, 510 F.Supp. 753, 758 (N.D.Ohio 1981); *Russey v. Rankin*, 837 F.Supp. 1103 (D.N.M. 1993); *Sluys v. Hand,* 831 F. Supp. 321, 325 (S.D.N.Y. 1993); *Fava v. RRI, Inc.* , 96 CV 629, 1997 WL 205336, 1997 U.S. Dist. LEXIS 5630 (N.D.N.Y. April 24, 1997); *Brujis v. Shaw*, 876 F. Supp. 975 (N.D.Ill. 1995); *Bailey v. Clegg, Brush & Assocs., Inc.*, 1991 WL 143361 (N.D.Ga. 1991); *Stone v. Talan & Ktsanes*, 91-244-FR, 1991 WL 134364, 1991 U.S. Dist. LEXIS 9632 (D.Ore. July 2, 1998), later opinion 1991 WL 226939, 1991 U.S. Dist. LEXIS 15599 (D. Or. Oct. 15, 1991); *Paradise v. Robinson & Hoover*, 883 F. Supp. 521 (D.Nev. 1995); *Hyman v. Hill & Associates*, 05 C 6486, 2006 U.S. Dist. LEXIS 5496 (N.D.Ill., Feb. 9, 2006); *Vlasak v. Rapid Collection Systems, Inc.,* 962 F. Supp. 1096, 1102 (N.D. Ill. 1997) ("When an individual

receives calls or letters from a distant collection agency--and when those calls or letters are allegedly illegal under the FDCPA--it makes sense to permit the individual to file suit where he receives the communications."). See *Calder v. Jones,* 465 U.S. 783 (1984) (defamation).

In *Lary v. The Doctors Answer, LLC*, CV-12-S-3510, 2013 WL 987879 (N.D.Ala. March 8, 2013), the court relied on the FDCPA cases to hold that suit could be filed where a fax ad was received, citing *Meredith v. Unifund CCR Partners,* No. 2:08–CV–375–MEF, 2008 WL 4767523 (M.D.Ala. Oct.29, 2008); *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2d Cir.1992); *Bailey v. Clegg, Brush & Assocs., Inc .,* No. 1:90–cv–2702–CAM, 1991 U.S. Dist. LEXIS 21591, 1991 WL 143461 at *2 (N.D.Ga. June 14, 1991); *Murphy v. Allen County Claims & Adjustments,* 550 F.Supp. 128, 130–31 (S.D.Ohio 1982); and *Gachette v. Tri–City Adjustment Bureau,* 519 F.Supp. 311, 313–14 (N.D.Ga.1981).

Other fax cases to the same effect include *Van Sweden Jewelers, Inc. v. 101 VT, Inc.,* No. 1:10–CV–253, 2012 WL 4074620 (W.D.Mich. June 21, 2012); *Flexicorps, Inc. v. Benjamin & Williams Debt Collectors, Inc.,* No. 06 C 3183, 2007 WL 1560212 (N.D.Ill. May 29, 2007).

6. Statute of limitations

Most courts have held that TCPA claims are governed by the four year federal statute of limitations in 28 U.S.C. §1658(a) (“Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues"). *Wellington Homes, Inc. v. West Dundee China Palace Restaurant, Inc.*, 2013 IL App (2d) 120740 (Feb. 4, 2013); *Benedia v. Super Fair Cellular, Inc.*, 07 C 1390, 2007 U.S. Dist. LEXIS 71911, 2007 WL 2903175, at *2 (N.D. Ill. Sept. 26, 2007); *Stern v. Bluestone*, 47 A.D.3d 576, 582, 850 N.Y.S.2d 90, 96 (1st Dep't 2008), rev'd on other grounds, 12 N.Y.3d 873, 911 N.E.2d 844, 883 N.Y.S.2d 782 (2009); *Zelma v. Konikow*, 379 N.J. Super. 480, 487-88, 879 A.2d 1185, 1189-90 (App. Div. 2005); *Worsham v. Fairfield Resorts, Inc.*, 188 Md. App. 42, 981 A.2d 24 (2009); *Bailey v. Domino's Pizza, LLC,* 11-04, 2012 U.S. Dist. LEXIS 48188 (E.D.La., April 5, 2012); *Anderson Office Supply, Inc. v. Advanced Medical Associates, P.A.,* 47 Kan. App. 2d 140; 273 P.3d 786 (2012); *Sznyter v. Malone,* 155 Cal. App. 4th 1152, 1168, 66 Cal. Rptr. 3d 633 (2007).

Prior to *Mims*, several courts held that various state statutes of limitation apply, including those for state “junk fax” claims, *Giovanniello v. ALM Media, LLC*, 660 F.3d 587 (2nd Cir. 2011), statutory penalties, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 327-28, 130 P.3d 1280, 1286-87 (2006), invasion of privacy, *Weitzner v. Vaccess Am. Inc.*, 5 Pa. D. & C. 5th 95, 123-27 (Pa. Ct. Com. Pl. 2008), and trespass, *David L. Smith & Assocs., LLP v. Advanced Placement Team, Inc.*, 169 S.W.3d 816, 822-23 (Tex. Ct. App. 2005). The issue is the meaning of the “otherwise permitted” language in 47 U.S.C. §227(b)(3), which provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State," a private action to enjoin a TCPA violation and to recover damages for actual monetary loss or $500, whichever is greater.

On remand from the Supreme Court, the Second Circuit reversed its decision in *Giovanniello v. ALM Media, LLC*, 660 F.3d 587 (2nd Cir. 2011), holding that in light of the holding in *Mims* that TCPA actions can always be brought in federal court, the four-year federal statute of limitations controlled. *Giovanniello v. ALM Media, LLC*, 10-2854-cv, 2013 WL 4016567 (2d Cir., Aug. 8, 2013).

Other courts have likewise held that the fact that TCPA cases can now always be

brought in federal court requires applying the federal statute of limitations. *Bailey v. Domino's Pizza, LLC, supra,* 11-04, 2012 U.S. Dist. LEXIS 48188 (E.D.La., April 5, 2012). *Accord, Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-00011, 2012 U.S. Dist. LEXIS 150210 (D.N.J., Oct. 17, 2012); *Bridging Communities, Inc. v. Top Flite Financial, Inc.*, No. 09–14971, 2013 WL 185397 (E.D.Mich., Jan. 17, 2013). Furthermore, the variety of state statutes "adopted" by courts applying state statutes indicates that doing so is contrary to the purpose of 28 U.S.C. §1658 which is "alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations [and] . . . it spared federal judges . . . the need to identify the appropriate statute of limitations." *Jones v R. R. Donnelley & Sons Co.*, 541 U.S. 369, 376-79, 382 (2004).

7. Class actions

Class actions for TCPA violations are often appropriate. Fax cases include: *Sadowski v. Med1 Online, LLC,* 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.,* 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.,* 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communs., Inc*., 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009); *Kavu, Inc. v. Omnipak Corp.,* 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.,* 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns. Inc.,* 306 S.W.3d 577 (Mo. App. 2010); *Lindsay Transmission, LLC v. Office Depot, Inc.*, 4:12cv221 (E.D.Mo., Feb. 25, 2013).

The fact that third parties were utilized to provide a lists and conduct a "blast fax" ad campaign for the defendant gives rise to the conclusion that consent was lacking and that the faxes were not sent *because of* an existing business relationship. *G.M. Sign, Inc. v. Finish Thompson, Inc.,* 07 C 5953, 2009 U.S. Dist. LEXIS 73869 (N.D. Ill. Aug. 20, 2009); *accord, Sadowski v. Med1 Online, LLC,* 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *Exclusively Cats Veterinary Hospital v. Anesthetic Vaporizer Services*, 10-10620, 2010 U.S.Dist. LEXIS 136941 (E.D.Mich., Dec. 27, 2010); *Hinman v. M & M Rental Ctr.,* 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *G.M. Sign, Inc. v. Group C Communs., Inc*., 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009).

Telephone call and text message cases include: *Meyer v. Portfolio Recovery Associates, LLC,* No. 11-56600, 2012 U.S. App. LEXIS 21136, *7-9 (9th Cir., October 12, 2012); *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D.Fla. 2013); *Mitchem v Illinois Collection Serv*., 271 F.R.D. 617 (N.D.Ill. 2011); *Balbarin v. North Star Capital Acquisition, LLC,*, 10 C 1846, 2011 U.S. Dist. LEXIS 686 (N.D. Ill., Jan. 5, 2011), later opinion, 2011 U.S. Dist. LEXIS 5763 (N.D.Ill., Jan. 21, 2011), later opinion, 2011 U.S. Dist. LEXIS

58761 (N.D. Ill., June 1, 2011); *Lo v. Oxnard European Motors, LLC*, 11CV1009 JLS (MDD), 2012 U.S. Dist. LEXIS 73983 (S.D.Cal., May 29, 2012).

In *Anderson v. Domino's Pizza, Inc.*, No. 11-cv-902 RBL, 2012 U.S. Dist. LEXIS 98482 (W.D.Wash., July 16, 2012), a case arising under a state telemarketing statute, the court held (*9-11):

> Commonality is lacking in this case for one overriding reason: the question of liability hinges on whether each proposed class member consented to receiving the calls--an individual determination. In short, WADAD penalizes only *unsolicited* commercial calls; calls to which a recipient has consented are fine. *See* Wash. Rev. Code § 80.36.400. Thus, this case turns entirely on whether each recipient had consented. And consent, or lack thereof, cannot be established for the proposed class members absent 42,000 individual hearings.
>
> There are certainly WADAD cases where the issue of consent can be resolved on a classwide basis. *See, e.g., Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D. Wash. 2007) (Lasnik, J.) (noting that "class membership [could] be determined based on objective criteria" where defendant obtained call list from a single third-party database, and the issue of consent was therefore common to all recipients). But this is not one. *See, e.g., Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169-70 (S.D. Ind. 1997) (holding that inability to determine consent on classwide basis undermined commonality); *Forman v. Data Transfer*, 164 F.R.D 400, 404 (E.D. Pa. 1995) (same); *Vigus v. Southern Illinois Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229, 238 (S.D. Ill. 2011) (same); *Gene and Gene LLC v. BioPay LLC*, 541 F.3d 318, 327-29 (5th Cir. 2008) (same). FOFI compiled its list directly from customers (via phone and computer sales), and many of the recipients accepted the discounts FOFI advertised, implying at least some consenting recipients exist in the class. Determining which members of the class gave prior consent to receive FOFI's calls is ultimately an individual question--a question that undermines commonality.

State law restrictions on aggregating statutory damages in class action (e.g., New York's) do not apply to TCPA case brought in federal court. *Bank v. Spark Energy Holdings*, 4:11-CV-4082, 2012 U.S. Dist. LEXIS 130531 (S.D.Tex. Sept. 13, 2012); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-00011, 2012 U.S. Dist. LEXIS 150210 (D.N.J., October 17, 2012); *Landsman & Funk, P.C. v. Skinder–Strauss Associates*, No. 08–3610 (KSH), 2012 WL 6622120 (D.N.J. Dec.19, 2012), later opinion, 2013 WL 466448 (D.N.J., Feb. 8, 2013); *Fitzgerald v. Gann Law Books, Inc.,* 11cv4287, 2013 WL 3892700 (D.N.J., July 29, 2013).

8. Constitutionality

The junk fax, robocalling, telemarketing and "do not call" provisions of the TCPA have been upheld against a variety of constitutional attacks, including attacks based on the First Amendment. *Destination Ventures v. FCC*, 46 F.3d 54 (9th Cir. 1995); *Missouri ex rel. Nixon v Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003); *Moser v FCC*, 46 F.3d 970 (9th Cir. 1995); *FTC v Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003); *Centerline Equip. Corp. v. Banner Pers. Serv.*, 545 F.Supp.2d 768 (N.D.Ill. 2008); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., L.P.,* 329 F. Supp. 2d 789 (M.D. La. 2004); *Texas v Am. Blast Fax, Inc.*,159 F. Supp. 2d 936 (W.D.Tex. 2001), later opinion, 164 F. Supp. 2d 892 (W.D.Tex. 2001); *Minnesota v Sunbelt Communs. & Mktg*., 282 F. Supp.2d 976 (D.Minn. 2002);

Phillips Randolph Enterprises, LLC v. Rice Fields, 06 C 4968, 2007 U.S. Dist. LEXIS 3027 (N.D.Ill. Jan. 11, 2007); *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825 (D.Md. 2011); *In re: Jiffy Lube International, Inc., Text Spam Litigation*, 3:11-md-2261-JM-JMA (S.D.Cal., March 9, 2012); *Wreyford v. Citizens for Transportation Mobility*, 1:12cv2524, 2013 WL 3965244 (N.D.Gal., Aug. 1, 2013). They are regarded as content neutral and reasonable "time place and manner" restrictions or reasonable regulations of "commercial speech" under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

More recently, courts have rejected the notion that the recipient of unwanted robocalls on their cell phone lacks "injury" sufficient to satisfy Article III of the Constitution. . *Smith v. Microsoft Corp.*, 11-CV-1958 JLS (BGS), 2012 U.S. Dist. LEXIS 101197 (S.D.Cal., July 20, 2012); *Torres v. National Enterprise Systems, Inc.*, No. 12 C 2267, 2012 U.S. Dist. LEXIS 110514 (N.D.Ill., August 7, 2012); *Martin v. Leading Edge Recovery Solutions, LLC*, 11 C 5886, 2012 U.S. Dist. LEXIS 112795 (N.D.Ill., August 10, 2012).

9. Persons liable

a. Individual officers and employees

Individuals acting on behalf of a corporation may be held personally liable for violations of the TCPA committed by the corporation where they "had direct, personal participation in or personally authorized the conduct found to have violated the statute." *Texas v. Am. Blastfax*, 164 F. Supp. 2d 892, 898 (W.D. Tex. 2001); *see also Maryland v. Universal Elections*, 787 F. Supp. 2d 408, 415-16 (D. Md. 2011) (reasoning, in pertinent part, that "if an individual acting on behalf of a corporation could avoid individual liability, the TCPA would lose much of its force"); *Baltimore--Washington Tel. Co. v. Hot Leads Co.*, 584 F. Supp. 2d 736, 745 (D. Md. 2008) (observing that if the defendants, who were the same defendants as in *American Blastfax*, "actually committed the conduct that violated the TCPA, and/or ... actively oversaw and directed the conduct," they could be held individually liable for the statutory violations); *Covington & Burling v. International Mktg. & Research, Inc.*, No. Civ. A. 01-0004360, 2003 D.C. Super. LEXIS 29, 2003 WL 21384825, at *6 (D.C. Super. Apr. 16, 2003) (holding that corporate executives were personally liable because they "set company policies and over[saw] day-to-day operations" and were "clearly involved in the business practices" that violated the TCPA), amended, 2003 D.C. Super. LEXIS 28, 2003 WL 21388272 (D.C. Super. May 14, 2003); *Kopff v. Battaglia*, 425 F. Supp. 2d 76 (D.D.C. 2006); *Versteeg v. Bennett, Deloney & Noyes, P.C.*, 775 F.Supp.2d 1316, 1321-1322 (D. Wyo. 2011) (finding corporate officer personally liable for direct involvement in TCPA violation); *Creative Montessori Learning Center v. Ashford Gear, LLC*, 2010 WL 3526691, *3 (N.D. Ill. 2010) ("Reeves, however, was much more involved with the day-to-day operations of Ashford Gear in general and with the specific conduct alleged in the instant complaint. He admittedly created the majority of the unsolicited facsimile advertisements, corresponded directly with Business to Business, and was in possession of the names and fax numbers of some, if not all, of the recipients. These facts are sufficient to allege an individual violation of the TCPA by Reeves under 42 U.S.C. § 227."); *The Savanna Group, Inc. vs. Truan*, No. 10-C-7995, *2 (N.D. Ill. Nov. 4, 2011) ("Based on well-settled tort law, however, federal courts that have addressed the issue of whether individuals acting on behalf of a corporation are liable for TCPA violations have concluded that if the individual officer directly participated in or personally authorized the conduct at issue, he may be held personally liable for the corporation's TCPA violations").

"The term 'person' as used in the TCPA includes 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" *All American Painting, LLC v. Financial Solutions and Associates, Inc*., 315 S.W.3d 719, 722

(Mo. 2010), citing 1 U.S.C. §1; *Reynolds v. Diamond Foods & Poultry, Inc.,* 79 S.W.3d 907, 909 n. 2 (Mo. banc 2002)).

b. Vicarious liability – see above

10. State laws

Some states, such as Illinois, Indiana, Louisiana, Minnesota, North Dakota, Utah, and Washington, have additional or duplicative restrictions on junk faxing, robocalling, and other regulated practices. For example, Indiana defines as a deceptive practice "An unsolicited advertisement sent to a person by telephone facsimile machine offering a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible," Ind. Code §24-5-0.5-2(a) (1)(B), and also has a Telephone Privacy Act, Ind. Code §24-4.7-1-1 et seq.

States have begun adopting laws tracking the 2012 FCC telemarketing regulations. For example, on August 14, 2012, New York adopted legislation, effective November 12, 2012, regulating all telemarketers doing business in the State and strengthening c7onsumer protections relating to pre-recorded telemarketing messages. Under the new law, telemarketers may not deliver a pre-recorded message without the express written agreement of the consumer that (1) was obtained only after the telemarketer s clear and conspicuous disclosure that the purpose of the agreement is to authorize telemarketing calls to that customer; (2) was not executed as a condition of purchasing any goods or service; (3) evidences the willingness of the consumer to receive telemarketing sales calls from a specific seller; and (4) includes the consumer s telephone number and signature. In addition, the new law requires that telemarketers provide customers with more opt-out mechanisms then currently are mandated. Under existing law, a telemarketer delivering a pre-recorded message to a live customer must offer an automated interactive voice and/or keypress activated opt-out mechanism to assert a do-not-call request. The new law requires that the call also include a mechanism to allow the consumer to automatically add the number called to the seller s entity-specific do-not-call list. Once this option is invoked, the telemarketer must immediately end the call. Further, if the call is answered by a consumer s voicemail, the new law requires that the telemarketer s message include a toll-free number at which the consumer may add the number called to the seller s entity-specific do-not-call request. Again, once this option is invoked, the telemarketer must immediately end the call. The new law also requires registration of all telemarketers doing business in New York with the Department of State, which will now have the authority to revoke or suspend the registration of non-compliant telemarketing companies and impose fines and/or misdemeanor charges.

The TCPA authorizes such regulation except with respect to the technical and procedural standards. *Van Bergen v Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *State ex rel. Stenehjem v FreeEats.com, Inc.*, 2006 ND 84, 712 N.W.2d 828 (2006); *Palmer v Sprint Nextel Corp.,* 674 F. Supp. 2d 1224 (W.D.Wash. 2009); *Utah Div. of Consumer Prot. v Flagship Capital*, 2005 UT 76, 125 P.3d 894 (2005); *Klein v. Vision Lab Telecommunications, Inc.,* 399 F.Supp.2d 528 (S.D.N.Y. 2005).

In addition, violations of the TCPA may also constitute violations of state consumer protection statutes and be actionable under state common law theories such as conversion, nuisance or trespass.

11. Nonstatutory defenses

Defendants often claim various "defenses" not contained in the TCPA and FCC regulations. The statute and regulations are comprehensive, and no such defenses should be recognized. Liability under a federal statute is a matter of federal law. *Felder v. Casey*, 487 U.S. 131 (1988) (state notice of claim statutes cannot limit liability under the federal civil rights acts); *United States v. Weststar Eng'r, Inc.*, 290 F.3d 1199, 1206 (9th Cir. 2002) (liability of surety on Miller Act bond is matter of federal law, not state); *U. S. Fidelity & Guar. Co. v. Quinn Bros.*, 384 F.2d 241, 247 (5th Cir. 1967) (state statute of frauds not relevant to liability under Packers & Stockyards Act).

For example, one court rejected a claim that the TCPA requires that one register his or her home telephone numbers on national do-not-call list as condition precedent to bringing a claim under the provisions restricting telemarketing calls to land lines. *State ex rel. Charvat v Frye*, 114 Ohio St. 3d 76, 868 N.E.2d 270 (2007).

Other courts have rejected contentions that the recipient of unlawful communications has a duty to "mitigate damages" or prevent further violations. *Powell v. West Asset Management,* 773 F.Supp.2d 761 (N.D.Ill. 2011); *Holtzman v. Turza*, 08 C 2014, 2010 U.S. Dist. LEXIS 80756, 2010 WL 3076258, at *5 (N.D. Ill. Oct. 19, 2010), citing *In the Matter of 21st Century Fax(es), Ltd.,* Citation #EB-00-TC-001 (March 8, 2000) (the FCC stated that "recipients of unsolicited facsimile advertisements are not required to ask that senders stop transmitting such materials."); *Fillichio v. M.R.S. Assoc.,* 09-612629-CIV, 2010 U.S. Dist. LEXIS 112780, 2010 WL 4261442, at *5 (S.D. Fla. Oct. 19, 2010); *Manufacturers Auto Leasing Inc., v. Autoflex Leasing, Inc.*, 139 S.W.3d 342, 347 (Tex. Ct. App. 2004); *Jemiola v. XYZ Corp.*, 2003 Ohio 7321, 802 N.E.2d 745, 750 (Ohio Misc. 2003). The situation is analogous to criminal cases stating that the government has no duty to stop the defendant from committing a crime, such as *United States v. Sanchez*, 92 CR 153, 1993 U.S. Dist. LEXIS 15746 (N.D.Ill., Nov. 8, 1993), *aff'd sub nom., United States v. Neville*, 82 F.3d 750 (7th Cir. 1996).

A fax recipient (plaintiff) has no duty to mitigate damages. *Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 126 Ohio Misc.2d 68, 2003 TCPA Rep. 1252 (Ohio C.P. 2003) ("plaintiff has no obligation to mitigate damages since the amount of damages is specifically set by statute and is therefore mandatory. In addition, mitigation of damages would undermine the legislative purpose by effectively rewarding the wrongdoer"), *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 139 S.W.3d 342, 2004 TCPA Rep. 1288 (Tex. App. 2004) ("Autoflex had no duty to contact MAL and ask them to stop violating the TCPA"), *Daniel Co. of Springfield v. Fax.com, Inc.*, 2004 TCPA Rep. 1265, 2004 WL 5460694 (Mo. Cir. Feb. 19, 2004) (mitigation of damages does not apply "to the commission of a series of intentional wrongful acts. . . . Each fax is independently actionable and, like the serial commission of torts, not the proper subject of the defense of mitigation or avoidance of damages."), *Nat'l Ed. Acceptance, Inc. v. Smartforce, Inc.*, 2002 TCPA Rep. 1057 (Mo. Cir. Jun. 21, 2002); *Schumacher Fin. Svcs., Inc. v. Nat'l Fed'n of Ind. Bus.*, 2003 TCPA Rep. 1088 (Mo. Cir. July 3, 2003); *Coontz v. Nextel Comm., Inc.*, 2003 TCPA Rep. 1237 (Tex. Dist. Oct. 10, 2003) (rejecting duty to mitigate); *Ruby v. Southwest Credit Sys., L.P.*, 2011 TCPA Rep. 2254, 2011 WL 7177005 (Pa. C.P. Nov. 1, 2012). *See also State ex rel. Charvat v. Fry*, 114 Ohio St.3d 76, 80, 2007-Ohio-2882 (Ohio 2007).

Mitigation of damages is improper because the concept of mitigation does not apply to the commission of a series of ***independently*** wrongful acts. Each unsolicited fax ad sent is an independent violation, and independently actionable. Mitigation of damages simply does not apply to an intentional act, such as sending illegal junk faxes. *Fletcher v. City of Independence*, 708 S.W.2d 158 (Mo. App. W.D. 1986). The law refuses to allow a tortfeasor to

assert the simple neglect of the victim to allay the damages so flagrantly incurred. Prosser and Keeton, *The Law of Torts* § 65 p. 462; § 67, p. 467 (5th ed. 1984); Restatement (Second) of Torts, § 918(2) (1977).

12. Attorney's fees

The TCPA does not provide for an award of attorney's fees against the defendant. *Klein v. Vision Lab Telecommunications, Inc.,* 399 F.Supp.2d 528, 542 (S.D.N.Y. 2005). Fees may be available under state law. *US Fax Law Center, Inc. v. Henry Schein, Inc.,* 205 P.3d 512, 516-17 (Colo. App. 2009).

V. Practical considerations

If you receive an illegal fax, text message or voicemail message, preserve it. In the case of a message, listen to the message, return the call, and make a note of who answers and what company they work for.

If you receive an illegal telemarketing call, note the date and time of the call, the number from which the call was placed, and the business name and the person to whom you spoke.

Note: The above is for general information only and does not represent legal advice; please contact us if you have a specific factual situation you want us to look at.

TELEPHONE CONSUMER PROTECTION ACT

as of July 12, 2012

47 U.S.C. §227, Restrictions on use of telephone equipment

(a) Definitions. As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that–

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment.

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) 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 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;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(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; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(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 a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by

paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)

(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005].

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights.

(1) Rulemaking proceeding required. Within 120 days after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations. Not later than 9 months after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted. The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method. If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b). The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards.

(1) Prohibition. It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines. The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems. The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information.

(1) In general. It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information. Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations.

(A) In general. Not later than 6 months after the date of enactment of the Truth in Caller ID Act of 2009 [enacted Dec. 22, 2010], the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations.

(i) In general. The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders. The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Report. Not later than 6 months after the enactment of the Truth in Caller ID Act of 2009 [enacted Dec. 22, 2010], the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.

(5) Penalties.

(A) Civil forfeiture.

(i) In general. Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) [47 USC § 503(b)], to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed $ 10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $ 1,000,000 for any single act or failure to act.

(ii) Recovery. Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) [47 USC § 504(a)].

(iii) Procedure. No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) [47 USC § 503(b)(3)] or section 503(b)(4) [47 USC § 503(b)(4)].

(iv) 2-year statute of limitations. No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine. Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $ 10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 [47 USC § 501] for such a violation. This subparagraph does not supersede the provisions of section 501 [47 USC § 501] relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States.

(A) In general. The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice. The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene. Upon receiving the notice required by subparagraph (B), the Commission shall have the right--

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction. For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process.

(i) Venue. An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

(ii) Service of process. In an action brought under subparagraph (A)--

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws. This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions. For purposes of this subsection:

(A) Caller identification information. The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service. The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information

regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service. The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation. Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law.

(1) State law not preempted. Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, 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--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States.

(1) Authority of States. Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $ 500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts. The district courts of the United States, the United States courts of any territory, and the District Court of the

United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission. The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process. Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers. For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation. Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) Definition. As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report. The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 [47 USC § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 [47 USC § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 [47 USC § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

Federal Communications Commission regulations implementing TCPA

As of July 12, 2012

47 CFR 64.1200

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through--

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes--

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in

writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a

do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also

provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal

law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is

being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term established business relationship for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three

months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed 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.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(9) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term sender for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(12) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47

CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

47 CFR 68.318

§ 68.318 Additional limitations.

(a) General. Registered terminal equipment for connection to those services discussed below must incorporate the specified features.

(b) Registered terminal equipment with automatic dialing capability.

(1) Automatic dialing to any individual number is limited to two successive attempts. Automatic dialing equipment which employ means for detecting both busy and reorder signals shall be permitted an additional 13 attempts if a busy or reorder signal is encountered on each attempt. The dialer shall be unable to re-attempt a call to the same number for at least 60 minutes following either the second or fifteenth successive attempt, whichever applies, unless the dialer is reactivated by either manual or external means. This rule does not apply to manually activated dialers that dial a number once following each activation.

Note to paragraph (b)(1): Emergency alarm dialers and dialers under external computer control are exempt from these requirements.

(2) If means are employed for detecting both busy and reorder signals, the automatic dialing equipment shall return to its on-hook state within 15 seconds after detection of a busy or reorder signal.

(3) If the called party does not answer, the automatic dialer shall return to the on-hook state within 60 seconds of completion of dialing.

(4) If the called party answers, and the calling equipment does not detect a compatible terminal equipment at the called end, then the automatic dialing equipment shall be limited to one additional call which is answered. The automatic dialing equipment shall comply with paragraphs (b)(1), (b)(2), and (b)(3) of this section for additional call attempts that are not answered.

(5) Sequential dialers shall dial only once to any individual number before proceeding to dial another number.

(6) Network addressing signals shall be transmitted no earlier than:

(i) 70 ms after receipt of dial tone at the network demarcation point; or

(ii) 600 ms after automatically going off-hook (for single line equipment that does not use dial tone detectors); or

(iii) 70 ms after receipt of CO ground start at the network demarcation point.

(c) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(d) Telephone facsimile machines; Identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted page.

(e) Requirement that registered equipment allow access to common carriers. Any equipment or software manufactured or imported on or after April 17, 1992, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes. The terms used in this paragraph shall have meanings defined in § 64.708 of this chapter (47 CFR 64.708).