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Fax Blasting at the OK Corral: Is the FCC Shooting from the Hip?

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FEATURE ARTICLES

Fax Blasting at the OK Corral: Is the FCC Shooting From the Hip?

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Technology is the Wild, Wild West on the legal map. While other areas of law have developed and become quite civilized, technology is emerging as the new frontier. As the new frontier of the legal world, it is often difficult to determine which entities comprise the good, the bad, and the ugly. One example of a legislative attempt to extend the long arm of the law over the new frontier is the Telephone Consumer Protection Act ("TCPA" or "Act") of 1991.[1] The TCPA is a comprehensive, federal act that defines prohibited conduct as it relates to telecommunications, and describes the available penalties.[2]

Under the tenets of federal preemption and the language of the TCPA, states may modify their version of the Act as long as it is as least as restrictive as the TCPA.[3] However, a violation of a state statute is separate from a violation of the TCPA.[4] Because a single

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[1] Telephone Consumer Protection Act, 47 U.S.C.A. § 227 (West 2005).

[2] *See id.*

[3] *See id.* § 227(e)(1)(A) (stating that "[e]xcept for the standard prescribed under subsection (d) of this section 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 . . . .").

[4] *See id.* § 227(f)(6) (stating that "[n]othing 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

violation of the TCPA may serve as the basis for two causes of action—one under state and one under federal law—it is important to discuss both the federal Act and the applicable state statutes. Both laws may come into play because the unusual text of the TCPA provides that state courts have exclusive jurisdiction for private rights of action under the Act.[5]

This paper will first analyze the pertinent provisions of the TCPA. It will then discuss the constitutional challenges leveled against the Act under the First, Fifth and Eighth Amendments as well as the Equal Protection Clause. Next, it will examine difficulties in the class action setting and conclude that a class action suit is an inappropriate tool to use to enforce the Act. Finally, this article will make some suggestions for the reformation of the Act such that it yields a greater benefit to both consumers and businesses.

I. Introduction

The fax machine was once considered an oddity, but its presence has now become rather commonplace and benign, although its function is essential for most businesses. In fact, Congress has recognized that, "the facsimile machine is a primary tool for business . . ." [6] By 1991, over thirty billion pages were transmitted by fax each year.[7] Unfortunately, as the popularity of facsimile machines has risen, so too has the prevalence of unsolicited facsimile advertising.[8]

Unsolicited facsimile advertising, commonly known as junk

State.")

[5] *Id.* *See also* Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd., 156 F.3d 432, 435-38 (2d Cir. 1998) (discussing jurisdictional aspects of the TCPA).

[6] *See* Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d 365, 377 (Tex. App. 2004). In *Chair King*, the recipients of unsolicited fax advertisements sued seeking private damages under the TCPA, along with claims for common law negligence, invasion of privacy, trespass to chattels, gross negligence, negligence per se, and civil conspiracy. *See id.* at 370-71. The trial court granted defendant's motions for no-evidence summary judgment and traditional summary judgment. *See id.* at 371-72. Plaintiffs appealed and the appellate court held that the TCPA applied to interstate faxes, did not violate the Commerce Clause, did not violate Due Process, did not violate Equal Protection, and did not violate the First Amendment. *See id.* at 396-97.

[7] *See id.*

[8] *See id.*

or mass faxing, is a $300 million per year industry.[9] Mass faxing is beneficial in industries such as pharmaceutical sales and travel agencies.[10] Mass faxing also provides a cost-effective way for small businesses to advertise on equally small marketing budgets.[11] As the success of this advertising medium developed, "fax blasting" corporations also began to emerge. These corporations are normally hired by small businesses that pay pennies per fax.[12] While fax blasting companies vary in their levels of involvement, they generally obtain materials that an entity wishes to "fax blast" and then actually transmit the material to a list of fax numbers that the company has either compiled itself, or that has been provided by the advertising entity.

Although a seemingly foolproof and incredibly cheap modicum of advertising to the masses, the Act has caused some high profile corporations to pay significant damages for taking part in "fax blasting". For example, in 2001, a Georgia appellate court ordered a Hooters restaurant to pay almost $12 million in damages for sending unsolicited faxes through a telemarketing company.[13] In addition, the Attorney Generals in several states have recently sued under this statute.[14] In August, 2002, the Federal Communications Commission ("FCC") fined Fax.com $5.3 million for violations of the TCPA.[15] Following that judgment, a $2.2 *trillion* lawsuit was filed in California by entrepreneur Steve Kirsch against Fax.com.[16] Although the suit is still pending, Fax.com is no longer in operation due to the tremendous sanctions and fines levied against it as a result of TCPA

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[9] Jeremiah Marquez, Lawsuits Threaten to Unplug Junk Fax Industry (Sept. 6, 2003), http://www.detnews.com/2003/technology/0309/07/technology-263719.htlm.

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See* Marquez, *supra* note 9 (citing Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468 (Ga. Ct. App. 2000). According to the plaintiff's attorney, this judgment was reduced to $9 million per a settlement agreement. *See id.*

[14] *See id.* It should also be noted that under the terms of the TCPA, actions brought by states have proper jurisdiction only in federal courts because, by definition, they are not private rights of action. *See id.* § 227(f)(2) (stating that, "the district courts of the United States. . .shall have exclusive jurisdiction over all civil actions brought under this subsection", referring to actions brought by States.)

[15] *See* Marquez, *supra* note 9.

[16] *See id.*

violations.[17]

Illinois is becoming a hotbed for TCPA litigation, and is focusing more heavily on the facsimile provisions.[18] In Cook County alone, a single judge has presided over more than one hundred TCPA suits.[19] In its attempt to curb the influx of unsolicited facsimiles, the FCC has levied almost 200 citations and fines since 1999.[20]

The law against fax blasting has also garnered national attention due to the wide net the statute spreads in terms of who may properly be named a defendant. While it is clear that the "fax blaster" is liable for the faxes it sends in violation of the Act, various interpretations of the statute have also placed liability on other entities. Specifically, agency theory can play an important role in deciding who may be named a defendant.[21] For example, if a fast food franchise performs a "fax blast" to advertise the particular franchise, the parent fast food corporation may also be implicated, even if that entity had absolutely no knowledge of the activities of the individual franchisees. Under certain circumstances, common carriers, which provide the telephone lines and means of transmission for facsimiles,[22] can also be held accountable under the Act.[23] Basically, any party associated with the "fax blaster" or the company that is advertised faces potential liability under the Act, as it may be argued that the facsimile was sent either by the party or on its behalf.[24]

II. Evolution and Current Status of the TCPA

The law has struggled to find a way to govern this new frontier. In support of the Act, the legislature clearly stated why such

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[17] Craig Anderson, *Executive Fights Faxes, One at a Time*, LOS ANGELES DAILY J., June 6, 2005, at 3.

[18] Walter Olson, *Land of Junk Fax Lawsuits*, (Dec. 15, 2004), http://www.overlawyered.com/archives/001811.html.

[19] *See id.*

[20] *See id.*

[21] *See* Worsham v. Nationwide Ins. Co., 772 A.2d 868, 877-79 (Md. Ct. Spec. App. 2001) (discussing liability for actions performed by independent contractors).

[22] *See* 47 U.S.C.A. § 227 (West 2005).

[23] Texas v. Am. Blast Fax, Inc., 121 F.Supp.2d 1085, 1089 (W.D. Tex. 2000).

[24] Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., 329 F. Supp. 2d 789, 805-07 (D. La. 2004).

legislation is necessary. The Congressional Findings contained in the Public Act pre-dating the TCPA state that, "Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[25] From 1989 to 1991, Congress considered various measures to address these new mediums made possible by technological innovations.[26] The TCPA was therefore the result of an evolving body of law calculated to put an end to this telemarketing technique.[27] Initially, states began passing their own legislation to address this issue.[28] However, state laws had a limited effect because they did not have jurisdiction over interstate calls, and therefore did not govern facsimiles sent interstate.[29]

The rationale for the Act is based on the inconvenience and costs to the fax recipients, including the cost of paper and toner, as well as wear and tear on the facsimile machines.[30] In addition, courts also cite to abstract damages such as the potential loss of business when facsimile machine lines are tied up, and the medical emergencies that could be exacerbated as a result of the use of facsimile lines.[31] Because of the cost shifting consequences of unsolicited fax advertisements, the practice itself is sometimes referred to as "advertising by theft."[32]

Generally speaking, Congress enacted the TCPA because of the public outrage over unsolicited telemarketing.[33] As a New York

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[25] Pub.L. 102-243 (9) codified as 47 U.S.C.A. 227 (West 2005).

[26] Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d365, 376 (Tex. App. Ct. 2004).

[27] *See id.* (stating that the TCPA combined various aspects from three previous bills).

[28] *See id.* (discussing the movement in New York by state official Richard Kessel which began after he was unable to fax a document to the governor's office because the fax lines were tied up by a junk fax., "The last thing you want when you're trying to meet a deadline, or trying to get a memo to your boss . . . is to be disturbed by someone trying to sell draperies or submarine sandwiches.").

[29] *See id.*

[30] Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296, 301 (Cal. Ct. App. 2003).

[31] *See id. See also* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459 (2002).

[32] Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296, 302 (Cal. Ct. App. 2003).

[33] *See* Rudgayzer & Gratt v. LRS Commns., Inc. 776 N.Y.S.2d 158, 164 (N.Y.

court noted in *Rudgayzer & Gratt v. LRS Commissions, Inc.*, "those who complain about these calls believe that they are a nuisance and an invasion of privacy. Residential and business subscribers believe that these calls are an impediment to interstate commerce."[34]

Congress has also identified a two-fold governmental interest in the Act. The first interest is that "unsolicited junk faxing shifts advertising costs from the advertiser to the recipient."[35] The second is that "unsolicited fax advertising occupies a recipient's facsimile machine so that the recipient cannot utilize it for his or her desired purpose."[36]

The movement against "fax blasting" as a legal means of advertising quickly gained such momentum that even organizations such as the ACLU joined in the call for protective legislation.[37] ACLU general counsel Janlori Goldman spoke to the House Subcommittee[38] formed to address the issue, stating that "we . . . support the . . . limits on fax machines, in terms of sending unsolicited advertising. We think that because of the burden that is placed on the individual who has to pay for the cost of communication, that that then justifies [a] broader ban [than that placed on telephone solicitation]."[39]

The House Report also distinguished the treatment of advertisements transmitted via facsimile from other mediums.[40] The report noted that when junk mail is sent, the recipient pays nothing to receive the advertisement.[41] On the other hand, when an advertisement is sent via facsimile, the recipient pays for the ink and the fax paper.[42] A federal district court explained the difference by stating that when people are exposed to advertisements via the

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Civ. Ct. 2003).

[34] *See id.*

[35] Missouri v. Am. Blast Fax, Inc., 196 F.Supp. 2d 920, 928 (E.D. Mo. 2002), *rev'd*, 323 F.3d 649 (8th Cir. 2003).

[36] *Id.*

[37] Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d365, 377 (Tex. App. Ct. 2004).

[38] The formal name is the Subcommittee on Telecommunications and Finance of the House Commission on Energy and Commerce. *Id.*

[39] *Id.*

[40] *See* H.R.REP. NO. 102-317, at 25 (1991).

[41] *See id.*

[42] *See id.*

newspaper or television it is because they have voluntarily opened the newspaper or turned on the television; in contrast, there is no voluntary act associated with the receipt of a facsimile advertisement.[43]

The legislative history of the Act also provides insight on whether the Act was meant to be enforced via a class action. Senator Ernest Hollings of South Carolina was the sponsor of the TCPA in 1991.[44] While promoting the Act, Senator Hollings stated:

> [t]he bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court . . . .Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set forth to be fair to both the consumer and the telemarketer. I thus expect that the States will act reasonably in permitting their citizens to go to court and enforce the bill.[45]

Despite Senator Hollings "hope" that the actions be brought in small claims court, class actions for TCPA violations abound. Based on the rationales outlined above, the TCPA was enacted was signed into law on December 20, 1991.[46].

A. Illegal Conduct

i. Under the Federal Act

The TCPA provides that it is illegal "to use any telephone

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[43] Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1168 (S.D. Ind. 1997).

[44] *See Kaufman,* 2 Cal. Rptr.3d at 302. The recipients of facsimile advertisements brought class actions against defendant corporations for TCPA violations. *Id.* The court found that the TCPA was constitutional and that while violations could be brought as class actions, recipients did not have private rights of action in state court. *Id.*

[45] *Id.*

[46] *See* Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d 365, 377 (Tex. App. Ct. 2004).

facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[47] In addition, the Act requires that, "all faxes clearly display of the first page or each page (a) the date and time of the transmission, (b) the identity of the sender, and (c) the telephone number of the sender or sending fax machine."[48] If the fax is sent by a third party service (i.e. a "fax blaster"), then both the author of the text and the service must be identified.[49]

The TCPA only prohibits *unsolicited* advertising.[50] Moreover, it does not impose liability for the distribution of non-commercial faxes, which include job opportunity advertising and political faxes.[51] These exceptions from liability are often justified by the fact that commercial speech is afforded a lower level of First Amendment protection.[52] The TCPA's legislative history also specifically supports the disparate treatment of the different types of facsimiles.[53] The regulations define "telephone facsimile machines" as "equipment which has the capacity to transcribe text or images, or both, from paper into an electronic 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."[54]

The FCC has further defined an "unsolicited advertisement" as "any material advertising the commercial availability or quality of

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[47] 47 U.S.C.A. § 227 (West 2005).

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] The exception from liability that exists for all non-advertising facsimiles is justified under the notion that commercial speech is afforded a lower level of protection under the First Amendment than other forms of speech. Missouri v. Am. Blast Fax, Inc., 196 F.Supp. 2d 920, 929 (E.D. Mo. 2002), *rev'd*, 323 F.3d 649 (8th Cir. 2003). A much more comprehensive discussion of this appears in Part III addressing constitutional challenges.

[52] *See* Missouri v. Am. Blast Fax, Inc.,_323 F.3d 649, 653 (8th Cir. 2003) , *rev'g*, 196 F.Supp. 2d 920 (E.D. Mo. 2002).

[53] 47 U.S.C.A. § 227 (West 2005). The Congressional findings accompanying the TCPA state that "[t]he Constitution does not prohibit restrictions on commercial telemarketing solicitations." Furthermore, in regards to telephone calls, but with reasoning equally applicable to the facsimile provisions, Congress found that while all calls were a nuisance, the FCC should have flexibility in proscribing regulations consistent with the free speech protections contained in the First Amendment.

[54] 47 C.F.R. § 64.1200 (2003).

any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[55] Under the FCC interpretations, permission to send a facsimile advertisement does not arise simply because someone requests, and is given, a fax number.[56] Furthermore, a sender cannot claim permission on the basis of a fax which places an affirmative burden on the recipient to notify the sender in order to opt-out of receiving future faxes.[57] In addition, publishing a fax number or handing out a business card that contains a fax number does not constitute the necessary express invitation or permission. [58]

Fax senders have been afforded some protection under the "Established Business Relationship" ("EBR") exception.[59] The EBR exception developed as a result of the FCC's interpretation of the term "unsolicited." [60] A fax sender using the EBR exception may argue that they had "permission" to fax the advertisement.[61] Permission to fax is presumed to exist if the sender can prove the existence of an EBR with the recipient.[62] The FCC's order of June 26, 2003, states that:

> [t]he term established business relationship 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 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 be

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[55] *See id.*

[56] *See* Commonly Asked Questions About Junk Faxing, http://www.junkfax.org/fax/basic_info/junk_fax_qa.htm (last visited Sept. 1, 2005).

[57] *See id.*

[58] *See id.*

[59] *See* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 19 F.C.C.R. 20125 (2004).

[60] *See* 47 C.F.R. § 64.1200(f)(3) (2005).

[61] *See id.*

[62] *See id.*

previously terminated by either party.[63]

Although facsimile senders were warned that the EBR liability exception would expire on January 1, 2006, on July 9, 2005, the President signed an amendment to the TCPA known as the Junk Fax Prevention Act of 2005, which reaffirms the EBR exception[64] As a result, the EBR will continue to exist as long as this statute remains good law.[65]

ii. Pre-emption discussion and survey of state enactments

As noted earlier, based on the doctrine of pre-emption, states are free to enact their own version of the TCPA as long as the state statute is at least as restrictive as the Act.[66] For example, in Louisiana, there is a statute called the Unsolicited Telemarketing Act ("UTMA").[67] This statute virtually mirrors the language contained in the TCPA, and allows for statutory penalties between $200- $500 per facsimile, as well as for costs and attorney's fees that are not provided for under the TCPA.[68] As these are penalties under a separate statute, they are in addition to any damages that may be assessed under the TCPA.

Taking advantage of the express permission to enact its own regulatory statute, Illinois has also codified its own version of the TCPA.[69] This section states in pertinent part that:

> [n]o person shall knowingly use a facsimile machine to send or cause to be sent to another person a facsimile of a document containing unsolicited advertising or fund-raising material, except to a person which the sender knows or

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[63] *See id.*

[64] 47 U.S.C. § 609 (2005).

[65] *See id.*

[66] *See* 47 U.S.C.A. § 227(e)(1)(A) (stating that "[e]xcept for the standard prescribed under subsection (d) of this section 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. . .").

[67] *See* LA.REV.STAT. Ann. §§ 51:1745 – 1746 (2005).

[68] *See* Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commns., L.P., 329 F. Supp. 789, 793 (D. La. 2004).

[69] *See* 720 ILL. COMP. STAT. 5/26-3 (2005).

> under all of the circumstances reasonably believes has given the sender permission, either on a case by case basis or a continuing basis, for the sending of such material.[70]

The penalty provision of the Illinois statute makes a violation of this section a petty offense and allows for a fine of up to $500.[71] In Illinois, this violation constitutes a crime, and not a civil action; thus, it cannot be brought by a private citizen.[72] Therefore, in Illinois, the TCPA is the sole means for a private citizen to seek redress for the receipt of unwanted facsimiles.[73]

B. Penalty Provisions

The TCPA allows for a $500 per violation (i.e. per fax) penalty.[74] This amount may be increased to $1,500 per violation if the court finds that the sender willfully or knowingly violated the Act.[75] The Act has been interpreted to mean that each separate page of a facsimile is a separate violation.[76] In addition, as discussed below, the Act is one of joint and several liability,[77] meaning that several parties may be held responsible for a single fax. The Congressional history reflects that "[t]he drafters recognized that damages from a single violation would ordinarily amount to only a few pennies worth of ink and paper usage, and so believed that the $500 minimum damage award would be sufficient to motivate private

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[70] *See id.*

[71] *See id.*

[72] *See id.* (The statute is contained in the Illinois criminal code).

[73] The TCPA is basically the only means for private citizens to seek redress for receiving facsimiles in violation of the TCPA because a theoretical alternative, a conversion claim in tort, has not been decided in any published opinion by Illinois courts. However, because in Illinois, the tort of conversion affords only actual damages, a great influx of conversion complaints based on the receipt of unsolicited facsimiles is unlikely. *See* Ruiz v. Wolf, 621 N.E.2d 67, 69 (Ill. App. Ct. 1981)). *See also,* Charles Selon & Assocs., Inc. v. Aisenberg's Estate, 431 N.E.2d 1214 (Ill. App. Ct. 1981) (holding that the "[g]eneral rule in conversion action is that damages are set at date of conversion").

[74] *See* 47 U.S.C.A. § 227 (West 2005).

[75] *Id.*

[76] *See* Commonly Asked Questions About Junk Faxing, http://www.junkfax.org/fax/basic_info/junk_fax_qa.htm (last visited Sept. 1, 2005).

[77] *See id.*

redress of a consumer's grievance through a relatively simple small claims court proceeding without an attorney."[78]

C. Designation of Parties Under the TCPA

An interesting and complex issue is who can sue and who can be sued under the TCPA. Technically, it is the receiver of the fax that has the standing to sue.[79] This can create complex issues in a corporate setting which have yet to be answered. For example, because statutory violations of the TCPA are considered tortious, both the company and the individuals involved in sending the fax can be held liable.[80] Additionally, issues involving the liability of independent contractors and common carriers have resulted in complicated decisions.

D. Independent Contractor Liability

One of the issues that is most difficult to rationalize is the role that the doctrine of *respondeat superior* plays in the Act. This doctrine is somewhat inconsistent with the near strict liability language found in the Act. Under the TCPA, the sender is almost always liable; there is no intent requirement.[81] In contrast, the doctrine of *respondeat superior* provides that a principal is only liable for the acts of his agent when they are within the scope and nature of the agent's employment.[82]

The problem with applying agency law in fax blasting cases is that frequently there is a party that acts as a middle man and brokers services for another corporation. In that capacity, the party acting as a middle man may or may not be considered an agent, depending on the specific facts of the case.

For instance, a restaurant may pay a fee to have its menu and carry out services included in an advertising publication published by a small, for-profit corporation. If the publishing group hires a marketer to publicize various restaurant menus and the marketer hires a "fax blaster" to send faxed menus to unsolicited customers, the

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[78] *See* 137 CONG. REC. S16204-01, 16205-06 (daily ed. Nov. 7, 1991).

[79] 47 U.S.C.A. § 227 (West 2005).

[80] *See* Commonly Asked Questions About Junk Faxing, http://www.junkfax.org/fax/basic_info/junk_fax_qa.htm (last visited Sept. 1, 2005).

[81] *See* 47 U.S.C.A. § 227 (West 2005).

[82] *See* Restatement (Second) of Agency § 219, Cmt. *a* (1958).

restaurant may be liable under the TCPA, even if it had no knowledge of the faxes.

Several cases emphasize that a defendant can be held liable under the TCPA even if they are not personally responsible for sending the fax.[83] Instead, as the Maryland Supreme Court noted in *Worsham*, "in the context of a damage action under 47 U.S.C. § 227(c)(5) . . . defendant still can be liable, even if independent contractor made the call on defendant's behalf."[84] In *Worsham*, the plaintiff received two unsolicited telephone calls advertising the services of Nationwide Insurance and sued under the "do not call" provisions of the TCPA.[85] The first telephone call was placed by a Nationwide insurance agent.[86] Nationwide contended that it was not liable under the TCPA for this call on the basis of an agency agreement between the insurance agent and Nationwide because the insurance agent was an independent contractor.[87] The trial court held that the placing of the call by the independent contractor insurance agent did not constitute a valid cause of action against Nationwide.[88] Worsham appealed, and the appellate court held that "the existence of an independent contractor relationship between Nationwide and [the insurance agent], would not, in itself, insulate Nationwide from liability under the TCPA."[89] The court further stated that the TCPA reaches not only the entity actually making the solicitation, but also the entity on whose behalf the solicitation is made.[90] Specifically, the court held that a principal can be liable for the solicitations of an independent contractor who makes the solicitation at the direction and request of the principal.[91]

In another case, although a Georgia appellate court ultimately

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[83] Worsham v. Nationwide Ins. Co., 772 A.2d 868, 877-79 (Md. Ct. Spec. App. 2001).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 871.

[88] *Id.*

[89] *Id.* at 878. However, an unanswered question remains regarding whether the status of a party as an independent contractor coupled with the fact that a facsimile was not sent on its behalf, would be sufficient for the independent contractor to escape liability. *Id.*

[90] *Id.*

[91] *Id.*

determined that the issue of whether the sender of the facsimile was an independent contractor was a question of fact for the jury, it did provide the trial court with some guidance for its analysis on remand.[92] The Court advised that even if the jury were to find that the facsimile sender was an independent contractor, the company could still be liable under the TCPA based on the FCC interpretation that the entity on whose *behalf* the facsimile was sent is ultimately liable.[93]

The foregoing examples illustrate that liability under the TCPA can be imputed to several parties, and often for the same facsimile. Common carrier liability is another avenue used by plaintiffs to collect damages from a party other than the specific transmitter of the facsimile.

E. Common Carrier Liability

Under the current law, common carriers generally cannot be held liable for faxes sent using their lines.[94] In the context of the TCPA facsimile provisions, common carriers are the owners/providers of the lines of communication over which the facsimiles are sent.[95] However, under limited circumstances, a common carrier can be held liable.[96] In a recent report accompanying the regulations, the FCC specifically drew a line of liability between the "fax broadcasters" (i.e. common carriers) and the "fax advertisers" (i.e. the authors of the fax), stating that:

> [p]arties commenting on the facsimile requirements for senders of facsimile messages urge the Commission to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimiles may not be held liable for any violations of [the regulations]. We concur with these comment[s]. In the

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[92] *See* Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 472 (Ga. Ct. App. 2000)..

[93] *Id.*

[94] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459 (2002) (noting that the FCC found that "in the absence of a 'high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,' common carriers will not be held liable for the transmission of a prohibited facsimile message.").

[95] *Id.*

[96] *Id.*

> absence of 'a high degree of involvement or actual notice of the illegal use and failure to take steps to prevent such transmissions,' common carriers will not be held liable for the transmission of a prohibited facsimile message.[97]

Therefore, for a common carrier to be liable under the Act, they generally must have some involvement other than simply supplying the technical means to send the fax.[98] For example, liability could potentially result if the common carrier was involved in creating any of the substantive content of the fax, or, more commonly, if they assisted in developing the telephone number list.[99]

In 1995, the FCC again addressed the issue of common carrier liability, stating that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule."[100] This interpretation is consistent with the TCPA's legislative history, and with our findings in the Report and Order that carriers will not be held liable for the transmission of a prohibited message."[101]

III. The Constitutionality of the TCPA

The majority of courts faced with constitutional challenges to the Act have rejected such claims, with the exception of the court in *Missouri v. American Blast Fax, Inc.*[102] However, as the proliferation of litigation becomes more widespread and class actions are utilized more often to raise the potential damage awards, an increase in the number of constitutional challenges is inevitable. This likelihood of additional constitutional challenges is further increased by the rise in

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[97] Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296, 315 (Cal. Ct. App. 2003) (citing In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. at 8779-80 (1992)).

[98] *See id.*

[99] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459 (2002).

[100] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 F.C.C.R. 12391 (1995).

[101] *Id.*

[102] *See* Missouri v. Am. Blast Fax, Inc., 196 F. Supp. 2d 920, *rev'd*, 323 F.3d 649 (8th Cir. 2003) (holding that the provision of the TCPA prohibiting unsolicited advertisements violated the First Amendment right of free speech).

volume of class actions leading to enormous damages awards. In addressing constitutional arguments, the courts must give deference to Congress' findings out of respect for its legislative power.[103]

A. First Amendment Concerns

The First Amendment to the United States Constitution guarantees free speech.[104] However, this right is not absolute, and therefore in certain contexts the government may place limitations on speech to protect other rights.[105] For example, the government may impose greater restrictions on commercial speech, keeping in mind that "[b]road prophylactic rules in the area of free expression are suspect, precision of regulation must be the touchstone in an area so closely touching our most precious freedoms' . . . forgiving standard for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest."[106]

The District Court for the Eastern District of Missouri was the only court to uphold a constitutional challenge against the TCPA when the defendant's arguments were rooted in the First Amendment.[107] In *Missouri v. American Blast Fax, Inc*, the court noted that while the Supreme Court will generally allow restrictions on speech content in only the most extreme circumstances, content-based restrictions on commercial speech are permissible.[108] The court noted that in analyzing a constitutional challenge based in the First Amendment, the United States Supreme Court has stated that:

> [e]ven in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when

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[103] *Kaufman,* 2 Cal. Rptr. 3d at 313.

[104] *See* U.S. CONST. amend. I.

[105] *See Kaufman,* 2 Cal. Rptr. 3d at 313 (stating that "the Court has afforded commercial speech a measure of First Amendment protection 'commensurate' with its position in relation to other constitutionally guaranteed expression).

[106] *Id.* at 314.

[107] *See Am. Blast Fax, Inc.,* 196 F. Supp 2d at 934.

[108] *See id.* at 927.

enacting nationwide regulatory schemes.[109]

The court held that the proper test to determine the constitutionality of a restriction on commercial speech is one of intermediate scrutiny, as described in *Central Hudson v. Public Services Commission of New York*.[110] This test has been described as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[111]

In applying this test, the court noted that the expressions involved in unsolicited faxes are afforded some protection under the First Amendment in that faxing advertisements is generally a lawful activity and is not misleading.[112] The court then analyzed whether the government had the requisite substantial interest, stating that "[a] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real. This

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[109] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 196 (1997).

[110] *See Am. Blast Fax, Inc.*, 196 F. Supp. 2d at 927 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980)). In *Central Hudson*, an electrical utility sued the State of New York to challenge the constitutionality of a regulation which completely banned the utility from being able to advertise. *Central Hudson*, 447 U.S.. at 559. The regulation was upheld by the trial court and the intermediate appellate court and was appealed to the United States Supreme Court, which held that the regulation was unconstitutional, based on the First and Fourteenth Amendments, in that the state's asserted interest and the link between the advertising prohibition was not sufficient, and that the regulation was more restrictive than necessary. *Id.* at 558.

[111] *Am. Blast Fax, Inc.*, 196 F. Supp. 2d at 927.

[112] *See id.* at 926-27. *See also* Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296, 314 (Cal. Ct. App. 2003) (noting that plaintiffs in that case contended that the sending of unsolicited facsimiles gave rise to a cause for trespass to chattels and therefore was not a lawful activity and therefore was not entitled to any degree of First Amendment protection). The court noted that in Intel Corp v. Hamidi, 71 P.3d 296 (Cal. 2003), the California Supreme Court held that such activities do not give rise to an action for trespass to chattels. *Id.*

burden cannot be satisfied by mere speculation or conjecture."[113] The court specifically noted that it was clear from the legislative history that Congress did not consider studies or empirical data estimating the costs.[114] Additionally, the court noted that the government did not distinguish between unsolicited faxes that violated the TCPA and those that the TCPA permitted.[115]

The court further stated that the government had not provided the requisite level of proof needed to show a true "substantial interest."[116] However, the court's analysis did not end there. The court stated that the government would not be able to satisfy the second prong of the *Central Hudson* test: whether the regulation directly advanced the governmental interest asserted.[117]

Additionally, the court held that the government would not be able to prove that the restrictions would alleviate the harm caused by the transmission of these facsimiles to a material degree,[118] citing to *City of Cincinnati v. Discovery Network, Inc.* in support.[119] In *Discovery Network, Inc.*, the Supreme Court upheld a prohibition on the distribution of commercial handbills, but allowed the distribution of other "non-commercial" handbills.[120] The Supreme Court held that the benefits received were not sufficient, nor a proper "fit," to be considered constitutional.[121] The Supreme Court stated that the distinction between the commercial and non-commercial handbills was not at all related to the purported interests of the City in safety and esthetics.[122]

A Missouri district court held that the Act was

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[113] *Am. Blast Fax, Inc.*, 196 F. Supp 2d at 928.

[114] *See id.* at 929.

[115] *See id.* at 932. For example, the government did not present any evidence regarding how may were protected political or job opportunity faxes as opposed to impermissible advertising faxes. *See id.*

[116] *See id.* at 931.

[117] *See id.*

[118] *See id.* The Court noted that the harm was two-fold: 1) the cost shifting effect, and 2) the occupation of a recipient's facsimile machine. *Id.*

[119] *See Am. Blast Fax, Inc.*, 196 F. Supp 2d at 933 (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424 (1993)).

[120] *See Discovery Network, Inc.*, 507 U.S. at 412-14.

[121] *See id.* at 428.

[122] *See id.* at 410.

unconstitutional because the regulation was more extensive than necessary.[123] The court made much of the fact that the TCPA only banned unsolicited advertisements as opposed to all unsolicited faxes.[124] The success of this constitutional challenge was short lived. This case was subsequently reversed by the Eighth Circuit.[125] The court stated that *Central Hudson* was the proper test for determining the constitutionality of a restriction on commercial speech.[126] Based on the legislative history of the TCPA, it found that there was a substantial interest in restricting unsolicited facsimile advertisements.[127] The court also distinguished the Supreme Court's decision in *Discovery Network, Inc.*, stating that in *American Blast Fax, Inc.*, the disparate treatment was indeed related to the asserted governmental interest, which was not the case in *Discovery Networks*.[128] The appellate court agreed that the distinction was justified.[129] It held that advertisers can still utilize any legal means, and that the statute was narrowly tailored to achieve the desired objective.[130] The court explained that the ban was not intended to protect the public from the content of the speech, or to implement policy unrelated to the delivery of the message itself.[131] Noting that the TCPA has not eliminated the facsimile machine as a potential channel for communication, it stated that the Act merely requires that the sender obtain prior permission.[132]

Although subsequently reversed, the reasoning espoused by the district court in *American Blast Fax, Inc.* has been used repeatedly, albeit unsuccessfully, by defendants in TCPA cases.[133]

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[123] *See Am. Blast Fax Inc.*, 196 F. Supp. 2d at 932.

[124] *See id.* at 933.

[125] *See* Missouri v. Am. Blast Fax, Inc.,_323 F.3d 649, 653 (8th Cir. 2003) , *rev'g*, 196 F.Supp. 2d 920 (E.D. Mo. 2002).

[126] *See id.* at 653 (noting that under *Central Hudson*, if the commercial speech is not unlawful or misleading, it must be determined whether "the asserted governmental interest is substantial).

[127] *See id.* at 655.

[128] *Id.* at 656.

[129] *See id.* at 655.

[130] *See id.* at 659.

[131] *Id.*

[132] *Id.*

[133] *See* Rudgayzer & Gratt v. LRS Commns., Inc., 193 Misc. 2d 449, 454

All other courts faced with the issue have held the TCPA constitutional.[134] The majority of these courts explained their decision by stating that the Act is a reasonable means to halt the shifting of advertising costs to consumers.[135] In doing so, courts state that "Congress's interests in passing the TCPA—preventing 'unwitting customers' from bearing the brunt of advertising costs and preventing unwanted fax machine interference—are substantial and real."[136]

Naturally, the requirement that the Act materially advance a substantial interest is easily met in that the ban on unsolicited faxes seeks to stop the harm that is allegedly caused by the receipt of such facsimiles. Past defendants have argued that the TCPA does not materially advance any substantial government interest; essentially asserting that the means are under inclusive because the statute still allows non-advertising junk faxes to be freely transmitted, including job postings and political announcements.[137] However, the *Destination Ventures* court quickly rejected this argument, stating that Congress's goal was to prevent the shifting of *advertising* costs, and therefore that limiting regulations to faxes containing advertising was reasonable in light of this aim.[138]

In *Destination Ventures*, the plaintiff was a travel agency that conducted various travel agent seminars.[139] Prior to the enactment of the TCPA, the plaintiff had advertised its seminars via facsimile machines.[140] Following the enactment of the TCPA, the travel agency and other business owners filed a declaratory judgment action arguing that the TCPA violated the First Amendment.[141] While the

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(N.Y. Civ. Ct. 2002) (relying on *Am. Blast Fax, Inc.* in holding that the TCPA violates the First Amendment).

[134] *See* Kaufman v. ACS Sys., Inc., 2 Cal. Rptr. 3d 296, 314 (Cal. Ct. App. 2003); *see also* Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d 365, 389 (Tex. App. 2004); *see also Am. Blast Fax, Inc.*, 323 F.3d at 653.

[135] *See Chair King,* 135 S.W.3d at 387. *See also Am. Blast Fax, Inc.,* 323 F.3d at 659.

[136] *See Chair King* 135 S.W. 2d at 387 (citing Destination Ventures, Ltd. v. F.C.C., 844 F. Supp. 632, 637 (D. Or. 1994)).

[137] *See* Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54, 56 (9th Cir. 1995).

[138] *Id.*

[139] *See id.* at 55.

[140] *See id.*

[141] *See id.*

plaintiffs conceded that the government had a substantial interest in eliminating advertising cost-shifting, they argued that it was nevertheless unconstitutional because it was not a "reasonable fit" for the interest.[142] The court disagreed with the plaintiff's contention, holding that "because Congress' goal was to prevent the shifting of advertising costs, limiting its regulations to faxes containing advertising was justified."[143] The court noted that the ban is even-handed in its application as it applies to all commercial enterprises, and stated that the First Amendment does not require Congress to reject partial solutions to a problem where a different solution would completely eliminate the cost-shifting.[144]

Courts also hold that the TCPA satisfies the third element of the *Central Hudson* test. The Texas appellate court in *Chair King* stated that "there is a reasonable fit, no more extensive than necessary between the TCPA's ban on unsolicited fax advertisements and the interests directly advanced by the ban."[145] This statement is echoed by an Indiana district court, which held that the existence of alternative approaches does not automatically indicate ill-tailored legislation.[146]

In *Kenro, Inc.*, the plaintiff filed a class action lawsuit alleging that the defendants violated the TCPA by sending a publication containing unsolicited advertisements.[147] The defendants leveled a constitutional challenge against the TCPA, setting forth several specific examples of ways in which the statute could have been more narrowly tailored.[148] The court stated that a properly tailored restriction seeks to eliminate the evils sought to be eradicated by the government, without simultaneously restricting a substantial quantity of speech which does not cause the same evils.[149] On this

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d 365, 387 (Tex. App. 2004).

[146] Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1168-69 (S.D. Ind. 1997).

[147] *See id.* at 1167.

[148] *See id.* (stating that the defendants' suggestions included limiting the hours during which faxes could be sent, requiring reimbursement to the recipients for actual costs).

[149] *Id.* at 1168.

basis, the *Kenro Inc.* court disagreed with the defendants' claims of unconstitutionality, reasoning that the TCPA is not an unqualified restriction, and that the only restriction it embodies is a prohibition against the use of facsimile machines to transmit unsolicited information.[150] Thus, the court held that the TCPA directly advanced the governmental interest and was sufficiently narrow to pass constitutional muster.[151] Congress was under no obligation to pick the "least restrictive" means available to alleviate the evils caused by fax blasting because as the court in *Florida Bar* states, commercial speech is not afforded that level of protection.[152]

The United States Supreme Court in *Florida Bar v. Went For It, Inc.* clarified that:

> [T]he 'least restrictive means' test has no role in the commercial speech context. What our decisions require,. . .is a "fit between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but. . .a means narrowly tailored to achieve the desired objective.[153]

The Supreme Court explained that if the commercial speech facing restriction could be communicated through channels other than the restricted medium, it is more likely that the restriction will be considered reasonable.[154] Thus, due to the myriad of alternative means for advertising—such as television, newspaper, and radio—it appears unlikely that a First Amendment challenge to the TCPA will ever be successful.

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[150] *Id.*

[151] *Id.*

[152] Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995).

[153] *See id.* (holding that the restriction imposed by the Florida Bar prohibiting using direct mailings to solicit wrongful death or personal injury claims within a thirty day period from an accident passed constitutional muster under the *Central Hudson* test for restrictions on commercial speech).

[154] *See id.* at 632-34 (noting that the alternative means of advertisement, such by telephone directory, periodicals, billboards, radio, television, and recorded messages, sufficiently serve the public interest such that no harm will result from the ban on unsolicited fax advertising).

B. Equal Protection Concerns

Additional TCPA constitutional challenges are rooted in the Equal Protection Clause, and are based on the fact that the Act separates commercial advertisements from other unsolicited faxes such as political postings or job openings.[155] In a Senate report prior to the Act's passage, Congress noted that the damages caused to fax machines and the impermissible shifting of cost to the consumer was a government interest protected by the Act.[156] Challengers argue that the harms caused by TCPA violations result regardless of the facsimile's content; therefore, they assert that it is unconstitutional to prohibit advertisements while not banning other types of fax communications.[157]

TCPA challengers contend that strict scrutiny must be used to analyze the TCPA within the context of the Equal Protection Clause because the fundamental First Amendment right of freedom of speech is implicated.[158] Typically, the courts rejecting the First Amendment arguments do so because strict scrutiny is not afforded when the court finds that a party's First Amendment rights have not been compromised.[159] In the case of the TCPA, these rights have not been compromised because commercial speech is afforded a lower level of protection. Therefore, because there is no other fundamental right implicated and no suspect class involved, the much more lenient standard of "reasonable fit" applies under the classic Equal Protection analysis.[160]

Analysis under the Equal Protection Clause closely mirrors the analysis supporting the rejection of First Amendment

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[155] *See* Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d 365, 388 (Tex. App. 2004).

[156] S. REP. NO. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969.

[157] *See Chair King*, 135 S.W. 3d at 389.

[158] *See id.* at 388.

[159] *See id.* at 388-89 (citing Dunagin v. City of Oxford, 718 F.2d 738, 752 (5th Cir. 1983)). However, it should be noted that if the court's holdings shifted in favor of finding First Amendment violations under the TCPA it would revive this constitutional argument as a potential basis for invalidation.

[160] *See id.* at 389 (stating that "[i]f there is a sufficient "fit" between the legislature's means and ends to satisfy the concerns of the First Amendment, the same "fit" is surely adequate under the applicable 'rational basis' equal protection analysis.").

challenges.[161] The Supreme Court in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* explained that if there is a finding of a sufficient relationship between the valid governmental interest and the restriction which satisfies the "reasonable fit" requirements of the First Amendment, the same relationship is almost necessarily adequate under the applicable 'rational basis' equal protection analysis, due to the analytical similarities between these Constitutional tests.[162] Courts that have performed an equal protection analysis have intertwined the First Amendment issues into their analysis such that a rejection of the First Amendment challenges necessitates a rejection of the Equal Protection challenges.[163]In *International Science*, the Fourth Circuit considered a slightly different equal protection challenge.[164] In that case, the defendants alleged that the Act's jurisdiction provision, granting state courts exclusive jurisdiction, violated the Equal Protection Clause.[165] Defendants pointed out that private TCPA action may be permitted in some state courts and disallowed in others based on the phrase "if otherwise permitted by the laws or rules of a court of [that] State."[166] The Fourth Circuit addressed this challenge and held that there was no violation because any inequality that could exist was a result of statutory authority to "enforce substantive rights which both state the state and the federal government can enforce in federal court through other mechanisms."[167] Therefore, the court found there was no violation of the Equal Protection Clause based on the potential for disparate treatment by different states.

C. Eighth Amendment and Due Process Concerns

The Eighth Amendment prohibits excessive bail, excessive

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[161] *See id.*

[162] Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 n. 9 (1986).

[163] *See* Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d365, 388 (Tex. App. Ct. 2004) (rejecting the First Amendment challenge based on the "reasonable fit" test and applying the same "reasonable fit" test to equal protection challenges).

[164] Int'l Science & Tech. Inst., Inc. v. Inacom Comm. Inc., 106 F.3d 1146, 1156-57 (4th Cir. 1996).

[165] *See id.*

[166] *Id.* at 1156.

[167] *Id.*

fines, and cruel and unusual punishment.[168] TCPA challengers argue that the fines imposed under the TCPA are clearly excessive, as the potential $1,500 per page liability far outweighs the actual damages to the recipient of the fax in terms of paper use, ink use, and wear and tear on the facsimile.[169] However, because the Eighth Amendment is applied to the states via the Fourteenth Amendment, this analysis is tied into the second prong of the due process analysis as described below. There have been two principle due process arguments against the constitutionality of the TCPA: 1) the statute is unconstitutionally vague[170]; and 2) the statute imposes an excessive fine in violation of due process.[171]

i. The TCPA is Unconstitutionally Vague

In determining whether a statute is unconstitutionally vague, the following standard applies: "a statute which either forbids or requires doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law."[172] In making this determination, it is important to determine whether the speech is protected by the First Amendment.[173]

In *Accounting Outsourcing*, the plaintiff sued on behalf of

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[168] *See* U.S. CONST. amend. VIII.

[169] *See* Kim v. Sussman, 2004 WL 3135348, at 3 (Ill. Cir. 2004) (stating that "[a]ssuming that the 16 or so individual plaintiffs pursue their claims and are each awarded the minimum $500.00 per violation, it will have cost defendant over $9,500 for his violation . . . . Such a sum is clearly sufficient to punish past and discourage future violations of the Act. On the other hand, certifying a class threatens to impose on a defendant a virtual automatic liability to thousands of individuals in a sum that dwarfs the magnitude of harm involved.").

[170] *See* Accounting Outsourcing, LLC, v. Verizon Wireless Pers. Commcns., L.P., 329 F. Supp. 789, 807 (D. La. 2004).

[171] *See* Chair King v. GTE Mobilnet of Houston, Inc., 135 S.W.3d365, 385 (Tex. App. Ct. 2004) (stating that the advertisers in that matter alleged that the $500 minimum damage amount violated constitutional due process because it was so disproportionate the amount of actual harm suffered.).

[172] *See Accounting Outsourcing, LLC*, 329 F. Supp. 2d at 804 (citing Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (citing Connally v. General Constr. Co., 269 U.S. 385, 391(1926)).

[173] *See Chair King*, 135 S.W.3d at 386-87 (classifying fax advertising as commercial speech and explaining that "[b]ecause commercial speech occupies a 'subordinate position in the scale of First Amendment values,'" a reasonable fit test is appropriate).

itself and a proposed class of Louisiana residents who alleged that they received unsolicited facsimiles from at least one of the members of a large group of defendants.[174] The court held that "because the TCPA regulates constitutionally protected commercial speech, it must satisfy a more rigid vagueness test, such that even one impermissible application would render the TCPA vague."[175]

The argument that the TCPA is unconstitutionally vague has three main components: 1) the TCPA does not clearly indicate what conduct is prohibited;[176] 2) the TCPA does not clearly indicate its geographic reach;[177] and 3) the TCPA does not clearly define proscribed facsimiles.[178]

With respect to the first and third argument, the *Accounting Outsourcing* Court held that a person of common intelligence could understand who the statute applied to "given the FCC's clear and unequivocal interpretations."[179] The notion that a facsimile sender has proper notice that the TCPA applies to them is also inherent in the plain language of the statute itself.[180] As always, ignorance of the law is no defense. Additionally, the prohibited conduct itself, i.e. the sending of an unsolicited facsimile advertisement, is expressed in the plain language of the statute.[181] A Louisiana district court in *Accounting Outsourcing* held that the detailed definition of "unsolicited advertisements" spelled out in the TCPA allows a person of common and ordinary intelligence to distinguish between commercial and non-commercial advertisements, and therefore which faxes are permissible and which are not.[182]

In responding to the second argument that the geographic reach of the statute is not clearly indicated, the district court found

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[174] *See Accounting Outsourcing, LLC*, 329 F. Supp. 2d at 792.

[175] *Id.* at 805.

[176] *See id.* at 807 (noting specifically the defendants argued that the TCPA is vague because it does not clearly indicate who is governed by or subject to the TCPA, i.e. fax broadcasters, advertisers, or "entitled".)

[177] *See id.* at 807 (noting specifically that the defendants argued that the plain language of the TCPA limits its application to "any person *within the United States*").

[178] *See id.* at 804.

[179] *Id.* at 805.

[180] *See* 47 U.S.C.A. § 227 (West 2005).

[181] *See Accounting Outsourcing, LLC*, 329 F. Supp. 2d at 805.

[182] *See id.* at 808.

that "[w]hen considered in the context of the Communications Act as a whole, persons of common intelligence would know what geographic scope is covered by the TCPA."[183] It discussed the meaning of the term "within" as used in the statute.[184] The court stated that the term needed to be interpreted in its statutory context, and noted that the TCPA as a whole applied to all interstate and foreign communications by wire or radio.[185] Therefore, the court held that the geographic scope was clear and thus that there was no due process violation on that ground.[186]

ii. The TCPA Imposes an Unconstitutional Penalty

The United States Supreme Court held that a statutory penalty violates the due process rights guaranteed by the Fifth Amendment where "[a] penalty prescribed is so severe and oppressive as to be wholly disproportional to the offense and obviously unreasonable."[187] TCPA challengers argue that the actual cost to the recipient is clearly disproportionate when compared to the $500 minimum penalty incurred by the sender of an unsolicited fax.[188]

In *Accounting Outsourcing*, the court analyzed whether the TCPA imposed an unconstitutionally harsh penalty.[189] The court stated that because the TCPA provides for statutory damages, defendants cannot complain that they did not have notice regarding the severity of the possible punishment.[190] Nevertheless, the *Accounting Outsourcing* court still analyzed whether the statutory penalty violated the Fifth Amendment's Due Process guarantee, as applied to the States through the Fourteenth Amendment.[191] The court recognized that the standard for judging the constitutionality of

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[183] *Id.* at 807.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] St. Louis Iron Mt. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919).

[188] *See* Chair King, Inc. v. GTE Mobilenet of Houston, Inc., 135 S.W.3d 365, 385-86 (Tex. App. 2004) (noting the advertisers' assertion that the actual cost of receiving a fax is two to forty cents, whereas the minimum penalty for sending the fax is $500.00).

[189] *See Accounting Outsourcing, LLC*, 329 F.Supp.2d at 808-09.

[190] *Id.* at 809.

[191] *See id.* at 809-10.

a penalty under due process considerations is modified in situations where the penalty is meant not only to compensate for private injury, but also to deter conduct for the public good.[192] When deterrence is one of the purposes, the court has held that 'the legislature may adjust its amount to the public wrong rather than the private injury . . . ."[193] Congress has specified two legitimate public harms that the TCPA aims to correct:

> (1) these fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, to the exclusion of other messages; and (2) unsolicited fax advertisements unfairly shift nearly all of the advertiser's printing costs to the recipient of the advertisement.[194]

Based on these goals and the application of the modified standard for determining whether there has been a Fourteenth Amendment violation, courts have consistently held that when measured against the harms of unsolicited fax advertising and the public interest in deterring unwelcome conduct, the TCPA's $500 minimum damages provision is neither disproportionate to the offense nor obviously unreasonable.[195]

IV. Class Actions

Aside from the issue of liability, there is no issue more critical to parties in TCPA cases than class certification. The statutory minimum damages provided for by the TCPA are $500 per facsimile.[196] Therefore, if a single plaintiff were to sue, the matter would be appropriate for small claims court. However, if the same plaintiff is named a representative plaintiff, and is successful in certifying a class of a few thousand members who received the facsimile, a $500 liability suddenly turns into a multi-million dollar

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[192] *See id.* at 809.

[193] *Id.* (citing St. Louis Iron Mt. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).

[194] H.R. REP. NO. 317 (1991). *See also* Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1166 (N.D. Ind. 1997) (explaining that the legislative history of TCPA reveals that Congress was concerned about the costs imposed on the recipient).

[195] *E.g., Kenro, Inc.*, 962 F.Supp. at 1167; *Accounting Outsourcing, LLC*, 329 F.Supp.2d at 808-09.

[196] 47 U.S.C.A. § 227 (West 2005).

liability.[197] Because of the availability of potentially huge damages and attorneys fees, class action certification is one of the most litigated issues in the context of the TCPA.

Class certification is granted under the broad discretion of the trial court.[198] Furthermore:

> [W]hen a state court hears a case brought under a federal law, local laws control procedure, jurisdiction, administration, and venue. It is often said that 'federal law takes the state courts as it finds them. . .The particulars of a TCPA case (jurisdiction, venue, residence, amount in controversy, etc.) must fit the administrative and jurisdictional rules of the state court hearing the case. The Supremacy Clause does not reach these administrative and procedural issues. . .Congress cannot command which court is a state has jurisdiction over TCPA claims. Nor can it mandate the 'modes of procedure'.[199]

A. Overlap of the TCPA with Class Action Statutes

The Illinois statute governing class actions applies, because the private TCPA remedy must be brought in state court, and *Erie* principles dictate that the state class action rules apply.[200] Thus, to maintain a valid class action in Illinois, the plaintiff class must show that: (1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; 3) the representative parties will fairly and adequately protect the interest of the class; and 4) the class action is an appropriate method to the fair and efficient adjudication of the controversy.[201]

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[197] *See* Craig Anderson, *Executive Fights Faxes, One at a Time,* Los Angeles Daily Journal, June 6, 2005, at 4. .

[198] McCabe v. Burgess, 389 N.E.2d 565. 567 (Ill. 1979).

[199] Kaufman v. ACS Sys., Inc. v. Fax.Com, Inc., 2 Cal. Rptr. 3d 296, 327 (Cal. Ct. App. 2003) (citing Robert R. Biggerstaff, *State Court and Telephone Consumer Protections Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 Conn.L.Rev. 431, 431).

[200] *See id.*

[201] *See* 735 ILL. COMP. STAT. 5/2-801 (2005).

B. Class Actions in Other Jurisdictions

The California appellate court in *Kaufman* noted that although TCPA claims may be brought as class actions, this does not mean that they should be.[202] A Pennsylvania district court stated that "[a] class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements."[203] The court then cited to *Ratner v. Chemical Bank New York Trust Co.*, holding that the denial of class certification was proper, in the context of the Truth in Lending Act's minimum award of $100 each for some 130, 0000 class members, as such a result would be a unrelated to any actual damages and would result in horrendous consequences against the defendants.[204]

Aside from public policy reasons supporting the denial of certification of a class, there is a separate issue as to whether the statutory requirements of the state class action statute can be met. There is much litigation over whether the established business relationship exception will almost always destroy the commonality that is an essential element to achieve class certification.[205]As one court noted in the context of a potential class action TCPA claim, the "[p]laintiff faces a unique problem because the proposed class definition flies directly in the face of a basic tenet of class certification: a court may not inquire into the merits of a case at the class certification stage."[206] Furthermore, it noted that "liability arises only if a transmitted advertisement is *unsolicited*."[207] Due to the EBR exception, courts must individually determine whether each fax was solicited in order to ascertain whether the recipient qualifies as a class member.[208]

This becomes important not only with respect to the commonality requirement of the class action statute, but also as to the

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[202] *Kaufman*, 2 Cal. Rptr. 3d at 303.

[203] Forman v. Data Transfer, Inc., 164 F.R.D. 400, 405 (E.D. Penn. 1995).

[204] *See id.* (citing Ratner v. Chem. Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972)).

[205] *See id.*

[206] *Id.* at 403.

[207] *See id.* at 404.

[208] *See id.*

"numerosity" requirement.[209] For example, in *Hammond v. Carnett's Inc.*, the Georgia appellate court examined a case in which a car wash company sent out unsolicited facsimiles.[210] The lower court denied class certification, and the potential class appealed.[211] The Georgia Court of Appeals reversed the denial and certified the class.[212] Among the arguments made in the lower court was that the EBR exception destroyed the element of numerosity.[213] The appellate court failed "to see any connection between the numerosity requirement and the question of whether Carnett's facsimile advertisements were unsolicited."[214]

Additionally, in *ESI Ergonomic Solutions v. United Artists Theater Circuit Inc.*, the Arizona appellate court reversed the trial court's denial of class certification and stated that the potential amount of the penalty was not an appropriate consideration in determining whether a class action is proper for a particular suit.[215] The court reasoned that it was not for the court to determine the fairness of a penalty awarded under a class action statute when Congress has specifically determined a per violation penalty.[216] The court explained that denial of a class action on the basis of the amount of the penalty would provide incentive for defendant's violation of the statute on a larger scale.[217]

However, in *Livingston v. U.S. Bank Co.*, the Colorado

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[209] *See* Hammond v. Carnett's Inc, 596 S.E.2d 729, 729 (Ga. Ct. App. 2004).

[210] *See id.*

[211] *See id.*

[212] *See id.*

[213] *See id.*

[214] *Id.*

[215] *See* ESI Ergonomic Solutions v. United Artists Theatre Circuit, Inc., 50 P. 3d 844, 850-51 (Ariz. Ct. App. 2002). In *ESI Ergonomic Solutions*, the recipients of facsimile advertisements sued as class action under the TCPA against defendant corporations. *Id.* at 850. The trial court denied the plaintiff's Motion to Certify and Motion to Reconsider. *Id.* The plaintiff appealed and the appellate court held that it was not appropriate for the court to take the possible penalty into consideration when determining whether the certify the class and that the penalties were not so oppressive or disproportionate as to deny due process. *Id.* at 851. The appellate court thus found that the trial court had abused its discretion in denying the plaintiffs' Motion to Certify and reversed and remanded. *Id.*

[216] *See id.* at 851.

[217] *See* Kaufman v. ACS Sys., Inc. v. Fax.Com, Inc., 2 Cal. Rptr. 3d 296, 328 (Cal. Ct. App. 2003) (citing *ESI Ergonomic Solutions*, 50 P. 3d at 850-851).

appellate court held that denial of class certification was appropriate for two reasons: 1) the class was not properly identified, and 2) the individual issues would predominate over the common issues.[218]

C. Class Actions in Illinois

Illinois courts have also specifically addressed whether a class action suit may be properly maintained in the context of a TCPA claim brought in state court.[219] In *Kim v. Sussman*, the plaintiff alleged violations of the TCPA, the Illinois Consumer Fraud Act, and conversion.[220] The plaintiff moved to certify the class, and the court denied the Motion.[221] The trial court stated that "individual issues, including each individual class member's burden to demonstrate that the transmission in question was unsolicited, preclude class certification." [222] It noted that "given the statutory framework of plaintiff's claims, the Court strongly believes that a class action is not an appropriate method for the "fair and efficient" adjudication of this controversy." [223] Furthermore, Illinois courts have held that class action allegations have been properly dismissed in situations where a "dual inquiry into each particular transaction involving member of proposed class would be required in order to establish a right of recovery in each class member."[224]

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[218] *See* Livingston v. U.S. Bank, 58 P.3d 1088, 1089 (Colo. Ct. App. 2002). In *Livingston*, recipients of unsolicited facsimile advertisements brought class actions under the TCPA against Defendant corporations. *Id.* at 1089. The district court denied the recipients' class certification motion and the Court of Appeals affirmed the denial on the basis that individual issues predominated over the common issues. *Id.* The court specifically noted that because the TCPA did not require permission in writing, the question of whether consent was given would have to be inquired of as to each potential class member. *Id.* at 1090.

[219] *See* Kim v. Sussman, 2004 WL 3135348, at 2 (Ill. Cir. 2004); Livingston v. U.S. Bank, 58 P.3d at 1089 (Colo. Ct. App. 2002); *Accounting Outsourcing, LLC*, 329 F.Supp.2d at 808-09.

[220] *See id.* at 2.

[221] *See id.* at 4.

[222] *Id.* at 2.

[223] *Id.*

[224] Arnold v. H. Frank Olds, Inc., 365 N.E.2d 615, 618 (Ill. App. Ct. 1977). In *Arnold*, the plaintiff brought an action alleging that defendant had charged a service occupation tax on the retail price of the parts used in their automobiles, instead of the actual costs. *Id.* at 615. The plaintiff moved to certify a class on behalf of all other persons who had their automobiles serviced by defendant, the circuit court

The court in *Kim* also discussed at length the general reasoning behind the denial of class certification.[225] The court stated that "[t]o engraft on the statutory scheme the possibility of private class actions, with potential recoveries in the millions of dollars, strikes the Court as unfair given the nature of the harm Congress attempted to redress in the TCPA."[226] The court also noted the irony in the fact that the only feasible way to notify the potential class members would be to use the same facsimile lists to again send an unsolicited fax.[227] In considering the unfairness of the damages, the district court's reasoning is directly contrary to the Arizona appellate court's statement that the fairness of the damages should not be considered where Congress has established a minimum penalty.[228]

V. Fixing the Problem

A. Impact on Consumers

Proponents of the TCPA argue that the Act itself is aimed at protecting consumers.[229] They point out that it provides redress for consumers who have had their private property in the form of paper and toner converted.[230] It also protects consumers from having their facsimile lines tied up, and serves to alleviate concerns that an important facsimile may not be transmitted.[231]

However, the consequences of TCPA enforcement also have

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held that the complaint was not legally sufficient to support a class action, and plaintiff appealed. *Id.* The appellate court affirmed the denial of class certification holding that there were two independent determinations that needed to be made as to each plaintiff: 1) the nature of the particular transaction, and 2) a showing of unjust enrichment was required for each particular case. *Id.* at 618.

[225] *See Kim*, 2004 WL 3135348 at 2.

[226] *Id.*

[227] *See id.*

[228] *See* ESI Ergonomic Solutions v. United Artists Theatre Circuit, Inc., 50 P. 3d 844, 851 (Ariz. Ct. App. 2002).

[229] *See* Jeremiah Marquez, Lawsuits Threaten to Unplug Junk Fax Industry (Sept. 6, 2003), http://www.detnews.com/2003/technology/0309/07/technology-263719.htm. Additionally, the author noted that consumer complaints against telemarketers increased from app. 1,300 in the beginning of 2002 to 4,100 by the beginning of 2003. *Id.*

[230] *See id.*

[231] *See id.*

negative effects on consumers, namely: 1) deprivation of receiving the contents of the facsimiles, and 2) residual effects on small businesses.

The sheer volume of fax blasting transmission[232] evidences the fact that there is at least some market for the service.[233] While proponents of the TCPA allege that fax blasting is a very inexpensive medium, it is not free. If these facsimiles were wholly offensive and undesired, it would not have become a $300 billion industry. From this data, the argument can be made that some consumers want to receive some of these faxes, or this would not be such a large industry. Companies would not continue to fax blast unless they received positive results.

Additionally, these facsimiles often contain special offers and coupons to *benefit* the consumer. They may advertise mom-and-pop businesses that do not have large advertising budgets. In this era of big box consumerism, some consumers prefer to patronize family-run businesses, and facsimile advertising provides a feasible way for these businesses to advertise.[234] Based on the projected cost of obtaining express written permission to send these facsimiles, small businesses may not be able to afford even this type of marketing, and therefore, all advantages of using this medium would be eliminated.

Perhaps the most devastating effect on consumers is the *destruction* of small businesses. As discussed previously, recovery under class action cases may reach well into the millions.[235] This liability, coupled with the current trend in the field of insurance, whereby insurance companies are denying coverage for TCPA violations, is enough to completely bankrupt small businesses.[236]

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[232] The Congressional findings accompanying the TCPA state that ". . . (2) Over 30,000 business actively telemarket goods and services to business and residential customers."

[233] Additionally, the Congressional findings accompanying the TCPA state that ". . .(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984".

[234] *See* Jeremiah Marquez, Lawsuits Threaten to Unplug Junk Fax Industry (Sept. 6, 2003), http://www.detnews.com/2003/technology/0309/07/technology-263719.htm (quoting Fax.com's attorney's position that the mass–faxing industry "helps small businesses without deep pockets get their message out.").

[235] *See* Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 470 (Ga, Ct. App. 2000) (stating that a $9 million settlement was reached following verdict).

[236] *See* Am. States Ins. Co. v. Capital Assoc. of Jackson County, 392 F.3d 939, 943 (7th Cir. 2004) (holding that there is neither a duty to defend nor indemnify a policyholder for TCPA violations under the terms of a Commercial General

Ill effects are especially likely for solo practitioners and sole proprietorships, thus depriving consumers of the opportunity to utilize these services, as these smaller operations are most likely to utilize cost-effective fax advertising and less likely to have comprehensive commercial insurance policies to cover them in the event of a TCPA violation. Often times, small businesses rely on third parties to market their goods and services to the public. However, reliance on third party marketers will not insulate the small businesses from liability in the event of a TCPA violation, as the Act imposes strict liability once a violation has been proven. In short, these owners may lose their family businesses and livelihoods, even where they did not know about the ban on unsolicited fax advertising.

B. Proposed Solutions

The court's holding in *Destination Ventures* established a framework which provides for some flexibility regarding the TCPA's future. In that case, the court stated that future advances in facsimile technology might allow for simultaneous transmission or reduce the consumption of paper, but that these possibilities had no bearing on their decision as it would be improper for the court to look to the future.[237]

However, since the adoption of the TCPA, there have been advancements in facsimile technology which all lead to one conclusion: the future is now.[238] Therefore, based on both the technological advancements and evolution of case law addressing the Act, there are now several possible solutions to increase the TCPA's fairness to protect both small business owners and consumers alike.

i. Eliminate the Possibility of Bringing Private Right of Action Claims as Class Actions

A class action suit is not an appropriate vehicle for TCPA

Liability Policy).

[237] Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54, 57 (9th Cir. 1995).

[238] For example, there now exists technology which allows for simultaneous transmission of facsimiles, so that one is not "blocked" at the expense of another being transmitted. Additionally, programs utilized by a large number of businesses which allow facsimiles to be intercepted from a machine and then transmitted directly to an e-mail account, thus allowing the e-mail account holder to determine whether or not they want to open the e-mail or delete it. In theory, this technological advancement makes opening the contents of the facsimile voluntary, as well as the choice to use paper and ink/toner to print it.

claims for two reasons: 1) the legislative intent, and 2) the incorporation of the EBR exception.

Congressional testimony makes it clear that the original proponents of the bill believed that small claims court was the appropriate forum for TCPA actions.[239] In fact, the bill's sponsor alluded to the fact that constitutional restraints prevented him from directing how states allocate their judicial resources, and, therefore, that he could not require claims to be brought in small claims court.[240]

Furthermore, the incorporation of the EBR exception necessitates individual hearings on the issue of whether each and every member of the plaintiff class did or did not have an EBR with the sender.[241] Because an EBR may exist as to some members of the plaintiff's class, there would be no liability to those plaintiffs.[242] The question of whether there is an EBR between the sender and the recipient is not merely a question of *how* liable the defendant is to a class member, instead, it is the very threshold inquiry of the litigation: *is* the recipient party actually a class member? If class actions were eliminated, the potential damages would remain in a range much more in proportion with the actual damages.

ii. Require Suits be Brought as the Tort of Conversion Unless Willful and Wanton Behavior can be Proven

Many courts have equated the treatment of TCPA to that of the torts of conversion or trespass.[243] This is an appropriate comparison under the Congressional cost shifting rationale which justifies the penalties of the TCPA because of the use of the recipient's paper and toner, and occupation of their telephone line. The conversion theory is that the use of such advertising is tantamount to "advertising by theft."

As such, the same penalties that arise in these torts should be applicable in TCPA cases. In Illinois, the tort of conversion is

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[239] *See* Kaufman v. ACS Sys., Inc. v. Fax.Com, Inc., 2 Cal. Rptr. 3d 296, 302 (Cal. Ct. App. 2003).

[240] *Id.*

[241] For examples of cases where such hearing were held, see Forman v. Data Transfer, Inc., 164 F.R.D. 400, 405 (E.D. Penn. 1995); *see also* Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162, 1169 (S.D. Ind. 1997).

[242] *See* Forman v. Data Transfer, 164 F.R.D. at 404 (E.D. Penn. 1995).

[243] *See* Kim v. Sussman, 2004 WL 3135348, at 2 (Ill. Cir. 2004).

compensated by actual damages.[244] Illinois courts have held that the "[m]easure of damages for conversion is fair market value at time of conversion, and it is plaintiff's burden to show reasonable basis to determine value of items converted."[245] In addition, Illinois courts hold that the proper amount of damages for wrongful detention of chattels is the reasonable value of the use of that chattel during that period.[246]

The attempt at determining the amount of actual damages suffered by the recipient is a much fairer way to determine penalties, and also serves to protect those who have been truly harmed. This is especially true under the reasoning of the *Crosby* court, whereby if any of the "worst case" scenarios alleged by supporters of the TCPA were to occur as a result of the occupation of the facsimile lines (i.e. medical emergencies, lost business opportunities, etc.), plaintiff could be compensated for these damages as well as long as they could properly establish a causal connection between the TCPA violation and their damages.[247]

iii. Amend the TCPA to Include a Mandatory Joinder Provision

Much has been said regarding the need to increase judicial efficiency and preserve judicial resources. Public policy ideals such as these are shunned by legislation like the TCPA because it allows a separate suit for each facsimile received, notwithstanding the fact that multiple facsimiles may have been transmitted between the same sender and receiver. One problem inherent in allowing a plaintiff to bring separate suits for each fax is that it allows for forum shopping, which can be detrimental to the operation of the judicial system. The danger is especially important to recognize with regard to legislation as new and dimorphous as the TCPA.

Separate suits make it all too easy for plaintiff's attorneys to find a judge that rules in the favor of class certification and attempt to

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[244] *See* Ruiz v. Wolf, 621 N.E.2d 67, 69 (Ill. App. Ct. 1981); s*ee also,* Charles Selon & Assocs., Inc. v. Aisenberg's Estate, 431 N.E.2d 1214, 1217 (Ill. App. Ct. 1981) (holding that the "[g]eneral rule in conversion action is that damages are set at date of conversion").

[245] *Ruiz*, 621 N.E. 2d at 69.

[246] *See, e.g.*,Crosby v. City of Chicago, 298 N.E.2d 719, 721 (Ill. App. Ct. 1973).

[247] *See id.*

file all of the cases with that judge. Forum shopping in this manner is clearly in opposition to the goal of judicial efficiency. As the statute allows suits to be brought in any venue where a violation occurs (i.e. anywhere a recipient resides), plaintiffs will likely have a choice as to where to file an action.[248] For example, if a certain jurisdiction is predisposed to granting class certification, plaintiffs will chose to file as many cases as possible in that jurisdiction instead of a different jurisdiction where certification is generally denied or the issue is undecided.

iv. Remove Strict Liability from the Statute

As discussed in the restaurant menu example above, the TCPA does not include a requirement that the advertised company have knowledge of the violation.[249] However, there is a knowledge requirement for liability to be imposed on a common carrier.[250] Specifically, there must be some showing that the common carrier was aware that its communication lines were being used for an unlawful purpose.[251]

The differential treatment of the advertised company versus the common carrier is not appropriate in light of the fact that, even with the removal of strict liability from the statute, there would always still be a defendant – the party that knowingly transmitted the faxes. Moreover, in most cases, the advertising company's knowledge would be easy to establish through the contracts entered into with "fax blasters."

In Illinois, the absence of a knowledge requirement is particularly troubling, as a violation of the TCPA is a violation of the Illinois Criminal Code.[252] While a petty offense may be one of strict liability, it is highly uncommon. Under the current law, the mere stigma that arises from such an offense could be unjustly placed on one who has no knowledge that a violation of the Act or state statute has occurred or is about to occur. The removal of the strict liability component would serve to protect those that are truly innocent, while not eliminating the plaintiff's chances at recovery from the proper party—that is, a party who intentionally violated the statute.

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[248] 47 U.S.C.A. § 227 (West 2005).

[249] *See id.*

[250] Texas v. Am. Blast Fax, Inc. 121 F.Supp.2d 1085, 1089 (W.D. Tex. 2000).

[251] *See id.*

[252] *See* 720 ILL. COMP. STAT. 5/26-3 (2005).

v. Require an Opt-out provision

Before liability attaches or a violation occurs, a recipient should have to provide notice that they want to opt-out of the faxes. This would still provide "victims" with a remedy; if it can be proven they were contacted again, then liability (even the willful and wanton standard) could attach.

The rationale behind this proposition is clear: if people are motivated enough and have the resources to sue, they clearly should be motivated enough to opt out of the list. This protects the recipients from unwanted faxes, as well as small business owners from becoming bankrupt.

vi. Increase the Evidentiary Requirements for Class Actions

The members of the plaintiff class should be required to present evidence that they retained the facsimile to which they are objecting instead of merely being allowed to send notice to the potential class members whose facsimile numbers are obtained off of a list from the offender.

Requiring this evidence would at the very least provide some assurance that the plaintiffs were truly "aggrieved."[253] Without this evidence, defense counsel will naturally argue that because the plaintiff cannot prove that they received the fax, as a natural consequence, they cannot prove that they received the fax *without* permission. Thus turning the litigation into a "he said-she said" battle, which wastes the time and resources of the judicial system.

VI. Conclusion

Now let me shoot from the hip. It seems that although Congress and the FCC were not necessarily panning for gold when they passed the TCPA, plaintiffs may have a different agenda. As a caveat, please note that in no way is this article meant to stand for the proposition that a plaintiff that can properly prove a violation of a constitutional statute should not be awarded the actual damages that they incur under the traditional formula of proximate causation. Instead, it asserts that the Act levies disproportionately harsh penalties on small businesses. Additionally, the real winners are class counsel when TCPA classes are certified, who collect huge paychecks based on their attorneys' fees.

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[253] *See* Kim v. Sussman, 2004 WL 3135348, at 2 (Ill. Cir. 2004).

Junk fax suits have resulted in multi-million dollar verdicts.[254] Such verdicts are comparable to verdicts rendered against major polluters and the tobacco industry. It is difficult to grasp how unwanted facsimiles are a $2.2 trillion inconvenience when awards for environmental pollution and wrongful death pale in comparison and are often reduced when a large verdict has been rendered. With TCPA plaintiffs seeking damages in excess of tobacco cases, potential criminal liability under some state statutes, and a "strict liability" application without a knowledge requirement, the Act has the potential to devastate small business when compared to the harm caused by the prohibited conduct.

We need to replace the current system with a system that does not adopt a "one size fits all" penalty. Rather, the punishment should fit the crime. Representative Fred Upton put things into perspective at a hearing of the House Subcommittee on Telecommunications and the Internet, citing a U.S. Chamber of Commerce survey estimating that compliance with the "express permission" requirement would cost business an average of $5,000 for the first year and $3,000 per every subsequent year.[255]

Clearly the harsh and expensive results which may arise from class action suits have the potential to bankrupt corporations and small business alike. Moreover, the damages for violations are not equivalent to the harm caused by the use of paper, nor do the violations justify, in the case of the Illinois statue, a conviction under the criminal code.

One of the biggest issues is where the regulations for commercial advertisements will stop. Currently, there are lawsuits pending to regulate commercials that are played before movie features. These lawsuits are brought as class actions seeking an award of seventy-five dollars per plaintiff. Based on the amount of time the movie viewer is subjected to the horrible injustice of seeing a commercial, this is the equivalent of asserting that the average person's time is worth $300 per hour, making the minimum wage laws seem oppressive. If plaintiffs could now sue for wasted time and money expended when "forced" to view advertisements, where does it end? Will consumers purchasing television services bring class action suits to end commercials altogether?

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[254] *See* Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468, 470 (Ga, Ct. App. 2000).

[255] Jan W. Baran, John F. Kamp, & William B. Baker, Proposed Amendments to TCPA Would Reduce Fax Restrictons, PRIVACY IN FOCUS (Wiley Rein & Fielding LLP, Washington, D.C.), June 2004, at 1.

As technology constantly evolves and advances, so too will legislation designed to regulate it. Necessity is the mother of invention, and as new technologies are invented so will regulations of the new technologies. Text messages, e-mails, any possible form of communication which may not yet have been imagined. Indeed, more regulations are already springing up with the enactment of the federal CAN-SPAM Act, which requires the FCC to adopt rules to protect mobile service customers from unwanted text messages.[256] The law must develop and evolve as quickly as technology in order to effectively govern these burgeoning industries, while still allowing for some proportional link between the crime and the punishment. If it does not, as exemplified by the TCPA, more defendants will be "strung up" by class actions and enormous fines for their advertising violations.

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[256] *See* The CAN-SPAM Act: Requirements for Emailers (Apr. 2004), http://www.ftc.gov/bcp/conline/pubs/canspam.htm. The Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C.A. § 7702 (220), *et. seq.*, establishes requirements for those who send commercial email, proscribes penalties for spammers and companies on whose behalf spam is sent if they violate the law, and empowers consumers to request that they not be emailed. *Id.* The law, which became effective January 1, 2004, covers email whose primary purpose is advertising a commercial product or service. *Id.* If an email is between to a customer with an EBR with the sender, or if the message is used to facilitate a previously agreed upon transaction, it simply cannot contain false or misleading routing information, but otherwise is exempt from most provisions of the CAN-SPAM Act. *Id*

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