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The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology

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THE TELEPHONE CONSUMER PROTECTION ACT OF 1991: ADAPTING CONSUMER PROTECTION TO CHANGING TECHNOLOGY

Spencer Weber Waller^{*}
Daniel B. Heidtke^{**}
& *Jessica Stewart*^{***}

FOREWORD

This study of the Telephone Consumer Protection Act (“TCPA”) was made possible through a cy pres distribution from a class action in the United States District Court for the Northern District of Illinois under the supervision of Senior Judge William Hart and Magistrate Judge Morton Denlow which involved claims under the TCPA. Following the settlement of the litigation, Judge Hart sought proposals for cy pres distributions that meet existing legal standards.

The Institute for Consumer Antitrust Studies is proud to have been one of the groups selected for a cy pres distribution. This is the most recent in a series of cy pres distributions that the Institute has received since its founding in 1994. These distributions and other sources of funds reported on our web site have allowed the Institute to serve its mission of supporting a consumer-friendly economy through the study of consumer protection and antitrust law and promoting vigorous enforcement for the benefit of ordinary consumers.

We thank Judge Hart and counsel for the parties for the funds and the opportunity to undertake the first comprehensive study of the TCPA since its passage in 1991. Since that time, the

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TCPA has been amended, interpreted, and applied in literally thousands of cases. Enacted in an era of fax machines and limited cell phone usage, the TCPA now must be enforced in an era of new technology, most notably ubiquitous cell phones, emails, and fax servers. In this report, we undertake the challenge of analyzing the TCPA's effectiveness in light of this changing technology which can both empower consumers, and make them vulnerable to new and increasingly sophisticated schemes to defraud and invasions of privacy. We propose further changes and amendments to the statute, its rules, and enforcement to keep the TCPA a relevant and effective means of protecting consumers.

The principal investigator for this report was Daniel B. Heidtke, a 2012 graduate of Loyola University Chicago School of Law and a former Student Fellow of the Institute for Consumer Antitrust Studies, who worked full-time on the research, interviews, and drafting of the report until he entered private practice in April 2013. The final drafting and editing of the report was undertaken by Jessica Stewart, also a 2012 graduate of the law school. All errors remain the responsibility of the Institute.

We would like to thank the following individuals who generously provided their time for interviews during the research of the report, reviewed and commented on drafts of the report, or provided additional research support: Stephen Beard, John C. Brown, Nicholas Connon, Julie Clark, Jeffery Cross, Daniel Edelman, Ian Fisher, David Friedman, Justin T. Holcombe, Max Huffman, David Leibowitz, Max Margulis, James Morsch, Dee Pridgen, Ali Saeed, Henry A. Turner, and Danny Worker.

This report is one of many projects, programs, and publications of the Institute for Consumer Antitrust Studies. We invite you to sample the full work of the Institute on our web site www.luc.edu/antitrust where you will find a variety of working papers, white papers, news and views on recent developments, information on our student and research fellowships, as well as print, audio, and video of recent Institute programs. We welcome your comments on this report and all the work of the Institute. You can reach us at antitrust@luc.edu or on our Facebook page, <https://www.facebook.com/groups/104637465017/>.

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EXECUTIVE SUMMARY

In the late 1980s, spurred by advances in technology, the telemarketing industry began aggressively seeking out consumers by the hundreds of thousands. Companies began using machines that automatically dialed consumers and delivered prerecorded messages (“robocalls”). Marketers also took advantage of another new and increasingly available piece of technology known as the facsimile machine (“fax machine”). With the fax machine, marketers could send tens of thousands of unsolicited advertisements (“junk fax”) each week to consumers across the nation.

Consumers and businesses became overwhelmed with unsolicited telemarketing calls and advertisements. Calls for action grew louder. States enacted laws, but could not reach the interstate practices of telemarketers. After reviewing and debating ten different pieces of legislation, Congress enacted the Telephone Consumer Protection Act of 1991 (“TCPA”).

The primary focus of this report is the Telephone Consumer Protection Act of 1991. The TCPA was born out of abusive telemarketing practices, made more intrusive by advances in technology. Originally, the TCPA imposed restrictions on the use of telephones for unsolicited advertising by telephone and fax.¹ The TCPA has since been expanded and adapted by administrative rule, judicial interpretation, and congressional amendment.

Since 1991, Congress has enacted other statutes relevant to the discussion of the TCPA. Despite common justifications and purposes, Congress determined that certain media would be regulated differently. For example, the TCPA originally banned the practice of sending “junk fax.” The justification for the ban was that the practice shifted the cost of advertising from the advertiser to the recipient. However, the practice of sending unsolicited commercial e-mail, which also shifts the cost of advertising from the advertiser to the recipient, was not banned but instead was regulated with certain “identification” requirements.

The original purpose of the TCPA was to regulate certain uses of technology that are abusive, invasive, and potentially dangerous. The TCPA effectively regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. The expansion of the TCPA into areas outside of telemarketing and new technologies over the years is consistent with its original purpose.

¹ 47 U.S.C. § 227 (2011).



Private parties are largely responsible for the enforcement of the TCPA, and have done so primarily through the class action mechanism. While this has drawn some criticism because of the provision of high statutory damages, the threat of class action has provided a significant deterrent to violators. Historically the government has only enforced the TCPA to a limited extent, yet the statute has been relatively successful in reducing the conduct it was enacted to regulate.

Technology is again rapidly changing and a number of trends are emerging. The number of entities that are operating in intentional disregard of the TCPA are growing, and they are using technology to help evade detection and enforcement. According to the Federal Trade Commission (“FTC”), about 59% of phone spam cannot be traced or blocked because the phone calls are routed through “a web of automatic dialers, caller ID spoofing and voice-over-Internet protocols.”² Although the traditional scheme of TCPA enforcement, with its strong reliance on the private right of action, has been successful in the past, two main issues are becoming clear. The private right of action is limited in both incentivizing lawsuits against, and deterring the actions of, intentional violators; and FCC enforcement is limited by its slow process.

In order for the TCPA to stay relevant after more than twenty years, certain modifications and improvements can be made. We recommend improving government enforcement efforts and increasing the uniformity of interpreting the statute. The FTC’s recent contest for a technical solution to robocalls is commendable, and should be followed with respect to other types of media currently exposed to unsolicited commercial messages such as text messages and e-mail.

In order for the TCPA to continue to remain relevant going forward, this report makes the following recommendations:

- Increase government enforcement of the TCPA by providing State Attorneys General with a larger incentive to bring TCPA cases, and empowering the FTC to bring suit under the TCPA;
- Increase uniformity of application of the TCPA by encouraging more frequent and quicker FCC rule-making procedures;

² Laura J. Nelson, *FTC Hangs Up On Robocalls from ‘Rachel,’* L.A. TIMES, Nov. 1, 2012, <http://articles.latimes.com/2012/nov/01/business/la-fi-tn-ftp-robocalls-credit-card-services-20121101>.

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- Continue to protect cell phones by requiring prior express consent for any communication (call or text) made to a cell phone;
- Place a time limit on the Junk Fax Established Business Relationship;
- Create incentives for fax broadcasting companies to determine whether the faxes they are sending on behalf of clients are in violation of the TCPA;
- Rebuff efforts to remove or otherwise modify the private right of action; and
- Place additional restrictions on entities that enable caller ID manipulation.

INTRODUCTION

In the late 1980s, Congress considered legislation aimed at stemming the tide of intrusive telemarketing practices. The debate over the appropriate action culminated in the Telephone Consumer Protection Act of 1991 (TCPA). This report analyzes and discusses the history of the TCPA and the role of the statute in modern times. The report examines whether the expansion of the statute to areas outside of telemarketing was warranted, and how Congress and the courts might best respond to current issues and problems.

The impetus for the TCPA was the “onslaught of telemarketing calls [. . .] invading the privacy of American homes.”³ The Senate found that “[t]he use of automated equipment to engage in telemarketing [wa]s generating an increasing number of consumer complaints The growth of consumer complaints about these calls ha[d] two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective.”⁴

Despite the clear focus on telemarketing practices during the debate over the TCPA, the statute is more than just telemarketing regulation. The TCPA was brought about by a determination that advances in technology had allowed an increase in access to consumers. Whether the individual was a telemarketer or not, Congress was determined to regulate intrusive technology, specifically, autodialers and the practice of sending unsolicited fax advertisements.

The TCPA was amended, adapted, and supplemented over time to address advances in technology and new practices in which that technology was being applied. The TCPA is more than a simple “junk fax law” and is rightfully applied to areas outside of the telemarketing industry.

The TCPA has been relatively successful over the past two decades. The Do-Not-Call Registry, an offshoot of the TCPA, has reduced unwanted telemarketing calls. In addition, a period of stepped-up government enforcement of the TCPA decreased the number of unsolicited fax advertisement complaints.

Three main issues will impact the TCPA going forward.

³ William L. Kovacs, U.S. CHAMBER OF COMMERCE, Comments of U.S. Chamber of Commerce, CG Docket No. 02-278 at 5 (Aug. 30, 2012).

⁴ S. REP. NO. 102-178, at 1-2 (1991) *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (1991).

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First, new types of TCPA violators, namely those that intentionally disregard the TCPA, are emerging at an increasing rate. These parties will challenge the traditional dependence on the private right of action. As a result, increased government enforcement is necessary to target these intentional violators.

Second, it is important that the TCPA remain in place and that it is effectively enforced to ensure that the intrusive practices that brought about the legislation do not return.

Finally, the TCPA must be adapted to better respond to new advances in technology. The issue is not solely focused on the use of technology to reach consumers in a potentially abusive fashion. Congress must focus on crafting clear legislation that will allow entities to effectively communicate with consumers using new advances in technology.

The principal goals of addressing these issues are balanced regulation, clear interpretation, and informed consent for consumers. A number of strategies have been employed by Congress to solve the problem of intrusive access to consumers, but those strategies have not always provided balance, clarity, and informed consent. Over time, gaps in the legislation and slow interpretive decisions by the Federal Communications Commission (FCC) have created confusion with respect to the legality of certain conduct.

This report sets forth several suggestions and recommendations. To address the new types of TCPA violators, the dependence on private attorneys general must be reduced. A more targeted focus on the actual technologies being used by these individuals and entities is also necessary to target the source of TCPA violations along with the cause. For example, the TCPA should be amended, or supplemented with additional regulation, which holds third parties liable for hiring entities that violate the TCPA even when those hired-violators are located offshore.

To address the efficiency of regulating traditional abuses, the Federal Trade Commission (FTC) should be granted authority to bring TCPA enforcement actions and State Attorneys General should be enabled to seek damages equal to the amount recoverable by the FCC under current law. Government enforcement of the TCPA is necessary, and current efforts have been lacking by the FCC. The FTC has recently shown an interest in TCPA-related matters, and by giving State Attorneys General a larger incentive to bring TCPA claims, the statute will be more effectively enforced.

The TCPA also must be adapted to address new technolo-

gy. The use of cell phones and text message advertising has grown exponentially. It is important that the FCC quickly issues clear guidelines that allow for balanced and clear regulation. Industry members have been successful at self-regulation to this point, but the potential for abuse is apparent. As a result, a scheme of regulation requiring actual, informed consent should be obtained prior to sending unsolicited advertisements because of the special safety and privacy concerns of reaching an individual on his or her cellular phone.

Part I of this report discusses the history of the TCPA and analyzes its structure. Part II reviews other relevant statutes that affect the operation of the TCPA. Part III focuses on the implementation of the TCPA and the judicial interpretation that broadened the scope of the statute to include new areas of regulation and evolving technologies. Part IV discusses the lessons learned throughout the implementation of the TCPA regarding successful and unsuccessful approaches to implementation and consumer protection legislation. Part V considers the overall impact of the TCPA, while Part VI addresses three main issues that hinder its success today: intentional violators, poor enforcement processes, and rapidly changing technology. Part VII provides solutions to these obstacles in the form of increased government enforcement, a more uniform application of the statute, and certain amendments focused on new technology and strengthening the private right of action.

I. HISTORY OF THE TCPA

In the late 1980s, telemarketing calls were becoming cheaper and easier to complete. The telemarketing industry was becoming more competitive and was expanding rapidly to reach as many consumers as possible. In a ten-year period beginning in 1981, spending on telemarketing activities increased from \$1 billion to \$60 billion.⁵ By 1990, over 300,000 telemarketers contacted more than 18 million Americans every day.⁶

New technology made it easier for telemarketers to reach consumers. Autodialers (also known as robocalls) automatically deliver a prerecorded message to a list of telephone numbers, and thus remove the need for human representatives. These predic-

⁵ See *Telemarketers Law & Legal Definition*, US LEGAL, <http://definitions.uslegal.com/t/telemarketers/> (last visited Apr. 24, 2013).

⁶ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C. Rcd. 14014 (July 3, 2003).

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tive dialers were developed to “find better pacing (scheduling of dialing attempts) by collecting and analyzing data on the proportion of call attempts that are answered, durations of time from call initiation to answer, and durations of service.”⁷ The technology was designed to minimize both the time that telemarketers must spend waiting between conversations and the amount of abandoned calls⁸ experienced by consumers.⁹

A relatively new and increasingly available piece of technology also enabled greater access to consumers by businesses and marketers alike. The telephone facsimile machine (the fax machine)—labeled an “office oddity” during the mid-1980s¹⁰—quickly became a primary tool for business.¹¹ The fax machine is an effective tool because it automatically accepts, processes, and prints each message sent. By 1991, more than 30 billion pages of information were sent via fax each year.¹²

By 1991, telemarketing calls were generating about \$435 billion in sales annually.¹³ The telemarketing and fax broadcast-

⁷ Douglas A. Samuelson, *Predictive Dialing for Outbound Telephone Call Centers*, 29 INTERFACES 66, 67 (1999) (“For example, when we call residences on weekdays, the proportion of call attempts answered typically quadruples from 5:00 P.M. to 6:00 P.M. Durations of completed calls also change over time for many applications: for example, if the calls are directed at a specific member of the household who is more likely to be home at 6:00 P.M. than at 5:00 P.M.”).

⁸ *Id.* at 66-67 (“Computer-based outbound telephone dialing systems . . . dial automatically and connect those who answer to live sales or collection representatives, while logging other results. Sometimes someone answers when no representative is available. Typically the system immediately *abandons* (hangs up on) *such a call*, with the caller paying for telephone charges and wasting representatives’ time and—more important—with the answering party suffering a nuisance.”)(emphasis added).

⁹ *Id.* at 67 (“If all we wanted was to keep the representatives as busy as possible, we could simply dial every available line all the time. This, however, would result in large numbers of abandoned calls.”).

¹⁰ H.R. REP. NO. 102-317, at 10 (1991).

¹¹ See *Telemarketing Practices: Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, House of Representatives, 101st Cong. 101-43 (1989) (Sales of fax machines grew exponentially. In 1986, there were just 192,000 total fax machines sold, the following year: almost 500,000, and in 1987: nearly a million fax machines sold in one year.).

¹² H.R. REP. NO. 102-317, at 10 (1991); see also *Kaufman v. ACS Sys., Inc.*, 110 Cal. App. 4th 886, 890-94, 2 Cal. Rptr. 3d 296, 300-03 (2003) (detailing the history of the TCPA).

¹³ See Seth Stern, *Will feds tackle telemarketers?*, CHRISTIAN SCIENCE MONITOR (Apr. 15, 2002), <http://www.csmonitor.com/2002/0415/p16s01-wmcn.html>.



ing industries were expanding at a rapid pace. Sending fax advertisements to potential customers was one of the most cost-effective methods of advertisement.¹⁴ One company advertised on its website that it could “[b]roadcast faxes to millions of customers daily [. . .],” using its “database that exceeds 30 million fax numbers.”¹⁵

Advertising through telemarketing and fax advertisements provide benefits to consumers and businesses alike. However, this process often comes at a cost. Unlike mail advertisements where the cost is born by the marketer, sending unsolicited faxes came at a cost to the recipient in the form of ink, paper, and blocked phone lines. Receiving an unsolicited fax has been compared to receiving advertisements through the mail with postage-due.¹⁶ When marketing is indiscriminately delivered to thousands or even millions of individuals, these minor costs invariably begin to mount.

A. Calls for Federal Regulation Begin to Grow

Widespread telemarketing abuses brought about the Telephone Consumer Protection Act of 1991 (“TCPA”).¹⁷ For example, “[h]aving an unlisted number [could not] prevent telemarketers that call numbers randomly or sequentially.”¹⁸ Similarly, “as tens of thousands of unsolicited fax advertisements per week” were sent to fax machines throughout the country,¹⁹ consumers could do little to stop these so called junk faxes from using up their paper, ink, and toner.

In response to consumer complaints, over forty states placed regulations on the use of autodialers and prerecorded mes-

¹⁴ See S. REP. NO. 109-76, at 3 (2005) (“Industry comments maintained that ‘faxing is a cost-effective way to reach customers, particularly for small business for whom faxing is a cheaper way to advertise.’”).

¹⁵ *Covington & Burling v. Int’l Mktg. Research, Inc.*, No. CIV.A. 01-0004360, 2003 WL 21384825, at *3 (D.C. Super. Ct. Apr. 17, 2003) (detailing the practices of Fax.com).

¹⁶ See 136 CONG. REC. H5818-02, (daily ed. July 30, 1990) (statement of Rep. Markey discussing how junk faxes are analogous to receiving a letter with postage-due)(quoting Jerry Knight, *The Junk Fax Attack: Why Maryland May Outlaw Unsolicited Advertisements*, WASH. POST, May 23, 1989, at C3).

¹⁷ 47 U.S.C. § 227 (2011).

¹⁸ S. REP. NO. 102-178, at 1 (1991) *reprinted* in 1991 U.S.C.C.A.N. 1968, 1970 (1991).

¹⁹ H.R. REP. NO. 102-317, at 6-7 (1991).

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sages, or otherwise restricted telemarketing by 1992.²⁰ Texas even enacted legislation that made it a Class C misdemeanor to advertise by sending unsolicited fax advertisements.²¹ Unfortunately, state laws “had limited effect [] because States do not have jurisdiction over interstate calls”²² and by the late 1980s “[m]any States [. . .] expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.”²³ In addition, the state laws had different, and often conflicting, requirements and prohibitions.

B. *The Result: The TCPA*

In 1991, Congress stepped in to address “[v]oluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes,”²⁴ and to “prevent businesses from shifting their advertising costs.”²⁵ The TCPA was enacted to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers.”²⁶

At the heart of the TCPA was an aim to regulate: (1) the use of computerized autodialing machines that deliver pre-recorded messages; and (2) the practice of sending unsolicited fax advertisements. The TCPA provided a statutory framework for which the FCC was tasked with interpreting and enforcing.

1. Regulating the use of “Robocalls”

One type of technology regulated by the TCPA was the automatic telephone dialing system, or robocallers. Robocallers

²⁰ S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968 (1991); *see also* *The Chair King, Inc. v. GTE Mobilenet of Houston, Inc.*, 184 S.W. 3d 707, 710 (Tex. Sup. Ct. 2006).

²¹ *See* *The Chair King, Inc.*, 184 S.W. 3d at 710.

²² S. REP. NO. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (1991).

²³ *Id.*

²⁴ *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 744 (2012).

²⁵ *Critchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 774 (Kan. 2011) (*citing* *Phillips Randolph v. Adler Weiner Research Chicago*, 526 F. Supp. 2d 851, 852 (N.D. Ill. 2007)).

²⁶ S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968 (1991); *see also* *The Chair King, Inc.*, 184 S.W. 3d at 710.

are used to deliver “artificial or prerecorded voice,”²⁷ or connect live operators to recipients after dialing numbers in random or sequential order. Congress placed a blanket ban on the use of such technology without the recipient’s consent, but granted the FCC authority to create exemptions.²⁸ While the initial blanket ban provided a very basic, clear method of regulation, the provision for exemptions would prove counterproductive.

The TCPA required parties using automatic dialing systems to “automatically release the called party’s line within 5 seconds of the time that the calling party’s system is notified of the called party’s hang-up.”²⁹ Additionally, “all artificial or prerecorded telephone messages delivered by an “autodialer” must clearly state the identity of the caller at the beginning of the message and the caller’s telephone number or address during or after the message.”³⁰

In the 1992 TCPA Order, the FCC set requirements regarding company-specific do-not-call lists, placed other technical requirements on telemarketing practices, and created the first exemption for parties with an established business relationship (EBR). The FCC’s action attempted to achieve a more balanced regulation, and to provide consumers with informed choice.

In recognition of the importance of consumer choice, and the possibility that some consumers value communications from certain entities,³¹ the FCC provided that any person engaged in telephone solicitation must maintain “company-specific do-not-

²⁷ See 47 U.S.C. § 227(b)(1) (2011).

²⁸ See *id.* at § 227(b)(1)(B) (“to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, *unless the call is initiated for emergency purposes or is exempted by rule or order by the [FCC] under paragraph (2)(B).*”) (*emphasis added*); See *id.* at § 227(b)(1)(A)(i)-(iii) (“To use of autodialers and prerecorded messages to place calls to an emergency telephone line, to health care facilities, to radio common carrier services, and to services for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party”).

²⁹ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. 8752, 8778 ¶ 52 (Oct. 16, 1992).

³⁰ *Id.* at 8779 ¶ 53.

³¹ See *id.* at 8757 ¶ 9 (During its initial rulemaking, the FCC concluded that even though “there are separate privacy concerns associated with [robocalls] as opposed to live operator solicitations (e.g. calls placed by recorded message players can be more difficult for the consumer to reject or avoid), the record as a whole indicates that consumers who do not wish to receive telephone solicitations would object to either form of solicitation.”).

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call lists.”³² The Order also placed new time limits on acceptable hours for telemarketing to protect consumer privacy and prevent nuisance.³³ The EBR exemption was based on the conclusion that a telephone solicitation to someone with whom a prior business relationship exists does not adversely affect the privacy interests of the recipient.³⁴ However, it did not provide clear guidelines on how an EBR is actually created. Restrictions on robocalls were also reduced. Coupled with the EBR exemption, the TCPA now permitted robocalls to residential phone lines on the basis of a mere inquiry by the recipient concerning the products or services of the calling party.³⁵

2. Banning Unsolicited Fax Advertisements

The TCPA made it “unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”³⁶ Originally, “unsolicited advertisement” was defined as “any material advertising the commercial availability of any property, goods, or services, which is transmitted to any person without that person’s prior express invitation or permission.”³⁷

Unlike the ban on robocalls, the TCPA’s ban on unsolicited fax advertisements was absolute and did not grant the FCC authority to create exemptions.³⁸ Congress recognized that fax advertisements were not only intrusive, but that additional cost-shifting concerns not present in phone communications justified a complete ban.

³² See *id.* at 8765 ¶ 23 (The FCC determined that “the company-specific do-not-call list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations.”).

³³ See *id.* at 8767-68 ¶ 26 (The FCC determined that it was reasonable to subject telemarketers to the same time of day restrictions as are imposed on debt collectors under the Fair Debt Collection Practices Act, and prohibited calls before the hour of 8 AM and after 9 PM, local time at the called party’s location.).

³⁴ See *id.*

³⁵ See *id.* at 8771 ¶ 35.

³⁶ 47 U.S.C. § 227(b)(1)(C) (2011).

³⁷ *Id.* at § 227(a)(4).

³⁸ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. at n. 87 (The FCC acknowledged the limits imposed by the TCPA prior to implementing a “junk fax” EBR and stated, “[i]n banning telephone facsimile advertisements, the TCPA leaves the [FCC] without discretion to create exemptions from or limit the effects of the prohibition.”).

In the 1992 TCPA Order, the FCC determined that fax advertisements sent to recipients by entities with which they had an EBR would be “deemed to be invited or permitted by the recipient.”³⁹ This exemption was an attempt to achieve a more balanced approach. However, like the telemarketing EBR exemption, it came at the cost of clarity and shifted costs back to the consumer. Despite the ability to call and request that the entity stop sending unsolicited advertisements, the consumer must at least bear the cost of the initial fax and take the time to call and opt-out of further advertisements—with each entity that sends an unwanted advertisement.⁴⁰

3. The Private Right of Action

The TCPA has three enforcement mechanisms. First, consumers have a private right of action in which they can sue an entity that has allegedly violated the TCPA for damages and injunctive relief.⁴¹ Second, a state attorney general (or another official or agency designated by the state) may bring a civil lawsuit for damages and injunctive relief when a case involves a “pattern or practice of violations.”⁴² Last, the FCC is authorized to enforce monetary forfeiture penalties against individuals and entities that violate the TCPA.⁴³

Consumers bringing suit under the TCPA may seek damages of \$500 per violation or actual monetary loss, whichever is greater. The court has discretion to award treble damages, if the defendant “willfully or knowingly” violated the TCPA.⁴⁴

From the outset, the TCPA was designed to rely on enforcement by private parties. One of the original sponsors of the TCPA, Senator Hollings, stated that “[the private right of action] will make it easier for consumers to recover damages from receiv-

³⁹ *Id.*

⁴⁰ See Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. at 8752 ¶ 190 (July 3, 2003) (“Unlike the do-not-call list for telemarketing calls, Congress provided no mechanism for opting out of unwanted facsimile advertisements. Such an opt-out list *would require the recipient to possibly bear the cost of the initial facsimile and inappropriately place the burden on the recipient to contact the sender and request inclusion on a “do-not-fax” list.*”) (*emphasis added*).

⁴¹ See 47 U.S.C. § 227(b)(3) (2011).

⁴² See 47 U.S.C. § 227(f) (2011).

⁴³ See 47 U.S.C. § 503 (2012).

⁴⁴ See 47 U.S.C. § 227(b)(3) (2011).

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ing these computerized calls.”⁴⁵ Senator Hollings continued, “[s]mall 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 to be fair to both the consumer and the telemarketer.”⁴⁶

Some critics of the TCPA maintain that the statutory damages provision coupled with the possibility of a class action provides “too strong of a hammer” for “too little an injury.” While the TCPA provides a private right of action and statutory damages for consumers that may have experienced little or no actual harm, this is not uncommon.⁴⁷ In *Crabill v. Trans Union L.L.C.*,⁴⁸ the Seventh Circuit noted, “[m]any statutes, notably consumer-protection statutes, authorize the award of damages for violations that cause so little measurable injury that the cost of proving up damages would exceed the damages themselves, making the right to sue nugatory.”⁴⁹ The court further indicated, “[t]he award of statutory damages could also be thought a form of bounty system, and Congress is permitted to create legally enforceable bounty systems for assistance in enforcing federal laws, provided the bounty is a reward for redressing an injury of some sort (though not necessarily an injury to the bounty hunter)[.]”⁵⁰

II. ANALOGOUS FEDERAL REGULATION AND TCPA OVERLAP

The TCPA is supplemented by a number of other laws and government agencies. Congress’ later efforts in enacting legislation similar to the TCPA helps demonstrate that the statute is not solely designed to target telemarketing practices and that not all technology should be regulated in the same manner.

A. Congress Tackles Telemarketing Fraud: the Telemarketing Act

Telemarketing fraud continued to grow in the early

⁴⁵ 137 CONG. REC. S16204-01 (daily ed. Nov. 7, 1991)(statement of Senator Hollings).

⁴⁶ *Id.* Many critics of TCPA class actions have pointed to Senator Hollings’ statements and the “individualized” nature of receiving an unwanted call or fax as support for holding that TCPA class actions are per se inappropriate.

⁴⁷ *Crabill v. Trans Union, LLC*, 259 F.3d 662, 665 (7th Cir. 2001).

⁴⁸ *Id.* at 662.

⁴⁹ *Id.* at 665.

⁵⁰ *Id.*

1990s,⁵¹ and the estimated cost of such practices hit \$40 billion in 1993.⁵² The response from Congress came in the form of the Telemarketing and Consumer Fraud and Abuse Prevention Act (the “Telemarketing Act”), which gave the FTC power to regulate abusive practices by telemarketers.⁵³

The Telemarketing Act is limited in both scope and jurisdiction. The FTC’s rules apply only to telemarketing, which is defined as any “plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.”⁵⁴

In contrast to the TCPA’s broad prohibitions on the use of certain technology and flexible application, the Telemarketing Act focuses more particularly on specific conduct and applies only to those parties within the FTC’s jurisdiction.⁵⁵ The Telemarketing Act applies specifically to behavior “causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse or harass any person.”⁵⁶

B. Congress Confronts E-Mail Spam: the CAN-SPAM Act

As new technology is developed, marketers utilize new forms of media to reach consumers in the most cost-effective way. In the late 1990s, marketers began to shift their focus from fax to e-mail.⁵⁷ The practice of sending unsolicited e-mail advertisements soon came to be known as “spamming.”

⁵¹ See DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW 505 (2009-2010 ed.) (Defining telemarketing fraud as: “the deceptive sale of goods or services over the telephone.”).

⁵² See *id.*

⁵³ 15 U.S.C. § 6102 (2006).

⁵⁴ 16 C.F.R. § 310.2(u) (2003).

⁵⁵ Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995) (codified as 16 C.F.R. § 310 (2010)).

⁵⁶ *Id.* § 310.4(b)(1).

⁵⁷ THE DIRECT MARKETING ASSOCIATION, 2001 STATISTICAL FACT BOOK 25 (23rd ed. 2001), <http://courses.washington.edu/emba532a/2001Factbook.pdf> (“Direct Marketing Methods Used by Marketers (2001): Direct mail (other than catalogs) is still the number one direct marketing method used by marketers (Fax marketing (outbound) – 12% [2000]; 23% [1999])—outbound telemarketing also decreased, from 37% (1999), to 32% (2000); the increase: “e-mail to prospects: from 28% to 42% (1999-2000)” and “e-mail to customers: from 28% to 42% (1999 to 2000).”).

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Unsolicited commercial e-mail and unsolicited bulk e-mail are the two most common definitions of spam. Although the TCPA does not cover e-mail,⁵⁸ considering the regulation of other forms of commercial advertising is useful when analyzing the TCPA as the primary justifications for regulating unsolicited fax advertisements and unsolicited e-mail advertisements are the same: to prevent costs and inconvenience imposed upon consumers.⁵⁹

By the time Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”) in 2003,⁶⁰ thirty-seven states already had anti-spam laws in effect.⁶¹ This legislation embodied a different regulatory scheme than the TCPA in a number of ways. First, CAN-SPAM does not outright prohibit commercial e-mails. Second, CAN-SPAM recognizes that spam e-mail proliferates by certain practices and prohibits such conduct. Lastly, unlike the TCPA, there is no private right of action.

In contrast to the TCPA’s general ban on unsolicited fax advertisements, CAN-SPAM regulates, rather than prohibits, commercial e-mails.⁶² Similar to the Telemarketing Act and its focus on fraudulent and deceptive practices, Congress was primarily concerned with misleading or fraudulent commercial e-mail.⁶³ As a result, it is predicated upon identification requirements and prohibits commercial e-mails that contain false header information⁶⁴ and deceptive subject headings.⁶⁵

⁵⁸ Unless sent to a cell phone and received by that cell phone as a text message.

⁵⁹ See David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001 (Fall 1997).

⁶⁰ Act of Dec. 16, 2003, Pub. L. No. 108-187, 117 Stat. 2699.

⁶¹ Stefanie Olsen, *Ad Groups Lobby for Antispam Law*, CNETNEWS.COM (Nov. 13, 2003, 2:29 PM), http://news.cnet.com/Ad-groups-lobby-for-antispam-law/2100-1024_3-5107059.html; see also Grant Yang, *CAN-SPAM: A First Step to No-Spam*, 4 CHI.-KENT J. INTELL. PROP. 1 (Fall 2004).

⁶² See CAN-SPAM Act, 15 U.S.C. § 7701 et seq.

⁶³ *Id.* at § 2(b)(2).

⁶⁴ *Id.* at § 5(a)(1) (“It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading.”).

⁶⁵ *Id.* at § 5(a)(2) (“It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material

Congress recognized that certain practices allowed for an increase in the amount of spam sent. For example, CAN-SPAM prohibits the practice of harvesting e-mails from the Internet, which seeks to prevent a spammer from building a large database of e-mail addresses to which spam may be sent.⁶⁶ The statute targets both the cause and the source of the e-mail spam problem by regulating the entities responsible for the content (i.e., products or services being advertised), the individuals sending out the spam, and holds third parties liable for hiring offshore spammers who engage in such practices.⁶⁷

CAN-SPAM does not include a private right of action, but is enforced primarily by the FTC,⁶⁸ and allows for civil actions to be brought by Internet Service Providers⁶⁹ and State Attorneys General.⁷⁰ Critics consider the lack of a private right of action a significant failure in deterring spammers.⁷¹ However, providing such a mechanism may have little practical effect. The proliferation of e-mail spam is the result of both a group of intentional violators determined to operate without regard to existing regulation, and a practice dominated by advertising products that are illegal (e.g., prescription drugs delivered without a prescription required). Additionally, these CAN-SPAM violators utilize technology that makes their detection difficult, which makes en-

fact regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of section 5 of the Federal Trade Commission Act (15 U.S.C. § 45)).

⁶⁶ See *Id.* at § 5(b)(1)(A)(i) (“[. . .](i) the electronic mail address of the recipient was obtained using an automated means from an Internet website or proprietary online service operated by another person, and such website or online service included, at the time the address was obtained, a notice stating that the operator of such website or online service will not give, sell, or otherwise transfer addresses maintained by such website or online service to any other party for the purposes of initiating, or enabling others to initiate, electronic mail messages.”); see also Grant Yang, *CAN-SPAM: A First Step to No-Spam*, 4 CHI.-KENT J. INTELL. PROP. 1 (Fall 2004) (indicating that § 5(b)(1)(A)(i) “would be ‘harvesting’ and §5(b)(1)(A)(ii) “would be ‘dictionary’ attacks.”).

⁶⁷ *Id.* at § 6(a).

⁶⁸ *Id.* at § 7(a).

⁶⁹ *Id.* at § 7(g).

⁷⁰ *Id.* at § 7(f).

⁷¹ See Yang, *supra* note 61 (citing Marc Rotenberg, Executive Director, Electronic Privacy Information Center, Testimony and Statement of Record before the Committee on Commerce, Science and Transportation (May 21, 2003), <http://epic.org/privacy/ie/testimony2806.pdf>); see also Declan McCullagh, *Bush OKs Spam Bill—But Critics Not Convinced*, CNETNEWS.COM (Dec. 16, 2003, 7:05 AM), http://news.cnet.com/Bush-OKs-spam-bill—but-critics-not-convinced/2100-1028_3-5124724.html.

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forcement by private parties also very difficult.

III. ADAPTATION OF THE TCPA

As the district court said in *Accounting Outsourcing*, “Congress is not required to develop a perfect solution before instituting measures to incrementally correct a problem.”⁷² Since Congress introduced the TCPA in 1991, it has been amended twice,⁷³ augmented by numerous FCC rules, and interpreted by thousands of judicial decisions. It has been applied to new areas and technology not originally contemplated in 1991, including debt collection practices and text messaging technology.

Some critics argue that this expansion of the TCPA is inappropriate and would seek to label the TCPA as a statute that strictly regulates telemarketing. Yet, the statute makes no mention of telemarketers. It was designed to protect the privacy interests of consumers and to respond to advances in technology. Therefore, the expansion of the TCPA into other areas that evoke these same concerns may be justified.

The TCPA creates a right that did not exist at common law. Typically, in order for a state consumer protection law to be implicated, there must be some showing of harm, fraud, or deception.⁷⁴ Judicial interpretation of the TCPA as a technology-regulating, rather than harm-compensating statute explains the adaptability of the statute. Such interpretation has allowed the TCPA to remain effective when addressing new technology and to be applied to emerging areas of concern, such as debt collection.

A. *Targeting the Use of Technology: Judicial Interpretations of the TCPA*

Judicial interpretations of the TCPA are largely focused on regulating the use of technology. For example, the district court in *Hinman* held, “On its face, the statute prohibits the sending of unsolicited fax advertisements and makes no reference at

⁷² *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc’ns., L.P.*, 329 F.Supp.2d 789, 817 (M.D. La. 2004).

⁷³ See *Junk Fax Prevention Act of 2005*, Pub. L. No. 109-21, 119 Stat. 359; see also *Truth in Caller ID Act of 2009*, Pub. L. No. 111-331, 124 Stat. 3572.

⁷⁴ SECTION OF ANTITRUST LAW, AM. BAR ASS’N, CONSUMER PROTECTION LAW DEVELOPMENTS, 1, 59 (Mar. 2009).

all to receipt, much less to printing.”⁷⁵ In *Satterfield*, the 9th Circuit held that a prohibited call is not dependent on a successful connection.⁷⁶ Similarly, the Arizona Court of Appeals in *Joffe*, stated that it was “the act of making the call. . .” that led to TCPA liability.⁷⁷

B. Targeting the Use of Technology: TCPA’s Expansion to Debt Collection

In 2011, the district court in *Consumer Portfolio Serv.*,⁷⁸ rejected the assertion that the TCPA applied only to telemarketers.⁷⁹ The court pointed to the FCC’s January 2008 TCPA Order which states, “The plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of [. . .] the prior express consent of the called party. We note this prohibition applies *regardless of the content of the call*, and is not limited only to calls that constitute ‘telephone solicitation.’”⁸⁰ This opened the door to apply the TCPA to the debt collection industry.

Although Congress did not intend to directly regulate debt collection practices with the TCPA, it did intend to protect consumers from autodialers and such protections have been afforded to consumers’ cell phones. Debt collection came into the cross-hairs of the TCPA because of the industry’s use of such technologies.

The typical TCPA-related debt collection situation is most clearly presented by Judge Easterbrook in *Soppet*:

Customer incurs a debt and does not pay. Creditor hires Bill Collector to dun Customer for the money. Bill Collector puts a machine on the job and repeatedly calls Cell Number, at which Customer had agreed to receive phone calls by giving his phone number to Creditor. The machine, called a predictive dialer,

⁷⁵ *Hinman v. M&M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1158 (N.D. Ill. 2009).

⁷⁶ *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

⁷⁷ *Joffe v. Acacia Mortgage Corporation*, 121 P.3d 831, 836 (Ariz. Ct. App. 2005).

⁷⁸ *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723 (N.D. Ill. 2011).

⁷⁹ *Id.* at 727 (“We reject [the] argument that the TCPA only applies to telemarketing, not debt collection.”).

⁸⁰ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 07-232 at ¶ 11 (Jan. 4, 2008) (emphasis added).

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works autonomously until a human voice comes on the line. If that happens, an employee in Bill Collector's call center will join the call. But Customer no longer subscribes to Cell Number, which has been reassigned to Bystander. A human being who called Cell Number would realize that Customer was no longer the subscriber. But predictive dialers lack human intelligence and, like the buckets enchanted by the Sorcerer's Apprentice, continue until stopped by their true master. Meanwhile Bystander is out of pocket the cost of airtime minutes and has had to listen to a lot of useless voicemail.⁸¹

Under the TCPA, the Defendants must have had "the prior express consent of the called party."⁸² The Defendants in *Soppet* argued that they had express permission to call "Cell Number"⁸³ and reasoned that even though "Bystander" now used "Cell Number," the "called party" for purposes of the TCPA was the party they intended to call (i.e., "Customer").⁸⁴ As a result, the call would be legal under the TCPA.⁸⁵ The court disagreed, and held that the "called party" means the "person subscribing to the called number at the time the call is made."⁸⁶ As a result, even after receiving express consent to call a number, debt collectors (or other entities using an autodialer) must make certain that number still belongs to the person that provided the consent.

C. Addressing Advances in Technology

The use of cellular phones has greatly increased over the past decade. In June 2008 there were 263 million cell phone subscribers in the United States, and 16% of those subscribers had replaced their residential home phone with cell phones.⁸⁷ In De-

⁸¹ *Soppet v. Enhanced Recovery, LLC*, 679 F.3d 637, 639 (7th Cir. 2012) (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559 ¶¶ 9, 10 (Jan. 4, 2008)).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 637.

⁸⁵ 47 U.S.C. § 227(b)(1) (2011) ("It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—(A) to make any call (other than a call made for emergency purposes or *made with the prior express consent of the called party*) using any automatic telephone dialing system or an artificial or prerecorded voice. . .").

⁸⁶ *Soppet v. Enhanced Recovery, LLC*, 679 F.3d at 643.

⁸⁷ FED. TRADE COMM'N, COLLECTING CONSUMER: DEBT THE CHALLENGES OF CHANGE, 17 (Feb. 2009), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer->

cember 2011, the number of U.S. cell phone subscribers (315.9 million)⁸⁸ exceeded the U.S. population (312.6 million)⁸⁹ for the first time. The increased use of cellular phones brings a renewed justification for the TCPA because safety, privacy, and cost-shifting concerns are even greater when robocallers or other technology is used to reach a consumer on their cell phone.

1. The TCPA and Cellular Phone Calls

Cell phones present increased privacy and safety concerns because consumers bring their cell phones wherever they go.⁹⁰ With respect to safety, a ringing cell phone presents a dangerous distraction while driving. A 2009 study by the National Highway Traffic Safety Administration indicated that cell phone use was involved in 18% of fatalities in distraction-related crashes.⁹¹ Recognizing these special concerns, the TCPA has been interpreted to ban the use of autodialers to make non-emergency calls without prior express consent to any cell phone.⁹²

The protection granted to cell phones is also necessary to prevent cost-shifting. This is especially relevant for consumers with prepaid cell phone plans, which, as of June 2012, made up over 23% of all wireless subscribers (74.9 million).⁹³ Unwanted calls use up limited prepaid minutes and text messages. Here,

debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

⁸⁸ CTIA, BACKGROUND ON CTIA'S SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2013) [hereinafter CTIA WIRELESS SURVEY], available at http://files.ctia.org/pdf/CTIA_Survey_YE_2012_Graphics-FINAL.pdf.

⁸⁹ Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2014, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?rc=bkmk> (last visited Apr. 3, 2014).

⁹⁰ Shannon D. Torgerson, *Getting Down to Business: How the Established Business Relationship Exemption to the National Do-Not-Call Registry Forces Consumers to Pay for Unwanted Sales Calls*, 3 NW. J. TECH. & INTELL. PROP. 24, ¶ 38-40 (Fall 2004) ("the very nature of mobile communication technologies makes unsolicited sales calls to these devices more intrusive, inconvenient, and dangerous than similar calls made to stationary, landline residential phones.").

⁹¹ Letter from National Association of Attorneys General to Congress (Dec. 7, 2011), available at http://signon.s3.amazonaws.com/20111207.signon.Final_HR3035_Letter.pdf (citing <http://distraction.gov/stats-and-facts/index.html>).

⁹² 47 U.S.C. § 227(b)(1)(A) (2011); 47 C.F.R. § 64.1200(a)(1)(iii).

⁹³ CTIA, *Semi-Annual Wireless Industry Survey* (June 2012), <http://www.ctia.org/resource-library/press-releases/archive/consumer-data-traffic-increased-104-percent> (in June 2011, 306 million total U.S. subscribers).

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more than ever, consumers bear the costs of telemarketing calls.

2. The TCPA and Text Messages

Cellular telephone users are able to send and receive 160-character messages through short message service (SMS), or “text messaging.” In 2003, the FCC determined that the TCPA’s ban on autodialers encompasses both voice and text calls.⁹⁴ In 2009, the 9th Circuit agreed with the FCC’s determination that the TCPA applied to text messages.⁹⁵ In *Satterfield v. Simon & Schuster*, the court held that a text message is a “call” within the meaning of the TCPA.⁹⁶ The putative plaintiff class had received the following text-message advertisement:

The next call may be your last . . . Join the Stephen King VIP Mobile Club at www.cellthebook.com. RplySTOP2OptOut. PwdbyNexton.⁹⁷

The 9th Circuit found that Congress intended “to call” to mean “to communicate with a person by telephone.”⁹⁸ Consequently, to hold that a text message was “a call” under the TCPA was consistent with the plain meaning and purpose of the TCPA.⁹⁹ The court then noted that the TCPA targeted “communicat[ing] with others in a manner that would be an invasion of privacy” and “a voice or a text message are not distinguishable in terms of being an invasion of privacy.”¹⁰⁰ As a result, advertisers are prohibited from sending text messages using autodialers or without the prior express consent of the recipient.

IV. LESSONS LEARNED OVER TIME

Congress has amended the TCPA twice since 1991 to address new technologies and practices. Similarly, the FCC has used various techniques of regulation, such as company-specific

⁹⁴ See Report and Order, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 03-153 ¶ 165 (July 3, 2003).

⁹⁵ *Satterfield*, 569 F.3d at 952.

⁹⁶ *Id.*; see also *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009); see also *Joffe*, 121 P.3d 831.

⁹⁷ *Satterfield*, 569 F.3d at 949.

⁹⁸ *Id.* at 954.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

opt-out lists and consent derived from EBR interactions. However, the FCC's perceived value of certain forms of communication as well as consumers' tolerance for unwanted advertisements appears to have decreased over time.¹⁰¹ As a result, there has been a shift away from such techniques and a move toward informed consumer choice.

A. Company Specific Opt-Out Schemes are Inefficient

By 2000, the TCPA and Telemarketing Act had been in place for the better part of a decade, although consumer complaints continued to mount. In response, the FTC began a comprehensive review that analyzed the effectiveness of existing regulations. Of particular concern was the current company-specific opt-out scheme in place for telemarketing solicitations. While autodialers and prerecorded messages were heavily restricted, calls conducted by live agents were limited only by identification¹⁰² and time of day¹⁰³ requirements, and the keeping of company-specific opt-out lists.

Until 2003, both the FCC and FTC required telemarketers to maintain company-specific do-not call lists,¹⁰⁴ which required consumers to request each individual telemarketer not to call them again.¹⁰⁵ According to the FTC, the original company-specific do-not-call list was "intended to prohibit abusive patterns of calls from a seller or telemarketer to a person."¹⁰⁶ Ideally, the company-specific opt-out list prevented abusive patterns by empowering consumers to prevent calls from specific callers, while still being able to receive other telemarketing calls.

The findings of the FTC review of the company-specific technique are helpful in understanding the change in enforcement mechanisms. It revealed that members of the industry generally supported the company-specific approach, "stating that it provides consumer choice and satisfies the consumer protection

¹⁰¹ See e.g., Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C. Rcd. 14014, 14129 ¶ 38 (July 3, 2003).

¹⁰² Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. 8752, 8772 ¶ 38 (Oct. 16, 1992).

¹⁰³ *Id.* at 8767 ¶ 25; see also Telemarketing Sales Rule, 16 C.F.R. § 310.4(c) (2010).

¹⁰⁴ Delivery Restrictions, 47 C.F.R. § 64.1200(c); Prior to amendment: 16 C.F.R. § 310.9(b)(iii)(A) (2010).

¹⁰⁵ *Id.*

¹⁰⁶ Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4,629 (Jan. 29, 2003) (codified at 16 C.F.R. § 310 (2010)).

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mandate of the Telemarketing Act while not imposing an undue burden on the industry.”¹⁰⁷ However, “the vast majority of individual commenters [. . .] joined by consumer groups and state law enforcement representatives, claimed that [the] company-specific ‘do-not-call’ provision [was] inadequate to prevent the abusive patterns of calls it was intended to prohibit.”¹⁰⁸

The FTC agreed with the consumer side and found that:

- The company-specific approach is burdensome to consumers, who must repeat their “do-not-call” request with every company that calls;
- Consumers have no way to verify their names have been taken off of a company’s calling list; and
- A company-specific approach does nothing to prohibit the first call from a telemarketer, and many consumers find even an initial call from a telemarketer to be abusive and an invasion of privacy.¹⁰⁹

The FCC concurred with such findings and removed the company-specific opt-out approach in 2003.

B. Empowering Consumers: the National Do-Not-Call Registry

After abandoning the company-specific approach, the FTC established the National Do-Not-Call Registry (“DNCR”) in late January 2003.¹¹⁰ The implementation of the DNCR was a dynamic change in regulation: rather than company-specific opt-out lists, it created a universal opt-out list which required a telemarketer to seek the recipient’s consent prior to placing any calls.

The DNCR opened for consumers to register their numbers on June 27, 2003, and enforcement began on October 1, 2003. The Telemarketing Sales Rule established that:

- A “telemarketer”¹¹¹ may not initiate an outbound

¹⁰⁷ *Id.* (citing comments made by ARDA, ATA, Bell Atlantic, DMA, ERA, and MPA).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ A “telemarketer” is defined as “any person who, in connection with telemarketing . . . initiates telephone calls to or from a customer or donor.” Tele-

telephone call to a person whose telephone number appears on the national registry;

- A “seller”¹¹² may not cause a telemarketer to initiate such calls; and
- A person may not use the Registry for purposes other than complying with the Telemarketing Sales Rule.¹¹³

As a result, consumers were further protected from telemarketing calls. The expanded regulations reached both inter- and intrastate phone calls¹¹⁴ and required more entities¹¹⁵ to abide by the prohibitions listed above.

C. The Established Business Relationship Exemption Is Not Informed Consent

A recurring trend in telemarketing regulation is to create a strict, opt-in or consent-based scheme followed by an agency rule creating an exemption for parties with an “Established Business Relationship.” For example, the purpose of the Do-Not-Call Registry was to provide consumers with the ability to universally opt-out of telemarketing phone call solicitations. Perhaps a bit uneasy about this “all-or-nothing” type of regulation, the FCC established that a party with an EBR could legally call a recipient even if that recipient had listed its number on the DNCR.

This provision was similar to the EBR recognized by the FCC in the junk fax provision and attempted to recognize that communications between those with an established relationship have less invasion of privacy concerns and may even be useful to

marketing Sales Rule, 16 C.F.R. § 310.2(bb) (2010). “Telemarketing” is defined as “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.” 16 C.F.R. § 310.2(cc).

¹¹² A “seller” is defined as “a person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.” Telemarketing Sales Rule, 16 C.F.R. § 310.2(z) (2010).

¹¹³ 16 C.F.R. § 310.4(b)(1)(iii)(B).

¹¹⁴ *Id.*

¹¹⁵ *Id.* (Entities such as banks, credit unions, and savings and loans institutions are not subject to FTC rule. However, they are subject to FCC rules and regulations.).

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and wanted by consumers. The DNCR EBR was eventually removed while the junk fax EBR survived when codified by Congress in the Junk Fax Prevention Act.

1. The Do-Not-Call Registry EBR

The Do-Not-Call Registry originally recognized an EBR limited in duration, which allowed a telemarketer to legally call a consumer on the Registry so long as the consumer had not previously asked to be placed on the seller's company-specific do-not-call list.¹¹⁶ The EBR in the Do-Not-Call Registry reflected a compromise that acknowledged that consumers might reasonably expect a call from a business, but that call may only be expected for a reasonable amount of time after the consumer contacts the business.

However, the exemption resulted in significant confusion for consumers that had registered their numbers on the Registry. By 2012, both the FTC and FCC had removed the exemption. The FTC was "persuaded by the number of comments opposing [the EBR], lack of consumer confidence in industry assurances to self-regulate and not abuse consumers, consumer privacy concerns, and the difficulty in stopping unwanted calls."¹¹⁷ Today, telemarketing calls to residential lines registered on the Do-Not-Call Registry require prior written consent, "even where the caller and called party [had] an EBR."¹¹⁸

2. The Junk Fax EBR

In 2003, the FCC announced that it would no longer recognize an EBR exemption for unsolicited fax advertisement.¹¹⁹

¹¹⁶ Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii) (2010) (An established business relationship existed if the consumer had (i) purchased, rented, or leased goods or services from the seller or entered into a financial transaction with the seller within the eighteen months immediately preceding the date of the telemarketing call; or (ii) made an "inquiry or application regarding a product or service offered by the seller, within the three months immediately preceding the date of a telemarketing call."); See Charles V. Gall and Margaret M. Stolar, *Federal and State Telemarketing Developments*, 59 BUS. LAW. 1241, 1243 (May 2004) (citing 16 C.F.R. § 310.2(n) (2010)).

¹¹⁷ Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51,164 (Aug. 29, 2008).

¹¹⁸ *Id.*

¹¹⁹ Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14127–28 ¶ 190 (July 3, 2003) ("As of the effective date of these rules, the EBR will no longer be sufficient to show that an indi-



The FCC stated, “[t]he record in this proceeding reveals consumers and businesses receive faxes they believe they have neither solicited nor given their permission to receive” and also acknowledged the cost-shifting nature of junk fax.¹²⁰ Consequently, the FCC determined that only written and signed express permission would be adequate to send a fax advertisement.¹²¹

With the Junk Fax Prevention Act of 2005 (“JFPA”),¹²² Congress effectively overruled the FCC’s decision, finding that “the revised interpretation would have significant, unintended consequences that harmed consumers.”¹²³ However, those findings largely relied on the burden imposed on businesses by the proposed written consent requirement.

The Senate report on the JFPA gave the following examples: “restaurants would not be able to fax a menu to a consumer who called and requested one unless the caller provided them with written consent (presumably by fax) or had one on file. Additionally, [. . .] potential homebuyers often call and request faxes when passing by homes for sale [. . .] the FCC’s new requirement for a written signature would effectively prevent realtors from faxing potential new home buyers the listing information they requested when they made such calls, adding unnecessary hurdles and delays even when consumers clearly wanted to receive the faxes as quickly as possible.”¹²⁴

The Senate report focuses on the issue of written consent. However, in each case listed above, a consumer is making an active choice to seek information from a business. The information being sought is not an unsolicited advertisement. Moreover, the two examples demonstrate instances where a consumer would expect a response in a limited period of time (immediately). The examples do not involve instances in which the consumer would then expect an unsolicited fax advertisement months or even years down the road.

Instead of using the above examples to tackle the FCC’s

vidual or business has given their express permission to receive unsolicited advertisements.”).

¹²⁰ *Id.* (“[r]ecipients of these faxed advertisements assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions.”).

¹²¹ *Id.*

¹²² Junk Fax Prevention Act, Pub L. No. 109-21, 119 Stat. 359 (2005).

¹²³ S. REP. NO. 109-76, at 4 (2005).

¹²⁴ *Id.*

proposed requirement of written consent, Congress used them as justification for expressly codifying the EBR previously recognized by the FCC.¹²⁵ The result is a much broader, more indirect way that a sender can achieve consent to send an otherwise unsolicited fax advertisement. Compared to the examples above where individuals are calling and requesting information, in order to send an unsolicited fax advertisement pursuant to an EBR only two prerequisites must be established:

1. The recipient's number must be obtained through voluntary communication within the context of the established business relationship,¹²⁶ or by the recipient voluntarily placing its number in a directory, advertisement, or on a website for public distribution;¹²⁷ and
2. The unsolicited advertisement must contain a notice¹²⁸ on the first page of the advertisement,¹²⁹ which provides a cost-free mechanism¹³⁰ for the recipient to opt-out of further unsolicited advertising sent by the sender.¹³¹

An EBR may be terminated by an opt-out request.¹³² If a consumer continues to do business with a company after opting-out, a sender may resume sending fax advertisements to a consumer only after that consumer subsequently provides his express invitation or permission to the sender.¹³³ However, this EBR technique ignores the inefficiencies that come with company-specific opt-out schemes, namely, that the consumer must pay for the first unwanted fax and then call to stop future unwanted fax-

¹²⁵ Delivery Restrictions, 47 C.F.R. § 64.1200(f)(6) (2011) (an EBR means "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction" by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party).

¹²⁶ 47 U.S.C. § 227(b)(1)(C)(ii)(I) (2011).

¹²⁷ *Id.* at § 227(b)(1)(C)(ii)(II).

¹²⁸ *Id.* at § 227(b)(1)(C)(iii).

¹²⁹ *Id.* at § 227(b)(1)(D)(i).

¹³⁰ *Id.* at § 227(b)(1)(D)(iv)(II).

¹³¹ *Id.* at § 227(b)(1)(D).

¹³² Delivery Restrictions, 47 C.F.R. § 64.1200(a)(4)(vi) (2011).

¹³³ *Id.*

es from each individual sender.¹³⁴

Critics of the JFPA often point to the fact that the sender need not receive the recipient's fax number directly from the recipient, but can pull it from the recipient's website, for example.¹³⁵ Additionally, there is no requirement that an entity inform the recipient that in so giving its fax number it may now receive unsolicited fax advertisements from the particular sender.¹³⁶ This, coupled with the relative ease of establishing and unlimited period of time that an EBR exists, has led to a great deal of criticism of the JFPA.

V. THE TCPA'S CURRENT IMPACT

The TCPA was a response to the "tens of thousands of unsolicited messages per week" being sent to fax machines throughout the country.¹³⁷ Since it was enacted, there has been a decline in the number of junk fax complaints and unsolicited telemarketing phone calls.¹³⁸ This decline can be attributed to periods of increased protections, greater enforcement, and changing technologies.

A. *The TCPA's Relative Success*

The TCPA has been relatively successful at reducing the number of junk fax complaints and unwanted telemarketing calls. Legitimate companies are largely deterred by the TCPA's private right of action. This, coupled with limited government enforcement, has perpetuated a dependency on the private right of

¹³⁴ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C. Rcd. 14014, 14128 ¶ 190 (July 3, 2003) (In fact, this was the basis for removing the EBR. "Unlike the do-not-call list for telemarketing calls, Congress provided no mechanism for opting out of unwanted facsimile advertisements. Such an opt-out list *would require the recipient to possibly bear the cost of the initial facsimile and inappropriately place the burden on the recipient to contact the sender and request inclusion on a "do-not-fax" list.*")(emphasis added).

¹³⁵ See Jennifer A. Williams, *Faxing It In*, 72 BROOK. L. REV. 345, 375-76 (2006).

¹³⁶ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005, 21 F.C.C. Rcd. 3787 (Apr. 6, 2006).

¹³⁷ H.R. REP. NO. 102-317, at 6-7 (1991).

¹³⁸ Robert G. Gibbons & Lisa M. Ferri, *Mail Control: Filtering Spam Through a Mix of Technology, Legislation and the Courts*, INTELL. PROP. TODAY 8 (Dec. 2001).

action. However, the government's decision to implement the Do-Not-Call Registry, and the period of increased enforcement by the FCC from 2006-2008 demonstrate the positive impact that government involvement has on the success of TCPA regulation.

1. The Dependence on Private Attorney Generals

Private parties have largely been responsible for enforcement of the TCPA. This may be attributed to the significant incentive: the private right of action provides a relatively large statutory damages amount, especially when compared to the "actual" harm in receiving a junk fax or unsolicited telemarketing call.¹³⁹ Private parties may seek \$500 per violation, which may be trebled to \$1500 per violation if the court determines that the defendant has "knowingly" or "willfully" violated the TCPA.¹⁴⁰ This serves as a significant deterrent when coupled with the threat of a class action.

A number of factors have created and perpetuated the TCPA's dependence on private enforcement. First, the statute operates with limited government resources and a lack of urgency. The TCPA does not cover conduct that is particularly destructive or dangerous,¹⁴¹ and although it continues to be adapted and interpreted to cover newer technology, it also covers technology and conduct that some may consider outdated.¹⁴² Consequently, it does not draw a great deal of attention from distracted legislative bodies and government regulators that are already

¹³⁹ David E. Sorokin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001 (Fall 1997) (for example, it is estimated that even in 1991, the most expensive faxes would only cost about 10 cents per fax received); *see also, e.g., A Bold Plan to End "Junk Fax,"* S.F. CHRON., Jan. 20, 1989; Peter Burrows, *Bill Would Put Some Fax on Hold*, NEWSDAY, June 29, 1989, at 43; *Destination Ventures, Ltd., v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (contrasting plaintiff's estimate of 2 cents per page with FCC's claim of 3 to 40 cents); Carroll Lachnit, *Electronic "Junk Mail": Judge Orders Fax Sender to Pay Businessman 22 Cents for Sending Unsolicited Ad*, ORANGE COUNTY REG., July 3, 1991, at B8 (describing small claims judgment of 22 cents for an unsolicited fax, apparently one page long).

¹⁴⁰ 47 U.S.C. § 227(b)(3) (2011).

¹⁴¹ CHARLES H. KENNEDY, *THE BUSINESS PRIVACY LAW HANDBOOK* 135 (2008) ("As privacy intrusions go, telemarketing calls cause little harm. Telemarketers do not ruin reputations, steal identities, destroy data, or commit any of the other destructive practices at which much of privacy law is aimed.")

¹⁴² Paul Venezia, *Why the Fax Machine Refuses to Die*, INFOWORLD.COM (Sept. 6, 2011, 3:00 AM), <http://www.infoworld.com/d/data-center/why-the-fax-machine-refuses-die-171308>.

stretched thin. Additionally, the process of government enforcement – when the FCC does become involved – is slow and limited.

Due to limited resources for government enforcement, dependence on the private right of action is unavoidable. Professor J. Maria Glover argues that private regulation through litigation is integral to the structure of the modern administrative state.¹⁴³ Private enforcement counters issues of limited agency resources, especially where the focus of the regulation is something as unexciting (and as relatively innocuous) as prohibiting a fax advertising discount round-trip airfare and vacations to Las Vegas.¹⁴⁴

¹⁴³ See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

¹⁴⁴ *Id.* at 1155.

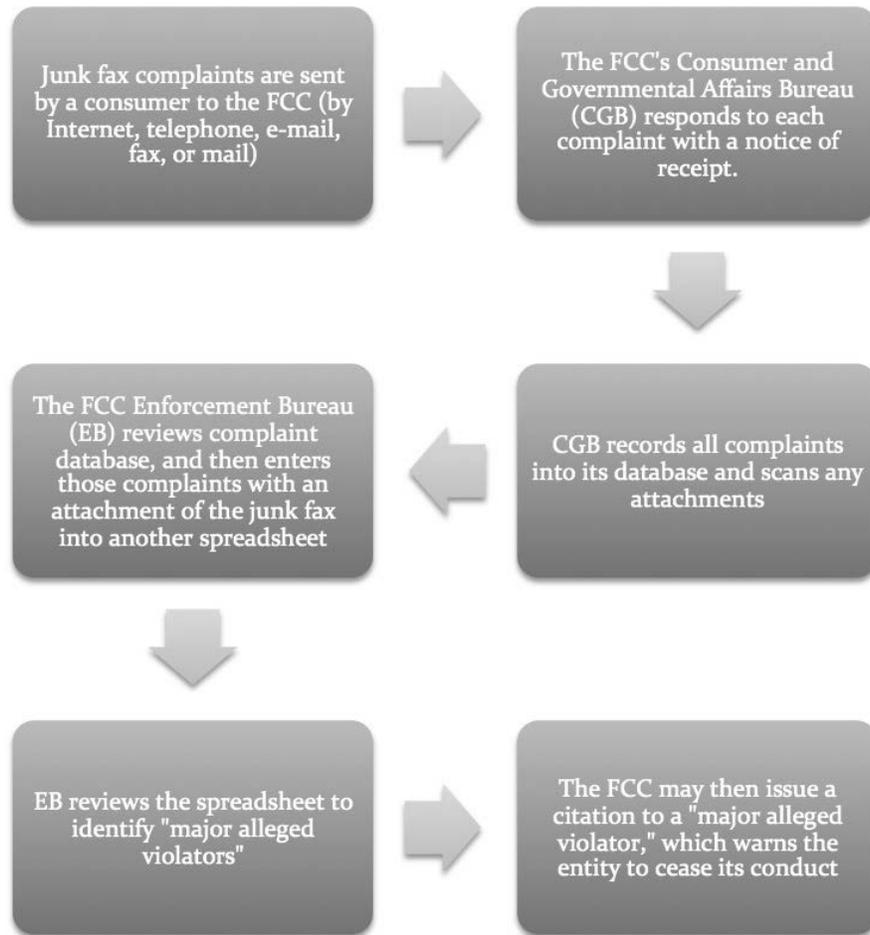


Figure 1¹⁴⁵

As illustrated, it takes a number of steps before the FCC even issues a citation, and, following a citation, forfeiture proceedings and monetary penalties will not be issued unless subsequent complaints are identified. If a forfeiture penalty is not paid, the case is referred to the Department of Justice for collection.

Since the TCPA was enacted in 1991, the available data demonstrates limited government enforcement. Only 1,082 citations have been issued since 1999.¹⁴⁶ Only thirty-nine 39 forfeiture

¹⁴⁵ GAO report (April 2006), *Weaknesses in Procedures and Performance Management Hinder Junk Fax Enforcement*, pg. 10, <http://www.gao.gov/assests/250/249596.pdf>.

¹⁴⁶ *Unsolicited Faxes Detailed Information*, FED. COMM'NS COMM'N, transition.fcc.gov/eb/tcd/ufax.html (last updated Feb. 26, 2014).

actions have been referred to the Department of Justice since 2005.¹⁴⁷ To place these numbers into greater context, in 2005 the FCC received 47,704 complaints,¹⁴⁸ and issued just 23 citations.¹⁴⁹

The TCPA's private right of action has proven a significant deterrent due to the statutory damages provision, the class action mechanism, and the relative ease of establishing a TCPA violation. The most notable example of the potential for enormous damages is a lawsuit that was filed in 2002 seeking \$2.2 *trillion* against Fax.com (a fax broadcaster company).¹⁵⁰ In interviews with practitioners it became clear that TCPA class actions are responsible for a significant increase in awareness of—and compliance with—the TCPA.¹⁵¹

Private lawsuits, coupled with limited government enforcement, have historically been successful under the TCPA. However, the continued dependence on private attorneys general may not continue to serve as a significant deterrent. Troubling trends are emerging that seem to indicate the continued enforcement scheme may be inadequate to control “the ever-increasing access through electronic means that advertisers have to consumers.”¹⁵²

2. The National Do Not Call Registry Reduced Unwanted Telemarketing Calls

Since its implementation in 2003, the Do-Not-Call Registry (“DNCR”) has been immensely popular among consumers and an effective tool in enforcing TCPA regulation.¹⁵³ According to

¹⁴⁷ Information retrieved pursuant to a Freedom of Information Act Request.

¹⁴⁸ KRIS ANNE MORTEITH, FED. COMM'NS COMM'N, ANNUAL REPORT ON UNSOLICITED FACSIMILE ADVERTISING, (Jan. 4, 2007), <http://transition.fcc.gov/eb/Orders/2007/DA-07-16A1.html> (represents period from July 9, 2005 through July 9, 2006).

¹⁴⁹ *Unsolicited Faxes Detailed Information*, *supra* note 146.

¹⁵⁰ *Lawsuit Seeks \$2.2 Trillion For Junk Faxes*, WALL ST. J. (Aug. 23, 2002), <http://online.wsj.com/article/SB1030078343814272235.html>.

¹⁵¹ Although, according to more than a few practitioners, this result has been abused by some and represents, as mentioned above, “too strong a hammer for too little a harm” to those critics. Many of the practitioners interviewed as part of this Report asked to remain anonymous. Copies of the confidential memoranda submitted in response to the authors' survey are on file with the authors.

¹⁵² *Critchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 774 (Kan. 2011).

¹⁵³ Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580 (Jan. 29,

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one survey, four years after the DNCR was implemented, over 72% of Americans had registered their numbers on the list.¹⁵⁴ As shown in the chart below, registration grew exponentially in the following years:

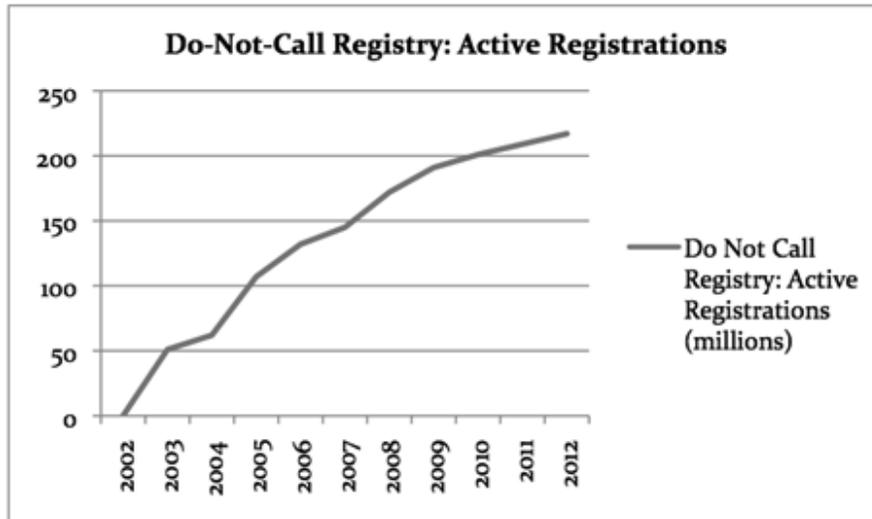


Figure 2¹⁵⁵

The DNCR was more than just popular; it was effective. Telemarketers were generally no longer able to cold call consumers.¹⁵⁶ By registering their number on the list, consumers prevented the first call from a telemarketer – drastically reducing the number of potential calls they could legally receive.¹⁵⁷

2003) (codified at 16 C.F.R. § 310.4(b)(1)(iii)(B) (2010)).

¹⁵⁴ ECONOMIC REPORT OF THE PRESIDENT TRANSMITTED TO THE CONGRESS JANUARY 2009 244 (2009), *available at* <http://www.gpo.gov/fdsys/pkg/ERP-2009/pdf/ERP-2009.pdf>.

¹⁵⁵ The authors compiled Figure 2 through reviewing the FTC Do Not Call Registry Annual Reports for the years 2002-2003. The Annual Reports are available on the FTC website, and for example, the FY2007 FTC Annual Report, *available at* <http://ftc.gov/reports/national-do-not-call-registry-annual-report-congress-fiscal-year-2007-pursuant-do-not-call>, the FY2010 FTC Annual Report *available at* <http://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2010>.

¹⁵⁶ The original Do-Not-Call Registry contained an “established business relationship” exemption. The EBR exemption did, in fact, allow some telemarketers to make one call without fear of any liability so long as that telemarketer had an EBR with the recipient. Nevertheless, the Do-Not-Call Registry drastically cut down on the amount of telemarketing calls that were legal before the Registry was enacted.

¹⁵⁷ Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4580,

By changing the regulation scheme of telemarketing solicitation from company-specific opt-out, to a “modified consent-based scheme,”¹⁵⁸ the FTC and FCC reduced the number of, and complaints from, unsolicited telemarketing calls. A survey conducted less than a year after the Registry was implemented found that registrants saw a reduction in telemarketing calls from “an average of 30 calls per month to an average of 6 per month.”¹⁵⁹ According to a 2004 poll, 92% of those who signed up for the Registry had received fewer telemarketing calls, and 25% of those stated that they had received no telemarketing calls since signing up.¹⁶⁰

3. Increased Government Enforcement Reduced Junk Fax Complaints

From 2006-2008, the FCC increased enforcement of the TCPA junk fax provisions and issued 738 citations¹⁶¹ that resulted in 78 proposed monetary forfeitures.¹⁶² Excluding these two years, the FCC has proposed only 20 monetary forfeitures since the implementation of the TCPA and issued just 1,082 citations

4629 (Jan. 29, 2003) (codified at 16 C.F.R. § 310.4).

¹⁵⁸ Michael R. Laudino, *To Fax or Not to Fax: Analysis of the Regulations and Potential Burdens Imposed by the Junk Fax Prevention Act of 2005*, 37 SETON HALL L. REV. 835, 859 (2007) (discussing the different approaches for regulating junk fax, the author refers to a “modified consent” scheme that allows for certain “special situations” or relationships wherein a fax sender could automatically send a fax to a recipient). Similarly, the EBR essentially created a “modified consent” based scheme in that it allowed telemarketers to call consumers who had “consented” by purchasing goods from the seller or otherwise meeting the definition of an EBR.

¹⁵⁹ Economic Report of the President, 2009, p.244, Box 9-1, *available at* http://www.nber.org/erp/2009_erp.pdf.

¹⁶⁰ Press Release, Fed. Trade Comm’n, Compliance with Do Not Call Registry Exceptional: Over 55 Million Telephone Numbers Registered - Only 150,000 Complaints in 2003 (Feb. 13, 2004), *available at* <http://www.ftc.gov/news-events/press-releases/2004/02/compliance-do-not-call-registry-exceptional> (citing Harris Interactive online poll conducted between January 19 and 28, 2004, among 3,378 adults throughout the United States); *See also* MONICA S. DESAI, FED. COMM’NS COMM’N, ANNUAL REPORT ON THE NATIONAL DO-NOT-CALL REGISTRY ¶ 9 (Sept. 16, 2005), *available at* <http://apps.fcc.gov/ecfs/document/view;jsessionid=2Z2mPCWZYZlNy1PxWzqdtL78p3QPyqZsKp16Q16pTDx3p1nhZQr!1471562840!-321460796?id=6518162563>.

¹⁶¹ *Unsolicited Faxes Detailed Information*, *supra* note 146.

¹⁶² *Id.*

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stemming from junk fax violations since 1999.¹⁶³

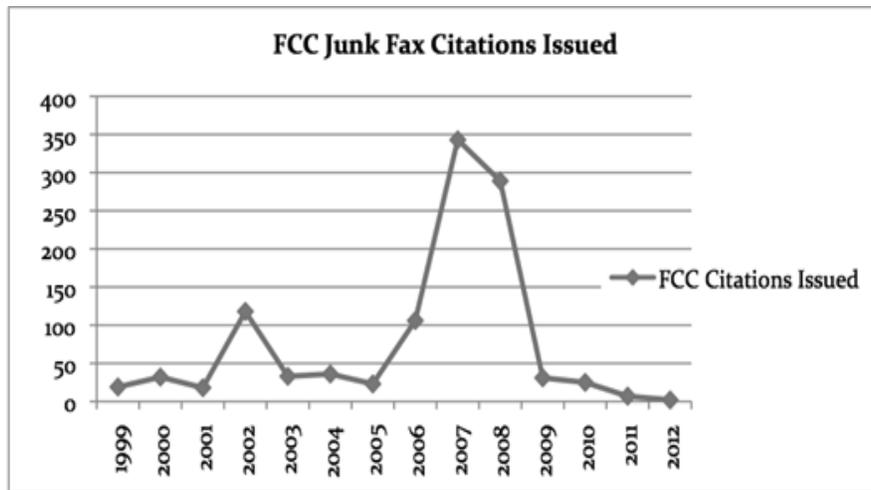


Figure 3¹⁶⁴

The cause of this increased enforcement may have been a desire to respond to the rapid increase in junk fax complaints¹⁶⁵ or a result of increased congressional attention to junk fax regulation.¹⁶⁶ During this time, the FCC mainly targeted a few entities that were responsible for multiple violations. For example, Fax.com asserted that its database “exceed[ed] 30 million fax numbers”¹⁶⁷ and was not the only fax broadcaster that existed during that time. However, with a database of 30 million fax numbers, it is easy to see how just a few companies could account

¹⁶³ *Id.*

¹⁶⁴ *Federal Communications Commission*, available at <http://transition.fcc.gov/eb/tcd/ufax.html>.

¹⁶⁵ See *infra* Figure 4, Junk Fax Complaints Chart (In 2000, the FCC recorded 2,200 junk fax complaints. In 2005, the FCC recorded over 47,000).

¹⁶⁶ The first amendment of the TCPA, the Junk Fax Prevention Act (JFPA) of 2005, Pub. L.No. 109-21, 119 Stat. 359 (2005), was enacted in 2005. The JFPA requires the FCC to submit an annual report on unsolicited fax advertisements. The FCC only issued this report once, in 2007.; See Annual report of Unsolicited Facsimile Advertisements (Rel. Jan. 4, 2007), available at <http://transition.fcc.gov/eb/Orders/2007/DA-07-16A1.html>.

¹⁶⁷ “In re Fax.com, Inc., File No. EB-02-TC-120, Notice of Apparent Liability for Forfeiture (*citing* Broadcast your advertising fax based on radius, Zip Codes, Metro Area, Area Code, County, State or the entire U.S. using a database that will exceed 30 million fax numbers, http://www.fax.com/Why_use_fax/direct.asp (website accessed May 29, 2002)”) available at <http://transition.fcc.gov/eb/Orders/2002/FCC-02-226A1.html>.

for the majority of the junk fax violations.¹⁶⁸ In 2007, the FCC proposed forfeitures against three companies that totaled over \$4.7 million.¹⁶⁹

From the graph below, one can see there was an exponential increase in the amount of junk fax complaints from the year 2000 until 2005. During and immediately after this enforcement period, complaints declined.¹⁷⁰

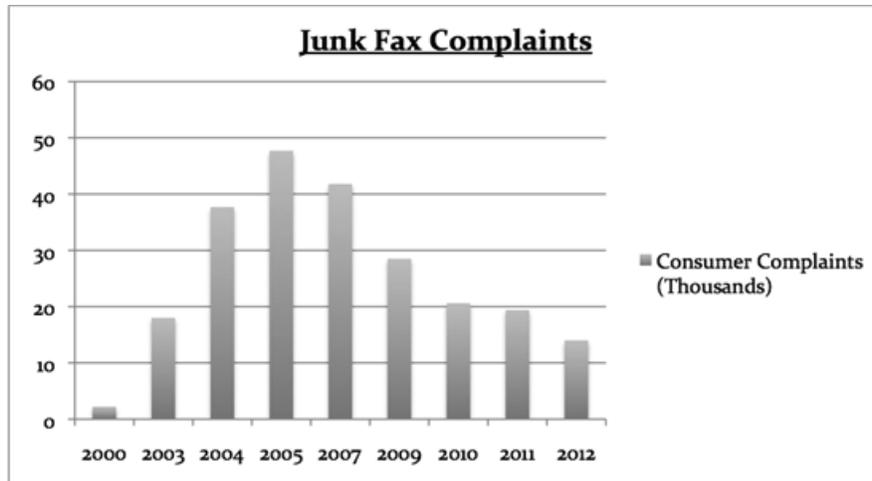


Figure 4¹⁷¹

After 2008, the FCC took a step back and issued few citations. Some State Attorneys General have continued strong enforcement efforts in recent years. For instance, in 2009, Indiana Attorney General Greg Zoeller filed 12 lawsuits over junk fax violations, and 24 lawsuits over telemarketing calls.¹⁷² In the late 1990's and early 2000's, a number of State Attorneys General brought actions against some of the largest violators of the

¹⁶⁸ *Id.*

¹⁶⁹ *Unsolicited Faxes Detailed Information*, *supra* note 146 (the three largest FCC proposed forfeitures in 2007 were filed against the following companies: The Hot Lead LLC (\$2,168,500), Mexico Marketing, LLC (\$1,133,000), and Extreme Leads, Inc. (\$1,377,000)).

¹⁷⁰ Although correlation does not imply causation, the available data may demonstrate that the FCC is much more able to tackle repeat, intentional offenders.

¹⁷¹ *Federal Communications Commission*, <http://transition.fcc.gov/eb/tcd/ufax.html>.

¹⁷² David A. Mann, *Attorney General Zoeller Vows Fight Over Junk Faxes, Solicitors*, NEWS AND TRIBUNE (Dec. 18, 2009), <http://newsandtribune.com/local/x546285000/Attorney-General-Zoeller-vows-fight-over-junk-faxes-solicitors/print>.

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TCPA; however, those lawsuits do not appear to correspond with a decrease in the overall number of junk fax complaints, as was seen with the 2006-2008 FCC enforcement era.

B. Changing Technology

The TCPA was enacted to respond to the changes in technology that allowed increased access to consumers; in 1991 it was the fax machine. With the decline in junk faxes, the TCPA has been adapted to address new technology that affects the privacy interests of consumers. Today, the TCPA may properly be analyzed on the basis of its ability to effectively protect consumers' cell phones.

1. Continued Importance of the TCPA Despite the Decline in Fax Machine Use

Although the traditional fax machine has seen a precipitous decline in use, faxes sent to personal computers and fax servers remain an important means of communication.¹⁷³ Unsolicited advertisements, whether sent to a computer or fax server, shift costs to the consumer. In 2003, the FCC concluded that unsolicited faxes, whether sent to a computer or fax server, still may “tie up lines and printers so that the recipients’ requested faxes are not timely received.”¹⁷⁴ If an advertisement is printed, recipients bear the cost in the form of materials and increased labor costs, as employees must sort out the junk messages.¹⁷⁵ This also presents the risk that an important message may be inadvertently discarded while sifting through junk faxes.

The FCC concluded that “because a sender of a facsimile message has no way to determine whether it is being sent to a number associated with a stand-alone fax machine or to one associated with a personal computer or fax server, it would make little sense to apply different rules based on the device that ultimately received it.”¹⁷⁶ Further, “Congress could not have intended to allow easy circumvention of its prohibition when faxes are (in-

¹⁷³ *Id.*

¹⁷⁴ There are a plethora of companies offering computer-based fax services and fax to e-mail or e-mail to fax services to this day.

¹⁷⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144, 44,174 (July 25, 2003) (to be codified at 47 C.F.R. § 64 and 68).

¹⁷⁶ *Id.*



tionally or not) transmitted to personal computers and fax servers, rather than to traditional stand-alone facsimile machines.”¹⁷⁷

2. Cell Phones and the TCPA

There are two trends emerging with respect to cell phones and the current impact of the TCPA: (1) over the past 5 years, TCPA-related wireless complaints have steadily risen; and (2) consumers are increasingly disconnecting their traditional residential landlines in favor of becoming cell phone-only households. Autodialed or prerecorded messages—or any telemarketing solicitations for that matter—received on a cell phone present increased cost-shifting, safety, and privacy concerns.¹⁷⁸ These trends demonstrate the importance of continued regulatory efforts to prevent illegal marketing phone calls to cell phones.

The FCC began recording complaints about TCPA violations experienced by consumers on their cell phones in the second quarter of 2007, as seen in the chart below.¹⁷⁹ Included in this total number are complaints by wireless subscribers about “bill shock,” “equipment related issues,” “service related issues,” and

¹⁷⁷ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 41,144, 44,170 (July 25, 2003) (compare the result of sending an e-mail received as a text message discussed below, where the sender (because of the e-mail address used) likely has knowledge that the e-mail will be received as a text message).

¹⁷⁸ See Shannon D. Torgerson, *Getting Down to Business: How the Established Business Relationship Exemption to the National Do-Not-Call Registry Forces Consumers to Pay for Unwanted Sales Calls*, 3 NW. J. TECH. & INTELL. PROP. 24, ¶¶ 38-40 (Fall 2004) (“the very nature of mobile communication technologies makes unsolicited sales calls to these devices more intrusive, inconvenient, and dangerous than similar calls made to stationary, landline residential phones.”).

¹⁷⁹ The FCC has data on the number of TCPA complaints stemming from violations experienced on consumers’ wireless phones from the first quarter of 2007. However, the first quarter of 2007 shows that there were 848 complaints from TCPA violations experienced on cell phones. In the second quarter of 2007, there were 3164 such complaints. The FCC attributes this dramatic increase to a change in the form for reporting TCPA related complaints. The new form, released sometime during the first quarter of 2007, was more detailed. The FCC noted there was a clear shift from “general” TCPA complaints, to more specific complaint types like “Wireless.” Information compiled by the authors through reviewing the FCC Quarterly Report of Informal Consumer Inquiries and Complaints available at <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints>.

“billing and rates.” TCPA related issues have been responsible for about 75% of wireless-related complaints received by the FCC over the past five years:

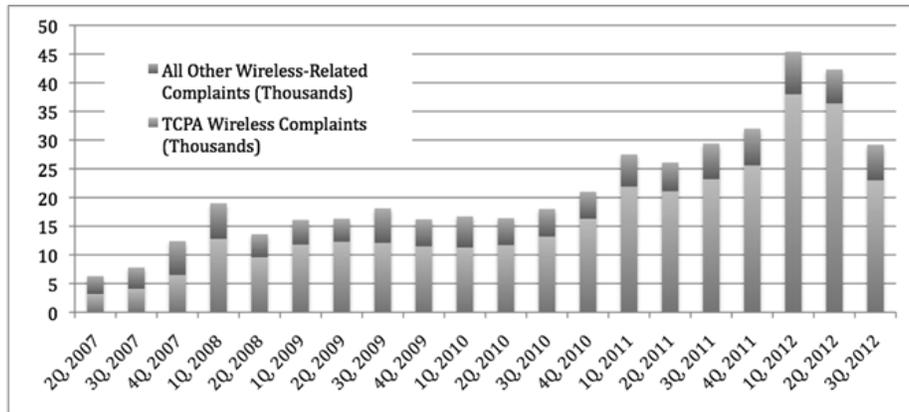


Figure 5¹⁸⁰

Since 2007, there has been a steady growth in both the total number of wireless complaints and the total number of TCPA-related wireless complaints recorded by the FCC.¹⁸¹ As shown below, when compared to all TCPA-related complaints received by the FCC, it is apparent that consumers are increasingly experiencing more unlawful conduct on their cell phones than by any other media.

¹⁸⁰ *FCC Annual Reports to Congress pursuant to Do-Not-Call Implementation Act*. The authors compiled Figure 5 through reviewing the FCC Quarterly Reports of Informal Consumer Inquiries and Complaints for fiscal years 2007-2012. The Quarterly Reports are available on the FCC, available at <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints>.

¹⁸¹ Data from the fourth quarter of 2012 is not yet available. As a result, it is not easily discernable whether the decrease in the total number of complaints in the third quarter of 2012 (from about 42,000 to 28,000) represents a broader decreasing trend in the number of TCPA complaints, or is just a slight anomaly.

TCPA-Related Complaints Recorded by FCC (Quarterly 2009-2012)

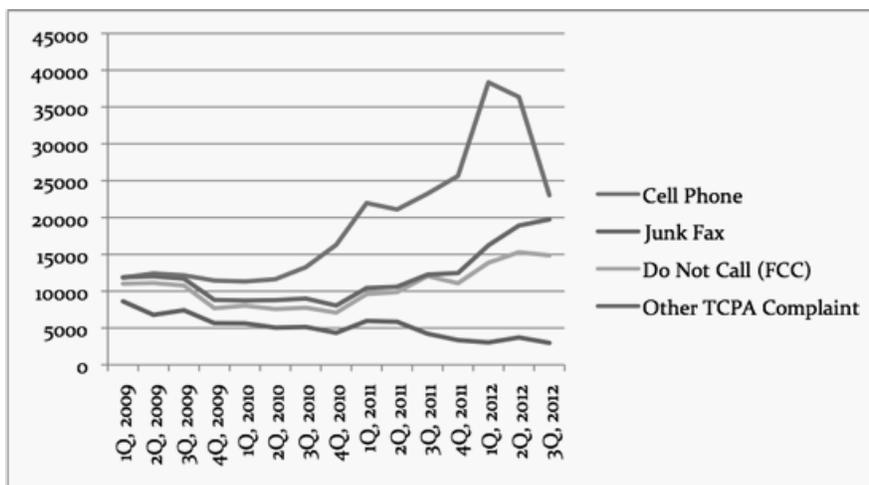


Figure 6¹⁸²

This data does not necessarily mean that telemarketers are intentionally targeting consumers on their cell phones. The increase in the number of TPCA-related wireless complaints corresponds with an overall increase in the number of cell phone subscribers:

	June 1997	June 2002	June 2007	June 2012
Wireless Subscriber Connections¹⁸³	48.7M ¹⁸⁴	134.6M	243.4M	321.7M
Wireless-Only Households¹⁸⁵	N/A	N/A	10.5%	34%

Figure 7¹⁸⁶

¹⁸² *Supra* note 180.

¹⁸³ CTIA, *Semi-Annual Wireless Industry Survey* (June 2012), <http://www.ctia.org/advocacy/research/index.cfm/aid/10316> (in June 2011, 306 million US subscribers).

¹⁸⁴ U.S. CENSUS BUREAU, <http://www.census.gov>. (Interestingly, the U.S. population is around 311 million).

¹⁸⁵ Stephen J. Blumberg, et al., *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, 2010-2011*, 61 National Health Statistics Report (Oct. 12, 2012), <http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf>.

¹⁸⁶ Authors compiled CTIA WIRELESS SURVEY, ¹⁸⁶ U.S. Census Bureau, <http://www.census.gov>. (Interestingly, the U.S. population is around 311 million), and Stephen J. Blumberg, et al., *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, 2010-2011*, 61 National



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As a consequence of a larger total amount of active cell phones, an increase in the amount of TCPA-related wireless complaints was expected. As cell phone use increases (and the percentage of cell phone-only households also increases) certain telemarketing practices will become even more invasive.¹⁸⁷ The greater number of calls received on a cell phone increases the likelihood that those calls will be received at a dangerous time (e.g., while driving a car).

The effectiveness of the TCPA ultimately will be defined by its ability to protect consumers' cell phones. The need for continued regulation is supported by the increase in TCPA-related wireless complaints over the past five years, the increase in the overall number of cell phones (and percentage of cell phone-only households), and the result of consumers' willingness to bring cell phones everywhere (and the potential for danger in doing so).

VI. THREE ISSUES AFFECTING THE EFFECTIVENESS OF THE TCPA

The TCPA remains relevant because it stems the tide of abusive and intrusive conduct that would otherwise occur, and, despite changing technology, remains justified by its original purpose of preventing cost-shifting and protecting privacy. A number of emerging trends and technology present a challenge going forward.

First, the majority of entities in violation of the TCPA and other telemarketing laws today are doing so intentionally. These entities are often based offshore and use technology to their advantage to avoid being detected. Second, the current public enforcement and application of the TCPA is increasingly inadequate to regulate intentional violators. Lastly, advances in technology, most notably cellphones and text messaging, require adaptation of the TCPA.

Health Statistics Report (Oct. 12, 2012), <http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf>.

¹⁸⁷ See Shannon D. Torgerson, *Getting Down to Business: How the Established Business Relationship Exemption to the National Do-Not-Call Registry Forces Consumers to Pay for Unwanted Sales Calls*, 3 NW. J. TECH. & INTELL. PROP. 24, ¶¶ 38-40 (Fall 2004) ("the very nature of mobile communication technologies makes unsolicited sales calls to these devices more intrusive, inconvenient, and dangerous than similar calls made to stationary, landline residential phones.").

A. New Types of TCPA Violators

The entities responsible for the majority of TCPA violations can generally be placed in one of two camps: (1) those that unknowingly or unintentionally violate the TCPA,¹⁸⁸ and (2) those that intentionally violate the TCPA. Within each of those two camps, there are subsets that more accurately describe those that have violated the regulation. For example, one subset of intentional violators are those actively looking to commit fraud;¹⁸⁹ whereas another subset may do so simply because it is the most cost-effective way to advertise.

Data collected by the FTC and FCC indicates that the number of entities operating in intentional disregard of the TCPA appears to be on the rise. This is illustrated by two facts: (1) the total number of entities that are paying to access the Do-Not-Call Registry is decreasing; and (2) the number of telemarketing complaints has been rapidly growing over the past few years.

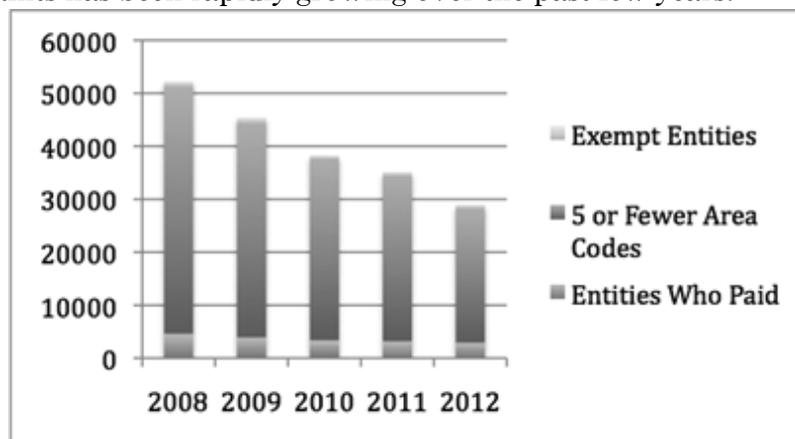


Figure 8¹⁹⁰

¹⁸⁸ See Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti- "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. Rev. 70, 91, n. 133 (2011).

¹⁸⁹ See Sid Kircheimer, *Stop Spam Text Messages*, AARP BULLETIN (Oct. 3, 2012), <http://www.aarp.org/money/scams-fraud/info-10-2012/stop-spam-text-messages.html> (quoting Cloudmark study) (There is evidence to suggest those sending unsolicited text message advertisements are the largest proportion of this group).

¹⁹⁰ The authors compiled Figure 8 by reviewing the FTC's National Do-Not-Call Registry Data Books. The Data Books may be found on the FTC website, and for example, the FY2013 Data Book available at <http://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call->

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The fact that fewer entities are paying for access to the Do-Not-Call Registry suggests that the number of legitimate entities engaged in telemarketing is on the decline. This is further supported by the decrease in telemarketers as defined and tracked by the Bureau of Labor Statistics over the past several years:

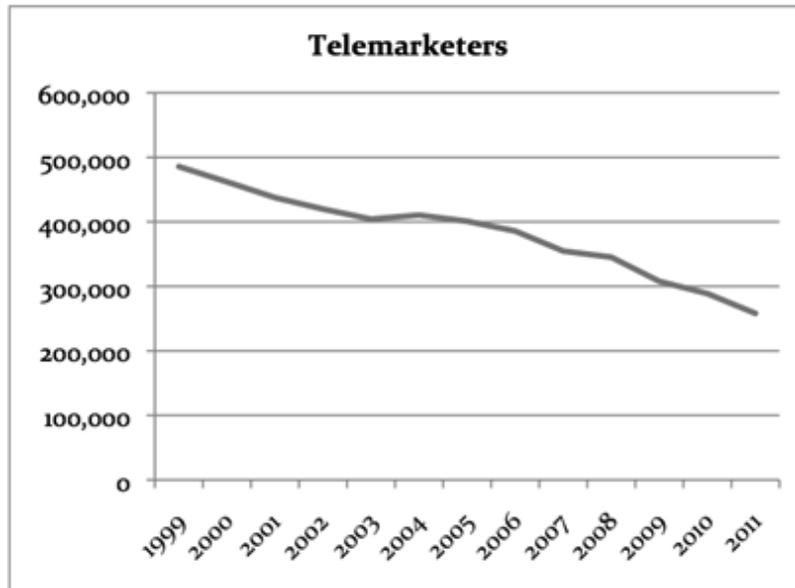


Figure 9¹⁹¹

Despite this decline in the number of telemarketers, there has been an exponential increase in the number of consumer complaints recorded by the FTC in recent years.

registry-data-book-fiscal-year-2013/131204dncdatabook.pdf.

¹⁹¹ Bureau of Labor Statistics, <http://www.bls.gov/oes/current/oes419041.htm>.

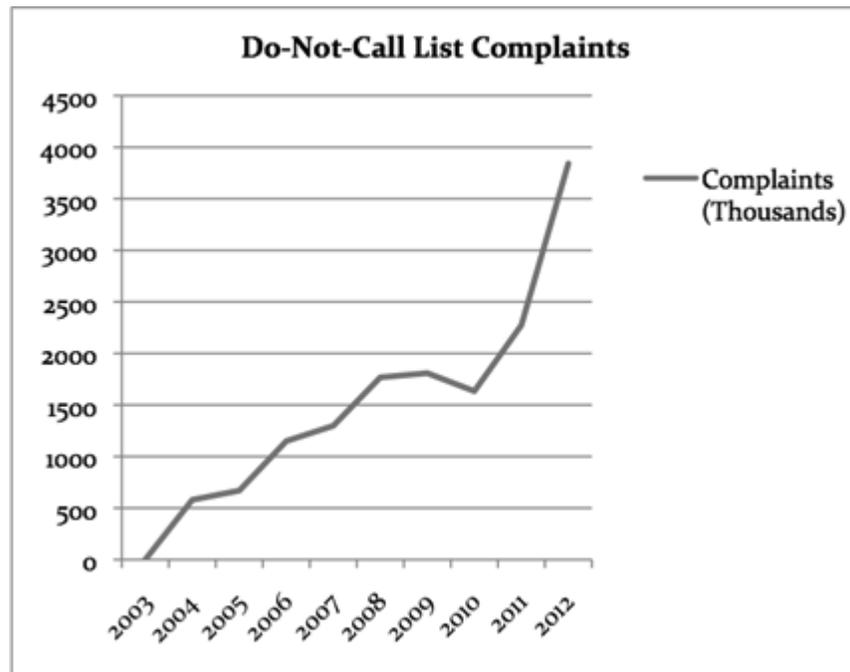


Figure 10¹⁹²

It is reasonable to suggest that the increased complaint level is a result of an increase in the number of entities that are intentionally violating the TCPA. The FTC recently found that “[c]onsumers are getting more robocalls than ever. Technology is ultimately to blame: Companies are using autodialers that can send out thousands of phone calls every minute for an incredibly low cost.”¹⁹³

B. Enforcement and Application of the TCPA is Increasingly Inadequate

Enforcement of the TCPA is complicated by changing technology. Increasingly, those responsible for TCPA violations are located outside the U.S. or are using the Internet to complete calls.¹⁹⁴ According to the FTC, about 59% of phone spam cannot

¹⁹² *Supra* not 187.

¹⁹³ Press Release, Fed. Trade Comm’n, FTC Announces Agenda for Robocall Summit on October 18, 2012 (Oct. 04, 2012), available at <http://www.ftc.gov/opa/2012/10/robocalls.shtm>.

¹⁹⁴ Lauren Silverman, *FTC Offers \$50,000 Reward to Help Stop Robocalls*, NPR (Jan. 02, 2013), www.npr.org/2013/01/02/168444025/reward-offered-to-

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be traced or blocked because the phone calls are routed through “a web of automatic dialers, caller ID spoofing and voice-over-Internet protocols.”¹⁹⁵ According to one staff member of the FTC, “you can track down one source of the calls, but there are likely hundreds of others now using the same type of recording.”¹⁹⁶

The traditional scheme of TCPA enforcement has reflected a strong reliance on the private right of action and a limited amount of government involvement. Although that scheme has been relatively successful in the past, two main issues are becoming clear: (1) the private right of action is limited in both incentivizing lawsuits against, and deterring the actions of, intentional violators; and (2) the current FCC enforcement mechanism fails to yield timely results.

The private right of action has been most effective at enforcing and deterring prohibited conduct of otherwise legitimate companies. The ever-growing population of intentional violators presents a new challenge. When TCPA violators are located overseas¹⁹⁷ or are judgment proof, there is little incentive for an individual or class of private plaintiffs to bring a lawsuit. The effort becomes futile when the violator cannot even be located.

The FCC’s enforcement process for violations of the TCPA is inherently slow. This process relies on consumer complaints that accrue over time and the process requires a number of steps before meaningful action is taken. During this time, the violator may continue to operate while escaping actual enforcement. For example, consider the following FCC enforcement action concerning one junk fax violation:

help-stop-robocalls.

¹⁹⁵ Nelson, *supra* note 2.

¹⁹⁶ David Lazarus, *Do-not-call list is almost like a feel-free-to-call-any-time list*, L.A. TIMES (Sept. 28, 2012), <http://www.latimes.com/business/la-fi-lazarus-20120928,0,3063900.column> (quoting Roberto Anguizola, FTC Assistant Director of Marketing Practices).

¹⁹⁷ See *Federal Trade Commission v. Asia Pacific Telecom, Inc.*, 788 F. Supp. 2d 779 (N.D. Ill. 2011) (defendants violated the Telemarketing Act by repeatedly making illegal telemarketing calls. The defendant corporations had as their principal places of business: Kowloon, Hong Kong; Almere, Netherlands, and the Northern Marina Islands).

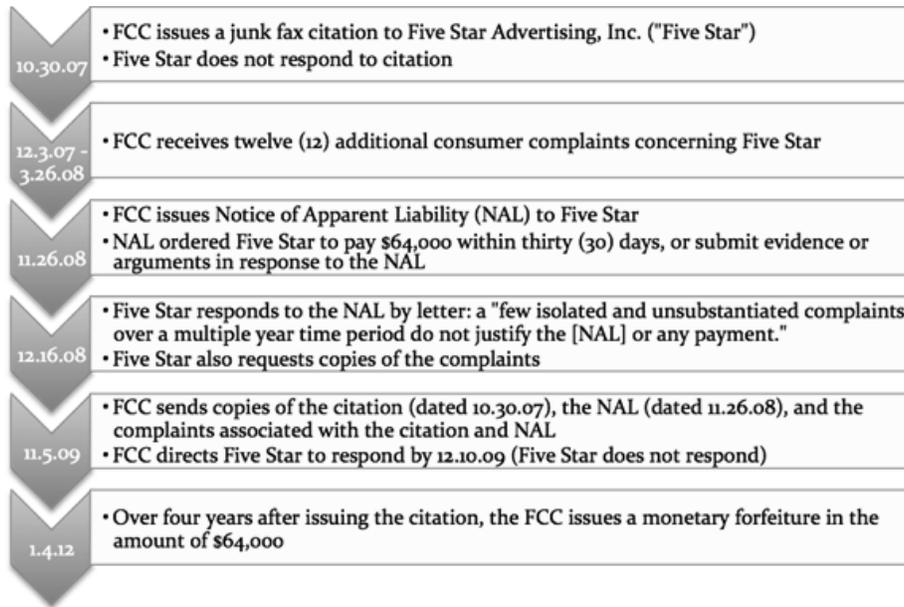


Figure 11¹⁹⁸

Under the Communications Act, the FCC is required to utilize this enforcement process, and unlike the FTC or a State Attorney General, the FCC does not have the power to go directly into federal court to seek an injunction.¹⁹⁹ The FCC is allowed only to issue a citation (i.e., a warning) to entities that do not hold FCC licenses "[. . .] to alert this entity that may not typically be [. . .] aware that it is operating in a regulated space that the FCC is involved in [. . .]"²⁰⁰

The FCC's Enforcement Bureau issued over 1,000 citations to Do-Not-Call Registry violators from 2003 until 2009.²⁰¹

¹⁹⁸ *Five Star Advertising, Inc.*, No. EB-07-TC-13323 (Fed. Commc'ns Comm'n Jan. 5, 2012), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-12-2A1.pdf.

¹⁹⁹ Transcript of Robocalls: All the Rage, An FTC Summit at 184-86 (Oct. 18, 2012), available at http://www.ftc.gov/sites/default/files/documents/public_events/robocalls-all-rage-ftc-summit/robocallsummittranscript.pdf (Eric Bash, Associate Bureau Chief, FCC Enforcement Bureau).

²⁰⁰ *Id.*

²⁰¹ FED. TRADE COMM'N, ADDITIONAL REPORT TO CONGRESS, PURSUANT TO THE DO NOT CALL REGISTRY FEE EXTENSION ACT OF 2007 6 (Dec. 2009), available at <http://www.ftc.gov/sites/default/files/documents/reports/additional-report-congress-pursuant-do-not-call-registry-fee-extension-act->

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However, the FCC only issued five Notices of Apparent Liability, resulting in only two forfeiture orders addressing Do-Not-Call violations during that same time period.²⁰² If the FCC continues to proceed at this pace, its enforcement of the TCPA will be almost entirely ineffective.

CASE STUDY #1: Security First of Alabama, LLC

Security First was issued a citation by the FCC on November 26, 2008, for delivering unsolicited, prerecorded advertising messages. In accordance with 503(b)(5) of the Communications Act, Security First was given 30 days to respond to the citation in the form of either requesting an interview with the FCC, or providing a statement responding to the citation. Security First did not respond to the citation.

The complaints about continued to roll in. Security First's conduct began affecting more than just consumers. From late 2010 until mid-2011, a company called A.V.P.S. Incorporated, located in Tempe, Arizona was being "bombarded with angry callers."¹ The reason: Security First had "spoofed" its caller ID so that A.V.P.S.'s telephone number was displayed on consumer caller ID displays when Security First made its telemarketing calls.¹

From the complaints it received, the FCC found that Security First sent 43 unsolicited, prerecorded advertising messages to 33 consumers.¹ Hundreds of other illegal calls were probably made to other individuals, yet went unreported.¹ Security First's conduct in (1) calling phone numbers registered on the National Do-Not-Call Registry,¹ (2) providing an opt-out telephone number in the prerecorded message that was always busy or disconnected, (3) failing to honor do-not-call requests that were made, and (4) deliberately "spoofing" its caller ID,¹ led the FCC to conclude that Security First was a "particularly egregious distributor of prohibited prerecorded messages."¹ As a consequence, the FCC issued a Notice of Apparent Liability to Security First in the amount of \$342,000.¹

This Notice of Apparent Liability was issued on April 14, 2011; two and a half years after the FCC first issued the citation. This did nothing to stop Security First's operations. Moreover, based upon Security First's decision to ignore the initial FCC citation, and a re-

2007/100104dncadditionalreport.pdf.

²⁰² *Id.*



fusal to respond to a civil lawsuit resulting in a default judgment, it is likely that they will also ignore the Notice of Apparent Liability.²⁰³

After the FCC receives a junk fax complaint, it records the complaint on an enforcement spreadsheet.²⁰⁴ Historically, the FCC had issues with consumers not providing all the information needed for the agency to go forward with tracking a violation or pursuing enforcement. In 2005, about 60% of the junk fax complaints did not include an attachment of the fax, and “therefore, under [the FCC Enforcement Bureau’s practice], would not have been included in the FCC’s enforcement spreadsheet. As a result, the FCC would not have included these complaints in searches for major alleged violators or repeat offenders or considered them in decisions about investigation or enforcement.”²⁰⁵

The FCC’s reliance on consumer complaints has limited its enforcement in the past. However, this weakness will further be exposed by increases in technology that makes it difficult for consumers to identify violators. A new enforcement process is necessary for effective TCPA enforcement.

C. Advances in Technology Require Adaptation

Advances in technology have guided interpretations and amendment of the statute since its enactment in 1991. Currently, the growth in text message spam and identification-spoofing technology present the greatest challenges. The current focus on identification requirements must be reconsidered, as new technology has made it easier to deceive consumers and ignore the re-

²⁰³ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-08-TC-6825 (November 26, 2008), fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-61A1.pdf; Notice of Apparent Liability for Forfeiture, *In the Matter of Security First of Alabama, LLC*, EB-08-TC-6825 ¶ 3 (Apr. 14, 2011); Gary Harper, *FCC crackdown on telemarketer that harassed Tempe business*, AZFAMILY.COM (May 10, 2011), <http://www.azfamily.com/news/consumer/FCC-Cracks-Down-On-Telemarketer-That-Harrassed-Tempe-Business-121574534.html>; 47 C.F.R. § 64.1200(c)(2) (2011); 47 C.F.R. § 64.1401(e) (2011); *Monitronics Funding LP v. Security First of Alabama, LLC*, No. 3-08-CV-333, 2008 WL 4367296 (N.D. Tex. 2008).

²⁰⁴ See UNITED STATES GOV’T ACCOUNTABILITY OFFICE, GAO-06-425, WEAKNESSES IN PROCEDURES AND PERFORMANCE MANAGEMENT HINDER JUNK FAX ENFORCEMENT (2006), available at <http://www.gao.gov/assets/250/249596.pdf>.

²⁰⁵ *Id.*

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quirements with impunity.

1. Growing Concern Over Text Message Spam

Over the last decade there has been an exponential increase in the amount of cell phone subscribers,²⁰⁶ text messaging,²⁰⁷ and text message spam. A report by Forrester Research Inc. indicated that in 2003, just 17% of U.S. cell phone customers were sending text messages.²⁰⁸ By 2011, 6 billion text messages were sent each day,²⁰⁹ with text messaging users sending or receiving an average of 35 messages per day.²¹⁰ As it becomes easier to reach consumers on cell phones, spammers will change their practices accordingly²¹¹ and a continued increase in text message spam seems inevitable.

Under the TCPA²¹² and the CAN-SPAM Act,²¹³ sending text message spam is illegal. However, consumers received about 4.5 billion spam text messages in 2011, up from 2.2 billion received in 2009.²¹⁴ Text message spam is also a major concern for

²⁰⁶ Michael O'Grady, *SMS Usage Remains Strong in the US*, FORRESTER RESEARCH (June 19, 2012), http://blogs.forrester.com/michael_ogrady/12-06-19-

[sms_usage_remains_strong_in_the_us_6_billion_sms_messages_are_sent_each_day](http://blogs.forrester.com/michael_ogrady/12-06-19-sms_usage_remains_strong_in_the_us_6_billion_sms_messages_are_sent_each_day) (According to Forrester Research, 80% of the U.S. population owns a mobile phone).

²⁰⁷ *Id.* (70% of mobile phone owners regularly send or receive text messages, according to Forrester Research.).

²⁰⁸ Wendy Tanaka, *Cell Phones New Target of Spammers*, CHI. TRIB. (July 10, 2004), http://articles.chicagotribune.com/2004-07-10/business/0407100257_1_cell-phone-text-messaging-internet-spam.

²⁰⁹ O'Grady, *supra* note 204.

²¹⁰ *Id.*

²¹¹ Olga Kharif, *Spam Texts Hit 4.5 Billion, Raising Consumer Ire*, S.F. CHRON. (Apr. 30, 2012), <http://www.sfgate.com/business/article/Spam-texts-hit-4-5-billion-raising-consumer-ire-3520012.php> (quoting Greg Goldfarb, a managing director at Summit Partners, "Bad actors will go to the biggest installed base worldwide. The volume of abuse that comes to people around me has increased 50 times in the last 18 months.").

²¹² Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C. Rcd. 14014, ¶ 165 (July 3, 2003) (Indicating that the TCPA's "ban on autodialers encompasses both voice and text calls, including short message service (SMS) calls.").

²¹³ *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005) (*citing* Rules and Regulations Implementing the CAN-SPAM Act of 2003 and the TCPA, 19 FCC Rcd. 15927, 15933 (2004)).

²¹⁴ Nicole Perlroth, *Spam Invades a Last Refuge, the Cellphone*, N.Y. TIMES (Apr. 7, 2012), http://www.nytimes.com/2012/04/08/technology/text-message-spam-difficult-to-stop-is-a-growing-menace.html?_r=0 (*citing* Ferris



wireless telephone providers.²¹⁵ In 2004, a spokesman for Verizon Wireless indicated that, at that point, wireless companies had been somewhat successful at “beating back” the potential onslaught of text message spam, but noted that “like your home computer, there are some that get through.”²¹⁶

The widespread use of cell phone technology has provided spammers with a cost effective way to reach millions of consumers. In 2004, a report noted that it was expensive to send cell phone spam: “most carriers charge between 8 and 12 cents per message, while sending spam over the Internet is virtually free.”²¹⁷ Today, spammers are able to send millions of texts at a low cost using basic technology. For example, in 2011 the FTC stopped a man after he had sent more than 5.5 million spam text messages – a rate of about 85 text messages per minute, every minute over a period of 40 days.²¹⁸

Like faxes, text messages arrive automatically. Consumers may respond to messages by writing ‘OPT-OUT’ or ‘STOP,’ however, this confirms that the spammer has reached an active phone number.²¹⁹ In the case mentioned above, the defendant advertised mortgage modification services and encouraged consumers to visit his website, “loanmod-gov.net.”²²⁰ By responding ‘STOP’ or by visiting his website and filling out a form, the defendant collected consumers’ information and then sold that information to marketers claiming they were “debt settlement leads.”²²¹

The technology associated with text message spam pre-

Research study).

²¹⁵ Press Release, AdaptiveMobile, 14.2 Million Brits Bombarded By SMS Spam, (Nov. 22, 2012) [hereinafter AdaptiveMobile Press Release], *available at* <http://www.businesswire.com/news/home/20121122005014/en/14.2-million-Brits-bombarded-SMS-spam#.Uz76zlehHHo> (indicating that, in Great Britain, “29% of those that received text spam claim that they would leave their operator if they received between 11 and 30 spam text messages a month.” It is reasonable to assume that tolerance in the United States would be at a much lower level (meaning consumers would switch carriers much sooner), given the current low amount of text message spam received by Americans in comparison to their British counterparts.).

²¹⁶ Tanaka, *supra* note 206.

²¹⁷ *Id.*

²¹⁸ Press Release, Fed. Trade Comm’n, FTC Asks Court to Shut Down Text Messaging Spammer (Feb. 23, 2011) [hereinafter FTC Text Messaging Press Release], *available at* <http://www.ftc.gov/opa/2011/02/loan.shtm>.

²¹⁹ AdaptiveMobile Press Release, *supra* note 213.

²²⁰ FTC Text Messaging Press Release, *supra* note 216.

²²¹ *Id.*

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sents an even greater harm. Consumers may accidentally sign up for a “bogus, impossible-to-cancel service” simply by clicking on a link in a text message.²²² Another text message scam encourages consumers to “claim a Walmart Gift Card,”²²³ or similar reward, it then directs its victims to a website called “walmart-gift.mobi,”²²⁴ or a similar deceptively named site. At the site, consumers are then required to enter in their personal information, including credit card numbers or social security numbers.²²⁵ This increasingly common practice has come to be known as “smishing.”²²⁶ According to a study by Cloudmark, a company that makes anti-spam software, 70% of all text message spam is designed to defraud the recipient in some way.²²⁷

It is often difficult to discover the origin of text message spam. As with telemarketing calls, spammers have learned how to evade identification.²²⁸ As a result, it is exceedingly difficult to locate offenders, which frustrates the efforts of private plaintiffs attempting to enforce the TCPA.

2. Congress Should Reconsider “Identification” Requirements

In 2010, the TCPA was amended by the Truth in Caller ID Act (“TCIDA”), which made it illegal to “knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value.”²²⁹ Unlike most of the TCPA, the TCIDA is not enforceable by private parties. Additionally, the language of the TCIDA focuses on fraudulent conduct. Unfortunately, the identification

²²² Perlroth, *supra* note 212 (quoting Christine Todaro, FTC attorney).

²²³ Claes Bell, *Walmart Warns of Text Message Scam*, BANKRATE.COM (May 24, 2012, 10:00 AM), <http://www.bankrate.com/financing/banking/walmart-warns-of-text-message-scam>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Similar to “phishing” with respect to e-mail spam, the practice is called “smishing” because text messages are also known as short message service messages, or SMS.

²²⁷ Kircheimer, *supra* note 186 (Only 10% of e-mail spam is sent with fraudulent intent).

²²⁸ Eric A. Taub, *Eluding A Barrage of Spam Text Messages*, N.Y. TIMES, Apr. 4, 2012, at B9 (Discussing self-help available for consumers concerning spam text messages: “Which is why when I recently tried to call back the phone number that sent the payday loan offer (via text), a recording stated that ‘the number you dialed is not a working number.’”).

²²⁹ 47 U.S.C. § 227(e) (2011).

requirements provided by the statute are insufficient.

An outright ban on caller ID manipulating technology would be inappropriate because there are a number of benign and even beneficial reasons for doing so. For example, a Caller ID display with the calling party identified as “Verizon Wireless” is much more meaningful to a consumer than a display showing Verizon’s legal name, “Cellco Partnership.”²³⁰ In reviewing the comments received from the public, the FCC noted that there are a “variety of legitimate reasons for altering caller ID information.”²³¹ For example, “doctors responding to after hours messages from their patients or other medical providers may want to use their cell phones to return the calls, but choose to transmit their office number rather than their cell phone number as the calling number.”²³² Consequently, caller ID-modifying technology may be beneficial both to consumers (who screen calls) and businesses (that wish to have consumers call back at a certain number).

Spoofing caller ID has gained more notoriety for its illegitimate (and now illegal) use. While spoofing technology has been used to prank the recipient,²³³ it is increasingly used to encourage consumers to pick up the phone.²³⁴ A spoofed caller ID display may be designed to enable a telemarketer to deliver a truthful

²³⁰ Advance Notice of Proposed Rulemaking Concerning Caller Identification, (Fed. Trade Comm’n Jan. 28, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_comments/16-cfr-part-310-telemarketing-sales-rule-00044%C2%A000044-57517.pdf (comments of Verizon and Verizon Wireless).

²³¹ *Caller ID spoofing*, WIKIPEDIA, http://en.wikipedia.org/wiki/Caller_ID_spoofing (last modified Apr. 1, 2014, 5:55 PM) (“Valid reasons to spoof caller ID”).

²³² In the Matter of Rules and Regulations Implementing the Truth in Caller ID Act of 2009, FCC 11-100, pg. 4-5 (June 20, 2011) (*citing* PRC Reply at 3; DOJ Reply at 4-5) *available at* http://hraunfoss.fcc.gov/eduocs_public/attachmatch/FCC-11-100A1/pdf.

²³³ *LAPD on Guard After Tom Cruise, Chris Brown ‘Swatting’ Incidents*, L.A. TIMES (Jan. 22, 2013, 4:04 PM), <http://latimesblogs.latimes.com/lanow/2013/01/lapd-on-guard-after-tom-cruise-chris-brown-swatting-incidents.html>.

²³⁴ Matt Richtel, *Who’s on the Line? Increasingly, Caller ID is Duped*, N.Y. TIMES (Nov. 22, 2011), http://www.nytimes.com/2011/11/23/us/whos-on-the-line-increasingly-caller-id-is-duped.html?pagewanted=all&_r=0 (“Telemarketers increasingly are disguising their real identities and phone numbers to provoke people to pick up the phone. ‘Humane Soc.’ may not be the Humane Society. And think the I.R.S. is on the line? Think again. Caller ID, in other words, is becoming fake ID.”).

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pitch, or to get a debtor to answer the phone. Both examples may be frustrating to consumers, but may be of little actual harm.

The issue with the TCIDA's identification requirements is two-fold. First, technology enabling individuals and entities to spoof their identification is cheap and readily available.²³⁵ Second, individuals that intend to deceive others or otherwise commit fraud are unlikely to be deterred by regulations that require them to provide truthful identification. As a result, identification requirements are difficult to enforce and may have little practical effect.

The TCPA has required sender identification for fax transmissions²³⁶ and prerecorded and autodialed messages²³⁷ since 1992, but that has not stopped companies from delivering callback numbers that do not lead back to the telemarketer making the phone call. To further illustrate this point, consider spam e-mail, which is regulated under the CAN-SPAM Act of 2003.²³⁸ CAN-SPAM, makes it (1) a *crime* to send unsolicited commercial e-mails containing fraudulent header information;²³⁹ (2) prohibits the transmission of spam to individuals that have opted out of receiving further communications from the sender;²⁴⁰ and (3) requires certain identification information be included in all com-

²³⁵ For example, the company SpoofCard offers 60 minutes of calls with a spoofed caller ID for \$9.95.

²³⁶ 47 C.F.R. § 68.318(c)(3) (1998) ("It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message."). Today, fax machine identification requirements are located at 47 C.F.R. § 68.318(d).

²³⁷ 47 C.F.R., §§ 64, 68: 64.1200(e)(iv) (1998) ("A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call.")

²³⁸ CAN-SPAM Act, 15 U.S.C.A. §§ 7701-7713 (West Supp. 2004).

²³⁹ 18 U.S.C.A. § 1037 (West Supp. 2004).

²⁴⁰ 15 U.S.C.A. § 7704(a)(4).



mercial e-mail.²⁴¹ As with spoofing caller ID, the practice of sending unsolicited commercial e-mail is legal, so long as the practice adheres to certain requirements.

In 2003, when CAN-SPAM was enacted, spam comprised nearly 60% of all e-mail traffic.²⁴² In 2010, it was estimated that 88% of worldwide e-mail traffic was spam.²⁴³ CAN-SPAM has had a limited effect on unsolicited commercial e-mail. Much of “spamming activity was already illegal, including the sale of counterfeit goods infringing on trademarks and intellectual property rights, or pharmaceuticals that are illegal to dispense without a prescription in many jurisdictions (or even to ship across state lines to a consumer with a valid prescription).”²⁴⁴ Additional regulations fail to deter those already acting illegally.

Regulation of spoofing caller ID – like regulation of spam – targets conduct that is most likely part of a larger overall scheme to defraud or scam individuals, conduct that is already illegal. Additionally, individuals or entities that are spoofing caller ID are just as likely to be located overseas as those individuals or entities flooding inboxes with spam.

This is not to say that regulation of such conduct is unnecessary. To the contrary, it is important to have legislation in place that clearly regulates the use of caller ID manipulation, spam e-mail, and the like. These laws deter legitimate companies that would otherwise engage in this intrusive conduct, and consumers are better protected as a result. However, it seems evident that, with respect to those that are determined to act illegally, an additional technical regulation will do little to stop them.

VII. ADDRESSING MODERN ISSUES IMPACTING THE TCPA

Today, the TCPA remains a relevant statute as advances in technology continue to lead to “ever-increasing access through electronic means that advertisers have to consumers.”²⁴⁵ The

²⁴¹ 15 U.S.C.A. §§ 7704(a)(3), (a)(5).

²⁴² Jonathan Krim, *Senate Votes 97-0 to Restrict E-Mail Ads: Bill Could Lead to No-Spam Registry*, WASH. POST, Oct. 23, 2003, at A1; see also Adam Zitter, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 FORDHAM L. REV. 2767, 2822 (2004).

²⁴³ Justin M. Rao and David H. Reily, *The Economics of Spam*, 26 J. OF ECON. PERSPECTIVES 87 (Summer 2012).

²⁴⁴ *Id.*

²⁴⁵ *Critchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 774

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TCPA's private right of action serves as an effective deterrent in curtailing the conduct of legitimate companies.

While consumers have been protected from some of the intrusive conduct targeted by the TCPA, there are a number of steps that should be taken to increase the effectiveness of the statute. The FCC enforcement process takes too long. Consumers would be better served by a quicker, more transparent process. Additionally, efforts at educating consumers about existing regulation and how to recognize scams or frauds would also go a long way in reducing the impact of TCPA violations.

A. Increase Government Enforcement of the TCPA

Government enforcement is critical to the success of the TCPA. In the past, private parties have represented the majority of TCPA enforcement, and the private right of action still serves as a significant deterrent. Nevertheless, there is a growing necessity for government enforcement actions due to a considerable rise in the amount of intentional violators. The case study below provides an illustration of the current shortcomings of government enforcement.

CASE STUDY #2: Fax.com

From 2000-2005, Fax.Com was subject of numerous of lawsuits filed across the country. The most notable was a lawsuit filed in California in 2002 seeking \$2.2 trillion in damages. At least one of these lawsuits was successful in securing a final judgment. However, it quickly became clear to the members of Covington & Burling (the plaintiff's firm) that Fax.Com's goal was to draw out the litigation while it continued to send illegal faxes. One year after being hit with a \$2.3 million judgment, Fax.com was still sending as many as 785,000 faxes per week.

While private lawsuits piled up, government regulators slowly intervened. In 2002, the FCC had proposed forfeiture against Fax.Com for TCPA violations. In conjunction with the proposed forfeiture, the FCC issued over 100 citations and letters of inquiry to companies that used Fax.Com's service to send fax advertisements.

(Kan. 2011).

However, even after the citations and proposed forfeiture, Fax.Com continued on with the illegal practices.

In July 2003, the Attorney General for the State of California then filed a lawsuit against the company, seeking more than \$15 million in penalties and other relief. According to then-California Attorney General Bill Lockyer, "Fax.Com, with high-level technology and low-level respect for the law, runs a 24-hour privacy invasion operation that continually spews unsolicited faxes and pre-recorded phone calls." In January 2004, the FCC imposed the previously proposed forfeiture, a \$5.4 million penalty, the largest single fine ever imposed for violation of the TCPA. In spring 2004, an injunction was issued in the case filed by the California Attorney General, mandating that Fax.Com and its surrogates refrain from sending junk faxes. With a valid injunction issued, Fax.Com finally agreed to stop.

The Fax.Com case study demonstrates the difficulty and time it takes to stop an entity that is determined to violate the TCPA. The imposition of fines and valid judgments in excess of \$7 million did little to deter Fax.Com's conduct. It was likely the threat of criminal prosecution (which would result if the injunction was violated) that coerced the company to stop its practice of sending unsolicited fax advertisements.²⁴⁶

²⁴⁶ See, e.g., Kaufman v. ACS Sys., Inc., 110 Cal. App. 4th 886, 2 Cal. Rptr. 3d 296 (2003); Aronson v. Fax.com Inc., No. AR00-003023, 2001 WL 1202609 (Pa. Ct. Common Pleas Feb. 28, 2001); Morris v. Fax.com, No. 03-CA-1109 (D.C. Super. Ct. 2003); Levitt v. Fax.com, Inc., 383 Md. 141, 857 A.2d 1089 (2004); Rudgayzer & Gratt v. Enine, Inc., 4 Misc. 3d 4, 779 N.Y.S.2d 882, 884 (N.Y. App. Term 2004); Bruns v. E-Commerce Exch., Inc., 51 Cal. 4th 717, 722, 248 P.3d 1185, 1188 (2011); McGarry v. Cingular Wireless, LLC, 267 Ga. App. 23, 599 S.E.2d 34, 35 (2004); Hanna Campbell & Powell, LLP v. Fax.com, Inc., No. CV 2002-12-6926, 2003 WL 25696634 (Ohio Ct. Common Pleas 2003); Redefining Progress v. Fax.Com, Inc., No. C 02-4057 MJJ, 2003 WL 926853 (N.D. Cal. 2003); Covington & Burling v. Int'l Mktg. & Research, Inc., No. CIV.A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. 2003); Ryan Singel, *Fax.com Still Dodging Legal Slaps*, WIRED.COM (Jan. 1, 2004), <http://www.wired.com/techbiz/media/news/2004/01/61861?currentPage=all> (quoting Jason Levine, an attorney at Covington & Burling, "During the course of our litigation, it became clear very quickly that Fax.com was very skilled at using the legal system to draw out the length of time that lawsuits against it would be pending."); *Unsolicited Faxes Detailed Information*, *supra* note 146 ("\$5,379,000 forfeiture proposed against Fax.com, Inc. for violations of the Telephone Consumer Protection Act."); Press Release, Fed. Comm'n

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Fax.Com was a company originally based in California, and private parties did not have difficulty locating the company. Unfortunately, the companies that are increasingly responsible for the majority of TCPA violations are located overseas. With respect to telemarketing solicitations, David Vladeck, Director of the FTC's Bureau of Consumer Protection has said, "These are not like the calls we grew up with . . . They are computer-blasted calls that are enabled by the Internet. The dialers are outside the U.S. generally, and these dialers are capable of blasting out an unfathomable number of telephone calls."²⁴⁷

Government enforcement is necessary. Private parties do not possess the resources or the incentive to track and locate entities located outside the United States. Even for companies located within the United States, such as the individual that the FTC prohibited from sending text messages to millions of people, private parties may lack an incentive to bring an enforcement action against them because (for private parties) a judgment is meaningless without the ability to recover damages.

B. Aiding FCC Enforcement Efforts: Expanding Authority and Increasing Incentive

The FCC is the only federal agency currently able to bring enforcement actions against TCPA violators. State Attorneys General also have this ability, but must generally defer to the FCC enforcement process. Several statutory amendments to the TCPA may increase the amount and effectiveness of government enforcement actions, including: (1) increasing penalties per violation; (2) enabling the FCC to dispense with its typical enforcement procedure; and (3) enabling the FTC to bring enforcement

Comm'n, FCC Proposes \$5,379,000 Fine Against Fax.Com, Inc. for Violating "Junk Fax" Prohibition (Aug. 7, 2002), *available at* http://transition.fcc.gov/eb/News_Releases/DOC-225128A1.html; Press Release, Office of the Attorney General, State of California Department of Justice, Attorney General Lockyer Files Lawsuit Against One of Nation's Largest Junk Fax Businesses (July 22, 2003), *available at* <https://oag.ca.gov/news/press-releases/attorney-general-lockyer-files-lawsuit-against-one-nations-largest-junk-fax>; Press Release, Fed. Comm'n, FCC fines fax.com over \$5 million for sending "junk faxes" (Jan. 5, 2004), *available at* http://transition.fcc.gov/eb/News_Releases/DOC-242654A1.html; Scott Hovanyetz, *Fax.com Accepts Injunction*, DMNEWS.COM (Oct. 11, 2004), <http://www.dmnews.com/faxcom-accepts-injunction/article/85570/>.

²⁴⁷ Lauren Silverman, *FTC Offers \$50,000 Reward to Help Stop Robocalls*, NPR (Jan. 02, 2013), www.npr.org/2013/01/02/168444025/reward-offered-to-help-stop-robocalls.

actions against TCPA violators.

Increasing the penalties per violation for government agencies would encourage more government action by both the FCC and by State Attorneys General. Currently, the FCC may seek up to \$16,000 per violation. State Attorneys General, on the other hand, are only provided with the same statutory damages amount as private parties. Granting State Attorneys General, whom have historically shown a willingness to bring such claims, the ability to bring suit seeking higher damages will increase the incentive for these state agencies to bring enforcement actions.

Increasing the number of government agencies that could bring a cause of action under the TCPA would also result in more effective enforcement actions. Enabling the FTC to bring enforcement actions against TCPA violators would provide the federal consumer protection agency with a broader arsenal with which to protect consumers. The FTC is already actively involved in the areas implicated by the TCPA, and would likely have greater success in pursuing individuals and entities that violate the FTC Act or Telemarketing Sales Rule when provided with the broader enforcement tool of the TCPA. Since the TCPA is more than just telemarketing regulation, and because of the increasing amount of fraud with respect to unsolicited calls and text messages, empowering the FTC to bring suit under the TCPA would increase the ability of the FTC to effectively protect consumers.

C. Increase Uniformity of Application

The TCPA has been amended and interpreted by FCC rules and many judicial decisions over the past twenty years. Combined with the slow FCC rulemaking process, this has resulted in inconsistent interpretations of the statute and confusion as to the legality of certain conduct.

The TCPA would be a more effective statute if steps were taken to increase the uniformity of its application. The Supreme Court's recent decision in *Mims v. Arrow Financial Services, LLC*, that the TCPA provides federal question jurisdiction should indirectly bring more uniformity in application. To the extent that increased litigation in federal courts cannot naturally solve the uniformity of application issues, consumers and industry members alike would be better served by more frequent and quickly delivered FCC interpretive rules. Lastly, rules and memoranda of understanding addressing FTC/FCC regulatory over-

lap would provide much needed clarity to all involved parties.

1. Increased Litigation in Federal Courts Should Bring More Uniformity

The Supreme Court in *Mims v. Arrow Financial Services, LLC*, only recently addressed the issue of federal question jurisdiction over TCPA violations brought by private parties.²⁴⁸ In *Mims*, the Court resolved a split among the circuits regarding whether a private party may file suit in federal court without diversity jurisdiction, or whether the TCPA granted exclusive jurisdiction to state courts.²⁴⁹ The Court held that the TCPA's grant of jurisdiction to state courts does not deprive the federal district courts of federal question jurisdiction over private lawsuits alleging TCPA violations.²⁵⁰

Until the Court's 9-0 decision in *Mims*, only the Sixth and Seventh Circuits recognized federal question jurisdiction over private lawsuits alleging TCPA violations.²⁵¹ The Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits had previously held that district courts lacked federal question jurisdiction over private TCPA claims.²⁵²

After the *Mims* decision, it can be expected that TCPA litigation will increase in federal courts (either initially filed or removed by defendants). Following the suit, several law firms stated that they expected a "flood of TCPA claims" in federal courts.²⁵³ In the year since more federal courts were opened to private TCPA litigants, the number of TCPA cases filed in-

²⁴⁸ *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Charvat v. EchoStar Satellite, LLC*, 630 F. 3d 459, 463-465 (6th Cir. 2010); *Brill v. Countrywide Home Loans, Inc.*, 427 F. 3d 446, 447 (7th Cir. 2005)

²⁵² *See e.g., Foxhall Realty Law Offices, Inc. v. Telecomm's Premium Servs., Ltd.*, 156 F.3d 432, 434 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3rd Cir. 1998); *Intern'tl Science & Technology Inst. v. Inacom Comm's, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *The Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Murphy v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000); *Mims v. Arrow Financial Services, LLC*, 421 Fed.Appx. 920, 921 (11th Cir. 2010).

²⁵³ *See David N. Anthony, et al., Flood of TCPA Claims Expected in Federal Courts*, TROUTMAN SANDERS LLP (Jan. 24, 2012), <http://www.troutmansanders.com/flood-of-tcpa-claims-expected-in-federal-courts-01-24-2012/>.

creased by 34%.²⁵⁴ However, relative to other consumer protection statutes (e.g., FDCPA²⁵⁵ and FCRA²⁵⁶), TCPA litigation remains a relatively low proportion of a federal court's docket:

TCPA Litigation in Federal Court

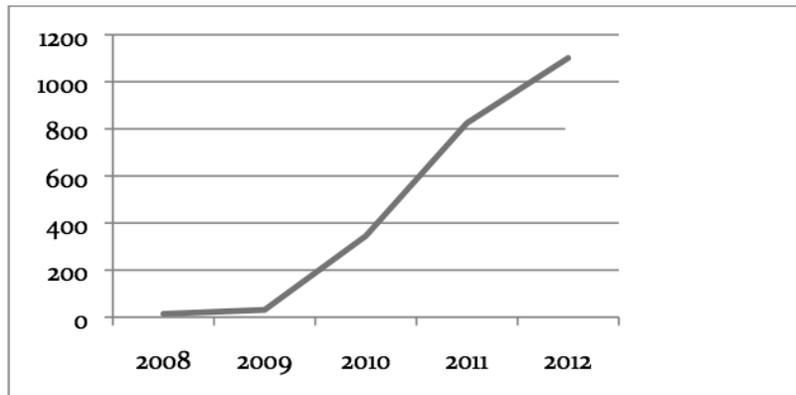


Figure 12²⁵⁷

TCPA Litigation vs. Other Consumer Protection Statutes

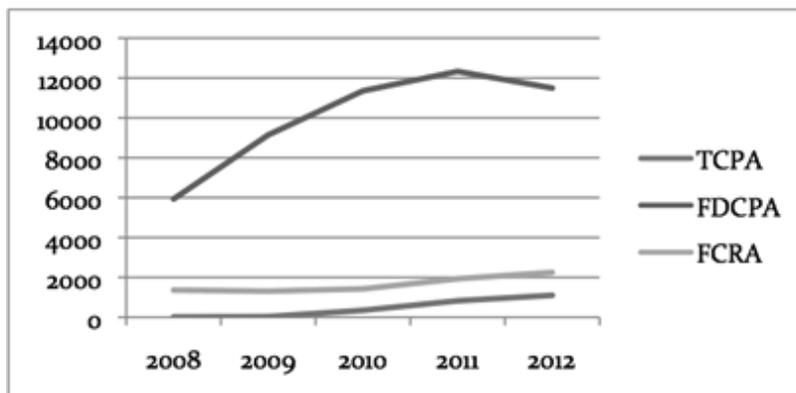


Figure 13²⁵⁸

²⁵⁴ Jack Gordon, *FDCPA and Other Consumer Lawsuit Statistics, Dec 16-31 & Year-End Review 2012*, INTERACTIVECREDIT.COM (Jan. 16, 2012), <http://interactivecredit.com/?p=1761> (1101 cases in 2012 compared to 825 in 2011).

²⁵⁵ Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

²⁵⁶ Fair Credit Reporting Act, § 1681 et seq.

²⁵⁷ *WebRecon, LLC*, <https://www.webrecon.com/b/2012-year-end-stats/for-immediate-release-fdcpa-and-other-consumer-lawsuit-statistics-dec-16-31-year-end-review-2012/>.

²⁵⁸ *WebRecon, LLC*, <https://www.webrecon.com/b/2012-year-end-stats/for-immediate-release-fdcpa-and-other-consumer-lawsuit-statistics-dec-16-31-year-end-review-2012/>.

The result of the *Mim*'s decision creates a more uniform application of the statute, if only because fewer courts are considering certain issues. However, inconsistent decisions remain within circuits on certain issues pertaining to the TCPA, which suggests that the statute will continue to suffer from interpretive fragmentation. Greater action on behalf of the government will help cure uniformity of application issues.

2. More FCC Rulemaking is Necessary

FCC rulemaking plays a critical role in providing uniformity and clarity in implementation and interpretation of the TCPA.²⁵⁹ An FCC ruling, such as the one discussed below, can save industry-members from the potential of inconsistent judicial interpretations and limits judicial review to the reasonableness of the FCC rule.

In its November 2012 Declaratory Ruling, the FCC considered the issue of whether a one-time confirmatory text message sent to acknowledge an opt-out request was a violation under the TCPA.²⁶⁰ From a practical standpoint, a confirmatory text message – sent in response to a request to opt-out of further texts – might be a reasonable thing to expect. Indeed, many consumers may wish to see a confirmatory response, to know that they have in fact been removed from the sender's text messaging list.²⁶¹

Recall that the TCPA strictly prohibits the use of auto-dialers²⁶² to make non-emergency calls without prior express consent to any cell phone.²⁶³ The FCC has concluded that this prohibition extends to both voice and text calls.²⁶⁴ Although it is

16-31-year-end-review-2012/.

²⁵⁹ Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1132, reenacted as 28 U.S.C. 2341-2353 (Challenges to FCC rules and regulations are subject to the Hobbs Administrative Orders Review Act, which deals with judicial review of agency regulations.)

²⁶⁰ Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991, C.G. Docket No. 02-278, FCC 12-143 (Nov. 26, 2012).

²⁶¹ MOBILE MARKETING ASSOCIATION, U.S. CONSUMER BEST PRACTICES, VERSION 6.1 15, § 1.6-4 (2011), available at http://mmaglobal.com/Consumer_Best%20Practices_6.1%20Update-02May2011FINAL_MMA.pdf.

²⁶² Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-153 ¶ 133 (July 3, 2003).

²⁶³ 47 U.S.C. § 227(b)(1)(A) (2011); 47 C.F.R. § 64.1200(a)(1)(iii) (2011).

²⁶⁴ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-153 ¶ 165 (July 3, 2003).

reasonable (from a consumer's standpoint) that a confirmatory text message would be sent in response to a request to opt-out, it is also reasonable (from a judge's standpoint) that the text message-sender no longer had "consent" after the consumer sent his or her opt-out request.²⁶⁵

The TCPA provided little guidance on the issue. Neither the text of the TCPA nor its legislative history address the circumstances under which prior express consent is deemed revoked.²⁶⁶ With the TCPA's statutory damages provision, different judicial interpretations could result in millions of dollars in potential TCPA liability. With one declaratory ruling, however, the FCC clarified the law on this matter.²⁶⁷ The FCC concluded that "one-time texts confirming a request that no further text messages be sent does not violate the TCPA or the [FCC's] rules as long as the confirmation text meets specific characteristics."²⁶⁸

A single FCC decision can provide a unified, national voice and guide to interpreting the TCPA. Here the agency was able to issue a ruling that prevented inconsistent – although equally reasonable – interpretations. Moreover, the FCC's process is likely more informed than merely one federal or state court hearing the matter. The FCC's rulemaking process requires a comment period in which many different interested parties (businesses and consumers alike) file their opinion to be considered. In contrast, a court proceeding is usually limited to just the parties involved in the particular litigation.

The importance of FCC interpretative guidance is demonstrated by the confirmatory opt-out text message case discussed above. One issue, however, is the speed with which the FCC responds to petitions from industry members and issues declaratory rulings like the one discussed above. For example, the original petition in the opt-out confirmatory text message case was filed on February 16, 2012.²⁶⁹ The FCC responded in late November 2012.²⁷⁰ Whether this is a natural result of the rulemaking process

²⁶⁵ Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991, C.G. Docket No. 02-278, FCC 12-143 at 2 (Nov. 29, 2012).

²⁶⁶ *Id.* at 4.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 4 n. 31 (Confirmatory texts must: "(1) merely confirm the consumer's opt-out request and do not include any marketing or promotional information; and (2) are the only additional message sent to the consumer after receipt of the opt-out request.").

²⁶⁹ *Id.*

²⁷⁰ *Id.*

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due to the amount of the research required or number of interested parties involved is not immediately clear.

The TCPA's effectiveness depends on the FCC continuing to timely deliver these types of declaratory rulings. This is especially true as the statute is interpreted to address new forms of technology. FCC interpretations reduce the likelihood of inconsistent judicial interpretations – as the focus of judicial inquiry on the topic would be on the reasonableness of the FCC's interpretation.²⁷¹ A continued FCC presence through declaratory rulings and interpretations would serve both consumers and industry members well.

Uniform regulation is necessary to provide industry members with a clear understanding of what practices are legally permitted. For instance, the Sixth Circuit in *Charvat v. EchoStar Satellite*,²⁷² noted that “[t]elemarketers generally peddle their services nationally [which creates] the possibility of conflicting decisions in different state and federal jurisdictions.”²⁷³ Similarly, debt collection agencies' business often spans multiple jurisdictions. Consequently, inconsistent judicial interpretations – a natural result of the many different jurisdictions considering TCPA lawsuits – leaves industry members exposed to unclear regulation.

There is reason to be optimistic that the TCPA will become more uniformly interpreted as the statute is litigated more frequently in federal courts rather than state courts.²⁷⁴ However, there is no guarantee. As the TCPA expands to cover new technologies, reasonable differences of opinion will surface, and the FCC must be present more often to issue guidance.

3. Clearer Rules and Memoranda of Understanding Could Help Reduce Confusion from Regulatory Overlap

Although both the CAN-SPAM Act and the TCPA primarily regulate the use of technology to send unsolicited messages, the two statutes have generally been confined to different me-

²⁷¹ *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010) (“[a]lthough a decision by the FCC would not *guarantee* nationwide uniformity, it would narrow the scope of judicial inquiry to whether the agency reasonably interpreted the statute.”).

²⁷² *Id.* at 459.

²⁷³ *Id.* at 466.

²⁷⁴ As opposed to thousands of state courts, TCPA lawsuits are now more likely to be filed in, or removed to, federal courts.



dia (e-mail for CAN-SPAM, and telephones and fax machines for the TCPA). However, new technology has resulted in an overlap: internet-to-cell phone text messages implicate both the TCPA and CAN-SPAM.²⁷⁵

Internet-to-cell phone text messages work as follows: every cell-phone number has an e-mail address, which is typically that user's cell phone number with their wireless carrier's Internet address.²⁷⁶ For example, a cell phone user that subscribed to AT&T with the number (123) 456-7890 would have the following e-mail address 1234567890@att.wireless.net.²⁷⁷ Anyone may write an e-mail to that address, which the wireless carrier then converts into a text message. The message is then sent directly to a person's cell phone as a text message.²⁷⁸

CAN-SPAM reaches text messages if "the messages use an Internet address that includes an Internet domain name."²⁷⁹ Specifically, under CAN-SPAM, the FCC has the power to regulate mobile service commercial messages (MSCMs), which are defined as "a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service . . . in connection with such service."²⁸⁰ With respect to the TCPA, text messages are considered a "call" for which the called party is charged. As a result, if the text message is sent by an "automatic telephone dialing system,"²⁸¹ or without consent of the recipient, it is illegal under the TCPA.

Under the CAN-SPAM Act, both the FTC and the FCC regulate certain text messages. Examining the FTC's rules, the

²⁷⁵ CAN-SPAM Act, 15 U.S.C. § 7712 (2006) (Section 14 of the CAN-SPAM Act explicitly states that the Act does not preempt the TCPA.).

²⁷⁶ Gareth S. Lacy, *Mobile Marketing Derailed: How Curbing Cell-Phone Spam in Satterfield v. Simon & Schuster May Have Banned Text-Message Advertising*, 6 WASH. J.L. TECH. & ARTS 33, 36 (2010).

²⁷⁷ *Joffe v. Acacia Mortgage Co.*, 121 P.3d 831, 837-38 (Ariz. Ct. App. 2005); See also Gareth S. Lacy, *Mobile Marketing Derailed: How Curbing Cell-Phone Spam in Satterfield v. Simon & Schuster May Have Banned Text-Message Advertising*, 6 WASH. J.L. TECH. & ARTS 33, 36 (2010).

²⁷⁸ *Joffe*, 121 P.3d at 837-38 (Ariz. Ct. App. 2005); See also, Gareth S. Lacy, *Mobile Marketing Derailed: How Curbing Cell-Phone Spam in Satterfield v. Simon & Schuster May Have Banned Text-Message Advertising*, 6 WASH. J.L. TECH. & ARTS 33, 36 (2010).

²⁷⁹ 15 U.S.C. §7712.

²⁸⁰ *Id.*

²⁸¹ 47 U.S.C. § 227(a)(1) (2011) ("The term 'automatic telephone dialing system' means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.").

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focus is placed on identification requirements. For example, under the FTC's CAN-SPAM Act rules all marketing messages must identify the sender and must include an opt-out mechanism.²⁸² In contrast to the FTC's rules, the FCC rules require the sender to have the consent of the recipient. Although the FCC also requires the sender to provide identification, under FCC rule the message must clearly identify the sender so that the recipient can reasonably determine that the sender indeed has obtained the recipient's consent.²⁸³

Joffe v. Acacia Mortgage Corp. sought to sort out the overlapping statutes.²⁸⁴ The defendant, Acacia, had programmed its computers to send e-mail advertisements to consumer e-mail addresses.²⁸⁵ In the plaintiff's case, Acacia's computers generated his cell phone number, "(602)XXX-XXXX," plus his cell phone carrier's domain name, "att.net," and sent the solicitations to the e-mail address 602XXXXXXXX@att.net. AT&T then converted the e-mails into text messages, which the plaintiff received on his phone.

Acacia argued that the TCPA did not apply because they had merely sent an e-mail to the plaintiff, and e-mails are covered by CAN-SPAM and not the TCPA.²⁸⁶ Disagreeing with Acacia's reasoning, the court held that "[w]hether a text message is sent phone-to-phone or Internet-to-phone, the end result is the same. The recipient's cellular telephone carrier forwards what is an SMS message to the recipient's cellular telephone."²⁸⁷ The court then held, "Acacia took advantage of Internet-to-phone SMS technology – technology that guaranteed its computer generated text messages would be delivered to [the plaintiff's] cellular telephone. By pairing its computers with SMS technology, Acacia did what the TCPA prohibits. It used an automatic telephone dialing system to call a telephone number assigned to a cellular telephone."²⁸⁸

The court then considered the TCPA's interaction with the CAN-SPAM Act. The court found that Congress believed that the "CAN-SPAM Act and the TCPA would have 'dual-

²⁸² 16 C.F.R. § 316.

²⁸³ 47 C.F.R. § 64.3100.

²⁸⁴ *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831 (Ariz. Ct. App. 2005).

²⁸⁵ *Id.* at 833.

²⁸⁶ *Id.* at 833.

²⁸⁷ *Id.* at 838.

²⁸⁸ *Id.* at 840.

applicability.”²⁸⁹ The court acknowledged that the FCC had decided to regulate Internet-to-phone SMS messages under § 14 of the CAN-SPAM Act because they are initially directed to an address that contains an Internet domain reference.²⁹⁰ However, this decision did not preempt the applicability of the TCPA to Internet-to-phone text messages. Moreover, “[a]pplication of the TCPA to Internet-to-phone SMS messages does not render the CAN-SPAM Act’s regulation of such messages superfluous” because the CAN-SPAM Act is “broader than the TCPA.” The court noted, “[t]he CAN-SPAM Act applies to all uninvited MSCMs. In contrast, the TCPA applies to only those calls made using an automated dialing system or an artificial or prerecorded voice.”²⁹¹

The FCC has issued rules in the past that make it clear that the use of certain technology is prohibited regardless of the content being delivered. In the above case, Acacia may have believed that sending e-mails (even though they ultimately became text messages) was legal. A clear rule issued by the FCC that states a text message received by a recipient is subject to the TCPA, no matter the manner in which it is sent, would clearly establish the bounds within which an industry member could operate.

The overlap between FTC and FCC rule should be addressed by the two agencies. The FTC and FCC have published memoranda of understanding in the past concerning regulatory and enforcement efforts.²⁹² A clear memorandum explaining the FTC and FCC’s positions on the application of CAN-SPAM and the TCPA to new technology would better serve both consumers and businesses alike.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 841 (*citing* Rules and Regulations Implementing the CAN-SPAM Act of 2003 and the TCPA, 19 FCC Rcd. 15927, 15933, § 16, 2004 WL 1794922 (2004)).

²⁹¹ *Id.*

²⁹² FED. TRADE COMM’N, ANNUAL REPORT TO CONGRESS FOR FY 2003 AND 2004 PURSUANT TO THE DO NOT CALL IMPLEMENTATION ACT ON IMPLEMENTATION OF THE NATIONAL DO NOT CALL REGISTRY app. (Sept. 2005), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call-registry-annual-report-congress-fy-2003-and-fy-2004-pursuant-do-not-call/051004dncfy0304.pdf> (FCC – FTC Memorandum of Understanding: Telemarketing Enforcement (Dec. 2003)).

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D. Amending the TCPA

In addition to more effective FCC rulemaking and an expanded role for the FTC, statutory amendments are necessary to address new and changing technology. The following addresses existing proposed amendments and new potential amendments that would clarify and strengthen TCPA regulation of new and existing technologies.

1. Protect Cell Phones: No Exceptions to Ban

Congress debated legislation in late 2010 and 2011 that would have limited the protections afforded to consumers' cell phones. Had The Mobile Informational Call Act of 2011 (MICA) been enacted, it would have amended the TCPA to "permit informational calls to mobile telephone numbers." The bill's sponsor, Congressman Lee Terry, explained that the bill was designed to "[p]rovide consumers with important information in a timely manner" and "would modernize the TCPA by:

- Exempting informational calls from the restriction on auto-dialer and artificial/prerecorded voice calls to wireless numbers;
- Clarifying the "prior express consent" requirement to ensure that the TCPA facilitates communications between consumers and the businesses with which they choose to interact; and
- Continuing the prohibition against the use of assistive technologies to make telemarketing calls to wireless numbers."²⁹³

Congressman Terry stated "[u]nfortunately, the [TCPA] restricts informational calls to mobile devices. With approximately 40% of consumers relying on wireless phones as their primary or exclusive communications device, the TCPA's outdated restriction on the use of assistive technologies in contacting wireless consumers for non-telemarketing purposes is now doing far more harm than good."²⁹⁴

²⁹³ Press Release, U.S. Congressman Lee Terry, The Mobile Informational Call Act of 2011 (Oct. 11, 2011), *available at* <http://leeterry.house.gov/news/documentsingle.aspx?DocumentID=359628>.

²⁹⁴ *Id.*

A letter sent to Congress signed by 54 Attorneys General outlined the danger of robocalls to cell phones as a result of the “inevitable increase in calls to wireless phones.”²⁹⁵ Although the legislation did not pass, it is important to acknowledge the ongoing efforts to change the TCPA, and the impact amendments would have on the statute.

The TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an EBR or similar exemption would drastically increase the amount of calls a consumer could receive. MICA, and legislation like it, should not be enacted. The heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.

2. Protect Cell Phones: Prior Express Consent Required

The FCC should require prior, express written consent for any commercial message received as a text message by a recipient. Various techniques have been proposed to regulate telemarketing technology. Company-specific opt-out schemes have proven inefficient when applied to both junk faxes and telemarketing regulation and should not be applied to text messages. The consumer would still bear the cost of the initial unwanted text message and would have to contact each company to opt-out. Thus, an EBR or other exception to a pure consent-based scheme for text messaging is inappropriate.

There is currently an FCC petition seeking to allow third parties to provide the consent required for sending an unsolicited text message to a recipient.²⁹⁶ Allowing consent to be given by a third party is not true consent, and would lead to significant consumer confusion. Consumers should not be exposed to a potential flood of unwanted text messages that might legally be sent through “consent” derived through a business relationship (i.e., a text message EBR) or from a third party. The FCC and Congress

²⁹⁵ Letter from the National Association of Attorneys General to Congress (Dec. 7, 2011), *available at* http://signon.s3.amazonaws.com/20111207.signon.Final_HR3035_Letter.pdf (*citing* distraction.gov; 2009 study by the National Highway Traffic Safety Administration indicated that cell phone use was involved in 995 fatalities (or 18%) in distraction-related accidents).

²⁹⁶ GroupMe, Inc., Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021871907>.

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must keep a strict, opt-in consent based scheme for the regulation of text messages.

3. Increasing Clarity: Placing a Time Limit on the Junk Fax EBR

A time limit on the junk fax EBR would be a simple and practical improvement. In considering whether a company has an EBR with a consumer, the FTC characterizes the issue as follows: “would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national ‘do-not-call registry’?”²⁹⁷ The same principle may generally be sought with respect to a junk fax EBR time limit: “after a certain period of time, would the consumer be surprised to receive an unsolicited fax advertisement from this entity?” The answer would almost assuredly be that the consumer does not expect to receive an unsolicited advertisement after over a year has passed since the EBR was formed (without additional facts showing that there is a continued relationship during that time).

While this would require an increased amount of record keeping by businesses, those wishing to send an unsolicited fax pursuant to an EBR must already be able to establish that an EBR exists in the event of a challenge brought by a consumer. Recognizing the ease in which an EBR may be created, Senator Dodd remarked, “[t]here are going to be people coming back, once they discover that *any* prior business relationship pretty much will allow the exception to occur . . . [that] are going to be asking us to come back and even close the loophole down further.”²⁹⁸ By placing a one-year time limit on the junk fax EBR, this loophole is closed, but does not place that great of a burden on an entity that was required to prove the existence of an EBR in the first place.

Some may advocate completely removing the junk fax EBR. However, this would come at a great cost to entities that send unsolicited advertisements pursuant to the EBR with little actual impact on the tide of the current problems facing the TCPA. The EBR is not the greatest source of the junk fax prob-

²⁹⁷ 68 Fed. Reg. 4594 (Jan. 29, 2003); *see also* 47 C.F.R. § 64.1200(f)(5)(ii) (2011) (the FCC’s rules provide: an “established business relationship with a particular business entity does not extend to affiliated entities unless the [consumer] would reasonably expect them to be included”).

²⁹⁸ 149 CONG. REC. S11957, 11964 (daily ed. Sept. 25, 2003) (statement of Sen. Dodd) (emphasis added).



lem. Current lawsuits indicate that those violating the TCPA are either unaware of the TCPA (and thus would not know of the EBR) or are intentionally violating the TCPA. As a result, completely removing the EBR may not have that great of a practical effect on increasing compliance.

A time limit placed on the junk fax EBR, based on the Do-Not-Call Registry's EBR, would reduce both consumer confusion and unwanted fax advertisements, and would do so without a significant burden on industry members. The time limit imposed should recognize that an EBR would last longer where the consumer-recipient has taken a more active step in communicating with the sender. Accordingly, the following should be adopted for the junk fax EBR:

The Junk Fax EBR should be limited to the following in instances where the recipient "(i) purchased, rented, or leased goods or services from the seller or entered into a financial transaction with the seller within the eighteen months immediately preceding the date of the telemarketing call; or (ii) made an "inquiry or application regarding a product or service offered by the seller, within the three months immediately preceding the date of a telemarketing call."²⁹⁹

4. Increase Effectiveness: Targeting Junk Fax Broadcasters

The immense amount of junk faxes that have been sent over the past twenty or more years is due largely in part to "fax blasters," third parties that send faxes to consumers on behalf of others. The FCC originally concluded that common carriers simply providing transmission facilities to transmit fax advertisements would not be held liable in the absence of a high degree of involvement or actual notice of illegal use of its system.³⁰⁰ In 2003, the FCC amended its rules "to state explicitly that a fax broadcaster will be liable for an unsolicited fax [only] if there is a high degree of involvement or actual notice on the part of the broadcaster."³⁰¹

Common carriers would only be subject to liability under similar circumstances of involvement or actual notice of illegal

²⁹⁹ Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii) (2010).

³⁰⁰ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. 8752, 8779; *see also Taylor v. XRG, Inc.*, 2007 WL 1816142 (Ct. of App. Ohio June 21, 2007).

³⁰¹ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 41,144, 44,169 (July 25, 2003).

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activity.³⁰² The FCC concluded that “if a common carrier is merely providing the network over which a subscriber [for example, a fax broadcaster or other individual, business, or entity] sends an unsolicited facsimile message, that common carrier will not be liable.”³⁰³ Consistent with previous interpretations, the FCC clarified the definition of “sender” to mean the person or entity on whose behalf the fax is transmitted or whose goods or services are advertised or promoted.³⁰⁴

In *Protus IP Solutions, Inc.*, the defendant allegedly sent unsolicited facsimile advertisements to plaintiffs over its “fax transmission system.”³⁰⁵ The defendant argued that because it was “merely a ‘fax broadcaster’ and not a true ‘sender’ of the faxes in question,” it could not be held liable for any of the faxes allegedly sent to plaintiffs.³⁰⁶ In response, the plaintiffs pointed to the text of the TCPA: it is “unlawful for *any person* . . . to use any telephone or facsimile machine . . . to send, to a telephone facsimile machine, an unsolicited advertisement.”³⁰⁷ The plaintiffs argued that “because the faxes at issue were technically sent through [the defendant’s] faxing software, [the defendant] is the true sender and is necessarily liable for any unwanted faxes sent over its system.”³⁰⁸ On plaintiff’s motion for summary judgment, the court held that the defendant met the definition of “fax broadcaster” under the FCC’s regulations.³⁰⁹

In *Texas v. American Blastfax, Inc.*,³¹⁰ the court rejected the defendant’s argument that the “fax broadcaster exception”

³⁰² Taylor v. XRG, Inc., No. 06AP-839, 2007 WL 1816142 (Ohio Ct. App. June 21, 2007).

³⁰³ Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 41,144, 44,169 (July 25, 2003); see Kaufman v. ACS Systems, Inc., 110 Cal.App.4th 886, 2 Cal.Rptr.3d 296 (2003); see also Taylor v. XRG, Inc., No. 06AP-839, 2007 WL 1816142 (Ohio Ct. App. June 21, 2007).

³⁰⁴ Taylor v. XRG, Inc., No. 06AP-839, 2007 WL 1816142 (Ohio Ct. App. June 21, 2007) (*citing* 47 C.F.R. § 64.1200(f)(8)); Covington & Burling v. Internatl. Marketing & Research, Inc., No. CIV.A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. 2004) (imposing liability on the sender of faxes as well as the companies whose products were advertised).

³⁰⁵ Pasco v. Protus IP Solutions, Inc., 826 F. Supp. 2d 825, 831 (D. Md. 2011).

³⁰⁶ *Id.* at 840.

³⁰⁷ *Id.* (*quoting* 47 U.S.C. § 227(b)(1)(C) (2011) (emphasis added)).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 841.

³¹⁰ Texas v. American Blastfax, Inc., 121 F. Supp. 2d 1085 (W.D. Tex. 2000).

applied. The court concluded that because the company's "business center[ed] around using a fax machine to send unsolicited advertisements—the precise conduct outlawed by the TCPA," the company "[wa]s more than a common carrier or service provider [because it] maintain[ed] and use[d] a database of recipient fax numbers, actively solicit[ed] third party advertisers and presumably review[ed] the content of the fax advertisements it sen[t]." ³¹¹ Therefore, the court held that the defendant was "more than a mere conduit for third party faxes." ³¹²

Targeting the cause of junk faxes, the TCPA places regulations on the creators of the junk fax content, which is similar to the regulations placed on "sellers" in telemarketing regulation. Fax broadcasters are the "source" of the junk faxes and are currently presented with very little incentive to determine whether the faxes they are sending are legal under the TCPA. In fact, fax broadcasters have every reason to remain willfully ignorant of the status of the faxes being sent because the higher degree of involvement that a fax broadcaster has with its client's faxes, the more likely it will be subject to TCPA liability.

The TCPA would be a more effective statute by increasing regulations on fax broadcasting companies. Holding fax broadcasters liable where it is obvious that their client does not possess an EBR with the large list of numbers will increase compliance. ³¹³ The TCPA would be a more effective statute in this sense, and it would mirror CAN-SPAM's prohibitions on e-mail harvesting.

5. Responding to Criticism: Preserving Private Right of Action and Statutory Damages Provision

The private right of action and the statutory damages provision of the TCPA receive the largest amount of criticism. In interviews with practitioners, many supported either an effort to remove the statutory damages provision or efforts to cap TCPA liability at a preset amount. Indeed, while one side laments the "cottage industry" of TCPA litigation that has arisen in recent years ³¹⁴ and advocates a more balanced approach to junk fax

³¹¹ *Id.* at 1089-90.

³¹² *Id.*

³¹³ For instance, where the company is a new company, but provides a list of telephone numbers that it would be impossible for a new company to have created EBRs with in such a short time.

³¹⁴ Brandee L. Caswell, *Regulating Faxing Activity Under State and Fed-*

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regulation,³¹⁵ the other side bemoans Congress' decision to "overlook well-established consumer protection policies of privacy and cost-shifting" by amending the TCPA with the JFPA in 2005.³¹⁶

A TCPA plaintiff does not need to prove receipt of a junk fax in order to have an actionable claim. Many claim that the TCPA represents "too strong of a hammer" given the ease in demonstrating a violation and the potential for large damages, and the relatively small amount of actual harm suffered by those receiving a fax advertisement or unwanted phone call.³¹⁷ Despite its impact in reducing intrusive practices, critics even find support amongst some members of the judiciary. One court commented, "[i]n 1991, with a conspicuous lack of foresight for the impact that it would ultimately have on courts – particularly courts of limited jurisdiction like our Small Claims Branch – Congress passed the Telephone Consumer Protection Act"³¹⁸

Most of the criticism is levied on the impact of the class action mechanism in TCPA litigation. In fact, two authors commenting on one TCPA lawsuit remarked, "What started out as a one-page fax offering discount burgers and beer became a nightmare of eight-figure proportions."³¹⁹ One court has noted:

Ostensibly, TCPA's purpose is to protect the individual telephone consumer by discouraging and preventing those annoying telephone calls which come in the middle of dinner, prerecorded sales pitches which fill an en-

eral Law, 34 COLO. LAW. 63 (Dec. 2005).

³¹⁵ See e.g., Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti- "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 91, n. 133 (2011); Michael R. Laudino, *To Fax or Not to Fax: Analysis of the Regulations and Potential Burdens Imposed by the Junk Fax Prevention Act of 2005*, 37 SETON HALL L. REV. 835, 859 (2007).

³¹⁶ Jennifer A. Williams, *Faxing It In*, 72 BROOK. L. REV. 345, 383 (2006).

³¹⁷ See Brandee L. Caswell, *Regulating Faxing Activity Under State and Federal Law*, 34 COLO. LAW. 63 (Dec. 2005); see also Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti- "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 91, n. 133 (2011).

³¹⁸ William Adler, et al. v. Imak Wireless, Inc., No. 14719-01 (D.C. Super. Ct. 2007), available at <http://www.groklaw.net/articlebasic.php?story=20071111092540787>.

³¹⁹ Michael J. Rust and Pamela S. Webb, *The Unsettling Fax About Coverage Claims Under the Telephone Consumer Protection Act*, 35 BRIEF 13 (Winter 2006) (discussing *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E. 2d 468, 245 (Ga. App. 2000)).



tire answering machine tape, and unsolicited faxes which waste time, paper and ink However, in a classic case of the best laid plans going awry, enterprising attorneys have gleaned, from the seemingly harmless packaging of consumer protection, a potent class-action weapon.³²⁰

Arguments concerning class actions are not unique to the TCPA. A significant amount of case law has been devoted to the relative appropriateness of TCPA class actions.

Courts have declined to certify a class action in TCPA causes of action for several different reasons. However, it appears that only one court has determined that class actions are virtually *per se* inappropriate for TCPA violations. In *Forman v. Data Transfer, Inc.*,³²¹ the court held 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.”³²² In so noting, the *Forman* court cited the decision in *Ratner v. Chemical Bank New York Trust Co.*,³²³ which “den[ie]d class certification where the Truth in Lending Act’s minimum award of \$100 each for some 130,000 class members would be an ‘horrendous, possibly annihilating punishment,’ unrelated to any damage to the purported class or to any benefit to defendant.”³²⁴

The *Forman* court’s citation of *Ratner* seems to suggest that the *Forman* court refused to allow TCPA class actions based upon the prospective of a large award of damages.³²⁵ Neverthe-

³²⁰ *Joseph N. Main P.C. v. Elec. Data Sys. Corp.*, 168 F.R.D. 573, 575 (N.D. Tex. 1996).

³²¹ *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D. Pa. 1995).

³²² *Id.* at 405 (*citing* *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D. N.Y. 1972) (class certification denied where the Truth in Lending Act’s minimum award of \$100 each for about 130,000 class members would be a “horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant.”).

³²³ *Ratner*, 54 F.R.D. at 416.

³²⁴ *Forman*, 164 F.R.D. at 405 (*citing* *Ratner*, 54 F.R.D. at 416) (class certification denied where the Truth in Lending Act’s minimum award of \$100 each for about 130,000 class members would be a “horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant.”).

³²⁵ Interestingly, after the decision in *Ratner*, Congress amended TILA by expressly authorizing class action and limiting the permissible aggregate recovery in a class action to the lesser of \$100,000 or 1 percent of the net worth of the class action defendant found in violation of TILA. *See* *Agostine v. Sidcon*

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less, the *Forman* court's focus on the "specific and personal remedy" of the TCPA indicates that the court was concerned with whether class actions were part of the original statutory scheme. A New Jersey state court held "[i]t would be manifestly unjust to subject [the defendant] to a \$23,000,000 judgment (including attorney's fees) for damages to an entire class of plaintiffs when Congress intended damages of \$500 to be pursued by individual plaintiffs."³²⁶ Similarly, the court in *Cellco P'ship* held that "[t]he scale of the damages sought by Plaintiffs in this action further indicates that Plaintiffs do not fall into the zone of interests of the TCPA."³²⁷ The TCPA [. . .] anticipates damages on an individual basis because the contemplated plaintiff is an individual natural person or business with a limited number of phone lines on which it might receive telemarketing calls. Congress contemplated that TCPA plaintiffs would bring claims in small claims court without the aid of an attorney."³²⁸

Other courts have responded differently as to whether allowing class actions for TCPA violations would be inconsistent with Congress' original intent. In *Kaufman v. ACS Sys., Inc.*,³²⁹ a California state court held "[a] class action in superior court would fulfill Senator Hollings's expectations. A class action, like a dispute in small claims court, would provide 'small claimants' with proper redress."³³⁰ Similarly, the Fifth Circuit held "violations of § 227(b)(1)(C) of the TCPA are not *per se* unsuitable for class resolution but, as these cases also illustrate, there are no invariable rules regarding the suitability of a particular case filed under this subsection of the TCPA for class treatment; the unique

Corp., 69 F.R.D. 437, 444 (E.D. Pa. 1975) ("The amendment represents a legislative response to those judicial decisions denying class action certification in Truth in Lending cases [. . .] At the same time, it places an aggregate limitation of the lesser of \$100,000 or 1 per centum of a creditor's net worth on a creditor's class action liability, not involving actual damages, thus avoiding the 'annihilating punishment' that could be caused by a damage award of at least \$100 per class member. See, *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y.1972).") (internal citations omitted) Today, TILA limits the permissible aggregate recovery in a class action to the lesser of "\$500,000 or 1 per centum of the net worth of the creditor." 15 U.S.C.A. § 1640(a)(2)(B).

³²⁶ *Freedman v. Advanced Wireless Cellular Commc'ns*, No. SOM-L-611-02, 2005 WL 2122304 (N.J. Super. Ct. Law Div. June 24, 2005).

³²⁷ *Cellco P'ship v. Wilcrest Health Care Mgmt.*, No. 09-3534 (MLC), 2012 WL 1638056 (D.N.J. May 8, 2012).

³²⁸ *Id.*

³²⁹ *Kaufman v. ACS Sys., Inc.*, 110 Cal. App. 4th 886, 2 Cal. Rptr. 3d 296 (2003).

³³⁰ *Id. at* 924.



facts of each case generally will determine whether certification is proper.”³³¹

The TCPA combines strict liability, statutory damages, and the class action mechanism to provide a high level of consumer protection and incentive for consumers to prosecute violations. Removing or reducing the level of damages or the ability to bring a class action would be detrimental to the statute. The prospect of a large class action suit provides a significant deterrent, especially given the FCC’s limited enforcement efforts. Class actions also bring attention to the TCPA and the illegality of certain conduct. Increased attention to the statute increases compliance by industry members and increases awareness by consumers, which is important where enforcement efforts rely so heavily on consumers reporting violations.

On the other hand, increasing the statutory damages amount would be inappropriate. The amount of damages already serves as a significant deterrent, and there is no reason to believe that increasing the damages would increase this effect. Moreover, given the increasing amount of intentional violators of the TCPA, increasing the statutory damages amount would likely have little effect.

Finally, with respect to TCPA damages, some attorneys have advocated for a fee-shifting provision. Unlike other consumer protection statutes such as the Truth in Lending Act,³³² the Fair Debt Collection Practices Act,³³³ and the Fair Credit Reporting Act,³³⁴ the TCPA does not contain a fee-shifting provision. Numerous individuals interviewed during the course of this report advocated that such a provision would increase the effectiveness of the TCPA. Attorney’s fees have been awarded where the plaintiff has successfully alleged violations of a state TCPA counterpart. For instance, the court in *Hot Leads*, considered attorney’s fees in the context of the Maryland TCPA, which provides (1) a person may not violate the federal TCPA, (2) statutory damages of \$500 per violation, and (3) reasonable attorney’s fees.³³⁵ Similarly, in *Jemiola* the court awarded the plaintiff damages in the amount \$9,000 for violations of the TCPA, \$1,200 for

³³¹ *Gene and Gene LLC v. Biopay LLC*, 541 F. 3d 318, 328 (5th Cir. 2008).

³³² Truth in Lending Act, 15 U.S.C. § 1601 et seq.

³³³ Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

³³⁴ Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.

³³⁵ *Baltimore-Washington Tel. Co. v. Hot Leads Co., LLC*, 584 F. Supp. 2d 736, 740 (D. Md. 2008).

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violations of the Ohio CSPA, and \$7,250 in attorney's fees.³³⁶

Data suggests that fee-shifting provisions do not provide a significant incentive to bring a TCPA case.³³⁷ Moreover, fee-shifting provisions do not seem to provide a significant increase in compliance with the TCPA, which is the main goal of this report's recommendations. It appears that fee-shifting provisions have more of an impact on regulating attorney conduct during litigation than actually preventing the initial violation. Preserving the availability of class actions appears more than an adequate substitute for new fee shifting provisions.

6. Responding to New Practices: Caller ID Manipulation

Tracking TCPA violators has become increasingly difficult. Many companies that are knowingly violating the TCPA will operate off-shore and are essentially judgment proof.³³⁸ Furthermore, some entities manipulate their caller ID. While there are legitimate reasons for manipulating caller ID, consumers would be better served by increased regulation.

One suggestion for tracking these entities is the mandatory logging and posting of bonds, which will increase the likelihood that an entity will be identified. Such a requirement would be levied on the carriers that wish to permit customers to manipulate their outbound caller ID. The regulation would require such carriers to collect a significant bond from each such customer. Legitimate companies should have no burden posting a bond. Companies that are planning to flout the TCPA would be deterred from doing so for two reasons: (1) initial start-up costs are much higher; and (2) the entity will lose the bond if it is determined that it is violating the TCPA.

Increasing logging requirements for those carriers that allow entities to manipulate caller ID would also improve the ability to track TCPA violators. These requirements would increase

³³⁶ *Jemiola v. XYZ Corp.*, 126 Ohio Misc. 2d 68, 2003-Ohio-7321, 802 N.E.2d 745, at ¶ 33.

³³⁷ Arguably, the potential TCPA plaintiff already has a large enough incentive to bring a case given the relative ease of establishing most TCPA violations and the low actual harm suffered by a TCPA plaintiff.

³³⁸ See Lauren Silverman, *FTC Offers \$50,000 Reward to Help Stop Robocalls*, NPR (Jan. 02, 2013), www.npr.org/2013/01/02/168444025/reward-offered-to-help-stop-robocalls ("These are not like the calls we grew up with . . . They are computer-blasted calls that are enabled by the Internet. The dialers are outside the U.S. generally, and these dialers are capable of blasting out an unfathomable number of telephone calls.").

the probability that a violator is located. Carriers could also be required to verify that any manipulated caller ID is actually a registered phone number.

During an interview conducted for this report, an example of requiring a bond for those that wish to manipulate their caller ID was likened to metal recyclers. Metal recyclers are confronted with individuals that are stealing copper and selling it as scrap. As a result, in many instances those metal recyclers require identification from the scrapper—to later track that person in case the metal was stolen. Those metal recyclers that choose not to do business with entities that are violating the law have no need to worry. Likewise, a carrier that does not allow an entity to manipulate its caller ID would incur no extra cost of this increased regulation. Regulating entities that enable caller ID manipulation provides a “chokepoint” in which illegal conduct may be cut-off and deterred. Amending the TCPA to implement this bond requirement would improve compliance with the statute.

CONCLUSION

The TCPA has remained relevant for over twenty years due to the basic premise for which it was enacted – to protect consumers from the ever-increasing access made possible by technology – and remains pertinent in modern times. Through the implementation of the Do-Not-Call Registry and periods of stepped-up government enforcement, the statute has curbed the abuses of robocalls and unsolicited fax advertisements.

Going forward, the TCPA will be defined by its ability to protect consumers’ cell phones. Whether the potential abuse is in the form of a robocall to a consumer’s cell phone, or a text message sent with fraudulent intent, the need for the TCPA is clear. The TCPA is designed to limit privacy intrusions, protect consumers, and prevent cost-shifting advertising. These fundamental purposes remain a strong basis to support continued enforcement of the statute as applied to both older technology (e.g., fax machines, residential lines) and newer forms of technology (e.g., cell phones).

Several amendments and modifications should be made to the TCPA and the agencies tasked with its enforcement and interpretation. In order for the TCPA to continue to remain relevant going forward, this report recommends:

- Increase government enforcement of the TCPA

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by providing State Attorneys General with a larger incentive to bring TCPA cases, and empowering the FTC to bring suit under the TCPA;

- Increase uniformity of application of the TCPA by encouraging more frequent and quicker FCC rulemaking procedures;
- Continue to protect cell phones by requiring prior express consent for any communication (call or text) made to a cell phone;
- Place a time limit on the Junk Fax Established Business Relationship;
- Create incentives for fax broadcasting companies to determine whether the faxes they are sending on behalf of clients are in violation of the TCPA;
- Rebuff efforts to remove or otherwise modify the private right of action; and
- Place additional restrictions on entities that enable caller ID manipulation.

By expanding the number of agencies responsible for the statute's enforcement, along with increasing the incentive to bring TCPA claims, increased enforcement should lead to increased compliance. By providing more frequent and comprehensive interpretations of the statute, the FCC can remove the necessity to resort to the courts to sort out gaps in the legislation as applied to newer technology. Properly updated, the TCPA can still play a vital role against the "ever-increasing access through electronic means" that companies have to consumers.³³⁹

³³⁹ Critchfield Physical Therapy v. Taranto Grp., Inc., 263 P.3d 767, 774 (Kan. 2011).