



Alabama Law Scholarly Commons

Articles

Faculty Scholarship

2011

Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act

Yuri R. Linetsky

Follow this and additional works at: https://scholarship.law.ua.edu/fac_articles



Part of the **Law Commons**

Protection of “Innocent Lawbreakers”: Striking the Right Balance in the Private Enforcement of the Anti “Junk Fax” Provisions of the Telephone Consumer Protection Act

TABLE OF CONTENTS

I. Introduction	72
II. Facsimile Machines, Advertising, and the TCPA	74
A. Development and Design of Telephone Facsimile Machines	75
B. Development of the Junk Fax Industry	76
C. Congress’s Solution to the Perceived Problem of Junk Faxes—Passage of the TCPA	77
1. Congress’s Stated Intent in Passing the TCPA..	78
2. The TCPA’s Enforcement Mechanisms	79
i. Public Enforcement	79
ii. Private Right of Action	81
3. Congress (Slightly) Amends the TCPA: The Junk Fax Prevention Act of 2005.....	83
III. The Costs of Unsolicited Facsimile Advertisements and the TCPA.....	83
A. Facsimile Machine Technology at the Time TCPA was Enacted and Today	84
B. Monetary Costs of Receiving Unsolicited Facsimiles	85
C. Non-Monetary Costs of Receiving Unsolicited Facsimiles	87
1. Annoyance Factor	87

© Copyright held by the NEBRASKA LAW REVIEW.

* Visiting Assistant Professor of Law, Case Western Reserve University School of Law, Cleveland, Ohio. The author thanks Professors Lewis Katz, Jacqueline Lipton, and Jonathan Adler of Case Western Reserve University School of Law for their thoughtful and helpful comments on earlier drafts of this Article. The author also thanks Christopher J. Diehl ('11) for his research assistance.

2011]	PROTECTION OF “INNOCENT LAWBREAKERS”	71
	2. Potentially Deceptive or Highly Valuable Content	88
IV.	The TCPA’s Current Relevance and Unintended Consequences	90
	A. Empirical Analysis of Recent TCPA Litigation	90
	B. Enforcement of the TCPA—Blast Faxers	92
	1. Shutting Down the Major Blast Faxers	92
	2. State Regulations of Unsolicited Facsimiles	94
V.	The TCPA and Innocent Lawbreakers	94
	A. TCPA Cottage Industry	94
	1. Support Infrastructure	96
	B. Innocent Lawbreakers	97
	1. What is an Innocent Lawbreaker in Connection with the TCPA?	98
	i. Ignorance of the TCPA’s Existence or Misunderstanding of the TCPA’s Scope and Prohibitions	98
	C. Why the Cottage Industry Targets Innocent Lawbreakers	99
	D. Effects of TCPA Litigation on Innocent Lawbreakers	101
	1. Threat of Class Actions	103
	2. Threat of Piggybacking of State Law Consumer Protection Claims	105
	3. Threat of Multiple Violations Per Fax	106
	4. Case Studies	108
	i. Members of a Chamber of Commerce	108
	ii. Who Can Give Consent?	109
VI.	Differences Between the TCPA Junk Fax Provisions and Other Federal Consumer Protection Statutes	110
	A. TCPA’s Anti Telemarketing Provisions	111
	B. The CAN-SPAM Act	112
VII.	Evening the Scale	113
	A. Requiring that the Plaintiff Prove that the Unsolicited Facsimile was Received Using a Traditional Facsimile Machine	114
	1. The FCC’s Incorrect Interpretation of the Act ..	115
	2. The Plain Language and Intended Scope of the TCPA	115
	B. Strictly Enforcing Traditional Litigation Requirements	118
	1. Standing	118
	i. Real Party in Interest	118
	ii. Assignability of TCPA Claims	119
	2. Knowingly/Willfully	120

C. Applying Traditional Legal Concepts to Limit Punitive Recovery	124
1. Mitigation of Damages	124
2. Due Process	127
3. Statute of Limitations Issues	133
4. Remittitur	134
D. Eliminate or Limit Private Enforcement Mechanism	135
E. Limits on Private Enforcement by the States	136
VIII. Conclusion	136
VIV. Appendix A	138

I. INTRODUCTION

Should a small business be put at risk of insolvency for sending advertisements by fax to prospective customers? Or have to spend thousands of dollars on legal fees to defend itself in court? Or be forced to “pay off” a plaintiff’s lawyer to avoid litigation? Though the intuitive answer is “no,” questions like these were overlooked in 1991 and again in 2005 when Congress responded to concerns about the costs of unsolicited facsimile advertising.¹ As a result, the cottage industry of “junk fax”² lawsuits that has developed and flourished in the last two decades has forced many small businesses—many of which had no idea they were breaking the law—to face these serious issues.³ The history of junk fax litigation shows that any real benefit bestowed by this legislation is outweighed by the harm to these small businesses—these “innocent lawbreakers.”⁴ As this Article will explain, if Congress will not act to remedy this imbalance, it is time for the courts to step in to bring balance to junk fax litigation.

Technological advances of the 1980s made new forms of advertising possible and economical. No longer were advertisers limited to sending solicitations through the mail or to calling consumers by tele-

-
1. *E.g.*, 151 Cong. Rec. H5,264 (daily ed. June 28, 2005) (statement of Rep. Markey).
 2. A junk fax is, like junk mail, nothing more than an unsolicited advertisement. Only the method of delivery is different. Subsection III.C.2 explores whether all such advertisements are “junk.”
 3. *See, e.g.*, Letter from Dan Danner, Executive Vice President, Pub. Policy and Political, Nat’l Fed’n of Indep. Bus., to Kevin Martin, Chairman, Fed. Comm’n Comm’n (Jan. 13, 2006) (on file with author) (“Many of these [lawsuits] are unfounded and require businesses to defend themselves in distant locations or settle business claims to avoid the cost of litigation.”).
 4. As discussed in section V.B, commercial facsimile advertising operations that send thousands of facsimile advertisements on behalf of clients are excluded from my definition of innocent lawbreakers.

phone.⁵ The introduction and gradual ubiquity of facsimile machines allowed advertisers to send their message to consumers⁶ without having to pay costs of printing and postage. Unlike traditional junk mail, which costs consumers no more than the minor inconvenience of throwing a piece of mail in the trash, receiving an unsolicited facsimile (at least in the 1990s) forced the consumer to pay for the ink and paper used to print the document.⁷ Responding to the proliferation of this new advertising technique, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA or the Act),⁸ which sought to prohibit all forms of unsolicited commercial⁹ advertising using facsimile machines. The Act also created a private cause of action for enforcement of the anti-junk fax provisions.¹⁰

This private cause of action has led to a proliferation of litigation seeking to hold senders of unsolicited advertisements financially liable for violations of the statute.¹¹ But unlike traditional measures of damages where the aggrieved party can, excepting extraordinary circumstances, recover only its actual losses, the TCPA allows for the recovery of damages which can be tens of thousands of times higher than their actual loss.¹² This potential windfall has led to a cottage industry of lawyers and litigants whose primary vocation has become

5. Though the Telephone Consumer Protection Act of 1991 also regulates aspects of direct telephone solicitations, except as discussed in section VI.A, this Article's scope is limited to regulations concerning the use of facsimile machines to transmit commercial solicitations.

6. As will be discussed later, the Act is not restricted to "consumers" as that term is commonly understood—that is, an individual who utilizes economic goods. See WEBSTER'S THIRD INTERNATIONAL DICTIONARY 490 (2002). Instead, the Act applies equally to individuals and business entities, large and small. See *Boydston v. Asset Acceptance LLC*, 496 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007) ("The TCPA entitles individual *citizens* to relief for the receipt of unsolicited telephone or fax advertisements . . ." (emphasis added)).

7. Whether the receipt of a facsimile advertisement is any more inconvenient than a phone call during dinner or receiving junk mail is up for debate. See *infra* subsection III.C.1. As discussed in section III.A, more recent advancements in facsimile technology and business practices have changed the cost-shifting dynamic.

8. 47 U.S.C. § 227(b)(1)(C) (2000), amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227(b)(1)(C)(i)–(iii) (2006).

9. The Act does not prohibit all unsolicited facsimile transmissions. It permits unsolicited faxes from charitable and political organizations. 47 U.S.C. § 227(a)(5) ("The term 'unsolicited advertisement' means any material advertising the *commercial* availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." (emphasis added)); see also *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 196 F. Supp. 2d 920, 934 (E.D. Mo. 2002) (holding the TCPA is unconstitutional because of the distinction it makes between commercial and non-commercial transmissions), *rev'd*, 323 F.3d 649 (8th Cir. 2003).

10. 47 U.S.C. § 227(b)(3). The Act also allows for enforcement actions by state attorneys general. *Id.* § 227(f)(1); see *infra* subsection II.C.2.a.

11. See *infra* subsection II.C.2.b.

12. See *infra* section III.B.

the filing of TCPA-related lawsuits.¹³ The TCPA was designed to address the harm caused by unsolicited facsimile advertising. But it has also spawned a cottage industry of attorneys who prey upon innocent law breakers—people and businesses who were never the TCPA’s intended targets.

This Article explores the history behind using facsimile machines as advertising tools, the enactment of the anti-junk fax provisions of the TCPA, and then explains why the TCPA, as generally interpreted by the courts, fails to strike the correct balance between consumer protection and the protection of small businesses that unintentionally run afoul of the law—innocent lawbreakers. After explaining why innocent lawbreakers deserve protection from those who seek to abuse the Act for pecuniary gain, I will suggest several approaches (using both traditional and non-traditional legal theories) to the application of the Act that will help even the scales in the adjudication of TCPA cases, thus maintaining the Act’s core mission of protecting consumers from unwarranted and costly intrusions, but at the same time, saving innocent lawbreakers from insolvency.

II. FACSIMILE MACHINES, ADVERTISING, AND THE TCPA

The junk-fax provision of the Act has generated volumes of litigation against companies (large and small) that sought to use new technologies to advertise their wares and services.¹⁴ This provision generally forbids any person from using “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”¹⁵ To understand how the

13. See *infra* section V.A.

14. *E.g.*, *Bonime v. Avaya Inc.*, No. 06 CV 1630(CBA), 2006 WL 3751219 (E.D.N.Y. Dec. 20, 2006); *Covington & Burling v. Int’l Mktg. & Research, Inc.*, No. CIV.A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. Apr. 17, 2004); *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892 (W.D. Tex. 2003). The Act also regulates certain telemarketing activities, which, though not the focus of this Article, are discussed in section VI.A.

15. 47 U.S.C. § 227(b)(1)(C) (2006). The general prohibition on the use of fax machines to send unsolicited emails does not exist if the sender and recipient have an “established business relationship” and certain other conditions are met. *Id.* The established business relationship exception was added to the Act by the Junk Fax Prevention Act of 2005, see *infra* subsection II.C.3, codifying the Federal Communications Commission rule on the subject. See 47 C.F.R. § 64.1200(a)(3)(i) (2010); § 64.1200(f)(3) (“The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.”); *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 16972 (2003); *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8779 n.87 (1992).

TCPA’s junk fax prohibition came to be, we must understand the origin of the telephone facsimile machine.¹⁶

A. Development and Design of Telephone Facsimile Machines

The commercially viable, modern telephone facsimile machine—one capable of transmitting both text and monochrome images over a telephone line—has its roots in the mid-1970s.¹⁷ This modern and once-ubiquitous¹⁸ facsimile machine (the kind the drafters clearly had in mind)¹⁹ is defined in the TCPA as follows:

The term “telephone facsimile machine” means equipment which has the capacity (A) to transcribe text or images, or both, *from paper* into an electronic signal and to transmit that signal *over a regular telephone line*, or (B) to transcribe text or images (or both) from an electronic signal received *over a regular telephone line onto paper*.²⁰

The introduction of the modern facsimile machine allowed individuals and businesses to transmit documents much more quickly and cheaply than using the mail or overnight delivery services. A customer could transmit an order to a supplier instantaneously. A lawyer could send a letter to opposing counsel across the country without waiting days for mail delivery. A doctor could deliver a report to a consulting physician across town without paying for a courier. And a business could notify its customers of a special promotion without paying for postage. This last use led to the proliferation of unwanted facsimile advertisements, an industry to send them, and ultimately, the enactment of the TCPA.

-
16. The term “facsimile” comes from the Latin *facio simile*, which means “make like.” OXFORD LATIN DICTIONARY 668–69, 1763 (P.G.W. Glare ed., 1982). The world’s first facsimile machine—that is, a machine that was capable of transmitting text across an electrical wire—was patented by Alexander Bain in 1843. *See generally* STEPHEN VAN DULKEN, INVENTING THE 19TH CENTURY 84 (2001). The first commercial fax system, based on a design by Italian Giovanni Caselli, was set up in 1863 between the French cities of Paris and Lyon. 7 SCIENCE AND ITS TIMES 534 (Neil Schlager ed., 2000). As early as 1902, German inventor Arthur Korn perfected a design that allowed users to send and receive photographs. *Id.* By 1906, this device was commercially available and widely used, especially in the newspaper industry. *Id.* But this is not the machine that comes to mind today when one talks about a fax machine.
 17. *See* KENNETH MCCONNELL ET AL., FAX: FACSIMILE TECHNOLOGY & SYSTEMS 62, 67 (3d. ed. 1999) (noting that the adoption of the Group 2 standard in 1976 “opened the door to universal fax machines”).
 18. *See, e.g.,* Robin Carol and Carter Rogers, *Use of Fax Machines Declines Among Students; Fax Machines Still Useful in the Workplace*, THE TUFTS DAILY, Apr. 30, 2010, available at <http://www.tuftsdaily.com/use-of-fax-machines-declines-among-students-1.2256256>.
 19. *See* H.R. REP. NO. 102-317, at 10 (1991) (“Facsimile machines are designed to accept, process, and print all messages.”).
 20. 47 U.S.C. § 227(a)(3) (emphasis added).

B. Development of the Junk Fax Industry

Though the modern “traditional” facsimile machines have their roots in the 1970s, the technology that allowed for computer-based facsimile broadcasting was not invented until the mid-1980s.²¹ The invention of computer-based fax boards by GammaLink Corp. allowed for the handling of multiple, simultaneous transmissions, and sparked the fax transmission industry.²²

By 1988, fax server software was developed to enable computer networks to send and receive facsimiles from shared telephone lines.²³ This, in turn, led to the formation of companies who provided fax transmission and receiving services for clients.²⁴ Marketing and communications companies were now able to hire faxing service providers to program a computer to transmit large quantities of faxes.²⁵ Some of the earliest users of this new technology were in the public relations field to fax press releases, and political organizations that faxed advocacy information to elected officials.²⁶ In fact, this may have been a marketing faux pas for the ages, because had Congress not received such a multitude of faxes, some believe junk fax legislation would have never been promulgated.²⁷

As the number of facsimile machines used by businesses grew to almost ubiquity, marketing companies sought to take advantage of this new medium to send advertising messages to potential customers at a relatively low cost. This led to the formation of a number of blast faxers—businesses that combined computer faxing technology with databases of millions of telephone facsimile numbers to send fax advertisement on behalf of clients. The most notorious of these companies, Fax.com, advertised on its web-site that it could “[b]roadcast faxes to millions of customers daily . . .’ using its database that ‘ex-

21. Letter from Maury Kauffman, President, The Kauffman Grp. Inc., to Fed. Comm’n Comm’n, at 2 (Nov. 30, 2002), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6513396899>.

22. *Id.* at 2–3.

23. *Id.* at 3.

24. *Id.*

25. *Id.*

26. *Id.* It should be noted that the TCPA did not prohibit political advocacy faxing because such faxes are not “advertising”—that is, they do not “advertis[e] the commercial availability or quality of any property, goods, or services.” 47 U.S.C. § 227(a)(5) (2006).

27. Letter from Maury Kauffman, *supra* note 21, at 3 (“[H]ad congressional offices NOT been one of the earliest targets of personalized fax broadcasting campaigns, (members of Congress received disproportionately, a significantly higher number of faxes as compared to consumers and businesses at large); restrictions on facsimile-based advertising, etc, would never have been included in what is essentially a law restricting telemarketing: the TCPA.”).

ceeds 30 million fax numbers.”²⁸ One anti-junk fax organization claims that Fax.com “used to be the world’s #1 fax broadcaster of junk faxes. They sent over half the junk faxes in America; they sent more faxes than their next two closest competitors combined; about 1 to 2M a day.”²⁹

Other companies that formed to broadcast huge quantities of faxes included the also infamous American Blast Fax,³⁰ which was the main defendant in the Missouri case that, for a short time, held the anti-junk fax provisions of the TCPA unconstitutional.³¹ Subsection IV.B.1, *infra*, discusses how companies like Fax.com and American Blast Fax were put out of business.

C. Congress’s Solution to the Perceived Problem of Junk Faxes—Passage of the TCPA

One court described the reason Congress enacted the TCPA:

[T]he TCPA was enacted because state laws that attempted to regulate telemarketing were ineffective because of telemarketers’ ability to “avoid the restrictions of State law, simply by locating their phone centers out of state. Congress thus sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps.”³²

Commentators have noted two reasons, as set out in the Congressional reports, for the strict prohibition against fax marketing: the prevention of cost-shifting and the invasion of privacy.³³ Cost shifting is considered a sound justification for the fax provision “due to the unique architecture of faxing technology, of which paper and ink are essential components.”³⁴ To compensate the unwitting fax advertisement recipient, and presumably, to deter violations, the Act provides for statutory damages.³⁵ Congress thought these statutory damages

28. *Covington & Burling v. Int’l Mktg. & Research, Inc.*, No. CIV.A. 01-0004360, 2003 WL 21384825, at *3 (D.C. Super. Ct. Apr. 17, 2004).

29. *Fax.com*, JUNKFAX.ORG, <http://www.junkfax.org/fax/profiles/faxcom.htm> (last visited Feb. 18, 2011).

30. *American Blast Fax*, JUNKFAX.ORG, <http://junkfax.org/fax/profiles/American-BlastFax.htm> (last visited Feb. 18, 2011).

31. *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 196 F. Supp. 2d 920 (E.D. Mo. 2002), *rev’d*, 323 F.3d 649 (8th Cir. 2003).

32. *Bonime v. Avaya Inc.*, No. 06 CV 1630(CBA), 2006 WL 3751219, at *5 (E.D.N.Y. Dec. 20, 2006) (citation omitted). The Act itself demonstrates that it was meant to supplement, rather than preempt, state laws regulating similar conduct. 47 U.S.C. § 227(f)(1) (“State law not preempted”).

33. Jennifer A. Williams, Note, *Faxing it in: How Congress Failed Consumers with the Junk Fax Prevention Act of 2005*, 72 BROOK. L. REV. 345, 353–54 (2006).

34. *Id.* at 354.

35. 47 U.S.C. § 227(b)(3).

were fair.³⁶ Whether they are, indeed, fair to both the recipient and sender is discussed later.³⁷

The privacy right advanced by the junk fax prevention aspect of the TCPA was slightly different than that of the telephone. "The privacy right thought to be infringed by unsolicited junk faxes was that of the recipient to use and control his or her own machine. . . . Congress sought to prevent junk faxes from impeding or prohibiting the transmission of consumers' legitimate business faxes."³⁸

Many courts that later interpreted the policies behind the Act supported the idea that these types of faxes were invasions of privacy, instead of only impediments to commerce.³⁹

1. *Congress's Stated Intent in Passing the TCPA*

In introducing what would become the TCPA, Senator Hollings, the bill's main sponsor in the Senate,⁴⁰ believed that the evil sought to be prevented by the Act was twofold. First, he wanted to keep unwanted faxes from tying up recipients' phone lines, thus keeping them free for legitimate business purposes.⁴¹ Second, he thought that it was patently unfair for the recipients to have to bear the cost of sending these unwanted advertisements.⁴²

Additionally, the House and Senate committee reports provide significant insight into Congress's intent in passing the TCPA. For instance, the House Committee did not want "to make all unsolicited telemarketing or facsimile advertising illegal."⁴³ But it found that "the facsimile machine ha[d] become a primary tool for business to relay instantaneously written communications and transactions."⁴⁴ Using this technological tool, "[a]n advertiser's facsimile machine can

36. 137 CONG. REC. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("The amount of damages in this legislation is set to be fair to both consumer and telemarketer.").

37. See *infra* Part V.

38. Williams, *supra* note 33, at 355.

39. *Id.*

40. See 137 CONG. REC. S9840-02 (daily ed. July 11, 1991) (statement of Sen. Hollings) ("[T]oday I am introducing the Automated Telephone Call Protection Act of 1991. This bill will ban computerized telephone calls to the home and so-called junk fax.").

41. *Id.* ("This bill . . . prohibits unsolicited advertisements sent to fax machines, known as junk fax. . . . These unsolicited advertisements prevent the owners from using their own fax machines for business purposes.").

42. *Id.* ("Even worse, these transmissions force the recipient to pay for the cost of the paper used to receive them. These junk fax advertisements can be a severe impediment to carrying out legitimate business practices and ought to be abolished.").

43. H.R. REP. NO. 102-317, at 6 (1991); S. REP. NO. 102-78, at 1968 (1991) ("The purposes of the bill are to protect privacy interests . . . by *restricting* certain uses of facsimile machines." (emphasis added)).

44. H.R. REP. NO. 102-317, at 10.

easily deliver tens of thousands of unsolicited messages per week to other facsimile machines across the country.”⁴⁵

The Committee concluded that the proposed ban on unsolicited facsimile advertising was wise because it stopped junk faxers from tying up the recipient’s phone lines and prevented them from shifting the costs of their advertising campaign onto the general public.⁴⁶

The Senate Committee Report recognized that the TCPA would place a burden on businesses seeking to advertise by facsimile machine, but noted that the burden to determine if the potential recipient consented to the fax was “the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.”⁴⁷

2. *The TCPA’s Enforcement Mechanisms*

Congress created two mechanisms for enforcement of the TCPA—one public and the other private.⁴⁸ In a somewhat unconventional scheme,⁴⁹ the public enforcement mechanism rests with either (or both) state attorneys general who may bring suits for injunctive relief and damages in federal courts, and with the Federal Communications Commission (FCC) which is empowered to take administrative action, including the imposition of civil forfeitures, against violators.⁵⁰ The private enforcement mechanism allows for any person who received an unsolicited facsimile advertisement to bring an action (usually in state court) for injunctive relief and actual or statutory damages.⁵¹

i. *Public Enforcement*

The Act gives state attorneys general the right to bring suit in federal court for violations of the TCPA when the attorney general “has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents

45. *Id.* at 6–7.

46. *Id.* at 10 (“Facsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines. The Fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient’s machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient’s facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.”).

47. S. REP. NO. 102-178, at 1975–76 (1991).

48. 47 U.S.C. § 227(b)(3), (e)(5)–(6) (2006).

49. *Weitzner v. Vaccess Am., Inc.*, 5 Pa. D. & C. 5th 95, 2008 WL 4491534 (2008) (“The statutory scheme behind the TCPA, although not unique, is somewhat unusual.”).

50. 47 U.S.C. § 227(e)(5)(A).

51. *Id.* § 227(b)(3).

of that State in violation of" the TCPA or regulations promulgated under the TCPA.⁵² The attorney general can seek both injunctive relief and monetary damages of up to \$1,500 per violation.⁵³

The consumer protection divisions of state attorneys general's offices are generally inundated with all varieties of complaints from consumers who believe that they have been defrauded or otherwise injured by unscrupulous businesses. The types of complaints vary widely from foreclosure rescue scams,⁵⁴ to foreign lottery frauds,⁵⁵ to debt collection abuses.⁵⁶ Limited resources, coupled with the large variety of complaints, require state attorneys general to be selective in deciding when to bring suit—often reserving actions under the TCPA to egregious violators.⁵⁷ Because they are public servants, attorneys general must also be mindful of the greater good in considering the types of damages to seek and how far to pursue cases. Ultimately, their goal is to stop the unlawful action, not to increase the state treasury.⁵⁸

In addition to complaining to their state's attorney general, consumers who received unsolicited fax advertisements can easily complain to the FCC using an on-line form on the Commission's web site.⁵⁹ After receiving a complaint, or more likely multiple complaints, the "FCC can issue warning citations and impose fines against companies violating or suspected of violating the junk fax rules, but does not award individual damages."⁶⁰ Like state attorneys general, the FCC is charged with regulating, monitoring, and enforcing

52. *Id.* § 227(g)(1)–(2).

53. *Id.* § 227(g)(1) (The state may demand injunctive relief and/or monetary damages to recover "actual monetary loss" or \$500 per violation; if the court finds that the violation was willful or knowing, it may award up to \$1,500 per violation).

54. See, e.g., Ohio Attorney General Richard Cordray, *Cordray Focuses on Foreclosure Rescue Scams in Ohio* (June 17, 2010), <http://loanworkout.org/2010/06/freedom-equity-savings-ohio-ag-sues-foreclosure-recue-firm>.

55. See, e.g., *Ask the Attorney General: Foreign Lotteries*, OFFICE OF THE ATTORNEY GENERAL: STATE OF CONNECTICUT, <http://www.ct.gov/ag/cwp/view.asp?A=2219&Q=295688> (last visited Feb. 18, 2011).

56. See, e.g., *Attorney General Cuomo Sues WNY Debt Collection Companies That Harassed And Threatened Consumers Nationwide*, OFFICE OF THE ATTORNEY GENERAL: STATE OF NEW YORK (June 1, 2010), http://www.ag.ny.gov/media_center/2010/june/june1a_10.html.

57. For examples of the more egregious violations, see *infra* subsection IV.B.1.

58. See, e.g., *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 897 (W.D. Tex. 2003).

59. See *File a Complaint*, FED. COMM'NS COMM'N, <http://esupport.fcc.gov/complaints.htm> (last visited Feb. 18, 2011).

60. *Fax Advertising: What You Need to Know*, FED. COMM'NS COMM'N, <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html> (last visited May 14, 2011). The FCC's authority to impose a civil forfeiture for violations of the Communications Act of 1934, as amended (of which the TCPA is a part), is found in 47 U.S.C. § 503(b)(1) (2006). The FCC has noted that it "has the authority under this section of the Act to assess a forfeiture against any person who has 'willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule,

ing rules against a myriad of telecommunications-related industries. The FCC's resources are similarly limited and it must also reserve its enforcement authority to serious violators. One FCC official is reported as saying that though he had heard of lawyers "ambulance chasing" for TCPA cases, the Act "was intended to protect consumers from real damage in the form of lost time and resources."⁶¹ The official added that in most cases where the recipient received one or two unwanted faxes, "a simple telephone call, rather than a court case, is often the place to start."⁶²

ii. Private Right of Action

In addition to providing for the TCPA's enforcement by state and federal officials, the Act created a right of action for anyone aggrieved by the receipt of an unsolicited commercial facsimile.⁶³ This private right of action was a late amendment to the Senate bill, designed to allow consumers to appear, without an attorney, in a state small claims court to recover damages in an amount that would make it worth their while to file suit.⁶⁴ It is codified in 47 U.S.C. § 227(b)(3):

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or (C) both such actions.

Interestingly, though the TCPA is a federal statute, until recently, the vast majority of courts that considered the issue held that, under this statutory scheme, "federal question jurisdiction for this federally authorized private right to a cause of action [is vested] exclusively in state courts."⁶⁵ One court even went so far as to characterize the

regulation, or order issued by the Commission under this Act" *In re First Choice Healthcare, Inc.*, 21 FCC Rcd 2795, 2795 n.1 (2006).

61. *Safeguarding Americans From a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse: Hearing Before the H. Comm. on the Judiciary*, 108th Cong. 174–75 (2004) [hereinafter *Lawsuit Abuse Hearing*] (newspaper article from MONITOR DAILY).

62. *Id.*

63. 47 U.S.C. § 227(b)(3).

64. *Levine v. 9 Net Ave., Inc.*, No. A-1107-00T1, 2001 WL 34013297, at *1 (N.J. App. Div. June 7, 2001) (citing Int'l Sci. & Tech. Inst. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1152–53 (4th Cir. 1997)).

65. *Levine*, 2001 WL 34013297. In December 2010, the Sixth Circuit, in *Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 463–64 (6th Cir. 2010), disagreed with six courts of appeals that had concluded that there is no federal question jurisdiction over private TCPA suits. See *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs.*, 156 F.3d 432, 435–37 (2d Cir. 1998); *Erienet Inc. v. Velocity Net Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.* 136 F.3d 1287, 1298 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir.); *Int'l Sci. & Tech. Inst. v. Inacom*

TCPA as the “functional equivalent [of] state law.”⁶⁶ Consequently, “although the substantive law giving rise to the private cause of action is a federally-enacted statute, Congress has rested jurisdiction with the states.”⁶⁷ Thus, courts have held that the “TCPA must be treated as a state statute.”⁶⁸

Courts have held that the TCPA recognizes “state sovereign power and authority to reject Congress’ conditional authorization of the private right to a cause of action.”⁶⁹ Despite being given the opportunity

Commc’ns, Inc., 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997). Presumably to resolve this newly created circuit split, on June 27, 2011, the Supreme Court granted certiorari in *Mims v. Arrow Financial Services, LLC*, No. 10-12077, 2010 WL 4840430 (11th Cir. Nov. 30, 2010), *cert granted*, 79 U.S.L.W. 3578 (U.S. June 27, 2011) (No. 10-1195), which, through dealing with a violation of the TCPA’s anti-telemarketing provision, concerns the same private right of action provision (47 U.S.C. § 227(b)(3)). Diversity jurisdiction, 28 U.S.C. § 1332(a), and jurisdiction based on the Class Action Fairness Act, 28 U.S.C. § 1332(d), in TCPA cases remain with federal courts. See, e.g., *US Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1117 (10th Cir. 2007); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 340–41 (2d Cir. 2006); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646 (W.D. Wash. 2007). But in another recent development, the Third Circuit granted rehearing en banc in *Landsman & Funk PC v. Skinder-Strauss Associates*, 640 F.3d 72, (3d Cir. 2011), *reh’g granted*, Nos. 09-3105, 09-3793, 2011 WL 1879624 (3d Cir. May 17, 2011) (en banc), to consider whether the TCPA also strips federal courts of diversity jurisdiction. This unusual statutory scheme for private enforcement of the TCPA has led to some equal protection based challenges, arguing that because some states may not allow for such actions while others do deprives residents of states prohibiting private enforcement of equal protection. E.g., *Foxhall*, 156 F.3d at 437–38.

“Essentially because of the nature of this statutory scheme under the TCPA only the existence of a private right of action based upon federal question jurisdiction would vary from state to state. Diversity jurisdiction would still remain as would rights enforceable by a state’s attorney general of the Federal Communications Commission irrespective of the above referenced private cause of action availability.”

Weitzner v. Vaccess Am. Inc., 5 Pa. D. & C. 5th 95, 103, 2008 WL 4491534 (2008). This argument was essentially foreclosed by the Fourth Circuit which held that any inequities under the TCPA’s legislative classification were not based on a fundamental right or immutable characteristic, and therefore survived rational basis scrutiny. *Inacom*, 106 F.3d 1146, 1156 (4th Cir. 1997). The court held that “Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year’s 6.75 billion telemarketing transmissions were illegal under the TCPA.” *Id.* at 1157.

66. *Gottlieb*, 436 F.3d at 342. The court added that “Congress . . . sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps.” *Id.*

67. *Holster III v. Gatco Inc.*, 485 F. Supp. 2d 179, 184 (E.D.N.Y. 2007).

68. *Bonime v. Avaya Inc.*, No. 06 CV 1630 (CBA), 2006 WL 3751219, at *4 (E.D.N.Y. Dec. 20, 2006).

69. *Weitzner*, 5 Pa. D. & C. 5th at 106.

to reject private causes of action under the TCPA, no state has done so.⁷⁰

3. *Congress (Slightly) Amends the TCPA: The Junk Fax Prevention Act of 2005*

Since its enactment in 1991, and despite great changes in telecommunications technology,⁷¹ the TCPA has undergone only one significant statutory revision—the Junk Fax Prevention Act of 2005 (JFPA).⁷² The amendment, however, made several important changes, including codifying the existing business relationship exemption and altering the definition of “unsolicited advertisement.”⁷³

The FCC’s regulations implementing the JFPA went into effect on August 1, 2006.⁷⁴ “The FCC’s JFPA regulations largely track the Congressional directives of the JFPA.”⁷⁵ But the FCC required that all facsimiles, not just unsolicited ones, contain an opt-out notice.⁷⁶ And though Congress had authorized the FCC to consider an expiration date on an established business relationship, the FCC declined to do so, relying instead on the opt-out notice provision.⁷⁷

Though some small business organizations fought for the codification of the established business relationship exception,⁷⁸ as explained below, its enactment did little to quell litigation against small businesses for alleged violations of the TCPA.⁷⁹

III. THE COSTS OF UNSOLICITED FACSIMILE ADVERTISEMENTS AND THE TCPA

In enacting the TCPA, Congress was obviously most concerned with the perceived costs of unsolicited facsimile advertising borne by

70. Some states have, however, enacted their own bans on unsolicited facsimile advertising that, in some instances, provide for additional penalties against fax advertisers. See *infra* subsection IV.B.2.

71. See *infra* section III.A.

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

73. Jean Noonan & Michael Goodman, *Fax, E-Mail, and Telephone: Federal Regulation of Marketing Methods*, 62 BUS. LAW. 575, 576–77 (2007) (arguing that Congress amended the TCPA through the JFPA in three main ways: 1) it added a definition of “established business relationship” that adopted the FCC’s definition; 2) it revised the definition of “unsolicited advertisement”; and 3) it codified, in the JFPA, the principle that unsolicited facsimile advertisements could be transmitted based on an established business relationship, even if the recipient has not previously provided permission).

74. Rules and Regulations Implementing the Junk Fax Prevention Act of 2005, 71 Fed. Reg. 42297 (July 26, 2006) (codified at 47 C.F.R. pt. 64).

75. Noonan & Goodman, *supra* note 73, at 577.

76. 47 U.S.C. § 227(b)(2)(D) (2006); 47 C.F.R. § 64.1200(a)(3)(iv) (2006).

77. 47 C.F.R. § 64.1200(f)(5).

78. See, e.g., Letter from Dan Danner, *supra* note 3.

79. See *infra* Part V.

consumers.⁸⁰ The recipient of junk mail does not have to pay to receive it, but the recipient of a junk fax, Congress thought, has to pay for toner and paper.⁸¹ But the costs of unsolicited faxes and the TCPA are more complex.

A. Facsimile Machine Technology at the Time TCPA was Enacted and Today

In the early 1990s, when the TCPA was enacted, three-fourths of facsimile machines in the United States printed faxes on rolls of costly thermal transfer paper.⁸² At that time, facsimile machines that could print faxes on ordinary “copier” paper cost approximately \$2,000.⁸³ Only a decade later, the cost of a plain-paper facsimile machine dropped by almost 95% to around \$100—almost completely replacing the older thermal transfer technology in the process.⁸⁴ An expert in the facsimile technology field estimated that when the TCPA was enacted, the cost to receive (and print) a facsimile was about ten to fifteen cents per page.⁸⁵ A decade later, technological advances and competition in the ink, toner, and paper industries, brought the cost down to about two to three cents per page.⁸⁶ Today the cost to receive a fax on a traditional laser facsimile machine is about two cents.⁸⁷

But traditional facsimile machines—or at least the use of traditional facsimile machines to receive faxes—have become the exception, rather than the norm.⁸⁸ Traditional facsimile machines have been replaced, in many instances, by computer fax servers that allow the recipient to view faxes on her computer and decide whether or not to print the document.⁸⁹ Thus the recipient of an unsolicited adver-

80. Though the Act's title implies that it applies only to “consumers,” which is sometimes defined as individuals, *see, e.g.*, *Culbreath v. Golding Enters., L.L.C.*, 872 N.E.2d 284 (Ohio 2007), the anti-junk fax provisions of the TCPA apply equally to all facsimile machine owners—from individuals to Fortune 500 corporations. *See supra* note 6.

81. 151 Cong. Rec. H5,264-04 (daily ed. June 28, 2005) (statement of Rep. Markey).

82. Letter from Maury Kauffman, *supra* note 21, at 6.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. This calculation is based on the cost of paper (about ½ cent per sheet) (samsclub.com: 5,000 sheets at \$29.88), the cost of toner for a Brother Intellifax 4100E laser facsimile machine (about 1 cent per page) (Officemax.com: \$69.99 for a cartage that yields about 6,000 pages), and the cost of the printing drum for the same machine (about ¾ of a cent) (Officemax.com: \$143.99 for a drum that yields about 20,000 pages).

88. Letter from Maury Kauffman, *supra* note 21, at 6–7.

89. *Id.* at 7. Though small businesses may still rely on a traditional facsimile machine more often than larger entities, the switch to a fax-server based model is relatively easy with many online companies offering such services to small businesses without the need for the business to purchase any special equipment. *See,*

tisement that she finds to have no value will simply ignore the document without printing it, reducing the actual cost of receiving the fax to zero—just like receiving an unwanted e-mail or a piece of traditional mail.⁹⁰

The use of computerized facsimile servers has led to the advent of “fax-to-email” technology, where a facsimile computer server converts the facsimile to an email attachment that is then forwarded to the intended recipient.⁹¹ This technology, likewise, reduces the real cost of receiving a facsimile advertisement to practically zero.⁹² Further, individual consumers or small businesses that cannot afford to set up their own facsimile server can sign up for fax-to-email services on the internet, some of which provide free facsimile receiving services.⁹³

B. Monetary Costs of Receiving Unsolicited Facsimiles

What is the true cost to a business or individual who received an unsolicited advertisement on their facsimile machine? The answer is rarely discussed in TCPA related court decisions,⁹⁴ and has changed dramatically with advances and changes in technology.⁹⁵ It is beyond dispute that the pecuniary cost of receiving an unsolicited facsimile has always been minimal, and is now practically zero.⁹⁶

e.g., FAXCOMPARE.COM (March 2011), <http://www.faxcompare.com> (providing an “apples to apples” comparison of six online facsimile service providers and reviews of other similar service providers).

90. Any annoyance factor is negligible, and further discussed in subsection III.C.1.
91. *See, e.g.*, WINDOWS NT FAX SOLUTIONS, <http://www.ntfaxfaq.com> (last visited Feb. 18, 2011).
92. *See, e.g.*, *Open Text Right Fax*, OPEN TEXT, <http://faxsolutions.opentext.com/fax-server.aspx> (last visited Feb. 20, 2011); *see also infra* section III.C (discussing the intangible costs associated with receiving an unsolicited facsimile advertisement).
93. *See, e.g.*, K7.NET: UNIFIED MESSAGING, <http://www.k7.net> (last visited Feb. 20, 2011).
94. Actual damages are rarely considered by courts because the vast majority of plaintiffs seek statutory damages of \$500–\$1,500 per facsimile. *See supra* subsection II.C.2.b; *infra* note 98.
95. Even at the time the TCPA was enacted, the “drafters recognized that damages from a single violation would ordinarily amount to a few pennies worth of ink and paper usage.” *Levine v. 9 Net Ave., Inc.*, No. A-1107-00T1, 2001 WL 34013297, at *1 (N.J. Super. Ct. App. Div. June 7, 2001) (citing 137 CONG. REC. S16204, S16205–06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings)); *see also* section III.A (comparing the cost of facsimile technology at the time the TCPA was enacted to the cost of the technology today).
96. *See Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900 (W.D. Tex. 2003) (“[D]efendants presented evidence from their expert that the average cost of receiving an unwanted fax is seven cents per page.”); David E. Sorkin, *Unsolicited Commercial E-mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1009 (1997) (citing a 1996 survey which found that “modern” fax machines printed pages at a cost of four to twelve cents each); *see also* section

When the TCPA was enacted, the financial costs borne by the recipient of an unsolicited facsimile advertisement included the following: (1) the cost of the paper used to print the fax, (2) the cost of the ink or toner used to print the fax, (3) extra electricity used by the fax machine in receiving the fax, and (4) the additional wear-and-tear on the fax machine.⁹⁷ One of the earliest cases to address and hear evidence on the issue of actual damages was *Missouri ex rel. Nixon v. American Blast Fax, Inc.*⁹⁸

In *Nixon*, the court heard testimony from an employee of a fax machine seller who “estimated that it would cost someone between 6 ½ and 17 cents to receive a faxed advertisement depending on the type of facsimile machine.”⁹⁹ But on cross the witness admitted that his estimates were based on retail prices, which few businesses, large and small, pay.¹⁰⁰ The witness also admitted that his estimate assumed that a fax advertisement used four times as much toner as a “Slerexe” letter¹⁰¹ and was “just that, an estimate.”¹⁰² Another witness, an in-

III.A (comparing the cost of a facsimile technology at the time the TCPA was enacted to the cost of the technology today).

97. See generally Joseph R. Compoli, Jr., *Junk Faxes: Combining Causes of Action Under Federal and State Law*, 2 AM. ASS'N JUST. 1829 (2007) (“Junk faxes are more than merely irritating. It represents an unfair shifting of the cost of advertising from the advertiser to the unwitting recipients who bear the expense of wasted paper, toner ink and electricity.”); Sorkin, *supra* note 96, at 1009 (“The recipient also bears the cost of wear and tear on the receiving fax machine, as well as administrative costs incurred in logging and routing incoming faxes and replenishing paper and ink supplies.”).
98. 196 F. Supp. 2d 920 (E.D. Mo. 2002), *rev'd*, 323 F.3d 649 (8th Cir. 2003). Few cases address actual damages because they are almost never demanded as the statutory damages provided for in the TCPA exceed by many orders of magnitude any actual damages the average fax recipient may incur. See, e.g., *Sedowski v. Med1 Online, LLC*, No. 07-C-2973, 2008 WL 489360, at *5 (N.D. Ill. Feb. 20, 2008) (holding that provision in TCPA providing for \$500 statutory damages does not violate due process even though defendants claimed it was “approximately 2500 times the actual damage”); *Italia Foods, Inc v. Marinov Enters., Inc.* No. 07-C-2494, 2007 WL 4117626, at *4 (N.D. Ill. Nov. 16, 2007) (finding no due process violation for imposing \$1,500 fine per violation, even though this was approximately 30,000 times the actual harm suffered).
99. *Nixon*, 196 F. Supp. 2d at 923.
100. *Id.* at 923–24.
101. A Slerexe Letter is a facsimile industry test document in which approximately four percent of the page is covered in ink that is often used to determine facsimile machine supply yields, transmission speed, and memory capacity. See Denine Phillips, *Demystifying Fax Terminology: Understanding How a Vendor Computes Operating Costs and Machine Speeds will Help Ensure that Your Next Fax Purchase is a Good Buy*, OFF. SYS'S MAG. (June 1995), http://www.tech-write.biz/docs/tw_a20.pdf; Denine Phillips, *Slerex Letter Sets Benchmarks: This Industry Test Document Determines Supply Yields, Transmits Speed and Memory Capacity*, BUS. TECH. AND SOLUTIONS MAG. (April 1995), http://www.tech-write.biz/docs/tw_a18.pdf.
102. *Nixon*, 196 F. Supp. 2d at 923 n.5.

insurance agent who runs a small office, testified that "the faxes tie up his phone lines for phone calls and other faxes, and that the faxes cost him money for tangible items such as paper and ink cartridges, as well as the time his staff has to spend retrieving these faxes from the fax machine."¹⁰³ But this witness's testimony did not hold up well either.¹⁰⁴

A facsimile industry consultant also testified for the defense in *Nixon*.¹⁰⁵ The consultant testified that in 2002, the cost to receive a normal facsimile was about two to three cents, not the much higher amount estimated by the plaintiff, whose estimate was based on "dealer list prices" that almost no one pays.¹⁰⁶ According to the witness' analysis, the cost to a business for "receipt of a telemarketing call is higher by a magnitude' than the receipt of a fax."¹⁰⁷ In addition, and to the likely surprise and dismay of the TCPA's supporters, the consultant "testified to all the advantages of fax advertising for both the business advertising and the consumers receiving the faxes."¹⁰⁸ As with other forms of advertising, one of the benefits conferred to the recipient is knowledge of a new product or discount. This benefit is likely overlooked by recipients of unsolicited facsimiles because the annoyance of receiving "useless" faxes colors the recipient's view of all fax advertisements.

C. Non-Monetary Costs of Receiving Unsolicited Facsimiles

In addition to the out-of-pocket costs of toner and paper, there is little doubt that receiving an unsolicited facsimile advertisement carries intangible costs like annoyance and potential deceit.

1. Annoyance Factor

Our lives are full of everyday, trivial, annoyances.¹⁰⁹ But few annoyances are worthy of government regulation—especially when the

103. *Id.* at 924.

104. On the insurance agent's testimony, the court noted:

[He] did not even estimate how much these unsolicited faxes cost his business per month or even per year. He also did not testify that he had received complaints from his customers of how they could not reach him by phone or fax because the lines were busy, nor did he give an example of a job he was unable to successfully complete because of the sending an unsolicited fax.

Id.

105. *Id.* at 926–27.

106. *Id.* at 926.

107. *Id.*

108. *Id.* at 927.

109. One court commented that the "receipt of an unwarranted fax is a trivial annoyance. Most individuals just 'toss' the document." *Freedman v. Advanced Wireless Cellular Commc'ns*, No. SOM-L-611-02, 2005 WL 2122304, at *3 (N.J. Super. Ct. Law Div. June 24, 2005).

elimination of the annoyance comes at a significant cost to other societal interests. Technological advances since the enactment of the TCPA in 1991 have rendered the receipt of unsolicited facsimile advertising no more than an annoyance.¹¹⁰ Few businesses still use traditional fax machines that automatically print each facsimile the business receives.¹¹¹ Such businesses need spend only seconds tossing an unwanted fax from an innocent lawbreaker into the recycling bin—the same time it takes to throw away a piece of junk mail.¹¹² And most businesses that receive faxes through a computer server can simply click the delete button as they do with unwanted e-mail. The minor inconvenience caused to the recipient by innocent lawbreakers sending unsolicited facsimiles should not be compensable to the point of placing these small businesses into insolvency. The inconvenience and business disruption suffered by innocent lawbreakers who have not run afoul of the TCPA but still have to defend against patently frivolous TCPA litigation is far greater.¹¹³

One may ask, from the point of view of the annoyed recipient of any unsolicited fax, why it should matter if the fax came from an innocent lawbreaker or blast-faxer? Though the minor annoyance of having to toss out (or delete) an unwanted fax may feel the same, the difference is that the innocent lawbreaker did not intend to annoy, where the fax-blaster knows that its transmissions are largely unwelcome. It is rarely difficult to discern an advertisement from an innocent lawbreaker, usually a local small business known to the recipient, from a blast fax. Any annoyance felt by a recipient of a truthful advertisement from a local business should be even further discounted, especially since the information contained in the fax may be of value to the recipient.¹¹⁴

2. *Potentially Deceptive or Highly Valuable Content*

Just as with many other forms of marketing or advertising, messages transmitted by facsimile may be truthful¹¹⁵, deceptive¹¹⁶, or

110. See *supra* section III.A.

111. See *supra* section III.A.

112. As discussed in subsection VI.B.1, professional fax blasters are excluded from my definition of innocent lawbreakers. These businesses that make their living by sending huge quantities of, often deceptive or fraudulent, advertisements by fax have been dealt with through State and Federal enforcement actions.

113. See *infra* Part V.

114. See *infra* subsection III.C.2.

115. Truthful facsimile advertisements market actual goods or services and are usually beneficial to the consumer because they may notify the consumer of a sale or promotion on a product or service the consumer is likely to want. See, for example, advertisements for daily food discounts offered by a neighborhood family-owned pizza restaurant, *Compoli v. Cumby, Inc.*, No. CV-01-437886 (Ohio Ct. Com. Pl., Cuyahoga Cnty. last disposition Mar. 13, 2003), and a letter from a college to fellow members of the local chamber of commerce looking to place grad-

fraudulent¹¹⁷. The TCPA, however, makes no distinction between honest and dishonest unsolicited facsimile advertisements—subjecting senders to the same penalties regardless of content. The transmitters of fraudulent advertisements are, by definition, crooks who have little interest in obeying fraud laws, let alone the TCPA. They are, therefore, difficult to stop using the TCPA’s private enforcement mechanism.¹¹⁸ Senders of fraudulent or deceptive facsimiles are not innocent lawbreakers.

The senders of truthful facsimile advertisements, and in particular the innocent lawbreakers with whom this Article deals, are in many instances providing a benefit to the consumer who receives their facsimile. Telecommunications consultant Maury Kauffman, in his 2002 comments to the FCC, gives a number of examples, based on real-world events, of facsimile transmissions that are beneficial but arguably violate the TCPA.¹¹⁹ Some of these examples include the following: information from the Food and Drug Administration about a newly approved drug dosage that is transmitted by the drug’s manufacturer to physicians; a recall notice sent by a baby products manufacturer to various retailers that also suggests a substitute product made by the manufacturer; and information about a software upgrade directed to a now-retired college-professor who had purchased a previous version, but received by the new professor who replaced her.¹²⁰

Answering the question of whether any of the above examples violate the TCPA is quite costly—especially to small businesses.¹²¹ Congress’s failure to distinguish between the variety of potentially

uates in internships and offering training opportunities to the members’ current employees, *Omerza v. Bryant & Stratton College, Inc.*, No 05 CV 001237 (Ohio Ct. Com. Pl., Lake Cnty. filed May 24, 2005). See *infra* subsection V.D.4.a.

116. Deceptive unsolicited advertisements may offer an actual product or service, but fail to disclose all of the costs or the true nature of the offer. For example, a notification by facsimile that the recipient has been selected for the claimed honor of inclusion in a “Who’s Who” publication, but failing to disclose that no actual selection criteria exists (other than a working telephone facsimile number) and that the true goal of the Who’s Who company is to sell very expensive copies of the publication and assorted plaques and certificates. See James F. McGrath, *Presidential Who’s Who Scam*, EXPLORING OUR MATRIX (Jan. 12, 2010, 12:34 PM), <http://exploringourmatrix.blogspot.com/2010/01/presidential-whos-who-scam.html>.

117. Fraudulent unsolicited facsimiles are not intended to offer a real product or service, but are sent with the intent to steal the recipient’s identity or money. Examples include “phishing” scams that try to obtain the recipient’s personal and financial information, offers for non-existent services such as debt relief or foreclosure avoidance, and supposed surveys that the recipient is asked to return by facsimile to a 1-900 number, incurring a charge for the transmission.

118. See *infra* section V.C.

119. Letter from Maury Kauffman, *supra* note 21.

120. *Id.* at 3–5.

121. For a more comprehensive discussion, see *infra* section V.D.

unsolicited advertisements that can be transmitted by facsimile in enacting the TCPA or the JFPA does little to stop fraud and deceit, but has a significant detrimental impact on innocent lawbreakers.

IV. THE TCPA'S CURRENT RELEVANCE AND UNINTENDED CONSEQUENCES

Some may argue that the changes in technology and communication preferences make the TCPA and TCPA litigation obsolete. But the data discussed below and the cottage industry of TCPA plaintiffs' lawyers demonstrate that these cases continue to be filed against innocent lawbreakers.¹²² It is precisely because of a decrease in facsimile usage and shuttering of the major blast faxers that the TCPA cottage industry lawyers are increasingly left with only innocent lawbreakers to target, sometimes in class action lawsuits.¹²³

Industry expert Maury Kauffman, in commenting on the FCC's proposed regulations implementing the TCPA, concludes that Congress never really considered the effect class actions could have on the TCPA's statutory damages provision.¹²⁴

A. Empirical Analysis of Recent TCPA Litigation

Despite the advances in technology described above that arguably render the harsh penalties for transmitting unsolicited facsimiles unnecessary, TCPA litigation continues.¹²⁵ As explained above, private enforcement actions may be brought in any state court of general jurisdiction, and in some cases, even in Federal Courts.¹²⁶ With ninety-four Federal District Courts¹²⁷ and approximately 13,500 state courts, it is difficult to quantify the total number of private TCPA enforcement cases that have been brought in American courts since the TCPA's enactment. And cases filed in "small claims" type courts,

122. See generally Letter from Maury Kauffman, *supra* note 21, at 7 ("Technology, the market and most importantly, consumers, have spoken and fax is the loser. Unsolicited facsimile advertisements are no longer the great threat they were feared to be in 1990–1992. Perhaps the best evidence of this fact, is the massive consumer outcry against unsolicited commercial email (UCE) or spam, versus the relative whimper regarding unsolicited (or junk) fax.").

123. See, e.g., *infra* subsection V.D.4.b.

124. Letter from Maury Kauffman, *supra* note 21, at 9. Kauffman also notes that "[f]rivolous suits have been brought in numerous states and jurisdictions across the country. Suing small business owners for millions of dollars because some consumers may have received one unsolicited advertisement is certainly NOT within the spirit of the law's Enforcement paragraphs." *Id.*

125. See, e.g., *Brodsky v. HumanaDental Ins. Co.*, No. 10-C-3233, 2011 WL 529302 (N.D. Ill. Feb. 8, 2011).

126. See *supra* subsection II.C.2.

127. *Federal Judges: Frequently Asked Questions*, UNITED STATES COURTS, www.uscourts.gov/faq.html (last visited Feb. 20, 2011).

which are often divisions within other state courts, are almost impossible to track.¹²⁸ Though an exact figure is practically impossible to determine, a representative sample of TCPA cases can be gleaned from private services such as the Courthouse News Service (“CNS”),¹²⁹

Beginning in 2003, CNS has catalogued all new case filings in various major Federal and State jurisdictions.¹³⁰ The analysis of available CNS data between March 27, 2003 and June 5, 2008,¹³¹ reveals that there were 1,744 new cases¹³² filed by or on behalf of private individuals or businesses¹³³ involving an alleged violation of the TCPA. One thousand, three hundred ninety-five of these cases (80%) involved alleged violations of the anti junk-fax provision, and 158 (9%) involved telemarketing calls.¹³⁴ Only a handful of these cases, about 4%, were brought by pro-se litigants.¹³⁵ Six hundred fifty-five of the fax cases were brought on behalf of or by individuals¹³⁶ and 740 were brought on behalf of companies; 134 of the telemarketing cases were brought by or on behalf of individuals and 24 were brought on behalf of businesses.¹³⁷ In 28% of the cases, the complaint demanded class certifi-

128. Since the monetary jurisdiction of small claims courts is relatively low, ranging from \$1,500 in Kentucky to \$15,000 in Georgia, such actions are of less concern. Indeed, if TCPA claims were limited to small claims court enforcement, much of the unfairness to innocent lawbreakers identified in this Article would be eliminated. *See infra* sections VII.D–E.

129. The CNS employs reporters who physically review all new case filings on a daily or weekly basis, depending on jurisdiction, and sends out reports via e-mail to subscribers. *See* COURTHOUSE NEWS SERVICE, www.courthouse-news.com (last updated Feb. 19, 2011). Subscribers use the reports to monitor case filings in their jurisdiction for marketing purposes, or to identify new litigation filed against the subscribers’ current clients or clients the subscribers seek to represent. *Id.*

130. *See About Us*, COURTHOUSE NEWS SERVICE, <http://www.courthousenews.com/aboutus.html> (last updated Nov. 14, 2008).

131. The CNS data included 104 state and federal trial courts. *See infra* chart of the CNS records, Appendix A.

132. Some of the filings in federal courts were removals of state court actions. The author has attempted to make sure that there are no duplicative figures.

133. The data also revealed eight cases brought by or on behalf of the public by, in almost every instance, a state Attorney General. *See infra* chart of the CNS records, Appendix A.

134. One hundred eighty-two (10%) of the cases could not be categorized as fax or telemarketing violations because of the limitations in the data set.

135. Twenty-two cases involving alleged fax violations and forty-two involving alleged telemarketing violations were brought without the aid of counsel. *See* COURTHOUSE NEWS SERVICE, *supra* note 130. Six additional cases brought by pro-se litigants could not be categorized based on the available data set. *See id.*

136. This estimate is likely significantly higher than reality. This is because in many instances, cases are brought in the name of individuals even though the cause of action belongs to a business entity. *See infra* subsection VII.B.1.

137. One hundred thirteen of the unclassified cases were individuals and sixty-nine were businesses. *See* COURTHOUSE NEWS SERVICE, *supra* note 130.

cation.¹³⁸ Interestingly, about one-third of the cases were filed by the same attorney.¹³⁹

B. Enforcement of the TCPA—Blast Faxers

As discussed above, the anti-junk fax provisions of the TCPA have three enforcement mechanisms: (1) lawsuits by states brought in federal court seeking damages and injunctive relief;¹⁴⁰ (2) enforcement action brought by the FCC seeking administrative civil penalties;¹⁴¹ and (3) private lawsuits brought by individuals in state court.¹⁴²

1. Shutting Down the Major Blast Faxers

As the number of facsimile machines used by businesses grew to almost ubiquity, marketing companies sought to take advantage of this new medium to send advertising messages to potential customers at a relatively low cost. This led to the formation of a number of blast faxers—that is, businesses that combined computer faxing technology with databases of millions of telephone facsimile numbers to send fax advertisement on behalf of clients. The most notorious of these companies, Fax.com, boasted of sending up to two million faxes per day.¹⁴³

This industry, however, was not long lived. Largely because of the TCPA, by 2004, Fax.com was effectively out of business—choosing not to even defend itself in TCPA litigation.¹⁴⁴ Fax.com's demise can be traced, in large part, to an enforcement action brought by the States of

138. Class certification was demanded in 453 of the fax cases (about 33%) but only in 8 telemarketing cases (5%). *Id.* Twenty-nine cases that demanded class certification could not be categorized from the available data. *Id.*

139. Five hundred seventy-eight of the cases identified in the CNS data involved the same attorney as either the lawyer or litigant. *Id.*

140. 47 U.S.C. § 227(f)(1)–(2).

141. *Id.* § 503(b)(1).

142. *Id.* § 227(b)(3).

143. Covington & Burling v. Int'l Mktg. & Research, Inc., No. CIV.A. 01-0004360, 2003 WL 21384825, at *1 (D.C. Super. Ct. Apr. 17, 2004). Fax.com also advertised on its web-site that it "had a database that 'exceeds 30 million fax numbers.'" *Id.* at *3.

144. See *Freedman v. Advanced Wireless Cellular Commc'ns*, No. SOM-L-611-02, 2005 WL 2122304 (N.J. Super. Ct. Law Div. June 24, 2005). *Freedman* described an award by default judgment of \$20,000,000 plus attorneys fees in a class action case against, primarily, Fax.com. *Id.* at *1. This award was vacated on a motion by a co-defendant after it demonstrated, among other defenses, excusable neglect in failing to defend. *Id.* at *4. Fax.com apparently never entered an appearance in the case.

California and Indiana.¹⁴⁵ In addition, in 2002, the FCC fined Fax.com \$5.3 million for TCPA violations.¹⁴⁶

In another more recent case, the FCC fined First Choice Healthcare \$776,500 after finding that First Choice transmitted "at least 98 unsolicited advertisements to the telephone facsimile machines of at least 37 consumers."¹⁴⁷ The FCC is authorized to fine a violator up to \$16,000 for each unsolicited facsimile advertisement,¹⁴⁸ but it has discretion to determine what it believes to be a proper penalty based on the specific facts of each case and the findings of its investigation.¹⁴⁹

Furthermore, the FCC's enforcement action against (any remaining) major violators of the TCPA may increase in light of the General Accountability Office's April 5, 2006 report that concluded the FCC needed to improve its efforts at enforcing the TCPA.¹⁵⁰

Though it was ultimately action by the FCC and state attorneys general that shut down the major blast faxes like Fax.com, there were private enforcement suits filed for Fax.com's blatant violations of the Act.¹⁵¹ In addition to Fax.com, junkfax.org has compiled a list of

145. See *California & Indiana v. Fax.com*, No. 03-CV-1438 (S.D. Cal. Oct. 5, 2004) (order granting preliminary injunction); Ryan Singel, *Curtain Call for Junk-Fax Blaster*, WIRED MAG. (Oct. 9, 2004), <http://www.wired.com/techbiz/media/news/2004/10/65291>.
146. *In re Fax.com, Inc.*, 17 FCC Rcd 15927, 15927 (2002); see also Brooke M. Carey, *Fax Blasting at the OK Corral: Is the FCC Shooting from the Hip?*, 18 LOY. CONSUMER L. REV. 1, 3-4 (2005-2006) (discussing lawsuits filed against Fax.com by recipients of unsolicited faxes).
147. *In re First Choice Healthcare, Inc.*, 21 FCC Rcd 2795, 2795 (2006) The FCC's proposed fine included \$4,500 for each facsimile sent to a consumer before that consumer requested that First Choice Healthcare stop sending the faxes, and \$11,000 for each facsimile sent after the request. *Id.* at 2798-2799.
148. 47 C.F.R. § 1.80(b)(3) (2008). Title 47 of the United States Code, Section 503(b)(2)(D), provides a base forfeiture amount of up to \$10,000, which must be adjusted for inflation under the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. The most recent amendment to 47 C.F.R. section 1.80(b)(3) sets the amount at \$16,000.
149. "In exercising such authority, we are to take into account 'the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.'" First Choice Healthcare, 21 FCC Rcd at 2798 (citing 47 U.S.C. § 503(b)(2)(D)); see *In re Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087, 17100-17101 (1997).
150. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-425, REPORT TO CONGRESSIONAL COMMITTEES, TELECOMMUNICATIONS: WEAKNESSES IN PROCEDURES AND PERFORMANCE MANAGEMENT HINDER JUNK FAX ENFORCEMENT (2006), available at <http://www.gao.gov/new.items/d06425.pdf>; see Noonan & Goodman, *supra* note 73, at 578.
151. See, e.g., *Covington & Burling v. Int'l Mktg. & Research, Inc.*, No. CIV.A. 01-0004360, 2003 WL 21384825, at *5 (D.C. Super. Ct. Apr. 17, 2003) (finding that Fax.com sent 1,634 unsolicited advertisement on behalf of three clients to plaintiff in one week, 1,471 of which were sent after the plaintiff had contacted

other major fax broadcasters who operated in an almost blatant disregard of the TCPA.¹⁵²

2. *State Regulations of Unsolicited Facsimiles*

Some states have enacted their own laws to prohibit the transmission of unsolicited facsimiles.¹⁵³ But few impose restrictions more stringent than the TCPA. One state, not surprisingly California, has attempted to eliminate the established business relationship exception that is codified in the TCPA.¹⁵⁴ But a California federal district court held that this provision could not apply to interstate facsimile transmissions because such interstate regulation is preempted by the TCPA.¹⁵⁵

V. THE TCPA AND INNOCENT LAWBREAKERS

Before discussing the TCPA's impact on innocent lawbreakers, it is important to discuss the "cottage industry"¹⁵⁶ of TCPA plaintiffs' lawyers that has developed and flourished in response to the TCPA's generous statutory penalties. It is because of this cottage industry that innocent lawbreakers have much to fear from inadvertent violations of the Act.

A. *TCPA Cottage Industry*¹⁵⁷

Unlike state attorneys general and the FCC, plaintiffs' lawyers who pursue TCPA claims do not necessarily have in mind the best

Fax.com to demand that the faxes stop); Carey, *supra* note 147, at 3–4; *Amkraut v. PCOP*, THE LAW OFFICES OF JAMIE R. SCHLOSS, <http://jrschlosslaw.org/amkraut/amkrautupdateA.html> (last visited Mar. 30, 2011) (describing the October 16, 2006 California superior court case, which awarded a \$235 million judgment against Fax.com); Michael Singer, *Fax.com Sued for \$2.2 Trillion*, INTERNETNEWS.COM (Aug. 23, 2002), <http://www.internetnews.com/bus-news/article.php/1451781/Faxcom-Sued-for-22-Trillion.htm>.

152. *Junk Fax Profiles*, JUNKFAX.ORG, <http://www.junkfax.org/fax/profiles/index.htm> (last visited Feb. 21, 2011).

153. See, e.g., ARIZ. REV. STAT. ANN. § 44-1482 (Supp. 2009); COLO. REV. STAT. ANN. § 6-1-702 (West 2010); MINN. STAT. ANN. § 325E.395 (West 2004); N.Y. GEN. BUS. LAW § 396-aa (McKinney Supp. 2007).

154. CAL. BUS. & PROF. CODE § 17538.43 (West 2008).

155. Chamber of Commerce of the U.S. v. Lockyer, No. 2:05-CV-2257MCEKJM, 2006 WL 462482, at *5 (E.D. Cal. Feb. 27, 2006).

156. *Omerza v. Bryant & Stratton Coll.*, 2007-Ohio-5215, at ¶20 (Ohio Ct. App. 2007), available at <http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2007/2007-Ohio-5215.pdf> ("Although the receipt of one 'unsolicited advertisement' may violate the TCPA, . . . what Congress did not intend as a result of the passage of the TCPA was the creation of a cottage industry for litigation. Nevertheless, this is precisely what has transpired.").

157. The term "cottage industry" to refer to plaintiffs' lawyers who bring TCPA claims has been used by both commentators and courts. See Brandee L. Caswell,

interest of the general public. Their duties are only to their clients (or, in some instances, themselves).¹⁵⁸ The TCPA cottage industry got a major boost with a headline grabbing victory against a Hooters restaurant franchise in Georgia, where a court ordered the restaurant to pay nearly \$12 million in damages for TCPA violations.¹⁵⁹

In 1995, Hooters of Augusta (Hooters) purchased fax advertising space on flyers sent out to a databank of local Georgia businesses.¹⁶⁰ A local Augusta attorney received one of the faxes and sued in state court under the TCPA.¹⁶¹ Not satisfied with seeking compensation for his own damages, the plaintiff in this case sought class certification—which the court granted.¹⁶²

Then, in early 2001, a jury found that Hooters had willfully and knowingly violated the TCPA by sending six facsimile advertisements.¹⁶³ Unfortunately for Hooters, these six ads went to a class of 1,321 businesses and individuals.¹⁶⁴ And, because the jury found that the faxes were sent willfully, the judge trebled the damages award, entering a judgment against Hooters of \$11,889,000.¹⁶⁵ TCPA plaintiffs' lawyers have touted this sensational decision in many of the threatening letters they send to innocent lawbreakers,¹⁶⁶ trying, presumably, to scare them into a quick settlement.

Many TCPA cases brought by lawyers are not brought on behalf of clients, but on behalf of the lawyer himself (or his law firm).¹⁶⁷ For instance, Consumer Crusade, Inc. and U.S. Fax Law Center, Inc.

Regulating Faxing Activity Under State and Federal Law, 34 COLO. LAW. 63, 67 (2005) ("The private right of action and statutory damage provisions of the TCPA have spawned an industry of junk fax litigation."); Carey, *supra* note 147, at 39 ("It seems that although Congress and the FCC were not necessarily panning for gold when they passed the TCPA, plaintiffs may have a different agenda.")

158. Whether many of these lawyers represent "real" clients or only nominal clients is not clear. See *infra* subsection VII.B.1.

159. *Nicholson v. Hooters of Augusta, Inc.*, No. 95-RCCV-616 (Ga. Sup. Ct. Apr. 25, 2001), available at <http://www.keytlaw.com/faxes/hooterscase.htm>.

160. *Id.*

161. *Id.*; *Faxed Ads Cost Hooters \$12 Million*, GOOD MORNING AMERICA ONLINE (July 25, 2005), <http://www.abcnews.go.com/GMA/story?id=126819&page=1>.

162. *Nicholson*, No. 95-RCCV-616 (Ga. Sup. Ct. Aug. 26, 1998) (order certifying case as a class action).

163. *Id.*

164. *Id.*

165. *Id.*

166. Letter from Joseph Compoli, Jr., Attorney at Law, to Custom Tool & Gage, Inc. (Mar. 11, 2004) ("Recently, in the case of *Nicholson v. Hooters of Augusta*, a court in Georgia awarded over \$11.8 million in a class action lawsuit under the TCPA."), as reprinted in *Lawsuit Abuse Hearing*, *supra* note 61 (statement of Karen R. Harned, Esq., Exec. Dir., Nat'l Fed'n of Indep. Bus. Legal Found.).

167. See, e.g., *Law Offices of Michael A. Freedman v. Advanced Wireless Cellular Commc'ns, Inc.*, No. SOM-L-611-02, 2005 WL 2122304 (N.J. Super. Ct. Law Div. June 24, 2005); *Covington & Burling v. Int'l Mktg. & Research, Inc.*, No. CIV.A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. Apr. 17, 2003); *Compoli v.*

would pay junk fax recipients a small fee (usually around \$25) for their junk faxes, have the claims assigned to them, and then seek statutory damages of \$1,500 per fax from the sender.¹⁶⁸ Some faxers have gone as far as accusing these attorneys of running “legal shakedown schemes.”¹⁶⁹ In another case, the frustrated president of a small Michigan company that specialized in medical equipment leasing that was sued in Ohio, commented, “[w]e make every attempt to conform to the law in all aspects of our business, and face the possibility of severe financial penalties for unintentionally causing miniscule damage—about \$0.03 in resources. I’m sure the people of Cuyahoga County [Ohio] want their courts to have time to concentrate on important problems . . . not have them used to line lawyer’s pockets.”¹⁷⁰

These descriptions are not entirely without foundation. For example, a 2006 article in the Wall Street Journal quotes one Chicago attorney as saying: “Why not turn all those junk faxes into a college fund for your kids?”¹⁷¹ The same article also referenced an Arizona website, which encouraged visitors to “[t]urn [their] fax machine into a money machine.”¹⁷² The article at one point goes on to liken these attorneys to “bounty hunters,” and notes that if Osama Bin Laden had sent 100,000 junk faxes, there would be a larger price on his head than the \$25 million reward the government was offering.¹⁷³

1. Support Infrastructure

Cottage industry lawyers use both public and private web sites to share information and strategies, as well as solicit new clients.¹⁷⁴ Many of these websites offer step-by-step guides and printable legal forms for potential plaintiffs to bring suit.¹⁷⁵

Additionally, several websites act as “support networks” for junk fax industry lawyers, helping them recruit clients and share information.¹⁷⁶ Junkfax.org, for example, has several links off of their

Cumby, Inc., No. CV-01-437886 (Ohio Ct. Com. Pl., Cuyahoga Cnty. last disposition Mar. 13, 2003).

168. Paula Moore, *Appeals Court Calls a Halt To Aspect of Junk Fax Suits*, DENVER BUS. J. (Feb. 16, 2007), <http://denver.bizjournals.com/denver/stories/2007/02/19/story8.html?t=printable>.

169. Seth Lubove, *Fax and Friction*, FORBES.COM (Jan. 1, 2004), http://www.forbes.com/2004/01/20/cz_sl_0120_faxes_print.html.

170. *Lawsuit Abuse Hearing*, *supra* note 61, at 174–75.

171. Walter Olson, *Rumpelstiltskin, LLP*, WALL ST. J., July 29, 2006, at A11, available at <http://online.wsj.com/article/SB115412707998020896.html>.

172. *Id.*

173. *Id.*

174. See, e.g., *Attorney Information*, JUNKFAX.ORG, http://www.junkfax.org/fax/basic_info/attorneys.htm (last visited Feb. 21, 2011) (lists dozens of attorneys in almost every state who handle TCPA litigation).

175. Lubove, *supra* note 169.

176. E.g., JUNKFAX.ORG, <http://www.junkfax.org> (last visited Feb. 21, 2011).

homepage for consumers about junk fax "horror stories,"¹⁷⁷ and "how to get even."¹⁷⁸ For those consumers who don't want to "do it yourself," there's the handy attorney reference page, which lists several experienced law firms and lawyers who have successfully prosecuted junk faxers in the past.¹⁷⁹

Then there is the so-called TCPA reporter. Self-described as the "most important and comprehensive research resource for TCPA litigation,"¹⁸⁰ this website contains links and information about the statute and the federal regulations implementing it, as well as databanks of cases and briefs about TCPA litigation.

"If your task is busting some illegal telemarketers, then there are many tools that can help,"¹⁸¹ or so says TCPAtools.com. This site contains links to several "wiki's" that help attorneys and consumers identify and track down junk fax senders and other TCPA violators.¹⁸²

Even local, state, and national bar associations have joined the fray, creating special chapters or subgroups dedicated to TCPA litigation.¹⁸³ The American Association of Justice¹⁸⁴ lists a "Telemarketing, Spam, or Junk Fax" litigation group.¹⁸⁵ All of this evidences the pervasiveness of TCPA and junk fax litigation, and the extent to which this cottage industry has blossomed into a national cash cow for plaintiffs attorneys specializing in TCPA disputes.

B. Innocent Lawbreakers

How can a lawbreaker be innocent? By innocent lawbreaker, I mean a person—or most often a small business—that unknowingly or

177. *Junk Fax Real Life Stories*, JUNKFAX.ORG, www.junkfax.org/fax/stories/index.html (last visited Feb. 21, 2011).

178. *How to Get Them to Stop And/Or Get Even*, JUNKFAX.ORG, www.junkfax.org/fax/action/getEven.html (last visited Feb. 21, 2011).

179. *Attorney Information*, JUNKFAX.ORG, www.junkfax.org/fax/reference/index.htm (last visited Feb. 21, 2011).

180. TCPALAW.COM, www.tcpalaw.com (last visited Feb. 21, 2011).

181. TCPATOOLS.COM, <http://www.tcpatools.com> (last visited Feb. 21, 2011).

182. *Id.* The links include the following: "User Guides," a "Caller ID Database," a "Complaint Generator" (for the industrious consumer), and even a "Perp Database," identifying all known "perpetrators" of the TCPA. *Id.*

183. See James Nash, *Junk Fax Senders Win a Victory in Ohio Courts*, COLUMBUS DISPATCH (Sept. 6, 2007) http://www.dispatch.com/live/content/business/stories/2007/09/06/JUNKFAX.ART_ART_09-06-07_C12_U97QQA8.html (quoting an attorney from the "Telephone Consumer Rights Bar Association of Ohio").

184. "For 65 years, the American Association of Justice, also known as the Association of Trial Lawyers of America (ATLA), has supported plaintiff trial lawyers—as the collective voice of the trial bar on Capital Hill and in courthouses across the nation and by providing exclusive services designed for trial lawyers." AMERICAN ASSOCIATION FOR JUSTICE (2011), <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm>.

185. *Litigation Groups*, AM. ASS'N FOR JUSTICE, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/1150.htm> (last visited Feb. 21, 2011).

unwittingly violates some (often obscure or technical) law or regulation. The lawbreaker is “innocent”—as I use the term here—because he is usually unaware of the law or regulation he is violating or is aware of the law but unaware that his conduct violates it.¹⁸⁶ The innocent lawbreaker does not intend to violate the law or regulation. And the “victim” of the violation suffers no real injury or damages beyond (in some instances) some de minimus cost or inconvenience. In a way, it is the innocent lawbreaker who is also the victim of (often well-intentioned) laws or regulations—a victim of strict-liability laws like the TCPA that have little or no safeguards to protect inadvertent violators against potentially ruinous litigation or settlement costs.¹⁸⁷

1. *What is an Innocent Lawbreaker in Connection with the TCPA?*

The TCPA, as originally enacted in 1991, completely forbade the transmission of advertisements by facsimile unless the recipient specifically consented to the transmission.¹⁸⁸ The 2005 amendment, the JFPA, added one significant exception to this general prohibition, codifying the FCC’s established business relationship (EBR) rule.¹⁸⁹ But even twenty years after its original enactment, many individuals and small businesses do not know about the TCPA.¹⁹⁰

i. *Ignorance of the TCPA’s Existence or Misunderstanding of the TCPA’s Scope and Prohibitions*

It is common for small businesses to be solicited by advertising companies that place an ad in a coupon book, coupon magazine, or a

186. Though the TCPA is a strict liability offense, the point here is that some violators of a strict liability statute are more morally culpable than others. This difference should not be ignored.

187. One may argue that all strict-liability laws create the risk of prosecuting innocent lawbreakers. But most strict liability laws differ from the TCPA because the victims of the regulated conduct suffer real injuries, and having a *mens rea* requirement would make enforcement unfeasible. As explained in Part III, *supra*, unsolicited facsimile recipients do not suffer the type of injury that needs to be addressed with a strict liability statute. In fact, the punitive nature of the TCPA’s statutory damages, *see infra* section VII.C, as compared to the de minimus damages suffered by fax recipients argue against strict liability and in favor of punishing only intentional violations. *See supra* section IV.B. Intentional violators of the TCPA are not innocent lawbreakers.

188. *See Williams, supra* note 33, at 346; *see also* 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, 840 (2007) (“[T]he TCPA set out to create a complete ban on unsolicited commercial faxes.”).

189. For a more thorough discussion of the EBR rule, *see* Laudino, *supra* note 188; Williams, *supra* note 33; Noonan & Goodman, *supra* note 73, at 576–77.

190. *See, e.g.,* Victoria Lim, *Coffee Offer Lands Business In Hot Water*, TAMPA TRIB., Jan. 23, 2005, Money Sense, at 1.

similar medium meant to promote local businesses to potential customers.¹⁹¹ One such medium promoted to small businesses was the inclusion of an advertisement in a newsletter sent by facsimile to potential customers.¹⁹² Other marketing businesses offer to send facsimiles advertising daily specials to a small business' customers.¹⁹³ It is safe to assume that the small businesses that sign up for such facsimile marketing campaigns do not know that sending such faxes can be a violation of the TCPA that could subject them to large statutory damages. One may think the small business that places the advertisement, but does not actually send the facsimile, is shielded from liability. But courts have held that that TCPA "appl[ies] not only to the actual sender of the unsolicited faxes, but also to the companies whose products are advertised."¹⁹⁴ Though an innocent lawbreaker could cross-claim against the marketing company that sent the faxes, it would still have to pay, at a minimum, legal fees to bring the cross-claim in addition to paying to defend the underlying suit. And if the marketing company is a fly-by-night operation, the innocent lawbreaker would still be left holding all of the liability.

C. Why the Cottage Industry Targets Innocent Lawbreakers

There are a number of reasons that TCPA plaintiffs' lawyers—the cottage industry—targets innocent lawbreakers. But the primary one is simply that it is much easier and cheaper (in terms of litigation costs for the plaintiff's lawyer) to target local small businesses.

First, local businesses are, by definition, easy to find. Innocent lawbreakers don't hide their identity; they display it prominently on the facsimile. Unlike senders of deceptive or fraudulent facsimiles,¹⁹⁵ innocent lawbreakers' goal is to attract customers, so concealing the name and address of the company would be self defeating. Like many

191. See, e.g., JB DOLLAR STRETCHER MAG., <http://www.jbdollar.com> (last visited Feb. 21, 2011); VALPAK, <http://www.valpak.com> (last visited Feb 21, 2011).

192. See, e.g., *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1170 (S.D. Ind. 1997).

193. See, e.g., RFG MARKETING, <http://www.rfgmarketing.com> (last visited Feb. 21, 2011).

194. *Covington & Burling v. Int'l Mktg. & Research, Inc.*, No. CIV.A. 01-0004360, 2003 WL 21384825, at *7 (Super. Ct. D.C., Civ. Div. Apr. 17, 2003) ("The FCC obviously construes the term 'use' in the TCPA's prohibitions to include both direct use, and indirect use by way of an agent. . . . This is wholly reasonable, since liability could be avoided by using an intermediary, advertisers could use a series of fly-by-night fax advertising firms to send waves of unsolicited faxes, and be insulated from liability. Such a construction would clearly allow avoidance of the statute, and such a construction is to be avoided." (quoting *Neil Zeid v. The Image Connection, Inc.*, No. 01AC-002885-Z-CV (Cir. Ct. Mo., St. Louis Cnty., Oct. 30, 2001))).

195. Senders of deceptive or fraudulent facsimiles earn money through the fraudulent or deceptive scheme the fax "advertises," and not through the sale of legitimate products or services. See *supra* subsection III.C.2.

other areas subject to government regulation, only law-abiding individuals and businesses are subject to the government regulation (or litigation). A company wanting to go back into the business of blast faxing can easily do so by setting up its business outside of the jurisdictional reach of United States laws. A blast faxer that operates "off-shore" can often ignore the TCPA and FCC rules.¹⁹⁶

Second, innocent lawbreakers are much more likely to be "collectible," that is, have easily locatable resources that can be used to satisfy a judgment.¹⁹⁷ Small businesses rarely hide their assets in anticipation of litigation as may be done by blast faxers who know that they are violating the law and will likely be subject to litigation or other enforcement action.

Third, many of the lawyers who are a part of the cottage industry are solo practitioners or part of a small law-firm, with limited financial resources.¹⁹⁸ Bringing a case against a local small business entails little more than paying the filing fee at a local court. Suing well financed, often out-of-state, corporations is potentially much more costly. Witnesses may reside outside of the court's subpoena jurisdiction, requiring potential travel expenses. Well-financed blast faxers will also have the financial resources to fight (in court) the lawsuits, forcing the plaintiff's lawyer to devote much more time (and potentially money) to the case. Small businesses are much more likely to settle a TCPA case early (even if they believe it is baseless) because of the potential costs to the business of fighting in court.¹⁹⁹ Thus, it is easy to see why small businesses are a popular target for these cottage industry trial lawyers.²⁰⁰

196. See, e.g., *Cyber Communications, Inc.*, 5/F Lyton Building 36 Mody Road Tsim Sha Tsui, Kowloon, Hong Kong.

197. "The plaintiff [a lawyer] has chosen this firm as counsel in four other TCPA cases brought not as individual claims by an aggrieved owner of a facsimile machine and telephone line, but as a skilled litigant who has culled through the numerous invaders of his privacy to select only those who have collectability." *Bernstein v. Am. Family Ins. Co.*, No. 02 CH 6905, 2005 WL 1613776, at *3 (Ill. Cir. Ct. July 6, 2005).

198. Though, as individuals, these lawyers do not appear to be an "industry," because these individual lawyers or small firms often share information, strategies, and legal briefs, taken together they can be said to make up an industry.

199. See *infra* section V.D.

200. *Lawsuit Abuse Hearing*, *supra* note 61, at 11 (statement of Karen R. Harned, Esq., Exec. Dir., Nat'l Fed'n of Indep. Bus. Legal Found.) ("Small business is the target of so many of these frivolous suits because trial lawyers understand that a small-business owner is more likely than a large corporation to settle a case rather than litigate. Small-business owners do not have in-house counsels to inform them of their rights, write letters responding to allegations made against them, or provide legal advice. They do not have the resources needed to hire an attorney nor the time to spend away from their business fighting many of these small claim lawsuits. And often they do not have the power to decide whether or not to settle a case—the insurer makes that decision.").

Finally, small businesses are the targets of TCPA lawsuits because there are almost no "big" targets left. Most of the major blast faxers have been shuttered.²⁰¹ Yet lawyers who make much of their living by bringing TCPA claims still need to make a living. With "no one" left to sue, cottage industry lawyers must sue everyone, even if the case they bring is, at best, marginal.²⁰²

D. Effects of TCPA Litigation on Innocent Lawbreakers

The harmful impact of TCPA litigation, or even threatened TCPA litigation, is felt most significantly by small businesses. Businesses that can least afford to employ compliance officers or attorneys. Businesses that find themselves facing significant unexpected costs resulting from the innocent transmission of an advertisement by facsimile. Small business owners are responsible for most aspects of the business' operations, from hiring employees to taking out the trash to trying to comply with the various state and federal regulatory mandates imposed on them.²⁰³ Thus for "small-business owners, even the threat of a lawsuit can mean significant time away from their business. Time that could be better spent growing their enterprise and employing more people."²⁰⁴

In testimony before a Congressional committee regarding the costs of unwarranted litigation, Karen Harned, Executive Director of the Legal Foundation for the National Federation of Independent Business (NFIB), first commented generally about the costs of actual and threatened litigation to NFIB members.²⁰⁵ With the cost of lawsuits skyrocketing, it is no wonder many small businesses cower at just the mere threat of a lawsuit.²⁰⁶ Harned noted that nearly half of small-business owners were either "very concerned" or "somewhat concerned" about being sued.²⁰⁷ These fears are due mainly to the frequency of suits, in general, or, sometimes, the vulnerability of the owner's industry as a whole to lawsuits.²⁰⁸

201. *See supra* subsection IV.B.1.

202. *See, e.g., infra* subsection V.D.4.

203. *Lawsuit Abuse Hearing, supra* note 61, at 10 (statement of Karen R. Harned, Esq., Exec. Dir., Nat'l Fed'n of Indep. Bus. Legal Found.).

204. *Id.*

205. The NFIB, which in 2004 counted 600,000 members from all fifty states, represents "small employers who typically have about five employees and report gross sales of \$300,000–\$500,000 per year. *Id.* at 9. NFIB's average member nets \$40,000–\$60,000 annually. *Id.* at 10. NFIB members represent an important segment of the business community—a segment with challenges and opportunities that distinguish them from publicly traded corporations." *Id.*

206. *Id.* (citing TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE (2003)).

207. *Id.* (citing NAT'L FED'N OF INDEP. BUS., NFIB NATIONAL SMALL BUSINESS POLL: LIABILITY (William J. Dennis, Jr. ed., 2002)).

208. *Id.*

These fears are not totally unfounded, and the multi-million dollar verdicts are not the problem²⁰⁹—at least, not when you consider the fact that many businesses net under \$100,000 per year.²¹⁰ To these businesses, “nuisance value” is a misnomer and settlement is not the end of the matter; their insurance premiums are likely to increase for the foreseeable future as well.²¹¹

The first tool in the plaintiff’s lawyer’s playbook is the demand letter. This seemingly innocuous one-to-two-page document informs business owners that they are currently in violation of some particular statute.²¹² The demand letter then spouts off a laundry list of case law and other legal citations to overwhelm the recipient and give them a feeling of futility.²¹³ But, at the end, the letter gives them the “opportunity” to avoid the whole thing for a “modest,” up-front fee.²¹⁴

The example of this phenomenon given by the NFIB Legal Foundation Executive Director involves TCPA litigation where a tool manufacturer was sued by an employee of one of its regular customers.²¹⁵

209. *Id.* at 10–11.

210. *Id.* at 10.

211. *Id.*

212. *Id.* at 12.

213. *Id.* For instance, the letter might read something like this:

Kindly be advised that it is a violation of the federal Telephone Consumer Protection Act (TCPA), Title 47, United States Code, Section 227, to transmit fax advertisements without first obtaining the ‘prior express invitation or permission’ of the recipient. See 47 U.S.C. 227(a)(4) and 227(b)(1)(C). In addition, Ohio courts have declared that a violation of the TCPA is a [sic] ‘unfair or deceptive’ act or practice under the Ohio Consumer Sales Practices Act (CSPA), Section 1345.02(A) of the Ohio Revised Code.

Letter from Joseph R. Compoli, Jr., *supra* note 166.

214. See Letter from Joseph R. Compoli, Jr., *supra* note 166. For example, one such demand letter states:

We are sending you this letter for the purpose of offering you an opportunity to resolve this matter without the expense of court litigation and attorneys [sic] fees. We are authorized to amicably settle this claim for the amount of \$1,700. This amount represents the sum of \$1,500 under the TCPA and \$200 under the CSPA for each unsolicited fax advertisement which was received by our client. We believe that our proposed settlement is very fair and reasonable under the circumstances. We will leave this offer open for fifteen (15) days from the date of this letter. Recently, in the case of *Nicholson v. Hooters of Augusta*, a court in Georgia awarded over \$11.8 million in a class action lawsuit under the TCPA. Also, more recently, in the case of *Gold Seal Termite & Pest Control v. Prime TV LLC*, a court in Indiana has certified a nationwide class action against Prime TV for sending unsolicited fax advertisements.

Id.; see also *Lawsuit Abuse Hearing*, *supra* note 61, at 11 (statement of Karen R. Harned, Esq., Exec. Dir., Nat’l Fed’n of Indep. Bus. Legal Found.) (discussing timeframes for paying the settlement fee, as well as escalation clauses that raise the price that the business must pay to settle as time passes).

215. *Lawsuit Abuse Hearing*, *supra* note 61, at 11 (statement of Karen R. Harned, Esq., Exec. Dir., Nat’l Fed’n of Indep. Bus. Legal Found.); see also Letter from

But the plaintiff, a truck driver, had no authority to bring a claim that, if it existed, belonged to his employer.²¹⁶ Even though this case was baseless, the defendant spent \$882.60 (over half the amount of the settlement costs) for his attorney to draft a letter to the plaintiff's lawyer and avoid payment of the demanded settlement.²¹⁷

1. Threat of Class Actions

Whether a TCPA case can be litigated as a class-action depends largely on the jurisdiction in which the case is brought. Courts have disagreed on whether class-actions are an appropriate way to resolve TCPA cases. There are various reasons for the disagreement, but it is beyond dispute that even the mere threat of a class action can have a devastating effect on the innocent lawbreaker.²¹⁸

Some states categorically bar TCPA cases from being litigated as class actions. For example, New York has a statutory bar on TCPA type cases being brought as class actions.²¹⁹ This statute has been interpreted as prohibiting lawsuits seeking a penalty from being brought as a class action absent specific legislative authorization.²²⁰

At least one Pennsylvania court has held that national class actions for violations of the TCPA cannot be brought in Pennsylvania state courts because not all states allow their citizens to bring TCPA class actions.²²¹ Thus comity concerns prevent the maintaining of class actions that include citizens of states where they could not maintain such an action in their home state.²²²

Courts have also held that TCPA cases are inappropriate for class action status because determining “membership in the class would es-

Kenneth W. Kleinman, counsel for Custom Tool & Gage, Inc., to Joseph R. Compoli, Jr. (Mar. 16, 2004) (describing Custom Tool & Gage as “a reputable company which sells precision materials to manufacturers of products which must meet exacting tolerances. The company has been in business for thirty years. The company does not send advertising by facsimile to businesses who are not frequent purchasers of its materials.”), reprinted in *Lawsuit Abuse Hearing*, *supra* note 61, app. at 170.

216. Letter from Kenneth W. Kleinman, Attorney at Law, to Joseph R. Compoli, Jr. (Mar. 16, 2004), as reprinted in *Lawsuit Abuse Hearing*, *supra* note 61; see *infra* subsection VII.B.1.a.

217. *Lawsuit Abuse Hearing*, *supra* note 61, at 11–12 (statement of Karen R. Harned, Esq., Exec. Dir., Nat'l Fed'n of Indep. Bus. Legal Found.).

218. See Deborah F. Buckman, Annotation, *Propriety of Class Actions Under Telephone Consumer Protection Act*, 47 U.S.C. § 227, 30 A.L.R. Fed. 2d 537 (2008); *supra* section V.D.

219. N.Y. C.P.L.R. § 901(b) (McKinney 2011).

220. *Holster III v. Gatco Inc.*, 485 F. Supp. 2d 179 (E.D.N.Y. 2007), *aff'd* 618 F.3d 214 (2d Cir. 2010).

221. *Weitzner v. Vaccess Am., Inc.*, 5 Pa. D. & C. 5th 95, 2008 WL 4491534 (2008).

222. *Id.*

sentially require a mini-hearing on the merits” of whether each class member received an “unsolicited” facsimile advertisement.²²³

Other state courts, have taken a more traditional case-by-case approach in determining whether a TCPA case can be litigated as a class action. In a 2005 Illinois case, the defendant was sued for hiring a company to send approximately 5,500 faxes advertising his insurance business.²²⁴ At the class certification phase, the plaintiff had no evidence that anyone other than he received the fax at issue and the defendant had no record of prior consent by any recipient.²²⁵ Further, because the company that allegedly transmitted the facsimiles did not enter an appearance, the court had no direct evidence of any facsimile being sent or received.²²⁶ The court, applying the Illinois version of the traditional test for class certification,²²⁷ found that, although the numerosity requirement was met, a class should not be certified because the plaintiff was not a suitable class representative because of his ties to the law firm he chose to file the claim.²²⁸

Courts have also held that Congress did not intend for TCPA claims to be brought as class actions.²²⁹ This congressional intent is relevant in the consideration of whether a “class action, as opposed to alternative procedures, provides a superior means for adjudicating the controversy.”²³⁰ A Pennsylvania federal court likewise held that the TCPA provides for the following:

[A] *minimum* recovery of \$500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation. This most likely exceeds any actual monetary loss in paper, ink or lost facsimile time suffered by most plaintiffs in such a case. The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf.²³¹

223. *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995).

224. *Bernstein v. Am. Family Ins. Co.*, No. 02 CH 6905, 2005 WL 1613776, at *1 (Ill. Cir. Ct. July 6, 2005).

225. *Id.*

226. *Id.*

227. The prerequisites for class certification under the Federal Rules of Civil Procedure require the finding of (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. *See* FED. R. CIV. P. 23(a).

228. *Bernstein*, 2005 WL 1613776, at *4. The plaintiff was a lawyer who had used the same law firm to bring previous TCPA cases and had worked together with the firm in at least two previous class actions that the plaintiff had initiated. *Id.* at *3.

229. *See Freedman v. Advanced Wireless Commc'ns, Inc.*, No. SOM-L-611-02, 2005 WL 2122304, at * 2 (N.J. Super. Ct., Law Div. June 24, 2005) (citing 137 CONG. REC. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (explaining that the Act was to provide a private cause of action for a consumer to pursue in small claims court)).

230. *Id.* at *2.

231. *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (footnote omitted) (citations omitted).

A class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements.²³² A number of courts have found that class actions are inappropriate in TCPA cases because individual issues predominate over common issues.²³³

Courts have also held that TCPA cases should not be certified as class actions because class actions are not superior to individual actions.²³⁴ “[T]he superiority prong of a class action is undermined where there is a readily available individual remedy. . . . Under the TCPA private action provision, the proofs are simple, the cost low, the injury small, and the \$500 damage award is attractively disproportionate to the extent of the actual injury.”²³⁵

But other courts have held that class actions are permissible because the Act contains no prohibition of class actions.²³⁶ Thus the threat of a TCPA class being certified for class action treatment is real in many jurisdictions and TCPA class actions have resulted in enormous damage awards.²³⁷ Since average innocent lawbreakers do not have the legal training or resources to determine if a threat of class certification contained in a demand letter²³⁸ from a TCPA plaintiffs’ lawyer has potential merit, they may choose to settle the case based on the threat alone.

2. *Threat of Piggybacking of State Law Consumer Protection Claims*

In addition to seeking damages for each unsolicited facsimile advertisement under the TCPA, cottage industry lawyers have sought to tack on state consumer protection law claims to further increase the plaintiff’s claimed “damages.” Though some states have enacted state-law prohibitions against the transmission of unsolicited facsimiles,²³⁹ even those that do not have specific prohibitions still have some

232. *Id.* at 404–05.

233. See *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997); *Livingston v. U.S. Bank, N.A.*, 58 P.3d 1088 (Colo. App. 2002); *Kondos v. Lincoln Prop. Co.*, 110 S.W.3d 716 (Tex. App. 2003).

234. *E.g., Freedman*, 2005 WL 2122304.

235. *Id.* at *3, (quoting *Levine v. 9 Net Ave., Inc.*, No. A-1107-00T1, 2001 WL 34013297, at *6 (N.J. Super. Ct. App. Div. June 7, 2001)).

236. See, *e.g.*, *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844, 850–51 (Ariz. Ct. App. 2002).

237. See, *e.g.*, *Nicholson v. Hooters of Augusta, Inc.*, No. 95-RCCV-616 (Ga. Sup. Ct. Apr. 25, 2001), available at <http://www.keytlaw.com/faxes/hooterscase.htm>.

238. *Lawsuit Abuse Hearing*, *supra* note 61, at 11–12 (statement of Karen R. Harned, Esq., Exec. Dir., Nat’l Fed’n of Indep. Bus. Legal Found.).

239. See ARIZ. REV. STAT. ANN. § 44-1482 (2003); CAL. BUS. & PROF. CODE § 17538.43 (West 2010); COLO. REV. STAT. ANN. § 6-1-702 (2002); GA. CODE ANN. § 46-5-25 (2008); IDAHO CODE § 48-1002 (2003); LA. REV. STAT. ANN. § 51:1745 (2003); MD. COM LAW CODE ANN. § 14-1313 (2002); ME. REV. STAT. ANN. tit. 10 § 1496 (2009);

form of consumer protection legislation.²⁴⁰ Most of these consumer protection laws seek to deter businesses from engaging in unconscionable or unfair dealings with consumers.²⁴¹

These general consumer protection statutes were designed to protect individuals against businesses; TCPA plaintiff's lawyers have argued that they should also apply to businesses that receive unsolicited fax advertising.²⁴² The Ohio Supreme Court has rejected this argument because Ohio's Consumer Protection Act applies only to "individuals" which the court held means "a single person or human being" and not a business.²⁴³ This is one of the reasons that TCPA cottage industry lawyers try to argue that individual employees of a business are the proper party in interest to the suit.²⁴⁴

The Ohio Supreme Court also held that sending a truthful facsimile advertisement, though unsolicited, does not violate Ohio's Consumer Sales Practices Act. Instead, in order to prevail on a claim that the facsimile advertisement violates the consumer protection statute, plaintiffs "have to make a showing that the unsolicited fax is part of a consumer transaction that is a deceptive, unfair, or unconscionable practice."²⁴⁵

Other states, however, have their own TCPA-like legislation that specifically allows the recovery of "state" statutory damages in addition to the federal statutory damages under the Act.²⁴⁶ Again, it is difficult for an innocent lawbreaker to determine if the threat of additional state damages is "real" without engaging counsel and spending significant resources in terms of time and money.

3. *Threat of Multiple Violations Per Fax*

Not satisfied with demanding \$500–\$1,500 per unsolicited facsimile, TCPA plaintiff's lawyers have demanded this statutory penalty for each alleged technical violation of the TCPA and FCC rules, demand-

MICH. COMP. LAWS ANN. § 445.1771 (2006); MINN. STAT. ANN. § 325E.395 (2004); MONT. CODE ANN. § 31-14-1501 (2009); N.C. GEN. STAT. ANN. § 75-101 (West Supp. 2010); N.D. CENT. CODE ANN. § 51-07-23 (West 2009); NEB. REV. STAT. § 86-243 (2007); N.J. STAT. ANN. § 56:8-157 (2001); N.Y. GEN. BUS. LAW § 396-aa (McKinney 2010); OR. REV. STAT. § 646A.360 (2009); PA. STAT. ANN., tit. 73 § 2250.1 (West 2010); R.I. GEN. LAWS ANN. § 6-47-1 (WEST 2010); S.C. CODE ANN. § 15-75-50 (West Supp. 2010); TENN. CODE ANN. § 65-4-501 (1994–95); TEX. BUS. & COM. CODE ANN. § 35.47 (repealed West 2009); UTAH CODE ANN. § 13-25A-101 (West 2010); WASH. REV. CODE ANN. § 80.36.540 (West Supp. 2011); WIS. STAT. ANN. § 134.72 (West 2011).

240. See, e.g., OHIO REV. CODE ANN. § 1345.01 (West 2004).

241. See *id.*

242. See, e.g., *Culbreath v. Golding Enters., LLC*, 872 N.E.2d 284 (Ohio 2007).

243. *Id.* at 290.

244. See *infra* subsection V.D.2.

245. *Culbreath*, 872 N.W.2d at 291.

246. See *supra* note 239.

ing multiple statutory penalties for each unsolicited facsimile advertisement.²⁴⁷ In *Culbreath v. Golding Enters., LLC*, the plaintiff demanded not only \$1,500 for each unsolicited fax advertisement it received, but additional statutory damages of \$1,500 for each technical violation of FCC regulations each fax allegedly contained.²⁴⁸ In addition to generally prohibiting the transmission of unsolicited advertisements by facsimile, Congress made it illegal to transmit such a facsimile if it did not contain "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."²⁴⁹ But unlike subsections 227(b) and (c), subsection (d) does not provide for a private cause of action for individuals who violate it.²⁵⁰ Despite this apparent intent by Congress not to permit private lawsuits to enforce these technical violations, plaintiffs' lawyers attempted to "skirt its provisions"²⁵¹ by relying on FCC regulations²⁵² that require similar identifying information on facsimiles.²⁵³

At least three courts have held that there is a private cause of action to enforce provisions of this FCC rule, thus allowing for a separate statutory penalty for each violation, even if they were all contained on the same document.²⁵⁴ But the Ohio Supreme Court, among other courts, disagreed, finding that because unsolicited facsimiles are rarely transmitted to a single recipient, there are many potential plaintiffs who could each recover up to \$1,500 per fax under Section 227(b)(3):

To allow each of those individuals, however, to multiply that award three times over would create a windfall not contemplated by the statutory scheme. Moreover, the attorney general could bring a lawsuit for not only sending the fax but for the technical defects as well. The prospect of an untold number of plaintiffs bringing suit, or joining a putative class action suit, combined with the possibility of a federal court action being initiated by a state attorney general for violations of subsection 227(d), serves as a significant deterrent in and

247. See *Culbreath*, 872 N.E.2d 284.

248. *Id.* at 286-87; see 47 C.F.R. § 68.318(d) (2011) (requiring that every facsimile contain certain identifying information).

249. 47 U.S.C. § 227(d)(1)(B) (2006).

250. *Id.* § 227(b), (c), (d).

251. *Culbreath*, 872 N.E.2d at 288.

252. 47 C.F.R. § 68.318(d).

253. Note that 47 U.S.C. § 227(d) is not without an enforcement mechanism. State attorneys general can sue to enforce these provisions in federal court under 47 U.S.C. § 227(f)(1).

254. *Schraut v. Rocky Mountain Reclamation*, No. 01AC-002848 O CV, 2001 TCPA Rep. 1182, (St. Louis Mo. Cir. Ct. Dec. 18, 2001); *Sterling Realty Co. v. Klein*, No. DC-010870-04, 2005 TCPA Rep. 1353, at *2 (N.J. Super. Ct. Mar. 21, 2005); *McKenna v. Acurate Comp. Serv., Inc.*, 2002 TCPA Rep. 1135, (Colo. Dist. Ct. Feb. 24, 2003). All of these cases are available at <http://www.tcpalaw.com>.

of itself without adding a dubious private cause of action for each violation.²⁵⁵

Thus, at least in Ohio, no private cause of action exists to enforce the FCC's technical regulations about the content of the facsimile.²⁵⁶

4. Case Studies

Though there are many instances where innocent lawbreakers were targeted by the cottage industry of TCPA plaintiffs' lawyers, the following two examples are illustrative²⁵⁷ of truly innocent lawbreakers and the TCPA's unintended consequences. Both of the below-described cases were brought by the same attorney.

i. Members of a Chamber of Commerce

*Omerza v. Bryant & Stratton College*²⁵⁸ is a case that demonstrates the ambiguity of the TCPA and the difficulty that an innocent lawbreaker has in determining if its sending of a facsimile will run afoul of the TCPA. In 2003, a small construction company sued a well respected for-profit college when it received, by facsimile, a two-page document from the college.²⁵⁹ The first page was a letter addressed to members of the local chamber of commerce introducing the College and offering to work with chamber members in both offering training to their employees and potentially placing College graduates as employees or interns with the chamber members²⁶⁰. The second page was a "fact sheet" describing the College and its programs.²⁶¹ Both the College and the construction company were members of the chamber of commerce, and the College obtained the company's facsimile number from the chamber of commerce's directory, where the recipient chose to list its address and fax number.²⁶²

At trial (and in filings before trial) the plaintiff's lawyer deliberately chose to disregard the first page of the two-page document, focusing only on the fact sheet that he argued was an advertisement

255. *Culbreath*, 872 N.E.2d at 289 (footnote omitted) (citation omitted); cf. *Klein v. Vision Lab Telecom., Inc.*, 399 F. Supp. 2d 528, 540 (S.D.N.Y. 2005).

256. *Culbreath*, 872 N.E.2d at 289.

257. Based on the author's experience defending TCPA claims, these case studies are representative of the types of cases brought against innocent lawbreakers.

258. 2007 Ohio 5215 (Ohio Ct. App. 2007).

259. *Id.* at ¶3; see *infra* subsection V.D.4.a. The author was lead defense counsel for Bryant & Stratton College. Numerous supporting documents are on file with the author or at the author's former law firm, Hahn Loeser & Parks, LLP.

260. *Omerza*, 2007 Ohio 5215, at ¶5-7.

261. *Id.* at ¶8.

262. *Omerza*, 2007-Ohio-5215, at ¶¶3-8. At trial, the Executive Director of the chamber of commerce testified that members could choose not to list a facsimile number in the directory. See *Omerza v. Bryant & Stratton Coll.*, No. 05 CV 001237 (Ohio Ct. Comm. Pl. May 9, 2006).

because it encouraged recipients to enroll in the for-profit College.²⁶³ Defense counsel argued that the document, taken as a whole, was not an advertisement because, among other reasons, the business to which it was directed could not be a student at the College.²⁶⁴ At trial, the Executive Director of the chamber of commerce testified that she encouraged communications such as the one at issue between members of the chamber.²⁶⁵ She told the court and jury that exchanging information like what was contained in the facsimile, or networking, was the very essence of why businesses join the chamber of commerce.²⁶⁶

After many thousands of dollars in legal fees²⁶⁷, the defendant prevailed when the trier of fact determined that the document at issue was not an advertisement under the TCPA.²⁶⁸ Not satisfied, the plaintiff's counsel unsuccessfully appealed, costing the College even more money in defense costs.²⁶⁹

In this case, Bryant & Stratton College, an institution founded in 1854 with sixteen campuses in four states, decided to fight what it perceived as a frivolous lawsuit. It had the resources to do so. Many innocent lawbreakers do not.²⁷⁰

ii. *Who Can Give Consent?*

As the use of facsimile machines in general, and to transmit advertising in particular, declines, and as businesses that send fax advertising become more aware of the TCPA, the cottage industry of TCPA plaintiff's lawyers have fewer cases to file. But because bringing TCPA lawsuits is their primary business model, some of these lawyers resort to manufacturing lawsuits and arguments where no legitimate claim exists. One such example involved the 2009 lawsuit by an optometrist against an eyeglass manufacturer.²⁷¹

The plaintiff (suing both in the name of the optometry business and the individual "owner") alleged that the defendant had transmitted by facsimile a number of unsolicited advertisements for

263. *See supra*, note 259.

264. *Id.*

265. *Id.*

266. *Id.*

267. The author, as lead defense counsel, was responsible for billing legal fees to the client.

268. *Omerza*, 2007 Ohio 5215, at ¶9.

269. *Id.* at ¶31.

270. *See supra* sections V.C–D.

271. *Jacobson v. Jonathan Paul Eyewear*, No. 09-CV-003340 (Ohio Ct. Com. Pl. Jan. 26, 2011) (granting, in part, defendant's motion for sanctions).

eyewear.²⁷² The defendant, aware of the TCPA's restrictions, claimed that it had obtained express permission from one of the Defendant's employees to transmit the faxes.²⁷³ The defendant not only had a database record of the telephone conversation in which it claimed it received consent and addressed the facsimiles to the individual from whom it received consent, but still employed the individual who spoke with the plaintiff's employee to obtain that consent.²⁷⁴

Undeterred by this evidence of prior express consent, the plaintiff's counsel attempted to suppress the evidence of consent by refusing to allow the defendant to depose the plaintiff's employee who had allegedly given consent.²⁷⁵ Plaintiff's counsel argued, among other spurious claims, that before the defendant could seek to depose the plaintiff's employee the defendant needed to be in possession of independent proof of the claimed prior consent.²⁷⁶

Counsel also argued that the defendant's employee, who claims to have spoken with the plaintiff's employee, could not testify because his statements would be hearsay.²⁷⁷ Despite the obviously specious nature of these arguments, plaintiff's counsel was able to force the defendant to spend significant legal fees to force the court to order the deposition.²⁷⁸ Further, when the court finally ordered the plaintiff's employee to be deposed, plaintiff's counsel dismissed the lawsuit.²⁷⁹ But the defendant, a small business with limited resources, was still forced to spend over ten thousand dollars in legal fees, which it will likely never recover.²⁸⁰

VI. DIFFERENCES BETWEEN THE TCPA JUNK FAX PROVISIONS AND OTHER FEDERAL CONSUMER PROTECTION STATUTES

There are numerous Federal consumer protection statutes: some addressing what can be regarded as annoyances or inconveniences,

272. The facts described here are based on the author's interview and e-mail exchange with the lead counsel for Defendant Johnathan Paul Eyewear—Michael B. Pascoe, Esq., of Hahn Loeser & Parks LLP.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. After the dismissal, the defendant filed a motion for sanctions which was granted by a magistrate. But the award of \$1,482 in sanctions will reimburse the defendant for only a tiny portion of the attorneys' fees spent in defending the case. *Jacobson v. Jonathan Paul Eyewear*, No. 09-CV-003340, slip op. (Ohio Ct. Com. Pl., Lake Cnty. Jan. 26, 2011) (granting, in part, defendant's motion for sanctions).

some addressing true fraud, and some addressing unfair practices.²⁸¹ But few of these other federal consumer protection statutes have strict liability private rights of action like the anti-junk fax provision of the TCPA. This section will address only two such statutes: the anti-telemarketing provision of the TCPA and the CAN-SPAM Act. Neither of these provisions is as harsh to innocent lawbreakers at the anti-junk fax provision of the Act.

A. TCPA's Anti Telemarketing Provisions

Before discussing other federal consumer protection statutes, it is important to examine the part of the TCPA which regulates commercial telemarketing activities.²⁸² The first of these provisions prohibits the use of an “automatic telephone dialing system²⁸³ or an artificial or prerecorded voice” to make calls to an emergency telephone line (like 9-1-1 or a poison control center), to a telephone line of a hospital patient, or to a mobile phone or pager.²⁸⁴ The second provision prohibits calling a *residential* telephone line “using an artificial or prerecorded voice to deliver a message” without the resident’s consent unless the call is for emergency purposes or exempted by FCC rule.²⁸⁵ The final

281. Some examples of other Federal consumer protection statutes include the following: (1) The Telemarketing and Consumer Fraud and Abuse Prevention Act. 15 U.S.C. § 6101. Enacted in 1994, it seeks to protect consumers from interstate telemarketing fraud. This act does provide for a private cause of action, but only when the amount in controversy is \$50,000 or greater. It allows an individual to seek injunctive relief, enforce compliance with agency rules, or damages. *See* § 6104(a). It also provides that state attorneys general may file civil actions to enjoin the illegal activities or seek damages. (2) The Fair Debt Collection Practices Act. 15 U.S.C. § 1692. Enacted in 1977, it seeks to protect consumers from abusive practices of debt collectors. The law allows for enforcement by individuals or class actions, *see* § 1692k(a)(2)(A)-(B), as well as enforcement by the Federal Trade Commission. Litigants can recover their actual damages plus up to a maximum of \$1,000 in statutory damages. Class action recoveries are capped at the lesser of \$500,000 or 1 percent of net worth of the debt collector. (3) The Fair Credit Reporting Act. 15 U.S.C. § 1681. Enacted in 1970, it regulates collection, dissemination, and use of consumer credit information. In addition to enforcement by the Federal Trade Commission, a private cause of action can also be brought. *See* § 1681n(a)(1)(A); *see, e.g.,* *Welch v. Target Nat’l Bank*, No. 2:08-cv-705-ftM-29SPC, 2009 WL 1659708 (M.D. Fla. June 15, 2009). Individuals bringing private actions can recover actual damages plus \$100–1,000 for willful non-compliance. 15 U.S.C. § 1681n. But when the violation is negligent non-compliance, the consumer may recover only her actual damages. § 1681o.

282. 47 U.S.C. § 227(b)(1)(A), (B), and (D) (2006).

283. The term “automatic telephone dialing system” is defined as “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.” *Id.* § 227(a)(1).

284. *Id.* § 227(b)(1)(A).

285. *Id.* § 227(b)(1)(B). Among the exceptions authorized by the FCC is that of an established business relationship. *See* 47 C.F.R. § 64.1200(a)(2)(iv).

prohibition is against using an automatic telephone dialing system to tie up two or more phone lines of a business at the same time.²⁸⁶ Though these prohibitions are absolute—like the anti-junk fax provision—they have generated far less litigation.²⁸⁷ And these provisions are far less likely to affect small businesses, because few, if any, have automatic telephone dialing systems or the ability to deliver prerecorded messages. It is only professional telemarketers—businesses that the TCPA intends to regulate—that would have the ability to violate these provisions. Further, the prohibition against using prerecorded or automated voices applies only to residential telephone numbers—a limitation that does not exist in the unsolicited facsimile prohibition.²⁸⁸

The TCPA also gave the FCC authority to prescribe rules to regulate other telemarketing activities short of those absolutely prohibited by the Act.²⁸⁹ Under this authority, the FCC was directed to enact rules “to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.”²⁹⁰ But, unlike the anti-junk fax provisions of the TCPA, privacy-driven rules allow for a private right of action only if the consumer received “more than one call within any 12-month period” from the same entity in violation of the FCC regulations.²⁹¹

B. The CAN-SPAM Act

The conveniences of facsimile communications have been largely replaced by an even faster and cheaper form of written communication: electronic mail. Marketers did not fail to notice, and take advantage of, this new form of mass communication. Just as junk faxers could send millions of facsimiles a month,²⁹² junk e-mailers could send millions of e-mails an hour.²⁹³ In response to the annoyance to consumers of wading through unwanted commercial e-mails, Congress enacted the CAN-SPAM Act of 2003.²⁹⁴ This law establishes national standards for sending commercial e-mails and protects consumers

286. 47 U.S.C. § 227(b)(1)(D).

287. A search of all cases reported on Westlaw revealed only 65 cases that cite to these provisions.

288. Compare 47 U.S.C. § 227(b)(1)(B) (noting the prohibition against prerecorded or automated voices with residential telephone numbers), with 47 U.S.C. § 227(b)(1)(C) (noting the unsolicited facsimile prohibition).

289. 47 U.S.C. § 227(c).

290. *Id.* 227(c)(1). These regulations are codified in 47 C.F.R. § 64.1200.

291. 47 U.S.C. § 227(c)(5).

292. See *supra* subsection IV.B.1.

293. See Dan Fletcher, *A Brief History of Spam*, TIME (November 2, 2009), <http://www.time.com/time/business/article/0,8599,1933796,00.html>.

294. CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. § 7701 (2004)).

from, among other things, mobile phone spam.²⁹⁵ Unlike the TCPA, however, the CAN-SPAM provides practically no private right of action.²⁹⁶ In fact, the law prohibits individuals who receive unsolicited commercial e-mails from suing the sender and preempts state laws that may have stricter penalties or rights of private enforcement.²⁹⁷ Enforcement of the law is left to federal agencies like the Federal Trade Commission and the states, which can seek penalties of up to thirty-five dollars per e-mail.²⁹⁸ Again, unlike the TCPA which has no damages cap,²⁹⁹ damages under the CAN-SPAM Act are capped at two million dollars.³⁰⁰

The CAN-SPAM Act is relevant to the discussion of the TCPA because of the move away from traditional facsimile machines to computer server based faxing. As discussed below, these technological advances blur the line between a fax and an e-mail. Yet an innocent lawbreaker who sends an unsolicited advertisement to a phone number rather than an e-mail address faces much stiffer penalties, even though the result from the point of view of the recipient is identical—an image on a computer screen that can be easily deleted without printing.³⁰¹

VII. EVENING THE SCALE

It is evident that the costs to small businesses of the junk fax litigation explored in this Article are grossly disproportionate to the small benefit conferred on consumers who receive these unsolicited facsimiles. In light of the technological changes discussed above³⁰², the best solution to this problem is congressional action that elimi-

295. *Id.*

296. *See, e.g.,* *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040 (9th Cir. 2009). The Ninth Circuit noted the following:

We, like Congress, are sympathetic to legitimate operations hampered by a deluge of unwanted e-mail marketing. Our record, however, conclusively demonstrates that this is not the case before us. [The Plaintiff] has created a cottage industry where he and his 'clients' set themselves up to profit from litigation. The CAN-SPAM Act was enacted to protect individuals and legitimate businesses—not to support a litigation mill for entrepreneurs like [the Plaintiff].

Id. at 1057 (emphasis added). This same language is equally applicable to TCPA litigation against innocent lawbreakers. *See supra* subsection V.A.

297. *Gordon*, 575 F.3d 1040; *see, e.g.,* CONN. GEN. STAT. ANN. § 52-570c (West 2005); FLA. STAT. § 668.60 (2010); KAN. STAT. ANN. § 50-6,107 (2005); N.M. STAT. ANN. § 57-12-23 (2010); OHIO REV. CODE ANN. § 2307.64 (LexisNexis 2005); OKLA. STAT. ANN. tit. 15, § 776.1 (West 2010); 18 PA. CONS. STAT. ANN. § 7661 (West 2010); W. VA. CODE § 46A-6G-1 (2010).

298. *See* 15 U.S.C. § 7704 (2006).

299. *See* 47 U.S.C. § 227.

300. 15 U.S.C. § 7706 (f)(3)(B) (2006).

301. *See supra* section III.A.

302. *See supra* section III.A.

nates or severely restricts the private cause of action. But since Congress and the FCC have rejected cries from small business to seriously amend the Act, courts must step in to even the scales in TCPA junk fax litigation. The courts can do this by strictly enforcing traditional litigation requirements and by applying traditional legal requirements to limit punitive awards.

A. Requiring that the Plaintiff Prove that the Unsolicited Facsimile was Received Using a Traditional Facsimile Machine

The simplest way for courts to ensure the proper balance between senders and receivers of unsolicited facsimiles is to properly interpret and follow the TCPA itself. The first thing a court must consider is whether the plaintiff's alleged injury is one that is compensable under the Act. In other words, did the defendant violate the TCPA when it transmitted the offending facsimile. The TCPA's definition of a "telephone facsimile machine"³⁰³ and Congress' intent in passing the Act make it clear that the law prohibits transmitting unsolicited advertisements only to traditional facsimile machines.³⁰⁴ Thus to violate the TCPA, the machine that receives an unsolicited advertisement must be one that receives an electronic signal over a regular telephone line and automatically renders that signal into an image on paper.³⁰⁵ In other words, the machine must be connected to a regular telephone line, and must be capable of printing an incoming message onto paper without human intervention.³⁰⁶

This definition best reflects the intent and purpose of the TCPA—to prevent an advertiser from tying-up an unwitting recipient's telephone line and forcing the recipient to pay for the printing of the sender's advertisement onto the recipient's paper.³⁰⁷ Any broader

303. 47 U.S.C. § 227(a)(3) (2006).

304. See *supra* subsection II.C.1.

305. 47 U.S.C. § 227(a)(3) ("The term 'telephone facsimile machine' means equipment which has the capacity (A) to transcribe text or images, or both, *from paper* into an electronic signal and to transmit that signal *over a regular telephone line*, or (B) to transcribe text or images (or both) from an electronic signal received *over a regular telephone line onto paper*." (emphasis added)); see also *infra* subsection VII.A.2 (discussing the plain language and intended scope of TCPA).

306. 47 U.S.C. § 227(a)(3).

307. S. REP. NO. 102-178, at 1968 (1991) ("The bill also prohibits unsolicited advertisements sent to fax machines, known as junk fax. Advertisements today are sent for cruises, home products, investments, and all kinds of products and services without the consent of the person receiving them. These unsolicited advertisements prevent the owners from using their own fax machines for business purposes. Even worse, these transmissions force the recipient to pay for the cost of the paper used to receive them. These junk fax advertisements can be a severe impediment to carrying out legitimate business practices and ought to be abolished."); see also *supra* subsection II.C.1 (arguing that Congress's reasons for

reading of the definition, like the one prescribed by the FCC and followed by a number of courts,³⁰⁸ fails to carry out the intention of the TCPA, and, instead, unjustifiably feeds the junk fax cottage industry.

1. *The FCC's Incorrect Interpretation of the Act*

As facsimile technology evolved from the traditional facsimile machine in common use when the TCPA was enacted to the use of computerized facsimile servers and personal computers to receive facsimiles,³⁰⁹ courts and the FCC were tasked with deciding whether the Act applied to these new fax machines. In 2003, the FCC incorrectly expanded the scope of the TCPA to include other types of devices that are capable of receiving facsimile transmissions—devices that are not directly connected to regular phone lines and that do not automatically print the document on paper, ruling that “personal computers equipped with, or attached to, modems and computerized fax servers” fall within the definition of a telephone facsimile machine under the TCPA.³¹⁰

As explained below, this interpretation is incorrect, and should not be followed by courts that hear TCPA cases because this expanded definition is improper as a matter of statutory interpretation, and, most importantly, addresses a “harm” that was not contemplated by Congress when it enacted the TCPA. It also allows, in effect, for a private cause of action under the TCPA for the receipt of an unsolicited commercial e-mail, something that the CAN-SPAM Act, which addresses unwanted e-mails, does not permit.³¹¹

2. *The Plain Language and Intended Scope of the TCPA*

It is evident from the language of the TCPA that Congress intended only to protect users of traditional facsimile machines from un-

passing the TCPA were (1) to keep unwanted faxes from tying up recipients' phone lines and (2) it is patently unfair for the recipients to have to bear the cost of sending unwanted advertisements).

308. See, e.g., *Holtzman v. Caplice*, No. 07 C 7279, 2008 WL 2168762, at *7 (N.D. Ill. May 23, 2008) (deferring to the FCC's order); *supra* subsection V.A.1.

309. See *supra* section III.A.

310. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14133 (2003) (“We conclude that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes.”). The FCC reasoned that a broad interpretation was necessary to prevent faxers from easily side-stepping the junk fax provision. *Id.* In arriving at this conclusion, the FCC reasoned incorrectly that faxes sent to computer servers would still shift advertising costs to the recipients “if they are printed,” tie up the recipient's phone lines, and increase the recipient's labor costs. *Id.* As discussed in section III.A, *supra*, this is simply not the case.

311. 15 U.S.C. § 7701 (2006); see *supra* section VI.B.

solicited fax advertisements.³¹² Before the enactment of the CAN-SPAM Act,³¹³ some litigants tried to use the TCPA to bring action against senders of commercial, unsolicited e-mails.³¹⁴ In a 2003 Pennsylvania case, the plaintiff demanded \$9,000 in statutory damages after receiving six e-mail advertisements.³¹⁵ The plaintiff argued that the TCPA's definition of "telephone facsimile machine" can include unsolicited commercial e-mail because his personal computer was attached to a telephone line and a printer, giving it the "capacity to transcribe text or images (or both) from an electronic signal . . . onto paper."³¹⁶ This is the very justification used by the FCC in deciding that computer fax servers were telephone facsimile machines.³¹⁷ But unlike the FCC, the *Aronson* court properly concluded that the TCPA does not apply to e-mail transmissions. As the court noted, the TCPA prohibits the use of "any telephone facsimile machine, *computer* or other device to send an unsolicited advertisement to a *telephone facsimile machine*."³¹⁸ The court further noted:

*If a computer and a FAX machine were considered one in the same, there would be no need to specifically include a computer as among the types of 'sending' equipment. It would have been sufficient to describe a telephone facsimile machine as both the sending and receiving instrument. Notably, only the term 'telephone facsimile machine' is set forth as the receiving equipment. A 'computer' is not included despite the fact that it is included as a device which may send an unsolicited advertisement.*³¹⁹

Employing the statutory construction maxim of *expression unius est exclusion alterius*,³²⁰ the court concluded that the inclusion of only a telephone facsimile machine in the receiving equipment section necessarily excludes computers as a piece of receiving equipment that can lead to a TCPA claim.³²¹

The Pennsylvania appellate court (in disagreement with the later conclusion of the FCC) further held that the plain language of the defi-

312. See *supra* section VII.A.

313. 15 U.S.C. § 7701; see *supra* section VI.B.

314. Most of these cases arose before the passage of the CAN-SPAM Act of 2003, which regulates the transmission of commercial e-mail (commonly known as SPAM). But as discussed in section VI.B, the CAN-SPAM Act does not provide for a private right of action. Thus, the cottage industry of TCPA litigants, with the blessing of the FCC, continue to file TCPA claims even when the "facsimile" was received by a server and converted to an e-mail.

315. *Aronson v. Bright-Teeth Now, LLC*, 824 A.2d 320, 321 (Pa. Super. Ct. 2003).

316. *Id.*; see also 47 U.S.C. § 227(a)(3) (2006) (defining telephone facsimile machines).

317. See *supra* subsection VII.A.1.

318. *Aronson*, 824 A.2d at 321 (emphasis added) (quoting 47 U.S.C. § 227(b)(1)(C)).

319. *Id.* at 321–22 (emphasis added).

320. *Id.* at 322 ("[T]he mention of one thing implies the exclusion of others not expressed.").

321. *Id.*

dition of a telephone facsimile machine necessarily excludes computers because “a computer does not have the capacity to print.”³²²

There can be little doubt that Congress agreed that electronic mail transmission of unsolicited commercial advertising was different from the transmission of similar content by fax. As discussed above, Congress enacted a separate federal law to deal with unsolicited e-mail more than a decade after the passage of the TCPA—the CAN-SPAM Act of 2003.³²³

Agreeing with reasoning of the *Aronson* court, in the context of deciding whether a TCPA case can be maintained as a class action, an Illinois court thought it important to know what kind of equipment was used to receive the facsimiles at issue.³²⁴ Because the actual fax transmitter chose not to participate in the litigation, “the Court [was] unable to find whether [the faxes] were sent by regular facsimile which would cause an automatic printing or computer which in [sic] no printing of the message occurs without deliberate action on behalf of the recipient.”³²⁵

The plain language of the Act and these cases support the position that Congress’s main concern in passing the TCPA was the cost shifting caused by the automatic printing of unsolicited facsimiles received on traditional fax machines.³²⁶ This cost shifting is not present when faxes are received using a computer fax server because the recipient can choose to not print the document, thus not incurring paper and toner costs. Congress’s further concern that unsolicited faxes can tie-up the recipient’s facsimile telephone line,³²⁷ thus preventing legitimate messages from going through, is also not present in fax server cases because most computerized fax servers can receive multiple transmissions at the same time.³²⁸

322. *Id.* The court stated:

A computer user reading a message may elect to print that message and send that message to a printer to accomplish that task. This function is entirely different from the printing function of a FAX machine which, after receiving a transmitted message over a phone line, prints out a copy of the message. The user does not read the message before it is printed and does not have the capability of determining whether to elect to have the message printed.

... A computer does not merely transcribe a message from a signal received over a regular telephone line onto paper as does a FAX machine. Simply stated, a computer is not a FAX machine.

Id.

323. 15 U.S.C. §§ 7701–7713 (2006); *see supra* section VI.B.

324. *Bernstein v. Am. Family Ins. Co.*, No. 02-CH 6905, 2005 WL 1613776 (Ill. Cir. Ct. July 6, 2005).

325. *Id.* at *1.

326. *See supra* subsection II.C.1.

327. *See supra* subsection II.C.1.

328. Some courts bypassed the Act’s requirement that the facsimile be received on a traditional facsimile machine by holding that the plaintiff’s “fax server was un-

B. Strictly Enforcing Traditional Litigation Requirements

The most straight-forward way that trial courts can ensure the proper balance between enforcing the TCPA and protecting innocent lawbreakers from the Act's unintended consequences is by applying long-accepted traditional litigation requirements to these cases. Too often, either because of ignorance by pro se defendants or poor "lawyering" by defense counsel, trial courts do little to analyze the procedural and substantive fairness of the litigation. By ensuring that procedural and substantive safeguards are followed, fewer innocent lawbreakers will suffer undue financial damages.

1. *Standing*

The question of standing to bring TCPA claims arises in a number of contexts. First, some plaintiffs' lawyers (and courts) contend that it is the sending of an unsolicited facsimile that is the violation, and so receipt is immaterial to maintain the claim. Second, some in the TCPA cottage industry have tried (sometimes successfully) to set up a business of buying TCPA lawsuits by paying recipients of unsolicited faxes to assign their TCPA claims.

i. *Real Party in Interest*

Where a small business is sued by an individual who was not the intended recipient of the facsimile at issue, the issue of who has standing is critical in protecting innocent lawbreakers from unwarranted litigation.³²⁹ The issue of real party in interest is important because some states only allow individuals to bring certain consumer protection claims.³³⁰ Thus if the TCPA suit is brought in the name of an individual, state law may allow recovery of damages in addition to the TCPA's statutory penalties, which would not be permissible if the suit was brought by a business entity.³³¹

But as is evidenced by the above-cited example, innocent lawbreakers often have to spend significant amounts in legal fees to determine who is the real party in interest.³³² Courts must therefore be careful

available to receive or transmit other faxes" while it was receiving the unsolicited advertisements. See, e.g., *Covington & Burling v. Int'l Marketing & Research, Inc.*, No. CIV.A.01-0004360, 2003 WL 21384825, at *3 (D.C. Super. Ct. Apr. 17, 2003). But this reasoning finds no support in the language of the TCPA. The "hijacking" of a company's fax server by a major blast faxer may well be actionable—but not under the TCPA.

329. See *supra* Part V.

330. See *supra* subsection V.D.3.

331. See *supra* subsection V.D.3.

332. In the case study discussed in subsection V.D.4.a, the author had to wait until the deposition of the named plaintiff (an individual) to learn that the facsimile ma-

when examining initial pleadings in a TCPA case to ensure that the named plaintiff is the party who has the right to bring the action.

ii. Assignability of TCPA Claims

As the TCPA litigation cottage industry has developed, some enterprising lawyers have sought to make a true business out of bringing unsolicited facsimile claims under the TCPA. In order to profitably operate such a business, these lawyers need to acquire a large volume of claims. Though some lawyers will solicit cases from facsimile machine owners, which are brought in the name of the facsimile recipient, more creative lawyers have themselves sent facsimiles offering to buy claims from recipients of unsolicited faxes.³³³ These lawyers—turned TCPA entrepreneurs—then bring the cases in the name of their own business to which the claim has been assigned by the original recipient. The question of whether these assignees have standing to bring TCPA claims has been addressed by a number of state courts, with non-uniform results.³³⁴ The courts that have decided this question do agree that the issue is governed by state law.³³⁵

Colorado courts have held that TCPA claims are not assignable because the TCPA provides for a penalty in the form of liquidated damages.³³⁶ In *Kruse v. McKenna*,³³⁷ the Colorado Supreme Court held that under its state law, "a claim for liquidated damages under the TCPA is a claim for a penalty which cannot be assigned."³³⁸ If a claim under the TCPA is unassignable, an assignee bringing such a claim will lack standing because he has not suffered an "injury in fact" to a legally protected right.³³⁹ The Court in *Kruse*, like other courts,³⁴⁰ looked to descendability of a claim to determine if the claim is assigna-

chine on which the alleged unsolicited facsimile was received was owned by a corporation.

333. See "Get Paid for Faxes!" advertisement, reprinted in Letter from Dan Danner, *supra* note 3.

334. *E.g.*, *Kruse v. McKenna*, 178 P.3d 1198 (Colo. 2008).

335. Courts have so held that because the private right of action provision of the TCPA allows state court action "if otherwise permitted by laws or rules of court of [the] state." 47 U.S.C. § 227(b)(3) (2006). "We construe this language as a statutory command to apply state substantive law in determining which persons or entities may bring TCPA claims in state court." *Kruse*, 178 P.3d at 1200.

336. *E.g.*, *id.* at 1202; see *US Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112 (10th Cir. 2007).

337. *Kruse*, 178 P.3d 1198.

338. *Id.* As discussed in sections III.A and B, *supra*, since the actual damages suffered by a recipient of an unsolicited facsimile are, at most, nominal, the author is unaware of any TCPA case where the plaintiff sought actual, as opposed to statutory, damages.

339. *Kruse*, 178 P.3d at 1199.

340. *E.g.*, *Micheletti v. Moidel*, 32 P.2d 266, (Colo. 1934) ("The general rule is that assignability and descendability go hand in hand.").

ble.³⁴¹ In Colorado, claims for punitive damages or penalties are non-descendable.³⁴² Thus the real question facing the Court in *Kruse* was whether a claim for statutory damages³⁴³ under the TCPA is a penalty claim. In answering, the court applied a test it previously developed to determine whether a statutory claim is "one for a penalty in the context of determining the correct statute of limitations to apply;" the test looked at whether: "(1) the statute asserted a new and distinct cause of action; (2) the claim would allow recovery without proof of actual damages; and (3) the claim would allow an award in excess of actual damages."³⁴⁴

It is easy to see why, under such a test, the Court in *Kruse* held that a claim for statutory damages under the TCPA is "a claim for a penalty."³⁴⁵

Not every state has a statute like Colorado's. But most states do have either statutory or common-law rules governing the assignability of causes of action.³⁴⁶ In determining whether TCPA claims are assignable, courts should consider Congress' intent in allowing for a private cause of action. That intent clearly argues against the permissibility of assigning TCPA claims.³⁴⁷

2. *Knowingly/Willfully*

The TCPA allows a litigant bringing a private enforcement action to recover statutory damages of \$500 per violation (each unsolicited facsimile advertisement).³⁴⁸ The Act further states:

341. *Kruse*, 178 P.3d at 1200.

342. Colorado Revised Statute section 13-20-101 (2003) provides the following:

All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor or against whom such action has accrued, *but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed.*

(emphasis added).

343. The plaintiff-assignee in *Kruse* did not seek compensation for actual money loss to himself or the assignor. *Kruse*, 178 P.3d at 1200.

344. *Id.* at 1201.

345. *Id.* The court dismissed *Kruse*'s argument that the statutory award was designed not only to compensate the recipient for the use of its paper and toner/ink, but also to compensate for damages incurred by the recipient as a result of the facsimile tying up his or her fax machine and disrupting his or her business. *Id.* ("[T]he TCPA's fax provisions are not limited to businesses, and in any event not every unsolicited fax to a business will disrupt that business. Even when an unsolicited fax to a business does cause an interruption, there has been no showing that such damages could consistently approach \$500 per fax.").

346. *E.g.*, *Sullivan v. Curling*, 99 S.E. 533, 534 (Ga. 1919).

347. *See supra* subsection II.C.1.

348. 47 U.S.C. § 227(b)(3)(B) (2006). As discussed in subsection V.D.3, *supra*, some cottage industry lawyers have argued that additional \$500 penalties can be had for multiple violations of FCC rules in each facsimile. These lawyers have also

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this section, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.³⁴⁹

Courts have interpreted this provision to mean that damages of \$1,500 per violation should almost always be awarded.³⁵⁰ But this could not have been what Congress intended, and is grossly unfair when applied to innocent lawbreakers.

*Charvat v. Ryan*³⁵¹ exemplifies the quintessential innocent lawbreaker. The defendant, Thomas Ryan, a local dentist, used automated dialing equipment to call Charvat and advertise dental services.³⁵² While trying to comply with the law, Ryan contacted the Ohio Attorney General’s office prior to starting his telemarketing campaign and was told that all he had to do was download and honor the federal do-not-call list.³⁵³ But Charvat chose not to place his number on the do-not-call list.³⁵⁴

Though Ryan admitted that he made the telemarketing call using automated dialing equipment, the trial court did not award treble damages to Charvat, quoting a previous appellate case involving Charvat that held “[a] defendant must affirmatively know it is violating a regulation when making the telephone call for purposes of the treble damages provision.”³⁵⁵ Not satisfied with receiving only

been known to suggest that the statutory penalty should apply to each page of a multi-page facsimile transmission that is sent at one time. *See, e.g., Omerza v. Bryant & Stratton Coll.*, 2007 Ohio 5215 (Ohio Ct. App. 2007).

349. 47 U.S.C. § 227(b)(3) (2006).

350. *See, e.g., Charvat v. Ryan*, 879 N.E.2d 765, 772 (Ohio 2007). Though the *Ryan* case involved an alleged violation of the telemarketing prohibition of the TCPA, the court’s analysis applies equally to the unsolicited facsimile provision of the Act because both prohibitions share the same private cause of action provision. *See* 47 U.S.C. § 227(b)(3).

351. *Ryan*, 879 N.E.2d 765.

352. *Id.* at 767.

353. *Id.* at 768 n.1.

354. *Id.* Although the *Ryan* court, citing *State ex rel. Charvat v. Frye*, 868 N.E.2d 270 (Ohio 2007), correctly held that registration on the do-not-call list is not a prerequisite to maintaining an action under the TCPA, the fact that Charvat chose not to register his number flies in the face of arguments raised by the cottage industry that the reason they bring TCPA claims is to stop unwanted phone calls and faxes. If Charvat was truly trying to stop the “intrusions” to his life caused by telemarketing and unsolicited faxes, it is hard to believe that he would not have registered his number. Instead, it is safe to assume, based on the twenty-nine decisions involving Charvat bringing TCPA-related claims reported on Westlaw.com as of March 27, 2011, that he welcomes “unwanted” phone calls and faxes as a way to make money. *See, e.g., Charvat v. Dispatch Consumer Servs.*, 769 N.E.2d 829 (Ohio 2001); *Frye*, 868 N.E.2d 270.

355. *Ryan*, 879 N.E.2d at 768 (quoting *Charvat v. Colorado Prime*, No. 97APG09, 1998 WL 634922 (Ohio Ct. App. Sept. 17, 1998)).

\$1,000³⁵⁶ for the phone call, Charvat appealed, ultimately to the Ohio Supreme Court. Charvat argued that knowingly should mean only that the defendant had knowledge of the facts that constitute the offense.³⁵⁷ Ryan urged the court to require proof that the defendant had a “culpable mental state” before treble damages could be awarded.³⁵⁸

The Ohio Supreme Court acknowledged that knowingly was not defined in the TCPA.³⁵⁹ However, instead of analyzing what Congress intended when it already allowed punitive statutory damages of \$500 per violation to be trebled in TCPA cases where actual damages are nominal, the court looked to criminal law for a definition, where the widely accepted maxim of “ignorance of the law is no excuse” generally applies.³⁶⁰ Thus the court held that to “establish a *knowing* violation of the TCPA . . . , a plaintiff must prove only that the defendant knew that it acted or failed to act in a manner that violated the statute, not that the defendant knew that the conduct itself constituted a violation of law.”³⁶¹

The Court in *Ryan* then went on to define willfully as practically indistinguishable from knowingly, agreeing with and deferring to the FCC’s determination that “a willful violation means that the ‘violator knew that he was doing the act in question . . . [and that the] violator need not know that his action or inaction constitutes a violation; ignorance of the law is not a defense or mitigating circumstance.’”³⁶²

The \$500 statutory penalty collectable by a TCPA litigant is already about 10,000 times higher than actual damages.³⁶³ A penalty of \$1,500 per violation is 30,000 times actual damages.³⁶⁴ It is incon-

356. The intermediate court of appeals held that Ryan committed two violations of the TCPA in the one phone call (which itself is of questionable logic), but held that the trial court did not abuse its discretion in finding that Ryan’s violations were not willful. *Id.*

357. *Id.* at 769.

358. *Id.*

359. *Id.*

360. *Id.* at 770 (quoting *Bryan v. United States*, 524 U.S. 184, 192 (1998) (“‘[K]nowingly’ does not necessarily have any reference to a culpable state of mind or to any knowledge of the law. . . . Thus, unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.”)).

361. *Id.*

362. *Id.* at 771 (quoting *In re Dynasty Mortg., L.L.C.*, 22 FCC Rcd. 9453, 9470 n.86 (2007)). The Ohio Supreme Court thus held that to “establish a willful violation of the [TCPA], for an award of treble damages, a plaintiff must prove that the defendant consciously and deliberately committed or omitted an act that violated the statute, irrespective of any intent to violate the law.” *Id.*

363. This estimate assumes actual damages of \$.05 per fax. *See supra* section III.B. In the cases of facsimiles received using servers as opposed to traditional facsimile machines, actual damages are zero.

364. *See supra* section III.B.

ceivable that Congress could have intended for this enhanced penalty to apply to run-of-the-mill cases. But following the Court’s reasoning in *Ryan*, it is hard to imagine any violation of the TCPA that would not entitle the plaintiff to demand treble damages.³⁶⁵

Instead, Congress must have intended this additional penalty to apply to egregious violations, or cases where the fax transmitter continued to send faxes after a recipient demanded that they stop. Despite its broad definition of “willful,” this is how the FCC has applied enhanced penalties—imposing higher fines on violators who continue to violate the Act after being directed to cease transmissions.³⁶⁶

Some courts have been hesitant to award treble damages for violations of the Act—even against fax blasters. For example, a D.C. trial court, even after concluding that defendant Fax.com knew of the TCPA, had been cited by the FCC for sending unsolicited faxes, and had been previously sued for violation of the Act, awarded a plaintiff treble damages only for faxes received after the plaintiff had demanded that Fax.com cease further facsimile transmissions.³⁶⁷

Courts hearing TCPA cases must be careful to limit the application of this treble statutory damages provision to cases where the violators of the Act are truly deserving. Innocent lawbreakers can, by definition, never fall into this category because their actions are not willful as that term should be applied to the TCPA. A knowing or willful violation is one where the transmitter knows that his actions are un-

365. The *Ryan* court tried to mitigate the impact of its decision by noting:

Because Congress chose to employ a low threshold to assess treble damages, by requiring a caller’s actions to be ‘knowing’ or ‘willful,’ it is important to highlight the language of the second part of the provision for treble damages: “[T]he court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount of the greater of \$500 or the actual money loss.

Ryan, 879 N.E.2d at 771. This admonition is of little help to the innocent lawbreaker like *Ryan*. He must still endure the legal fees associated with litigating a case with unknown potential damages, *see supra* section V.D, but is also subject to additional legal fees fighting an appeal by a plaintiff claiming that the trial court abused its discretion in not awarding treble damages. *See, e.g.*, *Reichenbach v. Fin. Freedom Ctrs., Inc.*, No. L-03-1357, 2004 WL 2634624 (Ohio Ct. App. Nov. 19, 2004). Presumably a defendant could avoid the discretion of a trial court if he could show that his facsimile machine somehow malfunctioned, sending faxes without his knowledge. The author is unaware of any instances where this has been argued, or actually happened. It is also conceivable that a defendant can claim that his facsimile machine was hijacked by a third party. But that would simply change the real party in interest, and not bear on whether the hijacker knowingly sent the faxes.

366. *See supra* subsection IV.B.1.

367. *Covington & Burling v. Int’l Marketing & Research, Inc.*, No. CIV.A.01-0004360, 2003 WL 21384825, at *8–9 (D.C. Super. Ct. Apr. 17, 2003). Likely cognizant that the companies who hired Fax.com to send the advertisements on their behalf may not have known of the TCPA’s prohibitions, the court did not award treble damages against the other defendants. *Id.*

lawful or that the recipient does not want to receive the faxes. A broader application, as suggested by some courts,³⁶⁸ does nothing more than feed the cottage industry of plaintiffs' lawyers who are the only ones who profit from such an interpretation of the Act.

C. Applying Traditional Legal Concepts to Limit Punitive Recovery

The primary rationale for allowing statutory damage claims is to incentivize litigation by making small claims feasible to pursue.³⁶⁹ These awards have a two-fold purpose, to compensate the plaintiff for actual harm done and to impose punitive penalties in hopes of deterring future wrong doing.³⁷⁰ As discussed in section III.B of this Article, damages for sending junk faxes can be as many as 30,000 times the actual harm. This leads to two questions: (1) should courts read past the plain language of the statute and examine excessively punitive awards; and (2) when should the court make such an inquiry? The remainder of this section examines the various challenges a defendant can make to an award of statutory damages, and attempts to discern the most prudent circumstances for a court to entertain such damages.

1. Mitigation of Damages

Though the statutory damages of \$500–\$1,500 per unsolicited facsimile was designed to both compensate the recipient and to serve as a deterrent against continued violation of the TCPA,³⁷¹ this penalty is often not enough for cottage industry lawyers. Lawyers who make their primary living by bringing TCPA lawsuits, understandably, try to maximize the income they earn from each case.³⁷² This often results in waiting until a fax recipient accumulates numerous facsimiles from the same sender before bringing suit. These lawyers will sometimes wait months or years before filing their complaint in order to accumulate multiple facsimiles.³⁷³

If the true goal of the facsimile recipients who litigate TCPA claims, or their lawyers, is—as they claim—to stop receiving these un-

368. See, e.g., *Ryan*, 879 N.E.2d 765.

369. Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 107–08 (2009) (“[S]tatutory damages guarantee a minimum recovery, and thus make a violation that may result in nominal or no actual damages more attractive to pursue.”).

370. See, e.g., *L.A. News Serv. v. Reuters Television Intern., Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (“[A]wards of statutory damages serve both compensatory and punitive purposes.”).

371. See *supra* section II.C.

372. See *supra* section V.A.

373. See, e.g., *Compoli v. Cumby, Inc.*, No. CV-01-437886 (Ohio Ct. Com. Pl., Cuyahoga Cnty. last disposition Mar. 13, 2003).

solicited advertisements which allegedly cost them paper, toner, and annoyance, this can often be accomplished with a phone call—not litigation.³⁷⁴ This is especially true when the transmitter of the unsolicited facsimile is an innocent lawbreaker.³⁷⁵ Small businesses have no incentive to send facsimile advertisements to customers who don’t want to receive them. No business wants to annoy potential customers as these customers may be less inclined to patronize the business because they may be irritated with the facsimile sender. So, innocent lawbreakers have no reason to continue transmitting facsimiles to individuals or companies who do not want to receive them.

Plaintiffs and their lawyers, however, have the opposite incentive. That is, they want to continue receiving “unsolicited” facsimile advertisements in order to maximize their statutory damages. They have no incentive to contact the transmitter to ask to have their facsimile number removed from the sender’s database. This perverse incentive structure is unique to the anti-junk fax provision of the TCPA and other similar consumer protection laws.³⁷⁶

Traditional tort law does not allow a plaintiff to recover preventable damages, instead requiring that the litigant take steps to mitigate, or reduce, his claimed damages. Mitigation of damages has been defined by the United States Court of Claims:

A reduction of the amount of damages, not by proof of facts which are a bar to a part of the plaintiff’s cause of action, or a justification, nor yet of facts which constitute a cause of action in favor of the defendant, but rather facts which show that the plaintiff’s conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him.³⁷⁷

Put more simply: “damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”³⁷⁸ *Rockingham County v. Luten Bridge Co.*³⁷⁹ (the “bridge to nowhere” case) is a fine example of the principle of mitigation. In *Rockingham*, the county awarded Luten Bridge Company a construc-

374. *Lawsuit Abuse Hearing*, *supra* note 61, at 174–75 (newspaper article from MONITOR DAILY).

375. As discussed in subsection III.C.2, transmitters of truly fraudulent advertisements (vacation scams, etc.) are unlikely to abide by a request to remove a facsimile number from their database. But as discussed in section V.C, these operations are rarely defendants in TCPA litigation.

376. For example, the anti-telemarketing provisions of the TCPA only permit a private cause of action if the caller disregards a request to remove the recipient’s phone number from their database. *See supra* section VI.A. Similarly, suits involving violations of the “do-not-call” database require that the litigant first affirmatively place her phone number into the database, something that takes only seconds to do. *See* NATIONAL DO NOT CALL REGISTRY, <https://www.donotcall.gov> (last visited Mar. 11, 2011).

377. *Motto v. United States* 360 F.2d 643, 645 (Ct. Cl. 1966).

378. RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981).

379. 35 F.2d 301 (4th Cir. 1929).

tion contract to build a bridge.³⁸⁰ However, a month later, the county cancelled not only the contract for the bridge, but decided not to build the road that the bridge was to be a part of.³⁸¹ Notwithstanding this course of action, Luten Bridge Company continued to build the bridge for another nine months, despite the fact that it was, quite literally, a bridge to nowhere.³⁸² When it finally stopped construction, it sued to enforce the contract.³⁸³ The court, however, held that the plaintiff's recovery was limited to his damages up until the breach occurred, and that he had a "duty to do nothing to increase [his] damages."³⁸⁴

Applied to TCPA litigation, courts should not allow a TCPA plaintiff to recover additional statutory damages where the defendant (the fax transmitter) can show that the plaintiff could have easily reduced (or eliminated) her damages by, for example, calling a toll-free number or visiting a web-site to request that future transmissions cease.³⁸⁵ This so-called opt-out requirement is not foreign to the TCPA itself. If the transmitter and recipient have an established business relationship, the onus shifts to the recipient to notify the sender that he no longer wishes to receive advertisements.³⁸⁶

TCPA cottage industry lawyers have argued that unsolicited fax recipients should not be obligated to mitigate their damages because the Act has no such requirement.³⁸⁷ But the equitable doctrine of mitigation of damages developed precisely because no such requirement existed at law.³⁸⁸

Cottage industry lawyers have also argued that requiring mitigation through contacting facsimile senders could open recipients to even more unsolicited advertisements because the opt-out phone number listed on a facsimile could lead to a data collection service that will use the caller's facsimile number to build a database of valid numbers

380. *Id.* at 302.

381. *Id.* at 303.

382. *Id.*

383. *Id.*

384. *Id.* at 308; *see also* Sperry Rand Corp. v. Hill, 356 F.2d 181, 187(1st Cir. 1966) (holding, in a case for invasion of privacy and libel, that the "plaintiff could not recover for damages he could have avoided after it became evident that defendant would continue its advertising campaign").

385. The FCC rules require that all facsimiles contain the transmitter's contact information. 47 C.F.R. § 64.1200 (2010).

386. 47 U.S.C. § 227(b)(1)(C) (2010). To take advantage of this provision, the Act requires that the transmitter have a cost-free mechanism that the recipient can use to opt-out of future faxes. 47 C.F.R. § 64.1200; *see In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act. of 1992 Junk Fax Prevention Act of 2005, 21 FCC Rcd. 3787, 3800 (2006); *In re* Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991, 18 FCC Rcd 14014 (2003).

387. *See, e.g., Mitigation of Damages*, TCPALAW.COM (Aug. 2, 2003), <http://www.tcpalaw.com/free/head2.pdf>.

388. *Motto v. United States*, 360 F.2d 643, 645 (Ct. Cl. 1966).

to which more unsolicited advertisements can be sent.³⁸⁹ Though this concern may be valid when applied to fraudulent facsimiles,³⁹⁰ it is unwarranted when the transmitter of the unwanted advertisement is an innocent lawbreaker—often a local business known to the recipient.³⁹¹ The innocent lawbreaker, by definition, will immediately cease transmitting unwanted facsimiles.³⁹²

Requiring TCPA litigants to make a small effort to limit their damages would significantly reduce potential litigation recovery against innocent lawbreakers to, in most cases, \$500,³⁹³ eliminating many of the concerns raised in this Article. Enforcing this traditional equitable doctrine would do nothing to impair Congress’ objective in enacting the TCPA, as real violators of the Act could be held accountable using the Act’s statutory penalty. Further, it would still allow individuals who received an unwanted, unsolicited advertisement to file suit in a small claims court, as Congress had envisioned.³⁹⁴

2. Due Process

Lately, some defendants have attempted to fight the TCPA’s statutory damages provisions on due process grounds, arguing that the statutory damages award is “wholly disproportionate” to the actual

389. *Commonly Asked Questions About Junk Faxing*, JUNKFAX.ORG, http://www.junkfax.org/fax/basic_info/junk_fax_qa.htm (last visited Feb. 21, 2011). Some of the information found on this page is displayed below:

Q. Should I call the opt out (removal) number? Unplug my fax machine for a week?

A. It depends on the broadcaster. Typically, calling the removal number will put you on the stop list for that ONE advertiser. But in general, the best advice is NOT to call the removal number . . . the cure might be worse than the disease! It also tells them you read your faxes and they aren’t wasting their time. Here are some real stories:

I was only getting a few each week until I started calling the opt out numbers. Now I’m deluged with them and am ready to sue. If it’s illegal, why can’t they be stopped?

I used to get one stock report fax a month or every couple of weeks, then I started calling the removal 800 numbers at the bottom. And now I am getting at least one a day. I have started keeping them and am trying to track down where they are coming from. Bit (sic) it seems the more I call the removal #s the more faxes i (sic) get. Please help.

Id.

390. *See supra* subsection III.C.2.

391. *See supra* subsection V.D.4.a.

392. If the transmitter fails to honor the request, he is no longer an innocent lawbreaker.

393. For a discussion of statutory treble damages for “willful” violations of the TCPA, see *supra* subsection VII.B.2.

394. 137 CONG. REC. S16205–06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

harm suffered.³⁹⁵ This wholly disproportionate language is somewhat misleading; the language has led several lower courts to apply the standard,³⁹⁶ which was elucidated in *St. Louis Iron Mountain & Southern Railway Co. v. Williams*.³⁹⁷ As explained more fully below, this wholly disproportionate analysis is inappropriate—especially in the context of the innocent law breaker—because it fails to account for the fact that the Supreme Court has recently shied away from using “public harm” as an adequate justification for an award to withstand a due process challenge.

In *St. Louis Railway*, the Supreme Court examined a due process challenge to a Congressional statute regulating the rates an interstate railway could charge.³⁹⁸ The defendant charged and collected sixty-six cents above the statutorily mandated maximum fee.³⁹⁹ The passenger brought suit under the act, which authorized statutory damages of “not less than fifty dollars and not more than three hundred dollars for the offense.”⁴⁰⁰ The railway was found to have violated the Act and ordered to pay statutory damages of seventy-five dollars.⁴⁰¹

The Supreme Court analyzed the statute under the due process clause of the Fourteenth Amendment, reasoning that because the fine was “imposed as a punishment for the violation of a public law, the Legislature [could] adjust its amount to the public wrong rather than the private injury.”⁴⁰² The Court went on to hold that these legislative enactments “transcend the (due process) limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”⁴⁰³

The Court underscored the “public harm” rationale in closing:

When [the penalty] is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.⁴⁰⁴

This is the key underpinning the Court’s analysis in *St. Louis Railway*: that because the legislature weighed the matter and thought that the public harm to be averted justified the imposition of the statutory damage amount, the Court should meddle no further.

395. See, e.g., *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc’ns, L.P.*, 329 F. Supp. 2d 789, 809-10 (M.D. La. 2004).

396. Scheuerman, *supra* note 369, at 123.

397. 251 U.S. 63 (1919).

398. *Id.*

399. *Id.* at 64.

400. *Id.* at 64.

401. *Id.*

402. *Id.* at 66.

403. *Id.*

404. *Id.* at 67.

But the more recent cases of *TXO Production Corp. v. Alliance Resources Corp.*,⁴⁰⁵ *BMW of North America v. Gore*,⁴⁰⁶ and *State Farm Mutual Automobile Insurance Co. v. Campbell*⁴⁰⁷ significantly undercut this rationale.⁴⁰⁸ *Campbell* and *Gore* reiterate the fact that exemplary damages should bear some relation to actual damages,⁴⁰⁹ and *Gore* held, rather explicitly, that: "punitive damages may not be grossly out of proportion to the severity of the offense."⁴¹⁰

Yet despite these admonitions, one of the few courts to directly construe a due process challenge to the TCPA continued to apply the wholly disproportionate standard from *St. Louis Railway*. In *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.*⁴¹¹ the court upheld the TCPA's statutory damages provisions for junk faxes against a due process argument grounded in *Gore* and *Campbell*. The court explained that "[a]t the heart of the Court's rulings in those cases was the concern that persons receive fair notice regarding the nature and severity of the punishment inflicted upon them."⁴¹² While this was a concern of the Supreme Court, it was only one concern.

The Supreme Court has long recognized that the Due Process Clause encompasses both a substantive and a procedural component when it comes to the imposition of damages.⁴¹³ Specifically, "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'"⁴¹⁴

405. 509 U.S. 443 (1993) (plurality opinion).

406. 517 U.S. 559 (1996).

407. 538 U.S. 408 (2003).

408. See also *S.W. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1905) (ruling that where a telephone company acted in complete good faith in adopting a regulation, the infliction of "penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law").

409. *Campbell*, 538 U.S. at 426 ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."); *Gore*, 517 U.S. at 575 ("As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect the enormity of his offense." (internal quotation marks omitted) (citing *Day v. Woodworth*, 13 How. 363 (1852))).

410. *Gore*, 517 U.S. at 576 (internal quotations and citations omitted).

411. 329 F. Supp. 2d 789 (M.D. La. 2004).

412. *Id.* at 808–09.

413. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465 (1993) (plurality opinion) (analyzing the defendant's contention that the award was excessive both substantively and procedurally). But see *id.* at 470–71 (Scalia, J., dissenting) (arguing that there is no "substantive due process right that punitive damages be reasonable").

414. *Id.* at 453–54 (quoting *Seaboard Air Line Ry. Co. v. Seegers*, 207 U.S. 73 (1907)).

Indeed, the court in *Verizon Wireless* conflates the inquiry from *Gore* and *Campbell* into one solely of notice.⁴¹⁵ But this misinterprets—and severely short-changes—the language and thrust of *Campbell*. In *Campbell*, the Court noted that “it is well established that there are procedural and substantive constitutional limitations on these awards.”⁴¹⁶ Furthermore, “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”⁴¹⁷

While it is true that the Court in both *Gore* and *Campbell* couches its analysis in procedural due process terms, the analyses themselves shout substance. The Court in *Gore* announced the formulation of three “guideposts” under which courts should evaluate punitive damage awards.⁴¹⁸ In finding that the jury’s \$2 million punitive damage award against BMW was “grossly excessive,” the Court looked to: (1) the degree of reprehensibility of the defendant’s conduct, (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award, and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.⁴¹⁹ The Court reiterated the propriety of these guideposts several years later in *Campbell*.⁴²⁰

Although the Court in *Gore* points out that each of the three guideposts “indicates that BMW did not receive adequate notice of the magnitude of the sanction” the State could impose,⁴²¹ it fails to mention what these guideposts have to do with providing the defendant notice.⁴²² A closer look at the factors themselves, reveals the Court’s hand.

The first factor, the degree of reprehensibility, is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.”⁴²³ It reflects the idea that “some wrongs are more blameworthy than others,”⁴²⁴ and “the principle that punitive damages may not

415. *Verizon Wireless*, 329 F. Supp. 2d at 808–09 (“At the heart of the Court’s rulings in those cases was the concern that persons receive fair notice regarding the nature and severity of the punishment inflicted upon them.”).

416. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

417. *Id.*

418. *BMW of N. Am. v. Gore*, 517 U.S. 559, 574–75 (1996).

419. *Id.* at 575.

420. 538 U.S. at 418.

421. *Gore*, 517 U.S. at 574.

422. See J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 541 (2004) (“[B]oth commentators and the Court itself state that *Gore* imposed a substantive due process limit on the size of punitive awards.”).

423. *Gore*, 517 U.S. at 575.

424. *Id.* at 575.

be grossly out of proportion to the severity of the offense."⁴²⁵ The Court determines reprehensibility by looking for several factors: (1) whether the harm was physical or economic; (2) whether the defendant was reckless or indifferent to the health and safety of others in his conduct; (3) whether the target of the defendant's conduct was financially vulnerable; (4) whether the defendant's conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of malice, trickery or deceit, or was just plain accidental.⁴²⁶

The Court then looks at the "ratio to the actual harm inflicted on the plaintiff."⁴²⁷ This line of inquiry reflects the Court's adherence to "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages."⁴²⁸ While the Court declined to specify a hard and fast limit to the ratio, it noted that "[a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of *noneconomic harm* might have been difficult to determine."⁴²⁹ Finally, "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of *excessiveness*."⁴³⁰

As much as the district court in *Verizon Wireless* would like to confine these precepts to the venerable grounds of due process, the writing is unmistakably clear: there are now "substantive limits beyond which penalties may not go."⁴³¹ Justice Scalia points this out in his concurrence to *TXO*.⁴³² His ire grows ever more forceful in *Gore*: "By today's logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition."⁴³³ By the time the Court decides *Campbell*, Justice Scalia is forced to be blunt: "the Due Process Clause provides no substantive protection against 'excessive' or 'unreasonable' awards of punitive damages."⁴³⁴

So what does all this mean for the innocent lawbreaker? It should certainly give pause—although, it has not yet—to courts that are content to apply the wholly disproportionate standard to statutory dam-

425. *Id.* at 576 (internal quotation marks omitted).

426. *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 U.S. 408, 419 (2003).

427. *Gore*, 517 U.S. at 580.

428. *Id.*

429. *Id.* at 582 (emphasis added).

430. *Id.* at 583 (emphasis added).

431. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (internal quotations omitted).

432. *Id.* at 470 (Scalia, J., concurring) ("I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip*: the existence of a so-called 'substantive due process' right that punitive damages be reasonable.").

433. *Gore*, 517 U.S. at 607 (Scalia, J., dissenting).

434. *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting).

ages. Though they are formally different, functionally, statutory damages serve the same purpose as punitive damages: to punish and deter wrongdoers. Certainly, a portion of the statutory damages goes towards compensating the victim. But above this, the stated reason for the TCPA's statutory damages provision is deterrence.⁴³⁵

Because the due process limitations identified by the Supreme Court are not merely procedural—much to Justice Scalia's and the court in *Verizon Wireless's* chagrin—they inquire into whether awards of statutory damages should not be confined to the archaic wholly disproportionate standard of *St. Louis Railway*.

Moreover, the rationale for more closely scrutinizing a statutory damages award gains more force when courts deal with aggregated statutory damages, like those facing the innocent lawbreaker. Often, an unwitting small business owner will send out a facsimile advertisement—which he thinks is completely legitimate—to one or several recipients and, not being told to stop, he will send more. The recipients will either hoard these junk faxes or forward them to one of the cottage industry lawyers.⁴³⁶ After accumulating enough of these from a single innocent lawbreaker to make it worth the attorney's time to file suit, he does so by filing, for example, a claim for receiving dozens of faxes.⁴³⁷

Congress is legislating these statutory damages in the abstract, in an effort to deter and punish this type of unwanted conduct. The jury, in awarding punitive damages, is deterring and punishing the offender in front of them. Yet, as the Supreme Court has stated in *Gore*, *Campbell*, *TSO*, and *Cooper Industry v. Leatherman Tool Group*,⁴³⁸ punitive damages exceeding even a 4:1 ratio may be excessive. So how can the innocent lawbreaker, who presumably Congress didn't mean to catch when it cast this broad net, receive less protection under the due process clause than the willful lawbreaker who engages in far more reprehensible conduct?

Many courts⁴³⁹ and commentators⁴⁴⁰ argue that the most appropriate time for a defendant to bring a due process challenge to their exposure under the TCPA's statutory damages provision is after the court renders a determination on liability. In reality, though, this is

435. See *supra* section II.C.

436. See *supra* section V.A.

437. See *supra* section V.A.

438. 532 U.S. 424 (2001).

439. See, e.g., *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 778 (N.D. Ill. 2008) ("It is premature at this stage (a motion to dismiss) to consider whether any hypothetical award might be constitutionally excessive.").

440. See, e.g., Chad R. Bowman, *Litigating Facsimile Advertising*, 26-NOV COMM. LAW 1, 23 (2008) ("The most persuasive time for a successful due process challenge . . . is likely after class certification and a liability determination for an amount far in excess of actual harm.").

an imprudent time for such a determination, especially in the context of a class-action, or when the damages will clearly force the defendant into a "bet-the-company" scenario. Delaying such a determination until after trial places enormous pressure on the defendants to settle.

When analyzing the timing of a due-process challenge, courts will often look to the rationale utilized in examining punitive damages cases.⁴⁴¹ They reason that it is inappropriate to address excessiveness claims at the early stages of litigation and, even if statutory damages prove to be excessive, the proper remedy is simply a reduction in those damages after the verdict.⁴⁴²

At least one commentator, however, has argued that deferring this analysis is inappropriate for a number of reasons, chief among them being that while punitive damages are not actually known at the pleading stage, statutory damages are "a mere mathematical exercise."⁴⁴³ As such, there is little reason to delay the due process analysis and force the defendants to proceed with what may very well be a multi-billion dollar cloud of potential liability over their heads.

Although Scheuerman's analysis comes in the context of class certification, the same logic should apply to innocent lawbreakers. Since these are often small business owners, even a class action suit for several hundred thousand dollars would be enough to force them into bankruptcy. The threat of such substantial liability would, understandably, create a powerful incentive to settle the suit, rather than risk devastating liability with a guilty verdict.

3. *Statute of Limitations Issues*

Courts generally hold that state statutes of limitations apply to claims brought under the TCPA because of the state opt-out provision, noting:

Under the opt out interpretation of section 227(b)(3) that we now have adopted, parties may assert private TCPA claims in an appropriate state court if state law permits. Therefore, if Texas limitations law does not permit the Recipients to pursue their claims . . . , then the Recipients' claims are not 'otherwise permitted' by [state] law."⁴⁴⁴

This issue is most important in considering whether class actions are allowed in TCPA litigation because residents of a state with a shorter statute of limitations may circumvent their state's rules by joining an out-of-state or national class action.

441. Scheuerman, *supra* note 372, at 127 ("[M]ost courts defer decision on the due process question until after class certification. Here, courts conveniently find punitive damages jurisprudence relevant.").

442. See *Centerline*, 545 F. Supp. 2d at 778; cf. *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892 (W.D. Tex. 2003) (reducing what would have been a \$2.34 billion award at \$500 per fax to an award of \$459,375, or seven cents per fax).

443. Scheuerman, *supra* note 369, at 147.

444. *Chair King Inc. v. GTE*, 135 S.W.3d 365, 390–91 (Tex. Ct. App. 2004).

4. Remittitur

Another avenue through which courts may be able to deal with excessive damages is through remittitur. Remittitur “is the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial.”⁴⁴⁵ But this option is available only where the verdict is “so grossly excessive as to shock the conscience of the court.”⁴⁴⁶ And the plaintiff must be willing to accept the remitted damage award because the election of a new trial is limited to the determination of damages.⁴⁴⁷

Generally, district courts may only remit a damages award that is “clearly excessive,” or that “shock[s] the judicial conscience of the court.”⁴⁴⁸ While some may argue that remittitur is inappropriate in statutory damages cases, district courts have often flatly rejected this argument.⁴⁴⁹ But almost no court has been willing to employ (or even discuss) remittitur in TCPA cases.⁴⁵⁰ This may be because if the plaintiff chooses a new trial on damages instead of accepting the reduced judgment amount proposed by the court, the measure of damages would still be the statutory penalty. The possibility of remittitur also does little to help innocent lawbreakers who are forced to settle rather than pay the legal fees required to go to trial.

For those innocent lawbreakers who can and do defend TCPA cases—especially class actions—at trial, remittitur remains a viable procedure that should be presented to the trial court. The potential of additional attorney’s fees that would have to be incurred by the plaintiff in re-trying the damages case may persuade the plaintiff to accept a reduced damages amount. Unfortunately, as explored in this Article, most of the cottage industry lawyers do not have “real” clients incurring fees.⁴⁵¹ Instead it is the lawyers themselves who are the real

445. *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2d Cir. 1990) (internal citations omitted).

446. *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003).

447. *See generally* *Capital Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1051 (D. Minn. 2010) (“[I]f this Court does order remittitur, it [must] also offer Plaintiffs the option of choosing to reject the remittitur and exercise their right to a new jury trial solely on the issue of damages.”).

448. *Gregory v. Shelby Cnty.*, 220 F.3d 433, 443 (6th Cir. 2000).

449. *See, e.g., Capital Records*, 680 F. Supp. 2d at 1051 (noting that “there is no authority for Plaintiffs’ assertion that the Court does not have the power to remit an award of statutory damages”); *Sony BMG Music Ent. v. Tenenbaum*, 721 F. Supp. 2d 85, 94 n.8 (D. Mass. 2010) (“Although I do not employ the remittitur procedure, I reject the plaintiffs’ contention that it is unavailable in cases where a jury has returned a statutory damages award under the Copyright Act.”).

450. *See, e.g., Centerline Equip. Corp. v. Banner Personnel Serv., Inc.*, 545 F. Supp. 2d 768, 778 n.6 (N.D. Ill. 2008); *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, 1117 (Ohio Ct. App. 2002).

451. *See generally supra* section V.A.

parties in interest and thus have little incentive to abandon the potential for a higher recovery.

D. Eliminate or Limit Private Enforcement Mechanism

As should be evident at this point in the Article, the TCPA's private enforcement mechanism, and its associated statutory damages, creates injury to innocent lawbreakers that exceeds the harm the Act was designed to mitigate. The simplest solution to repairing this imbalance is legislative. But a legislative fix is never simple. The 2005 enactment of the JFPA demonstrates that as recently as five years ago, Congress still believed that the underlying rationale for the TCPA and its high statutory penalties was sound.⁴⁵² Or at least that the innocent lawbreaker lobby—if such a thing exists—was not strong enough to move the TCPA's enforcement mechanism closer to that of the CAN-SPAM Act, which does not have a private enforcement mechanism.⁴⁵³

Though I advocate the elimination of the TCPA's private right of action, such legislation is unlikely so long as legislators believe it is their duty to try to eliminate even the minor annoyances of everyday life.⁴⁵⁴ But even without striking the private enforcement provision from the TCPA, Congress can adopt many of the suggestions discussed here to lessen the harsh impact of the TCPA on innocent lawbreakers.

For example, Congress can clarify the TCPA's definitions to exclude facsimiles received using computer fax servers from its reach, require consumers who do not wish to receive any commercial advertising by fax to place their telephone facsimile numbers on the already established and successful do-not-call registry, and revise the standard under which treble damages can be awarded to cover only egregious violators of the Act. These relatively minor fixes would go a long way in restoring balance to the enforcement of the TCPA by eliminating many of the meritless suits brought by the TCPA cottage industry, while still keeping the junk-fax industry (or what remains of it) at bay. These legislative revisions would also severely hamper the TCPA cottage industry, requiring lawyers who make their living attacking innocent lawbreakers to find real clients with more meritorious claims.

452. *See supra* subsection II.C.3.

453. *See supra* section VI.B.

454. Even without the TCPA, consumers or businesses that have actually been harmed by the receipt of unsolicited facsimiles have legal recourse under ordinary state tort law. Whether Congress has (or should have) the Constitutional authority to regulate private facsimile transmissions under the Commerce Clause is left to another article.

E. Limits on Private Enforcement by the States

Though it is unlikely that Congress will act to eliminate or limit the private right of action, the negative impact on innocent lawbreakers can also be lessened by state legislatures. Jurisdiction over the private right of action is vested in state courts that choose to permit it.⁴⁵⁵ Courts have consistently interpreted this delegation of jurisdiction as not requiring states to opt-in.⁴⁵⁶ In other words, state courts are presumed to have jurisdiction over private TCPA claims.⁴⁵⁷ But there appears to be no reason that state legislatures could not, without completely opting out of jurisdiction, limit what state courts can hear TCPA cases. If a state legislature were to statutorily restrict TCPA claims to small claim courts⁴⁵⁸—as intended by Congress⁴⁵⁹—the maximum damages to which an innocent lawbreaker could be subject would be greatly limited.⁴⁶⁰ Such a restriction would limit the potential impact of TCPA litigation on small businesses, while having no detrimental effect on the prosecution of major blast faxers by the FCC or state attorneys generals who can bring enforcement actions in federal court.⁴⁶¹

VIII. CONCLUSION

There is little doubt that the legislators who enacted the TCPA had only benevolent intent when they sought to ban the annoyance, distraction, and cost shifting associated with unsolicited facsimile advertisements. There can also be little doubt that those congresspersons never anticipated the changes in technology and growth of a cottage industry of plaintiffs' lawyers that would fundamentally alter the operation of the TCPA in the two decades since its passage. But these factors have changed the TCPA from a consumer protection statute to a law that is often used by unscrupulous lawyers to target small businesses who, at worst, may have unwittingly caused some annoyance by sending some facsimile advertisements.

455. See *supra* subsection II.C.2.b.

456. See *supra* subsection II.C.2.b.

457. See *supra* subsection II.C.2.b.

458. The term small claims court is used to describe the lowest level court of a state where litigants can appear without counsel to resolve relatively minor disputes that often involve only money damages. Though states may label this type of a court with different names, every state has such a limited jurisdiction court.

459. See 137 CONG. REC. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (explaining that the Act was to provide a private cause of action for a consumer to pursue in small claims court).

460. The maximum monetary jurisdiction of state courts varies from \$1,500 in Kentucky, KY. REV. STAT. ANN. § 24A.230 (West 2010), to \$15,000 in Georgia, GA. CODE ANN. § 15-10-2 (2008).

461. See *supra* subsection II.C.2.a.

Though the TCPA has well served the purpose of almost eliminating the junk-fax industry, it was largely the actions of state attorneys generals and the FCC that accomplished this laudable goal. Private enforcement actions have done little to help consumers—instead benefiting lawyers and professional litigants to pad their pockets with money taken from innocent lawbreakers. The use of the traditional telephone facsimile machine as the best means of instantaneous written communication has largely been overtaken by Adobe PDF documents attached to electronic mail messages. But while the harm of unwanted facsimiles has declined, the litigation driven by the cottage industry of plaintiffs’ lawyers has continued. If Congress does not act to reform the TCPA to limit the detrimental effects of the Act on small businesses, courts must step in to bring balance to the interests of consumers and innocent lawbreakers. Courts must carefully examine each TCPA case to ensure that true violators of the Act are held accountable and that innocent lawbreakers are not unfairly harmed for innocent mistakes.

VIV. APPENDIX A

Name of Court	State	First Case	Fax	Phn.	Und.	Total
U.S.D.C. Northern District of Alabama	AL	8/4/2005	1	1	2	4
U.S.D.C. Southern District of Alabama	AL	6/20/2007	0	0	3	3
Cobb County Court	GA	12/3/2003	1	1	0	2
DeKalb County Court	GA	3/29/2004	1	0	0	1
Fulton County Superior Court	GA	3/20/2008	1	0	0	1
Travis County District Court	TX	10/9/2003	6	1	0	7
Baltimore City Circuit Court	MD	1/28/2005	7	0	0	7
Baltimore County Circuit Court	MD	4/21/2008	1	0	0	1
U.S.D.C. Maryland	MD	5/30/2008	2	0	0	2
Jefferson County District Court	TX	6/10/2004	1	0	0	1
Suffolk County Superior Court	MA	9/25/2007	3	0	0	3
Santa Cruz County Superior Court	CA	8/26/2004	1	0	0	1
Mercer County Superior Court	NJ	2/13/2008	1	0	0	1
Somerset County Superior Court	NJ	8/31/2005	0	1	0	1
Franklin County Court of Common Pleas	OH	7/11/2005	6	21	0	27
Lucas County Court of Common Pleas	OH	2/20/2008	1	0	0	1
Montgomery County Court of Common Pleas	OH	8/2/2005	6	0	0	6
U.S.D.C. Southern District of Ohio	OH	11/20/2006	0	4	1	5
U.S.D.C. Northern District of Illinois	IL	2/17/2005	2	1	28	31
DuPage County Circuit Court	IL	4/28/2004	17	0	0	17
Kane County Circuit Court	IL	11/5/2004	2	0	0	2
Kendall County Circuit Court	IL	6/9/2004	3	0	0	3
Lake County Circuit Court	IL	6/1/2004	47	0	0	47
Butler County Court of Common Pleas	OH	7/19/2005	0	5	0	5
Hamilton County Court of Common Pleas	OH	11/23/2005	8	0	0	8
U.S.D.C. Northern District of Ohio	OH	10/12/2004	7	0	0	7
Cuyahoga County Court of Common Pleas	OH	11/9/2003	468	13	6	487
Lake County Court of Common Pleas	OH	7/12/2004	205	0	0	205
Portage County Court of Common Pleas	OH	3/7/2005	3	0	0	3
Summit County Court of Common Pleas	OH	6/23/2005	18	0	0	18
Cook County Circuit Court	IL	4/7/2003	200	3	9	212
Dallas County District Court	TX	2/1/2005	2	0	0	2
38th Judicial District of Montgomery County	PA	5/9/2008	1	0	0	1
Arapahoe County District Court	CO	3/7/2006	11	0	1	11
Boulder County District Court	CO	5/27/2005	1	0	0	1
Denver County District Court	CO	3/30/2005	19	0	3	22

Name of Court	State	First Case	Fax	Phn.	Und.	Total
El Paso County District Court	CO	3/28/2008	0	0	1	1
Jefferson County District Court	CO	3/23/2005	1	0	0	1
U.S.D.C. Colorado	CO	5/15/2003	31	0	6	37
U.S.D.C. Eastern District of New York	NY	9/28/2004	7	0	0	7
17th Circuit Broward County	FL	7/31/2003	12	0	0	12
Kent County Circuit Court	MI	1/9/2008	0	1	0	1
16th Circuit Court Macomb County	MI	12/13/2004	0	1	0	1
22nd Circuit Court Washtenaw County	MI	8/30/2005	0	1	0	1
6th Circuit Court Oakland County	MI	6/18/2006	3	1	0	4
Howard County Circuit Court	MD	5/12/2005	1	0	0	1
Montgomery County Circuit Court	MD	2/22/2005	5	5	0	10
Harris County District Court	TX	9/9/2004	0	2	0	2
U.S.D.C. Southern District of Texas	TX	7/31/2006	0	1	2	3
Madison County Circuit Court	IL	8/9/2005	2	1	0	3
St. Clair County Circuit Court	IL	10/18/2007	0	1	0	1
U.S.D.C. Central District of Illinois	IL	2/20/2008	1	0	0	1
U.S.D.C. Southern District of Illinois	IL	11/7/2007	0	0	1	1
Marion County	IN	2/17/2005	1	0	0	1
U.S.D.C. Southern District of Indiana	IN	6/8/2005	1	0	0	1
Riverside County Superior Court	CA	9/14/2007	1	0	0	1
Jackson County Circuit Court	MO	12/22/2004	10	0	0	10
Kings County Supreme Court	NY	3/27/2003	1	0	0	1
U.S.D.C. Central District of California	CA	4/11/2006	4	0	6	10
Los Angeles Superior Court Central District	CA	9/11/2003	5	0	23	28
U.S.D.C. Middle District of Louisiana	LA	8/14/2007	5	0	0	5
11th Judicial Circuit Court of Florida	FL	6/12/2003	0	1	4	5
Middlesex County Superior Court	MA	7/12/2007	0	1	0	1
Norfolk County Superior Court	MA	9/20/2005	1	0	0	1
Ramsey County District Court	MN	2/6/2008	1	0	0	1
U.S.D.C. Minnesota	MN	9/16/2005	0	0	1	1
Clark County District Court	NV	10/27/2003	20	0	0	20
U.S.D.C. District of Massachusetts	MA	6/6/2007	1	0	0	1
New Haven Superior Court	CT	1/18/2005	1	0	0	1
Morris County Superior Court	NJ	2/25/2008	0	1	0	1
U.S.D.C. Southern District of New York	NY	4/15/2005	1	1	2	4
New York County Supreme Court	NY	3/16/2006	1	0	0	1
Alameda County Superior Court	CA	3/16/2005	4	1	0	5
Contra Costa County Superior Court	CA	3/12/2004	1	0	0	1