

## 47 USCS § 227

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**United States Code Service > TITLE 47. TELECOMMUNICATIONS (Chs. 1 — 15) > CHAPTER 5. WIRE OR RADIO COMMUNICATION (§§ 151 — 646) > COMMON CARRIERS (§§ 201 — 276) > COMMON CARRIER REGULATION (§§ 201 — 231)**

### **§ 227. Restrictions on use of telephone equipment**

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**(a) Definitions.** As used in this section—

**(1)**The term “automatic telephone dialing system” means equipment which has the capacity—

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

**(B)**to dial such numbers.

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

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

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

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

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

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

**(b) Restrictions on use of automated telephone equipment.**

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

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

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

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

**(iii)**to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(D)** shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

**(i)** the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

**(ii)** the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

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

**(iv)** the notice includes—

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

**(II)** a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

**(v)** the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

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

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

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

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

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

**(F)** may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

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- (i) by regulation issued after public notice and opportunity for public comment; and
- (ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

**(G)**

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

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

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

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

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

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

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States; and

(I) shall ensure that any exemption under subparagraph (B) or (C) contains requirements for calls made in reliance on the exemption with respect to—

(i) the classes of parties that may make such calls;

(ii) the classes of parties that may be called; and

(iii) the number of such calls that a calling party may make to a particular called party.

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

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

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

(C) both such actions.

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

(4) Civil forfeiture.

(A) In general. Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) [[47 USCS § 503\(b\)](#)], to have violated this subsection shall be liable to the

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United States for a forfeiture penalty pursuant to section 503(b)(1) [47 USCS § 503(b)(1)]. Paragraph (5) of section 503(b) [47 USCS § 503(b)] shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this subparagraph shall be determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) [47 USCS § 503(b)(2)].

**(B)**Violation with intent. Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) [47 USCS § 503(b)], to have violated this subsection with the intent to cause such violation shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) [47 USCS § 503(b)(1)]. Paragraph (5) of section 503(b) [47 USCS § 503(b)] shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this Act [47 USCS §§ 609 et seq.]. The amount of the forfeiture penalty determined under this subparagraph shall be equal to an amount determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) [47 USCS § 503(b)(2)] plus an additional penalty not to exceed \$10,000.

**(C)**Recovery. Any forfeiture penalty determined under subparagraph (A) or (B) shall be recoverable under section 504(a) [47 USCS § 504(a)].

**(D)**Procedure. No forfeiture liability shall be determined under subparagraph (A) or (B) against any person unless such person receives the notice required by section 503(b)(3) [47 USCS § 503(b)(3)] or section 503(b)(4) [47 USCS § 503(b)(4)].

**(E)**Statute of limitations. Notwithstanding paragraph (6) of section 503(b) [47 USCS § 503(b)], no forfeiture penalty shall be determined or imposed against any person—

**(i)**under subparagraph (A) if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

**(ii)**under subparagraph (B) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice of apparent liability.

**(F)**Rule of construction. Notwithstanding any law to the contrary, the Commission may not determine or impose a forfeiture penalty on a person under both subparagraphs (A) and (B) based on the same conduct.

**(c) Protection of subscriber privacy rights.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(C)**both such actions.

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

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

**(d) Technical and procedural standards.**

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

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

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

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

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

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

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

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

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

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

**(3)**Regulations.

**(A)**In general. The Commission shall prescribe regulations to implement this subsection.

**(B)**Content of regulations.

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

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

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

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

**(4)**[Deleted]

**(5)**Penalties.

**(A)**Civil forfeiture.

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

**(ii)**Recovery. Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) [[47 USCS § 504\(a\)](#)]. Paragraph (5) of section 503(b) [[47 USCS § 503\(b\)](#)] shall not apply in the case of a violation of this subsection.



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

(iv) 4-year statute of limitations. No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice of apparent liability.

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

(6) Enforcement by States.

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

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

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

- (i) to intervene in the action;
- (ii) upon so intervening, to be heard on all matters arising therein; and
- (iii) to file petitions for appeal.

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

(E) Venue; service or process.

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

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

- (I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and
- (II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

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

**(8)Definitions.** For purposes of this subsection:

**(A)Caller identification information.** The term “caller identification information” means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service.

**(B)Caller identification service.** The term “caller identification service” means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic number identification services.

**(C)Text message.** The term “text message”—

**(i)**means a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a 10-digit telephone number or N11 service code;

**(ii)**includes a short message service (commonly referred to as “SMS”) message and a multimedia message service (commonly referred to as “MMS”) message; and

**(iii)**does not include—

**(I)**a real-time, two-way voice or video communication; or

**(II)**a message sent over an IP-enabled messaging service to another user of the same messaging service, except a message described in clause (ii).

**(D)Text messaging service.** The term “text messaging service” means a service that enables the transmission or receipt of a text message, including a service provided as part of or in connection with a voice service.

**(E)Voice service.** The term “voice service”—

**(i)**means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) [47 USCS § 251(e)(1)]; and

**(ii)**includes transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine.

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

**(f) Effect on State law.**

**(1)State law not preempted.** Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

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

**(B)**the use of automatic telephone dialing systems;

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

**(D)**the making of telephone solicitations.

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

**(g) Actions by States.**

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

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

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

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

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

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

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

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

**(h) Annual report to Congress on robocalls and transmission of misleading or inaccurate caller identification information.**

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**(1)** Report required. Not later than 1 year after the date of the enactment of this subsection [enacted Dec. 30, 2019], and annually thereafter, the Commission, after consultation with the Federal Trade Commission, shall submit to Congress a report regarding enforcement by the Commission of subsections (b), (c), (d), and (e) during the preceding calendar year.

**(2)** Matters for inclusion. Each report required by paragraph (1) shall include the following:

**(A)** The number of complaints received by the Commission during each of the preceding 5 calendar years, for each of the following categories:

**(i)** Complaints alleging that a consumer received a call in violation of subsection (b) or (c).

**(ii)** Complaints alleging that a consumer received a call in violation of the standards prescribed under subsection (d).

**(iii)** Complaints alleging that a consumer received a call in connection with which misleading or inaccurate caller identification information was transmitted in violation of subsection (e).

**(B)** The number of citations issued by the Commission pursuant to section 503(b) [[47 USCS § 503\(b\)](#)] during the preceding calendar year to enforce subsection (d), and details of each such citation.

**(C)** The number of notices of apparent liability issued by the Commission pursuant to section 503(b) [[47 USCS § 503\(b\)](#)] during the preceding calendar year to enforce subsections (b), (c), (d), and (e), and details of each such notice including any proposed forfeiture amount.

**(D)** The number of final orders imposing forfeiture penalties issued pursuant to section 503(b) [[47 USCS § 503\(b\)](#)] during the preceding calendar year to enforce such subsections, and details of each such order including the forfeiture imposed.

**(E)** The amount of forfeiture penalties or criminal fines collected, during the preceding calendar year, by the Commission or the Attorney General for violations of such subsections, and details of each case in which such a forfeiture penalty or criminal fine was collected.

**(F)** Proposals for reducing the number of calls made in violation of such subsections.

**(G)** An analysis of the contribution by providers of interconnected VoIP service and non-interconnected VoIP service that discount high-volume, unlawful, short-duration calls to the total number of calls made in violation of such subsections, and recommendations on how to address such contribution in order to decrease the total number of calls made in violation of such subsections.

**(3)** No additional reporting required. The Commission shall prepare the report required by paragraph (1) without requiring the provision of additional information from providers of telecommunications service or voice service (as defined in section 4(a) of the Pallone-Thune TRACED Act [[47 USCS § 227b\(a\)](#)]).

**(i) Information sharing.**

**(1)** In general. Not later than 18 months after the date of the enactment of this subsection [enacted Dec. 30, 2019], the Commission shall prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating to—

**(A)** a call made or a text message sent in violation of subsection (b); or

**(B)** a call or text message for which misleading or inaccurate caller identification information was caused to be transmitted in violation of subsection (e).

**(2)** Text message defined. In this subsection, the term “text message” has the meaning given such term in subsection (e)(8).

**(j) Robocall blocking service.**

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**(1)**In general. Not later than 1 year after the date of the enactment of this subsection [enacted Dec. 30, 2019], the Commission shall take a final agency action to ensure the robocall blocking services provided on an opt-out or opt-in basis pursuant to the Declaratory Ruling of the Commission in the matter of Advanced Methods to Target and Eliminate Unlawful Robocalls (CG Docket No. 17-59; FCC 19-51; adopted on June 6, 2019)—

**(A)**are provided with transparency and effective redress options for both—

**(i)**consumers; and

**(ii)**callers; and

**(B)**are provided with no additional line item charge to consumers and no additional charge to callers for resolving complaints related to erroneously blocked calls; and

**(C)**make all reasonable efforts to avoid blocking emergency public safety calls.

**(2)**Text message defined. In this subsection, the term “text message” has the meaning given such term in subsection (e)(8).

## History

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### HISTORY:

Act June 19, 1934, ch 652, Title II, § 227, as added Dec. 20, 1991, *P. L. 102-243*, § 3, *105 Stat. 2395*; Oct. 28, 1992, *P. L. 102-556*, Title IV, § 402, *106 Stat. 4194*; Oct. 25, 1994, *P. L. 103-414*, Title III, § 303(a)(11), (12), *108 Stat. 4294*; Dec. 16, 2003, *P. L. 108-187*, § 12, *117 Stat. 2717*; July 9, 2005, *P. L. 109-21*, §§ 2(a)–(g), 3, *119 Stat. 359, 362*; Dec. 22, 2010, *P. L. 111-331*, § 2, *124 Stat. 3572*; Nov. 2, 2015, *P. L. 114-74*, Title III, § 301(a), [129 Stat. 588](#); March 23, 2018, *P. L. 115-141*, Div P, Title IV, § 402(i)(3), Title V, § 503(a)(1)–(4)(A), *132 Stat. 1089, 1091, 1092*; Dec. 30, 2019, *P.L. 116-105*, §§ 3(a), 8(a), 10(a), (b), *133 Stat. 3274, 3283, 3284*.

Annotations

## Notes

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### HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Explanatory notes:**

**Amendment Notes**

**1992.**

**1994.**

**2003.**

**2005.**

**2010.**

**2015.**

**2018.**

**2019.**

**Other provisions:**

**Explanatory notes:**

The concluding parenthesis has been enclosed in brackets in subsec. (a)(2)(B) to indicate the probable intent of Congress to delete such punctuation.

**Amendment Notes**

**1992.**

Act Oct. 28, 1992, in subsec. (b)(2), in subpara. (A), deleted “and” following the semicolon, in subpara. (B)(ii)(II), substituted “; and” for the concluding period, and added subpara. (C).

**1994.**

Act Oct. 25, 1994, in subsec. (b)(2)(C), substituted “paragraph” for “paragraphs”; and, in subsec. (e)(2), substituted “database” for “datebase”.

**2003.**

Act Dec. 16, 2003 (effective on 1/1/2004, as provided by § 16 of such Act, which appears as 15 USCS § 7701 note), in subsec. (b)(1), in the introductory matter, inserted “, or any person outside the United States if the recipient is within the United States”.

**2005.**

Act July 9, 2005, in subsec. (a), redesignated paras. (2)–(4) as paras. (3)–(5), respectively, inserted new para. (2), and, in para. (5) as redesignated, inserted “, in writing or otherwise”; in subsec. (b), substituted para. (1)(C) for one which read: “(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or”, and, in para. (2), in subpara. (B), deleted “and” following the concluding semicolon, in subpara. (C), substituted the concluding semicolon for a period, and added subparas. (D)–(G); and added subsec. (g).

**2010.**

Act Dec. 22, 2010, redesignated subsecs. (e)–(g) as subsecs. (f)–(h), respectively; and inserted new subsec. (e).

**2015.**

Act Nov. 2, 2015, in subsec. (b), in para. (1), in subpara. (A)(iii), inserted “, unless such call is made solely to collect a debt owed to or guaranteed by the United States”, and in subpara. (B), inserted “, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States,” and, in para. (2), in subpara. (F), deleted

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“and” following the concluding semicolon, in subpara. (G), substituted “; and” for a concluding period, and added subpara. (H).

**2018.**

Act March 23, 2018, in subsec. (e), deleted para. (4), which read: “(4) Report. Not later than 6 months after the enactment of the Truth in Caller ID Act of 2009, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.”.

Such Act further (effective 6 months after date of regulations, as provided by § 503(a)(5) of such Act, which appears as a note to this section), in subsec. (e), in the heading, added “Misleading or”, in para. (1), substituted “or any person outside the United States if the recipient is within the United States, in connection with any voice service or text messaging service” for “in connection with any telecommunications service or IP-enabled voice service”, in para. (3)(A), substituted “The Commission” for “Not later than 6 months after the date of enactment of the Truth in Caller ID Act of 2009, the Commission”, and, in para. (8), in subpara. (A), substituted “voice service or a text message sent using a text messaging service” for “telecommunications service or IP-enabled voice service”, in subpara. (B), substituted “voice service or a text message sent using a text messaging service” for “telecommunications service or IP-enabled voice service”, substituted subpara. (C) for one which read: “(C) IP-enabled voice service. The term ‘IP-enabled voice service’ has the meaning given that term by section 9.3 of the Commission’s regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.”, and added subparas. (D) and (E).

**2019.**

The 2019 amendment by P.L. 116-105, § 3(a) (applicable as provided by § 3(b) of P.L. 116-105, which appears as a note to this section), added (b)(4); added the sentence beginning “Paragraph (5) of section 503(b)...” in (e)(5)(A)(ii); in (e)(5)(A)(iv), substituted “4-year” for “2-year” in the heading and substituted “4 years” for “2 years” in the text; and substituted (h) for one which read:

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

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

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

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

“(4) for each notice referred to in paragraph (3)—

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

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

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

“(D) the status of the proceeding;

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

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

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

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

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

“(D) the amount paid;

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

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

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

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

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

The 2019 amendment by P.L. 116-105, § 8(a), deleted “and” following the concluding semicolon in (b)(2)(G)(ii); substituted “; and” for a concluding period in (b)(2)(H); and added (b)(2)(I).

The 2019 amendment by P.L. 116-105, § 10(a), (b) (applicable before the effective date of § 503(a)(2) of P.L. 115-141, which appears as a note to this section), added (i) and (j).

### Other provisions:

**Congressional findings.** Act Dec. 20, 1991, *P. L. 102-243*, § 2, *105 Stat. 2394*, provides:

“The Congress finds that:

“(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

“(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

“(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

“(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

“(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

“(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

“(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

“(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

“(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.



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“(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

“(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

“(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

“(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

“(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

“(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.”.

**Deadline for regulations; effective date.** Act Dec. 20, 1991, *P. L. 102-243*, § 3(c), *105 Stat. 2402*; Oct. 28, 1992, *P. L. 102-556*, Title I, § 102, *106 Stat. 4186*, provides:

“(1) Regulations. The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [adding this section and amending [47 USCS § 152\(b\)](#)] not later than 9 months after the date of enactment of this Act.

“(2) Effective date. The requirements of section 227 of the Communications Act of 1934 [this section] (as added by this section ), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act.”.

**Junk fax prevention; regulations.** Act July 9, 2005, *P. L. 109-21*, § 2(h), *119 Stat. 362*, provides: “Except as provided in section 227(b)(2)(G)(ii) of the Communications Act of 1934 [subsec. (b)(2)(G)(ii) of this section] (as added by subsection (f)), not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section [amending subsecs. (a) and (b) of this section].”.

**Deadline for regulations.** Act Nov. 2, 2015, *P. L. 114-74*, Title III, § 301(b), [129 Stat. 588](#), provides: “Not later than 9 months after the date of enactment of this Act, the Federal Communications Commission, in consultation with the Department of the Treasury, shall prescribe regulations to implement the amendments made by this section.”.

**Deadline for regulations.** Act March 23, 2018, *P. L. 115-141*, Div P, Title V, § 503(a)(4)(B), *132 Stat. 1092*, provides: “The Commission shall prescribe regulations to implement the amendments made by this subsection [amending subsec. (e) of this section] not later than 18 months after the date of enactment of this Act.”.

**Effective date of § 503(a) of Act March 23, 2018.** Act March 23, 2018, *P. L. 115-141*, Div P, Title V, § 503(a)(5), *132 Stat. 1092*, provides: “The amendments made by this subsection [amending subsec. (e) of this section] shall take effect on the date that is 6 months after the date on which the Commission prescribes regulations under paragraph (4).” [For regulations effective Feb. 5, 2020, see [84 Fed. Reg. 45669](#).]

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**Rule of construction.** Act March 23, 2018, *P. L. 115-141*, Div P, Title V, § 503(d), *132 Stat. 1094*, provides: “Nothing in this section, or the amendments made by this section [amending [47 USCS § 227](#), and adding [47 USCS § 227a](#)], shall be construed to modify, limit, or otherwise affect any rule or order adopted by the Commission in connection with—

“(1) the Telephone Consumer Protection Act of 1991 (*Public Law 102-243; 105 Stat. 2394*) or the amendments made by that Act; or

“(2) the CAN-SPAM Act of 2003 ([15 U.S.C. 7701](#) et seq.).”.

**Commission defined.**

Act Dec. 30, 2019, *P.L. 116-105*, § 2, *133 Stat. 3274*, provides: “In this Act [ [47 USCS §§ 609](#) et seq.], the term ‘Commission’ means the Federal Communications Commission.”.

**Applicability of amendments made by § 3 of Act Dec. 30, 2019.**

Act Dec. 30, 2019, *P.L. 116-105*, § 3(b), *133 Stat. 3276*, provides: “The amendments made by this section [amending this section and adding note] shall not affect any action or proceeding commenced before and pending on the date of the enactment of this Act.”.

**Deadline for regulations.**

Act Dec. 30, 2019, *P.L. 116-105*, § 3(c), *133 Stat. 3276*, provides: “The Commission shall prescribe regulations to implement the amendments made by this section [amending this section and adding note] not later than 270 days after the date of the enactment of this Act.”.

**Protections from spoofed calls.**

Act Dec. 30, 2019, *P.L. 116-105*, § 7, *133 Stat. 3282*, provides:

“(a) In general. Not later than 1 year after the date of the enactment of this Act, and consistent with the call authentication frameworks under section 4 [ [47 USCS § 227b](#)], the Commission shall initiate a rulemaking to help protect a subscriber from receiving unwanted calls or text messages from a caller using an unauthenticated number.

“(b) Considerations. In promulgating rules under subsection (a), the Commission shall consider—

“(1) the Government Accountability Office report on combating the fraudulent provision of misleading or inaccurate caller identification information required by section 503(c) of division P of the Consolidated Appropriations Act, 2018 ( *Public Law 115-141*);

“(2) the best means of ensuring that a subscriber or provider has the ability to block calls from a caller using an unauthenticated North American Numbering Plan number;

“(3) the impact on the privacy of a subscriber from unauthenticated calls;

“(4) the effectiveness in verifying the accuracy of caller identification information; and

“(5) the availability and cost of providing protection from the unwanted calls or text messages described in subsection (a).”.

**Deadline for regulations.**

Act Dec. 30, 2019, *P.L. 116-105*, § 8(b), *133 Stat. 3283*, provides: “In the case of any exemption issued under subparagraph (B) or (C) of section 227(b)(2) of the Communications Act of 1934 ( [47 U.S.C. 227\(b\)\(2\)](#)) before the date of the enactment of this Act, the Commission shall, not later than 1 year after such date of enactment, prescribe such regulations, or amend such existing regulations, as necessary to ensure that such exemption

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contains each requirement described in subparagraph (l) of such section, as added by subsection (a). To the extent such an exemption contains such a requirement before such date of enactment, nothing in this section or the amendments made by this section shall be construed to require the Commission to prescribe or amend regulations relating to such requirement.”.

**Transitional rule regarding definition of text message.**

Act Dec. 30, 2019, *P.L. 116-105*, § 10(d), *133 Stat. 3285*, provides: “Paragraph (2) of subsection (i) of section 227 of the Communications Act of 1934 ( [47 U.S.C. 227](#)), as added by subsection (a) of this section, and paragraph (2) of subsection (j) of such section 227 [subsec. (j)(2) of this section], as added by subsection (b) of this section, shall apply before the effective date of the amendment made to subsection (e)(8) of such section 227 [subsec. (e)(8) of this section] by subparagraph (C) of section 503(a)(2) of division P of the Consolidated Appropriations Act, 2018 ( *Public Law 115-141*) as if such amendment was already in effect.”.

**Protection from one-ring scams.**

Act Dec. 30, 2019, *P.L. 116-105*, § 12, *133 Stat. 3286*, provides:

“(a) Initiation of proceeding. Not later than 120 days after the date of the enactment of this Act, the Commission shall initiate a proceeding to protect called parties from one-ring scams.

“(b) Matters to be considered. As part of the proceeding required by subsection (a), the Commission shall consider how the Commission can—

“(1) work with Federal and State law enforcement agencies to address one-ring scams;

“(2) work with the governments of foreign countries to address one-ring scams;

“(3) in consultation with the Federal Trade Commission, better educate consumers about how to avoid one-ring scams;

“(4) incentivize voice service providers to stop calls made to perpetrate one-ring scams from being received by called parties, including consideration of adding identified one-ring scam type numbers to the Commission’s existing list of permissible categories for carrier-initiated blocking;

“(5) work with entities that provide call-blocking services to address one-ring scams; and

“(6) establish obligations on international gateway providers that are the first point of entry for these calls into the United States, including potential requirements that such providers verify with the foreign originator the nature or purpose of calls before initiating service.

“(c) Report to Congress. Not later than 1 year after the date of the enactment of this Act, the Commission shall publish on its website and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the status of the proceeding required by subsection (a).

“(d) Definitions. In this section:

“(1) One-ring scam. The term ‘one-ring scam’ means a scam in which a caller makes a call and allows the call to ring the called party for a short duration, in order to prompt the called party to return the call, thereby subjecting the called party to charges.

“(2) State. The term ‘State’ has the meaning given such term in section 3 of the Communications Act of 1934 ( [47 U.S.C. 153](#)).

“(3) Voice service. The term ‘voice service’ has the meaning given such term in section 227(e)(8) of the Communications Act of 1934 ( [47 U.S.C. 227\(e\)\(8\)](#)). This paragraph shall apply before the effective date of the amendment made to such section by subparagraph (C) of section 503(a)(2) of division P of the Consolidated Appropriations Act, 2018 ( *Public Law 115-141*) as if such amendment was already in effect.”.

**Annual robocall report.**

Act Dec. 30, 2019, *P.L. 116-105*, § 13, *133 Stat. 3287*, provides:

“(a) In general. Not later than 1 year after the date of the enactment of this Act, and annually thereafter, the Commission shall make publicly available on the website of the Commission, and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a report on the status of private-led efforts to trace back the origin of suspected unlawful robocalls by the registered consortium and the participation of voice service providers in such efforts.

“(b) Contents of report. The report required under subsection (a) shall include, at minimum, the following:

“(1) A description of private-led efforts to trace back the origin of suspected unlawful robocalls by the registered consortium and the actions taken by the registered consortium to coordinate with the Commission.

“(2) A list of voice service providers identified by the registered consortium that participated in private-led efforts to trace back the origin of suspected unlawful robocalls through the registered consortium.

“(3) A list of each voice service provider that received a request from the registered consortium to participate in private-led efforts to trace back the origin of suspected unlawful robocalls and refused to participate, as identified by the registered consortium.

“(4) The reason, if any, each voice service provider identified by the registered consortium provided for not participating in private-led efforts to trace back the origin of suspected unlawful robocalls.

“(5) A description of how the Commission may use the information provided to the Commission by voice service providers or the registered consortium that have participated in private-led efforts to trace back the origin of suspected unlawful robocalls in the enforcement efforts by the Commission.

“(c) Additional information. Not later than 210 days after the date of the enactment of this Act, and annually thereafter, the Commission shall issue a notice to the public seeking additional information from voice service providers and the registered consortium of private-led efforts to trace back the origin of suspected unlawful robocalls necessary for the report by the Commission required under subsection (a).

“(d) Registration of consortium of private-led efforts to trace back the origin of suspected unlawful robocalls.

“(1) In general. Not later than 90 days after the date of the enactment of this Act, the Commission shall issue rules to establish a registration process for the registration of a single consortium that conducts private-led efforts to trace back the origin of suspected unlawful robocalls. The consortium shall meet the following requirements:

“(A) Be a neutral third party competent to manage the private-led effort to trace back the origin of suspected unlawful robocalls in the judgement of the Commission.

“(B) Maintain a set of written best practices about the management of such efforts and regarding providers of voice services’ participation in private-led efforts to trace back the origin of suspected unlawful robocalls.

“(C) Consistent with section 222(d)(2) of the Communications Act of 1934 ([47 U.S.C. 222\(d\)\(2\)](#)), any private-led efforts to trace back the origin of suspected unlawful robocalls conducted by the third party focus on ‘fraudulent, abusive, or unlawful’ traffic.

“(D) File a notice with the Commission that the consortium intends to conduct private-led efforts to trace back in advance of such registration.

“(2) Annual notice by the Commission seeking registrations. Not later than 120 days after the date of the enactment of this Act, and annually thereafter, the Commission shall issue a notice to the public seeking the registration described in paragraph (1).

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“(e) List of voice service providers. The Commission may publish a list of voice service providers and take appropriate enforcement action based on information obtained from the consortium about voice service providers that refuse to participate in private-led efforts to trace back the origin of suspected unlawful robocalls, and other information the Commission may collect about voice service providers that are found to originate or transmit substantial amounts of unlawful robocalls.

“(f) Definitions. In this section:

“(1) Private-led effort to trace back. The term ‘private-led effort to trace back’ means an effort made by the registered consortium of voice service providers to establish a methodology for determining the origin of a suspected unlawful robocall.

“(2) Registered consortium. The term ‘registered consortium’ means the consortium registered under subsection (d).

“(3) Suspected unlawful robocall. The term ‘suspected unlawful robocall’ means a call that the Commission or a voice service provider reasonably believes was made in violation of subsection (b) or (e) of section 227 of the Communications Act of 1934 ([47 U.S.C. 227](#)).

“(4) Voice service. The term ‘voice service’—

“(A) means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of the Communications Act of 1934 ([47 U.S.C. 251\(e\)\(1\)](#)); and

“(B) includes—

“(i) transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine; and

“(ii) without limitation, any service that enables real-time, two-way voice communications, including any service that requires internet protocol-compatible customer premises equipment (commonly known as ‘CPE’) and permits out-bound calling, whether or not the service is one-way or two-way voice over internet protocol.”

### **Hospital robocall protection group.**

Act Dec. 30, 2019, *P.L. 116-105*, § 14, *133 Stat. 3288*, provides:

“(a) Establishment. Not later than 180 days after the date of the enactment of this Act, the Commission shall establish an advisory committee to be known as the ‘Hospital Robocall Protection Group’.

“(b) Membership. The Group shall be composed only of the following members:

“(1) An equal number of representatives from each of the following:

“(A) Voice service providers that serve hospitals.

“(B) Companies that focus on mitigating unlawful robocalls.

“(C) Consumer advocacy organizations.

“(D) Providers of one-way voice over internet protocol services described in subsection (e)(3)(B)(ii).

“(E) Hospitals.

“(F) State government officials focused on combating unlawful robocalls.

“(2) One representative of the Commission.

“(3) One representative of the Federal Trade Commission.

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“(c) Issuance of best practices. Not later than 180 days after the date on which the Group is established under subsection (a), the Group shall issue best practices regarding the following:

“(1) How voice service providers can better combat unlawful robocalls made to hospitals.

“(2) How hospitals can better protect themselves from such calls, including by using unlawful robocall mitigation techniques.

“(3) How the Federal Government and State governments can help combat such calls.

“(d) Proceeding by FCC. Not later than 180 days after the date on which the best practices are issued by the Group under subsection (c), the Commission shall conclude a proceeding to assess the extent to which the voluntary adoption of such best practices can be facilitated to protect hospitals and other institutions.

“(e) Definitions. In this section:

“(1) Group. The term ‘Group’ means the Hospital Robocall Protection Group established under subsection (a).

“(2) State. The term ‘State’ has the meaning given such term in section 3 of the Communications Act of 1934 ( [47 U.S.C. 153](#)).

“(3) Voice service. The term ‘voice service’—

“(A) means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of the Communications Act of 1934 ( [47 U.S.C. 251\(e\)\(1\)](#)); and

“(B) includes—

“(i) transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine; and

“(ii) without limitation, any service that enables real-time, two-way voice communications, including any service that requires internet protocol-compatible customer premises equipment (commonly known as ‘CPE’) and permits out-bound calling, whether or not the service is one-way or two-way voice over internet protocol.”.

### **Separability clause.**

Act Dec. 30, 2019, *P.L. 116-105*, § 15, *133 Stat. 3290*, provides: “If any provision of this Act [ [47 USCS §§ 609](#) et seq.], the amendments made by this Act [for full classification, consult USCS Tables volumes], or the application thereof to any person or circumstance is held invalid, the remainder of this Act, the amendments made by this Act, and the application of such provision to other persons or circumstances shall not be affected thereby.”.

## **NOTES TO DECISIONS**

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### **I.IN GENERAL**

#### **1.Generally**

#### **2.Relationship to state laws, generally**

**3. Constitutional considerations****4.—Due process****5.—First Amendment****6.—Supremacy Clause****7. FCC rules and regulations****8. Do not call list****9. Particular activities as violations****10.—Unsolicited fax advertisements****11. Insurance coverage****12. Assignment of claims or rights, generally****13. Private right of action, generally****14. Parties and standing****15.—Assignments****15.5—Personal jurisdiction****16. State actions****17. Class actions****18. Insurer's duty to defend, generally****19. Dismissals****20. Summary judgment****21.—Insurer's duty to defend****22.—Injunctions****23. Appeal and review****24. Miscellaneous****II. JURISDICTION OVER PRIVATE ACTIONS****25. Federal diversity jurisdiction****26. Federal question jurisdiction****27. District of Columbia courts****28. State courts****29.—Particular cases****30. Removal and remand**

**31.—Federal diversity or federal question jurisdiction****32.Miscellaneous****I. IN GENERAL****1. Generally**

Telephone Consumer Protection Act of 1991 ([47 USCS § 227](#)) is reasonable means of preventing shifting of advertising costs to consumers. [Destination Ventures v. FCC, 46 F.3d 54, 95 Cal. Daily Op. Service 807, 95 D.A.R. 1463, 23 Media L. Rep. \(BNA\) 1446, 1995 U.S. App. LEXIS 1872 \(9th Cir. 1995\).](#)

Pursuant to District Court for District of Colorado, Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., is penal in nature. [US Fax Law Ctr., Inc. v iHire, Inc. \(2005, DC Colo\) 362 F Supp 2d 1248affd 476 F.3d 1112 \(CA10 Colo 2007\).](#)

Under [47 USCS § 227\(b\)\(1\)\(A\)](#), one could consent to call only if one had authority to do so, and only subscriber could give such consent, either directly or through authorized agent. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\).](#)

To fall within [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#)'s consent exception, caller must demonstrate that it had consent of subscriber, as defined by common law, to call telephone number assigned to cellular telephone service. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\).](#)

Nothing in statutory text of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), or of Fair Debt Collection Practices Act (FDCPA), [15 USCS §§ 1692](#) et seq., indicates that compliance with FDCPA excuses compliance with TCPA. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\).](#)

Eleventh Circuit presumes from Telephone Consumer Protection Act's, [47 USCS § 227](#), silence regarding means of providing or revoking consent that Congress sought to incorporate common law concept of consent. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\).](#)

Eleventh Circuit believes that Federal Communications Commission's 1992 ruling concerning [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#) was intended to exempt only communications between radio common carriers and their customers with regard to autodialed calls for which subscriber is not charged, and that ruling does not apply to third parties. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\).](#)

It was well-established at time that Congress drafted Telephone Consumer Practices Act (TCPA) that consent becomes irrevocable when it is integrated into binding contract, and there was no indication in statute's text that Congress intended to deviate from this common-law principle in its use of word "consent"; permitting consumer to unilaterally revoke mutually-agreed-upon term in contract would run counter to black-letter contract law in effect at time Congress enacted TCPA. [Medley v. Dish Network, LLC, 958 F.3d 1063, 28 Fla. L. Weekly Fed. C 1080, 2020 U.S. App. LEXIS 14052 \(11th Cir. 2020\)](#), reh'g denied, [2020 U.S. App. LEXIS 27879 \(11th Cir. Sept. 1, 2020\).](#)

For purposes of Telephone Consumer Protection Act, "express" means "explicit," not "implicit." [Edeh v. Midland Credit Mgmt., 748 F. Supp. 2d 1030, 2010 U.S. Dist. LEXIS 103888 \(D. Minn. 2010\).](#)



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In action that involved Telephone Consumer Protection Act, reconsideration was warranted because upon review of extensive briefing and persuasive authority, there was reason to reconsider court's prior position. [Asher & Simons, P.A. v. J2 Global Can., Inc.](#), 977 F. Supp. 2d 544, 2013 U.S. Dist. LEXIS 148972 (D. Md. 2013).

*Unpublished decision:* Debtor had provided prior express consent to bank to make such calls when he had given bank his cellphone number as contact number for his account in February 2009 in normal course of business. [Sartori v. Susan C. Little & Assocs., P.A.](#), 571 Fed. Appx. 677, 2014 U.S. App. LEXIS 12925 (10th Cir. 2014).

United States District Court for the Northern District of California Court agrees with the weight of authority holding that Telephone Consumer Protection Act claims do not require any proof of intent to establish liability, only to substantiate an award of treble damages based on a willful or knowing violation. [Berman v. Freedom Fin. Network, LLC](#), 400 F. Supp. 3d 964, 104 Fed. R. Serv. 3d (Callaghan) 949, 2019 U.S. Dist. LEXIS 150810 (N.D. Cal. 2019).

## 2. Relationship to state laws, generally

Telephone Consumer Protection Act ([47 USCS § 227](#)) does not preempt similar state law regulating use of automatic telephone dialing-announcing devices which prohibits use of such devices by candidate for public office. [Van Bergen v. Minnesota](#), 59 F.3d 1541, 23 Media L. Rep. (BNA) 2185, 1995 U.S. App. LEXIS 17022 (8th Cir. 1995).

Court affirmed dismissal of plaintiff's Telephone Consumer Protection Act (TCPA) action for lack of jurisdiction because TCPA used state law to define federal cause of action, and when state refused to recognize that cause of action, there remained nothing to which any grant of federal court jurisdiction could attach; Congress intended to give states fair measure of control over solving problems that TCPA addressed, and ability to define when class cause of action would lie was part of that control. [Holster v. Gatco, Inc.](#), 618 F.3d 214, 2010 U.S. App. LEXIS 17661 (2d Cir. 2010), cert. denied, 563 U.S. 969, 131 S. Ct. 2151, 179 L. Ed. 2d 952, 2011 U.S. LEXIS 3316 (2011).

Where relevant state law, [Conn. Gen. Stat. § 52-570c](#), specifically recognized cause of action for statutory damages for transmission of unsolicited commercial facsimile (fax) communications, but permitted such action to be filed only within two years of complained-of transmission, [47 USCS § 227](#) action could be maintained only as permitted by that state statute of limitations—not 4-year limitations period provided by [28 USCS § 1658\(a\)](#), catch-all statute of limitations; contrary to plaintiff's argument, complaint was untimely even if tolling were to be calculated as he urged; even if Connecticut law were to toll all times when plaintiff's earlier state and federal putative class actions pertaining to January 28, 2004, fax were pending, September 8, 2009, filing would be untimely and, therefore, not otherwise permitted by § 52-570c(d). [Giovanniello v. ALM Media, LLC](#), 660 F.3d 587, 2011 U.S. App. LEXIS 20956 (2d Cir. 2011), vacated, remanded, 568 U.S. 801, 133 S. Ct. 159, 184 L. Ed. 2d 1, 2012 U.S. LEXIS 7215 (2012).

Otherwise permitted provision of [47 USCS § 227\(b\)\(3\)](#) signals Congress' intent to allow state statutes of limitations to control [47 USCS § 227](#) filing; if claim for transmission of unsolicited commercial fax is no longer permitted by state statute of limitations, it cannot be maintained under TCPA, notwithstanding federal catch-all statute of limitations provided in [28 USCS § 1658\(a\)](#). [Giovanniello v. ALM Media, LLC](#), 660 F.3d 587, 2011 U.S. App. LEXIS 20956 (2d Cir. 2011), vacated, remanded, 568 U.S. 801, 133 S. Ct. 159, 184 L. Ed. 2d 1, 2012 U.S. LEXIS 7215 (2012).

[47 USCS § 227](#) claim is governed by law of state where injury occurred, i.e., where facsimile was received. [Giovanniello v. ALM Media, LLC](#), 660 F.3d 587, 2011 U.S. App. LEXIS 20956 (2d Cir. 2011), vacated, remanded, 568 U.S. 801, 133 S. Ct. 159, 184 L. Ed. 2d 1, 2012 U.S. LEXIS 7215 (2012).

State-oriented language of Telephone Consumer Protection Act applies only to claims in state court; thus, federal-question jurisdiction existed and federal catch-all limitations period, rather than state limitations period, applied to claim alleging unlawful fax transmission ([Foxhall Realty Law Offices v. Telecommunications Premium Servs.](#), 156

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[F.3d 432, 1998 U.S. App. LEXIS 24269 \(2d Cir. 1998\)](#), abrogated in part, [Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 Fla. L. Weekly Fed. S 95, 2012 U.S. LEXIS 906 \(2012\)](#); [Giovanniello v. ALM Media, LLC, 726 F.3d 106, 2013 U.S. App. LEXIS 16394 \(2d Cir. 2013\)](#).

Indiana's Automated Dialing Machine Statute (IADMS), [Ind. Code 24-5-14-1](#) et seq., is preempted by [47 USCS § 227](#), as it applies to interstate use of automatic telephone dialing systems; thus, plaintiff was granted injunction against enforcement of IADMS with regard to interstate calls made to express political messages. [Patriotic Veterans, Inc. v. Indiana ex rel. Zoeller, 821 F. Supp. 2d 1074, 2011 U.S. Dist. LEXIS 110787 \(S.D. Ind. 2011\)](#), rev'd, remanded, [736 F.3d 1041, 2013 U.S. App. LEXIS 23484 \(7th Cir. 2013\)](#).

Interpretation of TCPA does not require federal court to follow state law; accordingly, [N.Y. C.P.L.R. § 901\(b\)](#) did not prevent maintenance of TCPA claim as class action. [Bais Yaakov of Spring Valley v. Alloy, Inc., 936 F. Supp. 2d 272, 2013 U.S. Dist. LEXIS 45025 \(S.D.N.Y. 2013\)](#).

Recipients of unsolicited faxes in Texas have no right of action under [47 USCS § 227](#), part of Telephone Consumer Protection Act of 1991 (TCPA), as to faxes sent before September 1, 1999, effective date of [Tex. Bus. & Com. Code Ann. § 35.47\(f\)](#), by which Texas "opted in" to TCPA as provided in [47 USCS § 227\(b\)\(3\)](#). [Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707, 2006 Tex. LEXIS 97 \(Tex.\)](#), cert. denied, [548 U.S. 906, 126 S. Ct. 2941, 165 L. Ed. 2d 955, 2006 U.S. LEXIS 4959 \(2006\)](#).

Telephone Consumer Protection Act of 1991 does not preempt application of North Dakota telemarketing statutes to automated political polling calls made from Virginia to residents in North Dakota. [State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828, 2006 N.D. LEXIS 87 \(N.D.\)](#), cert. denied, [549 U.S. 953, 127 S. Ct. 383, 166 L. Ed. 2d 270, 2006 U.S. LEXIS 7525 \(2006\)](#).

### 3. Constitutional considerations

States have been given, subject to their consent, exclusive subject matter jurisdiction over private actions authorized by Telephone Consumer Protection Act of 1991 ([47 USCS § 227](#)), and fact that such private actions may be permitted in some states and prohibited in others does not render Act violative of equal protection component of Fifth Amendment's due process clause; further, interpreting statute as creating exclusive state jurisdiction does not infringe Tenth Amendment rights of states to govern without interference from federal government. [International Science & Tech. Inst. v. Inacom Communs., 106 F.3d 1146, 25 Media L. Rep. \(BNA\) 1498, 1997 U.S. App. LEXIS 2232 \(4th Cir. 1997\)](#), abrogated in part, [Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 Fla. L. Weekly Fed. S 95, 2012 U.S. LEXIS 906 \(2012\)](#).

Telephone Consumer Protection Act, [47 USCS § 227\(b\)\(1\)\(C\)](#), was held not to be unconstitutionally broad in claim by state of Missouri on behalf of telephone users, where advertisers remained free to publicize their products through any legal means, but simply could not do so through unsolicited fax; and Act did not totally ban on fax advertising where advertisers could still obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shops. [Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 2003 U.S. App. LEXIS 5469 \(8th Cir. 2003\)](#), reh'g denied, reh'g, en banc, denied, [2003 U.S. App. LEXIS 13540 \(8th Cir. July 3, 2003\)](#), cert. denied, [540 U.S. 1104, 124 S. Ct. 1043, 157 L. Ed. 2d 888, 2004 U.S. LEXIS 49 \(2004\)](#).

In private action brought under Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), it was determined that TCPA did not violate Eighth Amendment's Excessive Fines clause because that clause does not apply to actions for civil damages unless government is prosecuting action or will receive share of damages. [Centerline Equip. Corp. v. Banner Pers. Serv., 545 F. Supp. 2d 768, 2008 U.S. Dist. LEXIS 15946 \(N.D. Ill. 2008\)](#).

Telephone Consumer Protection Act does not run afoul of First Amendment. [Pasco v. Protus IP Solutions, Inc., 826 F. Supp. 2d 825, 2011 U.S. Dist. LEXIS 135268 \(D. Md. 2011\)](#).

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Telephone Consumer Protection Act articulates its aims with reasonable degree of clarity so as to reduce risk of arbitrary enforcement and enable individuals to conform their behavior to requirements of law. [\*Pasco v. Protus IP Solutions, Inc.\*, 826 F. Supp. 2d 825, 2011 U.S. Dist. LEXIS 135268 \(D. Md. 2011\)](#).

#### 4. —Due process

Two public harms are addressed by Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#): (1) unsolicited fax advertisements impose difficult-to-quantify interruption costs on businesses and residences because fax machines typically can only handle one fax at time; and (2) unsolicited commercial facsimiles shift advertisers' printing costs to unwitting recipients; legislative history of Louisiana Unsolicited Telefacsimile Messages Act (LUTMA), [La. Rev. Stat. Ann. § 51:1745](#) et seq., indicates that it prevents public harm: invasion of privacy caused by unsolicited facsimiles; therefore, damages provisions of TCPA and LUTMA do not need to be proportional to harm inflicted by unsolicited facsimiles and, as such, civil damages provisions of TCPA and LUTMA satisfy due process. [Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commun., L.P.](#), 329 F. Supp. 2d 789, 2004 U.S. Dist. LEXIS 15427 (M.D. La. 2004).

In private action brought under Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), on limited record presented by motion to dismiss, fax sender who was sued under TCPA failed to establish that TCPA's statutory damages in amount of \$500 violated Fifth Amendment's Due Process clause because, in setting statutory amount, Congress was free to choose amount that reflected injury to public as well as to individual. [Centerline Equip. Corp. v. Banner Pers. Serv.](#), 545 F. Supp. 2d 768, 2008 U.S. Dist. LEXIS 15946 (N.D. Ill. 2008).

#### 5. —First Amendment

Government-debt exception to TCPA's robocall restriction was unconstitutional content-based restriction, which did not withstand strict scrutiny under First Amendment; constitutional violation was cured by severing invalid government-debt exception from remainder of TCPA. [Barr v. Am. Ass'n of Political Consultants](#), 140 S. Ct. 2335, 207 L. Ed. 2d 784, 28 Fla. L. Weekly Fed. S 489, 2020 U.S. LEXIS 3544 (2020).

Telephone Consumer Protection Act of 1991 ([47 USCS § 227](#)) which makes it unlawful to send unsolicited faxes containing advertisements does not violate First Amendment. [Destination Ventures v. FCC](#), 46 F.3d 54, 95 Cal. Daily Op. Service 807, 95 D.A.R. 1463, 23 Media L. Rep. (BNA) 1446, 1995 U.S. App. LEXIS 1872 (9th Cir. 1995).

Provision of Telephone Consumer Protection Act of 1991 ([47 USCS § 227](#)) banning automated, prerecorded calls to residences is content-neutral and narrowly tailored to advance legitimate government interest and leaves open ample alternative channels of communication, and therefore provision does not violate First Amendment. [Moser v. FCC](#), 46 F.3d 970, 95 Cal. Daily Op. Service 925, 1995 U.S. App. LEXIS 2151 (9th Cir.), cert. denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 857, 1995 U.S. LEXIS 4329 (1995).

Telephone Consumer Protection Act, [47 USCS § 227\(b\)\(1\)\(C\)](#) satisfies constitutional test for regulation of commercial speech, and thus, withstands First Amendment scrutiny where there is substantial governmental interest in protecting public from cost shifting and interference caused by unwanted fax advertisements, and means chosen by Congress to address these harms directly and materially advances governmental interest; accordingly, statute is also narrowly tailored to create reasonable fit with its objective. [Missouri ex rel. Nixon v. Am. Blast Fax, Inc.](#), 323 F.3d 649, 2003 U.S. App. LEXIS 5469 (8th Cir. 2003), reh'g denied, reh'g, en banc, denied, 2003 U.S. App. LEXIS 13540 (8th Cir. July 3, 2003), cert. denied, 540 U.S. 1104, 124 S. Ct. 1043, 157 L. Ed. 2d 888, 2004 U.S. LEXIS 49 (2004).

*Unpublished decision*: District court properly found that Telephone Consumer Protection Act was content-neutral regulation that furthered important government interests unrelated to free express, and its restrictions did not

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burden substantially more speech than was necessary to protect those interests. [Maryland v. Universal Elections](#), 729 F.3d 370, 2013 U.S. App. LEXIS 15350 (4th Cir. 2013).

Fax advertisers' challenge to constitutionality of [47 USCS § 227\(b\)\(1\)\(C\)](#) fails, where advertisers sought to enjoin enforcement of statute forbidding transmission of unsolicited advertisements via telephone facsimile machines (fax), [47 USCS § 227\(b\)\(1\)\(C\)](#), because fax advertisement is commercial speech, government has legitimate purpose of preventing unfair cost-shifting to recipients of unsolicited advertisements, and ban on all unsolicited advertisements is reasonably crafted to fit purpose and therefore does not infringe impermissibly on advertisers' First Amendment rights. *Destination Ventures v. FCC*, 844 F. Supp. 632, 22 Media L. Rep. (BNA) 1171, 1994 U.S. Dist. LEXIS 6845 (D. Or. 1994), aff'd, 46 F.3d 54, 95 Cal. Daily Op. Service 807, 95 D.A.R. 1463, 23 Media L. Rep. (BNA) 1446, 1995 U.S. App. LEXIS 1872 (9th Cir. 1995).

Statutory claim brought by recipients of unwanted advertising via telephone facsimile (fax) will not be dismissed, because ban on unsolicited fax advertisements set forth at [47 USCS § 227\(b\)\(1\)\(C\)](#) is narrowly tailored to government's asserted interest in protecting consumers from unfair shifting of advertising costs and from interruption of their use of their own fax machines, and does not violate First Amendment guarantee of commercial free speech. *Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 25 Media L. Rep. (BNA) 1908, 1997 U.S. Dist. LEXIS 5628 (S.D. Ind. 1997).

Company in business of sending unsolicited fax advertisements is in violation of [47 USCS § 227](#), where its own president testified in deposition that company does not have prior express invitation or permission from, or business relationship with, more than half of people to whom it sends fax advertisements, because rehashed arguments about First Amendment and commercial speech have been and are again rejected. *Texas v. Am. Blast Fax, Inc.*, 159 F. Supp. 2d 936, 2001 U.S. Dist. LEXIS 12887 (W.D. Tex. 2001).

Court enjoined fax advertising service and its principal from sending unsolicited faxes to state residents where State was likely to prevail on its argument that Telephone Consumer Protection Act of 1991 (TCPA) did not violate First Amendment; State had legitimate interest in preventing invasion of privacy and cost-shifting effects of fax advertising, TCPA's allowance of certain fax advertising did not undermine its effectiveness in furthering State's interests, and TCPA was not more restrictive than necessary. *Minn. v. Sunbelt Communs. & Mktg.*, 282 F. Supp. 2d 976, 2002 U.S. Dist. LEXIS 18990 (D. Minn. 2002).

In applying Central Hudson analysis, court determined that Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), passed First Amendment muster because it regulated commercial speech that concerned lawful activity and was not misleading, government's interest in protecting consumers from costs and interruptions associated with unsolicited fax advertisements was substantial, TCPA directly and materially advanced that interest, and TCPA was not more extensive than necessary. *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., L.P.*, 329 F. Supp. 2d 789, 2004 U.S. Dist. LEXIS 15427 (M.D. La. 2004).

Because Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), directly advances legitimate government interest in controlling costs of unwanted faxes, and because it is plausible to assume that it does so using means that are in reasonable proportion to that goal, company that faxed unsolicited advertisements and was sued under Act failed to demonstrate that TCPA facially violates First Amendment. *Centerline Equip. Corp. v. Banner Pers. Serv.*, 545 F. Supp. 2d 768, 2008 U.S. Dist. LEXIS 15946 (N.D. Ill. 2008).

Defendants' motion to dismiss State's enforcement action arising out of anonymous robocalls placed to its residents on election day was denied as [47 USCS § 227\(d\)](#) did not violate *U.S. Const. amend. I*. Section 227(d) was content neutral and served government's interests of protecting residential privacy and preventing misleading automated calls. *Maryland v. Universal Elections*, 787 F. Supp. 2d 408, 79 Fed. R. Serv. 3d (Callaghan) 1128, 2011 U.S. Dist. LEXIS 55883 (D. Md. 2011).

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[47 USCS § 227\(b\)\(1\)\(C\)](#), which prohibits any person within United States from sending unsolicited fax advertisements, does not violate free speech guarantee of First Amendment. Re 21st Century Fax(es) Ltd. a.k.a. 20th Century Fax(es), FCC FCC02-2 (adopted 1/9/02).

## 6. —Supremacy Clause

In light of [47 USCS § 227\(e\)\(1\)](#)'s carefully-drafted language and legislative history, and in spite of presumption against preemption that attaches to State's exercise of its police power, there is inherent federal objective in Truth in Caller ID Act of 2009 to protect non-harmful spoofing; Mississippi Caller ID Anti-Spoofing Act's proscription of non-harmful spoofing (spoofing done without intent to defraud, cause harm, or wrongfully obtain anything of value frustrates this federal objective and is, therefore, conflict-preempted. [Teltech Sys. v. Bryant, 702 F.3d 232, 2012 U.S. App. LEXIS 25217 \(5th Cir. 2012\)](#).

State law which banned auto-dialed telephone calls unless receiver has consented to calls were not expressly preempted, since preemption of state laws prohibiting such calls was expressly excluded and regulation of interstate auto-dialing systems was not preempted. [Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 2013 U.S. App. LEXIS 23484 \(7th Cir. 2013\)](#).

Conflict preemption did not apply to state law which banned auto-dialed telephone calls unless receiver has consented to calls, since mere inconvenience or hardship without auto-dialing did not make it impossible to comply with both federal and state law. [Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 2013 U.S. App. LEXIS 23484 \(7th Cir. 2013\)](#).

Non-preemption clause indicated that Congress did not intend to preemptively occupy entire field of regulating auto-dialing, and more restrictive state statute which banned auto-dialed telephone calls unless receiver has consented to calls did not frustrate any purpose that federal law required. [Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 2013 U.S. App. LEXIS 23484 \(7th Cir. 2013\)](#).

Congress did not intend to occupy field by enacting Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., given savings clause set forth in [47 USCS § 227\(e\)](#). [Palmer v. Sprint Nextel Corp., 674 F. Supp. 2d 1224, 2009 U.S. Dist. LEXIS 114111 \(W.D. Wash. 2009\)](#).

Wash. Rev. Code. § 80.36.400 was not subject to conflict preemption where telecommunications provider failed to show that compliance with § 80.36.400 would have placed it in direct noncompliance with Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., and court interpreted [47 USCS § 227\(e\)](#) as evidencing Congress's intent not to preempt state laws that prohibit interstate telemarketing calls that used automatic dialing and announcing devices for purposes of commercial solicitation. [Palmer v. Sprint Nextel Corp., 674 F. Supp. 2d 1224, 2009 U.S. Dist. LEXIS 114111 \(W.D. Wash. 2009\)](#).

The consumer protection provisions of North Carolina Debt Collection Act, [N.C. Gen. Stat. §§ 75-50](#) et seq., and Telephone Consumer Protection Act of 1992, [47 USCS § 227](#), were not preempted by Dodd-Frank amendments to National Banking Act, [12 USCS § 25b](#). [Pryor v. Bank of Am., N.A. \(In re Pryor\), 479 B.R. 694, 2012 Bankr. LEXIS 4439 \(Bankr. E.D.N.C. 2012\)](#).

Private causes of action may be brought in Superior Court of District of Columbia under Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), without need for enabling legislation in District of Columbia; under Supremacy Clause, [U.S. Const. art. VI, cl. 2](#), TCPA is presumptively enforceable in Superior Court and there is no clear indication to contrary. [Portuguese Am. Leadership Council of the United States, Inc. v. Investors' Alert, Inc., 956 A.2d 671, 2008 D.C. App. LEXIS 390 \(D.C. 2008\)](#).

Under "opt-in" analysis of [47 USCS § 227\(b\)\(3\)](#), recipients of unsolicited faxes in Texas had no right of action under Telephone Consumer Protection Act of 1991 (TCPA) as to faxes sent before September 1, 1999, date on which Texas Business and Commerce Code was amended to allow parties to bring suit in state court for TCPA violations

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pursuant to [Tex. Bus. & Com. Code Ann. § 35.47\(f\)](#); Supremacy Clause did not require states to provide forum for private TCPA damage claims with no ability to decline. [Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707, 2006 Tex. LEXIS 97 \(Tex.\)](#), cert. denied, 548 U.S. 906, 126 S. Ct. 2941, 165 L. Ed. 2d 955, 2006 U.S. LEXIS 4959 (2006).

## 7. FCC rules and regulations

Because key principle underlying exemption for prerecorded telemarketing calls promoting over-the-air broadcasts extended to calls promoting specific broadcasts or radio station generally or both, plaintiff's argument based upon distinction between two failed; Federal Communications Commission had decided to exempt that type of phone call from [47 USCS § 227\(b\)](#)'s prohibitions. [Leyse v. Clear Channel Broad., Inc., 697 F.3d 360, 2012 FED App. 0307P, 2012 U.S. App. LEXIS 18706 \(6th Cir. 2012\)](#), reprinted, [545 Fed. Appx. 444, 2013 FED App. 934N, 41 Media L. Rep. \(BNA\) 2769, 2013 U.S. App. LEXIS 22770 \(6th Cir. 2013\)](#).

Administrative Orders Review Act, [28 USCS §§ 2342](#) et seq., precluded court from entertaining challenges to [47 CFR § 64.1200\(a\)\(3\)\(iv\)](#) other than on appeals arising from agency proceedings; without addressing such challenges, court could not reject Federal Communications Commission's plain-language interpretation of its own unambiguous regulation. [Nack v. Walburg, 715 F.3d 680, 2013 U.S. App. LEXIS 10158 \(8th Cir. 2013\)](#), reh'g denied, reh'g, en banc, denied, [2013 U.S. App. LEXIS 14424 \(8th Cir. July 16, 2013\)](#), cert. denied, 572 U.S. 1028, 134 S. Ct. 1539, 188 L. Ed. 2d 581, 2014 U.S. LEXIS 1966 (2014).

Under the Federal Communications Commission's (FCC's) 2003 interpretation of [47 U.S.C.S. § 227\(a\)\(1\)](#), reaffirmed in the 2008 FCC Ruling and the 2012 FCC Ruling, a system may qualify as an automatic telephone dialing system by simply having the capacity to dial numbers without human intervention. [Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 2018 U.S. Dist. LEXIS 108588 \(M.D. Tenn. 2018\)](#).

Consumer failed to allege sufficiently that telemarketer and consumer's mortgage servicer violated telemarketing regulations since consumer had established business relationship with servicer and made only conclusory allegations that telemarketer and servicer were partners in joint telemarketing effort, rather than telemarketer properly calling on servicer's behalf. [Wolfkiel v. Intersections Ins. Servs., 303 F.R.D. 287, 2014 U.S. Dist. LEXIS 28276 \(N.D. Ill. 2014\)](#).

Where plaintiff consumers alleged illegal Telephone Consumer Protection Act fax transmissions, fax identification regulations in [47 C.F.R. § 68.318](#) were issued pursuant to [47 USCS § 227\(d\)](#), for which there was no private right of action, and thus, claims as to violating those regulations against individual defendant were dismissed for failure to state claim. [Kopff v. Battaglia, 425 F. Supp. 2d 76, 2006 U.S. Dist. LEXIS 13638 \(D.D.C. 2006\)](#).

FCC, in promulgating its regulations under Telephone Consumer Protection Act, [47 USCS § 227](#), proceeded from premise that all debt collection calls involved prior or existing business relationship; since erroneously called non-debtor had no such existing business relationship, it followed that purview of FCC's exemption did not extend to 200 calls in five-month period made to new telephone customer. [Watson v. NCO Group, Inc., 462 F. Supp. 2d 641, 2006 U.S. Dist. LEXIS 87499 \(E.D. Pa. 2006\)](#).

Plaintiff's Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., claim failed because Federal Communications Commission (FCC) had determined that all debt collection circumstances were excluded from Telephone Consumer Protection Act's coverage, including calls made to nondebtor, and judicial deference to FCC was warranted. [Franasiak v. Palisades Collection, LLC, 822 F. Supp. 2d 320, 2011 U.S. Dist. LEXIS 112586 \(W.D.N.Y. 2011\)](#).

Under Chevron analysis, intent of Congress was not clear with regard to meaning of verb "to send" as used in provision of Telephone Consumer Protection Act, but Federal Communications Commission's construction based

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on its rule was reasonable. [Asher & Simons, P.A. v. J2 Global Can., Inc., 977 F. Supp. 2d 544, 2013 U.S. Dist. LEXIS 148972 \(D. Md. 2013\)](#).

*Unpublished decision:* In unsolicited faxes concerning business award, advertisements, such as logos, slogans, and contact information, constituted small portion of faxes; under interpretation of Federal Communication Commission, delegated pursuant to [47 USCS § 227\(b\)\(2\)](#), such de minimis advertising was insufficient to transform faxes that were largely permissible into prohibited communications. [N.B. Indus. v. Wells Fargo & Co., 465 Fed. Appx. 640, 2012 U.S. App. LEXIS 357 \(9th Cir. 2012\)](#).

*Unpublished decision:* Prerecorded telephone message promoting specific radio broadcast and radio station was within regulatory exemption from prohibition of prerecorded telemarketing telephone calls for calls with no unsolicited advertisement which included calls promoting specific and general broadcast programming provided without charge to broadcast listeners. [Leyse v. Clear Channel Broad., Inc., 545 Fed. Appx. 444, 2013 FED App. 0934N, 41 Media L. Rep. \(BNA\) 2769, 2013 U.S. App. LEXIS 22770 \(6th Cir. 2013\)](#), cert. denied, 574 U.S. 815, 135 S. Ct. 57, 190 L. Ed. 2d 31, 2014 U.S. LEXIS 5831 (2014).

*Unpublished decision:* Federal Communications Commission (FCC) was expressly authorized to promulgate implementing regulations carrying force of law to exempt prerecorded telephone calls from prohibition, and thus interpretation of exemption by FCC to include calls promoting specific and general broadcast programming was entitled to deference. [Leyse v. Clear Channel Broad., Inc., 545 Fed. Appx. 444, 2013 FED App. 0934N, 41 Media L. Rep. \(BNA\) 2769, 2013 U.S. App. LEXIS 22770 \(6th Cir. 2013\)](#), cert. denied, 574 U.S. 815, 135 S. Ct. 57, 190 L. Ed. 2d 31, 2014 U.S. LEXIS 5831 (2014).

## 8. Do not call list

Permanent injunction enjoining Federal Trade Commission (FTC) from implementing its national do-not-call list was stayed because there was substantial likelihood that FTC would be able to show reasonable fit between list and substantial governmental interests. [FTC v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 2003-2 Trade Cas. \(CCH\) ¶74170, 2003 U.S. App. LEXIS 20366 \(10th Cir. 2003\)](#).

United States District Court for Western District of Wisconsin concludes that consumers can revoke their consent to receive autodialer calls under Telephone Consumer Protection Act, [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#), and may do so orally. [Beal v. Wyndham Vacation Resorts, Inc., 956 F. Supp. 2d 962, 2013 U.S. Dist. LEXIS 89840 \(W.D. Wis. 2013\)](#).

Because provider had prior express consent to make prerecorded voice calls to debtor's cellular telephone, its calls to debtor did not violate TCPA and it was entitled to summary judgment on TCPA claims. [Medley v. Dish Network, LLC, 2018 U.S. Dist. LEXIS 144895 \(M.D. Fla. Aug. 27, 2018\)](#), aff'd, in part, rev'd, remanded, [958 F.3d 1063, 28 Fla. L. Weekly Fed. C 1080, 2020 U.S. App. LEXIS 14052 \(11th Cir. 2020\)](#).

Trial judge erroneously stayed action pursuant to Telephone Consumer Protection Act of 1991 (TCPA), and state Consumer Sales Practices Act, because TCPA did not require that one register his or her home telephone numbers on national do-not-call list as condition precedent to bringing claim. [State ex rel. Charvat v. Frye, 2007-Ohio-2882, 114 Ohio St. 3d 76, 868 N.E.2d 270, 2007 Ohio LEXIS 1574 \(Ohio 2007\)](#).

## 9. Particular activities as violations

Person may recover statutory damages of \$1500 for willful or knowing violation of automated-call requirements, under [47 USCS § 227\(b\)\(3\)](#), and \$1500 for willful or knowing violation of do-not-call-list requirements, under § 227(c)(5)—even if both violations occurred in same telephone call. [Charvat v. NMP, LLC, 656 F.3d 440, 2011 U.S. App. LEXIS 18081 \(6th Cir. 2011\)](#).

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Term “called party” in [47 USCS § 227\(b\)\(1\)](#) means person subscribing to called number at time call to cell phone is made. [Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 2012 U.S. App. LEXIS 9560 \(7th Cir. 2012\)](#), reh'g denied, [2012 U.S. App. LEXIS 10897 \(7th Cir. May 25, 2012\)](#).

Because robot-calls urged listener to “redeem” reward points, and were aimed at encouraging listeners to engage in future commercial transactions with defendant retailer, they constituted unsolicited advertisements, telephone solicitations, and telemarketing, and were prohibited by Telephone Consumer Protection Act. [Chesbro v. Best Buy Stores, L.P., 697 F.3d 1230, 2012 U.S. App. LEXIS 21594 \(9th Cir.\)](#), amended, [705 F.3d 913, 2012 U.S. App. LEXIS 26629 \(9th Cir. 2012\)](#), reprinted, [705 F.3d 913, 2012 U.S. App. LEXIS 26630 \(9th Cir. 2012\)](#).

Robot calls by retailer to customer constituted unsolicited advertisements, telephone solicitations, and telemarketing within meaning of Telephone Consumer Protection Act of 1991, [47 USCS § 227](#), and Washington Automatic Dialing and Announcing Device Act, [Wash. Rev. Code § 80.36.400](#), because calls encouraged listener to make future purchases, and customer repeatedly asked not to be called. [Chesbro v. Best Buy Stores, L.P., 705 F.3d 913, 2012 U.S. App. LEXIS 26630 \(9th Cir. 2012\)](#).

Third Circuit finds that Telephone Consumer Protection Act of 1991 provides consumers with right to revoke their prior express consent to be contacted on cellular phones by autodialing systems. [Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 2013 U.S. App. LEXIS 17579 \(3d Cir. 2013\)](#).

Creditor’s assertion that there was temporal limitation on when consumer could revoke her express prior consent to be contacted on cellular phones by autodialing systems was rejected given that Telephone Consumer Protection Act was remedial statute that was to be construed in consumer’s favor, and common law notion of consent allowed individual to withdraw consent at any time if she no longer wished to continue with particular course of action. [Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 2013 U.S. App. LEXIS 17579 \(3d Cir. 2013\)](#).

Creditor was not entitled to invoke any content-based exemptions to Telephone Consumer Protection Act as those exemptions applied exclusively to residential lines, not cellular phones, and there was no established business relationship or debt collection exemption that applied to autodialed calls made to cellular phones. [Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 2013 U.S. App. LEXIS 17579 \(3d Cir. 2013\)](#).

Summary judgment was improper on Telephone Consumer Protection Act, [47 USCS § 227](#), claim where there was genuine dispute of material fact as to whether borrower acted as cell phone subscriber’s agent when she gave car insurer subscriber’s cell phone number as contact number. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\)](#).

Cell phone subscriber was not required to prove that he was charged individually for each of autodialed calls to state [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#) claim. [Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 24 Fla. L. Weekly Fed. C 1153, 2014 U.S. App. LEXIS 5709 \(11th Cir. 2014\)](#).

Consumer was entitled to partial summary judgment in her action alleging that bank violated Telephone Consumer Protection Act of 1991’s prohibition on autodialing cell phones without express consent of called party because “called party,” for purposes of Act, meant subscriber to cell phone service, and consumer, subscriber to cell phone service, did not consent to bank’s calling via a dial system. [Breslow v. Wells Fargo Bank, N.A., 755 F.3d 1265, 24 Fla. L. Weekly Fed. C 1405, 2014 U.S. App. LEXIS 10623 \(11th Cir. 2014\)](#).

Prohibition of unsolicited automated telephone calls was not limited to calls to land lines alone since interest of residential privacy extended to text messages sent to recipient on behalf of U.S. Navy with which marketing consultant had contract. [Gomez v. Campbell-Ewald Co., 768 F.3d 871, 2014 U.S. App. LEXIS 18019 \(9th Cir. 2014\)](#), cert. granted, [135 S. Ct. 2311, 191 L. Ed. 2d 977, 2015 U.S. LEXIS 3362 \(2015\)](#), aff'd, remanded, [577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571, 25 Fla. L. Weekly Fed. S 585, 93 Fed. R. Serv. 3d \(Callaghan\) 884, 166 Lab. Cas. \(CCH\) ¶36411, 2016 U.S. LEXIS 846 \(2016\)](#).



Fact that prohibited unsolicited automated text messages were sent by third-party vendor did not preclude marketing consultant from being vicariously liable for unlawful messages through federal common law principles of agency. [Gomez v. Campbell-Ewald Co., 768 F.3d 871, 2014 U.S. App. LEXIS 18019 \(9th Cir. 2014\)](#), cert. granted, 135 S. Ct. 2311, 191 L. Ed. 2d 977, 2015 U.S. LEXIS 3362 (2015), aff'd, remanded, [577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571, 25 Fla. L. Weekly Fed. S 585, 93 Fed. R. Serv. 3d \(Callaghan\) 884, 166 Lab. Cas. \(CCH\) ¶36411, 2016 U.S. LEXIS 846 \(2016\)](#).

In case involving Telephone Consumer Protection Act of 1991, district court erred in granting summary judgment in favor of collection agency; plaintiff did not consent to receive collection calls on his cell phone, he did not provide his phone number during transaction that resulted in debt owed, and he was not consumer since he was third party. [Nigro v. Mercantile Adjustment Bureau, LLC, 769 F.3d 804, 2014 U.S. App. LEXIS 19817 \(2d Cir. 2014\)](#).

Where plaintiffs received two unsolicited, prerecorded messages on their home phone line, which stated "Liberty; this is public survey call. We may call back later," even if calls were made for commercial purpose, they were not advertisements prohibited by TCPA or its implementing regulations because messages did not mention property, goods, or services. [Golan v. Veritas Entm't, LLC, 788 F.3d 814, 91 Fed. R. Serv. 3d \(Callaghan\) 1779, 2015 U.S. App. LEXIS 9489 \(8th Cir. 2015\)](#).

With prerecorded voice, unless recipient answered, artificial or prerecorded voice was never used, and this was not violation of Telephone Consumer Protection Act; however, three phone calls made did create TCPA liability where system was used to make call, and consumer was entitled to damages. [Ybarra v. Dish Network, L.L.C., 807 F.3d 635, 2015 U.S. App. LEXIS 18242 \(5th Cir. 2015\)](#).

Statutory definition of automatic telephone dialing system under TCPA included device that stored telephone numbers to be called, whether or not those numbers had been generated by random or sequential number generator. [Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 2018 U.S. App. LEXIS 26883 \(9th Cir. 2018\)](#), reh'g denied, reh'g, en banc, denied, [2018 U.S. App. LEXIS 30739 \(9th Cir. Oct. 30, 2018\)](#), cert. dismissed, 139 S. Ct. 1289, 203 L. Ed. 2d 300, 2019 U.S. LEXIS 1597 (2019).

District court erred in finding that loan servicer's system qualified as auto-dialer because under subsection b)(1)(A), clause "using a random or sequential number generator" modified both verbs "store" and "produce." Further, telephone equipment used by time share marketer required human intervention and thus was not "automatic" dialing system where employee had to review information on a screen and choose whether to make call. [Glasser v. Hilton Grand Vacations Co., LLC, 948 F.3d 1301, 28 Fla. L. Weekly Fed. C 770, 2020 U.S. App. LEXIS 2481 \(11th Cir. 2020\)](#).

Cell customer's complaint failed to include enough facts to state a plausible TCPA claim under the legal theory of vicarious liability where the only conduct by the sandwich chain restaurant alleged in the complaint was engaging in a contractual relationship with the cell service provider, and there were insufficient facts showing that the restaurant manifested to the public that the provider was its agent or that the customer reasonably relied on any apparent authority. [Warciak v. Subway Rests., Inc., 949 F.3d 354, 2020 U.S. App. LEXIS 3487 \(7th Cir. 2020\)](#).

District court properly applied the wireless exemption when it found no TCPA violation existed where the customer's complaint conceded that the cell service provider that sent a text offer to a chain restaurant was his carrier, the provider sent the text, and the customer was not charged for the text. [Warciak v. Subway Rests., Inc., 949 F.3d 354, 2020 U.S. App. LEXIS 3487 \(7th Cir. 2020\)](#).

District court properly found that defendant satellite TV service provider violated Telemarketing Sales Rule because order-entry retailers were provider's agents, notwithstanding contractual disclaimer, making provider liable for their acts as matter of state agency law, except district court should not have held provider liable for substantially assisting its own agents; district court erred in calculating damages by basing penalty entirely on provider's ability to pay rather than harm done. [United States v. Dish Network L.L.C., 954 F.3d 970, 2020-1 Trade Cas. \(CCH\) ¶81147, 2020 U.S. App. LEXIS 9443 \(7th Cir. 2020\)](#), reh'g denied, [2020 U.S. App. LEXIS 19852 \(7th Cir. June 25, 2020\)](#).

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District court erred in granting summary judgment to defendant in plaintiff's action alleging that defendant sent texts using automatic telephone dialing systems in way prohibited by the Telephone Consumer Protection Act of 1991 because defendant's programs were automatic telephone dialing systems as they had "capacity" necessary to qualify as automatic telephone dialing systems because they stored lists of numbers and they had second "capacity" necessary to qualify as automatic telephone dialing systems because they dialed those stored numbers without human intervention. [\*Duran v. La Boom Disco, Inc.\*, 955 F.3d 279, 2020 U.S. App. LEXIS 10861 \(2d Cir. 2020\).](#)

Judgment was properly entered in favor of plaintiff in her action brought under Telephone Consumer Protection Act because bank's intent to call customer who had consented to its calls did not exempt it from liability under Act when it called plaintiff's minor child, who did not consent. [\*N. L. v. Credit One Bank, N.A.\*, 960 F.3d 1164, 2020 U.S. App. LEXIS 17434 \(9th Cir. 2020\).](#)

Plaintiff adequately pled absence of any prior express consent and adequately alleged that defendant made all eleven phone calls, as she identified single originating telephone number that was also source of recorded message on her cell phone that identified defendant as caller. [\*Zarichny v. Complete Payment Recovery Servs.\*, 80 F. Supp. 3d 610, 90 Fed. R. Serv. 3d \(Callaghan\) 1332, 2015 U.S. Dist. LEXIS 6556 \(E.D. Pa. 2015\).](#)

Under the TCPA, consent could be revoked at any time by any means, and a caller could not unilaterally limit those means, given clear authority from the FCC, the purposes of the TCPA, and persuasive case law. [\*Ammons v. Ally Fin., Inc.\*, 326 F. Supp. 3d 578, 2018 U.S. Dist. LEXIS 108588 \(M.D. Tenn. 2018\).](#)

Summary judgment was denied on the issue of whether the borrower had revoked consent under the TCPA where the creditor contested the borrower's evidence about the calls made by the creditor, her attempts at revocation, the means of revocation, and the timing of revocation. [\*Ammons v. Ally Fin., Inc.\*, 326 F. Supp. 3d 578, 2018 U.S. Dist. LEXIS 108588 \(M.D. Tenn. 2018\).](#)

FCC's interpretations that a seller can face vicarious liability under the statute pursuant to federal common law agency principles, application of similar rules to calls made to telephone numbers on the National Do Not Call Registry, and recognition of vicarious liability extending to the individuals on behalf of whom the telemarketing makes a call, but limiting the liability pursuant to general federal common-law agency standards, were reasonable. [\*Mohon v. Agentra LLC\*, 400 F. Supp. 3d 1189, 2019 U.S. Dist. LEXIS 104816 \(June 24, 2019\).](#)

Recipient of unsolicited telemarketing calls failed to show that satellite television provider violated telemarketing prohibitions, since there was no showing that provider, any authorized retailer, or anyone else for whose acts provider could be vicariously liable under agency principles initiated calls. [\*Donaca v. Dish Network, LLC\*, 303 F.R.D. 390, 2014 U.S. Dist. LEXIS 19740 \(D. Colo. 2014\).](#)

Plaintiff could not recover under Telephone Consumer Protection Act, [47 USCS § 227\(c\)\(5\)](#), for first call violation, and only statutory damages that he would have been able to recover would have been on subsequent nine phone calls proceeded, not on per-violation basis, which plaintiff claimed was in excess of 180 violations. [\*Charvat v. GVN Mich., Inc.\*, 531 F. Supp. 2d 922, 2008 U.S. Dist. LEXIS 5575 \(S.D. Ohio 2008\)](#), aff'd, [561 F.3d 623, 2009 FED App. 0142P, 2009 U.S. App. LEXIS 7445 \(6th Cir. 2009\).](#)

[47 USCS § 227](#) applies to text messages. [\*Lozano v. Twentieth Century Fox Film Corp.\*, 702 F. Supp. 2d 999, 2010 U.S. Dist. LEXIS 27447 \(N.D. Ill. 2010\).](#)

Fact that [47 USCS § 227\(b\)\(3\)](#) uses term "violation" instead of "call" does not signal any intent to compensate plaintiffs for multiple violations in single call; it simply betokens statute's application to telephone calls as well as other modes of communication. [\*Martin v. PPP, Inc.\*, 719 F. Supp. 2d 967, 2010 U.S. Dist. LEXIS 63192 \(N.D. Ill. 2010\).](#)

Because [47 USCS § 227\(b\)\(3\)](#) used term "violation" instead of "call," it did not signal any intent to compensate plaintiffs for multiple violations in single call; it simply betokened statute's application to telephone calls as well as

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other modes of communication; thus, plaintiff was entitled to compensation on per-call basis. [Martin v. PPP, Inc., 719 F. Supp. 2d 967, 2010 U.S. Dist. LEXIS 63192 \(N.D. Ill. 2010\).](#)

Plaintiff debtor stated plausible claim for relief under [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#) where debtor alleged that defendant debt collector called debtor's cellular phone using automatic telephone dialing system in effort to collect debt. [Brown v. Hosto & Buchan, PLLC, 748 F. Supp. 2d 847, 2010 U.S. Dist. LEXIS 116759 \(W.D. Tenn. 2010\).](#)

Plaintiff's claims under [47 USCS § 227](#) alleging that each of defendant telemarketers' 67 calls violated [47 CFR § 64.1200\(d\)\(3\)](#) because telemarketers failed to honor plaintiff's request to be placed on callers' do-not-call lists and alleging that each of 67 calls violated [47 CFR § 64.1200\(d\)\(6\)](#) because telemarketers failed to make record of plaintiff's previous requests to be placed on callers' do-not-call lists were dismissed because they failed to state separate violations of TCPA as only conduct proscribed by regulations was initiation of call without having implemented proper procedures. [Charvat v. DFS Servs. LLC, 781 F. Supp. 2d 588, 2011 U.S. Dist. LEXIS 28265 \(S.D. Ohio 2011\).](#)

While court possessed federal question jurisdiction over plaintiff's private cause of action arising under [47 USCS § 227\(b\)\(3\)](#), plaintiff's TCPA claims were dismissed because (1) plaintiff failed to state TCPA claim premised on § 227(b)(1)(A) as each call plaintiff received was from live caller who exercised his or her own independent judgment to personally connect to plaintiff after receiving automated calls from defendants, and that intervening act prevented plaintiff from receiving automated calls in violation of statute; and (2) plaintiff failed to state claim under § 227(b)(1)(D) as defendants' automated system was not used in such way to tie up two or more telephone lines of multi-line business. *Ashland Hosp. Corp. v IBEW Local 575* (2011, ED Ky) 807 F Supp 2d 633, 191 BNA LRRM 3348.

Revocation of consent under [47 USCS § 227\(b\)](#) does not operate to stop all debt collection calls; it operates to stop only autodialer calls to cellular phone. [Adamcik v. Credit Control Servs., 832 F. Supp. 2d 744, 2011 U.S. Dist. LEXIS 150107 \(W.D. Tex. 2011\).](#)

Oral revocation of consent to receive autodialer calls is legally effective under Telephone Consumer Protection Act, even in debt-collection context. [Adamcik v. Credit Control Servs., 832 F. Supp. 2d 744, 2011 U.S. Dist. LEXIS 150107 \(W.D. Tex. 2011\).](#)

Debt collector violated Telephone Consumer Protection Act because debt collector placed calls to debtor's cell phone via automatic telephone dialing system (ATDS), cell phone number that appeared on debtor's credit application was not same cell phone number that debt collector dialed, and no rational jury could conclude that debt collector had debtor's prior express consent to be contacted on specific cell phone number that debt collector dialed via ATDS to reach debtor for debt collection purposes. [Levy v. Receivables Performance Mgmt., LLC, 972 F. Supp. 2d 409, 2013 U.S. Dist. LEXIS 135675 \(E.D.N.Y. 2013\).](#)

Advertising agency's motion to dismiss cell phone user's [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#) claim arising from text message sent on behalf of United States Navy was denied where neither text of statute nor governing regulations provided exemption for those who acted on behalf of exempt entity, and neither exemption for established business relationships nor exemption for tax-exempt nonprofit organizations applied to agency. [Gomez v. Campbell-Ewald Co., 2010 U.S. Dist. LEXIS 143621 \(C.D. Cal. Nov. 5, 2010\).](#)

Plaintiff's claim under [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#) was dismissed because as to plaintiff's claim that he received unsolicited text message, TCPA did not impose liability for single, confirmatory text message, and as to plaintiff's claim that unsolicited text message advertisement was placed via automatic telephone dialing system, text message did not appear to be random but in direct response to plaintiff's message, and plaintiff's allegation that there was no human intervention on part of defendant did not satisfy or allege requirements of § 227(a)(1) [lbeey v. Taco Bell Corp., 88 Fed. R. Evid. Serv. \(CBC\) 967, 2012 U.S. Dist. LEXIS 91030 \(S.D. Cal. June 18, 2012\).](#)

Blood donor who voluntarily disclosed his cellular telephone number gave prior express consent to be called at that number, thus allowing auto-dialed text messages asking him for more donations, and he had no right of action based on receiving one text message during prohibited hours; requests for blood donations are not telephone solicitations. [\*Murphy v. DCI Biologicals Orlando, LLC\*, 2013 U.S. Dist. LEXIS 181732 \(M.D. Fla. Dec. 31, 2013\)](#), aff'd, [\*797 F.3d 1302, 25 Fla. L. Weekly Fed. C 1513, 2015 U.S. App. LEXIS 14632 \(11th Cir. 2015\)\*](#).

Chapter 11 debtors' claims alleging that company that serviced their mortgage loan account and bank that acquired note and deed of trust debtors signed violated North Carolina Debt Collection Act, [\*N.C. Gen. Stat. § 75-51\*](#), when they contacted debtors in attempt to collect on note after debtors received their discharge were not preempted by Bankruptcy Code, even though debtors had remedy under [\*11 USCS § 524\*](#); facts debtors alleged were also sufficient to state claim under Telephone Consumer Protection Act, [\*47 USCS § 227\*](#), but did not state claim alleging that mortgage servicing company and bank committed intentional or negligent infliction of emotional distress. [\*Waggett v. Select Portfolio Servicing, Inc. \(In re Waggett\)\*, 73 Collier Bankr. Cas. 2d \(MB\) 628, 2015 Bankr. LEXIS 840 \(Bankr. E.D.N.C. Mar. 17, 2015\)](#).

Trustee's summary judgment against creditor for treble damages for willful violations of Telephone Consumer Protection Act (TCPA) was reconsidered as although creditor made 50 calls to debtors on cell phone, without knowing when debtors told creditor to stop calling, it was impossible to know how many calls were made without consent and were willful violations; fact issue as to whether creditor willfully violated TCPA precluded summary judgment as to treble damages. [\*Herendeen v. Specialized Loan Servicing, LLC \(In re Fields\)\*, 27 Fla. L. Weekly Fed. B 193, 2018 Bankr. LEXIS 975 \(Bankr. M.D. Fla. Mar. 30, 2018\)](#).

#### **10. —Unsolicited fax advertisements**

In TCPA suit, where business owner instructed marketing company to send about 100 faxes to local businesses within 20-mile radius of his location, and where company sent 4849 faxes advertising owner's business across three states, owner was not liable for faxes sent outside 20-mile radius on which he had expressly instructed company because company was not acting as owner's agent in sending out-of-state faxes as there was no express actual authority, no implied actual authority, and no apparent authority to send faxes outside 20-mile radius. [\*Bridgeview Health Care Ctr., Ltd. v Clark\* \(2016, CA7 Ill\) 816 F3d 935cert den 2016 U.S. LEXIS 5249 \(US 2016\)](#).

Federal Communications Commission (FCC) explained that established business relationship (EBR) exemption under [\*47 USCS § 227\(b\)\(1\)\(C\)\(i\)\*](#) was sufficient to show that individual or business had given their express permission to receive unsolicited facsimile advertisements; given FCC's broad reading of EBR definition, appellate court agreed with district court that FCC did not intend to limit EBR exemption to only residential subscribers who received unsolicited faxes, and because company and corporation's publisher-subscriber relationship fell within scope of business relationships FCC intended EBR defense to cover, appellate court agreed that EBR exemption applied in case between corporation and media company. [\*CE Design, Ltd. v. Prism Bus. Media, Inc.\*, 606 F.3d 443, 2010 U.S. App. LEXIS 10799 \(7th Cir. 2010\)](#), reh'g denied, reh'g, en banc, denied, [\*2010 U.S. App. LEXIS 27614 \(7th Cir. July 26, 2010\)\*](#), cert. denied, [\*562 U.S. 1138, 131 S. Ct. 933, 178 L. Ed. 2d 753, 2011 U.S. LEXIS 185 \(2011\)\*](#).

Business was not required to establish vicarious liability to recover against dental practice for fax sent by third party on practice's behalf, as Federal Communications Commission had reasonably found that "sender" of fax was party on whose behalf fax was sent. [\*Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.\*, 771 F.3d 1274, 25 Fla. L. Weekly Fed. C 575, 2014 U.S. App. LEXIS 20870 \(11th Cir. 2014\)](#), vacated, sub. op., [\*781 F.3d 1245, 25 Fla. L. Weekly Fed. C 968, 91 Fed. R. Serv. 3d \(Callaghan\) 364, 2015 U.S. App. LEXIS 3630 \(11th Cir. 2015\)\*](#).

Where consumer obtained default judgment in suit alleging that unsolicited advertisement was sent to his emergency line in violation of Telephone Consumer Protection Act (TCPA), erroneous ruling that single fax could not amount to two TCPA violations was harmless because correct damages were awarded. [\*Lary v. Trinity Physician Fin. & Ins. Servs.\*, 780 F.3d 1101, 25 Fla. L. Weekly Fed. C 1002, 2015 U.S. App. LEXIS 3998 \(11th Cir. 2015\)](#).

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Summary judgment for corporation was proper in business consumer's TCPA action because TCPA did not allow imposition of liability where corporation had discussed another entity's use of its logo in emails but was wholly unaware of entity's use of its logo in unsolicited fax and did not give actual or implied authority to entity to send fax on its behalf. [Helping Hand Caregivers, Ltd. v. Darden Rests., Inc., 900 F.3d 884, 2018 U.S. App. LEXIS 22490 \(7th Cir. 2018\).](#)

Under TCPA, fax sender, hotel chain supplier, was not required to obtain prior express permission to send faxes to hotel franchisees because hotels gave their prior express permission to receive faxes as part of their franchise agreements, and thus, sending the faxes did not violate TCPA. [Gorss Motels, Inc. v. Safemark Sys., LP, 931 F.3d 1094, 28 Fla. L. Weekly Fed. C 51, 2019 U.S. App. LEXIS 22352 \(11th Cir. 2019\), reh'g denied, 2019 U.S. App. LEXIS 28648 \(11th Cir. Sept. 20, 2019\).](#)

Where, under TCPA, fax sender, hotel chain supplier, was not required to obtain prior express permission to send faxes to hotel franchisees because hotels gave their prior express permission to receive faxes as part of their franchise agreements, and thus, sending the faxes did not violate TCPA, faxes did not have to contain opt-out notices because, during pendency of consolidated appeal, FCC eliminated solicited-fax rule. [Gorss Motels, Inc. v. Safemark Sys., LP, 931 F.3d 1094, 28 Fla. L. Weekly Fed. C 51, 2019 U.S. App. LEXIS 22352 \(11th Cir. 2019\), reh'g denied, 2019 U.S. App. LEXIS 28648 \(11th Cir. Sept. 20, 2019\).](#)

Recipients of a certain fax advertisement properly recovered in a TCPA class action because the company that sent the faxes could not rely on the TCPA's established business relationship safe harbor, and its evidence failed to establish that it had prior express permission to send the faxes. [Physicians Healthsource, Inc. v. A-S Medication Sols., LLC, 950 F.3d 959, 2020 U.S. App. LEXIS 5489 \(7th Cir. 2020\).](#)

Where doctor met with representatives from pharmaceutical company on multiple occasions to discuss various pharmaceutical drugs, and where doctor provided company with his business card containing his fax number, two fax advertisements thereafter sent to doctor did not violate TCPA because faxes were solicited. [Physicians Healthsource, Inc. v. Cephalon, Inc., 954 F.3d 615, 2020 U.S. App. LEXIS 9782 \(3d Cir. 2020\).](#)

Faxes soliciting participation by recipients in market research surveys in exchange for monetary payments were advertisements within meaning of Telephone Consumer Protection Act because solicitations to buy products, goods, or services could be advertisements under TCPA and solicitations for participation in surveys were for services within TCPA. [Fischbein v. Olson Research Grp., Inc., 959 F.3d 559, 2020 U.S. App. LEXIS 15592 \(3d Cir. 2020\).](#)

In TCPA action, recipient dental practice plausibly alleged that fax transmitted by sender company, seeking information to verify system of provider information, was unsolicited advertisement insofar as it alleged that fax served as pretext to send recipient additional marketing materials where sender would make requested information commercially available to other health care organizations, who may subject recipient to future unsolicited advertising. [Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc., 962 F.3d 882, 2020 FED App. 0186P, 2020 U.S. App. LEXIS 19232 \(6th Cir. 2020\).](#)

Former employee of appellate services corporation did not violate [47 USCS § 227\(b\)](#) proscription against use of telephone facsimile machine (fax) to send "unsolicited advertisement," where employee and new business partner twice faxed unsolicited messages seeking to hire away corporation's employees, because messages did not fall within § 227(a)(4) definition of "material advertising commercial availability or quality of any property, goods, or services"—Congress did not prohibit fax transmissions of all unsolicited information or communications, and there is some question whether it could do so constitutionally. [Lutz Appellate Servs. v. Curry, 859 F. Supp. 180, 1994 U.S. Dist. LEXIS 10413 \(E.D. Pa. 1994\).](#)

Company in business of sending unsolicited fax advertisements is in violation of [47 USCS § 227](#), where its own president testified in deposition that company does not have prior express invitation or permission from, or business relationship with, more than half of people to whom it sends fax advertisements, because rehashed arguments

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about First Amendment and commercial speech have been and are again rejected. [Texas v. Am. Blast Fax, Inc., 159 F. Supp. 2d 936, 2001 U.S. Dist. LEXIS 12887 \(W.D. Tex. 2001\).](#)

Sender of facsimile (fax) advertisements did not violate [47 USCS § 227\(b\)\(1\)\(C\)](#) of Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., as faxes were not considered unsolicited pursuant to § 227(b)(1)(C)(i) and former [47 C.F.R. § 64.1200\(f\)\(3\)](#) (current version at [47 C.F.R. § 64.1200\(f\)\(5\)](#)) due to sender's existing business relationship with fax recipients. [Missouri ex rel. Nixon v. Progressive Bus. Publ'ns, Inc., 504 F. Supp. 2d 699, 2007 U.S. Dist. LEXIS 13036 \(W.D. Mo. 2007\).](#)

Court dismissed plaintiff's action alleging that defendants transmitted unsolicited facsimile (fax) advertisement in violation of Telephone Consumer Protection Act of 1991, because fax sent by defendants did not fall under § 227(a)(5), (b)(1)(C) as it did not promote "commercially available service," but research study, and plaintiff's comparison to pretextual free seminar was misguided as complaint did not allege that fax was pretext to advertisement, and unlike advertisement, fax was not indiscriminate, open-ended invitation, but rather, it made clear individuals interested in participating in research study had to be qualified and were pre-screened. [Phillips Randolph Enters., L.L.C. v. Adler-Weiner Research Chi., Inc., 526 F. Supp. 2d 851, 2007 U.S. Dist. LEXIS 7334 \(N.D. Ill. 2007\).](#)

[47 USCS § 227\(b\)](#) prohibits sending of unsolicited fax advertising, and Federal Communications Commission's regulatory prohibition of war dialing (very purpose of which is to obtain fax numbers to be used in unsolicited fax advertising) is reasonably related to purpose of enabling legislation; thus, [47 CFR § 64.1200\(a\)\(7\)](#) is valid. [Baltimore-Washington Tel. Co. v. Hot Leads Co., 584 F. Supp. 2d 736, 2008 U.S. Dist. LEXIS 105149 \(D. Md. 2008\).](#)

Because two of faxes sent by corporation were clearly unsolicited advertisements, company and its owner were entitled to summary judgment as to those faxes under Telephone Consumer Protection Act, [47 USCS § 227. Hinman v. M & M Rental Ctr., Inc., 596 F. Supp. 2d 1152, 2009 U.S. Dist. LEXIS 6183 \(N.D. Ill. 2009\).](#)

Telephone Consumer Protection Act does not completely ban unsolicited fax advertising—rather; unsolicited fax advertising is allowed so long as sender has preexisting relationship with recipient. [Pasco v. Protus IP Solutions, Inc., 826 F. Supp. 2d 825, 2011 U.S. Dist. LEXIS 135268 \(D. Md. 2011\).](#)

Faxes were advertisements because they were indiscriminate, open-ended invitations to sign up for products, they sought subscribers to commercial product, and faxes did not resemble kinds of faxes deemed informational, particularly as they contained no information about anything other than sender's services and while faxes were directed at schools, information was not of special interest to particular type of school. [Bais Yaakov of Spring Valley v. Alloy, Inc., 936 F. Supp. 2d 272, 2013 U.S. Dist. LEXIS 45025 \(S.D.N.Y. 2013\).](#)

*Unpublished decision:* Third Circuit agrees with other courts that have concluded that insurance policies that define "advertising injury offense" as making known to any person or organization covered material that violates person's right to privacy provide protection with regard to violations of privacy right of secrecy, not privacy right of seclusion, and that such advertising injury policies do not provide coverage with regard to "fax-blasting" claims under [47 USCS § 227\(b\)\(1\)\(C\)](#) because such claims deal with manner of advertisement, not content of advertisement. [St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp., 319 Fed. Appx. 121, 2009 U.S. App. LEXIS 6808 \(3d Cir. 2009\).](#)

*Unpublished decision:* District court properly concluded that insurance policies did not provide coverage with regard to claims asserted against insured in class action suit, arising from insured's alleged violation of [47 USCS § 227\(b\)\(1\)\(C\)](#) of Telephone Consumer Protection Act (TCPA), because property damages provision in policies excluded coverage for property damage that was expected or intended by insured: (1) class action complaint accused insured of violating TCPA by engaging in "blast faxing," which involved sending unsolicited fax advertisements to fax machines around country; (2) under New Jersey law, coverage issue boiled down to whether or not insured subjectively intended to cause injury to fax recipients, not whether insured intended to violate TCPA; (3) insured conceded that recipients suffered property damage arising from consumption of their paper and toner:

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and (5) there was no way that insured could not have expected or intended that damage to occur when it engaged in its unsolicited blast-faxing activity. [St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp., 319 Fed. Appx. 121, 2009 U.S. App. LEXIS 6808 \(3d Cir. 2009\).](#)

*Unpublished decision:* Defendant fax senders did not violate [47 USCS § 227](#) because advertisements within faxes concerning business award constituted small portion of faxes; such de minimis advertising was insufficient to transform faxes that were largely permissible into prohibited communications. [N.B. Indus. v. Wells Fargo & Co., 465 Fed. Appx. 640, 2012 U.S. App. LEXIS 357 \(9th Cir. 2012\).](#)

## 11. Insurance coverage

Fact that insured violated [47 USCS § 227\(b\)\(1\)\(C\)](#) when it sent out unsolicited advertisements by fax did not mean that injuries arising from its conduct were automatically covered under “advertising injury” provision of insured’s general liability policy; statute’s definition of privacy differed from one used in policy, which covered publication of material that violated person’s right of privacy, and policy provision did not cover normal consequences of junk advertising faxes that were prohibited under statute. [Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc., 392 F.3d 939, 2004 U.S. App. LEXIS 26859 \(7th Cir. 2004\)](#), reh’g denied, reh’g, en banc, denied, [2005 U.S. App. LEXIS 1352 \(7th Cir. Jan. 19, 2005\).](#)

In granting partial judgment on pleadings to insured in insurance coverage dispute, court rejected insurer’s argument that coverage for acts allegedly taken in violation of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), was excluded under “criminal act” exclusion; insurer argued that violations of TCPA also violated [720 Ill. Comp. Stat. 5/26-3](#), but Illinois law only prohibited knowingly using facsimile machine to send unsolicited advertising, and complaint in underlying action had not alleged only that insured knew that facsimile was unsolicited but also alleged that insured should have known that facsimile was unsolicited. *Park Univ. Enters. v Am. Cas. Co. of Reading* (2004, DC Kan) 314 F Supp 2d 1094affd [442 F.3d 1239 \(CA10 Kan 2006\).](#)

Insurer was not required to defend or indemnify insured in connection with suit alleging that insured had sent unsolicited faxes in violation of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#); underlying allegations did not fall within definition under insured’s policy of “advertising injury,” as right to privacy protected under that provision involved interests in secrecy, while privacy right protected under TCPA was right of seclusion; also, insured’s alleged actions did not involve “accident” triggering property damage coverage, and policy exclusion for expected or intended property damage was applicable. *Melrose Hotel Co. v St. Paul Fire & Marine Ins. Co.* (2006, ED Pa) 432 F Supp 2d 488affd [503 F.3d 339 \(CA3 Pa 2007\).](#)

Question was certified to Florida Supreme Court as to whether Florida law, including [Fla. Stat. § 627.419](#), would find that damages for violations of [47 USCS § 227](#) were covered by advertising injury provision of commercial liability policy when unsolicited facsimile advertisement did not reveal private information and where TCPA was not penal act for exclusion under [Fla. Stat. § 365.1657](#) to be found applicable. [Penzer v. Transp. Ins. Co., 545 F.3d 1303, 21 Fla. L. Weekly Fed. C 1189, 2008 U.S. App. LEXIS 22055 \(11th Cir. 2008\).](#)

Punitive damages exclusion was at minimum ambiguous, and under Georgia law had to be construed against insurer and in favor of coverage under [O.C.G.A. § 13-2-2\(5\)](#) for treble damages awarded for violations of Telephone Consumer Protection Act of 1991 pursuant to [47 USCS § 227\(b\)\(3\)](#). [Alea London Ltd. v. Am. Home Servs., 638 F.3d 768, 22 Fla. L. Weekly Fed. C 2007, 2011 U.S. App. LEXIS 7568 \(11th Cir.\)](#), cert. denied, 565 U.S. 1014, 132 S. Ct. 553, 181 L. Ed. 2d 397, 2011 U.S. LEXIS 7985 (2011).

On fair reading of policies, they referred to disclosure, not intrusion, so liability for violating Telephone Consumer Protection Act was not covered; policies’ advertising liability coverage applied only where insured made known to others covered material that violated some other person’s right of privacy; such was not basis for liability incurred by sending faxes in violation of [47 USCS § 227\(b\)\(1\)\(C\)](#). [Cynosure, Inc. v. St. Paul Fire & Marine Ins. Co., 645 F.3d 1, 2011 U.S. App. LEXIS 9713 \(1st Cir. 2011\).](#)

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Advertising injury provision of insurance policies, which covered publication of material that violated person's right of privacy, provided coverage for claims arising from insured's violation of Telephone Consumer Protection Act by dissemination of unsolicited fax advertisements. [Owners Ins. Co. v. European Auto Works, Inc., 695 F.3d 814, 2012 U.S. App. LEXIS 19458 \(8th Cir. 2012\)](#), reh'g denied, reh'g, en banc, denied, [2012 U.S. App. LEXIS 23095 \(8th Cir. Nov. 8, 2012\)](#).

Insurance company was permitted to deny coverage to insured sued for violating Telephone Consumer Protection Act based on policy exclusion for violations of any statute that addressed transmitting any material or information; policy was not ambiguous or void for being against public policy. [Interline Brands, Inc. v. Chartis Specialty Ins. Co., 749 F.3d 962, 24 Fla. L. Weekly Fed. C 1230, 2014 U.S. App. LEXIS 6945 \(11th Cir. 2014\)](#).

Where state plaintiffs sought damages for advertising injury, alleging that they received unsolicited facsimile advertisements that invaded their privacy in violation of Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., and where they chose to seek damages for each advertising injury instead of actual damages, as permitted under TCPA, insured entities were entitled to coverage under "advertising injury" portion of insurer's policy. [Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co., 269 F. Supp. 2d 836, 2003 U.S. Dist. LEXIS 10338 \(N.D. Tex. 2003\)](#), aff'd, [96 Fed. Appx. 960, 2004 U.S. App. LEXIS 9966 \(5th Cir. 2004\)](#).

Insurance policies provided coverage for harm suffered by individual which was related to unsolicited fax advertisements in violation of [47 USCS § 227](#) sent by business and settlement reached between parties; insurance policies afforded coverage because individual suffered advertising injury and coverage was not nullified for any reason. [Hooters of Augusta, Inc. v. Am. Global Ins. Co., 272 F. Supp. 2d 1365, 2003 U.S. Dist. LEXIS 12681 \(S.D. Ga. 2003\)](#), aff'd, [157 Fed. Appx. 201, 2005 U.S. App. LEXIS 26765 \(11th Cir. 2005\)](#).

Coverage was properly denied under advertising injury provision of commercial liability policy for insured's sending of unsolicited facsimile advertisements in violation of Telephone Consumer Protection Act, [47 USCS § 227](#) et seq., because (1) under Florida law, advertising injury coverage for "oral or written publication of material that violates person's right of privacy" did not extend to unsolicited facsimile transmissions of commercial advertisements, and (2) coverage existed only when content of material published violated person's right to privacy. [Penzer v. Transp. Ins. Co., 509 F. Supp. 2d 1278, 2007 U.S. Dist. LEXIS 72845 \(S.D. Fla. 2007\)](#), rev'd, remanded, [605 F.3d 1112, 22 Fla. L. Weekly Fed. C 799, 2010 U.S. App. LEXIS 9593 \(11th Cir. 2010\)](#).

Insurance policy's advertising injury coverage did not extend to underlying suit alleging that insured violated Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), by sending unsolicited facsimile advertisements; under Indiana law, TCPA violations based on "fax blasts" implicated different privacy interest than that covered by advertising injury provision; nor was coverage available under policy's property damage provision, as insured's alleged willful and intentional conduct was not "occurrence" or "accidental." [Ace Rent-A-Car, Inc. v. Empire Fire & Marine Ins. Co., 580 F. Supp. 2d 678, 2008 U.S. Dist. LEXIS 60610 \(N.D. Ill. 2008\)](#).

Insurers had no duty to defend their insured for claims asserted in heart center's underlying action that arose from receipt of alleged unsolicited fax advertisements from insured because plain language of violation of statutes policy exclusion clearly and unambiguously applied to extent it excluded coverage for claims based on alleged violations of Telephone Consumer Protection Act. [Nationwide Mut. Ins. Co. v Harris Med; assoc., LLC, 973 F. Supp. 2d 1045 \(ED Mo 2013\)](#).

*Unpublished decision:* Under Georgia law, umbrella liability policy's coverage for advertising injury applied to insured's liabilities under Telephone Consumer Protection Act, [47 USCS § 227](#), where insured's facsimile transmissions made in violation of Act amounted to act of publication in ordinary sense of word and constituted violations of privacy for purposes of policy; coverage was not nullified by endorsement entered at same moment as policy and was thus co-equal, allowing court to enforce coverage. [Hooters of Augusta, Inc. v. Am. Global Ins. Co., 157 Fed. Appx. 201, 2005 U.S. App. LEXIS 26765 \(11th Cir. 2005\)](#).



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*Unpublished decision:* Insurer was properly granted declaratory relief with regard to its claim, that advertising injury provision in insured's insurance policies did not apply to provide coverage with regard to insured's "fax-blasting" conduct, which allegedly violated [47 USCS § 227\(b\)\(1\)\(C\)](#): (1) policies defined "advertising injury offense" as making known to any person or organization covered material that violates person's right to privacy; (2) existing caselaw from other jurisdictions held that such language provided protection with regard to violations of privacy right of secrecy, not privacy right of seclusion; and (3) provision did not provide coverage with regard to "fax-blasting" claims asserted against insured under TCPA because such claims dealt with manner in which insured had distributed its advertisements, not content of advertisements themselves. [St. Paul Fire & Marine Ins. Co. v. Brother Int'l Corp.](#), 319 Fed. Appx. 121, 2009 U.S. App. LEXIS 6808 (3d Cir. 2009).

*Unpublished decision:* While insureds might not have intended to violate Telephone Consumer Protection Act, they did intend to send faxes and knew that sending them would use recipients' paper, toner, and time, and thus, insurer did not have duty to defend under policy. [Nationwide Mut. Ins. Co. v. David Randall Assocs.](#), 551 Fed. Appx. 638, 2014 U.S. App. LEXIS 433 (3d Cir. 2014).

Property damage insurance coverage was invoked in case under TCPA because insured's act of sending junk faxes was not excluded as intentional; nothing in record supported contention that insured sent faxes intending to injure recipients or to violate TCPA. [Columbia Cas. Co. v. Hiar Holding, L.L.C.](#), 411 S.W.3d 258, 2013 Mo. LEXIS 49 (Mo. 2013).

Advertising injury insurance coverage was invoked in case under TCPA because insurer did not expressly limit coverage by providing more precise definitions in policy; reasonable interpretation of policy could have included coverage for privacy rights claims of class. TCPA included privacy rights for businesses and persons. [Columbia Cas. Co. v. Hiar Holding, L.L.C.](#), 411 S.W.3d 258, 2013 Mo. LEXIS 49 (Mo. 2013).

When company received unsolicited fax advertisement and brought class action against real estate agency under Telephone Consumer Protection Act of 1991 (TCPA), [47 USCS § 227\(b\)\(3\)](#), this resulted in settlement. For purposes of determining insurance coverage, Supreme Court of Illinois held that TCPA was remedial statute and \$500 liquidated damages per violation were not punitive damages. [Std. Mut. Ins. Co. v. Lay](#), 2013 IL 114617, 371 Ill. Dec. 1, 989 N.E.2d 591, 2013 Ill. LEXIS 564 (Ill. 2013).

Insurer of real estate agency was not estopped from asserting coverage defenses to claim based on Telephone Consumer Protection Act of 1991, [47 USCS § 227\(b\)\(3\)](#), because its reservation-of-rights letter referred to coverage defense and conflict of interest regarding violations of penal statutes; agency could not show its was prejudiced by representation of insurer's attorney, as agency retained its own counsel and negotiated settlement. [Std. Mut. Ins. Co. v. Lay](#), 2013 IL 114617, 371 Ill. Dec. 1, 989 N.E.2d 591, 2013 Ill. LEXIS 564 (Ill. 2013).

## 12. Assignment of claims or rights, generally

Claims under Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., were unassignable because they were in nature of personal-injury, privacy claims. [US Fax Law Ctr., Inc. v. iHire, Inc.](#), 476 F.3d 1112, 2007 U.S. App. LEXIS 2622 (10th Cir. 2007), cert. denied, 552 U.S. 1139, 128 S. Ct. 1062, 169 L. Ed. 2d 806, 2008 U.S. LEXIS 1012 (2008).

Where assignee asserted invasion of privacy claims against company and its employees for sending junk faxes in violation of Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., TCPA claims were dismissed because claims were not assignable pursuant to *Colo. Rev. Stat. 13-20-101(1)*. *US Fax Law Ctr., Inc. v. iHire, Inc.* (2005, DC Colo) 362 F Supp 2d 1248affd [476 F.3d 1112 \(CA10 Colo 2007\)](#).

In case in which plaintiffs alleged that unsolicited advertisements contained in phone calls violated Telephone Consumer Protection Act, circuit court found that defendant was designated to be assignee's agent to hold

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contracts assigned to assignee, including plaintiffs' contract; defendant's motion to order arbitration should have been granted. [Andermann v. Sprint Spectrum L.P.](#), 785 F.3d 1157, 2015 U.S. App. LEXIS 7727 (7th Cir. 2015).

Corporations bringing claims under Telephone Consumer Protection Act of 1991 (TCPA), [47 USCS § 227](#), could only assert property interests TCPA was designed to protect; TCPA claims of these corporations were therefore assignable under 805 Ill. Comp. Stat. Ann. .10(e). [Eclipse Mfg. Co. v. M & M Rental Ctr., Inc.](#), 521 F. Supp. 2d 739, 2007 U.S. Dist. LEXIS 36505 (N.D. Ill. 2007).

### 13. Private right of action, generally

Where plaintiff consumer alleged violations of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), and district court dismissed TCPA claim for lack of jurisdiction, although consumer did not challenge dismissal of her TCPA claim on appeal, it was noted that U.S. Supreme Court had recently overruled prior precedent on which district court relied, holding that federal and state courts had concurrent jurisdiction over private suits arising under TCPA, thus, appellate court could sua sponte reverse district court's dismissal of TCPA claim. [Zinni v. ER Solutions, Inc.](#), 692 F.3d 1162, 23 Fla. L. Weekly Fed. C 1476, 2012 U.S. App. LEXIS 18163 (11th Cir. 2012), cert. denied, 569 U.S. 972, 133 S. Ct. 2337, 185 L. Ed. 2d 1063, 2013 U.S. LEXIS 3634 (2013).

Marketing consultant was not entitled to derivative sovereign immunity simply because U.S. Navy was ultimate initiator of prohibited automated text messages, since statute expressly created federal cause of action affording recipient standing to seek compensation for violations by consultant. [Gomez v. Campbell-Ewald Co.](#), 768 F.3d 871, 2014 U.S. App. LEXIS 18019 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311, 191 L. Ed. 2d 977, 2015 U.S. LEXIS 3362 (2015), aff'd, remanded, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571, 25 Fla. L. Weekly Fed. S 585, 93 Fed. R. Serv. 3d (Callaghan) 884, 166 Lab. Cas. (CCH) ¶136411, 2016 U.S. LEXIS 846 (2016).

Where consumer obtained default judgment in suit alleging that unsolicited advertisement was sent to his emergency line in violation of Telephone Consumer Protection Act, treble damages were not warranted because there were no allegations of willful conduct. [Lary v. Trinity Physician Fin. & Ins. Servs.](#), 780 F.3d 1101, 25 Fla. L. Weekly Fed. C 1002, 2015 U.S. App. LEXIS 3998 (11th Cir. 2015).

Fax recipient's personal claim under Telephone Consumer Protection Act should not have been dismissed as moot, despite his failure to accept offer that would have satisfied his entire demand, as district court could still award relief. [Chapman v. First Index, Inc.](#), 796 F.3d 783, 92 Fed. R. Serv. 3d (Callaghan) 488, 2015 U.S. App. LEXIS 13767 (7th Cir. 2015).

Plaintiffs failed to state Telephone Consumer Protection Act, [47 USCS § 227](#) claim for transmission of unidentified faxes; regulations prohibiting unidentified faxes were promulgated under § 227(d), but private right of action exists only under § 227(b). [Adler v. Vision Lab Telcoms., Inc.](#), 393 F. Supp. 2d 35, 2005 U.S. Dist. LEXIS 23691 (D.D.C. 2005).

Remedy provided in [47 USCS § 227](#) is designed to provide adequate incentive for individual plaintiff to bring suit on her own behalf. [Forman v. Data Transfer](#), 164 F.R.D. 400, 1995 U.S. Dist. LEXIS 14547 (E.D. Pa. 1995).

### 14. Parties and standing

Upon certification of class of junk fax recipients in action under Telephone Consumer Protection Act, there was no basis to allow defendants leave to appeal from certification order because their assertion that only fax owners had standing to be within class lacked merit, as there was no such statutory limitation. [Chapman v. Wagener Equities, Inc.](#), 747 F.3d 489, 2014 U.S. App. LEXIS 5962 (7th Cir. 2014).

Business was not required to establish that unsolicited fax advertising dental practice was seen by any of business's employees in order to have standing to sue practice under Telephone Consumer Protection Act of 1991 (TCPA); business was deprived of use of its fax machine during time required for transmission, and TCPA functioned as congressionally created "bounty" permitting private parties to sue based on violation. [\*Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.\*, 771 F.3d 1274, 25 Fla. L. Weekly Fed. C 575, 2014 U.S. App. LEXIS 20870 \(11th Cir. 2014\)](#), vacated, sub. op., [\*781 F.3d 1245, 25 Fla. L. Weekly Fed. C 968, 91 Fed. R. Serv. 3d \(Callaghan\) 364, 2015 U.S. App. LEXIS 3630 \(11th Cir. 2015\)\*](#).

District court erred in concluding that two unsolicited, prerecorded messages on plaintiffs' home phone line were exempt from regulation under TCPA and that plaintiffs did not have Article III standing, because calls, which were initiated and transmitted to plaintiffs in order to promote film, qualified as "telemarketing," even though messages never referenced film. [\*Golan v. Veritas Entm't, LLC\*, 788 F.3d 814, 91 Fed. R. Serv. 3d \(Callaghan\) 1779, 2015 U.S. App. LEXIS 9489 \(8th Cir. 2015\)](#).

Text of subsection (b)(3), does not limit universe of plaintiffs who may file suit in federal court; paragraph that establishes private right of action for violations of Telephone Consumer Protection Act's robocall provisions permits any person or entity to file lawsuit. [\*Leyse v. Bank of Am. Nat'l Ass'n\*, 804 F.3d 316, 2015 U.S. App. LEXIS 17840 \(3d Cir. 2015\)](#).

Although Congress did not expressly limit standing to "called party," its primary concern in enacting subsection (b)(1)(B), was to protect that party from unwanted robocalls; this necessarily means that "called party" is within zone of interests protected by Telephone Consumer Protection Act of 1991. [\*Leyse v. Bank of Am. Nat'l Ass'n\*, 804 F.3d 316, 2015 U.S. App. LEXIS 17840 \(3d Cir. 2015\)](#).

Telephone Consumer Protection Act's zone of interests encompasses more than just intended recipients of prerecorded telemarketing calls; it is actual recipient, intended or not, who suffers nuisance and invasion of privacy, but this does not mean that all those within earshot of unwanted robocall are entitled to make federal case out of it. [\*Leyse v. Bank of Am. Nat'l Ass'n\*, 804 F.3d 316, 2015 U.S. App. LEXIS 17840 \(3d Cir. 2015\)](#).

Mere houseguest or visitor who picks up phone would likely fall outside protected zone of interests, but on other hand, regular user of phone line who occupies residence being called undoubtedly has sort of interest in privacy, peace, and quiet that Congress intended to protect. [\*Leyse v. Bank of Am. Nat'l Ass'n\*, 804 F.3d 316, 2015 U.S. App. LEXIS 17840 \(3d Cir. 2015\)](#).

District court erred in dismissing resident's action because his status as regular user of phone line and occupant of residence that was called brought him within language of statute and zone of interests it protected; resident's roommate was subscriber and intended recipient of call, but resident regularly used phone, and fact that he lived with roommate indicated he had privacy interest in avoiding telemarketing calls to their shared home. [\*Leyse v. Bank of Am. Nat'l Ass'n\*, 804 F.3d 316, 2015 U.S. App. LEXIS 17840 \(3d Cir. 2015\)](#).

Revisiting its prior holding, court concluded that, even under Spokeo, plaintiffs had Article III standing because intangible injury claimed under TCPA — receipt of two answering machine messages without prior consent — was concrete injury. [\*Golan v. FreeEats.com, Inc.\*, 930 F.3d 950, 2019 U.S. App. LEXIS 21015 \(8th Cir. 2019\)](#).

Former client's Telephone Consumer Protection Act of 1991 action against attorney arising from single unsolicited text message attorney sent to client was properly dismissed because although text violated statute, allegations of brief, inconsequential annoyance was not concrete injury-in-fact sufficient to show U.S. Const. art. III standing. [\*Salcedo v. Hanna\*, 936 F.3d 1162, 28 Fla. L. Weekly Fed. C 217, 2019 U.S. App. LEXIS 25967 \(11th Cir. 2019\)](#), reh'g denied, [\*2019 U.S. App. LEXIS 32559 \(11th Cir. Oct. 30, 2019\)\*](#).

Consumers had standing to assert claims against time share marketer and student loan servicer under Telephone Consumer Protection Act because receipt of more than one unwanted telemarketing call was concrete injury that

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met minimum requirements of U.S. Const. art. III standing. [\*Glasser v. Hilton Grand Vacations Co., LLC\*, 948 F.3d 1301, 28 Fla. L. Weekly Fed. C 770, 2020 U.S. App. LEXIS 2481 \(11th Cir. 2020\)](#).

Corporate officer may be held personally liable under [47 USCS § 227](#) if he or she had direct, personal participation or personally authorized conduct found to have violated statute, and was not merely tangentially involved. [\*Texas v. Am. Blast Fax, Inc.\*, 164 F. Supp. 2d 892, 2001 U.S. Dist. LEXIS 12879 \(W.D. Tex. 2001\)](#).

Where plaintiff consumers alleged illegal Telephone Consumer Protection Act fax transmissions, because one individual defendant was alleged to be fax broadcaster with high degree of involvement in, and actual notice of, allegedly unlawful activity and that failed prevent it, that claim survived individual's motion to dismiss for failure to state claim. [\*Kopff v. Battaglia\*, 425 F. Supp. 2d 76, 2006 U.S. Dist. LEXIS 13638 \(D.D.C. 2006\)](#).

Second amended complaint clearly showed that adding corporation would meet requirements of [Fed. R. Civ. P. 20\(a\)](#) where corporation and manufacturer both allegedly received same facsimile from rental company on at least one occasion, satisfying same occurrence or transaction requirement of Rule 20; in addition, there was at least one common factual issue between parties—whether that facsimile constituted advertisement under [47 USCS § 227](#). [\*Eclipse Mfg. Co. v. M & M Rental Ctr., Inc.\*, 521 F. Supp. 2d 739, 2007 U.S. Dist. LEXIS 36505 \(N.D. Ill. 2007\)](#).

Where company sent fax transmissions to proposed class under same general circumstances, those transmissions— if found to violate Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#)—would result in same basic injury to all class members, two plaintiff recipients had standing to pursue class claims under U.S. Const. art. III. [\*Hinman v. M & M Rental Ctr.\*, 545 F. Supp. 2d 802, 2008 U.S. Dist. LEXIS 27835 \(N.D. Ill. 2008\)](#).

Business owner's wife lacked standing to pursue claim under Telephone Consumer Protection Act, [47 USCS § 227](#); although she worked as owner's assistant in his business, unsolicited faxes were addressed to him, not to her. [\*Kopff v. World Research Group, LLC\*, 568 F. Supp. 2d 39, 2008 U.S. Dist. LEXIS 58333 \(D.D.C. 2008\)](#).

Plaintiff's Telephone Consumer Protection Act (TCPA) claim would not be dismissed because comparing plain text of [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#), (b)(3) with plaintiff's allegations, plaintiff alleged sufficient facts to demonstrate that he had right to sue defendant under TCPA, and further, plaintiff did not need to be called party under § 227(b)(1)(A) to assert TCPA claim, and according to allegations of amended complaint, defendant did not have plaintiff's prior express consent, so court did not need to determine whether exception applied, but even if TCPA only afforded right of relief to called party, plaintiff was called party because defendant intended to call plaintiff's cellular telephone number and plaintiff was regular user and carrier of phone. [\*D.G. v. William W. Siegel & Assocs.\*, 791 F. Supp. 2d 622, 2011 U.S. Dist. LEXIS 63298 \(N.D. Ill. 2011\)](#).

*Unpublished decision*: Plaintiff failed to adequately demonstrate that he had standing to bring putative class action under Telephone Consumer Protection Act (TCPA) because plaintiff was not "called party" under TCPA because uncontroverted evidence showed that entity that placed call on behalf of bank placed call to plaintiff's roommate and telephone subscriber, and, although plaintiff answered call, he was unintended and incidental recipient of properly-directed communication to someone else. [\*Leyse v. Bank of Am., N.A.\*, 2014 U.S. Dist. LEXIS 125527 \(D.N.J. Sept. 8, 2014\)](#), vacated, remanded, [804 F.3d 316, 2015 U.S. App. LEXIS 17840 \(3d Cir. 2015\)](#).

Evidence that fax advertisements were successfully sent was sufficient to show standing for named plaintiff in putative class action. [\*City Select Auto Sales, Inc. v. David Randall Assocs.\*, 296 F.R.D. 299, 2013 U.S. Dist. LEXIS 178950 \(D.N.J. 2013\)](#).

Person or entity that owns fax machine that receives unsolicited fax advertisement is person or entity with standing to assert TCPA claim; accordingly, class certification was not warranted in suit alleging TCPA violations because class included persons lacking statutory standing. [\*APB Assocs. v. Bronco's Saloon, Inc.\*, 297 F.R.D. 302, 2013 U.S. Dist. LEXIS 59852 \(E.D. Mich. 2013\)](#), reconsideration granted, [315 F.R.D. 200, 2016 U.S. Dist. LEXIS 47033 \(E.D. Mich. 2016\)](#).

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*Unpublished decision:* Wireless telephone service provider and provider of in-car communications services lacked statutory standing under [47 USCS § 227\(b\)\(3\)](#), as providers were not intended recipients of telemarketing calls; nor was there prudential standing; providers did not fall within zone of interests protected by TCPA. [Cellco P'ship v. Wilcrest Health Care Mgmt., 2012 U.S. Dist. LEXIS 64407 \(D.N.J. May 8, 2012\)](#).

## 15. —Assignments

Claims under Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., were unassignable because they were in nature of personal-injury, privacy claims; because underlying assignment of TCPA claims was invalid, corporations lacked standing to bring actions for damages for unsolicited faxes under TCPA, and district court's dismissal based upon lack of standing was affirmed. [US Fax Law Ctr., Inc. v. Ihire, Inc., 476 F.3d 1112, 2007 U.S. App. LEXIS 2622 \(10th Cir. 2007\)](#), cert. denied, 552 U.S. 1139, 128 S. Ct. 1062, 169 L. Ed. 2d 806, 2008 U.S. LEXIS 1012 (2008).

Corporations bringing claims under Telephone Consumer Protection Act of 1991 (TCPA), [47 USCS § 227](#), could only assert property interests TCPA was designed to protect; TCPA claims of these corporations were therefore assignable under 805 Ill. Comp. Stat. Ann. .10(e); thus, because manufacturer's former owner could be assigned manufacturer's claims, and because court saw no other reason why owner lacked standing to pursue his claims, owner had standing to file motion for leave to file second amended class action complaint against rental center. [Eclipse Mfg. Co. v. M & M Rental Ctr., Inc., 521 F. Supp. 2d 739, 2007 U.S. Dist. LEXIS 36505 \(N.D. Ill. 2007\)](#).

From individual's suit against advertiser for violations of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), when advertiser sent unsolicited fax advertisements to individual's assignor, business, individual lacked standing to assert his claims under TCPA because he obtained them through void assignments; claim under TCPA for \$500 in liquidated damages per violation was penalty that could not be assigned; and for same reasons, claim for treble amount of those liquidated damages was also penalty that could not be assigned. [Kruse v. McKenna, 178 P.3d 1198, 2008 Colo. LEXIS 203 \(Colo.\)](#), cert. denied, 555 U.S. 821, 129 S. Ct. 112, 172 L. Ed. 2d 35, 2008 U.S. LEXIS 6555 (2008), overruled in part, [Guar. Trust Life Ins. Co. v. Estate of Casper, 418 P.3d 1163, 2018 CO 43, 2018 Colo. LEXIS 437 \(Colo. 2018\)](#).

## 15.5 —Personal jurisdiction

In a Florida resident's class action against affiliated pizza companies alleging violations of the Telephone Consumer Protection Act, [47 U.S.C.S. § 227](#), the out-of-state companies' motion to dismiss for lack of personal jurisdiction was denied because the alleged violation was a tort under Florida's long-arm statute, [Fla. Stat. § 48.193](#), and due process concerns were satisfied. [Keim v. ADF MidAtlantic, LLC, 199 F. Supp. 3d 1362, 2016 U.S. Dist. LEXIS 106300 \(S.D. Fla. 2016\)](#).

## 16. State actions

Telephone Consumer Protection Act, [47 USCS § 227\(b\)\(1\)\(C\)](#), was held not to be unconstitutionally broad in claim by state of Missouri on behalf of telephone users, where advertisers remained free to publicize their products through any legal means, but simply could not do so through unsolicited fax; and Act did not totally ban on fax advertising where advertisers could still obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shops. [Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 2003 U.S. App. LEXIS 5469 \(8th Cir. 2003\)](#), reh'g denied, reh'g, en banc, denied, [2003 U.S. App. LEXIS 13540 \(8th Cir. July 3, 2003\)](#), cert. denied, 540 U.S. 1104, 124 S. Ct. 1043, 157 L. Ed. 2d 888, 2004 U.S. LEXIS 49 (2004).

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State may pursue action against alleged sender of unsolicited advertisements by fax machine, even though sender argues it only sends such advertisements within Texas, because federal Telephone Consumer Protection Act ([47 USCS § 227](#)) applies both to intrastate and interstate fax advertisements. [Texas v. American Blast Fax, Inc., 121 F. Supp. 2d 1085, 2000 U.S. Dist. LEXIS 17798 \(W.D. Tex. 2000\)](#).

State was granted preliminary injunction under [47 USCS § 227\(f\)\(1\)](#) to enjoin fax advertising service and its principal from faxing unsolicited advertising to state residents where service and principal admitted in their answer that they had been sending faxes, where injunction fulfilled Telephone Consumer Protection Act's legislative purpose in protecting privacy interest of residential telephone subscribers, where harm did not fall disproportionately on service and principal, and where State was likely to prevail on its argument that Act did not violate First Amendment. [Minn. v. Sunbelt Communs. & Mktg., 282 F. Supp. 2d 976, 2002 U.S. Dist. LEXIS 18990 \(D. Minn. 2002\)](#).

Trial court erred by dismissing for lack of subject matter jurisdiction state consumer protection division's enforcement action against Florida telemarketer for violating [Utah Code Ann. § 13-25a-103\(1\)](#) and [Utah Code Ann. § 13-26-3](#) by using automated dialer to place unsolicited telephone call to Utah resident as [47 USCS § 227](#), part of Telephone Consumer Protection Act (TCPA), did not preempt Utah laws; TCPA did not meet requirements necessary to show express preemption, and telemarketer failed to establish that TCPA clearly intended to "occupy field" such that Utah laws concerning interstate telephone calls were preempted. [Utah Div. of Consumer Prot. v. Flagship Capital, 2005 UT 76, 125 P.3d 894, 2005 Utah LEXIS 122 \(Utah 2005\)](#).

## 17. Class actions

Class action individual filed against company that was hired by U.S. Navy to develop multimedia recruiting campaign, which alleged that company violated Telephone Consumer Protection Act ("TCPA"), [47 USCS § 227](#), when subcontractor it hired sent text message to individual without his permission, did not become moot because individual did not accept offer of judgment company filed pursuant to [Fed. R. Civ. P. 68](#) before individual sought class certification, and although U.S. and its agencies were not subject to TCPA's prohibitions because no statute lifted their immunity, company's status as federal contractor did not render it immune from suit for violating TCPA by sending text messages to unconsenting recipients. [Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571, 25 Fla. L. Weekly Fed. S 585, 93 Fed. R. Serv. 3d \(Callaghan\) 884, 166 Lab. Cas. \(CCH\) ¶36411, 2016 U.S. LEXIS 846 \(2016\)](#).

Class of fax recipients was improperly certified under [Fed. R. Civ. P. 23\(b\)\(3\)](#) because recipients failed to satisfy predominance requirement in that advertiser culled fax numbers from variety of sources, making class-wide proof of consent not possible to show violations of Telephone Consumer Protection Act, [47 USCS § 227](#). [Gene & Gene LLC v. BioPay LLC, 541 F.3d 318, 2008 U.S. App. LEXIS 17302 \(5th Cir. 2008\)](#).

In class action alleging violation of [47 USCS § 227](#), district court on remand improperly reopened discovery and considered new evidence regarding class certification; remand order under [Fed. R. Civ. P. 23\(f\)](#) had determined as law of case that certification could not be shown via class-wide proof of consent, which foreclosed relitigation of certification. [Gene & Gene, L.L.C. v. Biopay, L.L.C., 624 F.3d 698, 2010 U.S. App. LEXIS 22381 \(5th Cir. 2010\)](#).

Order certifying class pursuant to [Fed. R. Civ. P. 23](#) in action for violations of Telephone Consumer Protection Act (as amended by Junk Fax Prevention Act of 2005), [47 USCS § 227](#), was vacated and remanded because district court had failed to properly treat problem of credibility of plaintiff's president and consent defense, both of which were vital in assessing plaintiff's adequacy as class representative; district court erred in treating as immaterial president's testimony on whether plaintiff invited or permitted faxed advertisements; express consent to communications by fax and email from subscribers to listing book raised substantial question. [CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 79 Fed. R. Serv. 3d \(Callaghan\) 244, 2011 U.S. App. LEXIS 5365 \(7th Cir. 2011\)](#).

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It was premature to determine prior to discovery in Telephone Consumer Protection Act class action suit that class could not have been certified; issue of consent to receive faxes did not necessarily preclude finding of typicality and predominance under [Fed. R. Civ. P. 23](#). [Landsman & Funk PC v. Skinder-Strauss Assocs.](#), 640 F.3d 72, 2011 U.S. App. LEXIS 6786 (3d Cir.), vacated, reh'g, en banc, granted, 650 F.3d 311, 2011 U.S. App. LEXIS 9987 (3d Cir. 2011), reinstated, [2012 U.S. App. LEXIS 11946 \(3d Cir. Apr. 17, 2012\)](#).

Preliminary injunction was properly granted to debtor in action against debt collector under Telephone Consumer Protection Act, [47 USCS § 227](#), because debtor demonstrated likelihood of success on merits, including that collector's predictive dialers fell within definition of automatic telephone dialing system under § 227(a)(1), and that debtor would likely suffer irreparable harm in absence of injunctive relief; district court did not abuse its discretion by granting provisional class certification because district court properly acted within its discretion when it ruled that debtor met commonality, typicality, and adequacy requirements of [Fed. R. Civ. P. 23\(a\)](#), including that debtor was adequate class representative. [Meyer v. Portfolio Recovery Assocs., LLC](#), 696 F.3d 943, 83 Fed. R. Serv. 3d (Callaghan) 1039, 2012 U.S. App. LEXIS 21136 (9th Cir.), amended, 707 F.3d 1036, 2012 U.S. App. LEXIS 26707 (9th Cir. 2012), reprinted, 707 F.3d 1036, 2012 U.S. App. LEXIS 26708 (9th Cir. 2012), cert. denied, 569 U.S. 975, 133 S. Ct. 2361, 185 L. Ed. 2d 1068, 2013 U.S. LEXIS 3536 (2013).

Corporation was not entitled to have class certification, which involved statutory damages for faxing unsolicited advertisement pursuant to [47 USCS § 227\(b\)\(1\)\(C\)](#), (b)(3), reversed on basis that misconduct by attorneys for class disqualified firm as adequate class counsel pursuant to [Fed. R. Civ. P. 23\(g\)\(1\)\(B\)](#) because attorneys' alleged misconduct did not raise serious doubts about their ability to represent class faithfully, and their solicitation letter neither prejudiced class nor undermined outcome of case. [Reliable Money Order, Inc. v. McKnight Sales Co.](#), 704 F.3d 489, 84 Fed. R. Serv. 3d (Callaghan) 637, 2013 U.S. App. LEXIS 501 (7th Cir. 2013).

Provisional class certification was properly granted in action under Telephone Consumer Protection Act, [47 USCS § 227](#), as there was sufficient showing of commonality, typicality, and adequacy; individualized issues of consent did not preclude certification; evidence suggested that cellular telephone numbers that debt collection service found via skip-tracing were unlikely to have been provided by debtors to creditors. [Meyer v. Portfolio Recovery Assocs., LLC](#), 707 F.3d 1036, 2012 U.S. App. LEXIS 26708 (9th Cir. 2012), cert. denied, 569 U.S. 975, 133 S. Ct. 2361, 185 L. Ed. 2d 1068, 2013 U.S. LEXIS 3536 (2013).

In class action where attorney appealed district court's entry of summary judgment against him, his faxes violated Telephone Consumer Protection Act of 1991, [47 USCS § 227](#), and each recipient did not have to prove that he printed fax, thereby wasting paper, or otherwise suffered monetary loss [Ira Holtzman, C.P.A., & Assocs. v. Turza](#), 728 F.3d 682, 86 Fed. R. Serv. 3d (Callaghan) 728, 2013 U.S. App. LEXIS 17811 (7th Cir. 2013), cert. denied, 571 U.S. 1201, 134 S. Ct. 1318, 188 L. Ed. 2d 306, 2014 U.S. LEXIS 1528 (2014).

In class action in which district court ordered attorney to pay \$4,215,000 but did not say to whom and attorney had not agreed to give up his interest in money unclaimed by class members, district court had to enter judgment requiring attorney to remit damage award to registry of court or to third-party administrator. Class certified under [Fed. R. Civ. P. 23\(b\)\(3\)](#) was not juridical entity. [Ira Holtzman, C.P.A., & Assocs. v. Turza](#), 728 F.3d 682, 86 Fed. R. Serv. 3d (Callaghan) 728, 2013 U.S. App. LEXIS 17811 (7th Cir. 2013), cert. denied, 571 U.S. 1201, 134 S. Ct. 1318, 188 L. Ed. 2d 306, 2014 U.S. LEXIS 1528 (2014).

Where district court granted summary judgment in favor of defendant on plaintiff's claim under Telephone Consumer Protection Act, rather than entering judgment against entire class, it should have decertified class; however, court of appeals read district court's orders as doing just that because by denying plaintiff's request for permission to send notice to absent class members, damages class could not be bound by judgment and thus, in affirming judgment, court construed it as judgment against named plaintiffs only, with class decertified. [Sparkle Hill, Inc. v. Interstate Mat Corp.](#), 788 F.3d 25, 2015 U.S. App. LEXIS 9236 (1st Cir. 2015).

In fax recipient's action under Telephone Consumer Protection Act, district court did not abuse its discretion by declining to certify class of recipients identified by opt-out notices, as recipient's delay of over four years in seeking

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to define class in that manner was deemed inexcusable. [\*Chapman v. First Index, Inc.\*, 796 F.3d 783, 92 Fed. R. Serv. 3d \(Callaghan\) 488, 2015 U.S. App. LEXIS 13767 \(7th Cir. 2015\)](#).

In Telephone Consumer Protection Act case, district court abused its discretion in holding that class did not meet commonality and predominance requirements of [\*Fed. R. Civ. P. 23\(a\)\(2\)\*](#) and [\*\(b\)\(3\)\*](#); class certification was normal in litigation under [47 USCS § 227](#). [\*Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.\*, 821 F.3d 992, 94 Fed. R. Serv. 3d \(Callaghan\) 876, 2016 U.S. App. LEXIS 7992 \(8th Cir. 2016\)](#).

District court refused to certify class action filed against computer software company for sending unauthorized text messages in violation of Telephone Consumer Protection Act of 1991, because it was not superior method of resolving dispute as issue of express consent required individual proof; as five years had passed since text messages were sent, it was likely that many potential class members had changed their numbers which made identification of class members daunting task. [\*Smith v. Microsoft Corp.\*, 297 F.R.D. 464, 2014 U.S. Dist. LEXIS 12799 \(S.D. Cal. 2014\)](#).

Purported class action alleging violations of Telephone Consumer Protection Act (TCPA) was certified because issues related to plaintiffs' claims were better resolved on class-wide basis, and requirements of [\*Fed. R. Civ. P. 23\*](#) were met as to Class and narrowly drawn subclasses of Classes B and C. [\*Kaye v. Amicus Mediation & Arbitration Group, Inc.\*, 300 F.R.D. 67, 88 Fed. R. Serv. 3d \(Callaghan\) 1002, 2014 U.S. Dist. LEXIS 72377 \(D. Conn. 2014\)](#).

Where named plaintiffs were suing on behalf of themselves and proposed classes of state residents who alleged they received unsolicited fax ads from defendants, plaintiffs had private right of action under Telephone Consumer Protection Act (TCPA) and, in federal court, class actions were proper under both TCPA and Louisiana's Unsolicited Telefacsimile Messages Act so long as plaintiffs met requirements of [\*Fed. R. Civ. P. 23\*](#). [\*Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., L.P.\*, 329 F. Supp. 2d 789, 2004 U.S. Dist. LEXIS 15427 \(M.D. La. 2004\)](#).

Because substantive law of state applied in Telephone Consumer Protection Act (TCPA) class actions brought in federal court, and [\*N.Y. C.P.L.R. § 901\(b\)\*](#) was substantive provision that prohibited plaintiffs from asserting class action predicated on TCPA claims, plaintiff's TCPA claims were dismissed for lack of subject matter jurisdiction (plaintiff conceded amount in controversy could not be met in absence of such class action). [\*Holster v. Gatco, Inc.\*, 485 F. Supp. 2d 179, 2007 U.S. Dist. LEXIS 20953 \(E.D.N.Y. 2007\)](#), aff'd, [2008 U.S. App. LEXIS 23203 \(2d Cir. Oct. 31, 2008\)](#), aff'd, [618 F.3d 214, 2010 U.S. App. LEXIS 17661 \(2d Cir. 2010\)](#).

Where class members who allegedly received faxes in violation of Telephone Consumer Protection Act, [47 USCS § 227](#), could be identified with reference to lists generated by company or other entities, numerosity and definiteness were satisfied; as for commonality and typicality, company's fax broadcasts were transmitted en masse based on "leads" list compiled several years earlier as well as by reference to company's conduct. Class certification was granted. [\*Hinman v. M & M Rental Ctr.\*, 545 F. Supp. 2d 802, 2008 U.S. Dist. LEXIS 27835 \(N.D. Ill. 2008\)](#).

Illinois corporation was entitled to [\*Fed. R. Civ. P. 23\*](#) class certification in its action against chiropractic center under Telephone Consumer Protection Act, [47 USCS § 227\(b\)\(3\)](#); questions affecting only individual class members would not predominate over class issues for purposes of [\*Fed. R. Civ. P. 23\(b\)\(3\)\*](#) because successful class action would generate \$500 award for every class member able to prove basic elements of its claim. [\*Targin Sign Sys. v. Preferred Chiropractic Ctr., Ltd.\*, 679 F. Supp. 2d 894, 2010 U.S. Dist. LEXIS 4581 \(N.D. Ill. 2010\)](#).

Consumer bringing putative class action against defendant two telemarketers for alleged violations of [47 USCS § 227](#), claimed that offer of settlement did not moot his action because offer did not provide him with complete relief; but he failed to convincingly argue that offer was inadequate simply because it was not made under [\*Fed. R. Civ. P. 68\*](#). [\*Martin v. PPP, Inc.\*, 719 F. Supp. 2d 967, 2010 U.S. Dist. LEXIS 63192 \(N.D. Ill. 2010\)](#).

[\*Holstein v. City of Chicago\*, 29 F.3d 1145 \(7th Cir. 1994\)](#), includes no holding or even dicta requiring district courts to dismiss case as moot when plaintiff files class certification motion within [\*Fed. R. Civ. P. 68\*](#) deadline; because



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there is no principled basis for distinguishing between motion filed just before offer of judgment and one filed before deadline for accepting expires, live controversy remains so long as court grants plaintiff's motion for class certification; therefore, in action under [47 USCS § 227](#), advertiser was unable to avoid potential liability on classwide claim by offering representative maximum amount that it could have obtained on its individual claim; lawsuit was not moot if representative showed it was entitled to class certification. [Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc., 754 F. Supp. 2d 1009, 78 Fed. R. Serv. 3d \(Callaghan\) 96, 2010 U.S. Dist. LEXIS 130579 \(W.D. Wis. 2010\)](#).

Court denied plaintiff's [Fed. R. Civ. P. 23](#) motion to certify class in its action alleging violations of Telephone Consumer Protection Act, [47 USCS § 227](#), based on unsolicited fax advertisement sent by or on behalf of defendant because although it appeared that putative class met requirements of R. 23(a), (b)(3), there was no reasonable way of identifying potential class members as there appeared to be no list of numbers from which parties (or court) could reasonably assume class members could be identified, even if class members were only subset of that universal list. [Saf-T-Gard Int'l, Inc. v. Wagener Equities, Inc., 251 F.R.D. 312, 2008 U.S. Dist. LEXIS 43754 \(N.D. Ill. 2008\)](#).

Court granted plaintiff's [Fed. R. Civ. P. 23\(b\)\(3\)](#) motion to certify class in its action alleging violations of [47 USCS § 227\(b\)\(1\)\(C\)](#) arising out of fax advertisements for defendants' business that plaintiffs received because (1) opinions of plaintiff's expert regarding fax logs of company that sent faxes was admissible under [Fed. R. Evid. 702](#) as they reflected application of his expertise to data; (2) logs were admissible because testimony of custodian of company's database was sufficient to authenticate records under [Fed. R. Evid. 901\(a\)](#) and to establish foundation for admissibility under business records exception to hearsay rule under [Fed. R. Evid. 803\(6\)](#), and other evidence diminished any doubts about authenticity or reliability of logs; (3) plaintiff produced evidence of proposed class's size to satisfy numerosity requirement of R. 23(a)(1); (4) whether fax broadcast violated TCPA was issue common to class; (5) there was no reason to doubt adequacy of class representatives or of class counsel; (6) plaintiff's circumstantial proof of receipt by all of numbers to which logs indicated faxes were successfully sent satisfied preponderance of evidence standard; and (7) defendants' behavior in failing to verify consent of fax recipients likely precluded individualized defenses of consent. [CE Design Ltd. v. Cy's Crabhouse North, Inc., 259 F.R.D. 135, 2009 U.S. Dist. LEXIS 67323 \(N.D. Ill. 2009\)](#).

In class action suit against debt collection company for using automated dialing systems to contact debtors' cell phones in violation of Telephone Consumer Protection Act, company was ordered under [Fed. R. Civ. P. 26\(b\)\(1\)](#) to produce evidence relating to its prior express consent defense under [47 USCS § 227\(b\)\(1\)\(A\)](#) because information was critical to whether class would be certified. [Donnelly v. NCO Fin. Sys., 263 F.R.D. 500, 2009 U.S. Dist. LEXIS 124730 \(N.D. Ill. 2009\)](#).

While individual questions existed, that few advertisement "fax blasting" recipients may have consented to advertising faxes sent by defendant advertiser, common questions predominated, and action could finish with any individual questions; thus, superiority existed under [Fed. R. Civ. P. 23\(b\)\(3\)](#) for class certification on claims by plaintiff consumer under Telephone Consumer Protection Act of 1991; Congress had not provided express directive that class actions were inappropriate under Act. [Gene & Gene, LLC v. BioPay, LLC, 269 F.R.D. 621, 2009 U.S. Dist. LEXIS 128256 \(M.D. La. 2009\)](#), rev'd, remanded, [624 F.3d 698, 2010 U.S. App. LEXIS 22381 \(5th Cir. 2010\)](#).

In suit filed under Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., district court granted plaintiff's motion to certify class of persons who were sent without prior permission or established business relationship fax advertising defendant's services; plaintiff met all of [Fed. R. Civ. P. 23](#)'s requirements: plaintiff's claim was typical of class because it did not expressly consent to receiving fax advertisements by displaying its fax number on its website or in directory; common issues of law and fact predominated because class was limited to persons who did not consent to receiving defendant's faxed advertisements; and class action was superior to other available methods for fairly and efficiently adjudicating controversy. [CE Design Ltd. v. King Architectural Metals, Inc., 271 F.R.D. 595, 2010 U.S. Dist. LEXIS 131662 \(N.D. Ill. 2010\)](#), vacated, remanded, [637 F.3d 721, 79 Fed. R. Serv. 3d \(Callaghan\) 244, 2011 U.S. App. LEXIS 5365 \(7th Cir. 2011\)](#).

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Plaintiff's motion to certify class in his action against collection agency for alleged violations of Telephone Consumer Protection Act, [47 USCS § 227](#), was granted because proposed class, people whom agency called with auto-dialer during four-year period on area code cell phone number it obtained from medical provider, was defined by objective criteria and with reference to agency's alleged conduct. [Mitchem v. Ill. Collection Serv., 271 F.R.D. 617, 2011 U.S. Dist. LEXIS 714 \(N.D. Ill. 2011\)](#).

In plaintiffs' action asserting claims for violations of Telephone Consumer Protection Act, [47 USCS § 227](#), and [Cal. Bus. & Prof. Code § 17538.43](#), court certified classes under TCPA because plaintiffs demonstrated ascertainability as definition of that class described set of common characteristics sufficient to allow prospective plaintiff to identify himself or herself as having right to recover based on description, and that class also met all [Fed. R. Civ. P. 23\(a\)](#) and [\(b\)\(3\)](#) requirements; court refused to certify second class under TCPA or class under § 17538.43 because plaintiffs failed to establish objective way to determine class members. [Vandervort v. Balboa Capital Corp., 287 F.R.D. 554, 83 Fed. R. Serv. 3d \(Callaghan\) 1520, 2012 U.S. Dist. LEXIS 153096 \(C.D. Cal. 2012\)](#).

Even though certification of class in action that asserted claims under TCPA would not be denied on basis of ethical concerns with proposed class counsel, certification had to be denied because there was lack of ascertainable class since proposed imprecise and amorphous class definitions included persons that appeared to lack statutory standing to assert TCPA claim based upon unsolicited fax advertisement, and claims were inherently individualized due to statutory defense that only unsolicited faxes gave rise to claim. [Machesney v. Lar-Bev of Howell, Inc., 292 F.R.D. 412, 2013 U.S. Dist. LEXIS 57080 \(E.D. Mich. 2013\)](#), vacated, [317 F.R.D. 47, 94 Fed. R. Serv. 3d \(Callaghan\) 755, 2016 U.S. Dist. LEXIS 47034 \(E.D. Mich. 2016\)](#).

In this Telephone Consumer Protection Act action, plaintiff's motion for class certification was denied because proposed class definitions included all "persons who were sent" certain fax advertisements and it was entirely unclear who that included; there was possibility of multiple plaintiffs stemming from one fax transmission—all individuals at home or employed by corporate entity, or any person who happens to intercept fax advertisement by picking it up. [Compressor Eng'g Corp. v. Mfrs. Fin. Corp., 292 F.R.D. 433, 2013 U.S. Dist. LEXIS 59849 \(E.D. Mich. 2013\)](#), different results reached on reconsid., [2016 U.S. Dist. LEXIS 47038 \(E.D. Mich. Apr. 7, 2016\)](#).

Class action certification was not warranted in suits alleging violations of Telephone Consumer Protection Act (TCPA) because there was no ascertainable class since class definitions included persons who lacked statutory standing to assert TCPA claim based upon unsolicited fax advertisement. [APB Assocs. v. Bronco's Saloon, Inc., 297 F.R.D. 302, 2013 U.S. Dist. LEXIS 59852 \(E.D. Mich. 2013\)](#), reconsideration granted, [315 F.R.D. 200, 2016 U.S. Dist. LEXIS 47033 \(E.D. Mich. 2016\)](#).

*Unpublished decision:* In Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), based on unsolicited faxes sent by defendant, language of § 227(b)(3) did not require application of [N.Y. C.P.L.R. § 901\(b\)](#) regarding class actions under current precedent, so [Fed. R. Civ. P. 23](#) alone governed whether claim could be brought as class action. [Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC, 2012 U.S. Dist. LEXIS 150210 \(D.N.J. Oct. 17, 2012\)](#).

*Unpublished decision:* In class action alleging violations of Telephone Consumer Protection Act (TCPA) in which marketer moved to dismiss amended complaint and appellate court had directed district court to assess private-right-of action clause taking Shady Grove and Mims decisions into consideration, whether private right of action existed in first place under TCPA did not depend on state law; state-law limitations embodied in [N.Y. C.P.L.R. § 901\(b\)](#) had no application in present federal-question case in federal court. [Landsman & Funk, P.C. v. Skinder-Strauss Assocs., 2012 U.S. Dist. LEXIS 183249 \(D.N.J. Dec. 19, 2012\)](#).

*Unpublished decision:* District court improperly applied doctrine of collateral estoppel to bar plaintiff's third class action against bank under TCPA because there was at least some ambiguity as to whether Second Circuit's summary affirmance in second action that plaintiff lacked standing rested on ground that plaintiff was not called party or on issue of state law. [Leyse v. Bank of Am., N.A., 538 Fed. Appx. 156, 2013 U.S. App. LEXIS 20312 \(3d Cir. 2013\)](#).

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*Unpublished decision:* District court erred in holding that American Pipe tolling did not apply to plaintiff's third class action against bank under TCPA because plaintiff was putative member of alleged class in first class action, and statute of limitations on plaintiff's claim was tolled from date first class action complaint was filed until case was administratively closed. [Leyse v. Bank of Am., N.A., 538 Fed. Appx. 156, 2013 U.S. App. LEXIS 20312 \(3d Cir. 2013\)](#).

Trial court properly concluded that claimant's class action claim was barred after trial court determined that New York law applied since unsolicited fax ads sent in violation of law were sent within New York state and application of New York law would not produce arbitrary or irrational law; claimant could not maintain class action pursuant to applicable New York law, [N.Y. C.P.L.R. 901\(b\)](#), because applicable federal law that dictated application of state law, Telephone Consumer Protection Act, [47 USCS § 227](#), did not specifically authorize class actions for recovery of minimum \$500 established in act. [Weber v. U.S. Sterling Secs., Inc., 282 Conn. 722, 924 A.2d 816, 2007 Conn. LEXIS 235 \(Conn. 2007\)](#).

Appellate court erred in holding that trial court's judgment denying proposed class representative's motion for class certification had to be reversed on ground that commonality requirement of Georgia's class action statute ([O.C.G.A. § 9-11-23](#)) had been met because federal regulation regarding Telephone Consumer Protection Act, [47 USCS § 227](#) (TCPA), allowed unsolicited faxes to be sent to person or entity without violating TCPA where sender and person or entity had "established business relationship" and proposed class representative did not meet her burden of showing how many proposed class members qualified under that exception. [Carnett's, Inc. v. Hammond, 279 Ga. 125, 610 S.E.2d 529, 2005 Ga. LEXIS 169 \(2005\)](#).

Class certification for claim under [47 USCS § 227](#) was proper because, inter alia, recipient was not required to prove at time of certification that all or most of potential class were entitled to damages under TCPA, and fact that some class members fell within statutory exceptions did not defeat certification; over 100,000 individual small claims actions was not superior to single class action, and extent of distributor's liability did not affect superiority of class action procedure in this case; monetary damages were appropriate under [Kan. Stat. Ann. § 60-223\(b\)\(1\)\(A\)](#) and recipient was not required to allege exact number or identity of class members. [Critchfield Physical Therapy v. Taranto Group, Inc., 293 Kan. 285, 263 P.3d 767, 2011 Kan. LEXIS 328 \(Kan. 2011\)](#).

## 18. Insurer's duty to defend, generally

Unsolicited fax prohibition of Telephone Consumer Protection Act, [47 USCS § 227](#), protected "seclusion" privacy, for which content was irrelevant; plaintiff insured, bank that was being sued in class action under TCPA, did not buy insurance policies for seclusion damages; instead, it insured against, among other things, damages arising from violations of content-based privacy; thus, insurer had no duty to defend in class action. *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.* (2005, CA4 Va) 407 F3d 631cert den 546 U.S. 978, 126 S. Ct. 568, 163 L. Ed. 2d 463 (2005).

Insurance company had duty to defend insured in class action suit alleging violations of Telephone Consumer Protection Act (Act), [47 USCS § 227](#), because class action complaint alleged injury under policy because policy listed "private nuisance" under definition of injury and violations of Act were viewed as private nuisances. [Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc., 401 F.3d 876, 2005 U.S. App. LEXIS 4554 \(8th Cir. 2005\)](#).

In granting partial judgment on pleadings to insured, court found that potential of coverage existed under both property damage and advertising injury provisions of policy and that insurer had duty to defend insured in underlying action for acts allegedly taken by insured, which included transmitting unsolicited facsimiles containing advertising material in violation of Telephone Consumer Protection Act, [47 USCS § 227](#). *Park Univ. Enters. v. Am. Cas. Co. of Reading* (2004, DC Kan) 314 F Supp 2d 1094affd [442 F.3d 1239 \(CA10 Kan 2006\)](#).

Insurer was not required to defend or indemnify insured in connection with suit alleging that insured had sent unsolicited faxes in violation of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#); underlying

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allegations did not fall within definition under insured's policy of "advertising injury," as right to privacy protected under that provision involved interests in secrecy, while privacy right protected under TCPA was right of seclusion; also, insured's alleged actions did not involve "accident" triggering property damage coverage, and policy exclusion for expected or intended property damage was applicable. *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.* (2006, ED Pa) 432 F Supp 2d 488affd [503 F.3d 339 \(CA3 Pa 2007\)](#).

Insurer's declaratory judgment action, seeking determination that it had no obligation to defend or indemnify its insured in connection with underlying judgment that arose as part of class action settlement based on insured's alleged violation of Telephone Consumer Protection Act, was properly resolved in its favor because insurance policy did not cover underlying judgment. [Auto-Owners Ins. Co. v. Stevens & Ricci, Inc., 835 F.3d 388, 2016 U.S. App. LEXIS 16182 \(3d Cir. 2016\)](#).

In insurer's declaratory judgment action, judgment against insured was not within terms of business owners' policy because its intentional conduct in allegedly sending unsolicited fax advertisements was not "accident" for purposes of "property damage" coverage under either Pennsylvania or Arizona law, and damage to class members was not covered "advertising injury" because there was no violation of privacy interest in secrecy. [Auto-Owners Ins. Co. v. Stevens & Ricci, Inc., 835 F.3d 388, 2016 U.S. App. LEXIS 16182 \(3d Cir. 2016\)](#).

CGL policies' coverage for "accidents" did not cover claims against the insured for violations of the Telephone Consumer Protection Act, [47 U.S.C.S. § 227](#), arising out of the insured's sending fax advertisements without the recipients' permission, because the faxes were intentionally sent, even if under the mistaken belief that there was consent. [G.M. Sign, Inc. v. St. Paul Fire & Marine Ins. Co., 768 Fed. Appx. 982, 2019 U.S. App. LEXIS 10868 \(11th Cir. 2019\)](#).

Insurer had to indemnify insured for underlying judgment in case arising under TCPA because it wrongfully refused to defend; TCPA statutory damages of \$500 per occurrence were not damages in nature of fines or penalties. ([Olsen v. Siddiqi, 371 S.W.3d 93 \(Mo. App. 2012\)](#) is not to be followed on issue of whether damages under TCPA were fines or penalties). [Columbia Cas. Co. v. Hiar Holding, L.L.C., 411 S.W.3d 258, 2013 Mo. LEXIS 49 \(Mo. 2013\)](#).

## 19. Dismissals

Claims under Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., were unassignable because they were in nature of personal-injury, privacy claims; because underlying assignment of TCPA claims was invalid, corporations lacked standing to bring actions for damages for unsolicited faxes under TCPA, and district court's dismissal based upon lack of standing was affirmed. [US Fax Law Ctr., Inc. v. Ihire, Inc., 476 F.3d 1112, 2007 U.S. App. LEXIS 2622 \(10th Cir. 2007\)](#), cert. denied, 552 U.S. 1139, 128 S. Ct. 1062, 169 L. Ed. 2d 806, 2008 U.S. LEXIS 1012 (2008).

Where assignee asserted invasion of privacy claims against company and its employees for sending junk faxes in violation of Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., TCPA claims were dismissed because claims were not assignable pursuant to *Colo. Rev. Stat. 13-20-101(1)*. *US Fax Law Ctr., Inc. v. iHire, Inc.* (2005, DC Colo) 362 F Supp 2d 1248affd [476 F.3d 1112 \(CA10 Colo 2007\)](#).

Statutory claim brought by recipients of unwanted advertising via telephone facsimile (fax) will not be dismissed, because ban on unsolicited fax advertisements set forth at [47 USCS § 227\(b\)\(1\)\(C\)](#) is narrowly tailored to government's asserted interest in protecting consumers from unfair shifting of advertising costs and from interruption of their use of their own fax machines, and does not violate First Amendment guarantee of commercial free speech. [Kenro, Inc. v. Fax Daily, 962 F. Supp. 1162, 25 Media L. Rep. \(BNA\) 1908, 1997 U.S. Dist. LEXIS 5628 \(S.D. Ind. 1997\)](#).

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Parent company of debt collector was dismissed from action alleging violations of Telephone Consumer Protection Act of 1991 because plaintiff failed to allege that parent company made any phone calls, and her generalized allegations about company's business conduct fell far short of intrusive control required to hold parent company accountable for its subsidiary's actions. [Zarichny v. Complete Payment Recovery Servs., 80 F. Supp. 3d 610, 90 Fed. R. Serv. 3d \(Callaghan\) 1332, 2015 U.S. Dist. LEXIS 6556 \(E.D. Pa. 2015\).](#)

Constitutional challenge to federal statute prohibiting unsolicited fax advertisements is dismissed, even if court has subject-matter jurisdiction, where recipient of such fax has sued sender in state court, because, given that Congress has allocated interpretation and application of Telephone Consumer Protection Act ([47 USCS § 227](#)) to state courts to complement preexisting state-law causes of action, there is no strong reason why federal court should interlope on state adjudication of § 227(b) claim. [UA Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965, 2000 U.S. Dist. LEXIS 21219 \(D. Ariz. 2000\).](#)

Defendants' offer of judgment, which was declined by plaintiffs, did not require dismissal of purported class action alleging violations of Telephone Consumer Protection Act (TCPA) as moot because dispute remained regarding damages recoverable on individual claims, which sufficed to satisfy Article III's case-or-controversy requirement. [Kaye v. Amicus Mediation & Arbitration Group, Inc., 300 F.R.D. 67, 88 Fed. R. Serv. 3d \(Callaghan\) 1002, 2014 U.S. Dist. LEXIS 72377 \(D. Conn. 2014\).](#)

Where it was determined that violation of Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., was also violation of state Consumer Protection Act, *Colo. Rev. Stat. § 6-1-101* et seq., and where it was determined that assignors in case were not actual consumers who purchased any good, service, or property provided by defendants, and neither was plaintiff actual consumer or purchaser of defendants' goods, services, or property, or residential telephone subscriber under *Colo. Rev. Stat. § 6-1-113(a)*, or party injured in course of its business due to defendants' allegedly deceptive trade practices under *Colo. Rev. Stat. § 6-1-113(c)*, court granted defendants' motion for summary judgment pursuant to [Fed. R. Civ. P. 56](#) and their motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#). *US Fax Law Ctr., Inc. v iHire, Inc., 374 F. Supp. 2d 924 (DC Colo 2005).*

*Unpublished decision:* District court properly dismissed complaint filed under TCPA against fast food corporation, because corporation did not ratify text message advertisement that was sent by association of local store operators. Neither direct liability, nor vicarious liability applied; all control over manner and means of text message campaign was exercised by association of local store operators. [Thomas v. Taco Bell Corp., 582 Fed. Appx. 678, 2014 U.S. App. LEXIS 12547 \(9th Cir. 2014\).](#)

Trial court erred by dismissing for lack of subject matter jurisdiction state consumer protection division's enforcement action against Florida telemarketer for violating [Utah Code Ann. § 13-25a-103\(1\)](#) and [Utah Code Ann. § 13-26-3](#) by using automated dialer to place unsolicited telephone call to Utah resident as [47 USCS § 227](#), part of Telephone Consumer Protection Act (TCPA), did not preempt Utah laws; TCPA did not meet requirements necessary to show express preemption, and telemarketer failed to establish that TCPA clearly intended to "occupy field" such that Utah laws concerning interstate telephone calls were preempted. [Utah Div. of Consumer Prot. v. Flagship Capital, 2005 UT 76, 125 P.3d 894, 2005 Utah LEXIS 122 \(Utah 2005\).](#)

Individual's Telephone Consumer Protection Act of 1991 (TCPA) claim against loan servicer would not be dismissed since even if he failed to state a claim regarding the servicer's use of automatic telephone dialing system, his TCPA claim would proceed based on his allegation that the servicer used artificial or prerecorded voice. [Gonzalez v. Ocwen Loan Servicing, LLC, 2018 U.S. Dist. LEXIS 153480 \(M.D. Fla. Sept. 5, 2018\).](#)

## 20. Summary judgment

Because FCC's construction of statute was reasonable interpretation of Congressional intent under Telephone Consumer Protection Act and did not conflict with statute's underlying legislative history, appellate court had to defer to Agency's construction; there was sufficient record evidence to support golf course's claim that unsolicited

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fax advertisement was transmitted on behalf of dentist to golf course, and granting of summary judgment in favor of dentist was error. [\*Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.\*, 781 F.3d 1245, 25 Fla. L. Weekly Fed. C 968, 91 Fed. R. Serv. 3d \(Callaghan\) 364, 2015 U.S. App. LEXIS 3630 \(11th Cir. 2015\)](#).

Where defendant filed motion for summary judgment asserting statute of limitations defense to plaintiff's Telephone Consumer Protection Act claim and where district court granted that motion after plaintiff failed to oppose defense, then plaintiff waived any argument pertaining to procedural basis for district court's ruling by only addressing substantive merits of its claim in its opening brief; plaintiff could not prevail on plain error review, as district court's reasoning in its alternative holding on merits on issue of whether American Pipe tolling applied was not clearly or obviously wrong; nor did appeals court have to decide whether Massachusetts three-year statute of limitations or federal four-year catchall provision applied. [\*Sparkle Hill, Inc. v. Interstate Mat Corp.\*, 788 F.3d 25, 2015 U.S. App. LEXIS 9236 \(1st Cir. 2015\)](#).

Defendants were properly granted summary judgment on plaintiffs' claim that defendants were vicariously liable under Telephone Consumer Protection Act (TCPA) for illegal calls made by telemarketers promoting defendants' products because plaintiffs failed to rebut defendants' evidence that they repudiated telemarketers' alleged TCPA violations, their argument that defendants rewarded telemarketers for violating TCPA was based on speculative allegations and ignored element of ratification, and their argument that defendants benefited from telemarketers alleged TCPA violations was based on conjecture. [\*Hodgin v. UTC Fire & Sec. Ams. Corp.\*, 885 F.3d 243, 100 Fed. R. Serv. 3d \(Callaghan\) 202, 2018 U.S. App. LEXIS 6310 \(4th Cir. 2018\)](#).

Where it was determined that violation of Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., was also violation of state Consumer Protection Act, *Colo. Rev. Stat. § 6-1-101* et seq., and where it was determined that assignors in case were not actual consumers who purchased any good, service, or property provided by defendants, and neither was plaintiff actual consumer or purchaser of defendants' goods, services, or property, or residential telephone subscriber under *Colo. Rev. Stat. § 6-1-113(a)*, or party injured in course of its business due to defendants' allegedly deceptive trade practices under *Colo. Rev. Stat. § 6-1-113(c)*, court granted defendants' motion for summary judgment pursuant to [Fed. R. Civ. P. 56](#) and their motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#). *US Fax Law Ctr., Inc. v iHire, Inc.*, [374 F. Supp. 2d 924 \(DC Colo 2005\)](#).

Satellite television provider was entitled to summary judgment in consumer's action alleging violations of Telephone Consumer Protection Act of 1991, [47 USCS § 227](#), and Ohio Consumer Sales Practices Act, [Ohio Rev. Code Ann. § 1345.02](#), on basis of numerous telemarketing calls allegedly made to consumer's residence; provider could not be held liable for alleged telemarketing violations of its independent contractor retailers because consumer failed to put forth any evidence from which reasonable jury could find that provider retained right to control telemarketing activities of independent contractors. [\*Charvat v. EchoStar Satellite, LLC\*, 676 F. Supp. 2d 668, 2009 U.S. Dist. LEXIS 116556 \(S.D. Ohio 2009\)](#), vacated, remanded, [535 Fed. Appx. 513, 2013 FED App. 898N, 2013 U.S. App. LEXIS 21359 \(6th Cir. 2013\)](#).

Consumer was entitled to summary judgment where attorney and his law firm violated [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#) by intentionally using prerecorded voice to place automated calls to consumer's cellular telephone for non-emergency debt collection purpose without consumer's consent; attorney was personally liable for law firm's violation because he directly participated in statutory violation. [\*Versteeg v. Bennett, DeLoney & Noyes, P.C.\*, 775 F. Supp. 2d 1316, 2011 U.S. Dist. LEXIS 40351 \(D. Wyo. 2011\)](#).

Plaintiff was granted summary judgment on her claim that defendant violated Telephone Consumer Protection Act by making 27 calls and leaving two prerecorded messages on her cellular phone after January 8, 2010 and was awarded \$14,500 in statutory damages under [47 USCS § 227\(b\)\(3\)\(B\)](#). [\*Beal v. Wyndham Vacation Resorts, Inc.\*, 956 F. Supp. 2d 962, 2013 U.S. Dist. LEXIS 89840 \(W.D. Wis. 2013\)](#).

Based on Federal Communications Commission's statutory interpretation of provision of Telephone Consumer Protection Act, facsimile recipients were not entitled to partial summary judgment against sender that might not

have had high degree of involvement in unlawful activity. [Asher & Simons, P.A. v. J2 Global Can., Inc.](#), 977 F. Supp. 2d 544, 2013 U.S. Dist. LEXIS 148972 (D. Md. 2013).

Dental practice was entitled to summary judgment because vicarious liability was not pleaded as to unsolicited fax advertisement that could have been sent only by its agent; moreover, facts proffered were insufficient to establish vicarious liability on theories of formal agency, apparent authority, and ratification absent evidence fax content was advertisement or anyone other than agent knew of its content, and recipient could not demonstrate injury in fact without having read it. [Palm Beach Golf Center-Boca, Inc. v. Sarris](#), 981 F. Supp. 2d 1239, 2013 U.S. Dist. LEXIS 155912 (S.D. Fla. 2013), rev'd, remanded, 771 F.3d 1274, 25 Fla. L. Weekly Fed. C 575, 2014 U.S. App. LEXIS 20870 (11th Cir. 2014), rev'd, remanded, 781 F.3d 1245, 25 Fla. L. Weekly Fed. C 968, 91 Fed. R. Serv. 3d (Callaghan) 364, 2015 U.S. App. LEXIS 3630 (11th Cir. 2015).

*Unpublished decision:* Definition of “telephone solicitation” was clear and did not include implicit “purchases of peace” and investments in services that collection agency never offered to plaintiff; because collection agency’s calls were not telephone solicitations, court affirmed district court’s grant of summary judgment in favor of collection agency on plaintiff’s [47 USCS § 227\(c\)\(5\)](#) claim. [Meadows v. Franklin Collection Serv.](#), 414 Fed. Appx. 230, 2011 U.S. App. LEXIS 2779 (11th Cir. 2011).

*Unpublished decision:* Collection agency did not violate Telephone Consumer Protection Act (TCPA) because its prerecorded debt-collection calls were exempt from TCPA’s prohibitions on such calls to residences; because collection agency had existing business relationship with intended recipient of its prerecorded calls, and calls were made for commercial, non-solicitation purpose, calls were exempt from TCPA’s prohibitions of prerecorded calls to residences. [Meadows v. Franklin Collection Serv.](#), 414 Fed. Appx. 230, 2011 U.S. App. LEXIS 2779 (11th Cir. 2011).

*Unpublished decision:* In pro se Telephone Consumer Protection Act in which plaintiff appealed district court’s entry of summary judgment in favor of company by challenging its ruling on admission of evidence, company vice-president’s declaration and call logs were admissible as business records under [Fed. R. Evid. 803\(6\)](#); vice-president was custodian because he was familiar with company’s record keeping practices, and he did not need to have personally made calls to plaintiff. [Norman v. AllianceOne Receivables Mgmt.](#), 637 Fed. Appx. 214, 99 Fed. R. Evid. Serv. (CBC) 310, 2015 U.S. App. LEXIS 22307 (7th Cir. 2015).

*Unpublished decision:* In pro se Telephone Consumer Protection Act in which plaintiff appealed district court’s entry of summary judgment in favor of company by challenging its ruling on admission of evidence, court did not abuse its discretion in excluding as hearsay excerpt from Federal Communications Commission guide about dead air as it did not fit into any relevant hearsay exceptions for public records. [Norman v. AllianceOne Receivables Mgmt.](#), 637 Fed. Appx. 214, 99 Fed. R. Evid. Serv. (CBC) 310, 2015 U.S. App. LEXIS 22307 (7th Cir. 2015).

Telephone Consumer Protection Act of 1991 does not preempt application of North Dakota telemarketing statutes to automated political polling calls made from Virginia to residents in North Dakota; thus, summary judgment finding telemarketer to be in violation of North Dakota statute was affirmed. [State ex rel. Stenehjem v. FreeEats.com, Inc.](#), 2006 ND 84, 712 N.W.2d 828, 2006 N.D. LEXIS 87 (N.D.), cert. denied, 549 U.S. 953, 127 S. Ct. 383, 166 L. Ed. 2d 270, 2006 U.S. LEXIS 7525 (2006).

## 21. —Insurer's duty to defend

Insureds were entitled to summary judgment on insurance company’s action seeking declaration that it did not have duty to defend or indemnify any judgments entered against defendants in two state court class-action lawsuits that alleged violations of Telephone Consumer Protection Act (TCPA); remedy offered by TCPA was actual damages and because underlying complaint potentially sought to recover actual monetary loss, potential damages were sought, which triggered duty to defend. [Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.](#) (2004, ED Mo) 300 F Supp 2d 888affd [401 F.3d 876 \(CA8 Mo 2005\)](#).

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Insured were granted summary judgment on their duty to defend suit against insurers because, in light of state case law, similarities between Iowa and state policy interpretation rules, and approach of vast majority of courts that had looked at this issue, court held that Iowa Supreme Court would interpret “advertising injury” to include Telephone Consumer Protection Act junk-fax suits. [\*Am. Home Assur. Co. v. McLeod USA, Inc.\*, 475 F. Supp. 2d 766, 2007 U.S. Dist. LEXIS 8706 \(N.D. Ill. 2007\)](#).

Appellate court properly affirmed trial court’s partial summary judgment grant in favor of advertiser that found insurers had common law duty to defend advertiser from claims that advertiser violated Telephone Consumer Protection Act, [47 USCS § 227](#); individual’s lawsuit alleging that advertiser violated such law by sending unsolicited facsimile advertisements set forth facts that brought individual’s lawsuit potentially within coverage of relevant policies’ “advertising injury” provisions that protected advertiser from claims that publication of material violated person’s right of privacy. [\*Valley Forge Ins. Co. v. Swiderski Elecs., Inc.\*, 223 Ill. 2d 352, 307 Ill. Dec. 653, 860 N.E.2d 307, 2006 Ill. LEXIS 1655 \(Ill. 2006\)](#).

## 22. —Injunctions

Permanent injunction enjoining Federal Trade Commission (FTC) from implementing its national do-not-call list was stayed because there was substantial likelihood that FTC would be able to show reasonable fit between list and substantial governmental interests. [\*FTC v. Mainstream Mktg. Servs., Inc.\*, 345 F.3d 850, 2003-2 Trade Cas. \(CCH\) ¶74170, 2003 U.S. App. LEXIS 20366 \(10th Cir. 2003\)](#).

Court enjoined fax advertising service and its principal from sending unsolicited faxes to state residents where State was likely to prevail on its argument that Telephone Consumer Protection Act of 1991 (TCPA) did not violate First Amendment; State had legitimate interest in preventing invasion of privacy and cost-shifting effects of fax advertising, TCPA’s allowance of certain fax advertising did not undermine its effectiveness in furthering State’s interests, and TCPA was not more restrictive than necessary. [\*Minn. v. Sunbelt Communs. & Mktg.\*, 282 F. Supp. 2d 976, 2002 U.S. Dist. LEXIS 18990 \(D. Minn. 2002\)](#).

State was granted preliminary injunction under [47 USCS § 227\(f\)\(1\)](#) to enjoin fax advertising service and its principal from faxing unsolicited advertising to state residents where service and principal admitted in their answer that they had been sending faxes, where injunction fulfilled Telephone Consumer Protection Act’s legislative purpose in protecting privacy interest of residential telephone subscribers, where harm did not fall disproportionately on service and principal, and where State was likely to prevail on its argument that Act did not violate First Amendment. [\*Minn. v. Sunbelt Communs. & Mktg.\*, 282 F. Supp. 2d 976, 2002 U.S. Dist. LEXIS 18990 \(D. Minn. 2002\)](#).

## 23. Appeal and review

Judgment in favor of insured was affirmed where district court correctly determined that insurer had duty to defend insured in underlying state action for violations of Telephone Consumer Protection Act, [47 USCS § 227](#), under both “bodily injury” and “advertising injury” provisions of commercial general liability policy. [\*Park Univ. Enters. v. Am. Cas. Co.\*, 442 F.3d 1239, 2006 U.S. App. LEXIS 7458 \(10th Cir. 2006\)](#).

Claims under Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., were unassignable because they were in nature of personal-injury, privacy claims; because underlying assignment of TCPA claims was invalid, corporations lacked standing to bring actions for damages for unsolicited faxes under TCPA, and district court’s dismissal based upon lack of standing was affirmed. [\*US Fax Law Ctr., Inc. v. Ihire, Inc.\*, 476 F.3d 1112, 2007 U.S. App. LEXIS 2622 \(10th Cir. 2007\)](#), cert. denied, 552 U.S. 1139, 128 S. Ct. 1062, 169 L. Ed. 2d 806, 2008 U.S. LEXIS 1012 (2008).



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Upon certification of class of junk fax recipients in action under Telephone Consumer Protection Act, defendants were not entitled to leave to appeal from certification order because they failed to show that proposed appeal had merit. [Chapman v. Wagener Equities, Inc., 747 F.3d 489, 2014 U.S. App. LEXIS 5962 \(7th Cir. 2014\)](#).

Upon certification of class of junk fax recipients in action under Telephone Consumer Protection Act, there was no basis to allow defendants leave to appeal from certification order because they failed to show that class representative was not adequate or that there was cause to disqualify class counsel. [Chapman v. Wagener Equities, Inc., 747 F.3d 489, 2014 U.S. App. LEXIS 5962 \(7th Cir. 2014\)](#).

In case in which plaintiffs alleged that defendant violated Telephone Consumer Protection Act, plaintiffs' dilatory motion for reconsideration failed to toll time to appeal under *Fed. R. App. P. 4(a)(4)(A)(vi)*, and plaintiffs' notice of appeal was filed more than year after judgment entered against them; accordingly, circuit court lacked jurisdiction to hear appeal. [Weitzner v Cynosure, Inc., 2015 U.S. App. LEXIS 16504 \(CA2 NY 2015\)](#).

*Unpublished decision*: Because entry of judgment pursuant to defendant's unaccepted [Fed. R. Civ. P. 68](#) offer frustrated consumer's ability to challenge district court's ruling that he must demonstrate likelihood of future violations in order to obtain injunction under Telephone Consumer Protection Act, consumer's appeal was moot; he did not claim that, if he were to prevail, injunction sought in present case would differ in any manner from permanent injunction he had already obtained. [Bank v. Caribbean Cruise Line, Inc., 606 Fed. Appx. 28, 2015 U.S. App. LEXIS 11882 \(2d Cir. 2015\)](#).

Appellate court erred in holding that trial court's judgment denying proposed class representative's motion for class certification had to be reversed on ground that commonality requirement of Georgia's class action statute ([O.C.G.A. § 9-11-23](#)) had been met because federal regulation regarding Telephone Consumer Protection Act, [47 USCS § 227](#) (TCPA), allowed unsolicited faxes to be sent to person or entity without violating TCPA where sender and person or entity had "established business relationship" and proposed class representative did not meet her burden of showing how many proposed class members qualified under that exception. [Carnett's, Inc. v. Hammond, 279 Ga. 125, 610 S.E.2d 529, 2005 Ga. LEXIS 169 \(2005\)](#).

Appellate court erred in holding that trial court's judgment denying proposed class representative's motion for class certification had to be reversed on ground that commonality requirement of Georgia's class action statute ([O.C.G.A. § 9-11-23](#)) had been met because federal regulation regarding Telephone Consumer Protection Act, [47 USCS § 227](#) (TCPA), allowed unsolicited faxes to be sent to person or entity without violating TCPA where sender and person or entity had "established business relationship" and proposed class representative did not meet her burden of showing how many proposed class members qualified under that exception. [Carnett's, Inc. v. Hammond, 279 Ga. 125, 610 S.E.2d 529, 2005 Ga. LEXIS 169 \(2005\)](#).

Appellate court properly affirmed trial court's partial summary judgment grant in favor of advertiser that found insurers had common law duty to defend advertiser from claims that advertiser violated Telephone Consumer Protection Act, [47 USCS § 227](#); individual's lawsuit alleging that advertiser violated such law by sending unsolicited facsimile advertisements set forth facts that brought individual's lawsuit potentially within coverage of relevant policies' "advertising injury" provisions that protected advertiser from claims that publication of material violated person's right of privacy. [Valley Forge Ins. Co. v. Swiderski Elecs., Inc., 223 Ill. 2d 352, 307 Ill. Dec. 653, 860 N.E.2d 307, 2006 Ill. LEXIS 1655 \(Ill. 2006\)](#).

## 24. Miscellaneous

Preliminary injunction was properly imposed in action under Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#); plaintiff established likelihood of success on merits of claim that debt collection service violated TCPA by using predictive dialer to place calls to California cellular telephone numbers that were obtained via skip-tracing; predictive dialers were "automated telephone dialing system" within meaning of § 227(b)(1). *Meyer v. Portfolio*

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*Recovery Assocs., LLC*, 707 F.3d 1036, 2012 U.S. App. LEXIS 26708 (9th Cir. 2012), cert. denied, 569 U.S. 975, 133 S. Ct. 2361, 185 L. Ed. 2d 1068, 2013 U.S. LEXIS 3536 (2013).

District court improperly held that defendant's offer to pay plaintiff full statutory damages for any calls that violated Telephone Consumer Protection Act rendered plaintiff's case moot because defendant did not offer to satisfy plaintiff's entire demand, but rather, it offered to pay only for dialer-generated calls and acknowledged only six such calls, significantly fewer than 20 or more calls that plaintiff identified in her complaint, translating to difference of at least \$21,000 in damages due. [Scott v. Westlake Servs. LLC](#), 740 F.3d 1124, 2014 U.S. App. LEXIS 1335 (7th Cir. 2014).

District court properly dismissed plaintiff's action alleging that defendants violated Telephone Communications Practice Act by sending him two text messages because plaintiff, by voluntarily providing his cell phone number to defendants, gave his prior express consent to be contacted. [Murphy v. DCI Biologicals Orlando, LLC](#), 797 F.3d 1302, 25 Fla. L. Weekly Fed. C 1513, 2015 U.S. App. LEXIS 14632 (11th Cir. 2015).

In action alleging violations of Telephone Consumer Protection Act, district court did not err in rejecting reading of statute and regulations that imposed strict liability when instructing jury on meaning of sender because challenged instruction fairly and accurately summarized law. [Paldo Sign & Display Co. v. Wagener Equities, Inc.](#), 825 F.3d 793, 100 Fed. R. Evid. Serv. (CBC) 806, 2016 U.S. App. LEXIS 10878 (7th Cir. 2016), cert. denied, 137 S. Ct. 637, 196 L. Ed. 2d 520, 2017 U.S. LEXIS 662 (2017).

Under Telephone Consumer Protection Act, [47 USCS § 227](#), district court erred in basing attorney's fees on total value of damages award where court had already determined that this was not common-fund case, and adopted distribution scheme could have resulted in award of more than \$500 per fax. [Holtzman v. Turza](#), 828 F.3d 606, 2016 U.S. App. LEXIS 12594 (7th Cir. 2016), cert. denied, 137 S. Ct. 1330, 197 L. Ed. 2d 517, 2017 U.S. LEXIS 1912 (2017).

Because proper interpretation of term "called party" under Telephone Consumer Protection Act of 1991 means subscriber to cell phone service or user of cell phone called, defendant did not have consent here from "called party" to autodial cell number because consent was from party that formerly had cell phone number, not current user or subscriber. [Breslow v. Wells Fargo Bank, N.A.](#), 2014 U.S. App. LEXIS 10457 (11th Cir. June 5, 2014), vacated, op. withdrawn, sub. op., 755 F.3d 1265, 24 Fla. L. Weekly Fed. C 1405, 2014 U.S. App. LEXIS 10623 (11th Cir. 2014).

Where doctor met with representatives from pharmaceutical company on multiple occasions to discuss various pharmaceutical drugs, and where doctor provided company with his business card containing his fax number, and where two fax advertisements thereafter sent to doctor did not violate TCPA because faxes were solicited, fact that two solicited fax advertisements did not contain any opt-out language did not violate TCPA because statute was silent regarding solicited faxes and opt-out notices, and thus, it did not require opt-out language. [Physicians Healthsource, Inc. v. Cephalon, Inc.](#), 954 F.3d 615, 2020 U.S. App. LEXIS 9782 (3d Cir. 2020).

Because a bank waived its right to invoke the contractual waiver to a jury trial, the trial court erred in ruling in favor of the bank as to a customer's as to the claim that it violated the Telephone Consumer Protection Act; the bank did not raise the jury waiver in its answer. [Walton v. First Merchant's Bank](#), 2020 U.S. App. LEXIS 21032 (7th Cir. July 7, 2020), reh'g denied, 2020 U.S. App. LEXIS 24300 (7th Cir. July 31, 2020), cert. denied, 2020 U.S. LEXIS 5160 (U.S. Oct. 19, 2020).

Partial judgment on pleadings in favor of company was proper, because complaint did not plausibly allege that plaintiff was called with device that had capacity to store or produce numbers that had been randomly or sequentially generated, when best reading of this provision required that automated telephone dialing system have capacity to generate numbers randomly or sequentially and then to dial them, even if that capacity was not deployed for practical reasons. [Pinkus v. Sirius XM Radio, Inc.](#), 319 F. Supp. 3d 927, 2018 U.S. Dist. LEXIS 125043 (N.D. Ill. 2018).

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Because court adopted interpretation of automatic telephone dialing system (ATDS) definition that permits dialing pre-existing customer lists, defendant's system was not exempt from Telephone Consumer Protection Act (TCPA), [47 U.S.C.S. § 227](#) et seq., as matter of law; indeed, because system automatically dialed numbers from set customer list, it fell within definition of ATDS. [Espejo v. Santander Consumer United States, Inc., 2019 U.S. Dist. LEXIS 98445 \(N.D. Ill. June 12, 2019\)](#).

Plaintiff was not permitted additional discovery concerning text messages he received in response to messages he sent after defendant removed him from its database as he consented to those messages by sending texts to number known to be affiliated with automated system, with content other than "STOP," including questions. [Franklin v. Express Text, LLC, 727 Fed. Appx. 853, 2018 U.S. App. LEXIS 6102 \(7th Cir. 2018\)](#).

Corporate officer may be held personally liable under [47 USCS § 227](#) if he or she had direct, personal participation or personally authorized conduct found to have violated statute, and was not merely tangentially involved. [Texas v. Am. Blast Fax, Inc., 164 F. Supp. 2d 892, 2001 U.S. Dist. LEXIS 12879 \(W.D. Tex. 2001\)](#).

Business owner was barred from pursuing Telephone Consumer Protection Act, [47 USCS § 227](#), action by doctrine of judicial estoppel; he signed his bankruptcy statement of financial affairs and schedules without disclosing action and did not amend them until after he received discharge, and court would not allow him to pursue his claims by misleading bankruptcy court and trustee. [Kopff v. World Research Group, LLC, 568 F. Supp. 2d 39, 2008 U.S. Dist. LEXIS 58333 \(D.D.C. 2008\)](#).

In light of plain language of statute, and U.S. Supreme Court precedent, United States District Court for District of Maryland would not imply expanded liability under Federal Telephone Consumer Protection Act for aiding and abetting. [Baltimore-Washington Tel. Co. v. Hot Leads Co., 584 F. Supp. 2d 736, 2008 U.S. Dist. LEXIS 105149 \(D. Md. 2008\)](#).

Borrowers sufficiently stated claim against lender under [47 USCS § 227\(b\)](#) because they alleged that lender made artificial or pre-recorded calls multiple times day and lender failed to show that it qualified for exemption under § 227(b) and [47 CFR § 64.1200\(f\)\(4\)](#). [McGrew v. Countrywide Home Loans, Inc., 628 F. Supp. 2d 1237, 2009 U.S. Dist. LEXIS 57364 \(S.D. Cal. 2009\)](#).

In case in which plaintiff alleged defendant violated Telephone Consumer Protection Act (TCPA) by calling plaintiff on his cell phone using automatic telephone dialing system and/or prerecorded or automatic voice messages, plaintiff had no duty to mitigate damages under [47 USCS § 227](#). [Powell v. West Asset Mgmt., 773 F. Supp. 2d 761, 2011 U.S. Dist. LEXIS 32836 \(N.D. Ill. 2011\)](#).

Wireless phone service providers were entitled to compel arbitration under [9 USCS §§ 2](#) and [4](#); consumers did not articulate any application of state law that would survive preemptive sweep of FAA in light of U.S. Supreme Court's decision in *Concepcion*, and arbitration agreements did not deprive consumers of opportunity to vindicate claims under [47 USCS §§ 201\(b\)](#) and [227\(b\)](#). [Adams v. AT&T Mobility, LLC, 816 F. Supp. 2d 1077, 2011 U.S. Dist. LEXIS 118375 \(W.D. Wash. 2011\)](#).

Defendant could held liable under Telephone Consumer Protection Act even if it did not physically send messages at issue. [In re Jiffy Lube Int'l, Inc., 847 F. Supp. 2d 1253, 2012 U.S. Dist. LEXIS 31926 \(S.D. Cal. 2012\)](#).

Pursuant to [28 USCS § 1407](#), 31 cases sharing factual issues regarding common defendant's collection policies and actions, including whether defendant violated Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), were ordered centralized in Northern District of Illinois because centralization would serve convenience of parties and witnesses and promote just and efficient conduct of litigation. [In re Capital One Tel. Consumer Prot. Act Litig., 908 F. Supp. 2d 1366, 2012 U.S. Dist. LEXIS 177693 \(J.P.M.L. 2012\)](#), transferred, [2012 U.S. Dist. LEXIS 181151 \(J.P.M.L. Dec. 21, 2012\)](#).

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Claims were timely under applicable limitations period of [28 USCS § 1658\(a\)](#) because suit was filed within four years after first fax was sent. [Bais Yaakov of Spring Valley v. Alloy, Inc., 936 F. Supp. 2d 272, 2013 U.S. Dist. LEXIS 45025 \(S.D.N.Y. 2013\)](#).

In class action that alleged that debt collection company violated Telephone Consumer Protection Act (TCPA) by placing millions of calls to lead plaintiff's and other class members' cell phones by using automated dialing systems in violation of [47 USCS § 227\(b\)\(1\)\(A\)\(iii\)](#), magistrate judge compelled company to produce in discovery information about other TCPA suits against it, which were relevant to proving knowing violation; actual prerecorded messages company sent, not just script for such calls; statistical information about efficacy of its auto-dialers and prerecorded messages; and identity of its "caller ID" information and dates that it used each auto-dialing system. [Donnelly v. NCO Fin. Sys., 263 F.R.D. 500, 2009 U.S. Dist. LEXIS 124730 \(N.D. Ill. 2009\)](#).

In plaintiff's action brought under [47 USCS § 227](#), court granted defendant's motion for protective order under [Fed. R. Civ. P. 26\(c\)](#) because plaintiff's requested deposition topics under [Fed. R. Civ. P. 30\(b\)\(6\)](#) were beyond scope of allegations set forth in her petition, and allowing nationwide discovery would cause defendant undue burden and expense. [Heller v. HRB Tax Group, Inc., 287 F.R.D. 483, 2012 U.S. Dist. LEXIS 164595 \(E.D. Mo. 2012\)](#).

In suit brought by plaintiffs asserting violations of [47 USCS § 227](#) and Maryland Telephone Consumer Protection Act, [Md. Code Ann., Com. Law §§ 14-3201](#) and 14-3202, plaintiffs' motion for reconsideration of district court's order granting defendants protective order directing one plaintiff to comply with two Canadian statutes during discovery process was denied because plaintiffs did not point to any relevant case law or evidence that was unavailable at time of court's order and merely reiterated their arguments previously rejected by court. [AGV Sports Group, Inc v. Protus IP Solutions, Inc., 2010 U.S. Dist. LEXIS 37404 \(D. Md. Apr. 15, 2010\)](#).

*Unpublished decision:* Defendant failed to show intervening change in controlling law, new evidence, or need to correct clear error of law or fact or to prevent manifest injustice, so reconsideration was inappropriate and, as there was no substantial ground for difference of opinion as to [47 USCS § 227](#) holding, [28 USCS § 1292\(b\)](#) review was not warranted. [Landsman & Funk, P.C. v. Skinder-Strauss Assocs., 2013 U.S. Dist. LEXIS 28181 \(D.N.J. Feb. 8, 2013\)](#).

*Unpublished decision:* Mortgage company was entitled to have default judgment set aside on claims that included violation of Telephone Consumer Protection Act of 1991; company presented evidence of meritorious defenses, including affidavits and call records showing that no calls were made to mortgagors' cell phones during relevant time period. [Coniglio v. Bank of Am., N.A., 638 Fed. Appx. 972, 2016 U.S. App. LEXIS 1823 \(11th Cir. 2016\)](#).

Court stayed consumers action brought under Telephone Consumer Protection Act and compelled arbitration under Federal Arbitration Act because consumer was bound by terms of cardholder agreement, which required cardholder and any authorized user to arbitrate any claims arising out of communications bank made and collections activities it engaged in concerning account, and bank had contractual right to arbitrate consumer's dispute. [A.D. v. Credit One Bank, N.A., 2016 U.S. Dist. LEXIS 110393 \(N.D. Ill. Aug. 19, 2016\)](#), rev'd, remanded, [885 F.3d 1054, 2018 U.S. App. LEXIS 7156 \(7th Cir. 2018\)](#).

Where plaintiff alleged defendants violated Telephone Consumer Protection Act (TCPA), district court granted plaintiff's motion to compel discovery to determine if defendants' calling system qualified as automatic telephone dialing system under TCPA because it was relevant issue in case; plaintiff could hire expert to image defendants' salesforce database at its sole expense at time that was convenient to defendants, and had to return any documents that result from database imaging to defendants at conclusion of case to protect their trade secrets. [Buja v. Novation Capital, LLC, 2016 U.S. Dist. LEXIS 187456 \(S.D. Fla. Dec. 27, 2016\)](#).

Creditor mortgage lender was not liable under Telephone Consumer Protection Act (TCPA) for contacting debtors on their cell phone using autodialer because debtors consented to calls on their cell phone by listing that number on their mortgage application, and they never revoked that consent. [Welch v. Green Tree Servicing, LLC \(In re Runyan\), 530 B.R. 801, 25 Fla. L. Weekly Fed. B 313, 2015 Bankr. LEXIS 1569 \(Bankr. M.D. Fla. 2015\)](#).

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*Unpublished decision*: Plain meaning of phrases “on whose behalf” or “on behalf of” is act by representative of, or act for benefit of, another. *United States v Dish Network, LLC* (CD Ill 2010).

Company’s status as foreign registered and controlled company with its principal place of business in foreign country does not preclude finding that company is within United States for purposes of [47 USCS § 227\(b\)\(1\)\(C\)](#), which prohibits any person within United States from sending unsolicited fax advertisements. In re 21st Century Fax(es) Ltd. a.k.a. 20th Century Fax(es), FCC FCC02-2 (Adopted 1/9/02).

## II. JURISDICTION OVER PRIVATE ACTIONS

### 25. Federal diversity jurisdiction

[28 USCS § 1332](#) applies to private actions under Telephone Consumer Protection Act (TCPA); therefore, district court erred when it dismissed private action under TCPA for lack of jurisdiction since federal review was not precluded in diversity actions. [Gottlieb v. Carnival Corp., 436 F.3d 335, 2006 U.S. App. LEXIS 2677 \(2d Cir. 2006\)](#).

Because there was no express congressional intent to preempt diversity jurisdiction under Telephone Consumer Protection Act (TCPA), [47 USCS §§ 227](#) et seq., and because diversity jurisdiction statute and TCPA were not irreconcilable, district court erred in finding that Congress intended to preclude federal diversity jurisdiction over TCPA claims. [US Fax Law Ctr., Inc. v. Ihire, Inc., 476 F.3d 1112, 2007 U.S. App. LEXIS 2622 \(10th Cir. 2007\)](#), cert. denied, 552 U.S. 1139, 128 S. Ct. 1062, 169 L. Ed. 2d 806, 2008 U.S. LEXIS 1012 (2008).

Reasonable, narrow construction of Telephone Consumer Protection Act of 1991, [47 USCS § 227](#), jurisdiction precludes private cause of action under it in federal court under either federal question or diversity jurisdiction. *Consumer Crusade, Inc. v. Fairon & Assocs.* (2005, DC Colo) 379 F Supp 2d 1132affd, criticized in [476 F.3d 1112 \(CA10 Colo 2007\)](#).

District court had subject matter jurisdiction over class action alleging violations of Telephone Consumer Protection Act, [47 USCS § 227](#) because under amendments of [28 USCS § 1332\(d\)\(2\)](#) by Class Action Fairness Act of 2005, minimal diversity was present and 27 USCS § 227(b)(3) allowed for treble damages, yielding possible aggregate amount in controversy over \$5 million. [Gene & Gene LLC v. BioPay LLC, 541 F.3d 318, 2008 U.S. App. LEXIS 17302 \(5th Cir. 2008\)](#).

Jurisdiction existed under [28 USCS § 1332\(d\)](#) over class action suits brought under [47 USCS § 227\(b\)](#); although TCPA divested federal courts of federal question jurisdiction over individual claims, it did not preclude exercise of diversity jurisdiction. [Landsman & Funk PC v. Skinder-Strauss Assocs., 640 F.3d 72, 2011 U.S. App. LEXIS 6786 \(3d Cir.\)](#), vacated, reh'g, en banc, granted, 650 F.3d 311, 2011 U.S. App. LEXIS 9987 (3d Cir. 2011), reinstated, 2012 U.S. App. LEXIS 11946 (3d Cir. Apr. 17, 2012).

Telephone Consumer Protection Act does not strip federal courts of diversity jurisdiction over actions brought under [47 USCS § 227\(b\)\(3\)](#). [Landsman & Funk PC v. Skinder-Strauss Assocs., 640 F.3d 72, 2011 U.S. App. LEXIS 6786 \(3d Cir.\)](#), vacated, reh'g, en banc, granted, 650 F.3d 311, 2011 U.S. App. LEXIS 9987 (3d Cir. 2011), reinstated, 2012 U.S. App. LEXIS 11946 (3d Cir. Apr. 17, 2012).

Court had diversity jurisdiction for purposes of insurer’s declaratory judgment action concerning coverage because parties were completely diverse and amount-in-controversy requirement was met without running afoul of anti-aggregation rule, based on allegations in underlying complaint as to numbers of unsolicited fax recipients, amount of purported damages, trebling, and fees and costs under Telephone Consumer Protection Act, and fact that underlying action had not yet been settled. [Auto-Owners Ins. Co. v. Stevens & Ricci, Inc., 835 F.3d 388, 2016 U.S. App. LEXIS 16182 \(3d Cir. 2016\)](#).

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Plaintiffs' request for certification of issue of federal district court's jurisdiction of plaintiffs' claims under Telephone Consumer Protection Act (TCPA) was granted because plaintiffs were able to demonstrate substantial ground for difference of opinion as to district court's jurisdiction over their claims where two distinguished judges from sister district reached opposite conclusions on issue of diversity jurisdiction of TCPA claims. [Klein v. Vision Lab Telecomms., Inc., 399 F. Supp. 2d 528, 2005 U.S. Dist. LEXIS 29541 \(S.D.N.Y. 2005\)](#).

[47 USCS § 227\(b\)\(3\)\(A\)–\(C\)](#), which has been interpreted to mean that Congress intended to authorize private causes of action only in state courts and to withhold federal jurisdiction, does not foreclose federal court's exercise of supplemental jurisdiction under [28 USCS § 1367\(a\)](#) or diversity jurisdiction under [28 USCS § 1332\(a\)\(1\)](#) over TCPA claims. [Watson v. NCO Group, Inc., 462 F. Supp. 2d 641, 2006 U.S. Dist. LEXIS 87499 \(E.D. Pa. 2006\)](#).

Court could exercise subject-matter jurisdiction over plaintiff telephone company's Federal Telephone Consumer Protection Act claims on basis of diversity under [28 USCS § 1332](#) because parties were completely diverse (telephone company was Maryland corporation and defendants were citizens of Nevada and Texas), and amount in controversy requirement was met (telephone company's amended complaint requested damages of at least \$1,025,500). [Baltimore-Washington Tel. Co. v. Hot Leads Co., 584 F. Supp. 2d 736, 2008 U.S. Dist. LEXIS 105149 \(D. Md. 2008\)](#).

Because there is no express congressional intent to preempt diversity jurisdiction, and because diversity jurisdiction statute and Telephone Consumer Protection Act (TCPA), are not irreconcilable, diversity jurisdiction remains available to private litigants under TCPA. [Baltimore-Washington Tel. Co. v. Hot Leads Co., 584 F. Supp. 2d 736, 2008 U.S. Dist. LEXIS 105149 \(D. Md. 2008\)](#).

Claims against telemarketers under [47 USCS § 227\(b\)\(3\)](#) and [Ohio Rev. Code Ann. § 1345.02](#) were dismissed for failure to satisfy amount in controversy requirement under [28 USCS § 1332](#) because in part plaintiff was limited to allegation of one violation per call under TCPA and CSPA. [Charvat v. NMP, LLC, 703 F. Supp. 2d 735, 2010 U.S. Dist. LEXIS 31983 \(S.D. Ohio 2010\)](#), rev'd, remanded, [656 F.3d 440, 2011 U.S. App. LEXIS 18081 \(6th Cir. 2011\)](#).

*Unpublished decision:* Congress did not intend to preclude [28 USCS § 1332](#) diversity jurisdiction over claims under Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#); therefore, remand was denied in attorney's lawsuit against marketing company for sending numerous unsolicited advertisements to his office fax machine, in violation of TCPA, because diversity jurisdiction was established as parties—a New York attorney and Florida company—were diverse, and amount in controversy exceeded \$75,000. [Saporito v. Vision Lab Telecomms., Inc., 2005 U.S. Dist. LEXIS 43651 \(E.D.N.Y. May 10, 2005\)](#).

In suit brought by plaintiffs asserting violations of [47 USCS § 227](#) and Maryland Telephone Consumer Protection Act, [Md. Code Ann., Com. Law §§ 14-3201](#) and 14-3202, two defendants' motion to dismiss was granted because plaintiffs sought just \$15,000 in damages against those two defendants and claims, therefore, did not independently meet minimum requirements for diversity of citizenship. [AGV Sports Group, Inc v. Protus IP Solutions, Inc., 2010 U.S. Dist. LEXIS 37404 \(D. Md. Apr. 15, 2010\)](#).

*Unpublished decision:* Telephone Consumer Protection Act, [47 USCS § 227](#), does not bar district courts from exercising diversity jurisdiction under [28 USCS § 1332](#). [Landsman & Funk, P.C. v. Skinder-Strauss Assocs., 2013 U.S. Dist. LEXIS 28181 \(D.N.J. Feb. 8, 2013\)](#).

## 26. Federal question jurisdiction

Federal and state courts have concurrent jurisdiction over private suits arising under Telephone Consumer Protection Act of 1991; nothing in permissive language of [47 USCS § 227\(b\)\(3\)](#) makes state-court jurisdiction exclusive or otherwise purports to oust federal courts of their [28 USCS § 1331](#) jurisdiction over federal claims. [Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 Fla. L. Weekly Fed. S 95, 2012 U.S. LEXIS 906 \(2012\)](#).

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Congress clearly intended to create private cause of action under Telephone Consumer Protection Act ([47 USCS § 227](#)), and statutory analysis indicates that Congress intended to refer private litigants under Act to state court and to preclude federal question jurisdiction over such consumer suits. [Erienet, Inc. v. Velocity Net, 156 F.3d 513, 1998 U.S. App. LEXIS 23931 \(3d Cir. 1998\)](#), abrogated in part, [Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 Fla. L. Weekly Fed. S 95, 2012 U.S. LEXIS 906 \(2012\)](#).

Reasonable, narrow construction of Telephone Consumer Protection Act of 1991, [47 USCS § 227](#), jurisdiction precludes private cause of action under it in federal court under either federal question or diversity jurisdiction. *Consumer Crusade, Inc. v. Fairon & Assocs.* (2005, DC Colo) 379 F Supp 2d 1132affd, criticized in [476 F.3d 1112 \(CA10 Colo 2007\)](#).

Federal district court properly asserted subject matter jurisdiction over consumer's suit under [47 USCS § 227](#) because consumer's claims presented substantial issue regarding interpretation of this federal law. [Charvat v. Echostar Satellite, LLC, 630 F.3d 459, 2010 FED App. 0397P, 2010 U.S. App. LEXIS 26404 \(6th Cir. 2010\)](#).

District court erred in concluding that federal courts lack federal-question jurisdiction over private claims brought under [47 USCS § 227](#). [Charvat v. NMP, LLC, 656 F.3d 440, 2011 U.S. App. LEXIS 18081 \(6th Cir. 2011\)](#).

Corporation's action alleging violation of [47 USCS § 227](#) is not remanded to state court, because language of § 227(b)(3) providing for private right of action in state court was not meant to repeal federal question jurisdiction under [28 USCS § 1331](#); rather, state-court jurisdiction is concurrent, not exclusive, so court has federal question jurisdiction over this action which is based on violation of federal law. [Kenro, Inc. v. Fax Daily, 904 F. Supp. 912, 1995 U.S. Dist. LEXIS 16868 \(S.D. Ind. 1995\)](#).

Private right of action created by [47 USCS § 227](#) exists only in state court—thus precluding application of federal-question jurisdiction under [28 USCS § 1331](#)—but federal court may hear case if diversity jurisdiction exists. [Kopff v. Battaglia, 425 F. Supp. 2d 76, 2006 U.S. Dist. LEXIS 13638 \(D.D.C. 2006\)](#).

Where telemarketers were alleged to have engaged in unlawful telemarketing practices by placing 31 calls to plaintiff's home in violation of federal and state statutes, including [47 USCS § 227\(b\)\(3\)](#), court did not have federal question jurisdiction under [28 USCS § 1331](#) because TCPA created private right of action in state—not federal—court. [Charvat v. NMP, LLC, 703 F. Supp. 2d 735, 2010 U.S. Dist. LEXIS 31983 \(S.D. Ohio 2010\)](#), rev'd, remanded, [656 F.3d 440, 2011 U.S. App. LEXIS 18081 \(6th Cir. 2011\)](#).

Subject matter jurisdiction existed over cell phone user's claim that advertising agency violated Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., where claim was brought pursuant to [28 USCS § 1332\(d\)](#) and that statute provided independent basis for jurisdiction. [Gomez v. Campbell-Ewald Co., 2010 U.S. Dist. LEXIS 143621 \(C.D. Cal. Nov. 5, 2010\)](#).

## 27. District of Columbia courts

Plaintiffs stated Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), claim for transmission of unsolicited faxes, which could be brought in federal court or in D.C. court; because D.C. has not “opted out” of providing forum for TCPA claims, citizens could bring § 227(b) claims in D.C. court. [Adler v. Vision Lab Telcoms., Inc., 393 F. Supp. 2d 35, 2005 U.S. Dist. LEXIS 23691 \(D.D.C. 2005\)](#).

Private causes of action may be brought in Superior Court of District of Columbia under Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), without need for enabling legislation in District of Columbia; under Supremacy Clause, [U.S. Const. art. VI, cl. 2](#), TCPA is presumptively enforceable in Superior Court and there is no clear indication to contrary. [Portuguese Am. Leadership Council of the United States, Inc. v. Investors' Alert, Inc., 956 A.2d 671, 2008 D.C. App. LEXIS 390 \(D.C. 2008\)](#).

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**28. State courts**

State courts have exclusive subject matter jurisdiction over private actions brought under Telephone Consumer Protection Act of 1991 ([47 USCS § 227](#)). [Chair King v. Houston Cellular Corp.](#), 131 F.3d 507, 26 *Media L. Rep. (BNA)* 1244, 1997 U.S. App. LEXIS 35303 (5th Cir. 1997), abrogated in part, [Mims v. Arrow Fin. Servs., LLC](#), 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 *Fla. L. Weekly Fed. S* 95, 2012 U.S. LEXIS 906 (2012).

State courts have exclusive subject matter jurisdiction over private actions under Telephone Consumer Protection Act ([47 USCS § 227](#)). [Nicholson v. Hooters of Augusta](#), 136 F.3d 1287, 11 *Fla. L. Weekly Fed. C* 1112, 1998 U.S. App. LEXIS 4142 (11th Cir.), amended, review or reh'g granted, 140 F.3d 898, 11 *Fla. L. Weekly Fed. C* 1419, 1998 U.S. App. LEXIS 8682 (11th Cir. 1998), abrogated in part, [Mims v. Arrow Fin. Servs., LLC](#), 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 *Fla. L. Weekly Fed. S* 95, 2012 U.S. LEXIS 906 (2012).

State courts have exclusive jurisdiction over cause of action created by Telephone Consumer Protection Act of 1991 ([47 USCS § 227](#)), since statutory analysis indicates that Congress intended to confer exclusive state court jurisdiction over private rights created by statute. [Foxhall Realty Law Offices v. Telecommunications Premium Servs.](#), 156 F.3d 432, 1998 U.S. App. LEXIS 24269 (2d Cir. 1998), abrogated in part, [Mims v. Arrow Fin. Servs., LLC](#), 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 *Fla. L. Weekly Fed. S* 95, 2012 U.S. LEXIS 906 (2012).

Congress clearly intended to create private cause of action under Telephone Consumer Protection Act ([47 USCS § 227](#)), and statutory analysis indicates that Congress intended to refer private litigants under Act to state court and to preclude federal question jurisdiction over such consumer suits. [Erienet, Inc. v. Velocity Net](#), 156 F.3d 513, 1998 U.S. App. LEXIS 23931 (3d Cir. 1998), abrogated in part, [Mims v. Arrow Fin. Servs., LLC](#), 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 *Fla. L. Weekly Fed. S* 95, 2012 U.S. LEXIS 906 (2012).

**29.—Particular cases**

*Unpublished decision:* Since it was well-settled that state courts had exclusive jurisdiction over private rights of action under [47 USCS § 227](#), district court did not abuse its discretion in awarding attorney fees pursuant to [28 USCS § 1447\(c\)](#) to appellees. [Dun-Rite Constr., Inc. v. Amazing Tickets, Inc.](#), 2004 U.S. App. LEXIS 28047 (6th Cir. Dec. 16, 2004).

Fact that state legislation forbidding sending of unsolicited commercial faxes did not allow private cause of action did not preclude state courts from taking jurisdiction of private cause of action, which were brought under federal legislation that was enacted after state law, because federal law was designed specifically to address interstate activities that state regulation could not reach and there was no indication that such cause of action violated state public policy; furthermore, because federal act gave exclusive jurisdiction to state courts in such situations, state consumers would have been left without constitutionally guaranteed remedy if state courts could not hear such action. [R. A. Ponte Architects v. Investors' Alert, Inc.](#), 382 Md. 689, 857 A.2d 1, 2004 Md. LEXIS 503 (Md. 2004).

State superior court was competent to hear consumer's claim against telemarketer based on violation of [47 USCS § 227\(b\)\(1\)\(c\)](#) because (1) § 227(b)(3) did not require state to pass enabling legislation before private claims could be brought in state courts; (2) presumption of concurrent jurisdiction was not rebutted by language of § 227(b)(3) and presumption was particularly compelling because, under Telephone Consumer Protection Act of 1991 (TCPA), [47 USCS § 227](#) (2000), private litigants had no recourse to federal courts; and (3) at very least, Mass. Gen. Laws ch. 159C, § 13, demonstrated that Legislature had affirmatively chosen not to close Commonwealth's courts to private TCPA claims. [Mulhern v. MacLeod](#), 441 Mass. 754, 808 N.E.2d 778, 2004 Mass. LEXIS 284 (Mass. 2004).

Because Federal Telephone Consumer Protection Act of 1991, [47 USCS § 227\(b\)](#), extended jurisdiction to state courts and legislature had not acted to divest district court of jurisdiction, state's courts could hear complaints alleging violations of federal act, if they complied with state's other jurisdictional rules. [Edwards v. Direct Access](#),



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[LLC, 121 Nev. 930, 124 P.3d 1158, 2005 Nev. LEXIS 108 \(Nev. 2005\)](#), overruled in part, [Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670, 2008 Nev. LEXIS 22 \(Nev. 2008\)](#).

### 30. Removal and remand

While [47 USCS § 227\(b\)\(3\)](#) creates private right of action that can be maintained in state court, state court jurisdiction is not exclusive under § 227(b)(3); thus, company that sent out unsolicited fax advertisements was entitled to remove action by recipient of advertisement under [28 USCS § 1441\(a\)](#) because recipient's claims against company arose out of federal law and were not among those expressly prohibited from removal under [28 USCS § 1445](#). [Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 2005 U.S. App. LEXIS 22514 \(7th Cir. 2005\)](#).

Removed private action protesting unsolicited advertisements via facsimile machine in violation of [47 USCS § 227](#) is remanded, where § 227(b)(3) expressly authorizes action in state court, even though defendant argues for federal-question jurisdiction, because majority of courts have interpreted statute to authorize only action in state court. [Compoli v. AVT Corp., 116 F. Supp. 2d 926, 2000 U.S. Dist. LEXIS 15161 \(N.D. Ohio 2000\)](#).

Telephone customer's motion to remand Telephone Consumer Protection Act of 1991 (TCPA) class action to state court was granted because pursuant to [47 USCS § 227\(b\)](#), TCPA placed exclusive jurisdiction over private civil actions in state courts. [Biggerstaff v. Voice Power Telcoms., Inc., 221 F. Supp. 2d 652, 2002 U.S. Dist. LEXIS 17981 \(D.S.C. 2002\)](#).

Remand was granted because state courts had exclusive jurisdiction over claims brought under Telephone Consumer Protection Act, [47 USCS § 227\(b\)\(3\)](#), and there was no presumption of concurrent federal jurisdiction where statute mentioned only state court jurisdiction. [Repay v. Flag Co., 326 F. Supp. 2d 884, 2004 U.S. Dist. LEXIS 12575 \(N.D. Ill. 2004\)](#).

Garnishment action that had been removed from state court was remanded because each class member's damages for violation of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), could not be aggregated for purposes of determining amount in controversy; jurisdiction for claim under TCPA lay in state court. [Nat'l Union Fire Ins. Co. v. ESI Ergonomic Solutions, 342 F. Supp. 2d 853, 2004 U.S. Dist. LEXIS 26917 \(D. Ariz. 2004\)](#).

Plaintiff's class action lawsuit alleging violation of Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), was remanded to state court; defendant's removal pursuant to [28 USCS §§ 1441](#) and [1446](#) was untimely, as federal jurisdiction over private TCPA claims was uncertain and there was no binding precedent contrary to removal when action was initially claimed; "order or other paper" exception under [28 USCS § 1446\(b\)](#) was inapplicable because defendant could have timely removed action and challenged denial of removal on appeal. [G.M. Sign, Inc. v. Global Shop Solutions, Inc., 430 F. Supp. 2d 826, 2006 U.S. Dist. LEXIS 29208 \(N.D. Ill. 2006\)](#).

Where call recipient alleged that caller violated Telephone Consumer Protection Act (TCPA), [47 USCS § 227](#), removal to federal court was improper and remand was warranted because (1) regarding any claims under § 227(b)(3), private claims under TCPA did not confer federal question jurisdiction, and (2) call recipient could not maintain private right of action for alleged violations of § 227(d). [Boydston v. Asset Acceptance LLC, 496 F. Supp. 2d 1101, 2007 U.S. Dist. LEXIS 55106 \(N.D. Cal. 2007\)](#).

State was not entitled to remand under [28 USCS § 1441\(c\)](#) of its claim that facsimile sender's alleged violations of [47 USCS § 227\(b\)\(1\)\(C\)](#) of Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., constituted unfair practice under Missouri Merchandising Practices Act, [Mo. Rev. Stat. § 407.020](#); state was attempting to disguise purely federal claim as state law claim in order to avoid federal jurisdiction, and [47 USCS § 227\(f\)\(2\)](#) conferred exclusive jurisdiction on federal district courts over TCPA actions; removal was therefore proper pursuant to [28 USCS §§ 1331](#) and [1441](#). [Missouri ex rel. Nixon v. Progressive Bus. Publ'ns, Inc., 504 F. Supp. 2d 699, 2007 U.S. Dist. LEXIS 13036 \(W.D. Mo. 2007\)](#).

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**31. —Federal diversity or federal question jurisdiction**

Corporation's action alleging violation of [47 USCS § 227](#) is not remanded to state court, because language of § 227(b)(3) providing for private right of action in state court was not meant to repeal federal question jurisdiction under [28 USCS § 1331](#); rather, state-court jurisdiction is concurrent, not exclusive, so court has federal question jurisdiction over this action which is based on violation of federal law. [Kenro, Inc. v. Fax Daily, 904 F. Supp. 912, 1995 U.S. Dist. LEXIS 16868 \(S.D. Ind. 1995\)](#).

Plaintiffs' motion to remand their class action was denied because federal courts were not precluded from hearing claims under Telephone Consumer Protection Act of 1991 (TCPA) when parties were diverse; Congress did not intend to preclude federal diversity jurisdiction pursuant to [28 USCS § 1332](#) for claims brought under TCPA. [Accounting Outsourcing, LLC v. Verizon Wireless Pers. Communs., LP, 294 F. Supp. 2d 834, 2003 U.S. Dist. LEXIS 15251 \(M.D. La. 2003\)](#).

Plaintiffs' motion to remand was denied where Telephone Consumer Protection Act (TCPA), [47 USCS § 227\(b\)](#), did not grant state courts exclusive jurisdiction over private causes of action brought under TCPA because Congress did not intend to preclude federal diversity jurisdiction pursuant to [28 USCS § 1332](#) for claims brought under TCPA. [Klein v. Vision Lab Telecomms., Inc., 399 F. Supp. 2d 528, 2005 U.S. Dist. LEXIS 29541 \(S.D.N.Y. 2005\)](#).

Although debtor's action against creditor and collection agency regarding collection practices was removable based on diversity jurisdiction under [28 USCS §§ 1441\(a\), 1332](#), remand was required under [28 USCS § 1447](#) because defendants failed to comply with one-year time requirements of [28 USCS § 1446\(b\)](#) and were not entitled to equitable exception because they waited over four months after they received amended pleading from which it could be ascertained that case met jurisdictional amount based on statutory damages under [47 USCS § 227](#) of \$500 for each telephone call placed using automatic telephone dialing system without consent, whereby defendants placed 220 unattended messages on debtor's voice mail and answering systems. [Santee v. Encore Receivable Mgmt., 527 F. Supp. 2d 591, 2007 U.S. Dist. LEXIS 94010 \(W.D. Tex. 2007\)](#).

Removal of claims brought under Telephone Consumer Protection Act (TCPA), [47 USCS §§ 201](#) et seq., on basis of diversity jurisdiction is permissible; private cause of action under TCPA was properly removed to federal court where diversity jurisdiction existed, despite fact that TCPA provided for private causes of action to be brought in state court. *Kopff v World Research Group, LLC* (2003, DC Dist Col) 298 F Supp 2d 50 motion gr, in part, motion den, in part, dismd, in part [2006 U.S. Dist. LEXIS 77018 \(DC Dist Col 2006\)](#).

*Unpublished decision*: Because Telephone Consumer Protection Act (TCPA) unequivocally referred plaintiffs to state rather than federal court, Congress negated district court jurisdiction under [28 USCS § 1331](#); because district courts did not have general federal-question jurisdiction to hear claims under TCPA, plaintiff's TCPA claims had to be remanded to state court for lack of subject-matter jurisdiction. [Fenza's Auto, Inc. v. Montagnaro's, Inc., 2011 U.S. Dist. LEXIS 29696 \(D.N.J. Mar. 21, 2011\)](#).

**32. Miscellaneous**

District court had jurisdiction to hear suit challenging constitutionality of [47 USCS § 227](#), since suit did not challenge any related FCC regulations. *Moser v. FCC*, 46 F.3d 970, 95 Cal. Daily Op. Service 925, 1995 U.S. App. LEXIS 2151 (9th Cir.), cert. denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 857, 1995 U.S. LEXIS 4329 (1995).

Complaint filed by individual alleging that defendants had violated Telephone Consumer Protection Act ([47 USCS § 227](#)) by sending unsolicited facsimile advertisements to plaintiff was properly dismissed for lack of subject matter jurisdiction, since Act did not create private right of action in federal court. [Murphey v. Lanier, 204 F.3d 911, 2000 Cal. Daily Op. Service 1439, 2000 D.A.R. 2027, 2000 U.S. App. LEXIS 2777 \(9th Cir. 2000\)](#), abrogated in part, [Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 132 S. Ct. 740, 181 L. Ed. 2d 881, 23 Fla. L. Weekly Fed. S 95, 2012 U.S. LEXIS 906 \(2012\)](#).

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Because corporation's request sounded lot like one to enjoin, set aside, suspend, or to determine validity of final Federal Communications Commission order, tasks which Administrative Orders Review Act placed within exclusive jurisdiction of courts of appeals under [28 USCS § 2342\(1\)](#); district court correctly concluded that it lacked jurisdiction to consider validity of established business relationship defense under [47 USCS § 227\(b\)\(1\)\(C\)\(i\)](#). [CE Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443, 2010 U.S. App. LEXIS 10799 \(7th Cir. 2010\)](#), reh'g denied, reh'g, en banc, denied, [2010 U.S. App. LEXIS 27614 \(7th Cir. July 26, 2010\)](#), cert. denied, [562 U.S. 1138, 131 S. Ct. 933, 178 L. Ed. 2d 753, 2011 U.S. LEXIS 185 \(2011\)](#).

Although federal district court properly asserted subject matter jurisdiction over consumer's suit under [47 USCS § 227](#), case was referred to Federal Communications Commission (FCC) under doctrine of primary jurisdiction because such referral would promote uniformity needed from district courts' varying interpretations of whether entity on whose behalf call was made could be liable under Act, Congress had vested FCC with considerable discretion in issuing regulations implementing Act, and FCC had comparative expertise on this matter. [Charvat v. Echostar Satellite, LLC, 630 F.3d 459, 2010 FED App. 0397P, 2010 U.S. App. LEXIS 26404 \(6th Cir. 2010\)](#).

District Court did not have subject-matter jurisdiction over action brought under [47 USCS § 227](#), where alleged recipient of unsolicited facsimile advertisement brought putative class action in federal court against telecommunications company for statutory violation, because statutory language explicitly conferred permissive jurisdiction over such actions only in state courts. [Foxhall Realty Law Offices v. Telecommunications Premium Servs., 975 F. Supp. 329, 26 Media L. Rep. \(BNA\) 1092, 1997 U.S. Dist. LEXIS 19301 \(S.D.N.Y. 1997\)](#), aff'd, [156 F.3d 432, 1998 U.S. App. LEXIS 24269 \(2d Cir. 1998\)](#).

Constitutional challenge to federal statute prohibiting unsolicited fax advertisements is dismissed, even if court has subject-matter jurisdiction, where recipient of such fax has sued sender in state court, because, given that Congress has allocated interpretation and application of Telephone Consumer Protection Act ([47 USCS § 227](#)) to state courts to complement preexisting state-law causes of action, there is no strong reason why federal court should interlope on state adjudication of § 227(b) claim. [UA Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965, 2000 U.S. Dist. LEXIS 21219 \(D. Ariz. 2000\)](#).

[47 USCS § 227\(b\)\(3\)\(A\)–\(C\)](#), which has been interpreted to mean that Congress intended to authorize private causes of action only in state courts and to withhold federal jurisdiction, does not foreclose federal court's exercise of supplemental jurisdiction under [28 USCS § 1367\(a\)](#) or diversity jurisdiction under [28 USCS § 1332\(a\)\(1\)](#) over TCPA claims. [Watson v. NCO Group, Inc., 462 F. Supp. 2d 641, 2006 U.S. Dist. LEXIS 87499 \(E.D. Pa. 2006\)](#).

Telephone Consumer Protection Act is not pendent state law claim; it is federal claim despite fact there is no federal question jurisdiction to hear it. [Bridge v. Ocwen Fed. Bank, 669 F. Supp. 2d 853, 2009 U.S. Dist. LEXIS 77022 \(N.D. Ohio 2009\)](#), rev'd, remanded, [681 F.3d 355, 2012 FED App. 112P, 2012 U.S. App. LEXIS 8671 \(6th Cir. 2012\)](#).

Court lacked subject matter jurisdiction over Telephone Consumer Protection Act (TCPA) complaint; although federal question jurisdiction under [28 USCS § 1331](#) did not exist for TCPA, diversity jurisdiction under [28 USCS § 1332](#) did exist; however, second amended complaint did not allege diversity jurisdiction. [Bridge v. Ocwen Fed. Bank, 669 F. Supp. 2d 853, 2009 U.S. Dist. LEXIS 77022 \(N.D. Ohio 2009\)](#), rev'd, remanded, [681 F.3d 355, 2012 FED App. 112P, 2012 U.S. App. LEXIS 8671 \(6th Cir. 2012\)](#).

Federal district court has authority to exercise supplemental jurisdiction over private Telephone Consumer Protection Act, [47 USCS §§ 227](#) et seq., claims when they form part of same case or controversy as claims within court's original jurisdiction. [Brown v. Hosto & Buchan, PLLC, 748 F. Supp. 2d 847, 2010 U.S. Dist. LEXIS 116759 \(W.D. Tenn. 2010\)](#).

## Research References & Practice Aids

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### Cross References:

This section is referred to in [15 USCS §§ 6153, 7712](#); [47 USCS § 152](#).

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**Annotations:**

Insurance Coverage for Claims of Violations of the Telephone Consumer Protection Act ([47 U.S.C.A. § 227](#) [[47 USCS § 227](#)]). [3 ALR6th 625.](#)

Validity, Construction and Application of Telephone Consumer Protection Act ([47 U.S.C.A. § 227](#) [[47 USCS § 227](#)])—State Cases. [77 ALR6th 1.](#)

Validity, construction, and application of state statute or law pertaining to telephone solicitation. [44 ALR5th 619.](#)

Propriety of Class Actions Under Telephone Consumer Protection Act, [47 U.S.C.A. § 227](#) [[47 USCS § 227](#)]. [30 ALR Fed 2d 537.](#)

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1 [The Law of Advertising \(Matthew Bender\), ch 12](#), Exercise, Division and Conflicts of Powers and Conflict of Laws §§ 12.02, 12.03.

2 [The Law of Advertising \(Matthew Bender\), ch 17](#), The Jurisdiction of the Federal Trade Commission in Advertising § 17.03.

4 [The Law of Advertising \(Matthew Bender\), ch 58](#), Telemarketing § 58.02.

**Hierarchy Notes:**

[47 USCS, Ch. 5](#)

[47 USCS, Ch. 5, Common Carriers](#)

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