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

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I. INTRODUCTION

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

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

2. A junk fax is, like junk mail, nothing more than an unsolicited advertisement. Only the method of delivery is different. Subsection III.C.2 explores whether all such advertisements are “junk.”
3. See, e.g., Letter from Dan Danner, Executive Vice President, Pub. Policy and Political, Nat’l Fed’n of Indep. Bus., to Kevin Martin, Chairman, Fed. Comm’n Comm’n (Jan. 13, 2006) (on file with author) (“Many of these [lawsuits] are unfounded and require businesses to defend themselves in distant locations or settle business claims to avoid the cost of litigation.”).
4. As discussed in section V.B, commercial facsimile advertising operations that send thousands of facsimile advertisements on behalf of clients are excluded from my definition of innocent lawbreakers.
phone.\(^5\) The introduction and gradual ubiquity of facsimile machines allowed advertisers to send their message to consumers\(^6\) without having to pay costs of printing and postage. Unlike traditional junk mail, which costs consumers no more than the minor inconvenience of throwing a piece of mail in the trash, receiving an unsolicited facsimile (at least in the 1990s) forced the consumer to pay for the ink and paper used to print the document.\(^7\) Responding to the proliferation of this new advertising technique, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA or the Act),\(^8\) which sought to prohibit all forms of unsolicited commercial\(^9\) advertising using facsimile machines. The Act also created a private cause of action for enforcement of the anti-junk fax provisions.\(^10\)

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

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

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

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


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

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

\(^11\) See infra subsection II.C.2.b.

\(^12\) See infra section III.B.
the filing of TCPA-related lawsuits.13 The TCPA was designed to address the harm caused by unsolicited facsimile advertising. But it has also spawned a cottage industry of attorneys who prey upon innocent law breakers—people and businesses who were never the TCPA’s intended targets.

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

II. FACSIMILE MACHINES, ADVERTISING, AND THE TCPA

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

13. See infra section V.A.
TCPA’s junk fax prohibition came to be, we must understand the origin of the telephone facsimile machine.16

A. Development and Design of Telephone Facsimile Machines

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

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

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

16. The term “facsimile” comes from the Latin facio simile, which means “make like.” OXFORD LATIN DICTIONARY 668–69, 1763 (P.G.W. Glare ed., 1982). The world’s first facsimile machine—that is, a machine that was capable of transmitting text across an electrical wire—was patented by Alexander Bain in 1843. See generally STEPHEN VAN DULKEN, INVENTING THE 19TH CENTURY 84 (2001). The first commercial fax system, based on a design by Italian Giovanni Caselli, was set up in 1863 between the French cities of Paris and Lyon. 7 SCIENCE AND ITS TIMES 534 (Neil Schlager ed., 2000). As early as 1902, German inventor Arthur Korn perfected a design that allowed users to send and receive photographs. Id. By 1906, this device was commercially available and widely used, especially in the newspaper industry. Id. But this is not the machine that comes to mind today when one talks about a fax machine.


19. See H.R. REP. No. 102-317, at 10 (1991) (“Facsimile machines are designed to accept, process, and print all messages.”).

B. Development of the Junk Fax Industry

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

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

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

22. Id. at 2–3.
23. Id. at 3.
24. Id.
25. Id.
26. Id. It should be noted that the TCPA did not prohibit political advocacy faxing because such faxes are not “advertising”—that is, they do not “advertis[e] the commercial availability or quality of any property, goods, or services.” 47 U.S.C. § 227(a)(5) (2006).
27. Letter from Maury Kauffman, supra note 21, at 3 (“[H]ad congressional offices NOT been one of the earliest targets of personalized fax broadcasting campaigns, (members of Congress received disproportionately, a significantly higher number of faxes as compared to consumers and businesses at large); restrictions on facsimile-based advertising, etc, would never have been included in what is essentially a law restricting telemarketing: the TCPA.”).
ceeds 30 million fax numbers.”

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

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

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

One court described the reason Congress enacted the TCPA:

[The] TCPA was enacted because state laws that attempted to regulate telemarketing were ineffective because of telemarketers’ ability to “avoid the restrictions of State law, simply by locating their phone centers out of state. Congress thus sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps.”

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

34. Id. at 354.
35. 47 U.S.C § 227(b)(3).
were fair.\footnote{137 CONG. REC. S16205–06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (“The amount of damages in this legislation is set to be fair to both consumer and telemarketer.”).} Whether they are, indeed, fair to both the recipient and sender is discussed later.\footnote{See infra Part V.}

The privacy right advanced by the junk fax prevention aspect of the TCPA was slightly different than that of the telephone. “The privacy right thought to be infringed by unsolicited junk faxes was that of the recipient to use and control his or her own machine. . . . Congress sought to prevent junk faxes from impeding or prohibiting the transmission of consumers’ legitimate business faxes.”\footnote{Williams, supra note 33, at 355.}

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

1. Congress’s Stated Intent in Passing the TCPA

In introducing what would become the TCPA, Senator Hollings, the bill’s main sponsor in the Senate,\footnote{See 137 CONG. REC. S9840-02 (daily ed. July 11, 1991) (statement of Sen. Hollings) (“Today I am introducing the Automated Telephone Call Protection Act of 1991. This bill will ban computerized telephone calls to the home and so-called junk fax.”).} believed that the evil sought to be prevented by the Act was twofold. First, he wanted to keep unwanted faxes from tying up recipients’ phone lines, thus keeping them free for legitimate business purposes.\footnote{Id. (“This bill . . . prohibits unsolicited advertisements sent to fax machines, known as junk fax . . . . These unsolicited advertisements prevent the owners from using their own fax machines for business purposes.”).} Second, he thought that it was patently unfair for the recipients to have to bear the cost of sending these unwanted advertisements.\footnote{Id. (“Even worse, these transmissions force the recipient to pay for the cost of the paper used to receive them. These junk fax advertisements can be a severe impediment to carrying out legitimate business practices and ought to be abolished.”).}

Additionally, the House and Senate committee reports provide significant insight into Congress’s intent in passing the TCPA. For instance, the House Committee did not want “to make all unsolicited telemarketing or facsimile advertising illegal.”\footnote{H.R. REP. NO. 102-317, at 6 (1991); S. REP. NO. 102-78, at 1968 (1991) (“The purposes of the bill are to protect privacy interests . . . by restricting certain uses of facsimile machines.” (emphasis added)).} But it found that “the facsimile machine ha[dl] become a primary tool for business to relay instantaneously written communications and transactions.”\footnote{H.R. REP. NO. 102-317, at 10.} Using this technological tool, “[a]n advertiser’s facsimile machine can
easily deliver tens of thousands of unsolicited messages per week to other facsimile machines across the country.”45

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

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

2. The TCPA’s Enforcement Mechanisms

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

i. Public Enforcement

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

45. Id. at 6–7.
46. Id. at 10 (“Facsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines. The Fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.”).
51. Id. § 227(b)(3).
of that State in violation of" the TCPA or regulations promulgated under the TCPA. The attorney general can seek both injunctive relief and monetary damages of up to $1,500 per violation.

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

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

52. Id. § 227(g)(1)–(2).
53. Id. § 227(g)(1) (The state may demand injunctive relief and/or monetary damages to recover “actual monetary loss” or $500 per violation; if the court finds that the violation was willful or knowing, it may award up to $1,500 per violation).
57. For examples of the more egregious violations, see infra subsection IV.B.1.
60. Fax Advertising: What You Need to Know, Fed. Comm’ns Comm’n, http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html (last visited May 14, 2011). The FCC’s authority to impose a civil forfeiture for violations of the Communications Act of 1934, as amended (of which the TCPA is a part), is found in 47 U.S.C. § 503(b)(1) (2006). The FCC has noted that it “has the authority under this section of the Act to assess a forfeiture against any person who has willfully or repeatedly failed to comply with any of the provisions of this Act or any rule,
ing rules against a myriad of telecommunications-related industries. The FCC’s resources are similarly limited and it must also reserve its enforcement authority to serious violators. One FCC official is reported as saying that though he had heard of lawyers “ambulance chasing” for TCPA cases, the Act “was intended to protect consumers from real damage in the form of lost time and resources.”61 The official added that in most cases where the recipient received one or two unwanted faxes, “a simple telephone call, rather than a court case, is often the place to start.”62

ii. Private Right of Action

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

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

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

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

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

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Commc’ns, Inc., 106 F.3d 1146, 1158 (4th Cir. 1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 514 (5th Cir. 1997). Presumably to resolve this newly created circuit split, on June 27, 2011, the Supreme Court granted certiorari in Mims v. Arrow Financial Services, LLC, No. 10-12077, 2010 WL 4840430 (11th Cir. Nov. 30, 2010), cert granted, 79 U.S.L.W. 3578 (U.S. June 27, 2011) (No. 10-1195), which, through dealing with a violation of the TCPA’s anti-telemarketing provision, concerns the same private right of action provision (47 U.S.C. § 227(b)(3)). Diversity jurisdiction, 28 U.S.C. § 1332(a), and jurisdiction based on the Class Action Fairness Act, 28 U.S.C. § 1332(d), in TCPA cases remain with federal courts. See, e.g., US Fax Law Ctr., Inc. v. iHire, Inc., 476 F.3d 1112, 1117 (10th Cir. 2007); Gottlieb v. Carnival Corp., 436 F.3d 355, 340–41 (2d Cir. 2006); Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642, 646 (W.D. Wash. 2007). But in another recent development, the Third Circuit granted rehearing en banc in Landsman & Funk PC v. Skinder-Strauss Associates, 640 F.3d 72, (3d Cir. 2011), reh’g granted, Nos. 09-3105, 09-3793, 2011 WL 1879624 (3d. Cir. May 17, 2011) (en banc), to consider whether the TCPA also strips federal courts of diversity jurisdiction. This unusual statutory scheme for private enforcement of the TCPA has led to some equal protection based challenges, arguing that because some states may not allow for such actions while others do deprives residents of states prohibiting private enforcement of equal protection. E.g., Foxhall, 156 F.3d at 437–38.

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

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

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


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

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

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

The FCC’s regulations implementing the JFPA went into effect on August 1, 2006.\textsuperscript{74} “The FCC’s JFPA regulations largely track the Congressional directives of the JFPA.”\textsuperscript{75} But the FCC required that all facsimiles, not just unsolicited ones, contain an opt-out notice.\textsuperscript{76} And though Congress had authorized the FCC to consider an expiration date on an established business relationship, the FCC declined to do so, relying instead on the opt-out notice provision.\textsuperscript{77}

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

III. THE COSTS OF UNSOLICITED FACSIMILE ADVERTISEMENTS AND THE TCPA

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

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

\textsuperscript{71} \textit{See infra} section III.A.


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


\textsuperscript{75} Noonan & Goodman, \textit{supra} note 73, at 577.


\textsuperscript{77} 47 C.F.R. § 64.1200(f)(5).

\textsuperscript{78} \textit{See, e.g.}, Letter from Dan Danner, \textit{supra} note 3.

\textsuperscript{79} \textit{See infra} Part V.
consumers. The recipient of junk mail does not have to pay to receive it, but the recipient of a junk fax, Congress thought, has to pay for toner and paper. But the costs of unsolicited faxes and the TCPA are more complex.

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

In the early 1990s, when the TCPA was enacted, three-fourths of facsimile machines in the United States printed faxes on rolls of costly thermal transfer paper. At that time, facsimile machines that could print faxes on ordinary “copier” paper cost approximately $2,000. Only a decade later, the cost of a plain-paper facsimile machine dropped by almost 95% to around $100—almost completely replacing the older thermal transfer technology in the process. An expert in the facsimile technology field estimated that when the TCPA was enacted, the cost to receive (and print) a facsimile was about ten to fifteen cents per page. A decade later, technological advances and competition in the ink, toner, and paper industries, brought the cost down to about two to three cents per page. Today the cost to receive a fax on a traditional laser facsimile machine is about two cents.

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

80. Though the Act’s title implies that it applies only to “consumers,” which is sometimes defined as individuals, see, e.g., Culbreath v. Golding Enters., L.L.C., 872 N.E.2d 284 (Ohio 2007), the anti-junk fax provisions of the TCPA apply equally to all facsimile machine owners—from individuals to Fortune 500 corporations. See supra note 6.
82. Letter from Maury Kauffman, supra note 21, at 6.
83. Id.
84. Id.
85. Id.
86. Id.
87. This calculation is based on the cost of paper (about ½ cent per sheet) (samsclub.com: 5,000 sheets at $29.88), the cost of toner for a Brother Intellifax 4100E laser facsimile machine (about 1 cent per page) (Officemax.com: $69.99 for a cartage that yields about 6,000 pages), and the cost of the printing drum for the same machine (about ¾ of a cent) (Officemax.com: $143.99 for a drum that yields about 20,000 pages).
88. Letter from Maury Kauffman, supra note 21, at 6–7.
89. Id. at 7. Though small businesses may still rely on a traditional facsimile machine more often than larger entities, the switch to a fax-server based model is relatively easy with many online companies offering such services to small businesses without the need for the business to purchase any special equipment. See,
tisement that she finds to have no value will simply ignore the document without printing it, reducing the actual cost of receiving the fax to zero—just like receiving an unwanted e-mail or a piece of traditional mail.90

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

B. Monetary Costs of Receiving Unsolicited Facsimiles

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

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90. Any annoyance factor is negligible, and further discussed in subsection III.C.1.
92. See, e.g., Open Text Right Fax, Open Text, http://fxsolutions.opentext.com/fax-server.aspx (last visited Feb. 20, 2011); see also infra section III.C (discussing the intangible costs associated with receiving an unsolicited facsimile advertisement).
94. Actual damages are rarely considered by courts because the vast majority of plaintiffs seek statutory damages of $500–$1,500 per facsimile. See supra subsection II.C.2.b; infra note 98.
95. Even at the time the TCPA was enacted, the “drafters recognized that damages from a single violation would ordinarily amount to a few pennies worth of ink and paper usage.” Levine v. 9 Net Ave., Inc., No. A-1107-00T1, 2001 WL 34013297, at *1 (N.J. Super. Ct. App. Div. June 7, 2001) (citing 137 CONG. REC. S16204, S16205–06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings)); see also section III.A (comparing the cost of facsimile technology at the time the TCPA was enacted to the cost of the technology today).
96. See Texas v. Am. Blastfax, Inc., 164 F. Supp. 2d 892, 900 (W.D. Tex. 2003) (“[D]efendants presented evidence from their expert that the average cost of receiving an unwanted fax is seven cents per page.”); David E. Sorkin, Unsolicited Commercial E-mail and the Telephone Consumer Protection Act of 1991, 45 BUFF. L. REV. 1001, 1009 (1997) (citing a 1996 survey which found that “modern” fax machines printed pages at a cost of four to twelve cents each); see also section
When the TCPA was enacted, the financial costs borne by the recipient of an unsolicited facsimile advertisement included the following: (1) the cost of the paper used to print the fax, (2) the cost of the ink or toner used to print the fax, (3) extra electricity used by the fax machine in receiving the fax, and (4) the additional wear-and-tear on the fax machine.97 One of the earliest cases to address and hear evidence on the issue of actual damages was *Missouri ex rel. Nixon v. American Blast Fax, Inc.*98

In *Nixon*, the court heard testimony from an employee of a fax machine seller who “estimated that it would cost someone between 6 1/2 and 17 cents to receive a faxed advertisement depending on the type of facsimile machine.”99 But on cross the witness admitted that his estimates were based on retail prices, which few businesses, large and small, pay.100 The witness also admitted that his estimate assumed that a fax advertisement used four times as much toner as a “Slerexe” letter101 and was “just that, an estimate.”102 Another witness, an in-
A facsimile industry consultant also testified for the defense in Nixon.\footnote{Id. at 926–27.} The consultant testified that in 2002, the cost to receive a normal facsimile was about two to three cents, not the much higher amount estimated by the plaintiff, whose estimate was based on “dealer list prices” that almost no one pays.\footnote{Id. at 926.} According to the witness’ analysis, the cost to a business for “receipt of a telemarketing call is higher by a magnitude’ than the receipt of a fax.”\footnote{Id. at 927.} In addition, and to the likely surprise and dismay of the TCPA’s supporters, the consultant “testified to all the advantages of fax advertising for both the business advertising and the consumers receiving the faxes.”\footnote{Id. at 926.} As with other forms of advertising, one of the benefits conferred to the recipient is knowledge of a new product or discount. This benefit is likely overlooked by recipients of unsolicited facsimiles because the annoyance of receiving “useless” faxes colors the recipient’s view of all fax advertisements.

C. Non-Monetary Costs of Receiving Unsolicited Facsimiles

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

1. Annoyance Factor

Our lives are full of everyday, trivial, annoyances.\footnote{One court commented that the “receipt of an unwarranted fax is a trivial annoyance. Most individuals just ‘toss’ the document.” Freedman v. Advanced Wireless Cellular Comm’ns, No. SOM-L-611-02, 2005 WL 2122304, at *3 (N.J. Super. Ct. Law Div. June 24, 2005).} But few annoyances are worthy of government regulation—especially when the

\footnote{103. Id. at 924.}
\footnote{104. On the insurance agent’s testimony, the court noted: [He] did not even estimate how much these unsolicited faxes cost his business per month or even per year. He also did not testify that he had received complaints from his customers of how they could not reach him by phone or fax because the lines were busy, nor did he give an example of a job he was unable to successfully complete because of the sending an unsolicited fax.

Id.}
\footnote{105. Id. at 926–27.}
\footnote{106. Id. at 926.}
\footnote{107. Id.}
\footnote{108. Id. at 927.}
elimination of the annoyance comes at a significant cost to other societal interests. Technological advances since the enactment of the TCPA in 1991 have rendered the receipt of unsolicited facsimile advertising no more than an annoyance.110 Few businesses still use traditional fax machines that automatically print each facsimile the business receives.111 Such businesses need spend only seconds tossing an unwanted fax from an innocent lawbreaker into the recycling bin—the same time it takes to throw away a piece of junk mail.112 And most businesses that receive faxes through a computer server can simply click the delete button as they do with unwanted e-mail. The minor inconvenience caused to the recipient by innocent lawbreakers sending unsolicited facsimiles should not be compensable to the point of placing these small businesses into insolvency. The inconvenience and business disruption suffered by innocent lawbreakers who have not run afoul of the TCPA but still have to defend against patently frivolous TCPA litigation is far greater.113

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

2. Potentially Deceptive or Highly Valuable Content

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

110. See supra section III.A.
111. See supra section III.A.
112. As discussed in subsection VI.B.1, professional fax blasters are excluded from my definition of innocent lawbreakers. These businesses that make their living by sending huge quantities of, often deceptive or fraudulent, advertisements by fax have been dealt with through State and Federal enforcement actions.
113. See infra Part V.
114. See infra subsection III.C.2.
115. Truthful facsimile advertisements market actual goods or services and are usually beneficial to the consumer because they may notify the consumer of a sale or promotion on a product or service the consumer is likely to want. See, for example, advertisements for daily food discounts offered by a neighborhood family-owned pizza restaurant, Compoli v. Cumby, Inc., No. CV-01-437886 (Ohio Ct. Com. Pl., Cuyahoga Cnty. last disposition Mar. 13, 2003), and a letter from a college to fellow members of the local chamber of commerce looking to place grad-
fraudulent\textsuperscript{117}. The TCPA, however, makes no distinction between honest and dishonest unsolicited facsimile advertisements—subjecting senders to the same penalties regardless of content. The transmitters of fraudulent advertisements are, by definition, crooks who have little interest in obeying fraud laws, let alone the TCPA. They are, therefore, difficult to stop using the TCPA’s private enforcement mechanism.\textsuperscript{118} Senders of fraudulent or deceptive facsimiles are not innocent lawbreakers.

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

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

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

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

\textsuperscript{118} \textit{See infra} section V.C.

\textsuperscript{119} Letter from Maury Kauffman, \textit{supra} note 21.

\textsuperscript{120} \textit{Id.} at 3–5.

\textsuperscript{121} For a more comprehensive discussion, \textit{see infra} section V.D.
unsolicited advertisements that can be transmitted by facsimile in en-
acting the TCPA or the JFPA does little to stop fraud and deceit, but
has a significant detrimental impact on innocent lawbreakers.

IV. THE TCPA’S CURRENT RELEVANCE AND UNINTENDED
CONSEQUENCES

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

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

A. Empirical Analysis of Recent TCPA Litigation

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

122. See generally Letter from Maury Kauffman, supra note 21, at 7 (“Technology, the
market and most importantly, consumers, have spoken and fax is the loser. Un-
solicited facsimile advertisements are no longer the great threat they were feared
to be in 1990–1992. Perhaps the best evidence of this fact, is the massive con-
sumer outcry against unsolicited commercial email (UCE) or spam, versus the
relative whimper regarding unsolicited (or junk) fax.”).
123. See, e.g., infra subsection V.D.4.b.
124. Letter from Maury Kauffman, supra note 21, at 9. Kauffman also notes that
“[r]ivolous suits have been brought in numerous states and jurisdictions across
the country. Suing small business owners for millions of dollars because some
consumers may have received one unsolicited advertisement is certainly NOT
within the spirit of the law’s Enforcement paragraphs.” Id.
(N.D. Ill. Feb. 8, 2011).
126. See supra subsection II.C.2.
which are often divisions within other state courts, are almost impossible to track. 128 Though an exact figure is practically impossible to determine, a representative sample of TCPA cases can be gleaned from private services such as the Courthouse News Service (“CNS”). 129

Beginning in 2003, CNS has catalogued all new case filings in various major Federal and State jurisdictions. 130 The analysis of available CNS data between March 27, 2003 and June 5, 2008, 131 reveals that there were 1,744 new cases 132 filed by or on behalf of private individuals or businesses 133 involving an alleged violation of the TCPA. One thousand, three hundred ninety-five of these cases (80%) involved alleged violations of the anti junk-fax provision, and 158 (9%) involved telemarketing calls. 134 Only a handful of these cases, about 4%, were brought by pro-se litigants. 135 Six hundred fifty-five of the fax cases were brought on behalf of or by individuals 136 and 740 were brought on behalf of companies; 134 of the telemarketing cases were brought by or on behalf of individuals and 24 were brought on behalf of businesses. 137 In 28% of the cases, the complaint demanded class certifi-
Interestingly, about one-third of the cases were filed by the same attorney.139

B. Enforcement of the TCPA—Blast Faxers

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

1. Shutting Down the Major Blast Faxers

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

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

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

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


141. Id. § 503(b)(1).

142. Id. § 227(b)(3).


144. See Freedman v. Advanced Wireless Cellular Commc’ns, No. SOM-L-611-02, 2005 WL 2122304 (N.J. Super. Ct. Law Div. June 24, 2005). Freedman described an award by default judgment of $20,000,000 plus attorneys fees in a class action case against, primarily, Fax.com. Id. at *1. This award was vacated on a motion by a co-defendant after it demonstrated, among other defenses, excusable neglect in failing to defend. Id. at *4. Fax.com apparently never entered an appearance in the case.
California and Indiana. In addition, in 2002, the FCC fined Fax.com $5.3 million for TCPA violations.

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

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

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

\[\text{Footnotes:}\]


147. In re First Choice Healthcare, Inc., 21 FCC Rcd 2795, 2795 (2006) The FCC’s proposed fine included $4,500 for each facsimile sent to a consumer before that consumer requested that First Choice Healthcare stop sending the faxes, and $11,000 for each facsimile send after the request. Id. at 2798–2799.

148. 47 C.F.R. § 1.80(b)(3) (2008). Title 47 of the United States Code, Section 503(b)(2)(D), provides a base forfeiture amount of up to $10,000, which must be adjusted for inflation under the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. The most recent amendment to 47 C.F.R. section 1.80(b)(3) sets the amount at $16,000.

149. “In exercising such authority, we are to take into account ‘the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.’” First Choice Healthcare, 21 FCC Rcd at 2798 (citing 47 U.S.C. § 503(b)(2)(D)); see In re Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd. 17087, 17100–17101 (1997).


151. See, e.g., Covington & Burling v. Int’l Mktg. & Research, Inc., No. CIV.A. 01-0004360, 2003 WL 21384825, at *5 (D.C. Super. Ct. Apr. 17, 2003) (finding that Fax.com sent 1,634 unsolicited advertisement on behalf of three clients to plaintiff in one week, 1,471 of which were sent after the plaintiff had contacted...
other major fax broadcasters who operated in an almost blatant disregard of the TCPA.\footnote{152}

2. State Regulations of Unsolicited Facsimiles

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

V. THE TCPA AND INNOCENT LAWBREAKERS

Before discussing the TCPA’s impact on innocent lawbreakers, it is important to discuss the “cottage industry”\footnote{156} of TCPA plaintiff’s lawyers that has developed and flourished in response to the TCPA’s generous statutory penalties. It is because of this cottage industry that innocent lawbreakers have much to fear from inadvertent violations of the Act.

A. TCPA Cottage Industry\footnote{157}

Unlike state attorneys general and the FCC, plaintiffs’ lawyers who pursue TCPA claims do not necessarily have in mind the best
interest of the general public. Their duties are only to their clients (or, in some instances, themselves). The TCPA cottage industry got a major boost with a headline grabbing victory against a Hooters restaurant franchise in Georgia, where a court ordered the restaurant to pay nearly $12 million in damages for TCPA violations.

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

Then, in early 2001, a jury found that Hooters had willfully and knowingly violated the TCPA by sending six facsimile advertisements. Unfortunately for Hooters, these six ads went to a class of 1,321 businesses and individuals. And, because the jury found that the faxes were sent willfully, the judge trebled the damages award, entering a judgment against Hooters of $11,889,000. TCPA plaintiffs’ lawyers have touted this sensational decision in many of the threatening letters they send to innocent lawbreakers, trying, presumably, to scare them into a quick settlement.

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

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

1. Support Infrastructure

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

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

170. Lawsuit Abuse Hearing, supra note 61, at 174–75.
172. Id.
173. Id.
175. Lubove, supra note 169.
homepage for consumers about junk fax “horror stories,” and “how to get even.” For those consumers who don’t want to “do it yourself,” there’s the handy attorney reference page, which lists several experienced law firms and lawyers who have successfully prosecuted junk faxers in the past.

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

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

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

B. Innocent Lawbreakers

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

182. Id. The links include the following: “User Guides,” a “Caller ID Database,” a “Complaint Generator” (for the industrious consumer), and even a “Perp Database,” identifying all known “perpetrators” of the TCPA. Id.
184. “For 65 years, the American Association of Justice, also known as the Association of Trial Lawyers of America (ATLA), has supported plaintiff trial lawyers—as the collective voice of the trial bar on Capital Hill and in courthouses across the nation and by providing exclusive services designed for trial lawyers.” AMERICAN ASSOCIATION FOR JUSTICE (2011), http://www.justice.org/cps/rde/xchg/jchgjustice/hs.xsl/default.htm.
unwittingly violates some (often obscure or technical) law or regulation. The lawbreaker is “innocent”—as I use the term here—because he is usually unaware of the law or regulation he is violating or is aware of the law but unaware that his conduct violates it.186 The innocent lawbreaker does not intend to violate the law or regulation. And the “victim” of the violation suffers no real injury or damages beyond (in some instances) some deminimus cost or inconvenience. In a way, it is the innocent lawbreaker who is also the victim of (often well-intentioned) laws or regulations—a victim of strict-liability laws like the TCPA that have little or no safeguards to protect inadvertent violators against potentially ruinous litigation or settlement costs.187

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

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

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

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

C. Why the Cottage Industry Targets Innocent Lawbreakers

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

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

194. Covington & Burling v. Int’l Mktg. & Research, Inc., No. CIV.A. 01-0004360, 2003 WL 21384825, at *7 (Super. Ct. D.C., Civ. Div. Apr. 17, 2003) (“The FCC obviously construes the term ‘use’ in the TCPA’s prohibitions to include both direct use, and indirect use by way of an agent. . . . This is wholly reasonable, since liability could be avoided by using an intermediary, advertisers could use a series of fly-by-night fax advertising firms to send waves of unsolicited faxes, and be insulated from liability. Such a construction would clearly allow avoidance of the statute, and such a construction is to be avoided.” (quoting Neil Zeid v. The Image Connection, Inc., No. 01AC-002885-Z-CV (Cir. Ct. Mo., St. Louis Cnty., Oct. 30, 2001))).
195. Senders of deceptive or fraudulent facsimiles earn money through the fraudulent or deceptive scheme the fax “advertises,” and not through the sale of legitimate products or services. See supra subsection III.C.2.
other areas subject to government regulation, only law-abiding individuals and businesses are subject to the government regulation (or litigation). A company wanting to go back into the business of blast faxing can easily do so by setting up its business outside of the jurisdictional reach of United States laws. A blast faxer that operates “offshore” can often ignore the TCPA and FCC rules.\footnote{196. See, e.g., Cyber Communications, Inc., 5/F Lyton Building 36 Mody Road Tsim Sha Tsui, Kowloon, Hong Kong.}

Second, innocent lawbreakers are much more likely to be “collectible,” that is, have easily locatable resources that can be used to satisfy a judgment.\footnote{197. “The plaintiff [a lawyer] has chosen this firm as counsel in four other TCPA cases brought not as individual claims by an aggrieved owner of a facsimile machine and telephone line, but as a skilled litigant who has culled through the numerous invaders of his privacy to select only those who have collectability.” Bernstein v. Am. Family Ins. Co., No. 02 CH 6905, 2005 WL 1613776, at *3 (Ill. Cir. Ct. July 6, 2005).} Small businesses rarely hide their assets in anticipation of litigation as may be done by blast faxers who know that they are violating the law and will likely be subject to litigation or other enforcement action.

Third, many of the lawyers who are a part of the cottage industry are solo practitioners or part of a small law-firm, with limited financial resources.\footnote{198. Though, as individuals, these lawyers do not appear to be an “industry,” because these individual lawyers or small firms often share information, strategies, and legal briefs, taken together they can be said to make up an industry.} Bringing a case against a local small business entails little more than paying the filing fee at a local court. Suing well financed, often out-of-state, corporations is potentially much more costly. Witnesses may reside outside of the court’s subpoena jurisdiction, requiring potential travel expenses. Well-financed blast faxers will also have the financial resources to fight (in court) the lawsuits, forcing the plaintiff’s lawyer to devote much more time (and potentially money) to the case. Small businesses are much more likely to settle a TCPA case early (even if they believe it is baseless) because of the potential costs to the business of fighting in court.\footnote{199. \textit{See infra} section V.D.} Thus, it is easy to see why small businesses are a popular target for these cottage industry trial lawyers.\footnote{200. Lawsuit Abuse Hearing, supra note 61, at 11 (statement of Karen R. Harned, Esq., Exec. Dir., Nat’l Fed’n of Indep. Bus. Legal Found.) (“Small business is the target of so many of these frivolous suits because trial lawyers understand that a small-business owner is more likely than a large corporation to settle a case rather than litigate. Small-business owners do not have in-house counsels to inform them of their rights, write letters responding to allegations made against them, or provide legal advice. They do not have the resources needed to hire an attorney nor the time to spend away from their business fighting many of these small claim lawsuits. And often they do not have the power to decide whether or not to settle a case—the insurer makes that decision.”).}
Finally, small businesses are the targets of TCPA lawsuits because there are almost no "big" targets left. Most of the major blast faxers have been shuttered. Yet lawyers who make much of their living by bringing TCPA claims still need to make a living. With "no one" left to sue, cottage industry lawyers must sue everyone, even if the case they bring is, at best, marginal.

D. Effects of TCPA Litigation on Innocent Lawbreakers

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

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

201. See supra subsection IV.B.1.
204. Id.
205. The NFIB, which in 2004 counted 600,000 members from all fifty states, represents "small employers who typically have about five employees and report gross sales of $300,000–$500,000 per year." Id. at 9. NFIB's average member nets $40,000–$60,000 annually. Id. at 10. NFIB members represent an important segment of the business community—a segment with challenges and opportunities that distinguish them from publicly traded corporations." Id.
206. Id. (citing TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE (2003)).
208. Id.
These fears are not totally unfounded, and the multi-million dollar verdicts are not the problem—at least, not when you consider the fact that many businesses net under $100,000 per year. To these businesses, “nuisance value” is a misnomer and settlement is not the end of the matter; their insurance premiums are likely to increase for the foreseeable future as well.

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

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

209. Id. at 10–11.
210. Id. at 10.
211. Id.
212. Id. at 12.
213. Id. For instance, the letter might read something like this:

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

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

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

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

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

But the plaintiff, a truck driver, had no authority to bring a claim that, if it existed, belonged to his employer.\footnote{Letter from Kenneth W. Kleinman, Attorney at Law, to Joseph R. Compoli, Jr. (Mar. 16, 2004), as reprinted in Lawsuit Abuse Hearing, supra note 61; see infra subsection VII.B.1.a.} Even though this case was baseless, the defendant spent $882.60 (over half the amount of the settlement costs) for his attorney to draft a letter to the plaintiff’s lawyer and avoid payment of the demanded settlement.\footnote{Lawsuit Abuse Hearing, supra note 61, at 11–12 (statement of Karen R. Harned, Esq., Exec. Dir., Nat’l Fed’n of Indep. Bus. Legal Found.).}

1. Threat of Class Actions

Whether a TCPA case can be litigated as a class-action depends largely on the jurisdiction in which the case is brought. Courts have disagreed on whether class-actions are an appropriate way to resolve TCPA cases. There are various reasons for the disagreement, but it is beyond dispute that even the mere threat of a class action can have a devastating effect on the innocent lawbreaker.\footnote{See Deborah F. Buckman, Annotation, Propriety of Class Actions Under Telephone Consumer Protection Act, 47 U.S.C. § 227, 30 A.L.R. Fed. 2d 537 (2008); supra section V.D.}

Some states categorically bar TCPA cases from being litigated as class actions. For example, New York has a statutory bar on TCPA type cases being brought as class actions.\footnote{N.Y. C.P.L.R. § 901(b) (McKinney 2011).} This statute has been interpreted as prohibiting lawsuits seeking a penalty from being brought as a class action absent specific legislative authorization.\footnote{Holster III v. Gatco Inc., 485 F. Supp. 2d 179 (E.D.N.Y. 2007), aff’d 618 F.3d 214 (2d Cir. 2010).}

At least one Pennsylvania court has held that national class actions for violations of the TCPA cannot be brought in Pennsylvania state courts because not all states allow their citizens to bring TCPA class actions.\footnote{Weitzner v. Vaccess Am., Inc., 5 Pa. D. & C. 5th 95, 2008 WL 4491534 (2008).} Thus comity concerns prevent the maintaining of class actions that include citizens of states where they could not maintain such an action in their home state.\footnote{Id.}

Courts have also held that TCPA cases are inappropriate for class action status because determining “membership in the class would es-
sentially require a mini-hearing on the merits” of whether each class member received an “unsolicited” facsimile advertisement. 223

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

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

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

225. Id.
226. Id.
227. The prerequisites for class certification under the Federal Rules of Civil Procedure require the finding of (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. See Fed. R. Civ. P. 23(a).
228. Bernstein, 2005 WL 1613776, at *4. The plaintiff was a lawyer who had used the same law firm to bring previous TCPA cases and had worked together with the firm in at least two previous class actions that the plaintiff had initiated. Id. at *3.
230. Id. at *2.
A class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements.\textsuperscript{232} A number of courts have found that class actions are inappropriate in TCPA cases because individual issues predominate over common issues.\textsuperscript{233}

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

But other courts have held that class actions are permissible because the Act contains no prohibition of class actions.\textsuperscript{236} Thus the threat of a TCPA class being certified for class action treatment is real in many jurisdictions and TCPA class actions have resulted in enormous damage awards.\textsuperscript{237} Since average innocent lawbreakers do not have the legal training or resources to determine if a threat of class certification contained in a demand letter\textsuperscript{238} from a TCPA plaintiffs’ lawyer has potential merit, they may choose to settle the case based on the threat alone.

2. Threat of Piggybacking of State Law Consumer Protection Claims

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

\textsuperscript{232} Id. at 404–05.
\textsuperscript{234} E.g., Freedman, 2005 WL 2122304.
\textsuperscript{235} Id. at *3. (quoting Levine v. 9 Net Ave., Inc., No. A-1107-00T1, 2001 WL 34013297, at *6 (N.J. Super. Ct. App. Div. June 7, 2001)).
form of consumer protection legislation. Most of these consumer protection laws seek to deter businesses from engaging in unconscionable or unfair dealings with consumers.

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

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

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

3. Threat of Multiple Violations Per Fax

Not satisfied with demanding $500–$1,500 per unsolicited facsimile, TCPA plaintiffs' lawyers have demanded this statutory penalty for each alleged technical violation of the TCPA and FCC rules, demand-
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ing multiple statutory penalties for each unsolicited facsimile advertisement. In Culbreath v. Golding Enters., LLC, the plaintiff demanded not only $1,500 for each unsolicited fax advertisement it received, but additional statutory damages of $1,500 for each technical violation of FCC regulations each fax allegedly contained. In addition to generally prohibiting the transmission of unsolicited advertisements by facsimile, Congress made it illegal to transmit such a facsimile if it did not contain “the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.”249 But unlike subsections 227(b) and (c), subsection (d) does not provide for a private cause of action for individuals who violate it.250 Despite this apparent intent by Congress not to permit private lawsuits to enforce these technical violations, plaintiffs’ lawyers attempted to “skirt its provisions”251 by relying on FCC regulations252 that require similar identifying information on facsimiles.

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

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

247. See Culbreath, 872 N.E.2d 284.
248. Id. at 286–87; see 47 C.F.R. § 68.318(d) (2011) (requiring that every facsimile contain certain identifying information).
250. Id. § 227(b), (c), (d).
251. Culbreath, 872 N.E.2d at 288.
252. 47 C.F.R. § 68.318(d).
253. Note that 47 U.S.C § 227(d) is not without an enforcement mechanism. State attorneys general can sue to enforce these provisions in federal court under 47 U.S.C. § 227(f)(1).
Thus, at least in Ohio, no private cause of action exists to enforce the FCC’s technical regulations about the content of the facsimile.

4. Case Studies

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

i. Members of a Chamber of Commerce

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

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

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

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

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


261. *Id.* at ¶8.

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because it encouraged recipients to enroll in the for-profit College.\footnote{263 See supra, note 259.}
Defense counsel argued that the document, taken as a whole, was not an advertisement because, among other reasons, the business to which it was directed could not be a student at the College.\footnote{264 Id.} At trial, the Executive Director of the chamber of commerce testified that she encouraged communications such as the one at issue between members of the chamber.\footnote{265 Id.} She told the court and jury that exchanging information like what was contained in the facsimile, or networking, was the very essence of why businesses join the chamber of commerce.\footnote{266 Id.}

After many thousands of dollars in legal fees\footnote{267 The author, as lead defense counsel, was responsible for billing legal fees to the client.}, the defendant prevailed when the trier of fact determined that the document at issue was not an advertisement under the TCPA.\footnote{268 Omerza, 2007 Ohio 5215, at ¶9.} Not satisfied, the plaintiff’s counsel unsuccessfully appealed, costing the College even more money in defense costs.\footnote{269 Id. at ¶31.}

In this case, Bryant & Stratton College, an institution founded in 1854 with sixteen campuses in four states, decided to fight what it perceived as a frivolous lawsuit. It had the resources to do so. Many innocent lawbreakers do not.\footnote{270 See supra sections V.C–D.}

\textit{ii. Who Can Give Consent?}

As the use of facsimile machines in general, and to transmit advertising in particular, declines, and as businesses that send fax advertising become more aware of the TCPA, the cottage industry of TCPA plaintiff’s lawyers have fewer cases to file. But because bringing TCPA lawsuits is their primary business model, some of these lawyers resort to manufacturing lawsuits and arguments where no legitimate claim exists. One such example involved the 2009 lawsuit by an optometrist against an eyeglass manufacturer.\footnote{271 Jacobson v. Jonathan Paul Eyewear, No. 09-CV-003340 (Ohio Ct. Com. Pl. Jan. 26, 2011) (granting, in part, defendant’s motion for sanctions).}

The plaintiff (suing both in the name of the optometry business and the individual “owner”) alleged that the defendant had transmitted by facsimile a number of unsolicited advertisements for
The defendant, aware of the TCPA's restrictions, claimed that it had obtained express permission from one of the Defendant's employees to transmit the faxes. The defendant not only had a database record of the telephone conversation in which it claimed it received consent and addressed the facsimiles to the individual from whom it received consent, but still employed the individual who spoke with the plaintiff's employee to obtain that consent.

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

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

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

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

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

273. Id.

274. Id.

275. Id.

276. Id.

277. Id.

278. Id.

279. Id.

280. After the dismissal, the defendant filed a motion for sanctions which was granted by a magistrate. But the award of $1,482 in sanctions will reimburse the defendant for only a tiny portion of the attorneys' fees spent in defending the case. Jacobson v. Jonathan Paul Eyewear, No. 09-CV-003340, slip op. (Ohio Ct. Com. Pl., Lake Cnty. Jan. 26, 2011) (granting, in part, defendant's motion for sanctions).
some addressing true fraud, and some addressing unfair practices. But few of these other federal consumer protection statutes have strict liability private rights of action like the anti-junk fax provision of the TCPA. This section will address only two such statutes: the anti-telemarketing provision of the TCPA and the CAN-SPAM Act. Neither of these provisions is as harsh to innocent lawbreakers at the anti-junk fax provision of the Act.

A. TCPA’s Anti Telemarketing Provisions

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

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


283. The term “automatic telephone dialing system” is defined as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” Id. § 227(a)(1).

284. Id. § 227(b)(1)(A).

285. Id. § 227(b)(1)(B). Among the exceptions authorized by the FCC is that of an established business relationship. See 47 C.F.R. § 64.1200(a)(2)(iv).
prohibition is against using an automatic telephone dialing system to tie up two or more phone lines of a business at the same time.\footnote{286} Though these prohibitions are absolute—like the anti-junk fax provision—they have generated far less litigation.\footnote{287} And these provisions are far less likely to affect small businesses, because few, if any, have automatic telephone dialing systems or the ability to deliver prerecorded messages. It is only professional telemarketers—businesses that the TCPA intends to regulate—that would have the ability to violate these provisions. Further, the prohibition against using prerecorded or automated voices applies only to residential telephone numbers—a limitation that does not exist in the unsolicited facsimile prohibition.\footnote{288}

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

B. The CAN-SPAM Act

The conveniences of facsimile communications have been largely replaced by an even faster and cheaper form of written communication: electronic mail. Marketers did not fail to notice, and take advantage of, this new form of mass communication. Just as junk faxers could send millions of facsimiles a month,\footnote{292} junk e-mailers could send millions of e-mails an hour.\footnote{293} In response to the annoyance to consumers of wading through unwanted commercial e-mails, Congress enacted the CAN-SPAM Act of 2003.\footnote{294} This law establishes national standards for sending commercial e-mails and protects consumers

\footnote{286}{47 U.S.C. § 227(b)(1)(D).} \footnote{287}{A search of all cases reported on Westlaw revealed only 65 cases that cite to these provisions.} \footnote{288}{Compare 47 U.S.C. § 227(b)(1)(B) (noting the prohibition against prerecorded or automated voices with residential telephone numbers), with 47 U.S.C. § 227(b)(1)(C) (noting the unsolicited facsimile prohibition).} \footnote{289}{47 U.S.C. § 227(c).} \footnote{290}{Id. 227(c)(1). These regulations are codified in 47 C.F.R. § 64.1200.} \footnote{291}{47 U.S.C. § 227(c)(5).} \footnote{292}{See supra subsection IV.B.1.} \footnote{293}{See Dan Fletcher, A Brief History of Spam, TIME (November 2, 2009), http://www.time.com/time/business/article/0,8599,1933796,00.html.} \footnote{294}{CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. § 7701 (2004)).}
from, among other things, mobile phone spam. Unlike the TCPA, however, the CAN-SPAM provides practically no private right of action. In fact, the law prohibits individuals who receive unsolicited commercial e-mails from suing the sender and preempts state laws that may have stricter penalties or rights of private enforcement. Enforcement of the law is left to federal agencies like the Federal Trade Commission and the states, which can seek penalties of up to thirty-five dollars per e-mail. Again, unlike the TCPA which has no damages cap, damages under the CAN-SPAM Act are capped at two million dollars.

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

VII. EVENING THE SCALE

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

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

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

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


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

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

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

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

304. See supra subsection II.C.1.
305. 47 U.S.C. § 227(a)(3) (“The term ‘telephone facsimile machine’ means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” (emphasis added)); see also infra subsection VII.A.2 (discussing the plain language and intended scope of TCPA).
307. S. Rep. No. 102-178, at 1968 (1991) (“The bill also prohibits unsolicited advertisements sent to fax machines, known as junk fax. Advertisements today are sent for cruises, home products, investments, and all kinds of products and services without the consent of the person receiving them. These unsolicited advertisements prevent the owners from using their own fax machines for business purposes. Even worse, these transmissions force the recipient to pay for the cost of the paper used to receive them. These junk fax advertisements can be a severe impediment to carrying out legitimate business practices and ought to be abolished.”); see also supra subsection II.C.1 (arguing that Congress’s reasons for
reading of the definition, like the one prescribed by the FCC and followed by a number of courts.\footnote{See, e.g., Holtzman v. Caplice, No. 07 C 7279, 2008 WL 2168762, at *7 (N.D. Ill. May 23, 2008) (deferring to the FCC’s order); supra subsection V.A.1.} fails to carry out the intention of the TCPA, and, instead, unjustifiably feeds the junk fax cottage industry.

1. The FCC’s Incorrect Interpretation of the Act

As facsimile technology evolved from the traditional facsimile machine in common use when the TCPA was enacted to the use of computerized facsimile servers and personal computers to receive faxes,\footnote{See supra section III.A.} courts and the FCC were tasked with deciding whether the Act applied to these new fax machines. In 2003, the FCC incorrectly expanded the scope of the TCPA to include other types of devices that are capable of receiving facsimile transmissions—devices that are not directly connected to regular phone lines and that do not automatically print the document on paper, ruling that “personal computers equipped with, or attached to, modems and computerized fax servers” fall within the definition of a telephone facsimile machine under the TCPA.\footnote{In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14133 (2003) (“We conclude that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA’s prohibition on unsolicited faxes.”). The FCC reasoned that a broad interpretation was necessary to prevent faxers from easily side-stepping the junk fax provision. \textit{Id.} In arriving at this conclusion, the FCC reasoned incorrectly that faxes sent to computer servers would still shift advertising costs to the recipients “if they are printed,” tie up the recipient’s phone lines, and increase the recipient’s labor costs. \textit{Id.} As discussed in section III.A, supra, this is simply not the case.} As explained below, this interpretation is incorrect, and should not be followed by courts that hear TCPA cases because this expanded definition is improper as a matter of statutory interpretation, and, most importantly, addresses a “harm” that was not contemplated by Congress when it enacted the TCPA. It also allows, in effect, for a private cause of action under the TCPA for the receipt of an unsolicited commercial e-mail, something that the CAN-SPAM Act, which addresses unwanted e-mails, does not permit.\footnote{15 U.S.C. § 7701 (2006); see supra section VI.B.}

2. The Plain Language and Intended Scope of the TCPA

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

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

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

312. See supra section VII.A.
313. 15 U.S.C. § 7701; see supra section VI.B.
314. Most of these cases arose before the passage of the CAN-SPAM Act of 2003, which regulates the transmission of commercial e-mail (commonly known as SPAM). But as discussed in section VI.B, the CAN-SPAM Act does not provide for a private right of action. Thus, the cottage industry of TCPA litigants, with the blessing of the FCC, continue to file TCPA claims even when the “facsimile” was received by a server and converted to an e-mail.
317. See supra subsection VII.A.1.
318. Aronson, 824 A.2d at 321 (emphasis added) (quoting 47 U.S.C. § 227(b)(1)(C)).
319. Id. at 321–22 (emphasis added).
320. Id. at 322 (“[T]he mention of one thing implies the exclusion of others not expressed.”).
321. Id.
nition of a telephone facsimile machine necessarily excludes computers because “a computer does not have the capacity to print.”

There can be little doubt that Congress agreed that electronic mail transmission of unsolicited commercial advertising was different from the transmission of similar content by fax. As discussed above, Congress enacted a separate federal law to deal with unsolicited e-mail more than a decade after the passage of the TCPA—the CAN-SPAM Act of 2003.

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

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

322. Id. The court stated:

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

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

Id.

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


325. Id. at *1.

326. See supra subsection II.C.1.

327. See supra subsection II.C.1.

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


B. Strictly Enforcing Traditional Litigation Requirements

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

1. Standing

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

i. Real Party in Interest

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

But as is evidenced by the above-cited example, innocent lawbreakers often have to spend significant amounts in legal fees to determine who is the real party in interest. Courts must therefore be careful
when examining initial pleadings in a TCPA case to ensure that the named plaintiff is the party who has the right to bring the action.

ii. Assignability of TCPA Claims

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

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

333. See “Get Paid for Faxes!” advertisement, reprinted in Letter from Dan Danner, supra note 3.
334. E.g., Kruse v. McKenna, 178 P.3d 1198 (Colo. 2008).
335. Courts have so held that because the private right of action provision of the TCPA allows state court action “if otherwise permitted by laws or rules of court of [the] state.” 47 U.S.C. § 227(b)(3) (2006). “We construe this language as a statutory command to apply state substantive law in determining which persons or entities may bring TCPA claims in state court.” Kruse, 178 P.3d at 1200.
336. E.g., id. at 1202; see US Fax Law Ctr., Inc. v. iHire, Inc., 476 F.3d 1112 (10th Cir. 2007).
337. Kruse, 178 P.3d 1198.
338. Id. As discussed in sections III.A and B, supra, since the actual damages suffered by a recipient of an unsolicited facsimile are, at most, nominal, the author is unaware of any TCPA case where the plaintiff sought actual, as opposed to statutory, damages.
339. Kruse, 178 P.3d at 1199.
340. E.g., Micheletti v. Moidel, 32 P.2d 266, (Colo. 1934) (“The general rule is that assignability and descendibility go hand in hand.”).
ble.\textsuperscript{341} In Colorado, claims for punitive damages or penalties are non-descendable.\textsuperscript{342} Thus the real question facing the Court in \textit{Kruse} was whether a claim for statutory damages\textsuperscript{343} under the TCPA is a penalty claim. In answering, the court applied a test it previously developed to determine whether a statutory claim is “one for a penalty in the context of determining the correct statute of limitations to apply;” the test looked at whether: “(1) the statute asserted a new and distinct cause of action; (2) the claim would allow recovery without proof of actual damages; and (3) the claim would allow an award in excess of actual damages.”\textsuperscript{344}

It is easy to see why, under such a test, the Court in \textit{Kruse} held that a claim for statutory damages under the TCPA is “a claim for a penalty.”\textsuperscript{345}

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

2. \textit{Knowingly/Willfully}

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

\begin{quote}
\textsuperscript{341} \textit{Kruse}, 178 P.3d at 1200.

\textsuperscript{342} Colorado Revised Statute section 13-20-101 (2003) provides the following:

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

(Emphasis added).

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

\textsuperscript{344} \textit{Id.} at 1201.

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

\textsuperscript{346} \textit{E.g.}, Sullivan v. Curling, 99 S.E. 533, 534 (Ga. 1919).

\textsuperscript{347} \textit{See supra} subsection II.C.1.

\textsuperscript{348} 47 U.S.C. § 227(b)(3)(B) (2006). As discussed in subsection V.D.3, \textit{supra}, some cottage industry lawyers have argued that additional $500 penalties can be had for multiple violations of FCC rules in each facsimile. These lawyers have also
If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this section, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.\textsuperscript{349}

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

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

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

\begin{itemize}
\item been known to suggest that the statutory penalty should apply to each page of a multi-page facsimile transmission that is sent at one time. \textit{See, e.g.}, Omerza v. Bryant & Stratton Coll., 2007 Ohio 5215 (Ohio Ct. App. 2007).
\item \textit{See, e.g.}, Charvat v. Ryan, 879 N.E.2d 765, 772 (Ohio 2007). Though the \textit{Ryan} case involved an alleged violation of the telemarketing probation of the TCPA, the court’s analysis applies equally to the unsolicited facsimile provision of the Act because both prohibitions share the same private cause of action provision. \textit{See} 47 U.S.C. § 227(b)(3).
\item \textit{Ryan}, 879 N.E.2d 765.
\item \textit{Id. at} 767.
\item \textit{Id. at} 768 n.1.
\item \textit{Id. at} 768 n.1.
\item \textit{Id.} Although the \textit{Ryan} court, citing State \textit{ex rel.} Charvat v. Frye, 868 N.E.2d 270 (Ohio 2007), correctly held that registration on the do-not-call list is not a prerequisite to maintaining an action under the TCPA, the fact that Charvat, chose not to register his number flies in the face of arguments raised by the cottage industry that the reason they bring TCPA claims is to stop unwanted phone calls and faxes. If Charvat was truly trying to stop the “intrusions” to his life caused by telemarketing and unsolicited faxes, it is hard to believe that he would not have registered his number. Instead, it is safe to assume, based on the twenty-nine decisions involving Charvat bringing TCPA-related claims reported on Westlaw.com as of March 27, 2011, that he welcomes “unwanted” phone calls and faxes as a way to make money. \textit{See, e.g.}, Charvat v. Dispatch Consumer Servs., 769 N.E.2d 829 (Ohio 2001); Frye, 868 N.E.2d 270.
\end{itemize}
$1,000 for the phone call, Charvat appealed, ultimately to the Ohio Supreme Court. Charvat argued that knowingly should mean only that the defendant had knowledge of the facts that constitute the offense. Ryan urged the court to require proof that the defendant had a “culpable mental state” before treble damages could be awarded.

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

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

The $500 statutory penalty collectable by a TCPA litigant is already about 10,000 times higher than actual damages. A penalty of $1,500 per violation is 30,000 times actual damages. It is incon-
ceivable that Congress could have intended for this enhanced penalty to apply to run-of-the-mill cases. But following the Court’s reasoning in Ryan, it is hard to imagine any violation of the TCPA that would not entitle the plaintiff to demand treble damages.

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

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

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

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

Because Congress chose to employ a low threshold to assess treble damages, by requiring a caller's actions to be 'knowing' or 'willful,' it is important to highlight the language of the second part of the provision for treble damages: 'The court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount of the greater of $500 or the actual money loss. Ryan, 879 N.E.2d at 771. This admonition is of little help to the innocent lawbreaker like Ryan. He must still endure the legal fees associated with litigating a case with unknown potential damages, see supra section V.D, but is also subject to additional legal fees fighting an appeal by a plaintiff claiming that the trial court abused its discretion in not awarding treble damages. See, e.g., Reichenbach v. Fin. Freedom Ctrs., Inc., No. L-03-1357, 2004 WL 2834624 (Ohio Ct. App. Nov. 19, 2004). Presumably a defendant could avoid the discretion of a trial court if he could show that his facsimile machine somehow malfunctioned, sending faxes without his knowledge. The author is unaware of any instances where this has been argued, or actually happened. It is also conceivable that a defendant can claim that his facsimile machine was hijacked by a third party. But that would simply change the real party in interest, and not bear on whether the hijacker knowingly sent the faxes.

366. See supra subsection IV.B.1.

367. Covington & Burling v. Int'l Marketing & Research, Inc., No. CIV.A.01-0004360, 2003 WL 21384825, at *8–9 (D.C. Super. Ct. Apr. 17, 2003). Likely cognizant that the companies who hired Fax.com to send the advertisements on their behalf may not have known of the TCPA's prohibitions, the court did not award treble damages against the other defendants. Id.
lawful or that the recipient does not want to receive the faxes. A broader application, as suggested by some courts, does nothing more than feed the cottage industry of plaintiffs’ lawyers who are the only ones who profit from such an interpretation of the Act.

C. Applying Traditional Legal Concepts to Limit Punitive Recovery

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

1. Mitigation of Damages

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

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

368. See, e.g., Ryan, 879 N.E.2d 765.
369. Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. Rev. 103, 107–08 (2009) (“[S]tatutory damages guarantee a minimum recovery, and thus make a violation that may result in nominal or no actual damages more attractive to pursue.”).
370. See, e.g., L.A. News Serv. v. Reuters Television Intern., Ltd., 149 F.3d 987, 996 (9th Cir. 1998) (“[A]wards of statutory damages serve both compensatory and punitive purposes.”).
371. See supra section I.L.C.
372. See supra section V.A.
solicited advertisements which allegedly cost them paper, toner, and annoyance, this can often be accomplished with a phone call—not litigation. This is especially true when the transmitter of the unsolicited facsimile is an innocent lawbreaker. Small businesses have no incentive to send facsimile advertisements to customers who don’t want to receive them. No business wants to annoy potential customers as these customers may be less inclined to patronize the business because they may be irritated with the facsimile sender. So, innocent lawbreakers have no reason to continue transmitting facsimiles to individuals or companies who do not want to receive them.

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

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

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

Put more simply: “damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”

Rockingham County v. Luten Bridge Co. (the “bridge to nowhere” case) is a fine example of the principle of mitigation. In Rockingham, the county awarded Luten Bridge Company a construc-
tion contract to build a bridge. However, a month later, the county cancelled not only the contract for the bridge, but decided not to build the road that the bridge was to be a part of. Notwithstanding this course of action, Luten Bridge Company continued to build the bridge for another nine months, despite the fact that it was, quite literally, a bridge to nowhere. When it finally stopped construction, it sued to enforce the contract. The court, however, held that the plaintiff’s recovery was limited to his damages up until the breach occurred, and that he had a “duty to do nothing to increase [his] damages.”

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

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

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

380. Id. at 302.
381. Id. at 303.
382. Id.
383. Id.
384. Id. at 308; see also Sperry Rand Corp. v. Hill, 356 F.2d 181, 187 (1st Cir. 1966) (holding, in a case for invasion of privacy and libel, that the "plaintiff could not recover for damages he could have avoided after it became evident that defendant would continue its advertising campaign").
385. The FCC rules require that all facsimiles contain the transmitter’s contact information. 47 C.F.R. § 64.1200 (2010).
to which more unsolicited advertisements can be sent. Though this concern may be valid when applied to fraudulent facsimiles, it is unwarranted when the transmitter of the unwanted advertisement is an innocent lawbreaker—often a local business known to the recipient. The innocent lawbreaker, by definition, will immediately cease transmitting unwanted facsimiles.

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

2. **Due Process**

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

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Some of the information found on this page is displayed below:

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

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

- I was only getting a few each week until I started calling the opt out numbers. Now I’m deluged with them and am ready to sue. If it’s illegal, why can’t they be stopped?
- I used to get one stock report fax a month or every couple of weeks, then I started calling the removal 800 numbers at the bottom. And now I am getting at least one a day. I have started keeping them and am trying to track down where they are coming from. Bit (sic) it seems the more I call the removal #s the more faxes i (sic) get. Please help.

*Id.*


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

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

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

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

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

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

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

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

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396. Scheuerman, supra note 369, at 123.
397. 251 U.S. 63 (1919).
398. Id.
399. Id. at 64.
400. Id. at 64.
401. Id.
402. Id. at 66.
403. Id.
404. Id. at 67.
But the more recent cases of TXO Production Corp. v. Alliance Resources Corp.,\textsuperscript{405} BMW of North America v. Gore,\textsuperscript{406} and State Farm Mutual Automobile Insurance Co. v. Campbell\textsuperscript{407} significantly undercut this rationale.\textsuperscript{408} Campbell and Gore reiterate the fact that exemplary damages should bear some relation to actual damages,\textsuperscript{409} and Gore held, rather explicitly, that: “punitive damages may not be grossly out of proportion to the severity of the offense.”\textsuperscript{410}

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

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

\textsuperscript{405} 509 U.S. 443 (1993) (plurality opinion).
\textsuperscript{406} 517 U.S. 559 (1996).
\textsuperscript{407} 538 U.S. 408 (2003).
\textsuperscript{408} See \textit{S.W. Tel. & Tel. Co. v. Danaher}, 238 U.S. 482, 490 (1905) (ruling that where a telephone company acted in complete good faith in adopting a regulation, the infliction of “penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law”).
\textsuperscript{409} \textit{Campbell}, 538 U.S. at 426 (“In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”); Gore, 517 U.S. at 575 (“As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect the enormity of his offense.” (internal quotation marks omitted) (citing \textit{Day v. Woodworth}, 13 How. 363 (1852))).
\textsuperscript{410} \textit{Gore}, 517 U.S. at 576 (internal quotations and citations omitted).
\textsuperscript{411} 329 F. Supp. 2d 789 (M.D. La. 2004).
\textsuperscript{412} Id. at 808–09.
\textsuperscript{413} See \textit{TXO Prod. Corp. v. Alliance Res. Corp.}, 509 U.S. 443, 465 (1993) (plurality opinion) (analyzing the defendant’s contention that the award was excessive both substantively and procedurally). \textit{But see id. at} 470–71 (Scalia, J., dissenting) (arguing that there is no “substantive due process right that punitive damages be reasonable”).
\textsuperscript{414} \textit{Id. at} 453–54 (quoting \textit{Seaboard Air Line Ry. Co. v. Seegers}, 207 U.S. 73 (1907)).
Indeed, the court in Verizon Wireless conflates the inquiry from Gore and Campbell into one solely of notice. But this misinterprets—and severely short-changes—the language and thrust of Campbell. In Campbell, the Court noted that “it is well established that there are procedural and substantive constitutional limitations on these awards.” Furthermore, “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”

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

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

The first factor, the degree of reprehensibility, is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.” It reflects the idea that “some wrongs are more blameworthy than others,” and “the principle that punitive damages may not
be grossly out of proportion to the severity of the offense.” 425 The Court determines reprehensibility by looking for several factors: (1) whether the harm was physical or economic; (2) whether the defendant was reckless or indifferent to the health and safety of others in his conduct; (3) whether the target of the defendant’s conduct was financially vulnerable; (4) whether the defendant’s conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of malice, trickery or deceit, or was just plain accidental. 426

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

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

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

425. Id. at 576 (internal quotation marks omitted).
428. Id.
429. Id. at 582 (emphasis added).
430. Id. at 583 (emphasis added).
432. Id. at 470 (Scalia, J., concurring) (“I do not, however, join the plurality opinion, since it makes explicit what was implicit in Haslip: the existence of a so-called ‘substantive due process’ right that punitive damages be reasonable.”).
433. Gore, 517 U.S. at 607 (Scalia, J., dissenting).
ages. Though they are formally different, functionally, statutory damages serve the same purpose as punitive damages: to punish and deter wrongdoers. Certainly, a portion of the statutory damages goes towards compensating the victim. But above this, the stated reason for the TCPA’s statutory damages provision is deterrence.435

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

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

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

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

435. See supra section II.C.
436. See supra section V.A.
437. See supra section V.A.
439. See, e.g., Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 778 (N.D. Ill. 2008) (“It is premature at this stage (a motion to dismiss) to consider whether any hypothetical award might be constitutionally excessive.”).
440. See, e.g., Chad R. Bowman, Litigating Facsimile Advertising, 26-NOV Comm. Law 1, 23 (2008) (“The most persuasive time for a successful due process challenge . . . is likely after class certification and a liability determination for an amount far in excess of actual harm.”).
an imprudent time for such a determination, especially in the context of a class-action, or when the damages will clearly force the defendant into a “bet-the-company” scenario. Delaying such a determination until after trial places enormous pressure on the defendants to settle.

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

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

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

3. Statute of Limitations Issues

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

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

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

441. Scheuerman, supra note 372, at 127 (“Most courts defer decision on the due process question until after class certification. Here, courts conveniently find punitive damages jurisprudence relevant.”).
442. See Centerline, 545 F. Supp. 2d at 778; cf. Texas v. Am. Blastfax, Inc., 164 F. Supp. 2d 892 (W.D. Tex. 2003) (reducing what would have been a $2.34 billion award at $500 per fax to an award of $459,375, or seven cents per fax).
443. Scheuerman, supra note 369, at 147.
4. Remittitur

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

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

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

447. See generally Capital Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1051 (D. Minn. 2010) (“[i]f this Court does order remittitur, it must also offer Plaintiffs the option of choosing to reject the remittitur and exercise their right to a new jury trial solely on the issue of damages.”).
449. See, e.g., Capital Records, 680 F. Supp. 2d at 1051 (noting that “there is no authority for Plaintiffs’ assertion that the Court does not have the power to remit an award of statutory damages”); Sony BMG Music Ent. v. Tenenbaum, 721 F. Supp. 2d 85, 94 n.8 (D. Mass. 2010) (“Although I do not employ the remittitur procedure, I reject the plaintiffs’ contention that it is unavailable in cases where a jury has returned a statutory damages award under the Copyright Act.”).
451. See generally supra section V.A.
parties in interest and thus have little incentive to abandon the potential for a higher recovery.

D. Eliminate or Limit Private Enforcement Mechanism

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

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

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

\(^452\). See supra subsection II.C.3.

\(^453\). See supra section VI.B.

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

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

VIII. CONCLUSION

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

455. See supra subsection II.C.2.b.
456. See supra subsection II.C.2.b.
457. See supra subsection II.C.2.b.
458. The term small claims court is used to describe the lowest level court of a state where litigants can appear without counsel to resolve relatively minor disputes that often involve only money damages. Though states may label this type of a court with different names, every state has such a limited jurisdiction court.
461. See supra subsection II.C.2.a.
Though the TCPA has well served the purpose of almost eliminating the junk-fax industry, it was largely the actions of state attorneys generals and the FCC that accomplished this laudable goal. Private enforcement actions have done little to help consumers—instead benefiting lawyers and professional litigants to pad their pockets with money taken from innocent lawbreakers. The use of the traditional telephone facsimile machine as the best means of instantaneous written communication has largely been overtaken by Adobe PDF documents attached to electronic mail messages. But while the harm of unwanted facsimiles has declined, the litigation driven by the cottage industry of plaintiffs’ lawyers has continued. If Congress does not act to reform the TCPA to limit the detrimental effects of the Act on small businesses, courts must step in to bring balance to the interests of consumers and innocent lawbreakers. Courts must carefully examine each TCPA case to ensure that true violators of the Act are held accountable and that innocent lawbreakers are not unfairly harmed for innocent mistakes.
### VIV. APPENDIX A

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