

Rumplestiltskin, LLP The Dark Side of Fax

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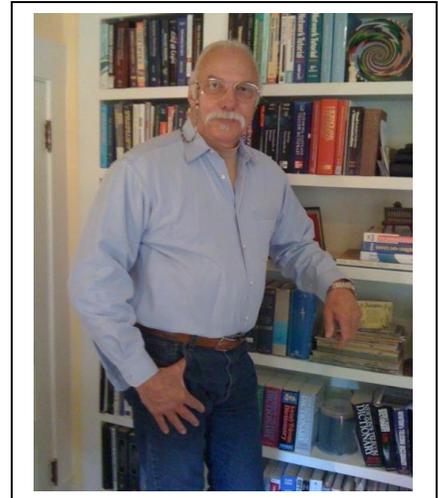
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In an effort to address a growing number of telephone marketing calls and certain other telemarketing practices thought to be invasions of privacy, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), codified at 47 U.S.C. § 227. Most of us know, at least in general terms, about the restrictions on unsolicited telemarketing calls to consumers and the national Do-Not-Call (DNC) list designed to end those annoyances...or opportunities, depending on your perspective. Many of us also are aware that, with some enumerated exceptions, the TCPA made it unlawful “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement unless...” The TCPA defined a telephone facsimile machine to “mean 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.” This very specific language was later broadened in FCC regulations which themselves were codified in 2003 at 47 CFR Parts 64 and 68. These FCC rules added personal computers equipped with fax modems and fax servers to the list of devices covered by the law, but specifically exempted “fax sent as email over the Internet.” There also is an exemption if you can prove an existing business relationship (EBR). The Junk Fax Protection Act of 2005 (JFPA), amending Section 227 of the Communications Act of 1934 and adding a few important points to the TCPA and the FCC rules and regulations, was signed into law by President George W. Bush in January 2005. It’s not quite that simple, of course, as there remain technical arguments about the definitions of such critical terms as facsimile machine, transmit, email and regular telephone line, to name a few.

One Is All It Takes

If a plaintiff can prove the transmission of a single unsolicited fax, the prescribed penalty is \$500. If the violation can be proved to be willful, the penalty is trebled to \$1,500. You may think that \$500 or even \$1,500 is trivial. After all, that’s the sort of issue that a really irate business person takes to small claims court, which is exactly where Senator Hollings, sponsor of the TCPA in the House of Representatives, says Congress intended these things to be resolved. But if you multiply those penalties by thousands, the numbers get real big and the matter becomes very serious, indeed. That’s what happens if a law firm that specializes in suing businesses for huge recoveries prevails in a class action suit. Defending yourself can be a very expensive proposition and winning your case can be tough. (Note: A civil case is unlike anything you have seen on Law and Order. In a criminal case, the burden of proof is on the prosecution, which must prove the guilt of the defendant beyond reasonable doubt. In a civil case, the plaintiff must

prove its case only on the balance of probabilities, which translates to more than 50%, i.e., more likely than not.)

Scenarios

A particularly nasty scenario may go something like this. A fax broadcaster (i.e., fax blaster) approaches you with the idea of a \$200 advertising campaign comprising faxes to 5,000 businesses of a certain size and SIC in the immediate and adjacent postal ZIP codes or perhaps in your immediate telephone area code or central office prefix. The fax blaster represents that it will select the fax recipients from a commercially available list of companies who have indicated their willingness to receive unsolicited advertisements. Upstanding business owner or manager that you are, you naturally ask about the legality of this sort of thing. The fax blaster assures you that it is perfectly legal and they have hundreds of satisfied clients. This all sounds like a real bargain, so you collaborate with the fax blaster to customize a simple ad template, perhaps offering a discounted dental exam, free insurance evaluation or something of the sort. Some of the recipients don't appreciate the unsolicited fax. One actually files a claim in small claims court or contacts an attorney, who files a claim on behalf of that one named plaintiff and "all others similarly situated". (Note: At this point, the class action attorney commonly has no idea as to how many, if any, others are "similarly situated".) Through the discovery process, the plaintiff's attorney gains access to the transmitting fax logs, notes the fact that there were as many as 5,000 other faxes involved and seeks class action certification on behalf of the one named plaintiff and 5,000 or so others "similarly situated". By the time this all unfolds, the fax broadcaster is in the wind, i.e., no longer in business and perhaps nowhere to be found. That leaves you, the advertiser, holding the bag, i.e., separately liable. If my math is correct, the exposure is in the range of \$2,500,000 to \$7,500,000, if the violations are proved to be willful. Note: Such cases often involve thousands of faxes, thousands of passive (unnamed) plaintiffs across dozens of jurisdictions, and millions of dollars. Remember that we're talking federal law here, but there are overlapping state laws that can affect your financial exposure, the statute of limitations, etc. This is one situation where state law can trump federal law to some extent, so the class action attorneys are very careful in selecting the jurisdiction in which they file, generally avoiding Arizona, New York and Michigan, as examples. They love Illinois.

If your ad happened to be one of a dozen on a page, multiply the aggregate risk times a factor of 12. A business liability insurance policy may cover all or some of that, but contemporary policies typically specifically exclude TCPA matters. If you have no insurance or the insurance company backs away, the class action attorneys may well go after your personal assets. These cases rarely go to trial but rather are settled out of court. In any case, so to speak, the class action attorneys at the firm of Rumpelstiltskin LLP seek to spin 1 junk fax into robes of gold for themselves, perhaps leaving you dressed in rags as you appear in bankruptcy court.

In another scenario, the fax advertising idea may have been your own. You may have provided your own list of client fax numbers plus a few thousand members of your trade association plus a few thousand numbers you gleaned from business cards you gathered at trade shows. You think that you have a solid existing business relationships (EBR) with each and every one of these folks, but one may take offense, so the end result is the same. By the way, there is no national fax DNC list, so you pay your money and take your chances, as the old saying goes.

In yet another scenario, a large national real estate company has a strict policy against fax advertising and goes so far as to require that each and every year all of its agents sign a document acknowledging that policy and vowing to adhere to it, on penalty of termination of the agency relationship. Unbeknownst to the insurance company, a rogue agent violates that policy and contracts with a fax broadcaster to send thousands or perhaps millions of unsolicited fax ads to people with whom neither he nor the company has any EBR. The class action attorneys, of course, don't go after the agent but the real estate company based on the legal doctrine of vicarious liability, a form of a strict, secondary liability that arises under the common law doctrine of agency, which holds that the superior party is responsible for the acts of its subordinate. (Rumpelstiltskin LLP goes for the deepest pockets. After all, that's where the biggest payoff is to be found and we're talking potentially many millions and even billions of dollars.) So, you can do everything right and you're still screwed, so to speak.

Note: These scenarios are based on actual cases in which I was involved as a consulting/testifying expert. I don't make this stuff up.

Serial Plaintiffs

Serial plaintiffs are not uncommon in TCPA litigation—some have been named plaintiffs in dozens of such suits. Some allegedly have even gone to great lengths to publish their fax numbers widely, thereby increasing the likelihood that they would receive an unsolicited fax ad. When they receive an unsolicited fax, they just place in a basket next to the fax machine. Every so often the contents of the basket go to a class action attorney who specializes in TCPA junk fax lawsuits and things soon start to get serious—very serious. Now, please understand that the recipient has every right to file a lawsuit under the TCPA for every occurrence. There also is a bit of financial encouragement to do so, as the named plaintiff in these class action suits generally receives a substantial cash incentive when the case settles or a judgment is rendered in favor of the plaintiff. According to my research, the incentive to the plaintiff is commonly in the neighborhood of \$7,500 and can run as high as \$25,000, depending on factors such as the amount of effort expended by the plaintiff during the legal process. The settlements and plaintiff incentives must be approved by the court, so are not only completely legal but also based on precedents.

Protect Yourself

There are protective measures, of course. Scrutinize your fax marketing practices. Avoid faxing anything at all to any company or person with whom you do not have an easily provable EBR or written express permission to fax. (I really mean rock solid, ironclad provable, for you may well be forced to prove it in a court of law.) The JFPA requires that you identify yourself in the fax header. All faxes must include a very specifically worded, no-cost, 24x7x365 opt-out provision—I suggest both a toll free number and a Web site. Avoid using a third-party fax broadcaster—unless the company is absolutely rock solid ethically, operationally and financially. A third-party broadcaster also should agree contractually to participate fully in your defense in the event of a lawsuit and should assume a full measure of liability for any TCPA/JFPA violations. (Good luck with that last condition.) Make sure that you know where your responsibilities end, where the fax broadcaster's begin, and where they are shared. Avoid using a list of fax numbers derived from a publicly available source (e.g., association membership list or scraped from websites). The only completely foolproof approach is to avoid fax broadcasting altogether. I know that seems a bit extreme, but now that I have your attention, avoidance is the operative word here. In other words, DO NOT engage in fax broadcasting unless you are absolutely certain that you are doing so within the law.

Fax Do-Not-Call (DNC) List

Congress did not include any provision for a fax DNC list in the TCPA or JFPA and the FCC did not take the initiative to establish one. The TCPA, of course, is primarily intended to protect consumers, not businesses, so I guess there is some logic behind that decision. I, on the other hand, think it makes a great deal of sense to publish a list of named plaintiffs in both individual and class action suits filed under the TCPA and JFPA, assembled from publically available case and docket information from State and U.S. District, Bankruptcy, and Appellate courts. The thought is that you could absolutely avoid faxing them anything unless you first establish or confirm an Existing Business Relationship (EBR) and are willing to go to the expense of proving it in the event that they file suit against you anyway. (Some class action TCPA cases have been dismissed after an EBR was proven—and a lot of time, effort and money expended in doing so.) If, however, you are about to embark on a fax broadcasting campaign, I suggest that you make certain that the third-party broadcaster has assembled an internal DNC list that includes such a list of named plaintiffs who have sued them and/or their clients under the TCPA/JFPA or related state statutes and that the broadcaster can scrub your list and block transmission to all associated telephone numbers. If they can't prove to your satisfaction that they have done and can do so, I suggest you find another broadcaster...or another advertising medium.

Defend Yourself

Assuming that you did it, anyway, there are a variety of defenses that can be more or less successful, depending on the specifics of the case, the jurisdiction (e.g., state vs. federal or even federal district) in which it is filed, and the skill and experience levels of the attorneys for the plaintiff(s) and defendant(s). The attorneys representing the plaintiffs often are highly skilled and experienced in TCPA class action litigation—and they can be relentless. There also are excellent attorneys who have successfully defeated class action junk fax claims and/or mitigated the damage. Attorneys for both the plaintiff and defendant often engage an expert witness, a role that I sometimes play—for the defense.

Disclaimer: Ray Horak is a respected author, telecom consultant and long-time contributor to TR as a staff writer and technology editor. Ray provides litigation support services as a consulting and testifying expert across a wide range of telecom matters, including the TCPA and JFPA. Ray is not an attorney and does not offer legal advice or opinions. The legal information provided herein is, at best, of a general nature and cannot substitute for the advice of a competent, licensed professional with specialized knowledge who can apply it to the particular circumstances of your case. Please contact the local bar association, law society or similar organization in your jurisdiction to obtain a referral to a competent, licensed attorney.

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This article initially appeared in the April 2019 issue of *Telecom Reseller*. Although the use of fax has declined considerably during the last several decades, fax remains a viable Unified Communications (UC) channel. The issue of fax liability under the TCPA, therefore, remains an important subject. Rumpelstiltskin LLP: The Dark Side of Dialers is a related article that discusses the TCPA provisions

relating to the use of Automatic Telephone Answering Systems (ATDSs) in the transmission of voice and text messages.

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