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Class Action Seminar  
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**Taking Junk Faxes Personally:  
Viability of a Class Action Suit under the  
Telephone Consumer Protection Act (TCPA)<sup>1</sup>**

Have you ever answered the phone, and an alien, robotic voice greets you? Have you ever had the maddening experience of having pre-recorded voice ask you to hold for a "live" representative? Even worse, have you received junk faxes? Some scholars have called it "telephone terrorism"<sup>2</sup> and I wholeheartedly agree.

I have one of those combination printer-fax machines. Every other week, I have to replace my \$35 ink cartridge, despite the fact that I am extremely conservative with my print jobs. The reason? Unwanted junk faxes. This week's ad was for a "March Spring Blowout" on Grandfather

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<sup>1</sup> A copy of the text of the act is attached as Appendix I.

<sup>2</sup> Miller, Hilary B., and Biggerstaff, Robert R. *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*. 52 Fed. Comm. L.J. 667, May 2000.

Clocks.<sup>3</sup> Ignore the fact that the date on the fax is April 24<sup>th</sup> and the sale was in March. What am I going to do with a grandfather clock in a one-bedroom apartment? I know for certain that this fax was unsolicited, but what can I do about it?

Consumers are regularly disturbed at home by unwanted "courtesy calls". More than 300,000 solicitors call more than 18,000,000 Americans every day,<sup>4</sup> and many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers. Businesses are subjected to the daily nuisance of costly unsolicited faxes.

Businesses have complained to the United States Congress and the Federal Communications Commission ("FCC") that automated or prerecorded telephone calls are a nuisance, an invasion of privacy, and interfere with interstate commerce.<sup>5</sup> One businessman who filed suit after receiving five

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<sup>3</sup> A copy of the fax is attached as Appendix II.

<sup>4</sup> PL 102-243, Congressional Findings.

<sup>5</sup> Id.

unsolicited faxes from Hooters Restaurants in 1995, stated, "They're annoying. They're using your paper. They can come in when you're looking for another fax."<sup>6</sup>

The harm may seem minimal, but when you consider that some abusers are faxing hundreds of faxes per day,<sup>7</sup> the aggregate damages are significant. In a particularly egregious case, *Texas v. American Blast Fax, Inc.*, it was undisputed that the defendants violated the TCPA from October 5, 2000 to March 15, 2001, and in that timeframe sent **2.5 million** fax advertisements per month.<sup>8</sup> In an effort to protect consumers from the harm caused, the U.S. Congress enacted the Telephone Consumer Protection Act or "TCPA".

Junk faxes are prohibited by Federal and most States' laws because the faxers abuse the concept

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<sup>6</sup> Glaberson, William. *Dispute Over Ads Draws Wide Scrutiny After Award*, New York Times, July 22, 2001.

<<http://www.nytimes.com/2001/07/22/national/22FAX.html>>

<sup>7</sup> See Fax.com settlement (consent decree) with Washington State's Attorney General, March 13, 2001 at ¶2.5

<sup>8</sup> 164 F. Supp. 2d 892 (W.D. Tex. 2001).

of "cost shifting". Advertisers use consumers' toner and paper to promote their message at the consumers' expense. It is "advertising by theft", and therefore outlawed by federal law. Technically, the fax perpetrator is committing a petty crime and a simultaneous tort.<sup>9</sup> Junk faxing is a multi-million dollar business, making huge profits because it uses other people's resources to send its advertising messages. Imagine the legal theories that could apply to the defendant's acts: nuisance, invasion of privacy, trespass on someone's telephone line and computer, theft of paper and supplies and interference with a business relationship in the case where the junk fax is preventing a legitimate fax from coming through.

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<sup>9</sup> It should be noted that not every fax is a junk fax that violates the federal law. To be subject to the Act, a fax must be an "unsolicited ad." An "unsolicited advertisement" is any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person without the receiver's prior express invitation or permission. If the receiving party has an established business relationship with the sender, then, according to the FCC, the receiver has given consent to receive unsolicited faxes from the sender. See <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>.

While these claims could legitimately be made, it is not feasible for a plaintiff to bring a suit on these grounds, primarily because the cost of litigating usually outweighs the costs of the aforementioned causes of action. The government is attempting to provide help through legislation.

### **Federal Help for Consumers**

The federal government may provide some help through the FCC. Consumers can file a complaint about unsolicited faxes by completing the FCC's on-line Consumer Complaint Form<sup>10</sup>, or by calling the FCC's Consumer Center<sup>11</sup> or also send a letter summarizing the complaint to the FCC.<sup>12</sup>

### **State Help**

Consumers can file a TCPA-related complaint with state authorities, including local or state

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<sup>10</sup> [www.fcc.gov/complaints.html](http://www.fcc.gov/complaints.html)

<sup>11</sup> 1-888-CALL-FCC (1-888-225-5322) voice or 1-888-TELL-FCC (1-888-835-5322) TTY.

<sup>12</sup> Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries and Complaints Division, 445 12th Street, SW, Washington, DC 20554

consumer protection office or the state Attorney General's office. In Florida, the Attorney General has the authority to impose a penalty of up to \$500 per occurrence for faxes within the state of Florida.<sup>13</sup>

### **Court Action**

Naturally a plaintiff has a private right of action, as well as the states have a right of action against the offender. Since the damage to each individual plaintiff is minimal, it would seem that a class action would be the perfect means to prevent such abuse. A class action is the superior

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<sup>13</sup> Fla. Stat. §365.1657 states:

Intrastate use of facsimile machine for unsolicited advertising; prohibition; penalties; injunctive relief.--

(1) It is unlawful for any person to use a machine that electronically transmits facsimiles of documents through connection with a telephone network to transmit within this state unsolicited advertising material for the sale of any real property, goods, or services.

(2) The Attorney General may bring an action to impose a civil penalty and to seek injunctive relief. The civil penalty shall not exceed \$500 per violation. Each transmission shall be considered a separate violation.

method for resolving this type of controversy<sup>14</sup> because it is more efficient than other available methods for the fair adjudication of the claims. The class of plaintiffs can be huge, just in one day, considering the daily abuse by junk fax marketers.

Under the Act, private citizens are given a right to sue to: 1) prevent (enjoin) future transmissions, 2) recover the greater of actual monetary damages or \$500 in damages for each junk fax, or 3) an injunction plus damages. If the court finds that the sender willfully or knowingly violated the Act, the court may increase the award up to three times the amount of damages ("treble"), or \$1,500 per occurrence.

It is also possible to bring a private suit against the violator in an appropriate court of each state. Courts have historically shown to prefer these claims be brought in small claims

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<sup>14</sup> Fed. R. Civ. P. 23(b)(2).

court rather than federal court.<sup>15</sup> Through a private suit, a consumer can recover either the actual monetary loss that resulted from violation of the Act, which is probably a very small amount and extremely difficult to quantify. Alternatively, the junk fax victim may receive up to \$500 in damages for each violation, whichever is greater. Under the federal law, TCPA, a court may triple the damages for each violation if it finds that the sender/defendant willingly or knowingly committed the violation. The plaintiff may also bring suit under state or local law, however, such actions are limited to junk faxes sent and received in that state.<sup>16</sup>

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<sup>15</sup> United States District Courts do not have federal question jurisdiction under U.S.C. §1331 over private actions brought under the TCPA. See *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Svcs.*, 975 F.Supp 329 (S.D.N.Y. 1997); *International Science & Technology Inst., Inc. v. Inacom*, 106 F.3d 1146, 1158 (4th Cir. 1997) (stating that "we today reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by federal law.").

<sup>16</sup> Whether or not a state can preside over interstate violations is currently in dispute. Some courts have held that the legislature must expressly pass legislation



The relevant Florida statute<sup>17</sup> provides for less relief than the federal statute in that it makes no mention of treble damages or attorney's fees. The Florida Attorney general may initiate an action against a violator on behalf of Florida Consumers at large.

### **True Relief by Class Action**

"Junk faxers will only be put out of business by class-action lawsuits," said Christopher A. LaVoy, a Phoenix lawyer who is handling an Arizona case under the TCPA. "It is too profitable a business to be affected by individual lawsuits."<sup>18</sup> The cost for marketing in this manner is very low and extremely attractive. One fax telemarketer, Lists R Us<sup>19</sup>, actually markets their "service" as "a

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allowing their courts to preside over interstate violations, while others maintain that unless the state legislates prohibits it, the state courts have jurisdiction over interstate violation claims. See *Hooters*, 537 S.E.2d at 471.

<sup>17</sup> Fla. Stat. §365.1657 (2001).

<sup>18</sup> Glaberson, William. *Dispute Over Ads Draws Wide Scrutiny After Award*, New York Times, July 22, 2001.

<<http://www.nytimes.com/2001/07/22/national/22FAX.html>>

<sup>19</sup> <<http://listsareus.com/fax-numbers.htm>>

way to get your ad to "the masses." Consider the following excerpt from their website:

"Fax broadcasting is the hot new way to market your product or service. If you are marketing B2B, you can not beat fax broadcasting for cost effectiveness and reliability. It is **the easiest way to get your information out to the masses** for the lowest possible price."

Emphasis added.

The marketing company admits it "blasts" faxes to businesses. Ignore for the moment that the "mass" faxes it is sending is costing the recipient, and let's just examine the concept. Is it legal to "blast" faxes to the "masses"? Isn't this the exact behavior Congress was trying to prevent by drafting and passing the TCPA?

Obviously, it is legal if the faxes were requested by the recipients, but that situation is highly unlikely and goes to the idea of whether or not there is a business relationship between the

sender and the recipient. If there is a prior business relationship, then the transmission is presumptively permitted by the recipient, according to the FCC.<sup>20</sup>

However, if we delve further into the "service" provided by ListsRUs, and as its name implies, it is **providing** the list of recipients to the sender.

"From our fax numbers list, you can choose from 5,000 to 1,000,000 faxes. Your fax advertisement is sent to the targeted fax numbers at the exact time you need your message to be in the hands of your prospects and customers. Our Fax List Experts can even track responses for you using one of our 800 numbers to keep your office fax lines free!"<sup>21</sup>

It would not be unreasonable to conclude that purchasers of these lists have **no** prior business

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<sup>20</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8779 n.87 (1992) ("Facsimile transmissions from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.").

<sup>21</sup> <<http://listsareus.com/fax-numbers.htm>>

relationship with the intended recipients. In fact, it would be quite reasonable to draw that conclusion. This is exactly the type of circumstantial evidence that a plaintiff should establish when proposing a motion for class certification. It should be argued that the faxes were "prima facie" unsolicited because no relationship existed. It is also evidence that the violation is willful, because it recognizes the opportunity costs related to merely "tying up fax lines."

As a matter of public policy, Congress intended the TCPA to address two specific public harms resulting from junk faxes: 1) Unsolicited fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, at the exclusion of other messages; and 2) junk faxes shift nearly all of the advertiser's printing costs

to the recipient of the advertisement.<sup>22</sup> The clear purpose for imposing statutory and treble damages is to deter conduct of this nature.

### **Class Action Relief**

Class actions under the Act face the same hurdle that has become a popular defensive tool: class certification. Class certification under the TCPA has been difficult to obtain.

### **TCPA Class Certification Landmark**

Formerly, class certification was unreasonably difficult to obtain in TCPA cases. In 1995, a federal court in Pennsylvania denied certification on typicality grounds. The *Forman* court stated that the plaintiffs' claims were not typical because membership in the class would have required mini hearings on the merits for each class plaintiff.<sup>23</sup> The tide started to turn in 1997 for

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<sup>22</sup> *Texas v. American Blast Fax, Inc.*, 121 F.Supp2d 1085, 1091 (W.D. Tex. 2000).

<sup>23</sup> *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D. Pa. 1995) (given the individual proof necessary to establish that each transmission was unsolicited, class certification was denied).

plaintiffs, when a federal court in Indiana affirmed the lower court's class certification.<sup>24</sup> The defendants challenged certification, alleging that the statutory punishment violated due process. Attacking the defendant's position and unquestionably justifying the statutory damages, the court reasoned:

Congress designed a remedy that would take into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements, effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of "junk faxes", and "provide adequate incentive for an individual plaintiff to bring suit on his own behalf." It is permissible for Congress to design a remedy that will "serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations."<sup>25</sup>

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<sup>24</sup> *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162 (S.D. Ind. 1997).

<sup>25</sup> *Kenro, Inc.*, 962 F.Supp. at 1166.

In recent landmark TCPA case in Georgia<sup>26</sup>, certification was granted by the lower court. The complaint alleged that Hooters, a well-known restaurant chain, used a third party to send unsolicited advertisements to facsimile machines in violation of the federal Telephone Consumer Protection Act.<sup>27</sup> The lower court granted certification under Georgia law because a class action is authorized if the members of the class share a common right, and common questions of law or fact predominate over individual questions of law or fact.<sup>28</sup>

On appeal, the defendant challenged both the applicability of the TCPA to intrastate communications and the class certification. Despite a strong dissent by two of the justices, the appellate court, affirmed the lower court's decision on both issues. The court announced that

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<sup>26</sup> *Hooters of Augusta v. Nicholson*, 537 S.E.2d 468, 245 Ga. App. 363, (Ga. App. 2000), cert. den. 2001 Ga. LEXIS 76 (Ga. 2001).

<sup>27</sup> *Hooters*, 537 S.E.2d at 363.

<sup>28</sup> *Hooters*, 537 S.E.2d at 368.

the standard for reviewing the certification of a class action is the abuse of discretion standard, which is very good news for these plaintiffs. The court went on to explain that absent an abuse of that discretion by trial judge, it will not disturb the trial court's decision to certify a class.<sup>29</sup>

**Potential Case Against Tallclocks, Inc.**

Eleven out of my last forty calls on my caller ID are from "unknown" or "blocked" callers. More than 25% of the calls I receive are from telemarketers. I know they are telemarketers because I have answered most of them. My fax machine automatically prints a log of all incoming and outgoing faxes. Naturally, the grandfather clock fax has "no ID". I have verified this with the log and compared it against the time stamp at the top of the fax.

Suppose I wanted to bring suit against Tallclocks, Inc., not only on my behalf but as a class representative, on behalf of everyone else

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<sup>29</sup> *Hooters*, 537 S.E.2d at 367.



who received this junk fax and is being abused by Tallclocks.

The action should be maintainable under Fed.R.Civ.P. 23 because it meets all the requirements of the rule.

Assuming that Tallclocks used a service such as ListsRUs.com, the class is so numerous that joinder of all members is impracticable. A key point in discovery would be to learn "how" Tallclocks obtained my number.

There are questions of law or fact common to the class, because as a matter of fact, it must be determined whether the fax was unsolicited and whether Tallclocks knowingly and intentionally sent the unsolicited faxes. This issue goes to damages, but is nonetheless a common fact that must be resolved.

Tallclocks' defenses to the identical or nearly identical claims of the representative parties are typical of the claims or defenses of the class.

All members of the plaintiff class were damaged by receipt of unsolicited faxes and/or seek to prevent future damage by junk faxes.

As a representative party, I will fairly and adequately protect the interests of the entire class. I will seek competent, class action counsel with requisite experience.

Finally, I will vigorously assert that the common questions of law or fact predominate over any questions affecting only individual members.

I would propose the following three subclasses of Florida plaintiffs: (1) those plaintiffs who have received, (2) those who are now receiving, and (3) those who are about to receive unsolicited fax advertisements on or after April 24, 2002 through the date of judgment.

I chose to limit the class to Florida plaintiffs because the action, according to the case law discussed above, will have to be brought in state court. Florida courts only have

jurisdiction over Florida plaintiffs. As a matter of public policy, Florida courts a duty to protect only Florida consumers, and opening Florida courts to a national plaintiff class would unduly burden Florida taxpayers. Additional benefits of litigating in state court include cost savings and speediness of trial docket.

Since the cause will be brought in Florida, the Florida equivalent of Fed.R.Civ.P. 23(b)(2) and (3). For pedagogical reasons, the discussion here will refer to the Federal rule, however.

The relief sought should be statutory damages of \$500 per junk fax, injunctive relief and treble damages. The cause should be brought under both 23(b)(2) for damages and 23(b)(3) for injunctive relief. In light of recent Florida decisions and certification problems, it is imperative that counsel stress the importance of the injunctive relief over the monetary relief. The monetary and treble damages relief should be "incidental" to the

injunctive relief. In a legal brief to the court supporting its motion for class certification, counsel should cite to favorable civil rights cases, where injunctive relief was granted, and statutory damages were awarded.<sup>30</sup>

### **Conclusion**

Hopefully, Tallclocks will be impressed (and discouraged) by the \$12 million dollar trebled damages awarded against Hooters in 2001<sup>31</sup>, and offer to settle once the complaint is filed. More likely than not, and depending on the liquidity of the company, Tallclocks will fight the class through the ruling on Motion for Class Certification.

In the meantime, I'm going to file my complaint with the Attorneys General of Florida (my state)

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<sup>30</sup> See *Smith v Texaco, Inc.*, 88 F Supp 2d 663 (2000, ED Tex) (Class of approximately 200 salaried African-American persons employed by joint venture is certified for racial discrimination case, where claim for injunctive relief meets requirements of FRCP 23(b)(2) and claim for legal relief meets requirements of FRCP 23(b)(3), because there is nothing in language of Civil Rights Act of 1991 which prevents courts from certifying Title VII (42 USCS §§ 2000e et seq.) classes under FRCP 23(b)(2) and (3).).

<sup>31</sup> < [http://augustachronicle.com/stories/032201/met\\_085-5970.000.shtml](http://augustachronicle.com/stories/032201/met_085-5970.000.shtml) >

and Texas (Tallclocks' state), the FCC and anybody else who will listen. I'm tired of "telephone terrorism" and I'm tired of financing someone else's marketing scheme.

## Appendix I

### Telephone Consumer Protection Act of 1991

47 U.S.C. §227

TITLE 47      CHAPTER 5      SUBCHAPTER II      Part I  
Sec. 227.

**Sec. 227. - Restrictions on use of telephone equipment**

(a) Definitions

As used in this section -

(1) The term ''automatic telephone dialing system'' means equipment which has the capacity

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

(B) to dial such numbers.

(2) The term ''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.

(3) The term ''telephone solicitation'' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message

(A) to any person with that person's prior express invitation or permission,

(B) to any person with whom the caller has an established business relationship, or

(C) by a tax exempt nonprofit organization.

(4) 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.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States -

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

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

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

(iii) to any telephone number assigned to a paging service, cellular

telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

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

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

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

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission -

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

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



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

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

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

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

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

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State -

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

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

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the

amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall -

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

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

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

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

the record, propose specific restrictions to the Congress; and

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

(2) Regulations

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

(3) Use of database permitted

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

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

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

objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of

(i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and

(ii) the methods by which such right may be exercised by the subscriber;

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

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

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

(G) specify

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

(ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and

other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

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

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

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

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

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall -

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

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

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

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

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

(C) consider

(i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and

(ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

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

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

(B) an action to recover for actual monetary loss from such a violation, or to

receive up to \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

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

(6) Relation to subsection (b)

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

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States -

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

(B) to use a computer or other electronic device to send any message via a telephone

facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that -

(A) all artificial or prerecorded telephone messages

(i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(ii) shall, during or after the message, state clearly the telephone



number or address of such business, other entity, or individual; and

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

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits -

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

(B) the use of automatic telephone dialing systems;

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

(D) the making of telephone solicitations.

(2) State use of databases

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

include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

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

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or

restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right

- (A) to intervene in the action,
- (B) upon so intervening, to be heard on all matters arising therein, and
- (C) to file petitions for appeal.

(4) Venue; service of process

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

(5) Investigatory powers

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

(6) Effect on State court proceedings

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

(7) Limitation

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

(8) ''Attorney general'' defined

As used in this subsection, the term ''attorney general'' means the chief legal officer of a State

Sample Unsolicited Facsimilie "Junk Fax"

ate. 4/24/02 Time: 3:49:06 PM

From: 1 800 457-5410 To: 954 689-3739

Appendix II

# GRANDFATHER CLOCK

## March Spring Blowout!

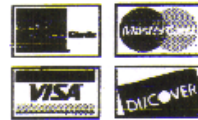
Unheard of Prices! Limited Quantities! Home Delivery!

 <p><b>Retail \$799</b> This Week's Blowout Price! <b>\$297</b></p> <p>Make 3 Easy Payments of <b>\$99</b></p> <p><b>NO TAXES!</b></p> <p><b>Havana</b></p> <p><i>31 Day Clock Spring Driven Movement Solid Ash Cherry Finish 6'3" Tall with Glass Front Door Brass Hanging Weights Chimes the Hour &amp; 1/2 Hour 1 Year Warranty Included Oak Available</i></p>	 <p><b>Retail \$995</b> This Week's Blowout Price! <b>\$397</b></p> <p>Make 4 Easy Payments of <b>\$99</b></p> <p><b>NO TAXES!</b></p> <p><b>Benton Massey</b></p> <p><i>31 Day Clock Spring Driven Movement Solid Ash Cherry Finish 6'4" Tall with Glass Front Door Brass Hanging Weights Chimes the Hour &amp; 1/2 Hour 1 Year Warranty Included Oak Available</i></p>	 <p><b>Retail \$1799</b> This Week's Blowout Price! <b>\$597</b></p> <p>Make 6 Easy Payments of <b>\$99</b></p> <p><b>NO TAXES!</b></p> <p><b>Bradley</b></p> <p><i>31 Day Clock Spring Driven Movement Solid Ash Cherry Finish 6'5" Tall with Glass Front Door Brass Hanging Weights Chimes the Hour &amp; 1/2 Hour 1 Year Warranty Included Oak Available</i></p>	 <p><b>Retail \$1792</b> This Week's Blowout Price! <b>\$797</b></p> <p>Make 8 Easy Payments of <b>\$99</b></p> <p><b>NO TAXES!</b></p> <p><b>Shanklin</b></p> <p><i>8 Day Clock Chain Driven Hermle Movement Solid Oak 7'1" Tall with Beveled Glass Brass Hanging Weights Weimarsner Chime Hour &amp; 1/2 Hr 1 Year Warranty Included Other Stains Available</i></p>
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**Blowout Sale Prices Good Through THIS FRIDAY ONLY!**

**30 Day Money Back Guarantee & Extended Warranties Available!**



FAX RESPONSE FORM TO: 1-800-341-7352

Yes, I'm interested. I would like some more information!

NAME \_\_\_\_\_

CITY \_\_\_\_\_ ST. \_\_\_\_\_

DAY PHONE \_\_\_\_\_

EVE PHONE \_\_\_\_\_

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*4/29/02 Called automated line to remove from An if data base.*