

# BETTER THINK BEFORE YOU FAX

*Unsolicited avert is bad business*

By Jonathon K. Stock



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Jones Day

While the act of sending a fax may seem rather ordinary, if that fax includes an advertisement, it is worth pausing before hitting the send button. In 1991 Congress passed the Telephone Consumer Protection Act designed to address certain abuses in telemarketing and fax advertising. At the time of the Act's passage, Congress focused its attention on telemarketing. More recently, however, it is the TCPA's fax advertising restrictions that have become a trap for the unwary and a source of high stakes litigation.

For those unfamiliar with the statute, the TCPA prohibits unsolicited fax advertising. It is a violation of the Act for any person within the United States "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." An "unsolicited advertisement" includes 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.

The TCPA has several methods of enforcement, including through a state attorney general, the Federal Communications Commission, or in certain circumstances, a private litigant. Even though the TCPA is a federal statute, actions by private litigants must be brought in state court. For successful private actions, the Act provides for injunctive relief and imposes a penalty of \$500 for a single violation which may increase to \$1500 if a defendant "willfully or knowingly violated [the TCPA]." Applying this statutory damage award in the context of a class action can have dire consequences.

Initially, the Act attracted little attention and generated few lawsuits. That all changed in 2001 after the decision in *Nicholson v. Hooters of Augusta*. In *Nicholson*, the plaintiff brought a TCPA action on behalf of a class which included 1,321 members who each received six unsolicited fax advertisements from the defendant. The class was certified, the case went to trial, and the plaintiffs received a judgment in the amount of \$11,889,000. That judgment was affirmed on appeal, and the defendant, Hooters of Augusta, Inc. filed for bankruptcy shortly thereafter.<sup>1</sup>

Other litigants quickly followed suit. In recent years, some of the nation's most famous companies, from Wal-Mart Stores to the Dallas Cowboys, have been the target of TCPA class actions for unsolicited fax advertising. Some companies subjected to these suits have paid a high price. The Dallas Cowboys, for example, paid over 1.7 million to settle a class action arising from the transmission of 125,000 fax advertisements.

Disputes over the interpretation of the Act have only increased the risk of fax advertising. Initially, the FCC determined that a party's "invitation or permission" to receive fax advertisements can be expressed through a prior business relationship. In Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, "the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions." More recently, the FCC has issued a proposed rule, yet to take effect (effective date July 1, 2005) that reconsiders the validity of the established business relationship defense for fax advertising: "under the new rules, the permission to send fax advertisements must be provided in writing, include the recipient's signature and

facsimile number." In the interim before the new rule goes into effect, plaintiffs under the TCPA have disputed both the validity and applicability of the established business relationship defense. Adding to the confusion, most states do not have a single published decision giving businesses clear guidance on what constitutes an established business relationship under the Act. The end result is that businesses are now being sued in class actions under the TCPA for sending faxes to their own customers.

In response, businesses and their allies have lobbied Congress to amend the TCPA. Those efforts came close to succeeding last year when the House and Senate each passed a separate version of the Junk Fax Prevention Act of 2004. Due to "add-ins" to the legislation unrelated to the TCPA, the Junk Fax Prevention Act stalled in Congress. If passed, the legislation would have re-instituted the FCC's original interpretation of the TCPA that permitted fax advertising to recipients with whom the sender had an established business relationship and clearly defined such a relationship. While proponents of the legislation are likely to try again to achieve its passage, those lobbying efforts offer little certainty to businesses struggling to navigate the increasing complexities of mass marketing.

So what can a business do to avoid liability? To start, a business should seek legal advice tailored to its situation. While some basic principles for fax advertising have been laid out in this article, there is a panoply of both federal and state laws that now apply to the various forms of mass marketing. To safely navigate through these restrictions, businesses should review their marketing practices and third-party contracts to ensure that they comply with all applicable laws. Certain forms of advertising (like sending ordinary mail) may pose less risk of liability and be more suited to your business objectives.

If some portion of the sales process requires contacting a customer by fax, it is important to gather prior express permission to fax the customer. Equally important are the form of the consent, and who gives it. Advertisers should seek written permission to fax. Further, the consent should be given by someone with authority to grant consent for the fax recipient. Getting permission in writing from the proper person prevents later confusion over whether the consent was given at all, and whether it was valid.

The growth of telecommunications has drastically increased the ways a business can contact potential customers. All advertising is not treated equally under the law, however. Businesses must be aware of the potential liabilities, both federal and state. With precautions businesses do not have to give up mass marketing and can spread the word of new ideas and products without the fear of crippling liability.

<sup>1</sup> See *In re Hooters of Augusta*, No. 1-01-6K-67611 (Bankr. N.D.Ga. filed June 8, 2001).



[jkstock@jonesday.com](mailto:jkstock@jonesday.com)