REGARDING THE FCC’s REQUEST FOR COMMENT:

DA 17-690

AMERIFACTORS FINANCIAL GROUP, LLC PETITION FOR DECLARATORY RULING

CG Docket No. 02278

CG Docket No. 05338

Comment Date: August 17, 2017

Attention: COMMISSIONER MICHAEL O'RIELLY and Secretary Ms. Marlene H. Dortch.

Mr. O’rielly and Ms. Dortch,

I am commenting in support of the Amerifactors Financial Group petition for declaratory ruling.

The TCPA statute was put into law over twenty years ago. The statute has not been amended nor has the FCC issued any declaratory rulings to keep pace with the vastly changed technology landscape over the past twenty years.

Very simply, the Amerifactors petition is requesting that the FCC clearly state that modern day efax solutions do not meet the statutory definition of a facsimile machine. Many other commenters have already voiced and repeated all the technical differences between modern day electronic communications solutions commonly referred to as “efax” solutions when compared to the TCPA statutory definition of a facsimile machine,which is:

“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."

There are two key elements within the TCPA Facsimile Machine statutory definition:

1. First being the “capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal”. Modern day efax solutions do NOT have the capacity to scan or transcribe anything from paper, period. This is a fact and is not debatable. However, others have argued in the past that the user of such efax services has a computer that does have that “capacity” and as such creates a systematic relationship with the efax service thus together (the user’s computer & the efax service) does meet that standard. This is utterly false on its face in modern times as most users who happen to be using a computer or laptop, etc. with their efax service do NOT have the capacity to transcribe from paper. To transcribe from paper, the end user would also be required to have some form of paper scanner. Again, having a paper scanner harkens back 10 years ago and is not representative of today’s technology landscape, especially with efax services of today. The fact is that no one could possibly know for every single electronic communication that transpires through an efax service (hundreds of millions per day), whether the user transcribed from paper or even has the capacity to readily transcribe from paper without purchasing other equipment. For this reason, the FCC must rule that since efax services do NOT have the capacity to transcribe from paper are NOT covered under the TCPA.
2. Secondly, the statutory definition states “over a regular telephone line”. This was specifically crafted to address the fact that receiving unwanted facsimiles over a regular telephone line creates a burden on the recipient in that they could not receive other facsimiles or send their own pertinent facsimiles during the time receiving the unwanted advertisement. It was also written precisely this specific so that other forms of communications known or unknown at the time could not be covered by the TCPA. It was specifically written this way to narrowly focus the TCPA to not infringe upon other electronic communications and stifle business and the economy. For this reason, the FCC must do two things.
   1. First, the FCC must clarify and rule that recipients of electronic communications received by the user in any form other than on a statutorily defined facsimile machine OVER A REGULAR TELEPHONE LINE are NOT governed by the junk fax components of TCPA statute and the JFPA. This would mean that receiving any electronic communication via email, web-portal, or software application not on a statutorily defined facsimile machine over a regular telephone line would not be governed by the fax provisions of the TCPA and JFPA.
   2. Second, the FCC must clarify and rule that senders or transmitters of electronic communications to efax services that did so without the use of a regular telephone line (i.e. emailed as an attachment, uploaded via a web-portal, etc.) are not covered/governed by the TCPA fax provisions. This is because the statute states only when someone sends something to a telephone facsimile machine “to use any telephone facsimile machine, computer, or other device to send, ***to a telephone facsimile machine***” can the action be governed by the TCPA statute. We have already established concretely that efax services of today cannot transcribe from or to paper, nor do they utilize “regular telephone lines” and as such do not meet the legal statutory definition of a “telephone facsimile machine”. It is also a fact that in today’s technology landscape the sender of the electronic communication only knows they are sending an electronic communication via email or an online web-portal in the cloud over the internet (TCP/IP protocol) and have no expectation that the receiving entity may have chosen to translate that internet based TCP/IP communication to an analog or digital signal over a regular telephone line (PSTN/POTS) to a device that can be defined as a “telephone facsimile machine”.

The president of the United States, Donald J. Trump, has been very critical of government overreach and regulation. In this specific case, the FCC has the obligation to quickly and decisively review and rule accordingly as I have outlined. Currently the public is not being served by having twenty plus year old technology statues, which is what the TCPA is, be leveraged by serial TCPA fax lawyers to hinder American businesses and economic growth through staggering financial fines and settlements. The right to private action would still exist for those that have statutorily defined facsimile machines using regular telephone lines. Those receiving unwanted communications via email through their efax service may also have the protections of state and federal email laws like the CAN-SPAM act as well depending on the circumstances.

It’s also pertinent to point out that in reviewing thousands of comments on the FCC ECFS system that there are rarely any comments relating to the TCPA/JFPA fax components and that is because it’s simply no longer a major issue, not because electronic advertisements don’t exist, it’s because the technology has changed and it’s just not an issue like twenty years ago.

Sincerely,

Johnny Daciolas