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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of	CG Docket No. 02-278
Todd C. Bank's Petition for Declaratory Ruling	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
	DA 16-341 31 March 2016

Gerald Roylance's Comments re Bank's Petition for Declaratory Ruling

In DA 16-341,¹ the FCC seeks comment about Todd C. Bank's Petition.² In particular, the Commission wants comments about establishing a "bright line" determination of "residential line". The Commission should not adopt a bright line test. Instead, it should continue with its case-by-case view or offer a list of factors for guidance.

The matter is also currently being litigated; the FCC should decline such petitions. Courts are perfectly capable of deciding such issues. Courts also have discovery, so they

¹ FCC, 31 March 2016, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling filed by Todd C. Bank regarding the TCPA's Provision concerning Prerecorded Calls*, https://apps.fcc.gov/edocs_public/attachmatch/DA-16-341A1.pdf

² Todd C. Bank, 7 March 2016, *Petition for Declaratory Ruling to Clarify the Scope of Rule 64.1200(a)(2) [sic]*, <http://apps.fcc.gov/ecfs/comment/view?id=60001496809>

can investigate claims more effectively than commenters or the Commission. Bank has attached to his petition the District Court's adverse ruling.

Bank is an attorney who uses a residential line as the main number for his law practice. Bank also deducts the cost of that line as a business expense. A District Court examined the facts and determined that Bank's line was a business line that the TCPA did not intend to protect. Bank, unhappy with that result and copying a page from the TCPA defendant's playbook, has petitioned the FCC.

Although a bright line test that looks only at how the line is subscribed with the telephone company would be clear, it would not be fair in some corner cases. The TCPA protects consumer privacy rights but it does protect business privacy rights. Todd Bank and others should not be able to subscribe to a residential line, publish the residential number with the state bar, and then turn around and sue under the TCPA an innocent company that calls that number trying to sell business products such as legal reporters, process serving, or accounting services. Such a company would have been duped into calling a residential number.

Bank does not come to court with clean hands. Arguably, he has cheated his telephone company out of higher fees.

But the case is not clear cut.

Bank runs his law practice out of his residence. There's an argument that any telephone line to a residence is a "residential line".

The defendant in Bank's case did not intend to call a business but rather a residence; the defendant was calling to sell residential energy services. The defendant was calling residential telephone lines. Nothing that Bank did mislead the defendant into believing the residential line was a business line.

What happened in the case was Bank sued the defendant Independence Energy, and then the defendant looked for a way out. The defendant found that way because Bank was using his telephone line almost exclusively for business.

The District Court ruled that Bank's line is a business line, so Bank cannot show the required elements of a TCPA violation. I'm not going to argue that the District Court got it wrong, but the District Court could have gone the other way by recognizing the defendant was calling residential lines. Even then, Bank's use of his residential line seems beyond the pale.

This Petition is a potential disaster for enforcing the TCPA. Although defendants abhor class actions, class actions are the best enforcement mechanism the TCPA has. Too many TCPA defendants have found it economic to pay off the direct-action defendant and continue violating the TCPA. Ali Shah's Optima Funding was hounded with small claims but continued to use prerecorded calls.³ It's a small cost of doing business to pay our a few smalls here and there when you're making millions. Even million dollar penalties do not deter TCPA violators. In 2007, ADT Security did a consent decree with FTC about DNC violations and paid a two million dollar civil penalty,⁴ but the violations continued and resulted in the 2013 *Desai v ADT Security* class action settlement for \$15 million.⁵ In 2005, DirecTV settled with the FTC for \$5.3 million dollars for DNC violations;⁶ in 2013, a class action lawsuit was filed against DirecTV.⁷ The FTC won summary judgment against Dish Network for tens of millions of telemarketing violations.⁸

³ <http://www.junkfax.org/fax/profiles/OptimaFunding.htm>

⁴ FTC enforcement. See "Consent Decree and Order for Civil Penalties, Injunction and Other Relief", November 20, 2007, <https://www.ftc.gov/enforcement/cases-proceedings/042-3091/adt-security-services-inc-united-states-america-ftc>

⁵ <http://www.leagle.com/decision/In%20FDSCO%2020150130G83/Desai%20v.%20ADT%20Security%20Systems,%20Inc.>

⁶ FTC, 13 December 2005, "DIRECTV to Pay \$5.3 Million Penalty For Do Not Call Violations", <https://www.ftc.gov/news-events/press-releases/2005/12/directv-pay-53-million-penalty-do-not-call-violations>

⁷ "DirecTV Named in Multi-Million Dollar Class-Action TCPA Lawsuit", <http://www.kleinmoynihan.com/directv-named-in-multi-million-dollar-class-action-tcpa-lawsuit/>

⁸ FTC, 21 January 2015, "Court Grants Partial Summary Judgment in FTC Case Against Dish Network, Finding the Company Liable for Tens of Millions of Telemarketing Violations," <https://www.ftc.gov/news-events/press-releases/2015/01/court-grants-partial-summary-judgment-ftc-case-against-dish>

Companies are willing to pay large penalties without modifying their behavior, but TCPA class actions have made companies think twice about practices that violate the TCPA. A bad result in this Petition could kill class actions, and that would essentially gut the TCPA. The possibility that a consumer such as Bank uses his residential line for business should not prevent class certification. A defense attorney should not be able to prevent class certification because there must be an individual examination of each residential line to determine if it is being used as a business line.

I. TCPA History

The TCPA uses the terms “residential subscriber” at 47 USC § 227(a)(2)(A), “residential telephone line” at 227(b)(1)(B), “residential telephone subscribers’ privacy rights” at 227(c)(1), “residential subscribers” at 227(c)(3), and “residential subscriber” at 227(c)(3)(E).

Those uses all seem consistent. A “residential telephone subscriber” is a person who pays for local telephone exchange services. That service is provided over a “telephone line”.

There are many uses of “business” in the TCPA. Most uses are about “established business relationship”. 47 U.S.C. § 227(b)(2)(A) shows that the TCPA did not intend to exclude prerecorded calls to businesses, but it granted the FCC the authority to make regulations that would. 47 U.S.C. § 227(b)(1)(D) refers to a “multi-line business”.

The definitions at 47 U.S.C. § 153 offer no further help.

Consequently, the TCPA seems to offer a bright line definition of “residential line”. It is how the person subscribed to the line with the local operating company.

Some legal cases offer nuanced views.

A. Commission definitions

The Commission offers definitions related to “residential line” at 47 C.F.R. § 64.2305:

(b) **Business subscriber.** Business subscriber refers to a subscriber to telephone exchange service for businesses.

(d) **Residential subscriber.** Residential subscriber refers to a subscriber to telephone exchange service that is not a business subscriber.

The Commission definitions offer a bright line how-the-service-is-subscribed.

There does seem to be a solid bright line for business subscriber. If a line is subscribed as a business line, then it is a business line.⁹

B. Local carrier impact

Local carriers sell both residential and business telephone lines. The rates for those services can be substantially different. Residential lines often come with unlimited local calls (I’ve chosen basic service for one of my residential lines). In the past, business lines were hit with message units on each call. That distinction seems to have waned because many business plans now come with unlimited calling. Business lines still carry higher prices, and those prices would reflect the expectation that business lines will be more heavily used than residential lines.

Tariffs and terms of service restrict residential lines being used for at least some business purposes.

⁹ I won’t dispute that conclusion, but business lines may be residential lines. Some computer science graduate students were sharing an apartment. For reasons that now fail me, they decided to get a business line rather than a residential line. Maybe they were trying to avoid telemarketing calls. They specified some hack company name. A business subscription came with a listing in the yellow pages, so they also had to specify the business category for the company. They entered “Turing Machine Repair” – a clever joke because a Turing machine is an abstract rather than a physical machine and never needs to be repaired. As it turned out, their yellow page listing came at a page break, so the heading “Turing Machine Repair” was printed at the top of the page.

AT&T's residential terms restrict business use. "The Unlimited Nationwide Calling Advantage 2 plan is available only in combination with the ALL DISTANCE package and cannot be used for long distance or local toll access to the Internet or for business purposes such as telemarketing, auto-dialing, or commercial or broadcast facsimile (FAX) where any of these calls would be long distance or local toll calls." "This plan is for residential customers, non-business use only."¹⁰

The Fax.com and voice blast prohibitions are interesting. The phone company is concerned about businesses abusing residential telephone service.

I don't see AT&T's "non-business use only" as an absolute prohibition. People use their residential telephones to call in sick. They use home phones to call clients to reschedule meetings.

When I took an MIT course on telephony 40 years ago, the main distinction between residential and business lines was about traffic statistics. Business lines had heavy, continual, use; residential lines were lightly used. That impacted the number of line finders that were needed on a block of ten lines. IIRC, a typical residential block would need 2 or 3 line finders, but a business block would need about 8. It costs more money to maintain a business block. In the old days, somebody using a residential line as a business line could mean the telephone company had to add another line finder to that residential block of lines.

Strowger and panel switches are probably long gone now, but the statistics are probably still there. My dentist's office makes lots of calls to confirm appointments; I'll guess at least 4 calls per hour: two dental technicians can handle 4 to 6 patients per hour. Medical doctors probably make more calls because office visits can be very short – about 5 minutes. That could translate to about 24 calls per hour: an incoming call to make the appointment in the first place and an outgoing call for a reminder. On top of that, there will be calls to and from pharmacies about prescriptions. Business lines can be heavily used.

¹⁰ <https://www.att.com/shop/residential-terms.html>

Residential lines are lightly used. In the past, teenagers would tie up lines for a couple hours, but the modern teenager uses text messages. Most residences are empty during the week day: mom and dad are at work and the kids are in school.

C. Adamo v AT&T

Adamo v AT&T (2001 WL 1382757 (Ohio App. 8 Dist.))¹¹ appears to stand for the bright line, but the fact pattern is more convoluted.

Sam Adamo ran a wedding photography business out of his home. He used a residential telephone line for that business. He ran advertisements using that telephone number. Consequently, Adamo's residential line ended up in a Dun & Bradstreet report. I don't know if Adamo had a single line to his home. I don't know if the business was part time; wedding are usually just on weekends, so it probably was part time.

Adamo and AT&T had a long history of TCPA disputes. Adamo made a do-not-call demand against AT&T on 18 July 1998, but AT&T continued to call his number. Adamo filed his first lawsuit against AT&T in February 1999. AT&T kept calling, and Adamo ultimately filed a total of seven lawsuits against AT&T.

During these suits, Adamo showed that his telephone line was listed and billed as a residential line. In its defense, AT&T claimed that Adamo's line should be considered a business line and hence ineligible for DNC protections. AT&T showed that Adamo's residential telephone line appeared on a Dun & Bradstreet (DnB) company report. The telephone bill was the better evidence.

Adamo obtained a judgment against AT&T in April 2000. The magistrate in that case had handled two previous suits by Adamo against AT&T. The magistrate cautioned AT&T against using such inaccurate records. AT&T assured the Court that it would not call Adamo again.

AT&T had abundant notice about Adamo's telephone number being a residential subscription.

On 19 July 2000, Adamo received another call from AT&T. On 9 August 2000, he received another call. Those calls were at issue in the appellate action. The appellate court upheld the judgment. Given the history, upholding the judgment is reasonable.

1. What was AT&T selling?

Adamo does not tell us what AT&T was selling. It says that AT&T claimed that Adamo's telephone line should be considered a business line because of a DnB report, but it does not tell us whether AT&T actually used that report or a list of supposed business numbers when it called Adamo. AT&T may just be using the DnB report as an after-the-fact reason to escape liability.

An after-the-fact claim is common in TCPA cases. A defendant will look for any excuse to escape liability, and one of those excuses is the plaintiff uses his residential line to run a business out of his home.

In that situation, I look to the Defendant's intent. If the Defendant intended to call a business and sell a business product, then the Defendant's argument carries some weight. If the Defendant called a residential line and tried to sell a consumer product, then the Defendant's argument carries no weight.

If AT&T were offering consumer services in its calls to Adamo, then AT&T was not being misled by the DnB report. It was just using the report to escape liability. AT&T should then have lost each of the seven lawsuits.

If AT&T used a DnB list of business telephone numbers and called Adamo to sell business services, then there's a gray area. Arguably, Adamo's own advertising had a hand in misleading AT&T. Adamo's first few cases may not have been successful or may have received minimal judgments. After a time, however, the Court could justifiably lose its patience with AT&T, and it did.

The Defendant's intent is Bank's best argument. Bank received a prerecorded call "to promote the retail electricity provided by Independence Energy". I read "retail" to

¹¹ <http://apps.fcc.gov/ecfs/document/view?id=6516785277>

mean consumer/residential electricity rather than commercial/business. The caller was not trying to reach businesses and offer business products; the caller was trying to reach a residence and sell a residential product. Consequently, the Defendant was not misled into believing it was calling a business line; any claim that Bank's telephone was a business line was learned after the call and used to escape liability. The goals of the TCPA would be served by letting Bank's suit proceed.

2. Data mining

Adamo does stand for not trusting poor quality records. Business telephone number data mining is inherently flawed. Say DnB gets a residential telephone number and publishes it as a business number. Acme Telemarketing Lists gets that number from DnB and publishes it as a business number. Subsequently, DnB learns it is not a business number, so DnB deletes the number from its list. All is not well and good. Later DnB gets a list of business telephone numbers from Acme and uses it to augment its list of business numbers. Consequently, the number reappears on DnB's list. Data mined lists should not carry any authority.

The only authority for business telephone number lists should be the local telephone companies. Data-mined numbers should be suspect. Maybe using reliable lists would have kept AT&T out of trouble with its solicitations.

Many residential telephone numbers get innocently sucked into business telephone number databases.

Say Alice is doing construction work but wants to go out on her own. Before she can do that, she needs a contractor's license. She applies to the state, but the form requires a telephone number, so she gives her residential phone number (she doesn't have her own work number yet). A data miner pushes that number onto a business list. She hasn't even started her business, but her number is now out there as a business line. She starts getting calls trying to sell her services useful for contractors.

Bob and his friends want to save-the-spotted-owl in their spare time. To do that, they decide to form a nonprofit company and collect donations. They register their

nonprofit with the state, but the form requires a telephone number. Bob puts his residential telephone number on the form. A data miner grabs it, and Bob gets flooded with calls selling business products.

Cindy gets elected president of the PTA. The PTA gives out her residential telephone number which is also on the NDNCR. Cindy's number should never get any telemarketing calls – even if the telemarketing calls are for business products that would be of interest to her PTA.

Doug has a telephone number that is one-digit different from Acme Products. A data miner makes a one-digit mistake while entering the telephone number of Acme Products in a database. Doug starts getting calls intended for Acme Products.

The apparent answer here is if a telemarketer wants to call telephone numbers to sell business products, then that telemarketer should use a reliable list of numbers.

D. Margulis v Fairfield Resorts

Margulis v Fairfield Resorts, Inc. 204 WL 5400462 (Mo. Cir., 3 August 2004) used the bright line of how the telephone was registered with the telephone company.

"How the telephone line is registered with the telephone company is a reasonable bright line test and consistent with the plain language of the statute."

"Many people conduct some “business” on their residential telephone lines. If a teenager posts signs in the neighborhood advertising babysitting services and includes her parent's phone number, it does not convert the phone at his home into a “business” telephone line."

This case uses a bright line, but it is clear that the bright line can be abused. In any event, how the telephone is subscribed with the local operating company should set the presumption of a residential line. Incidental or modest business use should not suddenly convert a residential line to a business line. Bank's use of his telephone line does not appear to be incidental or modest. Bank deducting the cost of the line as a business expense shows that Bank considered it a business line.

E. The NAR For-Sale-by-Owner Petition

The National Association of Realtors (NAR) petitioned to the FCC arguing that when a homeowner made a "For Sale by Owner" (FSBO), then the homeowner was engaging in a business and was no longer covered by the NDNC Registry.¹² NAR wanted all realtors to be able to call FSBO homeowners (even if the homeowners are on the NDNC Registry) and offer their services without running afoul of the TCPA.¹³ Page 4 of the petition states:

First, many individuals initially choose to try to sell their real estate by themselves, without the assistance of a real estate agent. These individuals advertise that their property is for sale in several ways - most commonly by posting a sign outside their house listing it as "for sale by owner," and providing a telephone number for interested buyers to call. Real estate brokers and agents regularly call these advertised phone numbers to inquire whether the homeowner would like an agent to represent him or her in marketing and selling the property, or to present a client who may be interested in purchasing the property.

The particular situation NAR wants to exempt is a silly one. A homeowner puts her house on the market. A realtor sees an FSBO advertisement and calls the homeowner to sell the realtor's services. If the homeowner were on the national DNC list, that would be a violation. NAR does not want it to be a violation, but a little thought brings up some problems. First, the homeowner does not want any telemarketing calls – that's why she's on the list. Second, not just one, but every realtor in town would have a license to call her; they all want the commission. Third, she has already decided to sell her house without a realtor; the FSBO is a statement that she does not want a realtor now. She may change her mind later, but her wishes start out crystal clear: she does not want a realtor, and she does not want telemarketing calls.

The FCC ruled that a FSBO did not trump the NDNC list: "Therefore, we clarify that a telephone solicitation would include calls by real estate agents to property owners

¹² National Association of Realtors, 25 August 2003, *National Association of Realtors Petition for Reconsideration of Telemarketing and Facsimile Advertisement Rules*, <http://apps.fcc.gov/ecfs/comment/view?id=5509935019>

¹³ National Association of Realtors, 5 November 2004, *Ex Parte Submission Regarding CG Docket No. 02-278 (Do-Not-Call rules)*, <http://apps.fcc.gov/ecfs/comment/view?id=5511945609>

for the purpose of offering their services to the owner, whether the property listing has lapsed or not.”¹⁴

More generally, the FCC decided to address the home-based business issue on a case by case basis:

We also decline to exempt from the do-not-call rules those calls made to “home-based businesses”; rather, we will review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.¹⁵

The FCC did not adopt a bright line test of a residential telephone line. Bank’s Petition quotes the above decision, but the Petition reads it wrong. It is not a clear statement “that the use of a residential line by a home business does not change the status of the line as residential under the statute.” The decision implies that some home-based businesses may cross the line and become business lines. The District Court looked at Bank’s circumstances and decided the usage crossed the line.

II. Home-based businesses

A residential line goes to someone’s home. A person calls the local telephone company and asks them to install the line. Maybe the inquiry can stop there. Any residential line is a residential line. No exceptions.

There are home-based businesses. Should home-based businesses be required to purchase business lines? A home-based business does not specify much. It might be part-time or full-time. The business may make a lot of money or it may be losing money.

Should a residential line ever be treated as a business line under the TCPA? Probably, but I don’t see a bright line here.

A daughter’s baby sitting business is clearly not full time and should not convert the line to a business line. The occasional selling of a home (FSBO) or other

¹⁴ 18 February 2005, *Second Order on Reconsideration*, FCC-05-28 ¶ 15 and fn 38, https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-28A1.pdf

¹⁵ FCC-05-28 ¶ 14

merchandise should not convert the line to a business line. Selling an old lawnmower in a newspaper want ad or Craigslist should not convert a residential line to a business line.

Some part-time business probably should not convert the line. Weddings are usually on Saturday. Somebody could have a full-time job at an office and moonlight as a weekend photographer.

I get queasy when a residential line is a full-time home-based business. At some point, such telephone lines are defrauding the telephone company and should be business lines.

Being a foster parent is a full-time job, but it should not require a business line. In contrast, providing home-based day care services is on the bubble for me. A neighborhood mom watching other kids could probably use a residential line. A day care that hires employees may need a business line.

I do not see full-time business use as a slam-dunk business line. A friend's wife is a full-time psychologist, and she has a normal (not home-based) office where she works 8 to 5. She does not see patients at her home. She did have a residential telephone line that enabled patients in crisis to call her at home after hours. Her husband and her kids were never supposed to answer it. I view that line as a legitimate residential line even though it is used 100% for her home business. It has limited use. (The residential line issue is moot now; she gives her patients her cellular telephone number.)

My mother used to get her house cleaned by an industrious woman whose only advertising was by word of mouth. It's a home-based business, but there are few calls. The only time mom called was to cancel or reschedule due to a conflict.

If the residence has one telephone line that is used for both personal stuff and the home-based business, then I bend toward keeping it a residential line. If the whole family is taking calls on the line, then it is probably residential. If the answering machine announces Acme Products, Inc., then I'm skeptical about it being a residential line. I could see the telephone service provider calling the number, hearing that commercial message, and then converting the line to a business subscription.

The economy has changed. Many people who were full time employees have been laid off. To make ends meet, they resort to working as contractors. They may provide their home telephone number to a contracting agency. Prospective clients may call them at home. If they get a contract, they may work out of their home. Such incidental use of a residential telephone should not convert it to a business line. I'd be fairly lenient here. I don't see anything bad with printing a business card that says, "Wile E. Coyote, computer programmer/consultant, 1-650-555-1234". Somebody might print such cards during an ordinary job search. But there are limits.

An aunt got a real estate license and tried selling real estate part time from her home. The idea crashed and burned rather quickly because she was not a good salesperson. I don't think I'd ding her residential line as a business line. If she was successful, then I'm not so sure. Putting a house on the market can generate a lot of telephone calls. To do the sale correctly, the telephone number needs to be published in the MLS.

Deducting the line on a tax return gives me more trouble. There something strange about telling the IRS it is a business expense and then claiming it is a residential line under the TCPA. I don't think that's a bright line test, because I think it would be OK for my friend's psychologist wife to deduct her after-hours line as business expense and still treat it as a residential line. (The psychologist actually escapes under the IRS home office deduction rules. The IRS prohibits deducting the first telephone line to a home; that line is needed for the home. The rules allow additional telephone lines to be deducted if they are used for business.)

As another point, exercising one's rights by suing TCPA violators should not be viewed as a business or convert residential subscriptions. Defendants often raise this defense, but even the FBI uses people to find violators.¹⁶ It would be sad if the FBI, the FCC, or an Attorney General subscribed to some residential lines to catch violators but could not prosecute them because the lines were viewed as business lines.

¹⁶ "Fraud Squad of Sly Seniors Helps FBI", *Los Angeles Times*, 28 June 1998, Jeff Leeds <http://articles.latimes.com/1998/jun/28/news/mn-64526>

III. Indicators

Although many have argued for the bright line test of how the telephone number has been registered with the operating company, I don't think there is a bright line. People do abuse residential subscriptions. The TCPA is a remedial statute, so it should be interpreted liberally to achieve its goals. That does not mean that businesses may register their telephone lines as residential lines and gain protections that the TCPA never intended to give them. I don't see a bright line, but I see some indicators.

The TCPA permits business-to-business prerecorded calls. I should not be able to obtain a residential line from my telephone company, hold that line out to the public as a business line, and then sue any business that innocently makes a prerecorded call to my residential line expecting to reach a business line.

A business to business call need not be scrubbed against the NDCL; business lines do not belong on the NDNCR; it would be an unneeded expense for a company to purchase the NDNCR when it is only soliciting other businesses.

Neither is it appropriate for a business that makes illegal prerecorded calls to consumers to use a business defense. Very few consumers actually file TCPA lawsuits. It takes a lot of effort to learn the law and to learn about prosecuting lawsuits.

Defense attorneys get creative. They look at the past lawsuits and claim the plaintiff is running a TCPA litigation business that sues TCPA violators. Consequently, the plaintiff's residential telephone line should be viewed as a business line, and prerecorded calls to business lines are permitted.

Such a claim is usually easy to defeat. It also does not have a lot of traction in California because there are state laws that prohibit using prerecorded calls to sell consumer goods and services, and those laws do not distinguish between business and residential lines. In an ADA case, a plaintiff's litigious past did not make him a "business" under the ADA. *Molski v. M. J. Cable, Inc.*, 481 F.3d 724 (9th Cir. 2007).

Colorado has found that a residential telephone that is also used for and published as a business number is not automatically a business line that escapes a Colorado statute.

John Holcomb v Steven D. Smith, Inc., (CO Appellate No. 06CA0997, 6 September 2007).¹⁷ A more tortured case is *John Holcomb v Jan-Pro Cleaning Systems of Southern Colorado* (CO No 06SC757 17 December 2007 modified 29 January 2008).¹⁸

In any event, the Commission should not make it easy for violators to use after-the-fact rationalizations.

If a line is subscribed as a residential line, then there should be a strong presumption that it is a “residential line” for the purposes of the TCPA.

A defendant should be able to overcome that presumption by demonstrating that the substantial usage of the telephone line is for business purposes and that the defendant intended to reach a business line. I see some indicators for the residential/business question:

1. Is the product being offered a business product or a consumer product? This goes to the intention of calling residential consumers. Home mortgage offers directed to businesses seem pretty silly. If the guy is selling a business product, then he probably intended to call a business. If the defendant is selling a consumer product, then the defendant intended to call a residential line. (This helps avoid after-the-fact rationalizations that would defeat the TCPA.)

2. How did the caller get the residential telephone number? If it isn't listed in the yellow pages and isn't advertised anywhere, then how did they ever get the number? The number may trace back to a data miner or aggregator.

3. Did the subscriber mislead the caller by publishing the number as a business line? The subscriber should not treat a residential line as a business line. Incidental use as a business line is OK. (For Sale by Owner, babysitting, after hours contact numbers for doctors and lawyers, part-time gigs for garage bands.) The answering machine's outgoing message should not imply a business.

¹⁷ <http://www.cobar.org/opinions/opinion.cfm?opinionid=6297&courtid=1>

¹⁸ <http://www.cobar.org/opinions/opinion.cfm?opinionid=6426&courtid=2>

4. Is the number listed in the white pages? A white page listing gives a business caller a chance to detect a residential telephone number. An unlisted number says nothing either way. A business calling other businesses should not be required to purchase the NDNCR to discern a residential subscription.

5. Is the subscriber violating the terms of service when using his phone for business purposes? Incidental usage should not convert the line.

6. Is the business use of the line significantly increasing its call traffic? Are there many incoming or outgoing calls? Low impact businesses (such as individuals running a housekeeping business) do not field a lot of calls. Businesses with substantial public contact (such as real estate sales) have a lot of traffic.

The above indicators are not absolute. They should be used and weighed by the finder of fact to determine whether a residential subscription should be a business line.

IV. Conclusion

Deny the Petition for a bright line and keep the previous determination that the FCC will consider home-based businesses on a case-by-case basis. Although a bright line test using how the line is subscribed would be nice, it would benefit those that Congress never intended to protect. The courts seem to deal with such a case-by-case determination appropriately. The *Adamo* and *Bank* decisions are reasonable.

I have no problem with the FCC stating that it agrees with the District Court's conclusion that Todd Bank's residential subscription was effectively a business line if the FCC points out that the strong presumption of a residential line was overcome because Bank used the number on his state bar record, Bank's law practice is a full-time business, Bank advertised his number as a business line, Bank used the line almost exclusively for business, and Bank deducted the line as a business expense on his tax returns.

If the Commission does want a bright line that serves both consumers and businesses, then make two bright lines. If the consumer has a residential subscription and the business intended to call a residence, then it is a "residential line". (This would

overturn *Bank*.) If the consumer publishes his number as a business and the caller was misled by that publication, then it is a business line. (This may overturn *Adamo*.) The ground between the two lines is grey.

The Commission could choose a multifactor analysis, but it should provide a list of factors, state that the list is incomplete, and let the finder of fact weigh those factors. Such a multifactor analysis essentially leaves the case-by-case determination in place.

The Commission should not imply that a case-by-case home-based business determination would prevent class certification. The presumption of a residential line with the intention of selling a consumer product should be enough to allow class certification.