

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	DA 14-120
Comment on Petitions Concerning)	
The Commission’s Rule on Opt-Out)	CG Docket No. 02-278
Notices on Fax Advertisements)	
)	CG Docket No. 05-338
)	

COMMENT

“To one consenting, no harm is done.” This common law doctrine is so old, it has a Latin version: “*Volenti non fit injuria.*” The comments herein explain why the Federal Communications Commission (“FCC”) should repeal 47 C.F.R. § 64.1200(a)(4)(iv), which creates a potential for imposing massive civil liability for consensual conduct that causes no harm.

Howmedica Osteonics Corp (“Howmedica”) submits this comment as it—like so many others—finds itself a defendant in a Telephone Consumer Protection Act (“TCPA”) class action where an important issue will be whether liability can attach to consensual transmissions that do not include the “opt out” language specified by 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Rule”). The plaintiff suing Howmedica has alleged that it received only a single fax, which it contends was an “unsolicited advertisement.” Through counsel, Howmedica respectfully submits that, insofar as it applies to facsimiles sent with the prior, express consent of recipients, the Opt-Out Rule: (1) exceeds the statutory authority granted to the FCC under the TCPA; (2) imposes an undue restraint on free speech in violation of the First Amendment; and (3) runs contrary to the public good, in that it has exposed both small businesses and large corporations to

potentially massive liability. Howmedica respectfully submits that the FCC should repeal the Opt-Out Rule. Moreover, it requests that the FCC grant a broad, retroactive declaratory ruling that the Opt-Out Rule *never* required the inclusion of an opt-out notice for solicited facsimiles. Such a declaratory ruling will ensure the prompt end of litigation against parties currently defending against TCPA class action lawsuits based on the Opt-Out Rule.

I. The FCC Lacked Statutory Authority to Promulgate the Opt-Out Rule, Insofar as it Applies to Facsimiles Sent with the Express Consent of Recipients.

Howmedica concurs with the position shared by all of the Petitioners referenced in the FCC’s Public Notice seeking comment—namely, that the TCPA, by its unambiguous terms, applies only to unsolicited advertisements (*see* TCPA, 47 U.S.C. § 227(b)(1)(C)), and that, insofar as it purports to regulate facsimiles sent with the express consent of recipients, the Opt-Out Rule exceeds the TCPA’s statutory authority.

The TCPA, by its clear and unambiguous terms, provides a private right of action for plaintiffs against defendants who “use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited advertisement*.” *Id.* (emphasis added). By definition, therefore, the Act does not apply to advertisements for which consent has been given. In contrast, Congress expressly did require “opt out” language for facsimiles sent under the color of an “Established Business Relationship.” *See id.* § 227(b)(2)(D). Congress’ explicit requirement for opt out language in one circumstance and its omission of such a requirement in another circumstance, gives rise to the rule of statutory construction “*inclusio unius, exclusio alterius*,”¹ and compels a conclusion that Congress never intended to require opt out language for faxes sent with consent.

¹ The inclusion of one is the exclusion of another. *See* Black’s Law Dictionary 687 (5th ed. 1979); *see also O’Melvany & Meyers v. FDIC*, 512 U.S. 79 (1994) (holding that express inclusion of defenses

An additional important canon of statutory construction supports repeal of the FCC Rule. Congress is presumed to legislate against the existing state of the law. “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”² Here, the legal doctrine *volenti non fit injuria* is fundamentally ingrained in English/American jurisprudence. *See, e.g.*, Terence Ingman, *A History of the Defence of Volenti Non Fit Injuria*, 26 JURID. REV. 1, 2-3 (1981) (References in English law to *volenti non fit iniuria* date to the early 14th century); 57B AM. JUR. 2D *Negligence* §767 (2014) (“The maxim ‘*volenti not fit injuria*’ means that a person is not legally injured if he or she has consented to the act complained of or was willing that it should occur.”); Charles Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457, 462 (1895) (tracing the doctrine to early 19th-century England). If Congress wanted to create a burden on consensual conduct that posed the potential for massive civil liability, it is reasonable to presume that it would have done so explicitly. The absence of any provision in the TCPA allowing imposition of statutory penalties for the lack of opt out language on consensual communications must be presumed intentional.

The Opt-Out Rule—which holds that “entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future”—oversteps the statutory authority provided by the TCPA, and should therefore be repealed.

under FIRREA precluded application of federal common law defenses not specifically delineated in the statute).

² *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Protection*, 474 U.S. 494, 501 (1986) (quoting *Edmonds v. Compagnie General Transatlantique*, 443 U.S. 256, 266-67 (1979)); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 553 (4th Cir. 2004) (“[W]ithout explicit statutory instructions, the cases drawn upon by Congress in writing legislation are not supplanted by the legislation, and courts may – indeed should – continue to look to those cases for guidance.”).

II. The Opt-Out Rule Violates the First Amendment to the Extent that It Requires that Solicited Faxes Contain an Opt-Out Notice.

An FCC regulation such as the Opt-Out Rule, which imposes a burden on speech made with the express consent of recipients also runs afoul of the First Amendment. Commercial speech may only be restricted in order to further a substantial government interest, and then the restriction imposed must actually further that interest. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (bans on commercial speech must be reasonably tailored to serve a substantial government interest); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (“regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”). Here, the government’s interest in burdening commercial speech to recipients who have provided express consent has never been established. Any such interest, moreover, would plainly be far less than the government’s interest in regulating unsolicited fax advertisements. Neither the TCPA nor the FCC provides any justification for regulating *solicited* facsimile advertisements. Under such circumstances, it simply cannot be demonstrated that Rule 47 C.F.R. § 64.1200(a)(4)(iv) is “reasonably tailored to serve a substantial government interest.” *Id.*

III. Sound Public Policy also Calls for the Repeal of the Opt-Out Rule.

Howmedica further agrees with the position taken by Petitioners Staples, Inc. and Quill Corporation, that the Opt-Out Rule is contrary to public policy, in that it has exposed small businesses and corporations to potentially massive liability for sending facsimiles with the express consent of recipients. One reason that companies, large and small, find themselves defendants in TCPA class actions is that its provisions are often obscure. Here, however, the “opt out” requirement for consensual faxes is not merely obscure (appearing only in the Code of Federal Regulations and not in the TCPA), but also counterintuitive. What ordinary person,

whether working for a company large or small, could anticipate that a customer's explicit request for a fax advertisement could lead to class litigation involving millions of dollars in statutory awards? What ordinary person could anticipate class litigation if he fails to provide "opt out" language on the fax he sends to the very same customer who just called and requested the fax advertisement?

As a matter of policy, the requirement to include opt-out language for faxes sent based on an established business relationship ("EBR") makes more sense because, in those instances, consent is not explicit. Where EBR recipients do not wish to receive fax communications despite prior business dealings, they may desire information that permits them to avoid receiving future communications. These considerations do not come into play when recipients consent to receive the fax communication.

The TCPA, in combination with the class action vehicle, has created an industry for class action lawyers and serial plaintiffs. In more than a few cases, the putative class members have expressly consented to receive the facsimiles, and in some instances, have only received a single fax such that inclusion of the "opt out" language has no practical significance. This type of litigation threatens businesses and jobs. Thus, sound public policy provides yet an additional reason for the FCC to repeal the Opt-Out Rule.

IV. A Declaratory Ruling is Necessary to Provide Retrospective Relief from the Opt-Out Rule.

As Petitioners Staples Inc. and Quill Corporation point out in their Petition, FCC rulemakings are generally prospective only, and repeal of the Opt-Out Rule will leave companies currently facing liability as a result of the rule to continue litigating. Therefore, the FCC should, in conjunction with repeal, issue a declaratory ruling that the Opt-Out Rule *never*

properly applied to facsimiles sent with the express consent of recipients. This is necessary to bring closure to pending litigation centered on this issue.

Respectfully Submitted,

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Dated: February 14, 2014

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