NO. 05-10-00129-CV

IN THE FIFTH DISTRICT COURT OF APPEALS

FIRST NATIONAL COLLECTION BUREAU, INC.,

Appellant,

V.

DANIELE WALKER,

Appellee.

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court No. 08-07249
Honorable Gena Slaughter, Judge Presiding

REPLY BRIEF OF APPELLANT, FIRST NATIONAL COLLECTION BUREAU, INC.

Robbie Malone
State Bar No. 12876450
Jacob C. Boswell
State Bar No. 24061269
Northpark Central, Suite 1850
8750 North Central Expressway
Dallas, Texas 75231
(214) 346-2625
(214) 346-2631 FAX
E-mail: rmalone@rmalonelaw.com

Counsel for First National Collection Bureau, Inc.

Oral Argument Requested

IDENTITY OF PARTIES & COUNSEL

Defendant/Appellant

First National Collection Bureau, Inc.

Counsel for Defendant/Appellant

Robbie Malone
State Bar No. 12876450
Jacob C. Boswell
State Bar No. 24061269
Northpark Central, Suite 1850
8750 North Central Expressway
Dallas, Texas 75231
(214) 346-2625
(214) 346-2631 FAX
E-mail: rmalone@rmalonelaw.com

Plaintiff/Appellee

Daniele Walker

Counsel for Plaintiff/Appellee

T. Dean Malone
State Bar No. 24003265
Michael T. O'Connor
State Bar No. 24032922
900 Jackson Street
Suite 730
Dallas, Texas 75202
(214) 670-9989
(214) 670-9904

Bruce K. Thomas
State Bar No. 19844300
1825 Market Center Blvd., Ste 200
Dallas, Texas 75207
214-296-9650
214-296-9662 (Fax)

TABLE OF CONTENTS

I.

INDEX OF AUTHORITIES

Cases

Statutes

II.

ARGUMENT AND AUTHORITIES

A. Standard of Review

A singular fundamental premise of law governs this case – a jury instruction that misstates the law as applied to the facts is reversible error. *See Wakefield v. Bevly*, 704 S.W.2d 339, 350 (Tex. App.—Corpus Christi 1985, no writ). In this case, the trial court submitted questions that misstated the law and did so over FNCB's objection.

B. FNCB Properly Preserved Error for Appeal.

"There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *State Dep't of Hwys & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). A party may preserve error on a charge question, instruction, or definition that they do not rely on by simply objecting or submitting a request and obtaining a ruling. *See First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 474-75 (Tex. 2004).

First National Collection Bureau ("FNCB") proffered its proposed jury charge to the trial court, including requested instructions and questions which the court refused. (CR 50-58; 5 RR 110:8-111:5).[1] In addition to the five proposed jury questions, FNCB preserved its issues on appeal by properly submitting a Motion for Judgment Notwithstanding the Verdict, a Motion for New Trial and a Motion to Modify, Correct or

[1] FNCB will refer to the Clerk's Record as (CR ___) where the blank refers to the page number. The Reporter's Record will be designated as (__ RR __ :__), where the first blank refers to the Volume number and the next two blanks contain the page and line numbers within the particular volume.

Reform the Judgment. (CR 92, 198, 201, 217, 255). Between the proposed questions and the above-listed motions, FNCB properly preserved each of its argued issues for this appeal. Because FNCB made the trial court aware of these issues by written motions, requested questions, and on the record in open court with the court refusing to correct the errors, FNCB did all that is necessary to preserve these matters for consideration on appeal.

C. The Trial Court's Errors Resulted in an Improper Jury Verdict and Judgment.

The trial court should have followed Texas' application of the TCPA. If federal law applies, the trial court still failed to submit a correct jury charge. Finally, there was insufficient evidence to support the jury's verdict, warranting reversal.

1. The Court Failed to Apply the TCPA according to Texas Law.

Appellee's position is that Texas law should provide only the procedural framework for the TCPA. (App. Br. at 13 & 17).[2] The Texas Supreme Court disagrees. *See Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707, 710 (Tex. 2006).*

a. *The TCPA Gives the State Court Exclusive Jurisdiction.*

Many courts have noted that "[t]he TCPA presents an unusual constellation of statutory features." *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 512 (5th Cir. 1997); *see Murphy v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3d Cir. 1998). "[T]he statute does not appear to reflect any significant federal interest, or one that is uniquely federal. It does not reflect

[2] FNCB will refer to Appellee's Brief as "App. Br. at __" where the blank refers to the page number.

an attempt by Congress to occupy this field of interstate communication or to promote national uniformity of regulation." *ErieNet*, 156 F.3d at 515; *Murphy*, 204 F.3d at 915. "Rather, Congress recognized that state regulation of telemarketing activity was ineffective because it could be avoided by interstate operations. Federal legislation was necessary in order to prevent telemarketers from evading state restrictions." *ErieNet*, 156 F.3d at 515; *Murphy*, 204 F.3d at 915. The end result is that "[o]n the one hand, the Act creates a federal right of action, but on the other it confers exclusive jurisdiction on state courts to entertain it." *Chair King, 184 S.W.3d at 710.*

In *Chair King*, the Supreme Court considered the TCPA's purpose, history, text, statutory framework, and traditional Constitutional analysis in order to determine how the statute should be applied.[3] The Supreme Court noted that "Congress chose to qualify the private TCPA right of action it created by including the proviso 'if otherwise permitted by the laws or rules of court of a State'" and "[f]ailure to give effect to the statutory proviso would itself run the risk of violating the Supremacy Clause by refusing to apply the federal right as written."[4] 184 S.W.3d at 712 (quoting 47 U.S.C. § 227(b)(3)). The TCPA "was from the beginning a cause of action in the states' interest," and was "meant to enhance the states' existing attempts to regulate unsolicited calls and faxes." 184 S.W.3d at 716. "There is strong evidence," the Court concluded, "that Congress wanted to assist state regulation in reaching interstate communications if a state so desired." *Id.*

[3] "[T]he issue the court faced," according to Appellee, "was simply *when* Congress intended the TCPA's private right of action to become enforceable in this state," but, a cursory glance at the *Chair King* opinion reveals that this issue was anything but simple. (App. Br. at 17).

[4] Appellee argues this "as written" phrase requires the State to entirely accept or reject the TCPA with "no option to rewrite [the] federal statute upon 'buying in.'" (App. Br. at 19).

Ultimately, the Texas Supreme Court found that Congress intended the TCPA to defer to state law in its application.

The Texas Court addressed the preemption language in § 227(e) of the TCPA. *See id.* at 717-18. The plaintiffs in *Chair King* argued that while the TCPA specifically does not preempt state laws imposing more restrictive requirements, the negative implication suggested that less restrictive penalties are indeed preempted.[5] *Id.* at 717. "If the TCPA were inoperative absent enabling legislation, the plaintiffs assert, then the TCPA could not preempt less restrictive state law and the section would be rendered meaningless." *Id.* But the Court disagreed, explaining that this would be the case under either an "opt-in" or "opt-out" approach and that only the "acknowledgement" interpretation, which the Court rejected, "would give full effect to subsection (e) ***if in fact it were intended to preempt less restrictive state penalties***." *Id.* at 717-718 [emphasis added].

In response, the Court first noted that Section 227(e)(1) is specifically titled "State law *not preempted*." *Id.* at 718 (quoting 47 U.S.C. § 227(e)(1). Next, the Court explains that "Congress's intent to supplement state legislation explains why the preemption concern would have focused on more aggressive regulation by the states. Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach, *but it does not necessarily follow that Congress intended the TCPA to be a mandatory floor for private enforcement whether or not a state chose to allow it*." 184 S.W.3d at 718 [emphasis added]. Immediately following this explanation, the Court cited the *Medtronic v. Lohr* presumption requiring a court to impose a narrow

[5] Appellee in the instant case makes the same argument. (App. Br. at 18).

interpretation to preemption language, particularly when Congress has legislated in a field which the States have traditionally occupied. *Id.* (citing 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). Thus, the Court acknowledged that while the TCPA expressly did not preempt more restrictive state laws, it also did not clearly and expressly preempt less restrictive laws. The Court could not, and did not, rule that the TCPA set a minimum enforcement standard once the State opted in.

b. *The States' Exclusive Jurisdiction Includes Substantive Law.*

Opponents of *Chair King* argue that the TCPA involves a "reverse-*Erie*" situation in which the substantive law is federal and the procedural law is that of Texas.[6] This issue has recently been extensively discussed by state and federal courts in New York and even tangentially considered by the United States Supreme Court. First, in 2006 and 2007, the United States District Court for the Eastern District of New York considered two cases involving class action claims under the TCPA which were brought pursuant to the Court's diversity jurisdiction. *Bonime v. Avaya*, Inc., 06-CV-1630 (CBA), 2006 WL 3751219 (E.D.N.Y. 2006); *Holster v. Gatco, Inc.*, 485 F.Supp.2d 179 (E.D.N.Y. 2007). At the time these cases were filed, New York maintained a law which stated, "Unless a statute...specifically authorizes...a class action, an action...may not be maintained as a class action." *Holster*, 485 F.Supp.2d at 182 (quoting N.Y. C.P.L.R. § 901(b)). In *Bonime* and *Holster*, the courts were faced with determining whether substantive New York law applied to TCPA cases in federal court, essentially barring the plaintiffs' class action

[6] The primary legal authority cited for this theory is *Manufacturer's Auto Leasing, Inc. v. Autoflex Leasing, Inc.*,139 S.W.3d 342, 346 (Tex. App.—Fort Worth 2004, pet. denied). However, *Chair King* was decided two years after *Manufacturer's Auto Leasing*. The *Chair King* Court specifically rejects the notion of the "reverse-*Erie*" analysis.

lawsuits. *See Holster*, 485 F.Supp.2d at 182; *Bonime*, 06-CV-1630. Both courts concluded that, among other reasons, the plain language of the statute "clearly indicates that the TCPA merely enables states to permit a cause of action and contemplates that the laws or rules of the courts of the state may restrict such actions." *Holster*, 485 F.Supp.2d at 184. "Thus, this Court, in exercising diversity jurisdiction over TCPA claims, must apply *Erie* such that state substantive law applies." *Id.* Since the TCPA did not specifically provide for class action suits, the New York law prohibited the plaintiffs' cases. *See Holster*, 485 F.Supp.2d at 186; *Bonime*, 06-CV-1630.

Both Holster and Bonime appealed these decisions to the Second Circuit Court of Appeals, which affirmed them on the same day. *See Holster v. Gatco, Inc.*, No. 07-2191-cv, 2008 U.S. App. Lexis 23203 (2d Cir. Oct. 31, 2008) (Summary Order); *Bonime v. Avaya, Inc.*, 547 F.3d 497 (2d Cir. 2008). In *Bonime*, the Second Circuit held that C.P.L.R. § 901(b) applied to TCPA actions in New York for two independent reasons. 547 F.3d at 499-502. First, "because Congress directed that the TCPA be applied as if it were a state law," the *Erie* doctrine required federal courts to apply §901(b) to TCPA claims in New York. *Id.* at 501. Permitting class actions in federal court that are not allowed in state courts "would create a predictable and foreseeable outcome-determinative difference that would strongly encourage forum shopping and create inequitable administration of the laws." *Id.* at 501-02. Second, the Court explained that the TCPA's specific language, "if otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227(b)(3), "constitute[d] an express limitation on the TCPA" and that "a claim under the TCPA cannot be brought if not permitted by state law." *Id.* at 502.

In 2010, the United State Supreme Court issued an opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, __ U.S. __, 130 S.Ct. 1431 (2010), which considered whether C.P.L.R. § 901(b) conflicted with Rule 23 of the Federal Rules of Civil Procedure regarding class actions. The Court held that Rule 23 preempted §901(b) because they "flatly contradict[ed] each other" and "Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts." *Shady Grove*, 130 S.Ct. at 1438, 1441. As a result of this holding, the Supreme Court granted certiorari in *Holster*, vacated the Second Circuit's decision, and remanded the case for consideration in light of its opinion in *Shady Grove*. *See Holster v. Gatco, Inc.*, __ U.S. __, 130 S.Ct. 1575 (2010). Because the Second Circuit affirmed *Holster* in a summary order predicated on *Bonime*, the Court focused on its *Bonime* opinion under the *Holster* remand in deciding the extent to which *Shady Grove* undercut the holding. *See Holster v. Gatco, Inc.*, 07-2191-cv (2d Cir. August 24, 2010).

In discussing the two, independent reasons for its holding in *Bonime*, the Court quickly conceded the first justification under the *Erie* doctrine because the Supreme Court made it clear that Rule 23 preempted C.P.L.R. § 901(b). *Holster*, 07-2191-cv. However, as to the second rationale, the Second Circuit pointed out that while "the *Shady Grove* Court said a great deal about the interaction of Rule 23 and C.P.L.R. 901(b), it said nothing at all about the TCPA." *Id.* Thus, the Second Circuit interpreted, as did the concurrence in *Bonime*, that the phrase "if otherwise permitted by the laws or rules of court of a State" was a "delegation by Congress to the states of considerable power to determine which causes of action lie under the TCPA." *Id.*

"In light of th[e] principle" that a court may "focus on the context of a law, as well as on its text," the Court explained, "nothing prevents us from saying that Congress intended some, but not necessarily all, state 'rules of court' to define what causes of action can lie under the TCPA." *Id.* The TCPA's congressional findings, that the statute was aimed to resolve the states' inability to deal with the interstate nature of telemarketing abuses and the fact that the statute expressly declined to preempt more restrictive state regulations, indicated to the Court that "Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses." *See id.* Therefore, the Court reaffirmed the district court, stating "The ability to define when a class cause of action lies and when it does not is part of that control." *Id.*

The holdings in *Holster* and *Bonime* confirm FNCB's argument in the present case by making clear that, even though a state makes the TCPA actionable, the statute does not operate unaffected by state law. The TCPA specifically conditions the private right of action on permission from the laws and court rules of the forum state. *See* 47 U.S.C. § 227(b)(3). The TCPA does not present a reverse-*Erie* situation where federal law is applied and any "modification" or "infringement" of the scope of the federal law violates the Supremacy Clause. Rather, a state is permitted to use its own laws and rules to "define what causes of action can lie under the TCPA." This is consistent with the purpose and text of the TCPA.

As helpful as the *Holster* and *Bonime* opinions are, those cases mainly focused on how the TCPA and state laws interacted in federal court. This is not the case here.

Instead, this court is faced with how the TCPA interacts with state law in state court. Fortunately, New York again provides an example for how to handle TCPA litigation.

In *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, the New York Supreme Court Appellate Division asked whether a "class action may be maintained for alleged violations of the [TCPA] in light of CPLR 901(b)." 799 N.Y.S.2d 795, 22 A.D.3d 148 (N.Y. App. Div. 2005). The plaintiff in this case argued that C.P.L.R. § 901(b) was not applicable "because, under federal case law, a class action is permitted unless otherwise expressly prohibited" and that the TCPA's "silence on the issue of class actions, in effect, specifically authorizes the same." 22 A.D.3d at 152. "However," the court responded, "the courts of this state have not interpreted silence on the issue of class actions in state or federal statutes to be, by implication, "specific authorization" to commence a class action within the meaning of CPLR 901(b)." 22 A.D.3d at 152.

Furthermore, "the purpose and objectives of Congress...under the TCPA, as drawn from the plain language and legislative history of the TCPA, and consistent with the case law, was not to create a federal private right of action that could not be defeated by the forms of local practice. Rather, it was...to provide 'permissive authorization to bring actions in state courts.'" *Id.* at 155. "Stated otherwise, it was to provide for such private rights of action ***only if, and then only to the extent, permitted by state law***." 22 A.D.3d at 155 [emphasis added]. Thus, application of C.P.L.R. § 901(b) to a private right of action under the TCPA would be completely consistent with the purposes and objectives of Congress. *See id.*

The TCPA's purposes were to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls...and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers." *Chair King*, 184 S.W.3d at 709. The statute was aimed at resolving a state's inability to deal with the interstate nature of these calls. *See Holster*, 07-2191-cv (2d Cir. 2010). Based on the purpose and plain language of the statute, Congress intended significant deference to states to determine if and to what extent it wished to employ the authority it was given. Therefore, state laws effecting the application of the TCPA do not violate the Supremacy Clause and must be enforced.

c. *Texas Does Not Apply the TCPA to Debt Collection Calls.*

Section 35.47 of the Texas Business and Commerce Code, Texas' enabling statute for the TCPA, was titled "Certain Electronic Communications Made For Purpose of Sales." This statute prohibited various methods of making calls or transmissions for the purpose of a solicitation or sale. The Texas Legislature reaffirmed its purpose for the TCPA in Texas in 2009 when it reorganized the Business and Commerce Code and placed the TCPA-enabling statute in "Chapter 305. Telephonic Communications Made For Purpose of Solicitation." *See* Tex. Bus. & Com. Code § 305.001.

Just as the courts above looked to the text and purpose of the TCPA to determine its effect, so too must this Court look to the actual language and congressional purpose of the Texas enabling-statute. A plain reading of the Texas Business and Commerce Code reveals that the Texas Legislature (as well as the federal Congress) intended for the TCPA to curb telemarketing and solicitation telephone calls and faxes. The text of the

TCPA allows states to determine if, and to what extent, a private right of action under the TCPA is available in that state. Texas has clearly limited the extent of this private right of action to solicitation and sales calls. Because Appellee admitted that FNCB never attempted to sell or lease her a product, good or services or solicit her in any way, Appellee's claim under the TCPA in Texas should have been dismissed. (5 RR 88:6-20).

d. *The Correct Standard for TCPA Violations in Texas is "Receives."*

In exercising the "fair measure of control over solving the problems that the TCPA addresses," Texas enabled the TCPA under Section 35.47(f), which stated that "[a] person who ***receives*** a communication that violates 47 U.S.C. § 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication." Tex. Bus. & Com. Code § 35.47(f) [emphasis added]. As a result of this language, Texas narrowed the scope of the state's private right of action under the TCPA to only those communications actually "received" by a person. Because states have "considerable power to determine which causes of action lie under the TCPA," the Court must respect Texas' decision to limit its cause of action to only communications received. *See Holster*, 07-2191-cv.

Appellee argues that "[a] call need not 'connect' to the called party to constitute a violation of the TCPA. *Id.* at 12. In support of this contention, Appellee cites an Arizona case involving the receipt of text messages on the plaintiff's cellular telephone. *Id.* (citing *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831 (Ariz. Ct. App. 2006)). In *Joffe*, the court held that "an attempt to communicate by telephone constitutes a call under the TCPA

even if the attempted communication does not present the potential for two-way real time voice intercommunication." 121 P.3d at 836. *Joffe* is easily distinguished.

The *Joffe* Court began its opinion with a background of the facts, which stated, "On January 6, 2001, Joffe's cellular telephone rang. When he answered it, he discovered he had *received* an unrequested text message solicitation from Acacia." *Id.* at 833 [emphasis added]. "On March 21, 2001, Joffe *received* a second text solicitation from Acacia on his cellular telephone." *Id.* [emphasis added]. As a result of *receiving* these two messages, Joffe filed suit against Acacia under the TCPA. Thus, the court in *Joffe* was not faced with mere call "attempts," but with the actual receipt of a communication. Granted, the communication did not present the potential for two-way communication, but FNCB has never argued that it must. In fact, the TCPA prohibits the use of artificial and prerecorded voice messages which do not present such potential. But, at the very least, the plaintiff must actually "receive" the violative call, message, or communication.

Appellee's second argument is that "[i]nitiating a call and receiving a communication are two sides of the same coin." (App. Br. at 21). To support this nebulous idiom, Appellee posits the false proposition that "[a] communication is 'received' by the called party every time an electronic transmission is sent to a cell phone." *Id.* "As is common knowledge," Appellee continues, "once a call has been placed, the receiving cell phone will notify the owner of the call. This itself is a 'communication.'" *Id.* Unfortunately, Appellee paints with too broad of a brush. Contrarily, "common knowledge" seems to be that not every call dialed to a cellular telephone reaches its destination or even notifies the intended recipient of the attempt.

"Common knowledge" espouses the incessant statement to friends, co-workers and loved ones, "I tried to call you three times," only to be answered with, "Really? I don't have any missed calls from you." Just like letters lost in the mail, not every communication *sent* to a cell phone is *received.*

Under Texas law, a plaintiff must prove that she actually received communications violative of the TCPA, rather than merely pointing to attempts. This very Court reversed a class certification order under the TCPA after finding that the class members were not presently ascertainable because while the plaintiffs were able to identify numbers to which the defendant sent faxes, they were unable to show who actually received them. *Intercontinental Hotels Corp. v. Girards*, 217 S.W.3d 736 (Tex. App.—Dallas 2007, no pet.).[7] Despite FNCB's request that the Court submit questions to the jury about whether Appellee received any of the alleged phone calls, the Court refused. (CR 50-58; 5 RR 110:8-20). Instead, the jury was incorrectly asked "How many call[s] were made by [FNCB]...," to which the jury answered "98."[8] (CR 81; 5 RR 152:20-24). Thus, the Court's erroneous application of the TCPA through § 35.47(f) of the Texas Business and Commerce Code resulted in an improper judgment.

In response to FNCB's explanation regarding the creation of a private right of action under the TCPA, Appellee explains that the Federal Communications Commission ("FCC") promulgated implementing regulations which proscribe a person from "initiating" a telephone call to a cellular telephone using an automatic dialer or artificial

[7] See *also Pinnacle Realty Management Co. v. Kondos*, 130 S.W.3d 292 (Tex. App.–Dallas 2004, no pet.); *Apartment Inv. And Management Co. v. Suggs & Assocs. P.C.*, 129 S.W.3d 250 (Tex. App.—Dallas 2004, no pet.).
[8] The 98 call attempts included non-answered calls and busy signals, neither resulting in a connection. (Pl's Ex. 4; Def's Ex. 2).

or prerecorded voice. (App. Br. at 8). Appellee claims that any limitation state law may have over the TCPA is superseded by this federal regulation which is specifically adopted as a part of Texas law. *See id.* at 21.

Appellee did not raise this argument at trial. Appellee never mentioned the FCC or regulations in any of its petitions. (CR 8, 22, 30). In addition, Appellee failed to request a jury charge regarding agency regulations or a jury question using this "initiating" language. (CR at 78). Thus, Appellee has waived its ability to now raise this argument on appeal and it cannot be a basis to support the trial court's erroneous verdict.

In addition, even if the FCC's regulations could be applied to this case, they are still subject to Texas law. As explained above, the text and purpose of the TCPA give states considerable power to define when a cause of action lies under the TCPA and when it does not. Texas has made that decision to limit its cause of action to calls "received." Pursuant to the "otherwise permit" language of the TCPA, an FCC regulation cannot supersede the State's decision. *See Pub. Employees Ret. Sys. Of Ohio v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) (No deference is due to agency interpretations at odds with the plain language of the statute itself.). Therefore, because the FCC's interpretation is contrary to Texas law through the plain language of the TCPA, it is given no deference and has no authority here.

e. *The Court Erroneously Held FNCB Vicariously Liable under Texas Law for Calls "Made or Caused to be Made."*

Prior to submission to the jury, FNCB objected to jury questions referring to calls made "on its behalf" or calls it "caused to be made." (5 RR 110:21-111:5); (CR 81-82).

FNCB argued that if the court insisted on submitting these questions, then the court should have provided blanks for each of the three calling parties in order to allocate calls amongst the parties and requested as much. (5 RR 110:21-111:5). This was based on the fact that Texas' TCPA-enabling statute does not contain this language and Appellee failed to support such a question with any legal authority. Because this question is contrary to Texas law, this Court should reverse the jury's verdict.

2. Even if Texas Law Does Not Affect the TCPA, the Trial Court still Erroneously Applied the Federal Law.

Should this Court decide that, despite the Texas Supreme Court's *Chair King* opinion and other relevant case law, Texas law does not affect the application of the TCPA, the trial court still failed to properly apply the federal statute.

a. *The TCPA Does Not Apply to Debt Collection Activities.*

"The Telephone Consumer Protection Act was enacted by the Unites States Congress in 1991 to address ***telemarketing*** abuses by use of telephones and facsimile machines." *Rudgayzer*, 22 A.D.3d at 149 [emphasis added]. "After lauding states' efforts to combat ***telemarketing*** abuses," Congress passed the TCPA to resolve the inability of state laws to deal with the problem's interstate nature." *Holster*, 07-2191-cv [emphasis added]. Based on Congress' discussion and subsequent case law, it is apparent that the purpose of the TCPA is to protect the public from telemarketing and unsolicited advertisements. In fact, the word "consumer," appearing in the very title of the Act, means "a person who buys goods or services for personal, family, or household use…"

Black's Law Dictionary 335 (8th Ed. 2004). This is further indication that this statute is meant to cover the buying and selling of goods or services.

There is no evidence suggesting that the TCPA should be applied to the debt collection industry. Creative lawyers have extended this statute beyond its intended target. While the specific statutory language may be broad enough to cover all manner of telephone calls, the Court is not required to turn a blind eye to a law's purpose and strictly enforce its text. "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49 (1949). Accordingly, the TCPA should not be applied to debt collection activities.

b. *Debt Collection Calls Do Not Use an "ATDS" as it is Defined by the TCPA.*

In its Brief, FNCB went to great lengths to explain that the TCPA did not intend to prohibit telephone calls to a pre-determined list of debtors. Appellee, on the other hand, summarily dismisses FNCB's argument as "academic," "nonsensical and unsupported by legal authority" and claims FNCB has "failed to provide this Court with any basis for not deferring to the FCC's ruling." (App. Br. at 29-30). But this accusation ignores six pages of explanation in FNCB's Brief as to why this Court should not employ such deference. *See id.* at 26-32.

In summary, FNCB explained that only if a statute is found to be "silent or ambiguous with respect to the specific issue" and "Congress has explicitly left a gap for [an administrative] agency to fill" may an agency clarify specific provisions of a statute by regulation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,

843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9.

The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *See* 47 U.S.C. § 227(a)(1). In an agency opinion, the FCC combined the two sections of the TCPA's definition of ATDS to incorrectly conclude that if a dialer "has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers," it is an ATDS. *Id.* This improperly transferred the "random or sequential" phrase from the section prohibiting how numbers are generated to how the calls are dialed. *See* 47 U.S.C. § 227(a)(1)(A) & (B). This flawed reasoning lead the FCC to conclude that it was irrelevant whether the dialing equipment created and dialed an arbitrary 10-digit telephone number or that it used a preprogrammed list of numbers.

Congress made its intent clear in the language that it used to define what constituted an ATDS. It prohibited a person from randomly- or sequentially-*generating* telephone numbers, not randomly or sequentially *dialing* a list of telephone numbers derived from debtors' account notes. Thus, calling a predetermined list of debtors cannot fulfill the ATDS requirement under § 227(b)(1)(A). Because the FCC's interpretation is manifestly contrary to the plain language of the statute, the Court should reject it.

As a result of rejecting the FCC's interpretation and finding that calls to a preset list of debtor's does not violate the autodialer prohibition in the TCPA, the only remaining conduct that could possibly violate the TCPA, if the statute actually applies to debt collection, is a call using an artificial or prerecorded voice to one of the prohibited destinations under § 227(b)(1)(A). Appellee testified that she only listened to two voice messages and part of less than five others. (5 RR 80:10-19; 90:2-5). This means that out of the 98 calls charged against FNCB, only a maximum of seven could be fairly characterized as having violated the TCPA. But, Appellee failed to present evidence proving that the messages were from FNCB. Thus, a jury finding that FNCB left these messages is contrary to the great weight of the evidence and is clear error.

c. *There is No Evidence that Every Call Made to Appellee Used an "ATDS" or Artificial or Prerecorded Voice.*

Even if the Court decides that the TCPA applies to debt collection calls and that the ATDS requirement is satisfied by such calls, Appellee still failed to prove that each call she received was made using either an ATDS or an artificial or prerecorded voice message. In response to this argument, Appellee, at best, demonstrates that FNCB used automated dialing equipment and prerecorded or automated voices to make collection calls. But Appellee did not prove that the calls she actually received used these technologies. Furthermore, Appellee's failure to prove that Global Connect or TCN used an ATDS or to present evidence apportioning responsibility among the three entities makes the jury's finding clearly wrong and manifestly unjust.

d. *The Court Erroneously Held FNCB Vicariously Liable under Federal Law for Calls "Made or Caused to be Made."*

The TCPA, under § 227(b)(1)(A), does not hold parties automatically vicariously liable for other's conduct and Appellee does not argue that it does. Instead, Appellee simply relies on an FCC opinion which FNCB explained violated the U.S. Supreme Court's opinion in *Chevron*. (App. Br. at 13-14). Furthermore, Appellee argues that, even if it was obligated to establish an agency relationship amongst the callers, she did so. *Id.* at 35-39. Unfortunately, "[t]he existence and scope of a principal-agent relationship is generally for the jury to determine." *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 173 (5th Cir. 1975). Since Appellee failed to submit a jury question on this issue, the court's imposition of vicarious liability was improper.

3. The TCPA and § 35.47(f) Provide "Up to" $500 in Statutory Damages.

In a proposed jury question, FNCB requested that the jury be instructed that it could award "*up to* $500.00 in damages for each call she received." (CR 56). In support of this question, FNCB proffered *State v. American Blastfax, Inc.*, 164 F.Supp.2d 892, 895 (W.D. Tex. 2001). Appellee argues this instruction is contrary to the language of the statute, but summarily ignores the statute when it comes to applying the TCPA to debt collectors, "received" calls, vicarious liability and intent standards. (App. Br. at 41). Because a court should presume that the legislature intended a just and reasonable interpretation of a statute,[9] the trial court should have included the "up to" language in the jury question and failure to do so was improper.

[9] *See Northwest Austin Mun. Utility Dist. No. 1 v. City of Austin*, 274 S.W.3d 820, 828 (Tex. App.—Austin 2008, pet. filed).

4. The Court's Finding that FNCB Willfully or Knowingly Violated the TCPA is Clearly Wrong and Unjust

a. *The Trial Court Erred by Finding Willful or Knowing Violations Based on Less than Clear and Convincing Evidence.*

FNCB requested that the trial court require any finding that FNCB acted "willfully or knowingly" be proven by clear and convincing evidence. (CR 57). This is the proper standard in Texas for finding aggravated conduct. *See* Tex. Civ. Prac. & Rem. Code § 41.003(a). The trial court's failure to both submit this instruction to the jury and to find, in its Findings of Fact and Conclusions of Law, that such a standard be employed resulted in an improper verdict.

b. The Trial Court's Finding of Willful or Knowing Violations is So Contrary to the Evidence that it is Manifestly Unjust and Wrong.

"[T]he TCPA is willfully or knowingly violated when the defendant knows of the TCPA's prohibitions, knows he does not have permission to send a fax ad to the plaintiff, and sends it anyway." *Manufacturer's Auto Leasing v. Autoflex Leasing*, 139 S.W.3d 342, 346 (Tex. App.—Fort Worth, 2004, pet. denied). At trial, FNCB demonstrated that it was not actually aware that the TCPA applied to the debt collection industry, (6 RR 28:7-29:14), and that it did not know it did not have permission to call the telephone number it called. (4 RR 62:6-10; 5 RR 45:25-46:5, 64:12-21). Based on this and other evidence admitted at trial, the court's finding that FNCB acted willfully or knowingly is contrary to the great weight of the evidence.

III.

PRAYER

FNCB requests that this Court enter Judgment in its favor, or, in the alternative, remand to the trial court for a new trial.

Respectfully submitted,

ROBBIE MALONE, PLLC

ROBBIE MALONE
State Bar No. 12876450
JACOB C. BOSWELL
State Bar No. 24061269
Northpark Central, Suite 1850
8750 North Central Expressway
Dallas, Texas 75231
(214) 346-2625
(214) 346-2631 FAX
E-mail: rmalone@rmalonelaw.com

Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded via certified mail, return receipt requested on this 20th day of September, 2010 to:

CM/RRR
T. Dean Malone
State Bar No. 24003265
900 Jackson Street
Suite 730
Dallas, Texas 75202

Bruce K. Thomas
State Bar No. 19844300
1825 Market Center Blvd., Ste 200
Dallas, Texas 75207

JACOB C. BOSWELL