



# ***How to Sue Telemarketers in Small Claims Court***

This guide explains step-by-step how other people have made money by taking telemarketers who violate the 1992 Telephone Consumer Protection Act (TCPA) to small claims court.

The best way to understand this program is to read this guide from beginning to end.

*Obligatory Disclaimer: This document was prepared by UCAN's staff and interns and was not written or edited by an attorney. This document does not constitute legal advice. It is simply a guide designed to advise you of your rights under the 1992 TCPA, which gives ordinary people the ability to take legal action in Small Claims Court against companies that violate the law. If you need legal advice, please consult an attorney.*

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## *From The Desk of Michael Shames*

Dear Fellow Telemarketing Victim:

You are awakened by a ringing phone, but when you answer, nobody is on the line. Then, just as you drift off to sleep, you get another call. This time there is a voice on the line, but while they seem to know you, you don't recognize the voice. Soon you realize: it is a telemarketer. What you may not realize is that you have just been targeted by a sophisticated piece of computer technology called a "predictive" dialer.

These machines call your home in advance of a telephone salesperson to find out when you are home. Once you answer, the device hangs up. Then, a few minutes, or up to an hour later, you will get a call from a sales person. Your phone has been automatically dialed by a computer, and as soon as you answer, you will hear a pause as the computer routes you through to an available telemarketer.

Auto-dialers and phone scripts are the tools of the telemarketer. This guide gives *you* the tools you need to fight back and regain your privacy. As a kicker, it shows you how you might get paid for your efforts.

As you'll see inside, we not only show you how to cut junk calls in half, but we've armed you with our own anti-telemarketing script, letters of complaint and legal notification, and legal references that you can use to argue your case. So the next time you are harassed by an unwelcome caller, do not get angry. Instead, take the law into your own hands and fight back.

Wishing you peaceful and quiet evenings,

Michael Shames, Executive Director, UCAN

### *Can I really make money suing telemarketers in small claims court?*

**Yes, in many cases! You can also forcefully recapture your telephone and your privacy.**

Few consumers know that under the Telephone Consumer Protection Act of 1991 (TCPA)\*, a company that calls you without your permission or without a prior business relationship must remove your name from their calling list immediately after you ask them. Armed with this little-known law, you can banish telemarketers from your life.

If the company calls you again, you may sue them for \$500 for the first violation and for triple damages for each violation thereafter. You can also collect \$500 plus triple damages if you can prove other violations.

And even if they never call you back, you can still take action against the company for damages. For example, the law requires that the company maintain a "Do Not Call List," and a written "Do not Call Policy" which they must provide to you on demand.

Since most companies do not have a written policy, they can be sued for not providing a copy of the policy.

The words "on demand" are critical to the interpretation of this law. It is the same wording used in the California Vehicle Code requiring you to provide your driver's license to a police officer. Legally the company must comply with your request for the "Do Not Call Policy" under ordinary standards of reasonableness.

We think five working days is reasonable, although a strong case could be made for demanding the policy via fax or overnight courier.

## ***Violations for which a telemarketing company can be sued***

By Law, a telemarketer can be sued in Small Claims Court for any of the following violations of the Telephone Consumer Protection Act (TCPA).

<b>LIST OF TCPA VIOLATIONS</b>	<b>FIRST VIOLATION</b>	<b>SECOND VIOLATION</b>	<b>LEGAL REFERENCE</b>
Not maintaining a "Do Not Call" list.	\$500	Up to \$1500	47 CFR  Sec. 64 . 1200 (e)(2)(i)
Not providing you with a written copy of the company's "Do Not Call" policy.	\$500	Up to \$1500	47 CFR  Sec. 64 . 1200 (e)(2)(vi)
Refusing to identify the caller's name, company name, street address and phone number	\$500	Up to \$1500	47 CFR  Sec. 64 . 1200 (e)(2)(i)
Calling you at any time in a twelve month period after you have asked to be put on the <i>Do Not Call list</i> .	\$500	Up to \$1500	47 CFR  Sec. 64 . 1200 (c)(5)

*\* Legal Reference: Telephone Consumer Protection Act (TCPA) 47 USC Section 227(c) and 47 CFR 64.1200. Note: USC is an abbreviation of "U.S. Code." CFR is an abbreviation of "Code of Federal Regulations."*

## ***What to do when you are solicited***

You are called by a telemarketer.

You know the routine: You are expecting a call from a friend or a relative, but instead you get a stranger asking for the "decision maker" in the household. Or worse, they ask for you by name and you don't recognize the voice at all. Your stomach tightens, your blood pressure rises. The telemarketer has struck.

Relax. Now is the time for you to strike back by gathering the information you need to sue the company that is calling you. All you need to do is collect a few easy pieces of information (see the "**Strike Back**" **Anti-Telemarketing Script** below).

Once you've used the script, you simply sit back and wait for the company to violate the law.

All they need to do is call you again and you are off and running. In fact, you can also sue them for not doing anything, including not sending you a copy of their "Do Not Call Policy" in a timely manner.

Another opportunity: Most of the calls you receive will be made by professional telemarketing firms on behalf of a "client" company.

You can double your chances for a successful suit or out-of-court settlement by getting the names and phone numbers of both companies.

## ***Who do you sue?***

Below is a list of questions to ask each telemarketer when they call you. But before you start asking questions, you must "qualify" the company so that you can assert your rights later. If, during the introductory "pitch," the telemarketer indicates that they are representing a non-profit firm, or a survey company, ask them to not call again and hang up immediately. They are not subject to the Federal law.

### **You cannot bring action against a company if:**

They are a non-profit corporation.

They are calling a place of business.

They are conducting a survey.

They are not doing business in your area.

**Note:** *Some companies will disguise their sales pitches as surveys.*

In the event this happens to you, you must elicit a frank admission that they are selling something. One of the best ways to do this is to get the company to send you sales literature or an order form. Other companies, once sued, will claim that they are invulnerable to your claim because they are not conducting business in your area. Obviously, if they have called you at home, they are conducting business in your area and are subject to the full force of the law.

## **“STRIKE BACK” ANTI-TELEMARKETING SCRIPT**

Before you start answering questions from a telephone solicitor, you must "qualify" the company as a potential prospect for a law suit. If, during the introductory pitch, the telemarketer indicates that they are working for a non-profit firm, or a survey company, hang up immediately. They are not subject to the law and are a waste of time.

Time of call: \_\_\_ AM \_\_\_ PM DATE: \_\_\_/\_\_\_/\_\_\_ (note: You can immediately sue for \$500 if before 8AM or after 9PM)

<b>Qualifying Questions</b>	<b>NOTES</b>
<b>1</b> <b>What is your name?</b> <i>(Refusal to answer is a \$500 fine)</i>	
<b>2</b> <b>What is the name and address of the company you represent?</b> <i>(Refusal to answer is a \$500 fine)</i>	
<b>3</b> <b>What is the company phone number?</b> <i>(Refusal to answer is a \$500 fine)</i>	
<b>4</b> <b>Are you an employee of this company, or do you work for a telemarketing service?</b> <i>(If they work for a service, get the name, address, and phone number.)</i>	
<b>5</b> <b>Does your company have a pre-existing business relationship with me?</b> <i>(If "yes" skip the next question)</i>	
<b>6</b> <b>Do you conduct business or have other customers in my city?</b> <i>(your case is stronger if answer is "yes")</i>	
<b>7</b> <b>Does your company have a written call policy?</b> <i>(\$500 fine if they say "No")</i>	
<b>8</b> <b>Will you send me a copy of your "Do Not Call" policy?</b> <i>(\$500 fine if they say "No")</i>	
<b>9</b> <b>Does your company maintain a "Do Not Call" list?</b> <i>(\$500 fine if they say "No")</i>	
<b>10</b> <b>Will you put my name on your "Do Not Call" list?</b> <i>(\$500 fine if they refuse)</i>	
<b>11</b> <b>May I have your supervisor's name and address?</b> <i>(This will help expedite your claim).</i>	

**WHO YOU CAN NOT SUE:** 1) Non-Profit corporations, 2) Companies calling you at a place of business, 3) Companies that are not doing business in your area. 4) Companies that are conducting surveys. Note: Some companies will disguise their sales pitch as a survey. In the event this happens you must elicit a frank admission that they are selling something. One way to do this is to get them to send you literature or an order form. Other companies will claim they are invulnerable because they are not "conducting business in your area." Obviously, if they call you at home, they are conducting business and are subject to the full force of the law.

## ***Controlling the call: a sample conversation***

*Note how "Mr. Jones" controls this call from start to finish. Even better, he uses our "Strike Back" phone script to obtain all of the information he needs to use his legal protection!*

**TELEMARKETER:** Hello Mr. Jones. This is John Spleenwacker for TGTBT Investments and I'm calling you to...

**MR. JONES:** *(interrupting with gusto)* John Spleenwacker! How the heck are you this evening?"

**TM:** *(puzzled)* ...um fine I guess. Anyway, TGTBT Investments has some remarkable...

**JONES:** *(writes down the name of the caller)* TGTBT huh! Sure. I know all about them. Fine company. Say what do those initials stand for anyway?

**TM:** Too Good to Be True. As I was saying, we have a new term life insurance policy that guarantees ...

**JONES:** Term life! I LOVE term life. Have had several policies in fact, can never buy enough of them. Term life!

**TM:** *(excited)* Good good. Glad to hear it. Then I think you'll like this offering

**JONES:** I should warn you John — may I call you that Mr. Spleenwacker?

*Anyway, John, I prefer to do business with companies that have local service centers. Where are you calling from?*

**TM:** Uh, Chicago, actually, but TGTBT is located in Lodi. Uh, Chicago, actually, but TGTBT is located in Lodi.

**JONES:** Lodi. Love that town! Do you have a street address? Lodi. Love that town! Do you have a street address?

**TM:** Sure. 1515 Lafayette Avenue. Sure. 1515 Lafayette Avenue.

**JONES:** So how is the weather in Chicago, John? So how is the weather in Chicago, John?

**TM:** It's rainy. Look Mr. Jones...

**JONES:** It's 75 degrees and sunny out here in San Diego. It's why I moved here. Do you have a local office or service center in San Diego?

**TM:** Yes we do. It's at 2350 Washington in Escondido.

**JONES:** Great, just great. By the way, why are you calling from Chicago? Are you with an outside marketing firm? Great, just great

**TM:** Actually, yes. We have been retained by TGTBT to help educate the public about their fine products and ...

**JONES:** Fascinating John. Just fascinating, but unfortunately I have to stop you for a second. You see, I get a huge number of calls like this and I wish you the best of luck, but I would like to be placed on your "Do Not Call" list, okay? I also want you to send me a copy of your written "Do Not Call" policy.

**TM:** *(confused - a bit taken aback)* Okay. Uh, sure.

**JONES:** And I want to put the request in writing. May I have the address of your call center in Chicago?

## *Using "rejection psychology" to your advantage*

Believe it or not, telemarketers are trained to "enjoy" the experience of being rejected by you. They are playing a numbers game. Here's why: They know that on average, one out of 25 people will say "yes" to their offer. As a result, they actually count the "No" responses, with the understanding that for every 24 rejections they will get at least one sale.

However, this constant rejection by hundreds of people a day takes its toll. This is why most telemarketers only work four to six hour shifts. The strain of constant rejection is both emotionally and physically exhausting. As a result, when you actually seem glad to hear from them, they are inclined to spend more time with you, even if all you are doing is talking about the weather and gathering the information you need to sue their employers.

### **Kill them with kindness**

We advise never being hostile to a telemarketer —they are trained to deal with hostility, but none of them know how to deal with cheerfulness and enthusiasm.

Telemarketers are trained to "take control" of the sales call. When they call you, they have only one intent: to make a sale. Your objective is to get enough information to use the law against them. This means that you have to turn the tables and take control of the conversation. The best way to take control is by being cheerful and asking frequent questions in a non-threatening manner.

On page 4 we showed you the information you need to gather in order to sue successfully. In telemarketing terms, this is called "qualifying the prospect." And the best way to control the call is to interrupt their script by using your script. Read on...

### **Putting the "Yes/No/Maybe" sales principle to work for you**

Most telephone sales people are trained using a sales technique called "Yes/No/Maybe." The objective of "Yes/No/Maybe" is to get you to say "yes" or "no" as fast as possible. Once you say "Maybe" and start asking unusual questions you slow the marketer down.

Almost 99% of the time, the person calling you will be reading a script. The script is used because years of market research show that salespeople who read a script over the phone and stick to it with minimal deviation tend to make more money.

Phone scripts are especially designed to prevent you from asking questions that put you in the costly "maybe" category. All they want from you is a sale. But what you want is the information required to optimize your chances of winning a lawsuit or getting an out-of-court settlement. Your job is to "reel them in."

Yes, it takes hard work and time, but remember, the cruelest thing that you can do to telemarketers is to keep them on the phone without buying anything. Every minute you spend, every question you ask, is costing them money. The kindest thing you can do is hang up the phone.

Some consumer advocates have claimed that if everyone in America kept a telemarketer on the phone for just one minute, instead of hanging up, the industry would be bankrupted in a matter of months.

After you have qualified a target company as an eligible lawbreaker (they are not a survey firm or a tax-deductible non-profit), you need to send them the following letter. This letter is especially designed to make the strongest possible legal case.

Send the letter below five working days from the time of first contact.

### **Now you simply wait for the company to violate the law.**

You sent your letter and now you wait. Enjoy the increased silence of your phone in the meantime. Inevitably, one of the companies will break the law in one of five ways:

- 1) They call you again in the next 12 months.
- 2) They neglect to put you on the "Do Not Call List"
- 3) They are not maintaining a "Do Not Call List."
- 4) They do not have a written "Do Not Call" policy.
- 5) They were unable to provide a copy of the "Do Not Call" policy on demand.

Once any of the above is violated, you are poised to exercise the full rights of the law. We call this the "F.I.S.T." legal strategy. "FIST" stands for "File, Inform, Settle, or Trial."

## ***Sample letter to a telemarketer suspected of breaking the law***

YOUR NAME AND

ADDRESS HERE

DAY/DATE/YEAR

CONTACT NAME

TITLE

COMPANY NAME

STREET ADDRESS

CITY / STATE / ZIP

RE: Request for written "Do Not Call" policy

Dear NAME:

Pursuant to your firm's efforts to conduct business in (name of your town), I received a phone solicitation on DAY/DATE/YEAR from your sales representative Mr./Ms. NAME at \_\_:00 AM / PM .

Your sales agent was promoting (NAME OF PRODUCT/SERVICE) for (Product / Service Company / Manufacturer) as an employee of your company (NAME OF OUTSIDE TELEMARKETING COMPANY IF APPLICABLE) .

During the conversation I requested that your sales agent provide me with a copy of your written "Do Not Call Policy," and to place my name and phone number on the "Do Not Call" lists of the companies listed above.

This letter is to inform you that

**(CHECK ALL THAT APPLY AND DELETE THE REST)**

the call was made before 8:00 AM, or after 9:00 PM.

I was called again by your company on (Day / Date / Time)

I have not received my copy of your "Do Not Call" policy.

I have not received a copy of the "Do Not Call" policy for (Company)

You are hereby notified that you are in "knowing violation" of Federal law CFR 64.1200(e)(2)(i), the Telephone Consumer Protection Act (TCPA). Under the provisions of this law you are required to maintain a "Do Not Call List" and provide a written copy of your "Do Not Call Policy" on demand.

In accordance with this law, I am demanding that you provide a copy of your "Do Not Call Policy" by or before (date)

Sincerely,

(YOUR NAME)

CC: UCAN Fraud Squad  
3100 5th Avenue, Suite B  
San Diego CA 92103

## ***F.I.S.T. Anti-Telemarketing Program***

**F**ile your complaint in small claims.

**I**nform the defendants and ...

**S**ettle out of court, or ... go to

**T**rial in small claims court.



**STEP 1: FILE your complaint with your local small claims court. with your local small claims court. with your local small claims court.**

Hopefully, you were able to identify the name of the "hired gun" telemarketing company that was retained by the company that called you. If this is the case, you can sue both of them by naming the companies as co-defendants, thereby doubling your odds for a lucrative settlement. Below is a checklist of the information and questions you will need to answer in order to complete a typical small claims form. How much can you sue them for? Skip ahead to the **"Hired Guns" sample letter** and calculate the fines.

The next step is to visit the nearest small claims court. A small claims court advisor will give you the specific complaint form you need (every court uses different forms). The advisor will assist you in filling out and filing the document(s) with the court clerk. The court clerk can be a tough person to get by.

If the company you are suing is headquartered out of your district or even out of state, you may have to argue for bringing the telemarketing company/defendant into a local small claims court.

You must convince the clerk that since the company is soliciting and marketing in your district and that because they are actively doing business in your community, they are obligated to defend a suit in your district (venue). You can also argue the following:

- 1** there is a direct relationship between the company's contact with your district and your specific lawsuit as the plaintiff,
- 2** you were damaged in your district,
- 3** the defendant offered a contract to be entered in your district,
- 4** it is more convenient for the defendant, a big company, to come to your district than for you to travel to them, and
- 5** it is in your district's interest to protect its citizens in a local court.

These arguments should pass muster with any clerk or judge. If the court clerk does not let you file in your district then you will have to go to the telemarketing company's venue or the district where their corporate headquarters are located.

### **The cost of filing a small claims suit**

§ most courts have a \$20 filing fee

§ \$6 if you want the court to send complaint by certified mail

§ Questions? The San Diego Small Claims Advisor can be called at (619) 236-2700

### Identifying the "Agent of Service"

You need to serve the complaint on a specified person or agent called an "agent of service of process." To identify the name and address for the agent of service of process you must write (not call):

**Secretary of State**

**1500 11th St.**

**Sacramento, CA 95814**

**Attn: IRC Unit**

Request registered agent for XYZ company.

§ Send a \$4 check payable to: "Secy. of State" for \$4 fee for the name and address of the agent (call (916) 653-7315 for more information). All out-of-state companies doing business in California **MUST** have a registered agent. If you are unable to identify a registered agent, contact UCAN and we will request an Attorney General investigation.

To serve the complaint on the agent you can:

- 1** Send it certified mail (or pay \$6 for the court to do it), but the agent must sign that he/she received the complaint for it to be effective (this process can be difficult if the defendant wants to make it difficult); or
- 2** Pay a marshal \$28 to serve the agent; or
- 3** Hire a private process server (fee varies).

#### SMALL CLAIMS CHECKLIST

Be prepared to answer the following questions:

**Plaintiff name**, address, and telephone (that's you);

**Defendant name** address and telephone (did you find the registered agent of service?);

**Money owed** to you (calculate the total owed by filling in the blanks in the "**Hired Gun**" **sample letter**)

**Specific violations** of the law (for example calling you twice in 12 months is a violation of 47 USC Sec. 227(c)(5)). See next page for legal citations.

**Justification of venue.** This is your explanation of why you should be allowed to sue in this particular small claims court. We advise the following wording: "Defendant is selling to and soliciting customers in district. My harm relates directly to this business activity. The company must therefore defend its violations of the law in the district where the unlawful activity occurred."

**STEP 2: Inform** the company, by sending this letter.

**STEP 3: SETTLE** out of court (if you want to).

Every defendant has different reasons for avoiding the risks involved in a court hearing. Some companies may want to settle with you. Remember, you don't have to settle, but if you decide to, here are some tips:

If you have identified a telemarketing firm that has acted as a sales agent for another company, then inform that company that you have filed a lawsuit against their client.

**DO NOT MAKE THREATS!** Keep your wits and be cordial. You are just calmly informing them of what you are doing.

**If you do not receive a reasonable settlement offer, then proceed to step four.**

## **STEP 4: TRIAL.**

### **Here is what you can expect in small claims court:**

The judge will call your name and you will present your evidence. Bring all of the evidence you have - the more paperwork, dates, faxes, letters, names, and other documents that you present, the stronger your case. Also bring a copy of the **Arkow v. Bank of America** case. (see last page)

Once the judge rules in your favor, the court will issue a judgment and order to the company to make payment to you. This can sometimes be a tricky process if the company does not want to abide by the judgment, but the court has various ways to collect including garnishing wages, reporting to collection agencies, attaching assets, etc. Most companies do not like to deal with these annoyances. In the event you are compelled to pursue collection activity, the court will force the defendant to reimburse you for all collection costs.

Keep in mind that if the company is out of state, the collection process can be difficult, making an out-of-court settlement more attractive.

Using answering machines and tape recorders to gather evidence

California law prevents you (or anyone else) from recording a conversation without the express knowledge of the participants. If you plan to record phone calls from telemarketers for future use in court, you must inform them that the call is being recorded. One way to do this is to just say "You know I've got this darned machine hooked up to my phone and it's recording this call. I hope you do not mind." The caller will likely assume that your answering machine is malfunctioning, and consent to be recorded. In the event a telemarketer calls your answering machine and leaves a message, the recording can be used in court because the caller knew at the time that his or her voice would be recorded.

**NOTE:** *The letter below was written specifically to get the attention of the "Hired Gun" telemarketing firms that are representing other companies as sales agents. If you were unable to identify the name and addresses of the "Hired Guns," that called you, simply modify the letter accordingly.*

***“Hired Gun” Sample Letter***

YOUR NAME  
STREET  
CITY / STATE / ZIP  
(TODAY'S DATE HERE)

NAME  
TITLE  
COMPANY NAME  
COMPANY STREET ADDRESS  
CITY / STATE / ZIP

RE:  I am suing your client because you have violated federal law.  
 I am suing your company because you have violated federal law

Dear NAME:

In a few days your company, AND OR your client NAME OF COMPANY will receive service of process for violations of the Telephone Consumer Protection Act (TCPA).

As you will see from the attached letter I requested that your company provide me with a copy of your written "Do Not Call Policy," and to place my name and phone number on the (USE ALL THAT APPLY)  "Do Not Call" lists of your telemarketing company,  as well as on the "Do Not Call List" of your client.

This letter is to inform you that I have filed a complaint in small claims court for the following violations of Federal law 47 USC Sec. 227, the Telephone Consumer Protection Act (TCPA).

I have not received my copy of your "Do Not Call" policy on demand after making two requests.

I am suing you for \$1,500 in accordance with 47 CFR Sec. 64.1200(e)(2)(i).

The call was made before 8:00 AM, or after 9 PM.

I am suing for \$500 in accordance with 47 CFR Sec. 64.1200(e)(1).

I was called again by your company on [DAY DATE TIME] in violation of 64.1200(e)(2)(vi).

I am suing you for an additional \$500.

I was again solicited by your company on (Day / Date / Time), and the law allows for triple damages of \$1,500 47 USC Sec. 227(c)(5).

It is apparent your company is not maintaining a "Do Not Call List" I am suing for triple damages of \$1,500 in accordance with 47 USC Sec. 227(c)(5).

Total damages : [ADD UP THE BOXES YOU CHECKED]

I am therefore suing

Your Company  (IF APPLICABLE) And Your Client in separate claims.

I am sending you this letter as a courtesy. If you wish to discuss or resolve this matter informally, I encourage you to contact me at the address above prior to the scheduled hearing date.

Sincerely,  
YOUR NAME

CC: UCAN Fraud Squad, 3100 5th Avenue, Suite B, San Diego CA, 92103  
Enc: Original letter of request for "Do Not Call Policy." (ATTACH YOUR FIRST LETTER)

MUNICIPAL COURT OF NEWHALL JUDICIAL DISTRICT FOR

THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

(SMALL CLAIMS DIVISION)

LARAIN K. ARKOW and ROBERT V. ARKOW - Plaintiff,

vs.

BANK OF AMERICA, N.T.S.A. - Defendants

CASE # s/c 95S00592

### STATEMENT OF DECISION

This action is brought on behalf of plaintiffs who allege total damages of \$2,000 excluding court costs as follows:

\$500.00 for Breach of Contract; \$500.00 Violation of Telephone Consumer Protection Act (TCPA); \$1,000.00 Punitive Damages

On April 13, 1995, a telephone call was made by Bank of America employee Jason Evans to plaintiffs. Plaintiffs telephone number and name was made available to Mr. Evans by the bank. The purpose of the contact was to advise the Arkows of other investments that would be available to them. The Arkows were not available to receive the call and a message was left by Mr. Evans stating substantially as follows:

"This is Jason calling from the Palmdale branch of Bank of America. I need to talk to you about your savings account. Please call me at (805) 378-7237."

The purpose of Mr. Evans call was to advise the Arkows of other investments that were being offered by defendant and as such, the telephone call was a telephone solicitation in that it was made for the purpose of encouraging a purchase or rental or investment in property, goods or services.

Telephone solicitation does not include a caller message to any person with whom the caller has an established business relationship. There is no dispute that a prior business relationship existed between plaintiffs and defendants by virtue of a deposit of account and a loan. An established business relationship may be terminated by indicating the consumer does not want to receive any more calls or solicitations from the business. A Disclosure and Loan Agreement dated February 5, 1994 includes a provision number 19, "Bank not to telemarket customer." The original loan agreement contains this paragraph. The loan was granted by the bank and no objection to the provision was made.

On April 13, 1995 plaintiff Robert Arkow faxed Bank of America in Lancaster a demand pursuant to 47 USC Section 227 for the banks "Do Not Call Policy". The do not call policy was not delivered until approximately five (5) weeks after the demand was made and after the claim of plaintiff was filed on May 1, 1995. At the time of making a live solicitation, the bank is required to provide the called party with the name of the individual caller, the person or entity on whose behalf the call is made and a telephone number or address at which the person or entity can be contacted. Bank of America employee, Jason Evans was not completely identified in that his name was not given, nor was his correct location given. Mr. Evans represented that he was from the Palmdale branch of Bank of America, however he

was not. The telephone number given by Mr. Evans for a return call is not for the Palmdale branch, but is some place in Moorpark, California.

The Telephone Consumers Protection Act provides for a private right of action that may be brought in State Court to recover actual monetary loss from a violation of the act, or \$500.00 in damages for each violation whichever is greater.

It is troubling in reviewing the Public Notice prepared by Federal Communication Commission on January 11, 1993 and the T.C.P.A that neither contemplates or gives right to a cause of action based upon one (1) Telephone Solicitation within a twelve month period. 47 USC Section 227 (c)(5) provides in part:

"a person who has received more than one telephone call within any twelve month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may...bring in an appropriate court of that state"(b) an action to recover for actual monetary loss from such a violation, or to receive up to \$500.00 in damages for each such violation, whichever is greater..."

There being only one telephone call at issue, the court finds that that single phone call did not constitute a violation of 47 USC, Section 227.

Defendant, however has violated FCC rules with respect to failure to provide the Do Not Call Policy upon demand. Senior Vice President and District Manager, Ron Nemitz testified that the demand for a copy of the policy waited on his desk for him to review the policy prior to it's release. I can find no authority for the delay of the bank in turning over the policy in response to a demand.

Furthermore, bank employee, Jason Evans failed to properly identify himself at the time the telephone solicitation was made. Damages in the sum of \$500.00 for each violation is awarded to Plaintiff.

Plaintiff's final cause of action for punitive damages is based upon, as plaintiff stated, a cause of action for intentional infliction of emotional distress. No testimony was offered to show that Bank of America intended to cause emotional distress to plaintiff, or that the defendant willfully or knowingly violated T.C.P.A. or FCC Regulations.

Judgment entered in favor of the Defendant on Plaintiffs claim of intentional infliction of emotional distress.

Dated June 15, 1995

Signed, James P. Reape



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