permits bankruptcy courts to award reasonable compensation for necessary services rendered by professionals. ASARCO challenged the applications, but the Bankruptcy Court rejected ASARCO's objections and awarded Baker Botts fees for time spent defending the applications. ASARCO appealed to the district court, which held that the law firms could be awarded fees for defending their fee applications. The Fifth Circuit reversed, holding that §330(a)(1) did not authorize fee awards for defending fee applications.
HOLDING: Affirmed.
REASONING: The U.S. Supreme Court held the basic point of reference for awards of attorney's fees is that each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise. Congress applied this "American Rule" in §330(a)(1) for fee-defense litigation. Professionals are hired to serve as estate's administrator for the benefit of the estate, and §330(a)(1) authorized "reasonable compensation for actual, necessary services rendered." The word "services" ordinarily refers to "labor performed for another." Thus, the phrase "reasonable compensation for services rendered" implied loyal and disinterested service in the interest of a client. Time spent litigating a fee application against the bankruptcy estate's administrator cannot be fairly described as "labor performed for" – let alone "disinterested service to" – that administrator. Had Congress wished to shift the burdens of fee-defense litigation under §330(a)(1), it could have done so, as it has done in other Bankruptcy Code provisions.

MISCELLANEOUS

EXEMPLARY DAMAGES CAP IS NOT AN AFFIRMATIVE DEFENSE

Zorrilla v. Aypco Constr. II, ____S.W.3d____ (Tex. 2015).
http://law.justia.com/cases/texas/supreme-court/2015/14-0067.html

FACTS: Homeowner Mirta Zorilla ("Zorrilla") agreed to pay construction contractor, Aypco Construction II, L.L.C. and its owner Jose Luis Munoz ("Aypco"), for certain construction services at two residential properties in May 2007. Zorrilla refused to pay several invoices for charges related to construction work.

Aypco brought an action against Zorrilla for breach of contract and fraud. The district court entered judgment on special jury verdict for Aypco and awarded them exemplary damages, in excess of the statutory cap, because Zorrilla did not assert the cap as an affirmative defense to the excess damages award until her motion for new trial. The appellate court affirmed, noting the split amongst the appeals court regarding the exemplary damages cap as an affirmative defense. The Texas Supreme Court granted the petition for review.
HOLDING: Reversed.
REASONING: In addressing whether the statutory cap on exemplary damages was an affirmative defense or could be asserted in a motion for new trial, the Texas Supreme Court held that the exemplary damages cap did not constitute an affirmative defense. The exemplary damages cap applied automatically when invoked, and Zorrilla did not need to prove any additional facts.

RULE 68 OFFER TO INDIVIDUAL PLAINTIFF DOES NOT MOOT CLASS ACTION

Hooks v. Landmark Indus. ___F.3d___(5th Cir. 2015).
http://www.ca5.uscourts.gov/opinions %5Cpub%5C14/14-20496-CV0.pdf

FACTS: Plaintiffs-Appellant David Hooks ("Hooks") withdrew funds from an ATM operated by Defendant-Appellee Landmark Industries, Inc. ("Landmark"). During the transfer, Hooks was charged for the withdrawal without any posted notice on or at the ATM. Hooks sued Landmark seeking statutory damages for alleged violations of the Electronic Funds Transfer Act ("EFTA").

At trial, Landmark tendered an offer of judgment to Hooks under Rule 68 of the Federal Rules of Civil Procedure that would cover the full statutory amount of one thousand dollars. Hooks motioned to strike the offer of judgment. Hooks then motioned for an extension deadline to file a motion for class certification. Landmark filed a motion to dismiss for lack of subject matter jurisdiction, which the district court granted. Hooks appealed.
HOLDING: Reversed.
REASONING: Landmark argued Hooks' individual claim and class action suit were moot by his rejection of the offer under Rule 68. Hooks argued that the offer was not a complete offer of judgment because it only included reasonable attorney's fees accrued through the date of the offer, and it did not include post offer fees. The court stated that an incomplete offer of judgment does not render a plaintiff's claim moot.

The court followed the Ninth and Eleventh Circuit's reasoning that an unaccepted Rule 68 offer cannot moot an individual's claim.

The court considered the split of authority in the federal appellate courts and rejected the argument that a rejected Rule 68 offer of judgment could moot a plaintiff's claims. The court held that an unaccepted offer of judgment to a named plaintiff in a class action is a legal nullity with no operative effect and nothing in Rule 68 alters that principle. The court followed the Ninth and Eleventh Circuit's reasoning that an unaccepted Rule 68 offer cannot moot an individual's claim. The court noted that a contrary ruling would result in allowing defendants to unilaterally moot named-plaintiffs' claims in a class action context.

The court was not deprived of the ability to enter relief, thus the claim was not mooted. The court concluded that even if Landmark's offer were complete, it did not moot Hooks's claim as the named plaintiff in the class action because Hooks's individual claim was not mooted by the unaccepted offer, and neither were the class claims.

UNDER THE TCPA RECIPIENT DOES NOT HAVE TO PRINT OUT FAX TO HAVE A CLAIM UNDER THE ACT

Imhoff Investment, L.L.C. v. Alfoccino, Inc, 792 F.3d 627 (6th Cir. 2015).
http://caselaw.findlaw.com/us-6th-circuit/1706917.html

FACTS: Plaintiff Avio, Inc. alleged that Defendant Alfoccino violated the Telephone Consumer Protection Act ("TCPA") by hiring Business to Business Solutions ("B2B") to send unsolicited facsimile advertisements to Avio and a class of similarly situated persons. In 2006, Tony Shushtari ("Tony"), an operator of Alfoccino, hired B2B and directed B2B to send out 20,000 faxes to local businesses on behalf of the two Alfoccino restaurants. Tony assumed that B2B obtained permission from its fax recipients before sending them ads but did not testify that he instructed B2B to do so. B2B's fax logs show that B2B faxed Alfoccino's ad to Avio on two dates in 2006; both transmissions were successfully completed.

The district court found that Avio lacked Article III standing to pursue its claim and, as a secondary basis for dismissal, that Alfoccino could only be held vicariously liable—not directly liable—under the statute, and Avio failed to offer sufficient evidence for a jury to find Alfoccino vicariously liable for the faxes B2B transmitted. Avio appealed.
HOLDING: Reversed and remanded.
REASONING: The court examined the TCPA and found that Congress intended to remedy a number of problems associated with junk faxes, including the cost of paper and ink, the difficulty of the recipients' phone line being tied up and the stress on switchboard systems. To remedy this situation, Congress authored the TCPA to give recipients of unsolicited fax advertising the legal right to recover damages and obtain injunctive relief from the senders of those faxes when senders lacked a prior business relationship with the recipient. Viewing or printing a fax advertisement was not necessary for Avio to suffer a violation of the statutorily created right to have its phone line and fax machine free of the transmission of unsolicited ads. The court concluded that a plaintiff doesn't have to see the fax to discern whether it is an advertisement or not because a reasonable trier of fact could find by a preponderance of the evidence that the content of the two faxes at issue was advertising material prohibited by the TCPA.

MINOR CHANGES IN TELEMARKETING LANGUAGE DO NOT DEFEAT CLASS CERTIFICATION

Reyes v. Netdeposit, LLC, ____F.3d____(3rd Cir. 2015).
http://law.justia.com/cases/federal/appellate-courts/ca3/14-1228/14-1228-2015-09-02.html

FACTS: Appellant, Reynaldo Reyes ("Reyes"), received an unsolicited phone call from a telemarketer informing Reyes that he qualified for a free government grant. After Reyes provided his bank account information, the telemarketer relayed the account information to Appellees, Zions First National Bank ("Zions Bank"), and its payment-processor subsidiaries, Netdeposit, LLC and MP Technologies (together, "Modern Payments"). Zions Bank processed two debits from Reyes's account and transferred the debits back to the telemarketer. Reyes brought a class action suit and alleged that Modern Payments violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") by operating a fraudulent enterprise that was a complete sham.

The district court denied Reyes's motion to certify a class to sue because Reyes failed to satisfy the commonality and predominance requirements of class action certification. Reyes appealed.
HOLDING: Vacated and remanded.
REASONING: Reyes argued that although the fraudulent transactions and the language used in perpetrating the transactions varied, class treatment was appropriate because the overall business model of each transaction was a "complete sham." The solicitations operated in an inherently fraudulent way by seeking bank account information from those contacted. The court accepted Reyes's argument, reasoning that the underlying facts, conduct, and objectives of the fraudulent transactions were common to all class members and predominated over the various particularized circumstances of each individual. In supporting the class certification, the court stated, "If absolute conformity of conduct and harm were required for class certification, unscrupulous businesses could victimize consumers with impunity merely by tweaking the language in a telemarketing script or directing some (or all) of the telemarketers not to use a script at all but to simply orally convey a general theme designed to get access to personal information such as account numbers."

Unscrupulous businesses could victimize consumers with impunity merely by tweaking the language in a telemarketing script.

PROVIDING CREDITOR WITH A CELL PHONE NUMBER IS "PRIOR EXPRESS CONSENT" UNDER THE TELEPHONE CONSUMER PROTECTION ACT ("TCPA")

Hill v. Homeward Residential, Inc.,____F.3d____ (6th Cir. 2015).
http://tcpablog.com/wp-content/uploads/2015/08/Hill-v-Homeward.pdf

FACTS: Appellant, Stephen M. Hill ("Hill"), obtained a mortgage loan that transferred to Appellee, Homeward Residential, Inc. ("Homeward"), a loan servicer. Hill provided Homeward his cell phone number, to be used if Homeward needed to contact him about the loan. Hill fell behind on his mortgage and eventually defaulted on the loan despite numerous modification attempts. When Hill continued to fail to pay his mortgage payments on time, Homeward called him numerous times to collect its payments.

Upset by the repeated calls, Hill filed suit and argued that Homeward violated the Telephone Consumer Protection Act ("TCPA") by using a device capable of autodialing his cell phone number without his consent. The district court ruled in favor of Homeward. Hill appealed.
HOLDING: Affirmed.
REASONING: The court first noted that a party who gives an invitation or permission to be called at a certain number, has given

its express consent under the TCPA with respect to that number. The court explained that a creditor does not violate the TCPA when it calls a debtor who has provided his number in connection with an existing debt.

The court explained that creditors can call debtors only to recover payment for obligations owed, not on any topic whatsoever, and a debtor does not need to give his consent to automated calls, specifically, his general consent to being called on a cellphone constitutes prior express consent. Because Hill gave Homeward permission to receive calls on his cell number in connection with his existing debt, the court found his actions constituted prior express consent.

FALSITY REQUIRES ALL REASONABLE EXPERTS AGREE

In re GNC Corp., 789 F.3d 505, 508 (4th Cir. 2015).
http://law.justia.com/cases/federal/appellate-courts/ca4/14-1724/14-1724-2015-06-19.html

FACTS: A marketing company and upset customers ("Customers") of joint health supplements brought a class action against GNC Corporation and Rite-Aid ("GNC") claiming GNC violated several consumer protection laws by misrepresenting the effectiveness of the supplement products.

The supplements all contain glucosamine and chondroitin, and most contain additional purportedly active ingredients. Customers claimed that GNC violated consumer protection laws of various states by marketing the supplements in question as promoting joint health. However, scientific studies have shown that glucosamine and chondroitin are not effective in treating the symptoms of osteoarthritis.

The district court granted GNC's motion to dismiss for failure to state a claim. Customers appealed.
HOLDING: Affirmed.
REASONING: The Fourth Circuit stated that the requirements to satisfy a claim for false and misleading statements are that all reasonable experts agree on the falsity of the product in question. The court agreed with some of the Customers' studies, however, the court stated that in order to state a false advertising claim on a theory that representations have been proven to be false, Customers must allege that all reasonable experts in the field agree that the representations are false. If the Customers cannot do so because the scientific evidence is equivocal, then they have failed to plead that the representations based on this disputed scientific evidence are false. The court concluded that the Customers failed to state a claim upon which relief could be granted and affirmed the holding of the lower court.

NO ADVERTISEMENT, NO TELEPHONE CONSUMER PROTECTION ACT LIABILITY

Sandusky Wellness Center v. Medco Health Solutions, 788 F.3d 218 (6th Cir, 2015).
http://www.ca6.uscourts.gov/opinions.pdf/15a0110p-06.pdf

FACTS: Plaintiff, Sandusky Wellness Center ("Sandusky"), a healthcare provider, sued Defendant, Medco Health Solutions, ("Medco"), a pharmacy benefit manager, alleging Medco faxed two unsolicited advertisements prohibited by the Telephone Consumer Protection Act ("TCPA"). Medco faxed Sandusky two formulary updates, informing Sandusky of certain plan-preferred drugs to lower medication costs for Sandusky's patients with Medco insurance policies. Neither fax contained pricing, ordering, or other sales information.

The TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services."

The district court granted Medco's motion for summary judgment, holding that the primary purpose of Medco's faxes were informational rather than promotional. Sandusky appealed.
HOLDING: Affirmed.
REASONING: Sandusky alleged Medco violated the TCPA by sending two advertisements to its fax machine. The TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5). The court found no evidence that Medco's faxes were ads under the TCPA because they lacked a necessary commercial aspect in failing to promote goods or services to be bought or sold and failing to have profit as an aim. The court rejected Sandusky's argument and held Medco's faxes were not advertisements within the meaning of the TCPA, finding no reasonable jury could conclude the faxes were commercial in nature.