

# Bloomberg Businessweek

## How a Fax Could Cost a Minnesota Business Owner \$48 Million

By [Patrick Clark](#) January 07, 2014

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The [Minneapolis StarTribune](#) reported this weekend on Doug Walburg, a White Bear Lake (Minn.) small business owner hoping the Supreme Court will shield him from as much as \$48 million in penalties in a class-action lawsuit arising from, of all things, a faxed advertisement.

It's the kind of story—local business fighting for its life against senseless regulation—that makes small government types foam at the mouth. So it's no surprise that the National Federation of Independent Business and the Cato Institute have [joined the case](#) (PDF). With the U.S. Chamber of Commerce taking aim at [class-action litigation](#), it's a suit you can expect to hear more about. (You don't hear much from those groups about class-action cases that remunerate victims of corporate malfeasance.)

Walburg should find out later this month whether the Supreme Court will hear his appeal. In the meantime, here's an outline of the case, drawn from the *StarTribune* and described in [various](#) (PDF) [legal](#) (PDF) [documents](#).

Walburg's company, [Mariposa Publishing](#), has sold directories containing telephone numbers for municipal, state, and federal courthouses for three decades. In 2007, a Mariposa employee made a sales call to a Missouri attorney named Michael Nack, then followed up with a faxed advertisement. A Federal Communications Commission [rule](#) created under the Telephone Consumer Protection Act requires faxed ads to include language allowing the recipient to opt out of future ads. Walburg's ad didn't include opt-out boilerplate. Nack sued. In hindsight, that shouldn't be surprising: The FCC's junk-fax rules have become [magnets for mass torts](#).

Mariposa, which has six employees and about \$1 million in annual revenue, won the first round, when a Missouri district court [dismissed the case](#) (PDF) in 2011. But an appeals court [overturned](#) (PDF) that decision last May, sending the case back to the district level. Because Nack brought his suit as a class action, Walburg faces potential penalties of \$500 to \$1,500 on each of about 33,000 faxed ads, or \$16 million to \$48 million. If the Supreme Court doesn't intervene, the case will be reinstated at the district level.

The legal issues are tricky. Walburg has argued that he shouldn't be subject to the junk-fax law because he asked Nack for permission to fax the ad. The Court of Appeals, citing a court brief filed by the FCC, [decided](#) (PDF) that the junk-fax rule applied to both solicited and unsolicited ads. The appeals court also ruled that it was precluded by a law called the [Hobbs Act](#) from

entertaining a challenge to the agency regulation. Walburg (as well as the NFIB and Cato Institute) is [asking](#) the Supreme Court to challenge the junk-fax regs as a defense in Nack's suit.

Emotionally, the case is much simpler: The FCC rule that Nack says Walburg broke was designed to prevent junk faxes, Walburg's ads don't sound like pure junk, and \$48 million seems to be a large enough number to put Mariposa out of business.