

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Englewood, Colorado 80112	
<b>Plaintiff:</b> <b>CONSUMER CRUSADE, INC., a Colorado corporation</b>  vs.  <b>Defendant:</b> <b>PHM FINANCIAL, INC., a Colorado corporation;</b> <b>and JERRY KAPLAN and CHAE BAE, its Officers and Directors</b>	<b>▲ COURT USE ONLY ▲</b>  Case Number: 04CV228  Div.: 408
<b>Order</b>	

THIS MATTER comes before the court on Defendants Motion to Dismiss and Plaintiffs Motion for Summary Judgment. The court has reviewed the Defendants motion to dismiss<sup>1</sup> and Plaintiff's response. Further, the court has reviewed the Plaintiffs motion for Summary Judgment, Defendants reply, and Plaintiffs response thereto. The court also having reviewed the case file, applicable case law, court rules, and statutes, and, being otherwise fully apprised, now makes the following findings of fact, conclusions of law, and ORDER.

First National Bank of Colorado, Lighthouse Mortgage, and Video Monitoring Services (recipients) allegedly received 81 unsolicited faxes from PHM Financial (Defendants). The recipients assigned, sold, and transferred all rights, title and interest in the faxes to Consumer Crusade, Inc. (Plaintiff). Plaintiff has now filed claims against the Defendant for allegedly violating the Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991) (TCPA).

Plaintiff seeks injunctive relief, and damages in the amount of \$40,500.00 for 81 violations of the TCPA. Furthermore, Plaintiff argues that if the court finds that the faxes were sent "willfully" and "knowingly" the amount of damages should be increased<sup>2</sup>. In contrast, Defendants in their Motion to Dismiss argue that Colorado courts do not have subject matter jurisdiction to hear private actions under the federal TCPA before 2004.

In essence, 47 U.S.C. § 227 (C) provides a private right of action when in the course of business a person sends an unsolicited advertisement to a telephone facsimile

<sup>1</sup> The court will first consider Defendants Motion to Dismiss and will then address Plaintiff's motion for Summary Judgment.

<sup>2</sup> \$1,500 per TCPA

machine. Section (3) of the same title states that, “a person will have a private right of action *if otherwise permitted by the law or rules of court of a State.*” (emphasis added).

Congress enacted the TCPA to thwart unwanted solicitation from out of state telemarketers. To that end, the TCPA granted Colorado state courts jurisdiction. Although there is a caveat, the TCPA grants jurisdiction so long as it is otherwise permitted by the law or rules of the Colorado state courts. Which begs the question, was a private right of action allowed by law or rules of court in 2003?

In 1999 the Colorado legislature added §6-1-702 C.R.S to the Colorado Consumer Protection Act, which state in relevant part:

Telephone and facsimile solicitation – deceptive trade practices

(1) A person engages in deceptive trade practice when, in the course of such person’s business, vocation, or occupation, such person:

(b)(1) Solicits a consumer residing in Colorado by a facsimile transmission without including in the facsimile message a toll-free telephone number that a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions.

§ 6-1-702(1)(b)(I)

Colorado’s legislature is presumed to know existing law. *Leonard v. McMorris*, 63 P.3d 323, 331 (Colo. 2003). Therefore, it is reasonable to presume that the Colorado legislature was aware of the TCPA when it enacted §6-1-702 C.R.S. The plain language of this statute does not grant a private right of action. Instead, said statute allowed consumers to bring suit in state court only when the sender failed to give the receiver an out-of-court remedy.<sup>3</sup>

In 2004 the Colorado Legislature repealed and reenacted §6-1-702 C.R.S Colo. Legis. Serv. Ch.130 (H.B. 04-1125) which states in relevant part:

Unsolicited facsimiles – deceptive trade practices.

(1) A person engages in deceptive trade practice when, in the course of such person’s business, vocation, or occupation, person:

(a) Uses a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine;

(b) []; or

(c) Violates 47 U.S.C. sec. 227 or any rule promulgated thereunder.

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<sup>3</sup> The court notes that in review of Plaintiff’s “Exhibit” A, Defendant provided telephone numbers whereby the parties who originally received the unsolicited could have been “taken off the list”.

The Colorado Legislature expressly granted state courts jurisdiction to hear private actions under the TCPA. Furthermore, the 2004 revised statute applies only to faxes sent after the 2004 effective date. H.D. 04-1125, 64<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Reg. Sess. (Colo. 2004).

Therefore, the court concludes that the 1999 CCPA did not provide state courts jurisdiction for private actions brought under the TCPA. In contrast, the 2004 revisions granted Colorado state courts subject matter jurisdiction to hear a private actions under the TCPA for faxes sent after 2004. Plaintiffs claim is based on faxes that were allegedly sent during 2003. Therefore, as a result of the above mentioned, Colorado courts did not have subject matter jurisdiction to hear private right of action for violation of the TCPA that occurred prior to 2004. Therefore, Defendant's Motion to Dismiss is **GRANTED**.

### **Plaintiff's Motion for Summary Judgment**

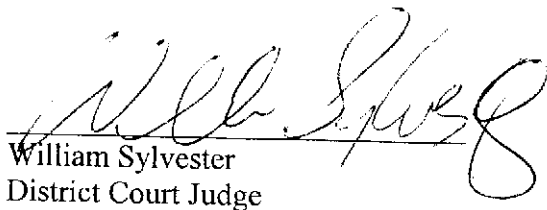
The court does not have jurisdiction to rule on Plaintiff's Motion for Summary Judgment, therefore said motion is considered moot.

### **ORDER**

In light of the above, it is ORDERED that Defendant's Motion to Dismiss With Legal Authority is **GRANTED**.

Done this *9<sup>th</sup>* day of *February*, 2005.

BY THE COURT:

  
William Sylvester  
District Court Judge

CERTIFICATE

Copies of the above order were mailed/~~e-filed~~/faxed on 15 Day of February, 2005, to following counsel of record:

This 15 Day, of February, 2005.

By: Matthew Barron

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