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Court of Appeals No.: 04CA2366  
City and County of Denver District Court No. 04CV4841  
Honorable Lawrence A. Manzanares, Judge

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Consumer Crusade, Inc., a Colorado corporation,

Plaintiff-Appellant,

v.

MBA Financial Group, Inc., a Colorado corporation, and Dale Finney,

Defendants-Appellees.

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JUDGMENT AFFIRMED

Division V  
Opinion by: JUDGE HAWTHORNE  
Webb and Russel, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced: September 28, 2006

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Demirali Law Firm, P.C., A.M. Demirali, Denver, Colorado, for Plaintiff-Appellant  
Douglas A. Turner, P.C., Douglas A. Turner, Golden, Colorado, for Defendants-  
Appellees

In this suit seeking to enforce a private right of action under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2005), plaintiff, Consumer Crusade, Inc., appeals the judgment dismissing its complaint against defendants, MBA Financial Group, Inc. and Dale Finney (collectively MBA), for lack of subject matter jurisdiction. We affirm, but on grounds different from those relied upon by the trial court.

Consumer's complaint alleged that in 2002 or earlier, MBA sent numerous unsolicited advertisements via facsimile (fax) to residents of the State of Colorado in violation of the TCPA. Based on assignments of the recipient's claims, Consumer sought damages and an injunction against MBA. The trial court concluded that Colorado does not permit private actions to enforce the TCPA, at least with respect to faxes sent prior to August 2004, and therefore dismissed the action with prejudice.

I. Standing

MBA contends, for the first time on appeal, that Consumer lacked standing to bring this action because TCPA claims are not assignable under Colorado law. We agree. Standing is a jurisdictional issue that can be raised at any

time, including for the first time on appeal. Anson v. Trujillo, 56 P.3d 114, 117 (Colo. App. 2002).

The inquiry on standing is whether a plaintiff suffered an

injury in fact to a legally protected interest as contemplated by

statutory or constitutional provisions. Wimberly v. Ettenberg, 194

Colo. 163, 570 P.2d 535 (1977). A plaintiff satisfies the injury-in-

fact requirement by demonstrating that the challenged activity has

caused, or has threatened to cause, injury to the plaintiff such that

a court can say with fair assurance that there is an actual

controversy proper for judicial resolution. Dunlap v. Colo. Springs

Cablevision, Inc., 829 P.2d 1286 (Colo. 1992). A plaintiff's lack of

standing may be cured by an assignment of the claim. Miller v.

Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App.

1996).

The TCPA provides for a private right of action for statutory

damages. Specifically, the TCPA permits an action to enjoin

unsolicited fax advertisements and allows a plaintiff to recover for

“actual monetary loss from such a violation, or to receive \$500 in

damages for each such violation, whichever is greater.” 47 U.S.C. §

227(b)(3)(B) (2005). It further provides that treble damages may be

awarded upon a showing that the defendant willfully or knowingly violated the statute. 47 U.S.C. § 227(b)(3).

The TCPA states, as relevant here, “It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C) (2005).

The TCPA allows for a private cause of action that can be prosecuted in state courts, “if otherwise permitted by the laws or rules of court of a State.” 47 U.S.C. § 227(b)(3) (2005). This language reflects an acknowledgement by Congress that states can

apply their own rules of procedure to a private cause of action under the statute. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 F.3d 350, 355 (Colo. App. 2005).

The TCPA is silent on the issue of assignment of a private right of action for statutory damages. Where a federal statute is silent on the issue of assignment, courts are to fill the statutory

gaps by referring to principles of common law. Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244, 1248 (Colo. 1994) (citing Fed. Deposit Ins. Corp. v. Bledsoe, 989 F.2d 805 (5th Cir. 1993)). The TCPA

itself acknowledges that states can apply their own "law and rules of court." This language has been construed to implicate both procedural rules and jurisdictional laws. See Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., supra, 121 P.3d at 355.

In Colorado, the law favors assignability of rights generally, except for matters of personal trust or confidence, or for personal services. Roberts v. Holland & Hart, 857 P.2d 492 (Colo. App. 1993). However, a division of this court has held that claims under the TCPA for violations of provisions prohibiting junk faxes are not assignable. McKenna v. Oliver, \_\_\_ P.3d. \_\_\_ (Colo. No. 05CA0298, Sept. 7, 2006)(adopting the federal district court's holding in US Fax Law Ctr., Inc. v. iHire, Inc., 362 F. Supp. 2d 1248 (D. Colo. 2005)).

As in this case, McKenna involved a suit by an assignee of many individual claims under the TCPA. The division held that individual claims based on a violation of the right to privacy were nonassignable and that the plaintiff, as an assignee of such individual claims, lacked standing to sue. Additionally, the division held that it need not consider whether the TCPA protected property

Consumer's claims, although we do so on grounds other than those

Mckenna, supra. Therefore, we affirm the judgment dismissing

lacks standing to assert the assigned claims under the TCPA. See

Accordingly, we agree with MBA's contention that Consumer

assignors used or leased their fax machines for business purposes.

unsolicited faxes to businesses or that any of the individual

harm. The complaint contains no allegations that MBA sent

unsolicited faxes in this case caused the assignors any economic

claims for loss of property because Consumer did not allege that the

We need not address whether Consumer's claims are assignable as

privacy. Those claims are nonassignable. See Mckenna, supra.

the assignee of individual claims based on a violation of the right to

and the federal district court. Here, as in Mckenna, Consumer is

We are persuaded by the reasoning of the division in Mckenna

claims were privacy related and nonassignable.

Hence, the Mckenna division concluded that all the plaintiff's

economic harm or that any of the assignors were business entities.

plaintiff there did not allege that the unsolicited faxes caused any

property loss had standing to sue under the TCPA because the

interests and whether an assignee of claims for damages based on

relied on by the trial court. See People v. Huynh, 98 P.3d 907 (Colo. App. 2004) (appellate court may affirm based on reasoning different from that of the trial court).

Given our conclusion that Consumer's claims were nonassignable, we do not reach the question of whether those

claims were penal in nature.

Because we conclude this case should have been dismissed based on Consumer's lack of standing, we need not address Consumer's contention that the trial court erred in dismissing its complaint for lack of subject matter jurisdiction. See Steamboat Springs Rental & Leasing, Inc. v. City & County of Denver, 15 P.3d 785 (Colo. App. 2000)(an appellate court may affirm a correct judgment or order based on reasoning different from that of the trial court).

The judgment is affirmed.

JUDGE WEBB and JUDGE RUSSEL concur.