District Court, Denver County Colorado Court Address: 1437 Bannock Street, Room 256; Denver Colorado 80202	
Plaintiff: Consumer Crusades, Inc. v. Defendants: MBA Financial Group, Inc., a Colorado Corporation; et al.	☐ **Court Use Only** ☐
Attorney for Defendant Douglas A. Turner, Esq. 602 Park Point Drive, Suite 240, Golden, Colorado 80401 Phone: (303) 273-2923 Fax: (720) 746-3027 E-mail: DTurner@DouglasTurner.com Atty. Reg. No. 22564	Case Number: 04 CV 4841 Division: 5 Courtroom:
REPLY TO MOTION TO DISMISS	

COMES NOW Defendants MBA Financial Group, Inc. and Dale Finney and file this Reply To Motion to Dismiss.

SUBJECT MATTER JURISDICTION

On July 26, 2004, the District Court in the City and County of Denver held that Colorado State Courts lack subject matter jurisdiction to hear T.C.P.A. claims. A copy of that well reasoned opinion is attached for the Court's convenience. See Exhibit A.

Defendants briefly touched upon this issue in the very last paragraph of their Motion to Dismiss. Colorado businesses should be able to rely on Colorado laws enacted after

the T.C.P.A., especially when the T.C.P.A. is expressly conditioned upon being otherwise allowed by the laws and rules of Colorado.

Whenever it appears by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction, the court shall dismiss the action. C.R.C.P. 12(h)(3). Defendants hereby raise the issue of subject matter jurisdiction and respectfully request this Court to dismiss the action.

Since Plaintiff, although obviously aware of this ruling, may not feel it had the opportunity to properly brief this issue, Defendants would not be opposed to a further Reply by Plaintiff.

ARGUMENT

PLAINTIFF'S CLAIM FOR DAMAGES PURSUANT TO 47 U.S.C. § 227(b)(3) SHOULD BE DISMISSED BECAUSE CLAIMS ARISING UNDER A PENALTY STATUTE ARE NOT ASSIGNABLE.

Plaintiff gets caught up in the mechanics of *Erie/Reverse Erie* or whatever they want to call it. Defendants' point is this – Defendants believes that the *Chair King* court got it right. This is a very unusual statute. The T.C.P.A. provides that "[a] person or entity may, *if otherwise permitted by the laws or rules of a court of a state*," file an action for recovery under the Statute "in an appropriate State court." 47 U.S.C. § 227(3) (emphasis added). As Plaintiff so eloquently points out, this Court should strive to give meaning to all the words of this statute. So, the pesky little question is, just what did Congress mean when it said, "if otherwise permitted by the laws or rules of a court of a state"? The *Chair King* court referred to this as a reverse

Erie analysis. Defendants do not really care how this Court classifies the analysis so long as meaning is given to "if otherwise permitted by the laws and rules of a court of a state."

That question, what Congress intended, is the starting point before deciding any substantive or procedural point of law before this Court. The primary issue raised by Defendants is whether the $500.00 statutory damage claim under the T.C.P.A. can be assigned. This Court can view it as a standing. This Court can view it in the context of real party in interest, or however this court wishes to characterize the issue. Defendants' assertion is that the claim is not one that can be assigned.

Before tackling the task of deciding whether the T.C.P.A. claim can be assigned, the very first order of business is to determine whose law to apply in making that decision about whether the claim can be assigned – federal, state or both. Defendants assert that the *Chair King* court got it right, and the answer is both federal law and Colorado law.

The *Chair King* court was faced with a statute of limitations issue. The starting point in applying a statute of limitations to a federally created claim is federal law. However, because Congress explicitly made the T.C.P.A. subject to the laws and rules of a state, the *Chair King* court applied a shorter state limitations period. The characterization of the law as procedural or substantive was not controlling.

The *Chair King* court reasoned that the starting point is federal substantive and federal procedural law. Consider it the set of all possibilities. Then state law that restricts the reach of the T.C.P.A. is applied. For example, if the applicable federal limitations period was 4 years and the most analogous state limitation period was 8 years, the 4-year federal limitations period would apply because Texas (or any other state) cannot expand the reach of federal law.

Turning to the case at hand, the issue is whether or not a T.C.P.A. claim is assignable. The claim may not be assignable for many reasons. It may not be assignable because it would violate public policy. It may not be assignable because it is most akin to an invasion of privacy claim and, under Colorado law, such a claim is not assignable. See Exhibit B, Jefferson County, County Court decision. It may not be assignable because, under federal law, penalties are not assignable. It may not be assignable because, under Colorado law, penalties are not assignable.

If the claim is not assignable because it is a penalty, then the question is whether federal or Colorado law is applied in determining whether the claim is remedial or penal. To avoid these very difficult questions, Defendants articulated (1) why both federal and Colorado law would classify the claim as penal and (2) why penalties are not assignable under either federal or Colorado law.

The above said, the survival of an action grounded in federal law is governed by federal common law. *Smith v. Dept. of Human Services*, 876 F.2d 832, 834-835 (10th Cir. 1989) *(Internal citations omitted)*. Federal law is consistent with the law of most states addressing the issue. "The general rule under the federal common law is that an action for a penalty does not survive the death of the plaintiff." *Id.* Plaintiff's assertion that Congress' use of the word "damage" as opposed to calling the $500.00 award a penalty is controlling is just plain wrong under either a federal analysis or a Colorado analysis. Nowhere in the statute does Congress equate $500 in damages to mean compensatory damages.[1]

Plaintiff completely ignores the *Smith* case. In *Smith*, the 10th Circuit was faced with the question of whether liquidated damages pursuant to an ADEA claim are penal or remedial. Mr. Smith had sustained actual damages as well. The 10th Circuit found that liquidated damages were a penalty even though Mr. Smith sustained actual damages. *Id.* The whole reason for the remedial/penal analysis is because the classification by Congress of an award as "damages" is not controlling. The term damages alone does not tell us whether it is compensatory damages or punitive damages.

This is no different under Colorado law. A liquidated damages clause in any contract is always subject to scrutiny to determine whether or not it is really a penalty. *See Powder Horn v. Florence*, 754 P.2d 356, 365 (Colo. 1988). Under Colorado law, a statute that

[1] If Plaintiff truly intends to pursue actual monetary loss incurred by the assignors as opposed to the statutory $500.00 award, Defendant is content with the Court allowing the assignment only to the extent Plaintiff intends to prove actual damages to the recipient, subject of course to Rule 11. However, the $500.00 statutory award and treble damages on that award is a penalty and may not be assigned under either federal or Colorado law.

imposes penalties in excess of actual damages is penal in nature. *Carlson v. McCoy*, 193 Colo. 391, 393-394 (1977). A treble damages award is an independent statutory penalty. *Palmer v. A. H. Robins Co., Inc.*, 684 P.2d 187, 214 (Colo. 1984) (*citing Carlson).*

The very T.C.P.A. cases Plaintiff cites to as support for a "remedial" classification call the $500.00 award a penalty. Let's take *Kenro Inc. v. Fax Daily Inc.*, 962 F.Supp. 1162 (S.D.Ind. 1997). In *Kenro*, the court isn't even one sentence into its Due Process clause analysis before it classifies the claim as a penalty! *Id.* at 1165. The same is true for Plaintiff's cite to *Blastfax. Texas v. American Blastfax, Inc.*, 121 F.Supp 2nd 1085, 1090 (W.D. Tex 2000).[2] Not even one sentence into the analysis, the court classifies the claim as penal.

Plaintiff cannot have it both ways – Plaintiff cannot argue that the $500.00 award is not a penalty and then assert that the $500.00 award *is* a penalty in the context of a Due Process analysis.[3] In both *Chair King* and *Kenro,* defendants argued that the T.C.P.A. claim violated the Due Process clause of the Fifth Amendment of the Constitution. The Due Process clause applies to statutorily prescribed damage awards. *Kenro* at 1165. The assumption in all these cases and the Due Process analysis is that the award is penal. The U.S. Supreme Court said it best in *State Farm Mut. Automobile Ins. v. Campbell*, 538 U.S. 408 (2003). "Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Campbell* at 416.

[2] Emphasis is added because Plaintiff's cite to this case is wrong, as is the cite to *Michelson*, which Defendant cannot even find.

[3] If the $500.00 award is compensatory without providing even the right to rebut the compensatory damages, then the statute has violated Defendant's right to due process.

IN COLORADO CLAIMS ARISING UNDER A PENALTY STATUTE ARE NOT ASSIGNABLE.

Plaintiff's asserts that Colorado law permits the assignment of T.C.P.A. claims. That assertion misses the primary issue. The primary issue is whether federal or Colorado allows the assignment of penal claims. Defendants' brief has addressed this issue. Of great significance is Plaintiff's inability to cite to any case in the United States holding that penalties are assignable.

Plaintiff's citation to Tivoli Ventures totally misses the issue. A Promissory Note is assignable. A Promissory Note is not a penalty nor does an action on the Note sound in tort.

Plaintiff argues that claims arising under the T.C.P.A. are assignable under Colorado law in accord with §13-20-101, C.R.S. ("Survival Statute"). This is an interesting argument considering that the very text of the statute states penalties do not survive death.

The purpose of the Survival Statute is to abolish the common law practice of extinguishing claims upon the death of a plaintiff, see *Micheletti v. Moidel*, 94 Colo. 587, 591 (1934). While the *Micheletti* court looked to statutory survivability as a factor in finding the fraud claim assignable, nothing in the *Micheletti* opinion nor in the Survival Statute itself suggests that the Survival Statute was intended to serve as a litmus test for determining the inter vivos assignability of a cause of action. In fact, the *Micheletti* Court acknowledged that penalties are not assignable, 94 Colo. at 592, and distinguished the *Micheletti* case from *Mumford v.*

A majority of courts have considered the damage award allowed under the T.C.P.A. to be a penalty. *See Giovanniello v. Hispanic Media Group, USA, Inc.* No. 7704/03, 2004 WL 1258014 (N.Y.Sup. Ct. May 27, 2004) ("$500.00 damages is a "penalty"" ... "treble damages under the TCPA is punitive in nature and constitutes a penalty"); *Chair King*, 2004 WL 162938 at 11 ("Congress intended to help states regulate and *penalize* unsolicited fax advertisements." Emphasis added.); *American Blastfax*, 121 F.Supp.2d at 1090 (referring to § 227(b)(3)(B) as a "minimum *penalty*". Emphasis added); *Rudgayzer & Gratt v. LRS Communications, Inc.*, 2003 WL 22344990, 1 (N.Y. Civ. Ct.) (classifying the T.C.P.A. as a "statutory penalty"); *Condon v. Office Depot*, 855 So.2d 644, 649 (Fla.App. 2 Dist 2003) ("The [T.C.P.A.] provided for a civil *penalty* not to exceed $500 per violation." Emphasis added.); *Mulhern v. MacLeod*, 2003 WL 22285515, 3 (Mass. Super.) ("[The T.C.P.A.] creates *penalties* for the transmission of unsolicited facsimiles..." Emphasis added); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844, 850 (Ariz. App. Div. 1 2002) (referring to violations of the T.C.P.A. as a statutory penalty); *Kaplan v. Democrat and Chronicle*, 698 N.Y.S.2d 799, 800 (N.Y. 1999) (holding "that the alternative remedy provided by the [T.C.P.A.] of up to $500 in damages...is punitive rather than compensatory.").

Wright, 12 Colo App. 214 (1898) in order to sidestep issues raised by the assignability of penalties.

While the Mumford case has been overruled as to the survivability of personal tort actions brought under the Survival Statue, *Publix Cab Co. v. Colorado Nat. Bank of Denver*, 338 P.2d 702, 712 (Colo. 1959), the non-assignability of statutory penalties has yet to be addressed directly by a modern Colorado court - although at least one pre-Survival Statute case found that penalties are not assignable, *Credit Men's Adjustment Co. v. Vickery*, 62 Colo. 214, 218 (1916).[4]

The survivability of a claim does not dispose of the issue of inter vivos assignability. *See Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993). In holding that legal malpractice claims are not assignable, the *Roberts* court relied upon public policy to determine the issue. *Id.* at 496.

The *Roberts* case is in direct conflict with Plaintiff's assertion that "claims for relief that survive the death of the party entitled to sue may be assigned." See *Plaintiff's Response page 9*. The *Roberts* court held that not only are legal malpractice claims not assignable, but also that claims based in personal trust, confidence or personal service are not

[4] Both Defendant and Plaintiff cite to this case as support for their positions. The Court will have to read this case and decide for itself if Plaintiff's interpretation of the case is correct. As Plaintiff noted, the Colorado Supreme Court found the statute to be remedial in character and not penal, thus avoiding the issue of whether penalties are assignable.

assignable. *Roberts* at 495. Therefore, we know from *Roberts* that assignability and descendability do not go hand-in-hand.

Respectfully submitted this 18th day of August 2004.

Douglas A. Turner, Esq. Reg. #22564

CERTIFICATE OF MAILING

I do hereby certify that on this 18th day of August 2004 deposited in the United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Reply to Motion to Dismiss*** properly addressed as follows, or by electronic filing to:

A.M. Demirali
The Demirali Law Firm
875 S. Colorado Blvd., Box 662
Denver, Colorado 80246

Catherine A. Carey

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Plaintiff: CONSUMER CRUSADE, INC. v. **Defendant:** AFFORDABLE HEALTH CARE SOLUTIONS, INC., *et al.*	cc: P. Ridley who SHALL IMMEDIATELY serve a copy to all counsel / parties pursuant to CRCP 5. ▲ COURT USE ONLY ▲ Case Number: 04 CV 803 Ctrm: 7

ORDER
(Re: Motion to dismiss pursuant to C.R.C.P. 12(b)(1) and (5))

THIS MATTER is before the Court pursuant to Defendant's Omnibus Motion to Dismiss, filed through counsel on April 23, 2004. The Court, having considered the motion and responsive pleadings, the court file, and the applicable authorities, finds and orders as follows:

In this action, Plaintiff asserts claims against Defendant under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991) ("TCPA"). The Complaint alleges that Defendant is liable to Plaintiff for violating the TCPA by sending unsolicited advertisements via facsimile (fax) to Plaintiff's assignors "at various times during the year 2003."

Subject Matter Jurisdiction

Defendant moves to dismiss Plaintiff's claims under C.R.C.P. 12(b)(1), on the basis that Colorado courts do not have subject matter jurisdiction to hear private actions under the federal TCPA. The relevant portion of the TCPA reads as follows:

> (b) Restrictions on use of telephone equipment
>
> (1) Prohibitions
>
> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

EXHIBIT tabbies A

> (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.
>
> (3) Private right of action
>
> A person or entity may, *if otherwise permitted by the law or rules of court of a State*, bring in an appropriate court of that State--
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

47 U.S.C. § 227 (emphasis added). The issue presented to the Court is whether private actions to enforce the federal TCPA are permitted in Colorado. The Court concludes that, with respect to faxes sent during the year 2003, such actions are not permitted in state court. Thus, the Court finds that it lacks jurisdiction to address Plaintiff's claim.

Congress included a private cause of action in the TCPA out of solicitude for, and purely in the interest of, the states. *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997). Before the statute was enacted, over forty states had adopted legislation to prohibit or restrict unsolicited telemarketing. S. Rep. No. 178, 102nd Cong., 1st Sess. 1, 3 (1991), U.S. Code Cong. & Admin. News at 1968, 1968. However, states' lack of jurisdiction over interstate calls thwarted enforcement of state regulation, and limited its effect. *Id.* Through the TCPA's private action provision, Congress answered the call for federal legislation to supplement restrictions on intrastate calls. *Id.* Ultimately, it was intended as a jurisdictional grant to the states, imparting the ability to burden interstate commerce by regulating interstate telemarketing. *Id.* at 1158. "Indeed, from top to bottom, the private TCPA action reflects Congress' intent to enhance state sovereignty." *International Science*, 106 F.3d at 1157.

Consistent with Congress' intent to aid states in preventing unwanted telemarketing, it was determined that private TCPA actions would be best resolved in state courts, particularly

considering the "small claims" nature[1] and high volume[2] of these disputes. Accordingly, the federal appellate courts have concluded that there is no federal private right of action. *See e.g. Murphey v. Lanier*, 204 F.3d 911, 913-15 (9th Cir. 2000) (concurring with five other circuits). As a result, state courts have exclusive jurisdiction to hear private actions under the TCPA.

The Supremacy Clause of Article IV[3] requires that states enforce federal law when federal and state courts have concurrent jurisdiction, *Testa v. Katt*, 330 U.S. 386 (1947), as the expense of enforcing such laws must be borne by both the federal and state governments. However, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. U.S.*, 505 U.S. 144, 162 (1992). Thus, under the Tenth Amendment,[4] it is an unconstitutional infringement on state sovereignty for the federal government to "commandeer" state courts by compelling them to enforce a federal program. *Id.* The TCPA was created by the federal government, but private enforcement may not take place in federal court. Understanding the constitutional impermissibility of coercing states, respecting the caseload challenges faced by state courts, and intending simply to assist states in the enforcement of their own laws, Congress specifically gave states the ability to reject the TCPA's grant of jurisdiction. *International Science*, 106 F.3d at 1157. As a result, states may choose not to open their courts to private enforcement of the TCPA's substantive rights. *Id.* at 1156.

The Court finds that, to the extent it is acceptable for a state to disallow private actions based upon the TCPA altogether, a state may also adopt a different standard of conduct for private actions on the issue of fax telemarketing. It would be incongruous to conclude that a state can constitutionally decline to enforce a federal law, but cannot give effect to a more limited right of action on the same subject. State laws regarding fax advertising are not preempted by the TCPA. With concern for the derogation of state law, the Supreme Court has addressed claims of preemption "with the starting presumption that Congress does not intend to supplant state law." *NY Conference of Blue Cross v. Travelers Ins.*, 514 U.S. 645, 654 (1995). Here, Congress clearly did not intend preemption. "[T]he TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines." *Van Bergen v. State of Minnesota*, 59 F.3d 1541, 1548 (9th Cir. 1995). First, this conclusion makes sense in light of the statute's legislative history, where there is no indication of a desire for national uniformity and no sense that federal law would "occupy the field." *Id.*; *International Science*, 106 F.3d at 1156 ("the existence of a *private* right of action under the TCPA could vary from state to state"). Second, preemption would render states' ability to elect another course of action, which is express under the TCPA and implied under the Tenth Amendment (given that there is no federal jurisdiction), completely useless. Third, the TCPA

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[1] The sponsor of the TCPA, Senator Hollings, expressed a desire for these actions to be brought in small claims court, where a consumer could appear without an attorney and prevent attorney fees from defeating any recovery. 137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991).

[2] "[There are] millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing transmissions were illegal under the TCPA." *International Science*, 106 F.3d at 1157.

[3] "[T]he laws of the United States which shall be made in pursuance [of the constitution]...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, § 2.

[4] "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

contains a preemption provision, specifically stating that certain state laws (more restrictive) are not preempted. 47 U.S.C. § 227(e); *International Science*, 106 F.3d at 1153 ("Congress stated that state law is not preempted by the TCPA"). Congress easily could have included its intent to preempt other state laws (less restrictive) as part of the same provision, but it did not. *Van Bergen*, 59 F.3d at 1548.

There has been much debate regarding whether, in giving or withholding consent to private actions under the TCPA, a state must opt-in or opt-out of the TCPA scheme. *See The Chair King, Inc. v. GTE Mobilenet of Houston, Inc.*, 2004 WL 964224 (May 6, 2004). However, it is unnecessary for the Court to resolve that issue in this case. Until the most recent legislative session, Colorado has exercised its right to set a different course for private litigation concerning unsolicited fax advertisements. Thus, this state both declined to opt-in and effectively opted-out of the TCPA's private enforcement scheme.

Congress enacted the TCPA in 1991. Eight years later, the Colorado legislature revisited the state's Consumer Protection Act. At that time, C.R.S. § 6-1-702 was added (effective May 18, 1999), and provides, in relevant part:

> Telephone and facsimile solicitations – deceptive trade practices
>
> (1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:
>
> > (b) (I) 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.*

C.R.S. § 6-1-702(1)(b)(I) (*emphasis added*). The 1999 statute also contains a number of exceptions (existing business relationship, transmissions requested or initiated by the consumer, transmissions by telecommunications transmission facilities providers). C.R.S. § 6-1-702(1)(b)(II). There is a private civil cause of action, and the damages remedy was amended to mirror the TCPA remedy almost exactly (actual damages or $500 per violation plus exemplary damages, if applicable).[5] C.R.S. § 6-1-113.

Colorado's legislature is presumed to know existing law. *Leonard v. McMorris*, 63 P.3d 323, 331 (Colo. 2003). Thus, with knowledge of the TCPA and the private right of action contained therein, Colorado chose instead to allow consumers to bring suit in state court only

[5] The difference is that Colorado's statute provides for the recovery of reasonable attorney fees, thus eliminating one practical barrier to bringing suit. C.R.S. § 6-1-113(2)(b).

when the sender fails to give the receiver out-of-court recourse to prevent fax advertisements. Essentially, Colorado made a permissible choice to limit private litigation based on the receipt of unsolicited faxes.[6] The 1999 enactment of section 6-1-702(1)(b) would be rendered meaningless if state courts retained subject matter jurisdiction to hear private actions under the TCPA. The statute addresses the same issue (private actions based on the receipt of fax advertisements) and provides a remedy nearly identical to the TCPA's, even as it sets forth a differing standard of conduct and excludes certain groups from its operation. These facts lead this Court to believe that Colorado's statute was not intended simply as an additional penalty designed to address additional wrongdoing. Nor does the label "deceptive trade practice" change the nature and purpose of the statute. Therefore, the Court concludes that the 1999 Colorado Consumer Protection Act precludes private actions under the TCPA in state court. As a result, the Court lacks subject matter jurisdiction to hear Plaintiff's claims.

The Court notes that in 2004, the Colorado legislature repealed and reenacted C.R.S. § 6-1-702. 2004 Colo. Legis. Serv. Ch. 130 (H.B. 04-1125). The relevant portion of the most recent statute provides:

> Unsolicited facsimiles -- deceptive trade practice.
>
> (1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:
>
> (a) Uses a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or
>
> (b) []; or
>
> (c) Violates 47 U.S.C. sec. 227 or any rule promulgated thereunder.

C.R.S. § 6-1-702(1)(a) and (c). Thus, the General Assembly has now decided to expand state court jurisdiction on this issue by expressly opting-in to the TCPA's private enforcement scheme. The 2004 statute applies only to faxes sent on or after the effective date,[7] and is not retroactive to faxes sent in 2003. While neither party contends that the new statute applies to the present case, its enactment (particularly section (c)) would be superfluous if a private party already had the ability to bring suit under the TCPA in Colorado courts. In addition, the fact that the legislature included the TCPA opt-in provision as part of C.R.S. § 6-1-702 supports the Court's judgment that the 1999 statute was intended to replace rather than supplement the TCPA.

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[6] "[W]e believe Congress acted rationally in both closing federal courts and allowing states to close theirs to...private actions..." *International Science*, 106 F.3d at 1157.

[7] If no referendum petitions are filed, the act is effective ninety days after final adjournment of the General Assembly.

The Court also notes that Colorado's 1999 decision to limit private litigation in state court did not alter Plaintiff's substantive right to be free from fax advertisements in 2003. *International Science*, 106 F.3d at 1156. The TCPA provides another mechanism for enforcement, as Colorado's Attorney General is authorized to bring a civil action in federal court on behalf of Colorado residents. 47 U.S.C. § 227(f)(1).

Assignability

As the Court does not have jurisdiction over Plaintiff's claims, it is unnecessary to address the other arguments for dismissal contained in Defendant's motion (i.e. assignability).

CONCLUSION

Defendant's motion to dismiss under C.R.C.P. 12(b)(1) is GRANTED, and this action is dismissed with prejudice.

SO ORDERED this 26 day of July, 2004.

BY THE COURT:

Martin Egelhoff

Martin F. Egelhoff
District Court Judge

cc:

District Court, Boulder County, Colorado Clerk of Boulder County District court 1777 6th Street, P.O. Box 4249 Boulder, CO 80306 303-441-3750	
Plaintiff(s): DOUGLAS M. MCKENNA Defendant: STEPHEN C. OLIVER, *et.al.*	▲ **COURT USE ONLY** ▲
Attorney for Defendants Name: Rubin & Zimmerman, P.C. Steven L. Zimmerman Address: 9725 E. Hampden Ave., #330 Denver, CO 80231 Phone Number: 303 306-6191 Fax Number: 303 306-7603 E-mail: steve@rzpc.com Atty. Reg. #469	Case Number: 03 CV 2099 Div.: Ctrm.
DEFENDANT'S SUPPORTING AUTHORITY TO MOTION TO DISMISS COMPLAINT	

The Defendants by and through the law firm of Rubin and Zimmerman, P.C., submit the attached case as its supporting authority to Motion to Dismiss Complaint.

Dated: June 18, 2004

Rubin and Zimmerman, P.C.

Steven L. Zimmerman

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2004, a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid, to the following:

Douglas M. McKenna
1140 Linden Avenue
Boulder, CO 80304

Lisa Cirwello

EXHIBIT B

COUNTY COURT, JEFFERSON COUNTY, STATE OF COLORADO Court Address: 100 Jefferson County Parkway Golden, Colorado 80401	
Plaintiff: USA TAX LAW CENTER, Inc. **v.** **Defendant:** CAPITAL ARBITRATION, Inc.	Δ Δ **Court Use Only**
	Case No.: 03-C-014825 **Division D Ctrm: 3D**

ORDER

BEFORE ME is defendant Capital Arbitration, Inc.'s motion to dismiss filed on January 5, 2004. Plaintiff USA Tax Law Center, Inc. filed a response on January 22, 2004, to which defendant replied on February 3, 2004. For the reasons stated below, the motion is **GRANTED.**

I. Background

Plaintiff filed a complaint on August 26, 2003, alleging a violation of the Telephone Consumer Privacy Act ("TCPA"), 47 U.S.C. § 227, against the defendant.[1] Plaintiff contends

[1] In addition to the statutory violation, plaintiffs assert that the defendant's conduct constitutes negligence, invasion of privacy, a trespass, and a conversion of personal property. However, plaintiff's complaint does not list individual claims for relief, and it is unclear whether they seek redress for these proposed causes of action. Nonetheless, I find a claim for relief under § 227(b)(3) of the TCPA is the only appropriate cause of action for defendant's alleged conduct.

that its assignor, Sign-A-Rama, received an unsolicited fax advertisement ("fax") sent by or on behalf of defendant in violation of § 227(b)(3)(c) of the TCPA. Plaintiff claims ownership through proper assignment of all causes of action available to Sign-A-Rama in conjunction with defendant's alleged act.

Plaintiff seeks damages in the amount of $500.00, or $1,500.00 upon a determination of willful or knowing conduct, pursuant to § 227(b)(3) of the TCPA. Plaintiff also seeks to enjoin the defendant from sending future unsolicited fax advertisements under that same subsection.

Pursuant to C.R.C.P. 307, I granted the parties permission to file dispositive motions in this case. Defendant filed such motion seeking dismissal of plaintiff's complaint under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction.

II. The TCPA

Section 227(b)(1)(C) of the TCPA states, "[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

Section 227 (b)(3) permits an individual or entity to bring in state court –

"(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions."

Additionally, § 227 (b)(3) allows for treble damages upon a finding that the defendant willfully or knowingly violated the statute.

In light of the foregoing history, I construe § 227(b)(3) to create a right of action intended to protect the privacy interests of the individual harmed by the illegal transmission of unsolicited faxes. Therefore, the common law principles regarding the assignability of an individual's right of privacy claim apply to this case.

B.

The general rule is that assignability and descendibility go hand in hand. *Home Ins. Co. v. Atchison*, 34 P. 281 (Colo. 1893). If a right of action survives the death of the party entitled to sue and passes to his personal representative, it may be assigned; if it does not, the converse is true. *Olmstead v. Allstate Ins. Co.*, 320 F.Supp. 1076 (D. Colo. 1971). Choses in action in tort for damage to property are transferable and may be assigned. *Ford v. Summertree Lane Ltd. Liability Co.*, 56 P.3d 1206 (Colo. App. 2002). However, personal torts not based upon an injury to property or connected with a contractual relation are intangible assets that do not survive the life of the individual claiming injury. *See Stanley v. Petherbridge*, 42 P.2d 609 (Colo. 1935).

Colorado case law has yet to address the assignability of a right of privacy claim. However, other jurisdictions hold that a right of privacy claim does not survive upon the death of the person and therefore is not assignable. *See Melvin v. Reid*, 297 P.91 (Cal. App. 1931)(right of privacy is purely personal action and does not survive, but dies with the person); *Nicholas v. Nicholas*, 83 P.3d 214 (Kan. 2004)(except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded); *See Young v. That Was The Week That Was a/k/a TW-3, et. al.*, 423 F.2d 265 (6th Cir. 1969)(decedent's heirs had no right of action for invasion of decedent's privacy); *See Shibley v.*

Time, Inc., 321 N.E.2d 791 (Ohio Com.Pl. 1974)(privacy claim is a peculiarly personal one that cannot be assigned and does not survive death).

Accordingly, I find that Sign-A-Rama's private right of action created under the TCPA is not assignable to plaintiff.

IT IS THEREFORE ORDERED THAT plaintiff's case is **DISMISSED.**

I find neither parties' claims to be substantially frivolous, groundless, or vexatious under C.R.S. § 13-17-101, *et seq.*, and award no attorney fees in this case.

March 31st, 2004.

BY THE COURT:

Kim Goldberger
County Court Judge

I certify that I have mailed a copy of this order to the parties this 1st Day of April 1, 2004

Tamara Bartholomew-Tripp

Tamara Bartholomew-Tripp
Division Clerk ITM