
COLORADO SUPREME COURT
Colorado State Judicial Building
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Denver, CO 80203

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COLORADO COURT OF APPEALS
Judges Hawthorne, Webb and Russel
Case No. 04CA2366

DISTRICT COURT, DENVER COUNTY
Judge Lawrence A. Manzanares
Case No. 04CV4841

Appellant:

CONSUMER CRUSADE, INC.,
a Colorado corporation,

v.

Defendants-Appellees:

MBA FINANCIAL GROUP, INC., a Colorado
corporation, and DALE FINNEY.

COURT USE ONLY

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Case No.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Consumer Crusade, Inc., by and through its attorneys, The Demirali Law Firm, P.C., submits the following in support of its Petition For Writ Of Certiorari in the above-captioned matter:

ADVISORY LISTING OF THE ISSUES PRESENTED FOR REVIEW

1. Are claims brought pursuant to the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. §227 (b) (1) (C), concerning the transmission of “unsolicited facsimiles” assignable under the laws of Colorado?
2. Does an assignee of claims arising under the TCPA have “standing” to bring suit on such claims in the courts of Colorado?

STATEMENT OF JURISDICTION

The decision of the Court of Appeals in *Consumer Crusade, Inc. v. MBA Financial Group, Inc.*, Case No. 04CA2366, ___ P.3d ___ (Colo. App. Sept. 28, 2006), is attached hereto as Appendix A. A petition for rehearing was timely filed on October 3, 2006, pursuant to C.A.R. 40 (a). The petition was denied by Order dated December 28, 2006, attached hereto as Appendix B. This petition is timely filed pursuant to C.A.R. 52 (b). This Court has jurisdiction pursuant to C.A.R. 49 (a) (2).

STATEMENT OF THE CASE

Consumer Crusade, Inc. is a Colorado corporation formed in 2003 to

address certain telemarketing abuses which were prevalent at that time. As part of its consumer advocacy, Consumer Crusade brings legal actions against businesses, as well as the principals of those businesses, which violate the consumer protection laws enacted by the Congress of the United States and state legislatures. One of those laws is the federal Telephone Consumer Protection Act of 1991 (TCPA or Act) codified at 47 U.S.C. §227, attached hereto as Exhibit C.

On June 25, 2004, Consumer Crusade brought suit against defendants MBA Financial Group, Inc. and its principal, Dale Finney, (jointly referred to herein as MBA or defendants) for TCPA violations resulting from the transmission of commercial advertisements by facsimiles (i.e. “junk” faxes) in violation of 47 U.S.C. §227 (b) (1) (C). Plaintiff’s claims were based upon assignments from the original recipients of defendants’ junk faxes. Several remedies, both legal and equitable, are provided by the Act’s private right of action. *See*, 47 U.S.C. §227 (b) (3).

Defendants filed their Motion To Dismiss on or about July 1, 2004, contending, *inter alia*, that state courts lacked subject matter jurisdiction to enforce the TCPA. And, based upon the ruling of another district court judge in an action known as *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. (AHCS)*, Case No. 04CV0803, which concluded that Colorado had not “opted-

in” to the TCPA by passing enabling legislation, or had “opted-out” of the TCPA by the passage of the Colorado Consumer Protection Act (CCPA), the district court in this action granted the defendants’ motion.

During the pendency of this appeal from the district court, the *AHCS* decision was *reversed* by a panel of the Colorado Court of Appeals. *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350 (Colo. App. 2005). However, in a diversity of citizenship action filed in *federal* district court, a plaintiff’s claims were dismissed because assignees of TCPA claims lacked standing. *See, U.S. Fax Law Center, Inc. v. iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2006) (hereinafter *iHire*). Specifically, the court found that TCPA claims were unassignable *under the laws of the State of Colorado*, and that as a consequence, the plaintiff therein lacked constitutional standing, as it had not suffered an injury in fact. Accordingly, these defendants alleged in the Court of Appeals that Consumer Crusade also lacked standing to bring TCPA claims on behalf of its assignors.

On September 7, 2006, an appellate panel in yet another TCPA junk fax case, *McKenna v. Oliver*, ___ P.3d ___, 2006 WL 2564636 (Colo. App. 2006), adopted the reasoning of *iHire* and concluded that *McKenna* lacked standing to assert claims based upon the assignments of family members. The *McKenna* panel

therefore affirmed the district court's dismissal on that alternative jurisdictional basis. The panel hearing *this* appeal then adopted the conclusions of the *McKenna* court, and affirmed the dismissal herein based upon a lack of standing rather than a lack of subject matter jurisdiction. Two other appellate panels, also citing *McKenna's* adoption of the *iHire* district court opinion, have also affirmed the dismissal of TCPA claims brought by an assignee. *U. S. Fax Law Center, Inc. v. Myron Corporation*, Case No. 05CA1426, ___ P.3d ___ (Colo. App. Nov. 2, 2006) and *U. S. Fax Law Center, Inc. v. MBA Financial Group*, Case No. 05CA1671 (Colo. App. Jan. 18, 2007). Thus, at the present time, four separate decisions of the Court of Appeals, all resting upon the validity of the *iHire* characterization of *Colorado law*, have rejected the assignability of claims under the TCPA.

ARGUMENT

It must first be noted that the instant petition concerns a case that is closely related to another action for which *certiorari* has been granted. *Kruse v. McKenna*, Case No. 06SC555, *cert. granted* 11/20/2006. In *Kruse*, the defendants have alleged that the Court of Appeals panel misinterpreted language in the TCPA governing actions brought in state courts of general jurisdiction. Specifically, the following language from the private right of action of the TCPA is at issue:

“A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State . . .”

47 U.S.C., §227 (b) (3) (emphasis supplied)

That provision, by its terms, addresses the role of individual states in the effectuation of Congressional intent concerning the enforcement of the TCPA. The very same statutory language is implicated here, except that the “if otherwise permitted...” phraseology now has been interpreted to bar *assignees* of original junk fax recipients from bringing cases to enforce their federal rights. Therefore, as with the *Kruse* case, this Court is being asked to apply principles of state law and procedure in a manner consistent with the purposes to be served by the Act.

The *iHire* opinion, which has now been adopted directly or indirectly by *four* different panels of the Colorado Court of Appeals, including *MBA*, rests upon two separate legal bases. First, the federal district court concluded that TCPA claims were unassignable because (a) they were in the nature of “invasions of privacy,” and (b) they were statutory penalties. Secondly, the district court found that, inasmuch as an assignee of a fax recipient’s TCPA claim has not suffered an “injury in fact,” the assignee cannot have standing to bring such claims. This lack of standing under the United States Constitution in *iHire* was then extended by implication to the Colorado Constitution by the state appellate courts that followed

iHire. Petitioner contends herein that the appellate panel in this case erred not only in concluding that TCPA claims are unassignable under state law, but also in deciding that an assignee lacks standing in Colorado. In order to present these separate issues with clarity, though, the order in which they are discussed shall be reversed in the following argument.

1. PETITIONER HAS STANDING UNDER FEDERAL AND STATE CONSTITUTIONS.

The *iHire* analysis begins with the flawed assumption that assignees lack Constitutional standing because they have suffered no “injury in fact.” The key case concerning Constitutional standing, however, is *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U. S. 765 (2000). The U. S. Supreme Court there held that, while a plaintiff must suffer an “injury in fact” to have standing, “the assignee of a claim has standing to assert the injury in fact suffered by the assignor.” *Id.*, at pages 773-74. This legal doctrine is recognized as *representational standing*. Thus, injury in fact as a requirement for standing is satisfied by an assignee of such claims.

In Colorado, standing is a judicially developed test designed to maintain the separation of governmental powers. *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004). As such, it is a threshold issue that must be satisfied before a court may

decide a case or controversy on the merits. *HealthONE v. Rodriguez, ex rel Rodriguez*, 50 P.3d 879 (Colo. 2002). Standing involves the application of a two-pronged analysis. *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977). First, there must be an “injury in fact,” and second, was the injury sued upon to a “legally protected interest”? See, *O’Bryant v. Pub. Utils. Commn.*, 778 P.2d 648 (Colo. 1989).

The TCPA claims brought by the petitioner typify cases known as “assignments for collection purposes.” See, *APCC Services, Inc. v. AT&T Corp.*, 281 F. Supp. 2d 41 (D.D.C. 2003), citing *Spiller v. Atchison*, 253 U. S. 117 (1920). The *Spiller* case confirmed that an assignee holding legal title to multiple claims alleging violations of federal law was entitled to bring suit for the collection of all statutory damages.

Assignments for collection are also well-established in Colorado. *Farmers Acceptance Corp. v. DeLozier*, 178 Colo. 291, 496 P.2d 1016 (1972); *Ballinger v. Vates*, 26 Colo.App. 116, 140 P.931 (1914). By virtue of the assignment, the assignee “stands in the shoes of the assignor,” *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994) (emphasis supplied). Thus, under controlling state law, an assignee asserting the claim of an original recipient has standing so long as that original recipient would have had standing.

2. COLORADO LAW PERMITS ASSIGNABILITY OF TCPA CLAIMS.

Colorado liberally permits assignments and favors the assignment of rights. *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo.App. 1993). The right to bring suit for damages based in tort is a “chose in action.” *Ford v. Summertree Lane Ltd. Liability Co.*, 56 P.3d 1206 (Colo.App. 2002). Choses in action generally are transferrable in Colorado. *Id.* at 1209 citing *Webb v. Desert Seed Co.*, 718 P.2d 1057 (Colo. 1986).

Another axiom of assignment law in Colorado is that “survivability” and assignability go hand in hand. *Home Insurance Co. v. Atchison, T&S.F.R.R. Co.*, 19 Colo. 46, 49, 34 P. 281, 282 (1893). Here, the Colorado survival statute clearly buttresses the state legislature’s preference for the transferability of legal claims as *all causes of action* except slander and libel survive, and therefore are assignable. *See*, C.R.S. 13-20-101. Inasmuch as the Colorado survival statute cannot be construed to include TCPA claims, those rights survive the death of a junk fax recipient and, consequently, must be assignable.

Furthermore, whether a right, claim or interest is assignable is primarily a *legislative prerogative*. The court in *Micheletti v. Moidel*, 94 Colo. 587, 32 P.2d 266 (1934) observed in relevant part:

“Our statute narrows greatly the common-law rule that personal actions die with the person. The modern tendency to *remove obstructions to the free transfer of all property*, tangible and intangible, and rights and interests, forbids an extension of the language of the exception in the statute beyond its fair import.”

Id. at 590, 591. (emphasis supplied)

(a) TCPA CLAIMS ARE COMMERCIAL TORTS.

The legislative right to regulate in the context of the police power is *greatest* where commercial activities are implicated. *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998). It follows that judicial interpretations which serve to *defeat* the statutory purposes of such legislation will not be followed. Rather, state courts should interpret the legislation with an eye towards effectuating Congressional intent. *Tivoli Ventures*, 870 P.2d at 1250. Neither federal law nor Colorado law expressly *prohibits* the assignment for collection of junk fax claims. Nevertheless, the Court of Appeals has chosen to bar petitioner’s enforcement based upon the *iHire* characterization of TCPA claims as invasions of privacy.

The telemarketing abuse of junk faxing is *commercial in nature*. That is because the *abuse* to be remedied is the advertisement by facsimile of the sender’s “property, goods or services.” 47 U.S.C. §227 (a) (4). A recipient’s *property* and *economic interests* are injured when fax equipment and supplies (e.g. paper, toner)

are used by telemarketers without permission. The TCPA's junk fax ban also was intended by Congress to *facilitate interstate commerce*. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995), *citing* Senate Telecommunications and Finance Subcomm., 102 Cong., 1st Sess. 3-4 (1992). Congress, therefore, concluded that unsolicited fax advertisements are *commercial torts*. *See, State of Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003) (TCPA regulates commercial speech).

The characterization of TCPA violations as commercial torts establishes that they are assignable under Colorado law. Specifically, C.R.S. 4-9-109 (d) (12) expressly permits security interests in *assignments of commercial tort claims*. If such assignments may be used as security interests under the current Colorado commercial code, they are "otherwise permitted" by state law.

(b) TCPA CLAIMS ARE NOT PRIVACY RELATED.

Colorado law treats "invasion of privacy" as three separate torts: first, unreasonable intrusion upon the seclusion of another; second, unreasonable publicity given to another's private life; and third, appropriation of another's name or likeness. *See, Denver Publishing Co. v. Buena*, 54 P.3d 893, 897 (Colo. 2002). The only form of invasion of privacy which compares with junk faxing, therefore, would appear to be intrusions upon the seclusion of another.

But junk faxing is not analogous to intrusions upon seclusion. That is because the abuse to be remedied is not dependent upon the type or location of a fax recipient; it is directed to the type of *transmission*. Personal or informational transmissions, in fact, are *exempt* from the Act's ban on unsolicited faxes. An invasion of privacy also requires *injury to the person* through mental and emotional distress. *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292 (Colo. 1998). In TCPA cases, though, no person can be considered a victim of physical or mental harm as a result of the receipt of faxes.

(c) TCPA CLAIMS ARE NOT PENAL IN NATURE.

The other basis for TCPA claim unassignability is the contention that such claims are statutory penalties. The following federal and state authorities, however, clearly establish that plaintiff's TCPA claims are not penal; rather, they are *remedial*. As such, the petitioner's claims were assignable.

Compensatory damages under the TCPA were designed by Congress to be fair to both the senders and recipients of junk faxes. *See*, 137 *Cong. Rec.* S16204-01 (Nov. 7, 1991) (Statement of Sen. Hollings). Those damages include the "difficult to quantify business interruption costs" that result from unlawful commercial fax transmissions. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997). The determination of statutorily set compensatory damages

is a proper exercise of discretion by Congress. *See, Reiter v. Sonotone Corp.*, 442 U. S. 330, 344-45 (1979). Because the TCPA also provides for additional (i.e. treble) damages if the violation was willful, though, the law has been characterized as penal. 47 U.S.C. § 227 (b) (3) (last paragraph).

Penal laws, strictly speaking, are those which impose *punishment* for an offense that is committed *against the state*. *Huntington v. Attrill*, 146 U. S. 657, 673-74 (1892). The potential imposition of treble damages pursuant to § 227 (b) (3), however, does not constitute *punishment*. *Palmer v. A. H. Robbins Co., Inc.*, 684 P.2d 187, 214 (Colo. 1984).

Moreover, *Credit Mens Adjustment Co. v. Vickery*, 62 Colo. 214, 161 P. 297 (1916) is controlling precedent on this issue. *Vickery* teaches that a statute may be penal in the sense that it must be *strictly construed* to establish liability. When that statute affords relief in the nature of *compensation to the private party* seeking enforcement, it is *remedial* and to be *liberally construed*. “The debts and the remedial right to collect them go together.” *Id.* at 217 and 298. Consequently, the treble damages of the TCPA private right of action are remedial and assignable under Colorado law. *Perini v. Continental Oil*, 68 Colo. 564, 190 P. 532 (1920).


CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court grant its Petition For Writ Of *Certiorari* to resolve the issues presented herein.

DATED this 26th day of January, 2007.

Respectfully submitted,

THE DEMIRALI LAW FIRM, P.C.


A. M. Demirali

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2007, a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI was deposited in the United States mail, postage prepaid, addressed to defendants' counsel:

Douglas A. Turner, Esq.
Douglas A. Turner, P.C.
602 Park Point Drive, Suite 240
Golden, CO 80401


Susan L. Beck, Legal Assistant

APPENDIX A

COLORADO COURT OF APPEALS

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

Consumer Crusade, Inc., a Colorado corporation,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

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. Etnenberg, 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 P.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

interests and whether an assignee of claims for damages based on property loss had standing to sue under the TCPA because the plaintiff there did not allege that the unsolicited faxes caused any economic harm or that any of the assignors were business entities. Hence, the McKenna division concluded that all the plaintiff's claims were privacy related and nonassignable.

We are persuaded by the reasoning of the division in McKenna and the federal district court. Here, as in McKenna, Consumer is the assignee of individual claims based on a violation of the right to privacy. Those claims are nonassignable. See McKenna, supra. We need not address whether Consumer's claims are assignable as claims for loss of property because Consumer did not allege that the unsolicited faxes in this case caused the assignors any economic harm. The complaint contains no allegations that MBA sent unsolicited faxes to businesses or that any of the individual assignors used or leased their fax machines for business purposes.

Accordingly, we agree with MBA's contention that Consumer lacks standing to assert the assigned claims under the TCPA. See McKenna, supra. Therefore, we affirm the judgment dismissing Consumer's claims, although we do so on grounds other than those

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.

APPENDIX B

CONSUMER CRUSADE INC, A COLORADO CORPORATION,
PLAINTIFF-APPELLANT
v.
MBA FINANCIAL GROUP, INC, A COLORADO CORPORATION, DALE FINNEY,
DEFENDANT-APPELLEE

Appeal from the DENVER DISTRICT CIVIL COURT
Honorable LAWRENCE A MANZANARES, Judge
No. 04CV4841

The PETITION FOR REHEARING filed in this appeal by:

CONSUMER CRUSADE INC/PLAINTIFF-APPELLANT

is DENIED.

Issuance of the Mandate is stayed until: January 29, 2007

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by that Court.

By the Court:

HAWTHORNE, J.
WEBB, J.
RUSSEL, J.

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Judge - Tri. Ct. Clerk
AND _____
ON. 12/28/06
BY. [Signature]
COLORADO COURT OF APPEALS

APPENDIX C

From the U.S. Code Online via GPO Access
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[Laws in effect as of January 16, 1996]
[Document not affected by Public Laws enacted between
January 16, 1996 and August 28, 1996]
[CITE: 47USC227]

TITLE 47--TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5--WIRE OR RADIO COMMUNICATION

SUBCHAPTER II--COMMON CARRIERS

Sec. 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term ``automatic telephone dialing system'' means equipment which has the capacity--

- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
- (B) to dial such numbers.

(2) The term ``telephone facsimile machine'' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term ``telephone solicitation'' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term ``unsolicited advertisement'' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

- (i) to any emergency telephone line (including any ``911'' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

- (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or

similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

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

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement; and

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws 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.

If the court finds that the defendant willfully or knowingly

violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with

regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of 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 up to \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require

that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section,

the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) ``Attorney general'' defined

As used in this subsection, the term ``attorney general'' means the chief legal officer of a State.

(June 19, 1934, ch. 652, title II, Sec. 227, as added Dec. 20, 1991, Pub. L. 102-243, Sec. 3(a), 105 Stat. 2395; amended Oct. 28, 1992, Pub. L. 102-556, title IV, Sec. 402, 106 Stat. 4194; Oct. 25, 1994, Pub. L. 103-414, title III, Sec. 303(a)(11), (12), 108 Stat. 4294.)

Amendments

1994--Subsec. (b)(2)(C). Pub. L. 103-414, Sec. 303(a)(11), substituted ``paragraph'' for ``paragraphs''.

Subsec. (e)(2). Pub. L. 103-414, Sec. 303(a)(12), substituted ``national database'' for ``national datebase'' after ``such single''.

1992--Subsec. (b)(2)(C). Pub. L. 102-556 added subpar. (C).

Effective Date; Deadline for Regulations

Section 3(c) of Pub. L. 102-243, as amended by Pub. L. 102-556, title I, Sec. 102, Oct. 28, 1992, 106 Stat. 4186, provided that:

``(1) Regulations.--The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [enacting this section and amending section 152 of this title] not later than 9 months after the date of enactment of this Act [Dec. 20, 1991].

``(2) Effective date.--The requirements of section 227 of the Communications Act of 1934 [this section] (as added by this section), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act [Dec. 20, 1991].''

Congressional Statement of Findings

Section 2 of Pub. L. 102-243 provided that: ``The Congress finds that:

``(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

``(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

``(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

``(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

``(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

``(6) Many consumers are outraged over the proliferation of

intrusive, nuisance calls to their homes from telemarketers.

“(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

“(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

“(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

“(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

“(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

“(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

“(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

“(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

“(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.”

Section Referred to in Other Sections

This section is referred to in section 152 of this title.