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:
BRIEF IN SUPPORT OF MOTION TO DISMISS	

COMES NOW Defendants MBA Financial Group, Inc. and Dale Finney pursuant to C.R.C.P. 12(b)(5) and file this Brief in Support of Motion to Dismiss.

SUMMARY OF THE ARGUMENTS

The Telephone Consumer Protection Act (T.C.P.A.) creates a private right of action to recover penalties against a person or entity found to be in violation of the Act. 47 U.S.C. § 227(b)(3). Claims arising under the Act are subject to the jurisdiction of the State in which the claim is filed. In determining liability under the T.C.P.A, both federal and state substantive law control. Under the reverse-Erie analysis adopted in *Chair King*, federal substantive law is the starting point and state law can then restrict (but not expand) that

substantive federal law. Under both federal law and Colorado law, penalty claims are not assignable.

INTRODUCTION

The T.C.P.A., 47 U.S.C. § 227(b)(1)(C) prohibits any person within the United States from using any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C. § 227(b)(1)(C). The Act creates a private right of action to secure injunctive relief and to recover the greater of actual damages or $500 for each violation of the Act. However, this private right of action is conditional upon being "otherwise permitted by the laws or rules of Court of a State." *Id.*

Plaintiff does not claim to have received any faxes from Defendant. Plaintiff is an assignee – one of many assignees in the cottage industry of T.C.P.A. assignment of claims. Plaintiff is an assignee of an undisclosed number of faxes from an undisclosed number of separate individuals or companies. *See* Complaint, ¶¶ 4 - 6.

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.

A. Both Federal and Colorado law control for the purposes of determining assignability.

The very first issue the court must decide when faced with any issue in a T.C.P.A. case is how state and federal law interact with this federally created cause of action. Congress has directed that state procedural law and state substantive law be applied when state procedural or substantive law precludes a T.C.P.A. claim. 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). The five Circuit Courts of Appeals that have addressed the question of jurisdiction in cases arising under the T.C.P.A. have unanimously determined that claims arising under 47 U.S.C. § 227(b)(3) may only be brought in State court. *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000) (holding that "states have exclusive jurisdiction over a cause of action created by...the Telephone Consumer Protection Act of 1991"); s*ee ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *see Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 438 (2nd Cir. 1998); *see Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1287, *modified*, 140 F.3d 898 (11th Cir. 1998); *see Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997). In addition, a recent case involving a statute of limitations dispute in Texas held that claims arising under the T.C.P.A. involve a "reverse-Erie situation, in which the substantive law is federal and the procedural law is that of [the State]." *Chair King,*

Inc. v. GTE Mobilnet of Houston, Inc., 2004 WL 162938 at 19 (Tex. App. 14th Dist.) ("*Chair King*"). The *Chair King* Court further held that the "otherwise permitted" clause of § 227(b)(3) of the Act precludes the Act from preempting State substantive law. *Id.* at 20. The Court concluded that State law preempts the T.C.P.A. in situations where State law would prevent a claim, reasoning that the "otherwise permitted" clause of the statute provides the States with an "opt-out" provision thereby allowing parties to assert a claim only for "as long as [State] law has not prohibited them from doing so." *Id.* at 11-12; s*ee also International Science & Tech Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1156-58 (4th Cir. 1997) (adopting opt-out interpretation); *Condon v. Office Depot, Inc.*, 855 So.2d 644, 645-48 (Fla. 3 Dist. App. 2003) (adopting opt-out interpretation); *Kaufman v. ACS Sys., Inc.*, 2 Cal.Rptr.3d 296, 312 (Cal. App. 1 Dist. 2003) (adopting opt-out interpretation); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 910 (Mo. 2002) (adopting opt-out interpretation); *Worsham v. Nationwide Ins. Co.*, 772 A.2d 868, 874 (Md. Spec. App. 2001) (adopting opt-out interpretation); *Aronson v. Fax.com Inc.*, 51 Pa. D. & C. 4th 421, 430 (Pa. Com. Pl. 2001) (adopting an opt-out interpretation).

The *Chair King* Court also noted that this interpretation of the clause is in agreement with legislative intent with regard to the purpose of the Act. 2004 WL 162938 at 12. Legislative history of the T.C.P.A. suggests that the Act was initially designed to give states an additional tool for addressing the issue of unsolicited interstate calls and faxes. *Id.* at 7. The Act was intended to procure jurisdiction over interstate transmissions for the States, *id.*, without usurping State control over the issue. S*ee* Sen. Rpt. 102-178, 3 (1991) ("[State laws] had limited effect…because States do not have jurisdiction over interstate calls. Many States…expressed a

desire for Federal legislation to regulate interstate telemarketing calls to *supplement* their restrictions on intrastate calls."(Emphasis added.). The inclusion of the words "laws or rules" in the "otherwise permitted" clause also suggests that Congress intended for States to look at both substantive and procedural State law when determining whether or not to allow a claim to proceed. *See* § 227(b)(3).

While Colorado state law controls in determining assignability of claims arising under the T.C.P.A., this is assuming that the claims are initially assignable under federal law. Generally, federal law controls the assignability of a federal claim. *See, e.g., APCC Services, Inc. v. AT&T Corp.*, 281 F.Supp.2d 41, 50 (D.C. 2003). However, the private cause of action under the T.C.P.A. is conditioned upon existing state law. Under the *Chair King* analysis, if either federal law or state law does not allow assignment of the claim, then the claim cannot be assigned. If federal law does not allow for the assignment of the claim, the analysis ends right there. Only if federal law allows for the assignment of the claim do we reach the question of whether Colorado law allows assignment of the claim because the state cannot expand this federal cause of action. The state may, however, limit or restrict the reach of the claim.

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." *Smith v. Dept. of Human Services*, 876 F.2d 832, 834-835 (10th Cir. 1989) *(Internal citations omitted)*. The question presented is whether an action under § 227(b)(3) is an action for a penalty.

"Typically, a court is required to infer from a reading of the relevant statute and its history whether a cause of action is remedial or penal in nature." *Id.* In *Smith*, the 10th Circuit sets out a three-factor analysis to assess whether a statute is remedial or penal. Those three factors are (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public, (2) whether recovery under the statute runs to the harmed individual or to the public and (3) whether the recovery authorized by the statute is wholly disproportionate to the harmed suffered. *Id.*

Regarding the first factor, the *Chair King* court pointed out that the T.C.P.A. addresses more general wrongs to the public. The only factor possibly in Plaintiff's favor (i.e., T.C.P.A. claims are not a penalty) is the second. *But see, Chair King (pinpoint cite unavailable on Loislaw) (citing St. Louis Iron Mt & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)* stating that the penalty may go to an individual "just as if it were going to the state." Regarding the third factor, Plaintiff does not make a claim for any actual damages. Plaintiff only makes claims for the statutory penalties. For each one page fax sent, Plaintiff is requesting damages based upon converting one piece of copy/fax paper – pennies.[1] Under the assigned T.C.P.A. claims, however, Plaintiff is requesting $500.00 per fax plus treble damages for a total of $1,500.00 per fax![2]

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[1] If the Court requires evidence of the nominal nature of the "damage" caused by a one-page fax, Defendants respectfully request an evidentiary hearing on the issue.

[2] Courts addressing whether the primary T.C.P.A. claim violates due process under the U.S. Constitution because it is so grossly disproportionate to the harm suffered find the claim to be a penalty to save it from being a violation of due process. *See, e.g., Chair King*. The court in *Chair King*, citing the Supreme Court, went as far as to say that although the penalty was being paid to an individual, it can be looked at as if it was a penalty going directly to the state. To find that the T.C.P.A. claims are not a penalty also requires finding that Defendant's due process rights have been violated.

Even though *Smith* articulates a three-factor analysis to determine whether a federal statute is penal or remedial, the 10th Circuit went on to discount the analysis in the context of the survivability of an ADEA claim. *Smith* at 836. The 10th Circuit noted that the Supreme Court characterized liquidated damages recovery under the ADEA as a substitute for a criminal sanction. *Id.* This characterization as a criminal sanction substitute trumped any three-factor analysis.

So what are we left with? Apparently, we are left with a three-factor assessment that can be trumped by case law finding that a statute was intended to be penal as opposed to remedial or trumped by legislative intent showing the intent of the statute to be penal.

Three-part analysis aside, the basic federal test of whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. *Huntington v. Attrill*, 146 U.S. 657, 668, 13 S.Ct. 224, 36 L.Ed. 1123.

While the electoral impetus for the T.C.P.A. may have its origin with disgruntled individuals among business and residential phone customers, Congressional authority for federal regulation of intrastate electronic traffic is derived from the Commerce Clause of the United States Constitution. Congress addresses the aggregate telephone system, even the intrastate components of that network, as an instrumentality of interstate commerce. Hence, it is the intrusion of the uninvited faxes upon the greater instrumentality of the interstate system, and the

resulting "wrong to the public" that is the "wrong sought to be addressed" by the T.C.P.A., under the *Huntington* test.

Moreover, if a sum of money is to be recovered by a third person for violation of a statute instead of the person injured, *Huntington v. Attrill*, supra, 146 U.S. 657, 668, 13 S.Ct. 224, 36 L.Ed. 1123; *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 299, 8 S.Ct. 1370, 32 L.Ed. 239, or if the sum exacted is greatly disproportionate to the actual loss, *Helwig v. United States*, 188 U.S. 605, 611, 23 S.Ct. 427, 47 L.Ed. 614, it constitutes a penalty rather than damages.

The T.C.P.A. clearly goes far beyond compensation of the injured individual, for the few pennies that claimant may have been damaged. Under 46 U.S.C. Section 227 (f) (1) through (3), the attorneys general of the states are specifically empowered to bring T.C.P.A. actions in the federal District Courts of each state, in order to enforce compliance, and collect the civil penalties without any demonstration of damages to said state. This TCPA remedy is clearly independent of recovery for damages; it is meant to impose sanctions upon offending "faxcasters" for the deterrent effect.

Further, the "sum extracted" under the T.C.P.A. ($500 per violation, subject to treble damages) is "greatly disproportionate to the actual loss." The costs of receiving a typical junk fax has been the subject of specific federal District Court (*Nixon ex rel. Missouri v. American Blastfax, et al.*) findings, and has been determined to cost approximately $.05 to $.08 per page. Although the ruling in the *Nixon* case has been overturned, these findings were not disturbed on

appeal. Hence, a minimal recovery of $500 would represent as much as ten thousand times the actual compensatory damages. In the case of multiple violations, and willfulness, the statutory penalty could be nine times that, or ninety thousand times the actual damages. Again, this criterion, disproportionality to the actual loss, suggests that T.C.P.A. sanctions are, indeed, statutory penalties, not damages. The provision for treble damages is clearly penal in its impact, and clearly calculated to have a deterrent effect, rather than compensatory. These are further indicia of the penal nature of the T.C.P.A. sanctions.

While private rights and interests are necessarily affected, the Congressional purpose in passing the T.C.P.A. was to protect the instrumentalities of interstate commerce, and the sole source of federal authority asserted over facsimile traffic is the Commerce Clause of the United States Constitution. Hence, the statutory rationale is based upon protection of the public communications infrastructure, and the statutory sanctions are calculated to obtain a deterrent effect (*i.e.* they go beyond mere compensation of loss), and are thus penal in nature.

B. Colorado law prohibits assignment of § 227(b)(3) claims.

A review of the Colorado case law reveals four criteria for classifying a statute as a 'statutory penalty'. A statute will be construed as penal in nature when the statute: 1) "create[s] a new and distinct statutory cause of action," *Palmer v. A. H. Robins Co., Inc.*, 684 P.2d 187, 214 (Colo. 1984), 2) "requires no proof of actual damages as a condition precedent to recover," *Palmer*, 684 P.3d at 214, 3) "impose[s] penalties in excess of actual damage," *Carlson v. McCoy*, 566 P.2d 1073, 1074 (Colo. 1977), and 4) serves a public interest "through the deterrent effect" of the damages awarded, *Carlson*, 566 P.2d at 1075. While the case law is unclear as to how

many criteria must be satisfied in order to make a determination, 47 U.S.C. § 227(b)(3) satisfies all four criteria and should be construed as a statutory penalty.

i. 47 U.S.C. § 227(b)(3) creates a new and distinct statutory cause of action.

The T.C.P.A. was enacted to allow State jurisdiction over unsolicited interstate calls and faxes, *Chair King*, 2004 WL 162938 at 12, in response to a growing concern over unsolicited advertising. *Id.* at 8. Prior to the enactment of the measure, unsolicited faxes were considered a legitimate advertising strategy, and the recipient of such advertising "assume[ed] both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out the facsimile messages.'" H.R. Rpt. 102-317, 25 (1991); *Chair King*, 2004 WL 162938 at 8. Legislative history of the measure shows that it was fully understood that "these costs are borne by the recipient of the fax advertisement..." *Id.* Prior to the passage of the Act, no remedy existed. Thus, the Act created a new and distinct statutory cause of action.

ii. 47 U.S.C. § 227(b)(3) requires no proof of actual damages as a condition precedent to recovery.

The T.C.P.A. provides that the recipient of an unsolicited fax may "receive $500 in damages for each such violation" in lieu of actual damages when the actual monetary loss is less than $500. 47 U.S.C. § 227(b)(3)(B). The alternative provision to an actual damages award suggests that Congress did not intend for the recipient bear a burden of proof with regard to showing damages. *See id.* A recipient may file a claim for monetary damages even in the absence of actual damages, further suggesting that no proof of actual damages is required. *Id.*; *see Kaplan v. First City Mortg.*, 701 N.Y.S.2d 859, 863 (City Ct. 1999). In addition, where

"plaintiff offered no proof of actual monetary loss as a result of [an] unsolicited telephone call", the *Kaplan* court concluded that the plaintiff was "[n]onetheless,...entitled to damages of $500 for the T.C.P.A. violation." 701 N.Y.S.2d at 863.

iii. 47 U.S.C. § 227(b)(3) imposes monetary damages in excess of actual damage.

The T.C.P.A. provides that the recipient of an unsolicited fax may "receive $500 in damages for *each such* violation." § 227(b)(3)(B) (emphasis added). Courts considering whether or not the $500 per fax award violates the Due Process Clause of the Constitution have acknowledged that the Act allows a damage amount in excess of actual damages. *See Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1165 (S.D. Ind. 1997); *see Chair King*, WL 162938 at 15; *see Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1090 (S.D. Tex. 2001). It has been estimated that "'the cost of one page of paper used by the typical fax machine in use today is two and one-half cents,' and 'it takes between 30 and 45 seconds for a fax machine to print an 8-inch by 11-inch page of text.'" *Destination Ventures, Ltd. v. F.C.C*, 46 F.3d 54, 56 (Or. 1995); *see Kenro*, 962 F.Supp. at 1160. Given this estimate, the actual damages for any one violation will amount to more than nominal damages in any situation.

iv. 47 U.S.C. § 227 was enacted to serve a public interest.

In conjunction with their due process analysis of the T.C.P.A., the *Kenro*, *Chair King*, and *American Blastfax* Courts each concluded that the Act was designed to address a public harm. 962 F.Supp. at 1165, 2004 WL 162938 at 16; 121 F.Supp.2d at 1090. The *American Blastfax Court* noted that "...the T.C.P.A. damage provision was not designed solely to

compensate each private injury caused by unsolicited fax advertisements. It was also intended to address and deter the overall public harm caused by such conduct." 121 F.Supp.2d at 1090; *see Chair King*, 2004 WL 162938 at 16. In addition, all three Courts pointed out that "Congress identified two legitimate *public harms* intended to be addressed by the T.C.P.A.'s ban on unsolicited fax advertisements: (1) these fax advertisements can substantially interfere with a business or residence...and (2) unsolicited fax advertisements unfairly shift nearly all of the advertiser's printing costs." *American Blastfax*, 121 F.Supp.2d at 1091 (emphasis added); *Chair King*, 2004 WL 162938 at 16 (emphasis added); *Kenro,* 962 F.Supp at 1166; *see also* H.R. Rpt. 102-317 at 25. In addition, all three Courts concluded that Congress intended for the monetary damages imposed by the Act to serve as a deterrent to these public harms. *Kenro*, 962 F.Supp at 1166 ("Congress designed a remedy that would...effectively deter the unscrupulous practice of shifting these costs..."); *see American Blastfax*, 121 F.Supp.2d at 1091; *GTE*, 2004 WL 162938 at 16. Overwhelming evidence supports the conclusion that Congress intended the Act to serve as a deterrent to a public harm. Thus, the Act was clearly designed to serve a public interest.

Applying the four criteria clearly shows that the T.C.P.A. was designed to be a statutory penalty. In addition, numerous courts have considered the damage awards allowed under the Act to be a penalty. *See 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*, 855 So.2d at 649 ("The [T.C.P.A.]

provided for a civil *penalty* not to exceed $500 per violation." Emphasis added.); *Kaufman*, 2 Cal.Rptr.3d at 328 (referring to § 227(b)(3)(B) as a penalty); *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*, 701 N.Y.S.2d at 863 (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."). Furthermore, even if an underlying statute is found to be remedial and not penal, Colorado law specifically classifies treble damage statutes as a statutory penalty. *Carlson v. McCoy*, 566 P.2d 1073, 1075 (Colo. 1977).

C. Claims arising under a penalty statute are not assignable.

"[A] right to recover a penalty is generally not assignable," 36 Am. Jur. 2d *Forfeitures and Penalties* § 56 (2003), on the grounds that "[a]ssignability of such claims encourages litigation and strife" and that "the conversion of penalties into commodities or assets [is against public policy]," *Peterson v. Ball*, 296 p. 291, 294 (Cal. 1931); *Wilson v. Shrader*, 79 S.E. 1083, 1086 (W. Va. 1913). While addressing the issue of whether or not a statute imposing liability on directors for the debts of a corporation allows assignability, the Supreme Court of Colorado acknowledged the general rule that statutory penalties are not assignable. *Credit Men's Adjustment Co. v. Vickery*, 62 Colo. 214, 218 (Colo. 1916) (holding that the statute in question was "not an assigned right of action to collect a penalty" and classifying the claim as remedial in order to allow the claim to proceed). Furthermore, a review of the case law overwhelmingly

indicates that the general rule against the assignability of statutory penalties is well settled. Twelve other States found to have addressed the issue have concluded that statutory penalties are not assignable. *Peterson,* 296 p. at 294 (statutory penalties not assignable); *Canal Indem. Co. v. Greene*, 2003 WL 22966370 at 5 (Ga. App.) ("...claims for statutory penalties...may not be assigned"); *Robinson v. St. Maries Lumber Co.*, 204 p. 671, 672 (Idaho 1921) ("The right to recover the penalty... is a personal right, [sic] and cannot be assigned."); *Hart Conversions v. Pyramid Seating Co., Inc.*, 658 N.E.2d 129, 131 (Ind. App. 1995) ("The general rule is that the right to collect a penalty is a personal right which is not assignable."); *Lloyd v. First Nat. Bank of Russell*, 47 p. 575, 576 (Kan. App. 1897) (usury statute providing for the recovery of a statutory penalty not assignable); *State ex rel. Mitchell v. City of Shawnee*, 31 P.2d 552, 554 (Okla. 1934) ("The right of action for a penalty is clearly personal and nonassignable."); *Rorvik v. North Pacific Lumber Co.*, 195 p. 163, 167 (Or. 1921) ("Rights given by statute for the redress of personal wrongs are generally not assignable."); *National Surety Corp. v. State*, 198 So. 299, 301 (Miss. 1940) ("The general rule is that a right to recover a penalty is not assignable."); *Heitfeld v. Benevolent and Protective Order of Keglers*, 220 P.2d 655, 659 (Wash. 1950) ("In general, a cause of action for the recovery of a penalty is not assignable unless specifically made so by statute."); *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W.Va. 588, 591 (W. Va. 1978) ("As a general rule, an action to collect a statutory penalty is not assignable unless the statute contains language indicating an intention to make the cause of action assignable."); *see Investors Title Insurance Co., v. Herzig*, 413 S.E.2d 268, 272 (N.C. 1992) (holding that treble damages pursuant to a cause of action for unfair practices are punitive in nature and not assignable); *see*

Pardoe v. Iowa State Nat. Bank, 76 N.W. 800, 802 (Iowa 1898) (usury statute providing for the recovery of a statutory penalty not assignable).

In addition to the general rule, "[i]t is well-settled that penal statutes are to be strictly construed" for the purposes of determining liability. William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corps.* vol. 3A, § 1203 (West 2003); *see Denning*, 326 P.3d at 79 ("The statute in question is penal and must be strictly construed."); *Credit Men's Adjustment*, 62 Colo. at 216 ("...the statute...may well be considered penal, in the sense that it should be strictly construed."). The T.C.P.A. creates a "[p]rivate right of action" allowing a "person or entity" to file a claim based on violations of the Act. 47 U.S.C. § 227(b)(3). The language of the statute clearly entitles the ***recipient*** of an unsolicited fax to file a claim, *see id.*, and is silent as to the assignability of any claims arising under the statute. *Id.* Construing the statute strictly, a direction that only a recipient is entitled to the claim and silence on the assignability of claims further indicates that the claim is not assignable.

Not only is 47 U.S.C. § 227 silent on assignability, the statutory language is strained by implying the right to assign. The T.C.P.A. provides an injunctive remedy as well as statutory penalties. While Plaintiff requests an injunction against Defendant, Defendant has never sent and Plaintiff has never received a single fax. The assignors are the ones who allegedly received fax transmissions – not Plaintiff.

Perhaps more important is the legislative history. The legislative history quoted in *Chair King* repeatedly speaks to Senator Hollings statements regarding "consumers" being able to bring the action and his hope that states will allow "consumers" to bring the action in small claims court. This indicates intent that the action be personal to the consumer who received the fax.

D. Penalty or not, Colorado law prohibits assignment of T.C.P.A. claims

Even if statutory penalties are assignable, Colorado law prohibits the assignment of T.C.P.A. claims. *See Livingston v. U.S. Bank*, 58 P.3d 1088, 1090-1091 (Colo.App. 2002). In *Livingston*, Plaintiff sought class action certification on behalf of all persons who received U.S. Bank facsimile advertisements who did not request that they be added to the facsimile advertisement database. *Id.* The court denied the request for class certification because the predominance requirement of C.R.C.P. 23(b)(3) was not met. *Id.* The court found that the question of whether any individual fax recipient gave "prior express invitation or permission" would have to be decided on an individual basis and therefore would overwhelm, let alone predominate over, the common issues. *Id.* Individual inquiries into the facts and circumstances of each recipient's invitation and permission would have to be made. *Id.* Each potential plaintiff must prove that a specific transmission to its machine was without express invitation or permission.

If *Livingston* stands for anything, it stands for the proposition that T.C.P.A. claims are claims of the wronged consumer not assignees. Plaintiff's use of an assignment mechanism is simply an attempt to avoid the holding and reasoning of *Livingston*. Plaintiff will be required to prove that each fax sent was sent to the facsimile machine of each individual assignor and was done so without the assignor's prior express permission. This will require individual testimony from each undisclosed assignor and the requisite discovery equivalent to an undisclosed number of lawsuits rolled into one.

E. Colorado law prohibits multiple T.C.P.A. claims by recipients who fail to delist

The Court should further consider that the Colorado State legislature has enacted a substantially more balanced state statute (**CCPA**) to address and govern these same technologies and issues. That statute places a small burden upon recipients of unwelcome facsimiles -- that of affirmatively de-listing their fax number from the pertinent database.

Only "more restrictive" state law pre-empts the T.C.P.A. (47 U.S. 227(e)(1)). In this regard, the CCPA is "more restrictive" upon the claimants, which clearly embodied Colorado's legislative intent that consumers should play a role in protecting themselves, and asserting their objections to unsolicited facsimiles. Congressional use of the "... if otherwise permitted..." language permits the CCPA to pre-empt the T.C.P.A. with regard to serial offenses, and bar penalties for subsequent faxes received by the same recipient. In the alternative, T.C.P.A.

claimants should be limited to recovery for the first T.C.P.A. violation, because the CCPA imposes a duty of de-listing upon the recipient.

The Courts in implementing the procedural avenues by which T.C.P.A. claims can be litigated in Colorado state courts should consider the legislative history of the Colorado Consumer Protection Act. The CCPA is the state law most closely analogous to the T.C.P.A., and the state legislatures' intent in passing it should bear upon the implementation of the federal law that now is asserted to pre-empt it. The state legislators clearly meant for individual recipients of fax transmissions to affirmatively remove their numbers from the advertiser's database, raising the question as to whether T.C.P.A. claimants in Colorado, who failed to remove their numbers, can collect for more than one violation.

CONCLUSION

Plaintiff attempts to do something with the T.C.P.A. that was not its intended purpose – create a moneymaking enterprise for law firms and debt collectors. The T.C.P.A. was created to give the recipients of unwanted fax ads a reasonable remedy. The T.C.P.A. was never meant to be a right that could be assigned. The rights created under the T.C.P.A. are personal. For the foregoing reasons, Defendant requests this Court grant this Motion to Dismiss.

Respectfully submitted this 1st day of July 2004.

Douglas A. Turner, Esq. Reg. #22564

CERTIFICATE OF MAILING

I do hereby certify that on this 1st day of July 2004 deposited in the United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Brief in Support of Motion to Dismiss*** properly addressed as follows:

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