DISTRICT COURT, CITY AND COUNTY
OF DENVER, COLORADO
City and County Building
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Denver, Colorado 80202
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CONSUMER CRUSADE, INC., a
Colorado corporation,

Plaintiff,

vs.

AFFORDABLE HEALTH CARE
SOLUTIONS, INC., a California
corporation, et al.,

Defendants.

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Case No.04 CV 0803
Courtroom 7

MOTION TO RECONSIDER ORDER
(Re: Motion To Dismiss Pursuant To C.R.C.P. 12(b)(1) and (5))

Plaintiff, Consumer Crusade, Inc., by and through its attorneys, The Demirali Law Firm, P.C., submits the following Motion To Reconsider Order (Re: Motion To Dismiss Pursuant To C.R.C.P. 12(b)(1) and (5). As grounds therefor, Plaintiff states the following:

Blumberg No. 5113
PLAINTIFF'S
EXHIBIT
B

On or about April 23, 2004, Defendant Affordable Health Care Solutions, Inc., a California corporation, filed an Omnibus Motion To Dismiss which asserted, *inter alia*, that Colorado state courts do not have subject matter jurisdiction to hear private actions under the Telephone Consumer Protection Act (TCPA). By Order dated July 26, 2004, this Court concluded that Colorado does not permit private actions to enforce that federal statute, at least with respect to faxes sent prior to 2004. .

The first legal basis for its conclusion was that States have considerable discretion under the Tenth Amendment of the U. S. Constitution to govern independently of federal law. Stated otherwise, the Congress must not seek to compel the States to govern according to its instructions. Order, page 2, at paragraph 1.

Secondly, this Court concluded that "a state may also adopt a different standard of conduct for private actions on the issue of fax telemarketing." Order, page 2, at paragraph 2. The logic of that position was premised on Colorado's power to limit remedies under a federal law, inasmuch as it could constitutionally decline to enforce the law altogether.

The third jurisdictional bar to private enforcement actions stemmed from Colorado decision to exercise its right to "set a different course for private litigation involving junk faxes." Order, page 4 at paragraph 1. This right has been manifested both in the State's (a) failure to opt-in (ostensibly through enabling legislation), and (b) implicit opt-out from the federal law (by virtue of a later legislative enactment). *See,* Order, page 4, paragraph 3 through page 5.

And finally, the Court's Order noted that the TCPA provided another possible remedial alternative for its citizens, i.e. the authority of the Colorado Attorney General to bring a *parens*

patrie action in U. S. District Court pursuant to another provision of the TCPA. *See*, 47 U.S.C. Section 227(f)(1).

MOTION TO RECONSIDER

The cases interpreting the language of the TCPA concerning a claimant's private right of action in state courts are confusing at best. The language in question reads as follows:

> "Private right of action
>
> A person or entity may, if otherwise permitted by the law or or rules of court of a State, bring in an appropriate court of that State – "

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

The reason for that confusion is the fact that two separate and distinctive issues are presented by that statutory language. First, there is a question of subject matter jurisdiction (i.e. the authority of a court to adjudicate claims under the enacted law). Secondly, however, there is the issue of federalism and state sovereignty (or the extent to which a state may permit private actions in its courts to enforce the rights created by federal statute). Although these two issues often appear to be two sides of the same coin, when analyzing the TCPA, they must be considered separately.

The TCPA, as enacted by the Untied States Congress, is an unusual statute in that it creates a national law for, among other things, unsolicited fax advertisements. Yet, the federal appellate courts have concluded that subject matter jurisdiction was enforceable by private actio only in state courts. *See*, *Murphy v. Lanier*, 204 F.3d 911, 913 (9th Cir. 2000) (and cases cited therein). The consequences of this jurisdictional anomaly upon the several states were two-fol First, each state was left to decide whether subject matter jurisdiction was mandated by the Act

or was instead permissive. And second, whether state court exclusivity was offensive to the doctrine of state sovereignty. Not surprisingly, the courts of the various states, and even different courts in the same state, have reached very different conclusions on these questions. *See*, section B infra.

The following section shall set forth the guiding principles of subject matter jurisdiction in general as well as pursuant to the TCPA specifically.

A. Subject Matter Jurisdiction.

Whether the legislative act of the federal government is binding upon the states of the union begins with an analysis of the Supremacy Clause of the U. S. Constitution. The Supremacy Clause provides that the Constitution and the laws passed pursuant to it are the supreme law of the land, binding alike upon states, courts, and the people. U. S. Court Act VI 2. *Testa v. Katt*, 330 U. S. 386, 391 (1947).

Although the Supremacy Clause dictates that federal law shall supercede state law, "anything in the Constitution or Laws of any State to the contrary notwithstanding," cases from early in this nation's history questioned under what circumstances the states were required to accept federal law as binding. The case of *Mondou v. New York*, 223 U. S. 1 (1912) finally resolved the issue of state compliance with federal law. The United States Supreme Court there concluded:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for

> all. That policy is as much the policy of (the state) as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."

Mondou v. New York, 223 U.S. 1, 57 (1912) (emphasis supplied)

Having determined that federal law generally is supreme, *Mondou* also addressed the subjects upon which the laws of Congress may be enacted. Where Congress is granted explic authority by the Constitution to enact laws, U. S. Const. Art. I, the exercise of that authority i: plenary, *Id.* Nevertheless, Congress may use its discretion to enact laws which involve less total preemption.

> "Where Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of "cooperative federalism," offer states the choice of regulating that activity according to federal standards or having the state law preempted by federal regulation."

New York v. United States, 505 U.S. 144 (1992) (emphasis supplied)

Concededly, some federal courts have assumed, during their analysis of federal court jurisdiction of TCPA claims, that the "if otherwise permitted" language delegated to the state the power to either accept or reject subject matter jurisdiction. *See, e.g. International Scienc Tech Inst., Inc. V. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997) ("if the state consents"). That same court recognized, however, that state courts are courts of genera jurisdiction and "presumed to have jurisdiction over federally created causes of action unless Congress indicates otherwise." *International Science*, 106 F.3d at 1152 (citing *Tafflin v. Le*, 493 U.S. 455 (1990)).

Whether Congress indicated otherwise in the TCPA is the central, but until now,

unresolved issue affecting subject matter jurisdiction in the state courts. *Tafflin* correctly noted that state court jurisdiction is ordinarily to be presumed. Thus, it is apparently the position of advocates for "consensual" TCPA jurisdiction, that the phrase "if otherwise permitted by state law or rules of court" was intended by Congress to avoid or overcome that presumption of state court jurisdiction. Such an interpretation of a federal law which was enacted to provide a jurisdictional basis for state enforcement of telemarketing regulation, would be counterintuitive if not plainly contradictory. Consequently, the quoted language could not have been intended to limit the scope of subject matter jurisdiction.

Moreover, the assertion that the language "if otherwise permitted..." was used in deference to a state's Tenth Amendment powers, is similarly misplaced. It is sometimes argued that the Tenth Amendment gives the states broad powers to disregard, or choose another direction pursuant to its own laws. While it is true that under our federal system, states possess sovereignty concurrent with the federal government, *Tafflin v. Levitt*, 495 U.S. 455 (1990), that sovereignty is subject to the Supremacy Clause. *Id.* Congress, presumably, was aware of its plenary power under the Commerce Clause, and the effects of the Supremacy Clause when it enacted the TCPA. Because state enactments are subject to the Supremacy Clause, it is implausable that Congress intended to undermine its authority by granting to each state the ability to ignore or supercede its jurisdictional grant. And if that was Congress' intent, it used particularly inexact language to "opt-out" of its constitutional responsibilities.

The application of these principles to the TCPA yields clear demarcations between federal and state law, as applied to the subject of telecommunications. First of all, Congress acted well within its authority under the Commerce Clause to prohibit certain telemarketing

activities. Indeed, the passage of federal legislation on that subject was occasioned by the

inability of the states to regulate interstate commerce. *See, International Science & Tech In*

Inc. v. Inacom Communications, 106 F.3d 1146 (1997) quoting the following legislative his

> "States do not have jurisdiction over interstate calls.
> Many States have expressed a desire for Federal
> legislation to regulate interstate telemarketing calls...."

Sen. R. No. 102-178 at 5 (1991)

It is also true that Congress had the power to, and did in fact, exercise authority over

intrastate telemarketing activities. *See, Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d,

1085, 1087-90 (2000). The Act itself, which is part of the overall *Communications Act of 1*

47 U.S.C. 151, *et seq.*, confirms that fact:

> "Except as provided in sections 223 through 227, [47 USCS
> sections 223-227, inclusive]... nothing in this Act [47 USCS
> sections 151 *et seq.*] shall be construed to apply or to give
> The Commission jurisdiction with respect to (1) ... practices...
> or regulations for or in connection with intrastate communication
> service by wire or radio of any carrier...."

47 U.S.C. Section 152 (b) (emphasis supplied)

Furthermore, the "savings clause" contained in 47 U.S.C. 227 (e) provides as follows:

> "(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;"

Contrary to the proposition that Congress sought to defer to state sovereignty in enacting the TCPA, constitutional doctrine as well as statutory interpretation support the conclusion that Congress intended to exercise its powers over telemarketing abuse in accordance with federal sovereignty.

There is one remaining issue concerning subject matter jurisdiction which must be noted. Several cases have emphasized that by enactment of the TCPA, Congress did not intend to occupy the field, or supplant state law. *See, e.g. International Science*, 106 F.3d at 1156, and *VanBergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995). And that statement of jurisdictional reach is true enough. Those conclusions, however, were either reached in the context of determining whether the federal courts had subject matter jurisdiction pursuant to 28 U.S.C. 1331 (i.e. "Federal question") (*International Science*), or was irrelevant to the question before the court (i.e. whether the TCPA entirely preempted state law). (*VanBergen*). The Eighth Circuit there stated:

> "The savings clause (of the TCPA) does not state that all less restrictive requirements are pre-empted; it merely states that more restrictive intrastate requirements are not preempted.

VanBergen, 59 F.3d at 1547-48.

The issue in *VanBergen* was whether a Minnesota statute was a reasonable time, place and manner restriction on political speech. *Id.* At 1546. The Circuit Court concluded that the restriction enacted by Minnesota was not clearly preempted because (a) more restrictive state lav provisions were exempt, and (b) any less restrictive provisions were "among those variations" the FCC was authorized to consider under the TCPA. *Id.* At 1548. The conclusion reached by

the court under those circumstances (i.e. use of automatic dialing machines for political speech) was that the Minnesota law and the TCPA were not in conflict (i.e. they both were designed to promote an identical objective). *Id.*

Therefore, based upon the foregoing it can be concluded that:

(1) Congress has the authority under the Commerce Clause to regulate interstate (and where appropriate intrastate) commerce, including the subject of telecommunications;

(2) The Supremacy Clause mandates that when Congress is acting within the scope of its delegated powers, state law to the contrary is preempted;

(3) Congress, in enacting the TCPA, appropriately exercised its authority to provide standards for telemarketing pursuant to such authority, and states were not free to enact less restrictive state (i.e. intrastate) standards; and

(4) The State of Colorado, may not decline to enforce a federal law applicable to its citizens on the grounds that it is against the statutory policy of this state.

B. State Sovereignty.

The language "if otherwise permitted by the law or rules of court of a State...," also implicates an aspect of state sovereignty not otherwise encompassed by the analysis above. Although the Congress is empowered by the U. S. Constitution to pass laws such as the TCPA, and despite the preemption of state law which is inconsistent with the federal law, as dictated by the Supremacy Clause, there remains an issue of federalism. That issue concerns the power or authority of the federal government to direct the states to enforce federal laws in that state's judicial system.

While it is clear that, as to the substantive law of the TCPA, the federal regulatory

scheme reigns supreme, that constitutional exercise does not suggest federal control over a state's legal system. It is in this sense that a Tenth Amendment argument has been raised about state enforcement. Stated otherwise, while a state is not free to decline enforcement of federal regulation on policy grounds, it might act to restrict enforcement of the law by virtue of its sovereignty over its state courts. And, because the TCPA requires that enforcement of private actions occur, if at all, in the courts of the several states, a state sovereignty concern has been raised.

We begin with the proposition that the federal government may not "commandeer" state courts for the enforcement of a federal program. *New York v. United States*, 505 U.S. 144 (1992). However, it is also true that state courts have jurisdiction over federal causes of action because "the laws of the Untied States are the laws in the several states." *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876). *See, also, Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912). The question, therefore, is whether a state has a right to deny enforcement of claims arising out of federal law in its courts. *Testa v. Katt*, 330 U.S. 386 (1947).

Supreme Court caselaw teaches that (a) where (as here) the same type of claim which has been enacted by Congress also arises out of state law, and (b) where jurisdiction in the state courts under local law is adequate and appropriate to enforce state law, a state may not refuse enforcement of the federal law. *Testa v. Katt*, 330 U.S. 386, 394 (1947). Moreover, in the case of the TCPA, Congress was assisting the states to exercise jurisdiction over telemarketing abuses they would not be able to otherwise remedy. It was for this reason that the federal government enacted "interstitial law" to prevent evasion of state law. *See, Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995). Understood in this way, the federal government did not intend to oust

the states from jurisdiction through a passage of the TCPA, although limited preemption was required to achieve a national standard for junk faxes. *See*, 47 U.S.C. 227(e).

When construing a statute, a court must consider the provisions of the whole law, its object and its policy. *U. S. Natl. Bank v. Independent Ins. Agents of America, Inc.*, 508 U.S. 43 (1993). And the statute (i.e. TCPA) must be construed so that effect is given to all of its provisions. *Erienet v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1988).

Congress appears to have tread carefully upon the traditional area of state sovereignty over state courts when it enacted the TCPA. The statutory language "if otherwise permitted by law or rules of court of a State" which prefaces the right of private enforcement, indicates that Congress respected traditional areas of state court practice, not to require a state to opt-in. The laws of the United States already are the laws of the several states. Enabling legislation is therefore superfluous, and Congress presumably knew that when enacting the TCPA.

Similarly, because the quoted language might be construed to give states the discretion t enact laws or rules of court, the phrase might be interpreted as an "opt-out" provision. But Congress did not compel states to enforce the TCPA; it proscribed certain conduct, and left it tc the states to enforce the law as it would enforce any other law. *See, Testa v. Katt*, 330 U.S. 386 394. ("Thus the (state) courts have jurisdiction adequate and appropriate under established loca law to adjudicate this action.") The Constitution confers upon Congress the right to regulate individuals (as opposed to states). *Hodel v. Virginia Surface Mining & Reclamation act Ass'n., Inc.*, 452 U.S. 264 (1981). The acts prohibited by the TCPA were without question directed to individuals. The Act does not seek to compel the states to legislate to prohibit junk faxes or to force courts to hear cases not otherwise contemplated by state court jurisdiction. Rather, the

Congress acting within its constitutional authority has prohibited junk faxes, and consistent with established precedent, the states inherently (and in this case explicitly) have the authority to enforce the law. Consequently, no Tenth Amendment issue is logically presented by the subject phraseology used in TCPA Section 227(b)(3).

It also follows from the preceding point that the quoted language is simply incompatible with an opt-out interpretation. As has been emphasized previously, the TCPA was enacted to prohibit conduct that the states were powerless to proscribe. Thus, the term "if otherwise permitted..." must mean something other than the authority to regulate interstate commerce. Where no state authority existed in the absence of federal legislation, no power to withdraw jurisdiction can be inferred by the quoted language.

Therefore, if the subject language is to have any meaning at all, it must relate to something other than the substantive law of unsolicited facsimiles. By the foregoing process of elimination, the quoted language must refer to state substantive laws and court procedures that would affect other conditions of state jurisdiction or justiciability. There are many matters whicl are derived from state law or procedure which relate directly to whether a particular litigant may bring an action, including a TCPA action, in a state court. The law of assignments, for example, addresses such an area of substantive state law. Prerequisites such as the amount in controversy or the availability of equitable remedies are also set by state law and may determine in which state court a person chooses to file a claim. And procedurally, it is beyond dispute that state rule of procedure necessarily govern TCPA cases. From pleading to judgment, the course of all such litigation will be governed by the Colorado Rules of Civil Procedure. "Thus, the statute's text... provides for the right of action in state court, but gives states discretion over its administration."

Chair King v. Houston Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997).

Fundamentally, the jurisdiction of the Colorado district courts is determined by the Colorado Constitution. Colo. Const. Article VI Section 9(1). To change the (general) jurisdiction of those courts requires more than a state law which purports to address issues similar to those set forth in the federal law. Congress expressly permitted compatible state legislation in the Act's savings clause. To limit the state courts' jurisdiction over a matter the statute must do so plainly. *People v. Higa*, 735 P.2d 203 (Colo. App. 1987). There is no authority for the proposition that the Colorado legislature intended to deprive its citizens of the protections of, or the remedies of, the TCPA by closing its courts to enforcement of that Act. *Cf. Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1988) (re: federal court enforcement).

In addition, the savings clause of the TCPA explicitly provides that more restrictive provisions of interstate regulation are not preempted. 47 U.S.C. 227 (e). That provision only has meaning if Congress intended preemption for less restrictive state laws. *"Expressio unius est exclusio alterius,"* meaning the expression of one thing implies the exclusion of others. Furthermore, as stated above, the states had no authority to enact law governing interstate commerce. Therefore, by the subsequent passage of C.R.S. 6-1-702, the Colorado legislature could not logically have elected to supercede the federal law and prevent its enforcement as written.

The passage in 2004 of another junk fax statute in Colorado, only serves to clarify or vindicate the position stated above. If a state wished to enact its own regulation of faxes it could do so, but only if it was consistent with the TCPA. To avoid any further confusion over the language of the TCPA, the state law now incorporates the federal law into its text.

Therefore, the foregoing establishes that, given the federal policy prohibiting junk faxes, we may conclude the following with respect to the application of the Tenth Amendment and state sovereignty:

(1) A state's power to decline enforcement of federally created rights must be limited to circumstances where state authority is protected by the Tenth Amendment;

(2) It is only in the area of state court enforcement that state law or procedure might affect jurisdiction over TCPA actions;

(3) The text and legislative history of the TCPA suggests that the phrase "if otherwise permitted by the law or rules of court of a State" relates (a) to the state laws and regulations applicable to the filing of any comparable private action, or (b) to the withdrawal of the general jurisdiction over TCPA claims in the district courts by the state legislature; and

(4)(a) The existing laws and procedures applicable to the Colorado courts do not preclude TCPA claims, and

(b) the Colorado legislature has never explicitly attempted to withdraw general jurisdiction for such claims from the Colorado district courts.

CONCLUSION

The decision of this Court to dismiss Plaintiff's TCPA action has broad ramifications to the citizens of Colorado. That decision shall deprive every citizen of his right to access the district courts for junk fax claims. While it is true an action representing all the citizens of Colorado <u>may</u> be asserted by the Attorney General, that does not justify the invalidation of a federal right otherwise available to all persons and entities in this nation. The decision to dismi: and order thereon should be reconsidered and reversed.