

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112	<p style="text-align: center;">σ COURT USE ONLY σ</p> <hr/> Case Number: 04CV91 Div.: 407
<hr/> Plaintiff(s): USA TAX LAW CENTER, INC. d/b/a US FAX LAW CENTER, INC. Defendant(s): MBA FINANCIAL GROUP, INC.	
ORDER GRANTING MOTION TO DISMISS	

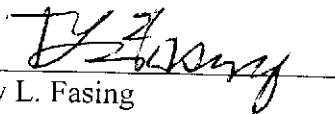
THE COURT having examined the pleadings and documents of record, and being sufficiently advised in the premises, FINDS AND ORDERS:

1. A motion to dismiss for failure to state a claim pursuant to C.R.C.P. 12(b) is viewed with disfavor and rarely granted. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992).
2. In evaluating a motion to dismiss, all averments of material fact in the complaint must be accepted as true. *Board of County Comm'rs of Adams County v. City of Thornton*, 629 P.2d 605 (Colo. 1981).
3. A complaint should not be dismissed unless it appears certain that the plaintiff would be entitled to no relief under any set of facts which could be proved in support of the claim. *People ex rel. Bauer v. McCloskey*, 112 Colo. 488, 150 P.2d 861 (1944); *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).
4. The Telephone Communication Privacy Act of 1991, 47 U.S.C. §227 (TCPA) does not address the issue of assignment of claims.
5. Where federal law is silent, "courts are to fill the statutory gaps by referring to principles of common law" and as a general principle of common the assignee stands in the shoes of the assignor. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994).
6. In Colorado, generally, claims are assignable unless they involve matters of personal trust or confidence, or for personal services. *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993).
7. Further, as a general rule, statutory penalties may not be assigned. See *Credit Men's Adjustment Co. v. Vickery*, 62 Colo. 214, 161 P.297 (Colo. 1916); *US Fax Law Center, Inc. v. IHire, Inc.*, No. CIV.04-B-344(CBS), 2005WL730352 (D. Colo. March 28, 2005).
8. Defendant asserts that assignment of these claims is invalid because the damages sought by the assignee under the TCPA are penal in nature.
9. In determining whether a statute is penal in nature, the Court must examine whether the statute creates a new cause of action and whether the statute requires proof of actual damages. *Palmer v. A.II. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984).
10. The Court must also examine whether the penalty imposed is greater than the actual damages. *Carlson v. McCoy*, 193 Colo. 391, 566 P.2d 1073 (Colo. 1977).

11. Although the holding in *US Fax Law Center, Inc.*, is not binding authority, the Court finds the reasoning to be persuasive and agrees that the TCPA creates a new cause of action which not does not require proof of actual damages and, in fact, imposes a penalty in excess of the actual damages. *US Fax Law Center, Inc. v. IHire, Inc.*, No. CIV.04-B-344(CBS), 2005WL730352 (D. Colo. March 28, 2005). The TCPA, therefore, is penal in nature and as such, TCPA claims cannot be assigned. *Id.*
12. Accordingly, the Motion to Dismiss is GRANTED.

Dated this 1st day of July 2005.

BY THE COURT:



Timothy L. Fasing
District Court Judge

The Moving Party is hereby Ordered to provide copy of this Order to all parties of record within five (5) days from receipt of this Order and File Certificate of Compliance within five (5) days thereafter