

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	cc: <u>P. Ridley</u> who SHALL IMMEDIATELY serve a copy to all counsel / parties pursuant to CRCP 5.
Plaintiff: CONSUMER CRUSADE, INC.	▲ COURT USE ONLY ▲
v. Defendant: AFFORDABLE HEALTH CARE SOLUTIONS, INC., <i>et al.</i>	Case Number: 04 CV 803
Ctvm: 7	
ORDER (Re: Motion to dismiss pursuant to C.R.C.P. 12(b)(1) and (5))	

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

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

Subject Matter Jurisdiction

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

(b) Restrictions on use of telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States,
or any person outside the United States if the recipient is
within the United States--

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

(3) Private right of action

A person or entity may, *if otherwise permitted by the law or rules of court of a State*, bring in an appropriate court of that State--

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

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

(C) both such actions.

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

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

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

considering the “small claims” nature¹ and high volume² of these disputes. Accordingly, the federal appellate courts have concluded that there is no federal private right of action. See e.g. *Murphey v. Lanier*, 204 F.3d 911, 913-15 (9th Cir. 2000) (concurring with five other circuits). As a result, state courts have exclusive jurisdiction to hear private actions under the TCPA.

The Supremacy Clause of Article IV³ requires that states enforce federal law when federal and state courts have concurrent jurisdiction, *Testa v. Katt*, 330 U.S. 386 (1947), as the expense of enforcing such laws must be borne by both the federal and state governments. However, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *New York v. U.S.*, 505 U.S. 144, 162 (1992). Thus, under the Tenth Amendment,⁴ it is an unconstitutional infringement on state sovereignty for the federal government to “commandeer” state courts by compelling them to enforce a federal program. *Id.* The TCPA was created by the federal government, but private enforcement may not take place in federal court. Understanding the constitutional impermissibility of coercing states, respecting the caseload challenges faced by state courts, and intending simply to assist states in the enforcement of their own laws, Congress specifically gave states the ability to reject the TCPA’s grant of jurisdiction. *International Science*, 106 F.3d at 1157. As a result, states may choose not to open their courts to private enforcement of the TCPA’s substantive rights. *Id.* at 1156.

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

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

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

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

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

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

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

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

Telephone and facsimile solicitations – deceptive trade practices

(1) A person engages in a deceptive trade practice when, in the course of such person’s business, vocation, or occupation, such person:

(b) (I) Solicits a consumer residing in Colorado by a facsimile transmission *without including in the facsimile message a toll-free telephone number that a recipient of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions.*

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

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

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

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

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

Unsolicited facsimiles -- deceptive trade practice.

(1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:

- (a) Uses a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or
- (b) []; or
- (c) Violates 47 U.S.C. sec. 227 or any rule promulgated thereunder.

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

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

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

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

Assignability

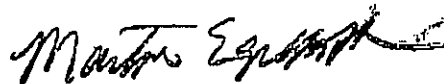
As the Court does not have jurisdiction over Plaintiff's claims, it is unnecessary to address the other arguments for dismissal contained in Defendant's motion (i.e. assignability).

CONCLUSION

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

SO ORDERED this 26 day of July, 2004.

BY THE COURT:



Martin F. Egelhoff
District Court Judge

cc: