


DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	
Plaintiff: U.S. FAX LAW CENTER, INC., a Colorado corporation Defendants: THE BARRINGTON GROUP, and JOHN HUELESKAMP and PAT WOODWARD, individually; <i>et al.</i>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case Number: 05 CV 2090 Courtroom 2
<p style="text-align: center;">ORDER RE: MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO C.R.C.P. 12(b)(1)</p>	

THE COURT having considered defendants T2 Technologies, Inc., David Baker and Kristin McDonald's (Defendants) motion to dismiss for lack of subject matter jurisdiction, the response, the reply, the court file and relevant authorities, and being sufficiently advised in the premises, finds, concludes and orders as follows.

1. Plaintiff brings this action as assignee from three corporate entities of claims under the Telephone Consumer Protection Act (TCPA), 42 U.S.C. §227 *et seq.* and the Colorado Consumer Protection Act (CCPA), C.R.S. §6-1-101 (*et seq.*), based on receipt of alleged unsolicited facsimile advertisements received from Defendants and others. Defendants move to dismiss for lack of subject matter jurisdiction contending that plaintiff's claims are non-assignable and therefore plaintiff lacks standing to assert them. The court first addresses the plaintiff's claims under the TCPA.

2. As an initial matter, standing is a question of subject matter jurisdiction. See Ainscough v. Owens, 90 P.3d 851, 855 (Colo.2004). Therefore, this motion is properly decided under C.R.C.P. 12(b)(1). In ruling on such a motion, the court acts as the factfinder. See Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo.1993).

3. In support of this motion Defendants rely primarily on U.S. Fax Law Center, Inc. v. IHIRE, Inc., 362 F.Supp.2d 1248 (D.Colo.2005) which held that TCPA claims based upon receipt of unsolicited facsimile advertisements are not assignable under Colorado law for the following reasons: (1) a TCPA claim is in the nature of a personal injury claim which would not

survive the plaintiff's death under the Colorado Survival Statute, C.R.S. §13-20-101(1); (2) TCPA claims are invasion of privacy tort claims which are not assignable; and (3) as to the statutory damages sought in both IHIRE, Inc. and in this case the TCPA is penal in nature and the right to collect a penalty may not be assigned. The court respectfully disagrees with reasons (1) and (2) above but agrees with reason (3) and hence grants the motion as to plaintiff's TCPA claims.

4. The TCPA prohibits, among other things, the sending of unsolicited facsimile advertisements. See 47 U.S.C. 227(b)(1)(c). Section 47 U.S.C. 227(b)(3)(B) provides for a private right of action "to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater. . . ." That section further provides that where a defendant willfully or knowingly commits the violation the court may triple the amount of the award. Thus, one knowingly sending an unsolicited fax may be liable in damages for up to \$1,500 for each facsimile sent. Where, as here, the statute is silent as to the assignability of claims, the determination of assignability is based upon the common law. See Tivoli Ventures v. Bumann, 870 P.2d 1244, 1248 (Colo.1994).

5. The court is unaware of any Colorado case which sets forth a definitive, all-inclusive test for the assignability of civil causes of action. Nevertheless, it does appear that in Colorado the following types of actions are not assignable: (a) matters of personal trust or confidence, or for personal services, Roberts v. Holland & Hart, 857 P.2d 492, 495 (Colo.App.1993); (b) an assignment of a claim which would be against public policy, id. at 496; (c) causes of action which do not survive the death of the plaintiff, Olmstead v. Allstate Ins. Co., 32 F.Supp. 1076, 1077 (D.Colo.1971) (noting that the general rule, established by the great weight of authority, is that actions which do not survive the death of the plaintiff are not assignable); and (d) causes of action to recover punitive damages or penalty absent express statutory language permitting assignability, see C.R.S. §13-20-101(1) (claims for punitive damages and penalties do not survive the death of the plaintiff), Estate of Burron v. Edwards, 594 P.2d 1064, 1065 (personal injury claim for exemplary damages does not survive the death of the plaintiff), U.S. Fax Law Center, Inc. v. IHIRE, Inc., 362 F.Supp.2d 1248 (D.Colo.2005) (citing 36 Am. Jur. 2d, Forfeitures and Penalties §56 for the proposition that generally, the right to recover a penalty is not assignable in the absence of express statutory language, and noting that this general rule was acknowledged in Credit Men's Adjustment Co. v. Vickery, 161 P. 297 (Colo.1916).

6. The court notes that while Roberts and Olmstead reached contrary results regarding the assignability of a legal malpractice claim, those cases are reconcilable. First, the later case, Roberts, which did not mention either Olmstead or the survival statute, categorized as non-assignable the same type of personal injury/trust claims which do not survive the plaintiff's death except for damages for loss of earnings and expenses. See C.R.S. §13-20-101(1). While Olmstead held that a legal malpractice claim was assignable because it survived the death of the plaintiff, Roberts held that the legal malpractice claim was not assignable on an entirely different ground – the assignment would be against public policy. In any event, for reasons stated below any possible conflict between Roberts and Olmstead does not affect this court's conclusion regarding the assignability of plaintiff's TCPA claims.

7. The first reason given for non-assignability in IHIRE, Inc. is that plaintiff's TCPA claims were claims in tort based upon personal injury and the statutory damages sought were not limited to loss of earnings and expenses sustained prior to death. Therefore such claims did not survive the death of plaintiff under C.R.S. §13-20-101(1) and were hence not assignable. This court finds that plaintiff's TCPA claims are not tort claims for personal injury and therefore respectfully disagrees with the first reason for non-assignability given by the court in IHIRE, Inc.

8. For reasons below this court concludes that plaintiff's TCPA claims are property claims in the nature of conversion or private nuisance which do survive the death of the plaintiff, see C.R.S. 13-20-101(1), and do not involve matters of personal trust, confidence or services. Therefore, absent being a penalty the claims are assignable. First, as observed by the court in International Science & Technology Institute, Inc. v. Inacom Communications, Inc., 106 F.3d 1146, 1150 (4th Cir.1997):

[T]he TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers (emphasis added).

Second, the legislative history of the TCPA indicates that the evils sought to be addressed by prohibiting unsolicited facsimile advertising, or junk faxes, were the shifting of the costs of advertising from the sender to the recipient, and preemption of the use of the recipient's facsimile machine by making it unavailable for legitimate business messages while processing the junk fax. Destination Ventures, Ltd. v. F.C.C., 844 F.Supp. 632, 636-37 (D.Or.1994). Thus, the purpose of, and legislative history behind the TCPA's prohibition against junk faxes suggest that the sending of junk faxes is a property claim in the nature of the conversion of the use of another's fax machine and materials, or a property claim for private nuisance. See Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631, 642 (4th Cir.2005) (an unwanted fax is a paradigmatic private nuisance). Third, the measure of non-statutory damages recoverable against the sender of a junk fax- "actual monetary loss from such a violation", 47 USC 227(b)(3)(B),- is more consistent with a property tort than a personal injury tort which normally involves non-economic damages. In summary, the court concludes that a violation of the junk fax prohibition under the TCPA gives rise to a claim for injury to property is thus assignable under Colorado law except to the extent it constitutes a penalty as discussed below.

9. This court also respectfully disagrees with the conclusion of the court in IHIRE, Inc. that a junk fax violation of the TCPA is a claim for invasion of privacy and thus non-assignable under the Restatement (Second) of Torts §652(I). The four generally recognized invasion of privacy torts are: (1) intrusion on the plaintiff's seclusion or solitude, or into plaintiff's private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of plaintiff's name or likeness. See Resource Bankshares Corp., 407 F.3d at 640, citing William L. Prosser, Privacy, 48 Cal. Law Review, 383 (1960). See also,

Restatement (Second) of Torts §652A (listing essentially the same four invasion of privacy torts). The only type of invasion of privacy relevant to the TCPA's prohibition against junk faxes would appear to be intrusion on the recipient's seclusion or solitude. While the TCPA was enacted to protect that privacy interest by restricting unsolicited telemarketing calls into the home, the interests sought to be protected by the prohibition against junk faxes is the facilitation of interstate commerce. See International Science & Technology Institute, Inc., 106 F.3d at 150. Furthermore the recipient of a junk fax can largely defeat the intrusion by simply disregarding the fax and, as a practical matter, commercial businesses with fax machines normally do not place a high value on seclusion or solitude. To the contrary, legitimate intrusions are normally good for business or at least part of business.

10. The court finds materially distinguishable the numerous federal court decisions relied on in IHIRE, Inc which have held that TCPA junk fax claims trigger coverage under insurance policies which provide coverage for advertising injury resulting from providing material that violates another person's right of privacy. First, there is a difference between the "right of privacy" for purposes of finding insurance coverage on the one hand, and the tort of invasion of privacy on the other. In addition, Resource Bankshares Corp., reversed the district court's decision in Resource Bankshares Corp., v. St. Paul Mercury Ins. Co., 323 F.Supp.2d 709 (E.D.Va.2004) which concluded that there was insurance coverage for a TCPA junk fax violation because it violated the recipient's right of privacy. In doing so, it convincingly called into question the reasoning of the lower court and raises questions about the reasoning of other federal cases relied on in IHIRE, Inc. In summary, the court concludes that plaintiff's TCPA junk fax claims are not claims for invasion of privacy and are thus not subject to the prohibition of assignability of such claims. As stated above, the court concludes that these claims are property claims in the nature of conversion or private nuisance.

11. The court does agree with the analysis and conclusion the court in IHIRE, Inc. that substantially identical TCPA junk fax claims in that case were not assignable because as to such claims the TCPA is penal in nature. First, as noted in IHIRE, Inc., the general rule is that the right to recover a penalty is not assignable in the absence of express statutory language to the contrary. IHIRE, Inc., 362 F.Supp.2d at 1253, citing 36 Am. Jur. 2d, Forfeiture and Penalty §56. Second, the court agrees that Palmer v. A.H. Robins Company, 684 P.2d 187, 214 (Colo. 1984), sets forth the appropriate test for determining whether or not a statute is penal in nature. Third, the court agrees with the analysis of the court in IHIRE, Inc. that the TCPA claims in this case, where plaintiff also seeks only statutory damages, see prayer for relief in Complaint, are penal nature under the Palmer test.

12. As to the Palmer test, the court would add that the use of "actual monetary loss" in section 47 USC 227(b)(3)(B) as the measure of actual damages clearly indicates that the type of consequential damages referred to by the plaintiff in its argument that the statute is primarily remedial, are not recoverable. Further, "actual monetary loss" as recognized in the congressional history to the TCPA consists of the shifting of costs of advertising from the sender to the recipient and preemption of the use of the recipient's facsimile machine for the brief period of time it is processing the unsolicited fax. See Destination Ventures, Ltd., 844 F.Supp at 636. Barring consequential damages, damages of between \$500 and \$1,500 for a single fax are going

to be grossly disproportionate to any actual monetary loss in any reasonably conceivable situation.

13. In summary, the court concludes that plaintiff's TCPA claims are penal in nature and thus not assignable. Since plaintiff asserts these claims only in the capacity of assignee, plaintiff lacks standing to assert its TCPA claims. Therefore, the court grants the motion to dismiss plaintiff's TCPA claims for lack of subject matter jurisdiction over said claims. All of plaintiff's claims based on violation of the TCPA are ORDERED dismissed.

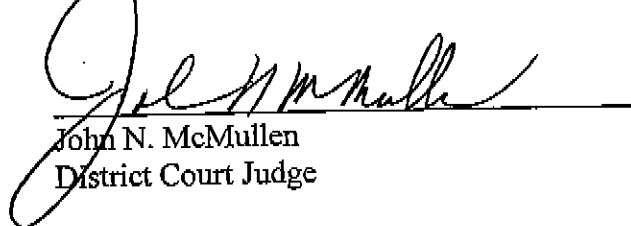
14. The court does not address this motion as it relates to plaintiff's CCPA claims because substantially all of the argument on this motion was directed to the TCPA claims, and the court is not aware of whether plaintiff intends to pursue its CCPA claims in view of this order. Plaintiff is ordered to advise the court of its intention within 20 days and/or request a ruling on the CCPA claims.

15. The court has thoroughly considered the arguments in plaintiff's self described "ponderous" (53 page) Response and has read and considered the voluminous attachments to the Response. Plaintiff is advised that the court does not intend to reconsider this order absent the presentation of previously not cited, reported authority directly on point.

SO ORDERED.

Dated this / day of July, 2005

BY THE COURT:


John N. McMullen
District Court Judge

cc: All parties.

cc: Andrew Quiat who
**SHALL IMMEDIATELY serve a
copy to all counsel / parties
pursuant to CRCP 5.**