
AN EASY CAUSE OF ACTION FOR SPAM FAXES— THE TELEPHONE PROTECTION ACT OF 1991

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Although Congress has not yet addressed e-mail spam. Congress passed the Telephone Consumer Protection Act of 1991 ("TCPA") in an attempt to address the complaints and cries of annoyed consumers fed up with receiving unwanted facsimile solicitations and telephone calls. See 47 U.S.C. §227 (1991). As a result of the enactment of this legislation, private individuals and entities who receive unsolicited fax advertisements may seek damages and an injunction against both the actual physical person who sent the fax, as well as the company or entity on whose behalf the fax was sent. The TCPA is apparently designed with the pro se plaintiff in mind – (1) it provides for statutory damages, and (2) most courts have forced litigation into state court, including small claims court. Further, the elements appear simple to prove and provide for a further penalty if the actions are determined to be willful.

At least one Alabama *pro se* plaintiff has filed at least fifty of these lawsuits. Further, at least one class action (against the Hooter's restaurant) has resulted in a verdict in excess of \$1 million. Although the TCPA also addresses unsolicited telephone calls and the restrictions Congress implemented regarding the same, this article will focus only upon unsolicited facsimile advertisements and the related issues. Congress recognized that the facsimile machine, by its very design, provided a unique avenue for telemarketers to overwhelm consumers with unsolicited advertisements. Specifically, the recipient of the unsolicited fax advertisement is harmed in two distinct ways. "First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." Jeffrey Danile, *Recent Developments in New York Law*, 73 ST. JOHNS L. REV. 613, 613, n.4 (1999) (discussing H.R. Rep. No. 102-1096, at 100-01, which outlined the facsimile machine's ability to print messages sent to the machine's designated telephone number and the process the auto-

matic dialing service to dominate a telephone line until the message has been accepted).

The TCPA's history can be traced back to 1989 when three separate bills were introduced on the floor of the House of Representatives. Fabian D. Gonell, *Statutory Interpretation of Federal Jurisdictional Statutes: Jurisdiction of the Private Right of Action Under the TCPA*, 66 FORDHAM L. REV. 1895, 1912 (1998). The purpose of each of the bills was to force the Federal Communications Commission ("FCC") to promulgate rules and regulations that would place restrictions on the telemarketing industries. During this same year, similar legislation was introduced in twenty-seven states. Because of the federal preemption in the Communications Act of 1934, however, states had the right to implement only legislation that regulated intrastate activity. As such, the TCPA was the federal legislation needed to address the issues spawning from the new wave of telemarketing. *Id.*

Federal Versus State Court

Although the TCPA does not directly address the issue of whether federal jurisdiction is available, the vast majority of the courts that have considered the issue, including the Eleventh Circuit, have held that claims under the TCPA cannot be brought in federal court because Congress specifically intended for jurisdiction to be in the respective state courts.

In *Nicholson v. Hooters of Augusta Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), the Eleventh Circuit stated:

Here, the text of the Act, including the specific grant of federal jurisdiction to state attorneys general, as well as the Act's legislative history, demonstrate that Congress intended to assign the private right of action to state courts exclusively.

Id. In making this determination, the court also discussed the rationale of other circuits that have

held that Congress specifically provided for jurisdiction under the TCPA to be in the respective state courts. See Murphey v. Lanier, 204 F.3d 911, 915 (9th Cir. 2000) (holding that there was no federal court jurisdiction over a claim brought by a lawyer who received an unsolicited facsimile advertising computer systems); Ernienet Inc. v. VelocityNet Inc., 156 F.3d 513, 519 (3rd Cir. 1998) (holding that there was no federal court jurisdiction over a class action claim brought by a corporation that received an unsolicited facsimile advertisement); Foxhall Realty Law Offices v. Telecomm. Premium Servs. Ltd., 156 F.3d 432, 434 (2nd Cir. 1998) (holding that there was no federal court jurisdiction over a class action claim brought by a corporation that received an unsolicited facsimile advertisement); see also Chair King Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997) (holding there was no federal court jurisdiction over a claim brought by a corporation that received an unsolicited facsimile advertisement); International Science & Tech. Inst. v. Inacom Communications Inc., 106 F.3d 1146 (4th Cir. 1997) (holding there was no federal court jurisdiction over a claim brought by a corporation that received several unsolicited facsimile advertisements for long-distance telephone service). But see Kenro Inc. v. Fax Daily Inc., 962 F. Supp. 1162, 1164 (S.D. Ind. 1997) (holding that a federal court had jurisdiction over TCPA claim removed from state court).

Private Causes of Action Under the TCPA

The statutory language of the TCPA that creates a private cause of action has been widely debated. 47 U.S.C. §227 (a)(3). The meaning of the key phrase “if otherwise permitted by the laws or rules of court of a State” has been interpreted differently by courts. *Id.* For example, the Texas Court of Appeals has held that in order for an individual to bring a private cause of action, the state must have explicit legislation authorizing this type of claim. Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc., 16 S.W.3d 815 (Tx. Ct. App. 2000). (This has been referred to as an opt-in requirement.) On the other hand, the Georgia Court of Appeals disagreed and held that the cause was allowed so long as the state did not have a statute prohibiting such action. Hooters of Augusta, Inc. v. Nicholson, 537 S.E.2d 468 (Ga. Ct. App. 2001). (This has been referred to as an opt-out requirement.) Alabama has not passed any legislation that could be construed as authorizing an individual to bring a private cause of action under the TCPA.

Section (b) of the statute sets forth the statutory restrictions placed on automated telephone equipment. With regard to facsimile machines, the statute makes it “unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited adver-

tisement to a telephone facsimile machine” 47 U.S.C. §227 (b)(C).

Damages

The TCPA provides for injunctive relief and statutory damages in the amount of five-hundred dollars (\$500.00) per violation. 47 U.S.C. §227(b)(3). Additionally, the court has the discretion to award the plaintiff treble damages where the court determines that the statute was “willfully and knowingly” violated. *Id.*

The dilemma that courts and attorneys face regarding the damage provision is that no court has defined the terms “willful” and “knowingly” under the confines of the TCPA. See Irvine v. Akron Beacon Journal, 770 N.E.2d 1105, 1120 (Ohio Ct. App. 2002) (noting that it was unable to find any cases defining the terms “willful” or “knowingly” under the TCPA). As such, courts have been forced to consider the definitions of the two terms in other contexts.

In Charvat v. Colorado Prime, Inc., 1998 Ohio LEXIS 4292, *6 (Ohio Ct. App. 1998), the court held that in order for a plaintiff to be held liable for treble damages under the TCPA, the plaintiff must “affirmatively know it is violating a regulation when making a telephone call.” The court stated that it found “no congressional intent indicating that knowingly should be interpreted to encompass ‘should have known’ and finds that this interpretation would be inconsistent with the plain meaning of knowingly.” *Id.* Likewise, in Kaplan v. City of New York, 701 N.Y.S.2d 859, 864 (N.Y. Ct. Cl. 1999), the court denied treble damages stating that the party’s actions were not willful or knowing. Because the terms were not defined in the statute, the court construed the terms according to their ordinary and natural meanings. The court specifically referenced the defendant’s testimony that he was not aware of the statutory provisions restricting telemarketing. As such, the court noted that it appeared the defendant’s actions were “innocent, unintentional, unknowing, and not reckless.” *Id.*

However, other courts have not been so conservative in their application of the damage provision. The cases where treble damages have been awarded under the TCPA have noted that the defendants in those actions were aware of the TCPA at the time when the alleged violations occurred. In State of Texas v. American Blast Fax, Inc., 164 F. Supp. 2d 892, 899 (W.D. Tex. 2001), the court stated that “the defendants were well-aware of the TCPA when they began sending unsolicited intrastate faxes” The court held that the Federal Communications Act (of which the TCPA is part) has interpreted “willful or knowing” as not requiring bad faith, but only that the person have reason to know, or should have known, that his conduct would violate the statute. *Id.* In Irvine v. Akron Beacon Journal, 770 N.E.2d 1105, 1120 (Ohio Ct. App. 2002), the

court considered the definition of “willful violation” under the Age Discrimination Employment Act (“AEDA”) when attempting to determine if a plaintiff willfully violated the TCPA. The AEDA states that an employer willfully violated the act if he “demonstrates a knowing or reckless disregard for the matter of whether its conduct was prohibited by the act.” The court considered the fact that the company was aware of the TCPA and that even with this knowledge, the company’s manager engaged in conduct that violated the statute without discussing the matter with the legal department or anyone else. *Id.* The court held that reasonable minds could conclude that the company demonstrated a reckless disregard for whether its conduct violated the TCPA. In the wake of such different rulings by courts, a defendant found guilty of sending an unsolicited facsimile advertisement could be forced to pay \$1500.00 per fax.

Independent Contractors

In many of the cases involving unsolicited advertisement faxes, there are two separate parties involved – the party who actually sent the fax and the party on whose behalf the fax was sent. As expected, the result is that both parties are often named in the complaint and, in turn, each party often points the finger at the other.

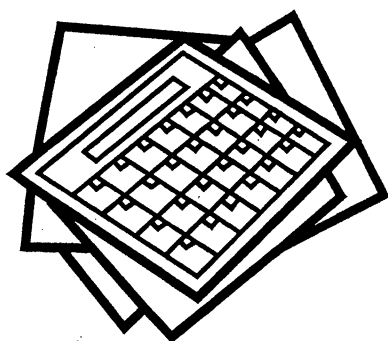
In *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. Ct. App. 2001), the court held that “[u]nder the TCPA the entity or entities in whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA’s] rule banning unsolicited

facsimile advertisements.” *Id.* at 473 (citing Release No. 95-310 of the Federal Communications Commission, CC Docket No. 92-90, 10 FCC Rcd. 12391 (1995), Pars. 34-35). The court held, based on the authority from the FCC, the advertiser could not avoid liability under the TCPA because the transmission of the fax was executed by an independent contractor. *Id.* See also *Worsham v. Nationwide Ins. Co.*, 772 A.2d 868 (Md. Ct. App. 2001) (stating that the existence of an independent contractor relationship would not, alone, insulate the company from liability under the TCPA).

Regardless of the court considering this particular issue, it is apparent that companies will not be able to avoid liability under the TCPA by merely hiring a third party to actually hit the send button.

Conclusion

The TCPA was intended to provide the *pro se* plaintiff the ability to walk into small claims court and seek relief from an industry that had started to invade the consumer in his home and office. Much to the dismay of the legislators who drafted the TCPA, ironically, the statute has become the subject of complex and lengthy lawsuits, resulting in class action suits with verdicts of 1.7 million, not to mention exorbitant legal fees. As a result, unsolicited advertisement faxes violating the TCPA have been listed by the National Law Journal as one of the “6 New Ways to Win”. There remain unresolved legal issues on this statute but more TCPA claims can be expected in the future.



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