

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
LOS GATOS FACILITY
SMALL CLAIMS**

Endorsed
FILED

MAY 29 2002

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of Cal. County of Santa Clara
By S. J. [Signature] Deputy

ROBERT M. FENERTY,
Plaintiff,
vs.
CEDAR MORTGAGE COMPANY, INC.
Defendant.

No. AS 02274098

JUDGMENT

The matter came on regularly for court trial on Monday, May 20, 2002, as line item number 5 on the 8:30 a.m. calendar, in Department 97 of the court, before the Honorable M. Dean Sutton, Judge Pro Tem. Plaintiff Robert M. Fenerty appeared for himself, and Ms. Marge Nagosek appeared as authorized officer on behalf of Defendant Cedar Mortgage Company, Inc. with one witness, Mr. Brian Nall. The parties agreed to trial by Judge Pro Tem. The parties and witness, after being duly sworn, testified.

ISSUE SUBMITTED

In summary, Plaintiff sues for damages for alleged violation of a federal statute which prohibits unsolicited advertisements transmitted by telephone facsimile machine ("fax"). Such unsolicited faxes are commonly referred to as "junk faxes."

Defendant defends by asserting that the fax advertisements sent out are not unlawful under the federal statute, because they are in compliance with the provisions of a similar, but different, California statute. The Defendant argues that the California statute, rather than the federal statute, is the applicable rule of law to fax advertisements sent intrastate, and therefore the present advertisements are not actionable and no damages are due.

1 The issue presented to the Court is whether Congress intended to completely preempt the
2 field in the area of regulation of unsolicited fax advertisements, and if not, should a court apply
3 the provisions of the federal or state statute, or both, to determine legality?

4 The issue appears to be a matter of first impression in California courts.

5 **FINDINGS OF FACT**

6 The relevant and material facts are not contested. Defendant corporation is in the business
7 of arranging real estate mortgage loans. Defendant hired a third party business to send a one-page
8 advertisement to telephone numbers in the area which have fax machines which print out the
9 advertisement. The advertisement contains the name, address, 800 toll-free telephone number,
10 and email address of Cedar Mortgage, and of one of the real estate salesman, Brian Nall. The
11 advertisement contains at the bottom a line in smaller font which provides: "If you received this
12 fax in error and would like to have your fax number removed from our list, call toll-free: ..." a
13 different 800 toll-free number than that for the mortgage broker. A copy of the one-page fax
14 advertisement is attached hereto as Exhibit A.

15 There was no pre-existing relationship between Plaintiff and Defendant. They did not
16 know each other. Neither had ever had any business transaction with the other. The
17 advertisements here were unsolicited.

18 Plaintiff testified that he received the first advertisement on his home fax machine on
19 March 7, 2002 at 5:30 p.m. He did not call the 800 number to ask to have his fax number
20 removed from the list. Instead, on March 11, 2002 he mailed a letter to Cedar Mortgage, citing
21 the Telephone Consumer Protection Act of 1991, 47 USC § 227, and demanding the payment of
22 \$1,500 no later than March 31, 2002 to avoid further litigation.

23 On April 4, 2002, Defendant by Marge Nogosek, President of the corporation, sent a letter
24 to Plaintiff saying it was not their intent to send unsolicited facsimile messages. The letter in part
25 says that ..." [P]lease note that we have deleted your number from our database and you will no
26 longer be receiving communications to that number."

27 Plaintiff filed action in Small Claims Court on April 2, 2002 for \$1,500.
28

1 At trial on May 20, 2002, Plaintiff testified that he had received a second unsolicited fax
2 from Defendant on April 5, 2002 at 1:00 p.m..

3 Plaintiff moved to amend his "Plaintiff's Claim" to ask for \$3,000, being \$1,500 for each
4 of the two unsolicited faxes under the federal statute.

5 **PLAINTIFF'S POSITION**

6 Plaintiff sues for damages under the provisions of 42 U.S.C. § 227, the Telephone
7 Consumer Protection Act of 1991 ("TCPA"), Pub.L. No. 102-243, 105 Stat. 2394-2402 (1991),
8 which took effect on December 20, 1991.

9 Specifically, section 227(b)(C) provides in relevant part that: "It shall be unlawful for any
10 person within the United States ... to use any telephone facsimile machine, computer, or other
11 device to send an unsolicited advertisement to a telephone facsimile machine; ... "

12 In § 227(a)(4), Congress defines "unsolicited advertisement" as "... any material
13 advertising the commercial availability or quality of any property, goods, or services which is
14 transmitted to any person without the person's prior express invitation or permission."

15 The TCPA authorizes and directs the Federal Communications Commission ("FCC") to
16 prescribe regulations to implement the requirements of the statute. Plaintiff provided to the court
17 a copy of what appears to be the current regulations, being 47 C.F.R. § 64.1200, which at (a)(3)
18 again provides that no person may use a telephone facsimile machine, computer, or other device
19 to send an unsolicited advertisement to a telephone facsimile machine.

20 In § 227(3), Congress provides for a private right of action:

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

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

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

27 (C) both such actions.

28 **If the court finds the defendant willfully or knowingly violated this subsection
or the regulations prescribed under this subsection, the court may, in its
discretion, increase the amount of the award to an amount equal to not more
than 3 times the amount available under subparagraph (B) of this paragraph.**

1 (Emphasis added.)
2 Plaintiff sues for statutory damages \$500 for the advertisement of March 7, trebled to
3 \$1,500, plus \$500 for the advertisement of April 4, trebled to \$1,500, for a total of \$3,000.
4 Other than use of his phone line and fax machine, time, paper and ink/toner, Plaintiff alleged no
5 actual damages. Plaintiff asks for court costs, and for litigation costs such as mileage and
6 photocopies, which are not allowed by law.

7 DEFENDANT'S POSITION

8 Defendant argues that the advertisements here are legal as authorized by California
9 Business & Professions Code § 17538.4 (enacted 1992) which provides in relevant part:

10 (a) **No person** or entity conducting business in this state shall facsimile (fax) or
11 cause to be faxed, or electronically mail (e-mail) or cause to be e-mailed,
12 documents consisting of **unsolicited advertising material** for the lease, sale,
13 rental, gift offer, or other disposition of any realty, goods, services, or extension of
14 credit **unless:**

15 **(1) In the case of a fax, that person or entity establishes a toll-free telephone
16 number that a recipient of the unsolicited faxed documents may call to notify
17 the sender not to fax the recipient any further unsolicited documents.**

18 (2) ...

19 (b) All unsolicited faxed or e-mailed documents subject to this section shall
20 include a statement informing the recipient of the toll-free telephone number that
21 the recipient may call, or a valid return address to which the recipient may write or
22 e-mail, as the case may be, notifying the sender not to fax or e-mail the recipient
23 any further unsolicited documents to the fax number, or numbers, or e-mail
24 address, or addresses, specified by the recipient.

25 In the case of faxed material, the statement shall be in at least nine-point type. In
26 the case of e-mail, the statement shall be the first text in the body of the message
27 and shall be of the same size as the majority of the text of the message.

28 (c) Upon notification by a recipient of his or her request not to receive any further
unsolicited faxed or e-mailed documents, no person or entity conducting business
in this state shall fax or cause to be faxed or e-mail or cause to be e-mailed any
unsolicited documents to that recipient.

(d) ...

(e) ...

(f) As used in this section, "fax" or "cause to be faxed" or "e-mail" or "cause to be
e-mailed" does not include or refer to the transmission of any documents by a
telecommunications utility or Internet service provider to the extent that the
telecommunications utility or Internet service provider merely carries that
transmission over its network.

(g) ...

(h) ...

(i) ...

(Emphasis added.)

1 Defendant argues that:

2 1. the California statute expressly allows unsolicited advertisement by fax if the fax
3 contains an 800 "opt out" phone number which the recipient can call to remove his fax telephone
4 number from the sender's database;

5 2. the California statute is not completely preempted by the federal statute and therefore is
6 the controlling rule of law for faxes sent intrastate; and,

7 3. the 800 "opt out" telephone number provision of the California statute prevails over the
8 federal statute, causing the unsolicited advertising by fax to be lawful.

9 **CONCLUSIONS OF LAW**

10 A. There is no question that the Plaintiff may bring a suit in state court, including Small
11 Claims Court, for damages for violation of this federal statute. Under § 227(3), Congress
12 expressly provides for a private right of action in an appropriate state court if otherwise permitted
13 by the laws or rules of court of a State. The jurisdictional limit for recovery of money damages in
14 Small Claims Court is \$5,000. (California Code of Civil Procedure § 116.220(a).) This action is
15 proper in this court.

16 B. There is no issue of interference with free speech under First Amendment for protected
17 commercial speech. Commercial speech for which the recipient must pay to receive advertising is
18 not protected by the Constitution. A governmental body seeking to sustain a restriction on
19 commercial speech must demonstrate that the harms it recites are real and that is restriction will in
20 fact alleviate them to material degree. The TCPA's ban on unsolicited faxes is a reasonable means
21 of preventing the shifting of advertising costs to consumers and is valid. (Destination Ventures,
22 Ltd. v FCC, 844 F. Supp. 632, affirmed 46 F.3d 54 (9th Cir. 1995).)

23 C. It is no defense to the Defendant that the Plaintiff did not call the 800 "opt-out"
24 number to remove his fax number. A residential consumer and a business person is entitled to
25 uninterrupted use of their fax machine, and have no duty to spend time calling telephone numbers,
26 begging unknown, unidentified people or automated machines not to trespass in their home or
27 business any further. Just because a business is open to the public does not mean that a business
28

1 fax can be tied up for endless, unsolicited advertisements. Faxes cost the recipient money, paper,
2 ink/toner, distraction, and time. Junk faxes cause actual damages to a business. In businesses,
3 employees have to be instructed as to what to throw away and when to call to try to stop the faxes.
4 None of this is a burden accepted by a residential consumer or a business when a fax machine is
5 purchased. Businesses need to be free from the intrusive burden of junk faxes even more than a
6 residential consumer who is only occasionally inconvenienced by them. The cumulative burden
7 on the economy and society was clearly a consideration of Congress in passing the federal statute.

8 D. The issue here is: Did Congress intend to completely preempt the field of junk faxes?
9 Put differently, is this similar, but different, state statute also effective? Even if an advertiser
10 complies with the state statute, must he also comply with the federal statute?

11 In general, the U. S. Constitution establishes a federal system, in which some areas of law
12 are exclusively federal, such as bankruptcy; some areas of law are exclusively state, such as real
13 estate law; and many areas of law are in the middle and may be regulated by both. In today's
14 world, many areas of law could be governed and regulated solely by Congress by federal law
15 under the "Interstate Commerce" Clause (U.S. Constitution, Article I, Sect. 8). If Congress has
16 the power to regulate, it could decide to "preempt," that is, totally take over the field no matter
17 what state law says, under the "Supremacy Clause" (U.S. Constitution, Article VI). (See: United
18 States v Lopez 514 U.S. 549 (1995); Wickard v Filburn 317 U.S. 111 (1942).) However, in many
19 areas of modern life, Congress decides often not to completely preempt the field, but only to
20 establish a "default" provision of law which is the applicable rule of law, unless a state passes a
21 more protective statute otherwise.

22 In health and safety and "consumer protection" statutes, Congress will often pass a statute
23 which provides a level of minimum protection for individuals, which is the applicable rule of law,
24 unless a state passes a higher minimum of consumer protection. If a state provides a higher
25 minimum of consumer protection, the state law will be the applicable rule of law in that state. A
26 state law may not, however, provide a lower minimum of consumer protection, even under a
27 theory of "state's rights" or state sovereignty.

28

1 So it appears in the present case. Here, Congress has declared that any, even the first,
2 unsolicited fax advertisement is prohibited, wrongful, and gives a cause of action to the victim for
3 actual damages or \$500, whichever is greater.

4 The California statute says an advertiser can send an unlimited number of unsolicited fax
5 advertisements if the 800 "opt-out" number appears, unless the recipient calls the 800 number and
6 asks to be removed from the list.

7 Clearly the federal statute provides a higher minimum level of protection to the innocent
8 recipients of the unsolicited advertisements. This Court has found nothing in the statutory
9 language, FCC regulations, or in the public policy of Congress which leads to the conclusion that
10 Congress intended any state statute to allow a lower level of consumer protection in this area.

11 Therefore, this Court holds and declares that to the extent California Business &
12 Professions Code § 17538.4 authorizes unsolicited solicitation by fax which is prohibited by 42
13 U.S.C. § 227, the California statute is preempted by federal law under the Supremacy Clause of
14 the U.S. Constitution. An advertiser who sends an unsolicited fax must comply with both
15 statutes. Violation of either statute gives a right to damages under the violated statute.
16 Compliance with the state statute is no defense to violation of the federal statute.

17 There remains the issue of the proper measure of damages. Defendant stresses that it
18 simply hired a separate advertising business, and did not do anything with a malicious heart. This
19 Court believes that Ms. Nagosek did not intend to violate any law. However, the law requires a
20 minimum damage of \$500 per fax, or actual damages, whichever is greater.

21 The last issue is whether treble damages for the first or second fax should be awarded.
22 The law does not require a finding by the court that the defendant maliciously caused the
23 unsolicited advertisement, but only that the act was willful or knowing. The defendant only has
24 to intend to send (or cause to be sent) via fax the unsolicited advertisement.

25 Plaintiff submitted to the court a letter of July 27, 1999 from the FCC to Robert
26 Biggerstaff, copy attached hereto as Exhibit B. In the letter, the FCC states it has not expressly
27 defined "willfully or knowingly" for this statute, but in other contexts has decided the word
28 "willful" means "the conscious and deliberate commission or omission of [an] act, irrespective of

1 any intent to violate any provision of this Act or any rule or regulation of the Commission
2 authorized by this Act." "Willful" has been interpreted to mean simply that "the acts or omissions
3 are committed knowingly. It is not pertinent whether or not the [...] acts or omissions are intended
4 to violate the law." The letter also states that "knowingly" in similar contexts has been interpreted
5 as "knew or should have known." "Knowingly" is equivalent to "willful." This Court agrees
6 with this interpretation.

7 It is no defense to the Defendant that it hired an outside advertising business. The
8 violation of law is imputed to the person causing and benefitting from the unsolicited advertising.

9 The Court finds that Defendant willfully and knowingly sent the first and second fax in
10 this case. The situation was made worse because of the letter from Defendant saying Plaintiff had
11 been removed from the database, only to have the Plaintiff receive the second fax. This clearly
12 demonstrates the lesser protection to the recipient under the state statute. Therefore, treble
13 damages are appropriate here.

14

15 **JUDGMENT**

16 The issues having being argued and submitted, and good cause appearing:

17 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

18 Plaintiff Robert M. Fenerty is hereby awarded damages against Cedar Mortgage Company,
19 Inc. in the total sum of \$3,000.00, plus allowable court costs in sum of \$28.00, for a **total**
20 **judgment of \$3,028.00.**

21

22 Date: May 23, 2002

23

24

25

26

27

28



M. DEAN SUTTON
Judge Pro Tem of the Superior Court

Exhibit A

www.



CedarMortgage.com

If you are thinking about purchasing or refinancing,

Get Your Rate...

...Before It's TOO LATE!



ACT NOW! Mortgage rates are lower than they've been in years. Who knows how long they'll stay this low!

- No Points! No Costs! *Call For a Quote.*
- No Money Down! *Call For a Quote.*
- No Income Verification Loans!
- Buy Your Dream Home Now!

Call today to find out if you can SAVE HUNDREDS OF DOLLARS per month! Even **GET CASH BACK**, wipe out debts, and still lower your payments! Don't miss out.

We Can Help!

Call Toll-Free:

888-827-2885

Brian Nall x 119

Call Toll-Free:

www.CedarMortgage.com

If you received this fax in error and would like to have your fax number removed from our list, call toll-free: 800-405-5537.

3-7-02 5:30 PM

EXHIBIT "A" 1/1

Exhibit G



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 27, 1999

Robert Biggerstaff
P.O. Box 614
Mt. Pleasant, SC 29465

Dear Mr. Biggerstaff:

I am writing in response to your June 22, 1999, letter requesting that the Commission clarify a provision of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA). Specifically, in your letter you note that the TCPA provides for trebled damages if a defendant has "willfully or knowingly" violated the statute or the Commission's rules.¹ Your letter requests that the Commission clarify the phrase "willfully or knowingly" as utilized in section 227(c)(5).

The Commission has not defined the phrase "willfully or knowingly" in the context of the TCPA. Congress and the Commission, however, have defined the terms "willfully" and "knowingly" in other contexts. For example, section 312(f)(1) of the Communications Act of 1934, as amended, (Act), 47 U.S.C. § 312(f)(1), defines the word "willful" as "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act."² In examining the definition of "willful" outside its use in section 312, the Commission has explained that an intent to do wrong is not required to find willfulness.³ Applying that standard, the Commission has stated that the term "willful" has been interpreted to mean simply that "the acts or omissions are committed knowingly. It is not pertinent whether or not the [] acts or omissions are intended to violate the law."⁴

¹ 47 U.S.C. § 227(c)(5).

² 47 U.S.C. § 312(f)(1).

³ See *Liability of Midwest Radio-Television Inc., Memorandum Opinion and Order*, 45 F.C.C. 1137, 1140-41, at paras. 3-11 (1965) (explaining that the word "willfully" as used in section 503(b) of the Act does not require that the actor knew he was acting wrongfully; it requires only that the actor knew he was doing the acts in question).

⁴ *Media General Cable of Fairfax County, Notice of Apparent Liability for Forfeiture*, 13 FCC Rcd 11863, 11870, para. 7 (1998).

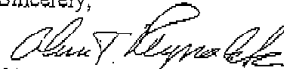
EXHIBIT "B" ("OVER")
1/2

Robert Biggerstaff
July 27, 1999
Page 2

The term "knowingly" has not been defined by the Commission in the TCPA context. The Commission, however, has discussed the word "knowingly" in other contexts. For example, the Commission defined "knowingly" as used in section 223(b)(1) of the Act, 47 U.S.C. § 223(b)(1), as "knew or should have known."⁵ In other cases, the Commission has defined "knowingly" as equivalent to "willful."⁶

We hope that this information is helpful. This is an informal staff opinion issued pursuant to authority delegated in sections 0.91 and 0.291 of the Commission's rules.⁷

Sincerely,



Glenn T. Reynolds
Acting Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission

⁵ *Audio Enterprises, Inc., Notice of Apparent Liability for Forfeiture*, 3 FCC Rcd 7233, 7237, para. 29 (1988) (stating that the definition of "knowingly" used by the Commission is consistent with Congressional intent).

⁶ *See Liability of Outlet Communications, Inc. and Atlin Communications, Inc., Memorandum Opinion and Order*, 7 FCC Rcd 652, 653, para. 13 (1992); *see also Midwest*, 45 FCC Rcd at 1159, para. 8; *see also George E. Cameron Jr. Communications, Memorandum Opinion and Order*, 95 F.C.C. 2d 789, 792 n.7 (1983).

⁷ 47 C.F.R. §§ 0.91, 0.291.

EXHIBIT "B" 2/2