

4. Facts supporting this request (cases 4-03-SC-003174, 4-04-SC-006735, 4-04-SC-006736)

Background: On July 30, 2004, Plaintiff had hearings on three cases, all involving the same Defendants, for three separate and unrelated violations of the Telephone Consumer Protection Act. These hearings were in the Los Gatos Small Claims Court. The Commissioner ruled that Plaintiff was splitting a single case. The three cases asked for damages in the amounts of \$2,500, \$2,500, and \$4,500.

The Commissioner ruled that Plaintiff could either pursue a single case for the lesser amount (with both other cases dismissed with prejudice) or that Plaintiff could choose dismissal of all three cases without prejudice such that the cases could be pursued of in the Court of Limited Jurisdiction. Plaintiff chose dismissal of all three cases without prejudice.

The Commissioner was incorrect in ruling that these were really a single case that Plaintiff had split.

Arguments:

All three of these cases involved knowing or willful violations of the TCPA and regulations promulgated under the TCPA—specifically, that Defendants sent three unsolicited faxes, each separated from the others by at least a month in time, to Plaintiff advertising mortgages after having been cited by the FCC for past unsolicited faxes. Further, Defendants violated other regulations under the TCPA in attempting to conceal their identity.

The TCPA, a federal law with a private right of action in state court, specifies that:

“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—

...

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

The relevant point of this section is that **the tort occurs the instant the fax is sent**. The fact that a second fax is sent a month later constitutes a completely separate violation (different occurrence, event, and nucleus of facts); the violations are independent of one another and each has statutory minimum damages (as specified by the TCPA). The plain language of the law makes clear that the violation and damages for each fax are entirely independent of any other fax sent.

To require mandatory joinder of these claims requires that these claims arise out of the same occurrence, event, or nucleus of facts. Just because the legal theory is similar doesn't mean it arises out of the same transaction or occurrence

These three claims do not meet the requirements for mandatory joinder. Each claim was a separate occurrence, unrelated to the others. Each was a discrete event; no event spanned the sending of any two faxes and they did not occur closely in time. The facts in each case are distinct and unrelated; certainly the relevant facts to each claim do not include the facts of any other claim. The fact that Plaintiff is suing under the same law or legal theory is neither relevant to nor part of the mandatory joinder test.

Each unsolicited fax sent on each separate occasion gives rise to a separate and distinct claim from each other fax. Each claim can be brought in a separate action. Just because each claim will involve the same plaintiff and the same defendant as any other similar claim does not require joining the separate claims into one action; Plaintiff could have done so if desired (permissive), but Plaintiff did not have to join the cases (mandatory). Plaintiff is not splitting a claim by filing a separate action on each fax. Each fax gives rise to a separate claim and each of the claims is a claim separate from each of the others.

The word "claim" (not defined in the California Code of Civil Procedure but used by it to describe both the legal right and the document filed and served to set in motion the legal process to vindicate violation of a legal right), when used as a noun, means in general legal parlance "making of a demand (asserting a claim) for money due, for property, from damages or for enforcement of a right." After Plaintiff received the first fax, Plaintiff had the right to demand damages for enforcement of his TCPA right thereto.

It is clear that each fax is a separate offense and each is entitled to be sued on by way of separate action. Claims are not identical simply because they involve the same parties. One defendant can injure the same plaintiff on two or more separate occasions and not create the required condition to require that they be combined into one civil action.

Since there is no legal linkage among the torts and no dependency among them for any claim raised, they cannot be forced into a combination to reduce the claims available to Plaintiff.

By ruling that the three faxes (each sent at a different time with approximately a month between faxes) were one related case, the Commissioner ignores the plain language of the law that the violations and damages were each complete the instant each fax was sent. There was no relationship among these three torts; each stands alone.

Further, by forcing Plaintiff to combine unrelated claims, the Court denies access to the Small Claims process for these distinct torts. This is in contradiction to the express legislative intent of Congress in passing the TCPA. Senator Hollings specifically expressed the intent that Pro Se litigants be able to pursue claims under the TCPA in Small Claims Court.

Pragmatically, the Court's ruling creates an impossible situation for plaintiffs. Since most junk faxers send faxes repeatedly over time, plaintiffs would be forced to amend their "one" case as each new fax came in until the Small Claims limit was exceeded—at which point, plaintiffs could no longer recover statutory damages for additional faxes in

Small Claims Court. In fact, it would encourage junk faxers to send more junk faxes to each recipient to force the damages beyond the limit of Small Claims Court.

There is also an issue that this exact same question, also involving multiple cases for multiple junk faxes, was heard by Commissioner Madden in Palo Alto Small Claims Court the week prior to the decision in question. Defendants attempted to have the cases consolidated, claiming that this was a split case; Commissioner Madden ruled that this was not case-splitting—citing that the cases were independent occurrences and events without a common nucleus of facts—and allowed each of the cases to proceed as independent events as made clear in the plain language of the TCPA.

Thus, these three claims are for independent torts as defined by the plain language of the TCPA. They do not meet any of the tests for mandatory joinder--that these claims arise out of the same occurrence, event, or nucleus of facts. They are clearly separate occurrences and separate events and there is no relevant fact in proving violation of the TCPA (and, therefore, mandatory damages) that spans any two of the claims. Further, forcing joinder of the cases would contravene the legislative intent of the TCPA and conflict with a prior ruling made by Commissioner Madden in Palo Alto.

Plaintiff therefore requests that these cases be reinstated.

Respectfully submitted,

Jimmy A. Sutton