UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, *ex rel*. JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL Plaintiff, vs. FAX.COM, INC. Defendant.	)	No. 4:00CV00933 LOD

PLAINTIFF'S RESPONSE TO FAX.COM'S MOTION TO DISMISS

PRELIMINARY STATEMENT

The State of Missouri filed suit against Fax.com, Inc., alleging that Fax.com violated the Federal Telephone Consumer Protection Act, 47 U.S.C. §227 (hereinafter, TCPA), as well as the Missouri Merchandising Practices Act, §407, RSMo 1994 (hereinafter, MPA) by sending unsolicited facsimile advertisements to Missouri residents.

The TCPA was passed in 1991 as part of Public Law 102-243. The portions relevant to this case prohibit unsolicited fax advertising. 47 U.S.C. (b)(1)(C). The MPA prohibits deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of material facts in connection with the sale or advertisement of any merchandise in Missouri. §407.020, RSMo 1994. Despite these prohibitions, Fax.com has sent numerous unsolicited fax advertisements to consumers throughout Missouri. The State of Missouri is seeking to enjoin this unsolicited fax advertising and to recover damages and penalties as provided for in the statutes.

I. THE TCPA DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A REASONABLE AND CONSTITUTIONAL REGULATION OF COMMERCIAL SPEECH (Responds to section III.A. of Defendant's Memorandum).

The TCPA is not a blanket ban on facsimile advertising. It does not single out advertisement of any particular products or services for prohibition. Rather, the section of the TCPA addressing facsimile advertising provides that "[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]" 47 U.S.C. §227(b)(1)(C). The statute allows individuals to send facsimile advertisements to consumers; it just requires that the fax advertiser obtain permission from target recipients before flooding their fax machines with commercial solicitations. Nevertheless, Fax.com asserts that this requirement is an "unconstitutional restriction on protected speech" and asks this Court to dismiss the State's claim under the TCPA. (Memorandum at 4.) The State submits that its claim should not be dismissed because 47 U.S.C. §227(b)(1)(C) is a constitutional regulation of commercial speech and allows Fax.com to send all the fax advertisements it wants, as long as Fax.com does so with permission of the fax machine owners.

A. The TCPA is not a complete ban on commercial speech and is not subject to the Strict Scrutiny Standard (Responds to sections III.A.1,2,2).

As an initial matter, the appropriate standard for testing the constitutionality of restrictions on commercial speech is set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 564-66 (1980). Fax.com, however, asserts that the TCPA regulation of unsolicited fax advertising is subject to "a more rigorous

standard," citing *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), and suggests that the *Central Hudson* test may no longer be applicable. (Memorandum at 14-18).

In *44 Liquormart*, however, the court did not actually overrule *Central Hudson*, which Fax.com has recognized in a footnote (Memorandum at 14 fn. 5) or hold that commercial speech should necessarily be subject to the same scrutiny as other speech. 517 U.S. 484. In addition, *44 Liquormart* may be distinguished from the case at bar. In *44 Liquormart*, there was a complete ban on alcohol price advertising, regardless of the way the information was published, whether it be billboards, newspapers, flyers, or whatever. *Id*. at 501-02. The *44 Liquormart* prohibition was clearly content-based and left advertisers with no options, unlike the present case where fax advertising is not prohibited, only fax advertising sent without consent of the recipient, and an abundance of options are left for the advertiser.

It its lengthy "strict scrutiny" discussion, Fax.com also cites *United States v Playboy Entertainment Group, Inc*., 529 U.S. 803, 120 S.Ct. 1878 (2000), which may likewise be distinguished. *Playboy Entertainment* concerned complete scrambling or blocking of sexually-explicit television channels during certain hours of the day, with the government's interest being to shield children from possible "signal bleed." 120 S.Ct. at 1885. This regulation was pointedly content-based, unlike the present regulation, which does not single out any particular advertising and does not ban advertising with permission. Furthermore, there was no way that someone who did want to access the Playboy channel could do so during the prohibited hours. *Id*. By contrast, the TCPA regulation does allow consumers to access fax advertising if they wish to do so. The two cases are not comparable. Moreover, although the Court in *Playboy Entertainment* did apply strict scrutiny to that case, it did not overrule *Central*

Hudson.

Fax.com additionally relies on *Whitton v. Gladstone*, 54 F.3d 1400 (8th Cir. 1995), and *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). *Whitton* may be distinguished from the present case in that it involved prohibitions on political candidates' signs during an election period, and the court recognized that First Amendment protections for speech related to a political campaign are especially necessary. 45 F.3d at 1401-03. Unsolicited fax advertisements are not comparable. As for *Discovery Network*, the Court applied the *Central Hudson* standard. 507 U.S. at 416.

Finally, the Supreme Court's decision in *Greater New Orleans Broadcasting, Inc., v. United States*,527 U.S. 173 (1999) makes clear that although the *Central Hudson* test has been questioned, it has not been overruled or modified:

> [P]etitioners as well as certain judges, scholars, and amici curiae have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech. As the opinions in *44 Liquormart* demonstrate, reasonable judges may disagree about the merits of such proposals. It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground. See *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

527 U.S. at 183-84. It should also be noted that after this decision, the Fifth Circuit recognized the continued viability of the *Central Hudson* test. *Bailey v. Morales*, 190 F.3d 320 (5th Cir. 1999).

The TCPA regulation of fax advertising is not subject to strict scrutiny and *Central Hudson* is the correct test to be applied in determining the constitutionality of the statute.

B. Under the *Central Hudson* test, 47 U.S.C. §227(b)(1)(C) is a Constitutional regulation of commercial speech. (Responds to III.A.3)

The advertisements addressed by the TCPA's junk faxing provision fall into the category of commercial speech, as the TCPA's definition of advertisement is "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. §227(a)(4). As noted above, the appropriate standard for testing the constitutionality of restrictions on commercial speech is set forth in *Central Hudson.* 447 U.S. at 564-66 (1980). As an initial matter, the commercial speech involved must not be misleading or relate to unlawful activity; otherwise, it is not protected by the First Amendment. *Id*. at 563-64. If the commercial speech is protected, a statute regulating it is valid if the statute: (1) is supported by a substantial governmental interest; (2) directly advances the governmental interest asserted; and (3) is not more extensive than necessary to serve that interest. *Id*. at 566.

1. The commercial speech must not be misleading or relate to unlawful activity. (Responds to III.A.3)

The State has not alleged that the specific claims made by Fax.com's advertisers are misleading or related to unlawful activity.[1] Fax.com's own addition to the advertisements at the bottom of the page, "If you received this fax in error and would like to have your number removed from our database, call toll-free at 800-992-5328[,]" is misleading, however, in that it

[1] That the State has not made this particular allegation in this case is not to be construed as an admission that the State believes that these advertisements are not misleading or unrelated to unlawful activity. In fact, the State has received complaints from consumers regarding the "corporate travel" opportunities advertised in these faxes. The State has simply chosen at this time not to hold Fax.com responsible for its advertisers' content.

leads the consumer into believing that it is the consumer's responsibility to prevent unsolicited fax advertising.[2] Nevertheless, whether or not this representation nullifies First Amendment protection for Fax.com's faxes, the TCPA as applied to fax-blasting is Constitutional under the First Amendment, as argued below.

2. Congress' interest in enacting 47 U.S.C. §227(b)(1)(C) is substantial. (Responds to III.A.3.a)

Congress identified two particular interests in seeking to regulate unsolicited fax advertising: (1) unsolicited junk faxing shifts advertising costs from the advertiser/sender to the recipient; and (2) unsolicited fax advertising occupies a recipient's fax machine so that the recipient cannot utilize it for his or her desired business purposes. H.R. Rep. No. 102-317 at 10, 25 (1991).

In identifying these interests, the House of Representatives' Energy and Commerce Committee found not only the cost of junk-faxing to be a problem, but also recognized that complaints had arisen from consumers fed up with the costs and irritations of unsolicited fax advertising:

> [W]hen an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter. In the case of fax advertisements, however, the recipient assumes both the cost associated with the use of the facsimile machine and[] the cost of the expensive paper used to print out facsimile messages. It is important to note that these costs are borne by the recipient of the fax advertisement regardless of [his or her] interest in the product or service being advertised.
>
> In addition to the costs associated with fax advertisements, when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable

[2] This representation is one that provides a basis for the State's claims under the MPA.

> to process actual business communications. Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time. Since businesses have begun to express concern about the interference, interruptions and expense that junk fax[es] have placed upon them, states are taking action to eliminate these telemarketing practices. Connecticut and Maryland have enacted laws banning the use of facsimile machines for unsolicited advertising. Similar bills are currently pending in the legislatures of about half the states.

Id. at 25.

Fax.com asserts, without citing any evidence, that Congress' interests are not substantial and that the burden is "*de minimus*." Memorandum at 21-22. First, Fax.com ignores that courts have addressed the TCPA junk-faxing provision and examined Congress' asserted interests and the evidence presented to Congress, and they found those interests to be substantial. *Destination Ventures, Ltd. v. FCC*, 844. F.Supp. 632, 637 (D. Oregon 1994), *aff'd* 46 F.3d 54 (9th Cir. 1995), *State of Texas v. American Blast Fax, Inc.*, No. A 00 CA 085 SS (W.D. Texas, October 5, 2000)[3]; *see also, Kenro, Inc. v. Fax Daily, Inc*., 962 F.Supp. 1162, 1167 (S.D. Indiana 1997). Second, Fax.com bases a considerable portion of its argument addressing the potential claims that unsolicted fax advertisements are annoying and an invasion of privacy but ignores that Congress cited the shifting of advertising costs and occupation of fax machines as its primary interest in enacting the junk-faxing provision of the TCPA.

Congress has a substantial interest in seeking to prevent the shifting of advertising costs to unwilling consumers. Fax.com attempts to make a comparison with direct-mail advertising, but with direct-mail advertising, as with other advertising media such as outdoor, broadcast, newspaper, and magazine advertising, the cost is completely borne by the advertiser. The cost

[3] A copy of this case, which is unpublished, is attached for the Court's convenience.

may be passed on to the consumer, but only to those consumers who are interested in the product, in contrast to unsolicited fax advertising. Fax.com also mentions telemarketing, but a consumer can hang up the telephone when a telemarketer calls. Owners of fax machines, in contrast, have no choice but to endure another's occupation of their machines and the use of their paper and toner when advertisers send them unwanted commercial solicitations. *See Kenro*, 962 F.Supp. at 1168.

Congress' objectives in preventing the shifting of advertising costs to consumers and in preventing the hijacking of consumers' fax machines are substantial governmental interests.

3. The TCPA restriction on unsolicited fax advertising directly advances Congress' interests. (Responds to III.A.3.b)

By requiring that fax advertisers seek permission before sending advertisements to consumers' fax machines, the TCPA directly advances Congress' goal of preventing cost-shifting of unwanted advertisements and unwanted occupation of consumers' machines. The courts in *Destination Ventures* and *Kenro* have already made this finding. 844. F.Supp. at 637; 962 F.Supp. at 1168. *See also, American Blast Fax* at 12.

Fax.com claims that the government must produce "actual evidence." Memorandum at 25. Hard evidence is not required, however, as the Supreme Court has noted:

> [W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (citations omitted).

Fax.com bases it argument in opposition essentially on the claim that the regulation is underinclusive and, because the TCPA does not require faxers of non-commercial speech to obtain the permission of fax machine owners, the statute is irrational. Memorandum at 25-26. Fax.com ignores the fact, however, that banning unsolicited advertising does reduce shifting of **advertising** costs and unwanted intrusion on fax machines. Furthermore, just because the regulation does not completely eliminate all possible ways in which the governmental interest could be violated does not render the regulation unconstitutional. *United States v. Edge Broadcasting*, 509 U.S. 418, 434-35 (1993) (ban on broadcast of lottery advertisements in states without lotteries; "Nor do we require that the Government make progress on every front before it can make progress on any front . . . .); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 511 (1981) (plurality opinion) ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising."); *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995) (ban on pre-recorded, automated telephone calls; "The Supreme Court has repeatedly stated that 'underinclusiveness' may be the basis of a First Amendment violation only when a regulation represents an 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" (citations omitted)).

Furthermore, the cases that Fax.com does cite in support of its claim are ones where the government regulation very clearly did not advance the asserted governmental interests. In *Rubin v. Coors Brewing Co.*, the federal government sought to ban display of alcohol content on beer labels, citing an interest in preventing "strength wars" in beer manufacturing and marketing.

514 U.S. 476, 482 (1995). The Supreme Court found the government's scheme to be irrational, not just because the law did not apply to other alcoholic beverages, but also because brewers could disclose alcohol content in other forms of advertisement and could use descriptive terms, such as "malt liquor," on their labels to indicate higher alcohol content. *Id*. at 487. This prohibition obviously would not advance the asserted government interest when the information the government sought to suppress would not actually be suppressed because of other methods of marketing the information.

Greater New Orleans Broadcasting concerned a government statute banning broadcast advertising of privately-owned gambling casinos. 527 U.S. at 176. The ban applied to broadcast areas where gambling was legal and did not apply to advertising of tribal casino gambling. *Id*. at 176, 190. The government's interest was in reducing the social costs of gambling and in assisting states with restricting gambling with their borders. *Id*. at 185. The Court found that this statute did not further its stated interest in that much of the advertising would just channel gamblers to one casino over another because advertising for tribal casinos was permitted. *Id*. at 189. This case does not compare with the present case, in that all unsolicited fax advertising is prohibited.

Likewise, in *City of Cincinnati v. Discovery Network*, the government regulation did not materially advance its stated interests. 507 U.S. 410, 424-29 (1993). The city sought to reduce the number of newsracks on its sidewalks in the interest of safety and aesthetics; however, it attempted to do so by banning commercial newsracks and not those containing newspapers. *Id*. at 413. The effect of this ordinance would have been to eliminate sixty-two newsracks, while 1,500 to 2,000 would remain. *Id*. at 417-18. The Court found this "fit" to be lacking and that

the city did not show that its distinction between commercial and non-commercial newsracks had any bearing on its asserted interests. *Id*. at 418, 428. The effect of this ordinance would have been very minimal in achieving the city's goals, unlike in the case at bar where the prohibition on unsolicited fax advertising directly eliminates unfair cost-shifting of advertising and use of recipients' fax machines. In fact, both *Destination Ventures* and *Kenro* distinguished *Discovery Network* from cases involving the TCPA regulation on unsolicited faxes. 46 F.3d at 56; 962 F.Supp. at 1168. The Ninth Circuit in *Destination Ventures* wrote:

> Unlike city of Cincinnati v. Discovery Network . . . , a case relied on by Destination, where the Court found no reasonable fit between the ordinance and Cincinnati's goals of reducing blight and making sidewalks safer, because commercial newsracks constituted a small share of all newsracks . . . , here there is a reasonable fit. The plaintiff's have not disputed that unsolicited commercial fax solicitations are responsible for the bulk of advertising cost shifting. Thus, banning them is a reasonable means to achieve Congress's goal of reducing cost shifting. The First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates cost shifting.

46 F.3d at 56 (citations omitted).

The TCPA prohibition of unsolicited fax advertising directly advances the government interest in preventing shifting of advertising costs to consumers and unwanted occupation of consumers' fax machines.

4. The TCPA restrictions on unsolicited fax advertising are no more extensive than necessary. (Responds to III.A.3.c, d)

Fax.com premises its entire argument, that the TCPA restrictions are not narrowly-tailored, on the existence of alternative methods of regulation. Memorandum at 28. The fact that "some imaginable alternative that might be less burdensome on speech" exists, however, does not render the chosen restriction not narrowly-tailored for purposes of the First Amendment. *Ward v. Rock Against Racism*, 491 U.S. 781, 797, (1989). *See also, Kenro*, 962

F.Supp. at 1168. Moreover, the requirement that a regulation be narrowly tailored to the government's interest does not mean that the regulation employ the "least restrictive means" available. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989); *Discovery Network*, 507 U.S. at 416, n.12; *Kenro*, 962 F.Supp. at 1168. What is required is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480; *see also, Greater New Orleans Broadcasting*, 527 U.S. at 188 (1999).

In its listing of alternatives, Fax.com ignores the most obvious, which is to obtain permission from the fax recipient before faxing its advertisements. In addition, other alternatives, such as limiting the hours of faxes, creating and maintaining a "do not fax list, and limiting the number or frequency of fax transmissions -- were all considered and rejected by *Kenro* and *Destination Ventures*. 962 F.Supp. at 1168-69; 844 F.Supp. at 639. Both courts found that the existence of these alternatives still did not establish that the TCPA fax advertising restrictions were insufficiently narrow for the asserted governmental interest. *Id*. Moreover, Fax.com also does not address the fact that alternative channels of communication are open for advertisers. Among the most obvious are mail, outdoor, broadcast, and newspaper media. Simply because Fax.com and its advertisers prefer the cost and ease of unsolicited fax advertising does not render the restrictions on it unconstitutional. *Moser*, 46 F.3d at 974 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.")).

In summary, the TCPA restriction on unsolicited fax advertising is a constitutional regulation of commercial speech. The government's asserted interests in preventing the shifting of advertising costs to consumers and in minimizing the occupation of consumers' fax machines are substantial, and the TCPA restriction requiring that fax advertisers obtain a consumer's permission before sending a fax advertisement directly advances those interests and is narrowly tailored to serve that purpose. Therefore, the State's case should not be dismissed.

II. THE TCPA DAMAGE AWARD OF $500 DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT AND DOES NOT VIOLATE THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE. (Responds to III.B)

Next, Fax.com alleges that the TCPA damages and MMPA civil penalties violate the Eighth Amendment's excessive fines clause and violate Due Process. The essence of Fax.com's argument is that the amounts are "completely out of proportion to any harm." Memorandum at 30. Fax.com characterizes the harm as "mere pennies," although no evidence is cited for this conclusion. Defendant's Memorandum at 32.

Fax.com's arguments are nearly identical to the arguments made in *Kenro*. 962 F.Supp. at 1165-66. The *Kenro* court rejected the argument that the TCPA damage award violated Due Process. The court noted that even if the printed costs of fax advertisements were only a few cents per sheet, Congress was concerned with more than the printing costs when it included the $500 damages remedy:

> Congress designed a remedy that would take into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements, effectively deter the unscrupulous practice of shifting these costs

> to unwitting recipients of "junk faxes[,]" and "provide adequate incentive for an individual plaintiff to bring suit on his own behalf."

Id. at 1166 (quoting *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 995)). The *Kenro* court found that even if the actual monetary costs to unsolicited fax recipients were small in comparison to the $500 minimum damage penalty, the penalty was not so severe and oppressive as to violate the Due Process clause. *Id*. at 1167; *see also*, *American Blast Fax* at 9.

Moreover, the Supreme Court has repeatedly rejected Fax.com's approach:

> When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

St. Louis I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919) (mandatory award of $50 to $300 plus attorneys' fees where actual harm was only a few cents did not violate Due Process). The *Williams* Court cited several factors other than a pure mathematical equation that courts can consider, such as: (1) the importance of the public interest at hand; (2) the number of opportunities to commit the offense; and (3) the need for securing uniform adherence to the relevant law. *Id*.

In the present case, the damages are not disproportionate to the costs and aggravations of the junk faxing violations of Fax.com so as to violate Due Process. The cases Fax.com cites in support of its argument are not relevant, in that they involve punitive damage awards, rather than statutory liquidated damages. Furthermore, for the same reasons that these damages do not violate Due Process, they do not violate the Eighth Amendment. Determining whether a fine is excessive requires a showing of "gross disproportionality" and "an excessiveness so great that

'the punishment is more criminal than the crime.'" *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996) (citing *United States v. Alexander*, 32 F.3d 1231, 1235, 1237 (8th Cir. 1994)). Courts have already found that the TCPA damage provision is not grossly disproportionate. *Kenro*, 962 F.Supp. at 1167; *American Blast Fax* at 9.

Therefore, the State's requests for damages should not be stricken from the State's Prayer for Relief.

III. COUNT III, WHICH CHARGES FAX.COM'S VIOLATIONS OF THE MISSOURI MERCHANDISING PRACTICES ACT, DOES NOT FAIL TO STATE A CLAIM AND SHOULD NOT BE DISMISSED (Responds to III.C.).

Fax.com claims that the State's allegations with respect to Fax.com's violations of the MPA do not state a claim and should be dismissed. The MPA enables the State to take legal action when an individual or entity has utilized deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of material facts in connection with the sale or advertisement of any merchandise in Missouri. §407.020, RSMo 1994. The MPA applies to deceptive and fraudulent merchandising practices in general, and for relief allows for injunctions, restitution, civil penalties, attorneys' fees, and investigative costs, and additionally provides for felony criminal prosecution. *See* §407, RSMo. In contrast, the section of the TCPA at issue in this case applies exclusively to the act of fax-blasting, and provides for statutory damages and injunctive relief only. The State is completely within its authority to bring legal action against Fax.com for violating the MPA.[4]

[4] In its introductory section, Fax.com puts forth some footnote arguments that the MPA is unconstitutional and that Fax.com is exempted from liability under the MPA. First, the State would note that Fax.com presents no law to support its claim that the MPA is unconstitutional,

A. Prosecuting Fax.com for violating the MPA does not violate the Supremacy and Commerce clauses of the United States Constitution. (Responds to III.C.1. a. and b.)

1. As applied in the present case, the MPA does not violate the Supremacy Clause.

Fax.com first claims that the MPA violates the Supremacy Clause, allegedly because the TCPA preempts it from addressing fraudulent marketing practices with respect to fax-blasting. Memorandum at 35. The MPA is a consumer protection statute that allows for criminal as well as civil prosecution of violative merchandising practices. The TCPA is a specific regulation. The two statutes are not analogous, as Fax.com in fact alleges in Section III.C.1.c. of its memorandum.

A court will find preemption of a state law only in specific circumstances:

1. When the federal law expressly preempts the state law;
2. When the two laws are directly in conflict;
3. When the federal law is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it."
4. when the legislation is in an area where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Heart of America Grain Inspection Service, Inc. et al. v. Missouri Department of Agriculture et al., 123 F.3d 1098, 1103 (8th Cir. 1997) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

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other than referring to its previous argument. The MPA is not unconstitutional.

With respect to Fax.com's second argument, the MPA exemption that Fax.com cites does not apply to Fax.com in the present action. This provision exempts publishers from liability for the deceptive content of another's advertisement. Fax.com is not at present being held liable for its advertisers' content.

As mentioned above, the MPA is a general consumer protection statute. It is not expressly preempted by the TCPA, no does it conflict with the TCPA. Consumer protection is not an area where the federal law is no pervasive as to preclude state laws, nor is the federal interest so dominant to preclude state enforcement. In fact, consumer protection is an area where the states necessarily take the lead in enforcing protections for their residents. "In the interest of avoiding untintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *Heart of America Grain*, 123 F.3d at 1103 (quoting *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993)).

The MPA does not violate the Supremacy Clause.

2. The MPA does not violate the Commerce Clause.

Fax.com next claims that the MPA violates the Commerce Clause, allegedly because it regulates outside its borders. Memorandum at 38. As an initial matter, a state regulation is invalid under the Commerce Clause when the statute applies to commerce that takes place entirely outside the state's borders. *Cotto Waxo Company v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). Fax.com's actions do not take place wholly outside of Missouri. It may have sent its faxes from California, but the faxes were directed inside the State of Missouri and received by Missouri consumers. The State is not attempting to apply the MPA to activity that takes place solely outside its borders. In fact, the State's case is concerned only with faxes received by Missouri consumers. Under Fax.com's logic, the State could never prosecute fraudulent mailings or telemarketing from other states into Missouri, and neither could any other state into

which persons outside its borders send fraudulent material to the state's citizens. Any scam artist could escape state prosecution by simply calling, faxing, or mailing into any state but the one where he or she is located. This claim is simply wrong.

Next, the MPA, as applied to fax-blasting, does not discriminate against out-of-state fax-blasters. To be sure, if Fax.com were fax-blasting from inside Missouri to Missouri consumers, the State would certainly be pursuing legal action for those activities under the MPA. Intrastate fax-blasters are not "free to send unsolicited faxes with impunity," as Fax.com claims. Memorandum at 40.[5] There is no disparate and discriminatory treatment, and Fax.com's claim that the MPA violates the dormant Commerce Clause must fail.

[5] Furthermore, intrastate fax-blasters are not beyond the reach of the TCPA, which applies to all fax-blasting. *See, American Blast Fax* at 2-6; *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 366-67 (Ga. Ct. App. 2000).

B. Count III should not be dismissed because the State has alleged misrepresentations of fact, not misrepresentations of law. (Responds to III.C.2.)

Fax.Com is not charged with misrepresenting the law. The State is not alleging that Fax.com misrepresented the TCPA; rather, the State alleges that Fax.com, by sending fax advertisements, represented that it has permission to send the faxes. This activity is a misrepresentation of fact, just as when an entity sends a consumer an item the consumer did not order and attempts to bill the consumer for the item. The entity represents that the consumer wanted the item, just as Fax.com has misrepresented that Missouri consumers want its fax advertisements. Of course, the difference would be that Fax.com, by virtue of its marketing technique, does not have to bill the consumer because it has already taken the consumer's money by faxing. Even though an application of the relevant law may be required before determining whether a representation is true or false, it does not turn a question of fact into a question of law. *See McMullin v. Community Savings Corporation et al.*, 762 S.W.2d 462, 465 (Mo. Ct. App. 1988). The State has alleged a question of fact, and accordingly, Count III should not be dismissed.[6]

[6] The State would further note that misreprentations of law are actionable when one party has superior knowledge of the law and takes advantage of the other party's ignorance to deceive him or her. *Mullin v. Fridley et al.*, 600 S.W.2d 125, 128 (Mo. Ct. App. 1980). It is arguable that in the present case, because Fax.com is in the business of fax-blasting, that it has superior knowledge of the TCPA and takes advantage of the fact that most consumers do not realize that Fax.com is faxing to them illegally.

C. Count III should not be dismissed for not containing an allegation of intent to defraud, because the State is not required to allege intent in a civil action under the MPA. (Responds to III.C.3)

Fax.com claims that Count III must be dismissed because it does not contain an allegation of intent to defraud, and it cites criminal cases in support of its argument. Memorandum at 42. Because this case is civil, however, an allegation of intent is not necessary. To establish a violation of the MPA in civil actions, "the state does not need to prove the elements of common law fraud." *State ex rel. Webster v. Areaco Investment Company*, 756 S.W.2d, 633, 635 (Mo.Ct. App. 1988); *State ex rel. Webster v. Milbourn*, 759 S.W.2d 862, 864 (Mo.Ct. App. 1988) (Proof of a representation and the falsity of such representation sufficient to establish violation of §407.020). Instead, the State need only prove that the defendant's conduct constituted an "unfair practice" or other violation of Section 407.020. *Areaco Investment* at 637.

Moreover, the State would submit that Fax.com did have intent to defraud, in that it is clear that unsolicited fax advertising is illegal under the TCPA, and Fax.com knew it was faxing to fax numbers without permission of the recipients.

Count III should not be dismissed because intent is not alleged.

D. The MPA is applicable to the challenged activity, and the fact that the TCPA is a not a "statutory surrogate" has no bearing on charges under the MPA. (Responds to III.C.4.)

Fax.com claims that because the TCPA and MPA are not "statutory surrogates" that Fax.com's fax-blasting activities cannot be prosecuted under the MPA. Memorandum at 43. It

should be noted that this claim contradicts Fax.com's assertions under its Supremacy Clause argument above.

This argument makes no sense. Nothing precludes the State from charging more than one count when a defendant violates more than one statute.

The rest of Fax.com's argument is argument of fact. Fax.com claims that fax-blasting does not involve any fraud upon consumers, and thus cannot be brought under the MPA, and in its conclusion, Fax.com claims that "the Attorney General simply cannot credibly contend that sending unsolicited faxes implicates any deceptive representation . . . ." These claims require an adjudication of fact. In a motion to dismiss, the Court must view the evidence in the light most favorable to plaintiff, and must resolve all factual conflicts in plaintiff's favor. *Dakota Indus. v. Dakota Sportswear,* 946 F.2d 1384, 1387 (8th Cir. 1991).

For the above reasons, this portion of Fax.com's motion must be overruled.

E. The State agrees that Fax.com does not need to have a certificate of authority from the Missouri Secretary of State's Office.

The State agrees at this point, barring any evidence of Fax.com fax-blasting intrastate, that Fax.com does not need a certificate of authority and requests leave of this Court to amend the State's complaint to remove this allegation.

CONCLUSION

Wherefore, Plaintiff, the State of Missouri, prays that this Court overrule Defendants' Motion to Dismiss in the present action.

Respectfully Submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JILL C. LAHUE
Assistant Attorney General
Missouri Bar No. 44092
P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax No. (573) 751-7948

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of the foregoing was served via Federal Express on this 17th day of November, 2000 to:

Mary Ann Wymore
John E. Petite
Greensfelder, Hemker & Gale, P.C.
10 South Broadway, Suite 2000
St. Louis, MO 63102

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Jill C. LaHue