

# Asserting a Claim Under the Telephone Consumer Protection Act

## Plaintiffs are Limited to Exclusive State Court Jurisdiction

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### **PRIVATE RIGHT OF ACTION UNDER THE TCPA**

The Telephone Consumer Protection Act (TCPA) is a federal statute that creates a private right of action for violations of its provisions regulating unsolicited telemarketing advertisements, including faxes. *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 975 F. Supp. 329, 330 (S.D. N.Y. 1997). Under the TCPA, a plaintiff may seek an injunction, monetary damages, or both. 47 U.S.C. § 227(b)(3) (1994). This statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf. *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995). Congress provided this specific and personal remedy to afford consumers a means of combating the minor nuisance of unsolicited telemarketing advertisements. *Id.* at 405.

In *International Science and Technical Institute v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997), the Fourth Circuit determined that Congress intended to authorize jurisdiction over private actions brought under the TCPA exclusively in state courts. Five other circuits have since joined the Fourth Circuit in “the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal statute, the [TCPA].” *See Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Foxhall Realty Law Offices v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 438 (2d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289, *modified*, 140 F.3d 898 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997). Only one district court has reached the opposite conclusion in a published

decision, holding that the TCPA, a federal law which expressly provides for a private cause of action, presents a federal question pursuant to 28 U.S.C. § 1331, providing for concurrent federal and state jurisdiction. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164 (S.D. Ind. 1997). Therefore, TCPA cases brought by consumers under the Act’s grant of a private right of action are, for the most part, exclusively heard in state courts.

### **EXCLUSIVE STATE COURT JURISDICTION: OPTING-IN OR OPTING-OUT**

After *International Science*, however, it has been argued that a state must “opt-in” by passing enabling legislation to open its courts to the private right of action under the TCPA. The *International Science* court considered the TCPA’s private right of action language which provides:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each violation, whichever is greater, or (C) both such actions.

47 U.S.C. § 227(b)(3) (1994).

The phrase “if otherwise permitted by the laws or rules of court of a State” and its interpretation by the *International Science* court has caused a chain reaction of conflicting decisions culminating in the idea that each state may either “opt-in” by authorizing TCPA suits in its courts, or “opt-out” by closing its doors to TCPA suits. See *Int’l Sci. & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997); *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 16 S.W.3d 815 (Tex. App.—Fort Worth 2000, no pet. h.); *Foxhall Realty Law Offices v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 438 (2d Cir. 1998).

There are two different interpretations of what a state must do in order to “opt-in” so that consumers may bring a private right of action under the TCPA in that state’s courts. Under one interpretation, to “opt-in” a state must pass legislation or promulgate rules consenting to state court actions based on the TCPA before such suits may be brought in state courts. See, e.g., *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 16 S.W.3d 815, 817 (Tex. App.—Fort Worth 2000, no pet. h.). Other courts have adopted a theory that would recognize a private right of action under the TCPA despite any enabling legislation. See, e.g., *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 471 (Ga. App. 2000) (citing the following cases as recognizing a private right of action under a similar section of the TCPA despite the absence of any enabling legislation: *Charvat v. ATW, Inc.*, 712 N.E.2d 805 (Ohio 1998); *Szefczek v.*

*Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. Ct. Law Div. 1995); *Kaplan v. Democrat & Chronicle*, 266 A.D.2d 848 (N.Y. App. Div. 1999)).

For the most part, courts have read the TCPA’s private right of action language to confer state court jurisdiction over TCPA claims in the absence of a state statute either expressly granting such jurisdiction or declining to exercise jurisdiction. See *Kaplan v. Democrat & Chronicle*, 266 A.D.2d 848, (N.Y. App. Div. 1999) (followed by *Schulman v. Chase Manhattan Bank*, 268 A.D.2d 174 (N.Y. App. Div. 2000); *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000); *Zelma v. Total Remodeling, Inc.*, 756 A.2d 1091 (N.J. Super. Ct. Law Div. 2000). Under this interpretation, as long as a state has not refused to exercise jurisdiction over TCPA

claims, no special legislation is required to enable them to do so. *Democrat & Chronicle*, 266 A.D.2d

To date, the only state appellate court case to hold that states must pass enabling legislation to authorize TCPA suits in its courts is *Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.*, 16 S.W.3d 815 (Tex. App.—Fort Worth 2000, no pet. h.). In *Autoflex Leasing*, the Texas appellate court interpreted the TCPA’s private right of action language to mean that suits may be brought for TCPA violations in state court only if permitted by state law or state court rule. *Id.* at 817. This holding has been criticized as lacking “intrinsic logic” and unpersuasive. See *Davis, Keller, Wiggins, L.L.C. v. JTH Tax, Inc.*, No. 00AC-023280 (Div. 39) (Mo. Cir. Ct., Aug. 28, 2001). Legal scholars have also rejected the *Autoflex Leasing* decision, calling it “poorly reasoned” and unsupported. See Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 Conn. L. Rev. 407, 415 (2001). In 1999, the Texas legislature amended section 35.47 of the business and commerce code, the corresponding Texas statute, to authorize a private right of action under the TCPA. TEX. BUS. & COM. CODE ANN. § 35.47(g) (Vernon Supp. 2000). The statute became effective on September 1, 1999. *Autoflex Leasing*, 16 S.W.3d at 817-818.

The clause, “if otherwise permitted by the laws or rules of court of a State,” in the TCPA’s private right of action language has also engendered the theory that states may “opt-out” or refuse to exercise the jurisdiction authorized by the statute. See *Nicholson*, 537 S.E.2d at 470; *Int’l Sci. & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1156 (4th Cir. 1997); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432 (2d Cir. 1998); *Zelma v. Total Remodeling, Inc.*, 756 A.2d 1091 (N.J. Super. Ct. Law Div. 2000). In other words, a state could choose to close its courts to private actions under the TCPA. Those opposing this interpretation have raised due process and equal protection challenges, premised on the argument that if some states “opt-out” of the TCPA, the citizens of those states will not enjoy the private right of action under the TCPA, whereas citizens of other states will. See *Foxhall*, 156 F.3d at 438; *Zelma*, 756 A.2d at 1094. This argument, however, has been rejected because the inequality touches only a statutory permission to enforce privately the same substantive rights which both state attorneys general and the FCC can enforce in federal courts through other mechanisms. *Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000). Nonetheless, no state has tested the constitutionality of this theory by attempting to “opt-out.” See Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 Conn. L. Rev. 407, 416 (2001).

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