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TELECOMMUNICATIONS LITIGATION PRACTICE GROUP

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Florida Appellate Decision Paves the Way for More “Junk Fax” Lawsuits

In a decision issued August 22, 2003, Florida’s Second District Court of Appeal held that Florida law permits private lawsuits under the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). The Court’s opinion in *Condon v. Office Depot, Inc.*, 2003 WL 21990263 (Fla. 2d DCA Aug. 22, 2003), marks the first appellate decision in Florida on this issue, and eliminates a significant defense to claims seeking damages for unsolicited faxes received in Florida.

Congress passed the TCPA in 1991 to “protect the privacy interest of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile ([f]ax) machines and automatic dialers.” S.Rep. No. 102-178, at 1 (1991). Among other things, the TCPA prohibited sending unsolicited advertisements to fax machines, and provided for a private right of action to recover \$500 for each violation. 47 U.S.C. § 227(b)(1)(C) and (b)(3). Private actions to enforce the TCPA may be filed only in State courts, however, and only “if otherwise permitted by the laws or rules of court of a State.” *Id.*

Two years before Congress enacted the TCPA, the Florida Legislature outlawed the transmission of unsolicited fax advertisements and provided for the State’s Attorney General seek a civil penalty of \$500 for each violation. Fla. Stat. § 365.1657. The Florida law does not provide for a private right of action. *Id.*

The trial court in *Condon* dismissed the case, which sought damages for violation of the TCPA, finding that because Florida law provides only for enforcement of the unsolicited fax law by the Attorney General, and does not provide for lawsuits by private citizens, private causes of action are not “otherwise permitted” and no claim could be made under the TCPA in Florida. *Condon* at 1. The District Court of Appeal disagreed, reversed the trial court’s ruling, and remanded the case to be reinstated by the trial court. *Id.*

The appellate court held that interpreting the TCPA to require states to enact “opt-in” legislation before enforcement actions can be pursued in their courts would violate the Supremacy Clause of the United States Constitution. *Id.* At 2. The court referred to the

presumption that state courts have jurisdiction over federal claims, and that presumption “can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” *Id.* at 3 (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). The court found no such basis to prevent Florida’s courts from handling claims under the TCPA and, because Florida’s unsolicited fax statute was enacted prior to the TCPA, the court held that it did not constitute a refusal to allow the filing of private claims under the TCPA in Florida’s courts. *Id.*

Chief Judge Altenbernd dissented from the majority decision in *Condon*, and argues that only the Florida Legislature can determine the extent of the jurisdiction of the State’s courts. *Id.* at 4. Judge Altenbernd asserts that the Tenth Amendment, not the Supremacy Clause of the U.S. Constitution, provides the basis for interpreting the application of the TCPA in state courts. *Id.* Florida law clearly does not permit private claims for unsolicited faxes, and Congress is prohibited by the Tenth Amendment from expanding the jurisdiction of a state’s courts. *Id.* (citing *United States v. Sprague*, 282 U.S. 716, 733 (1931) and *United States v. Darby*, 312 U.S. 100, 124 (1941)).

The *Condon* decision is likely to embolden the plaintiffs’ lawyers to file “junk fax” cases against companies doing business in Florida. Carlton Fields is currently defending a number of these cases, and we will continue to monitor developments in this area.

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