

In researching this matter I have discovered several court decisions and FCC clarifications and findings with regards to a consumer's right to sue in small claims courts for TCPA infractions:

Jurisdiction

State courts are expressly given jurisdiction under 47 U.S.C. § 227(b)(3). The following court cases have found that state courts have sole jurisdiction under this law:

- *International Science and Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997)
- *Chair King, Inc. v. Houston Cellular Corporation*, 1997 WL 768609 (5th Cir. 12/15/97);
- *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998)
- *Murphy v. Lanier*, 204 F.3d 911,912-13 (9th Cir. 2000);
- *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289, modified, 140 F.3d 898 (11th Cir. 1998).
- *Foxhall Realty Law Offices v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432 (2nd Cir. 1998)

Additionally there is no requirement for affirmative state enabling legislation.

- *James C. Reynolds v. Diamond Foods and Poultry, Inc.*, 2/5/2002, ED79488 (MO Court of Appeals, Eastern District)
- *Foxhall v. Telecommunications*, 156 F.3d 432 (2nd Cir. 1998)
- *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 245 Ga.App. 363 (Ga. App. 2000) (en banc)

Small claims is also a proper venue, as indicated by the sponsor of the original bill, Sen. Hollings. The quote from the congressional record is (137 Cong. Record S16205-16206 (daily ed. Nov. 7, 1991)):

“... The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States make it as easy as possible for consumers to bring such actions, preferably in small claims court. ...”

TCPA is Constitutional

The Ninth Circuit has upheld the TCPA's constitutionality in:

- *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, (9th Cir. 1995)
- *See also Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Indiana 1997).

Published Number is Permission

The FCC has held that merely publishing a phone number does not create permission to fax. The relevant quote from the FCC in the *Memorandum Opinion and Order* (CC Docket No. 92-90, 7/26/1995):

"The mere distribution or publication of a telephone facsimile number does not confer invitation or permission to transmit advertisements to a particular telephone facsimile machine."

Faxing Agent

The FCC has held that both the broadcaster and the business on whose behalf the fax was sent are liable. In the Matter of 21st Century Fax(es) Ltd., -- FCC Rcd.--, 2002 WL 27541 (F.C.C.) (Jan 9, 2001):

"Moreover, the term 'person' in Section 227(b)(1) includes the individual who actually performs the faxing as well as the corporate entity on whose behalf he or she is acting."

Damages Exceed Harm

From the decision of *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc* (CV 99-020649, AZ Div 1, pg. 15, 7/16/2002):

"27. Congress made a legislative determination that the appropriate penalty for violating 47 U.S.C. § 227 was \$500 per violation or, in the court's discretion, \$1,500 per willful violation. 47 U.S.C. § 227(b)(3). In doing so Congress established a penalty designed not only to compensate for the actual damages and unquantifiable harm, but also to deter the offensive conduct. *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1090-91 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997). The penalty is not so disproportionate to actual damages as to violate due process *American Blastfax*, 121 F. Supp. 2d at 1090; *Kenro*, 962 F. Supp. at 1166."

Additionally:

- *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085 (W.D.Tex. 2000)

TCPA Does Restrict Intrastate Activities

Section 152(b) specifically bars the FCC from regulating intrastate communications. The first sentence, however, is an "except" clause. Section 227 is INCLUDED in that clause (an amendment to section 152(b) was passed concurrently with the TCPA to include the TCPA in this clause) and thus the bar to intrastate regulation is removed. See Pub. Law 102-243 §(3)(b) NOT to be confused with §227(3)(b)

Additionally:

- *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085 (W.D.Tex. 2000)