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Judge upholds ban on 'junk faxes'

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A statute designed to crack down on "junk faxes" is constitutional, a federal judge has held.

In an opinion made available Tuesday, U.S. District Judge Charles P. Kocoras declined to dismiss a lawsuit alleging that Phillips Randolph Enterprises LLC was faxed an unsolicited advertisement for a Chicago restaurant.

Kocoras rejected arguments advanced by Rice Fields, which does business as Baisi Thai Restaurant Inc., and the other defendants that the Telephone Consumer Protection Act violates the First Amendment and the due process clause.

The TCPA allows the recipients of unsolicited fax advertisements to seek the actual damages they incurred or \$500 for each violation of the statute, whichever is larger.

An award may be trebled if the violation of the TCPA was willful or knowing.

Kocoras acknowledged that the U.S. Supreme Court in two cases — *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America Inc. v. Gore*, 517 U.S. 559 (1996) — struck down jury awards of punitive damages that "vastly" exceeded the amount of compensatory damages awarded.

But "considerations pertinent to the validity of jury awards are not the same as those attendant to damage amounts set by statutes," Kocoras said.

In setting statutory damages, he said, a legislature "must choose a benchmark that will be appropriate to many different situations" and must consider such matters as the public interest.

The penalty set for a violation of the TCPA reflects the fact that the injuries inflicted on the recipients of unsolicited advertising faxes "are not limited to the cost of materials used to print the fax," Kocoras said.

"In choosing \$500 as the minimum penalty for the TCPA, Congress also took into account harm that would be difficult to quantify, such as business interruption costs and wasted time," Kocoras wrote, citing *Kenro Inc. v. Fax Daily Inc.*, 962 F.Supp. 1162 (S.D. Ind. 1997). "In addition, the statute aimed to curb the practice of shifting advertising costs to an unwilling recipient even if only in a single instance."

The minimum penalty, Kocoras continued, "is high enough to serve as a disincentive to this practice in the industry as a whole."

"As a result, the severity of the potential punishment is not out of proportion with the offense or obviously unreasonable, even where the transmission consists of a single page," Kocoras wrote, citing *St. Louis, Iron Mountain, and Southern Railway Co. v. Williams*, 251 U.S. 63 (1919).

Kocoras labeled as a "nonstarter" the argument raised by the defendants — he referred to them collectively as "Rice Fields" — that the TCPA violates the due process clause because a defendant named in a class-action suit could be hit with "crippling" damages.

By making the transmission of junk faxes "prohibitively expensive," the TCPA serves the goal of deterring such conduct, Kocoras said.

"Contrary to Rice Fields' implicit position, the due process clause of the Fifth Amendment does not impose upon Congress an obligation to make illegal behavior affordable, particularly for multiple violations," Kocoras wrote.

Kocoras also rejected the contention that the TCPA violates the First Amendment.

The TCPA passes the four-part test for commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), Kocoras said.

He conceded that the Baisi Thai menu allegedly faxed to Phillips "concerned lawful activity and was not misleading."

But Kocoras said the defendants were wrong when they asserted that the government did not have a substantial interest in regulating unsolicited fax advertisements and that the TCPA therefore flunked the second part of the *Central Hudson* test.

Kocoras rejected the notion that *Edenfield v. Fane*, 507 U.S. 761 (1993), requires Congress to provide empirical data to back up the significance of the interest purportedly served by a statute.

Instead, that ruling states only that "a governmental body seeking to restrict commercial speech must set forth harms that are real, not speculative or the product of conjecture," Kocoras said.

Kocoras said the TCPA passes muster under the third part of the *Central Hudson* test because the statute directly advances Congress' interest in shielding unwilling recipients from unsolicited faxes.

And Kocoras said the TCPA meets the fourth part of the test because the methods it sets out for battling junk faxes "reasonably fit the goal of reducing the costs and wasted time" stemming from the receipt of such unwanted ads.

The case is *Phillips Randolph Enterprises LLC v. Rice Fields, d/b/a Baisi Thai Restaurant Inc., et al.* , No. 06 C 4968.

NOTE: Chicago attorney Thomas A. Zimmerman, Jr., of the Zimmerman Law Offices, P.C., represents the plaintiff Phillips Randolph Enterprises, LLC in the litigation.