

Telephone Consumer Protection Act

A Burr & Forman **BLOG**

Michigan District Court Holds State Prohibition On Class Actions Does Not Preclude TCPA Class In Federal Court

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[Small v. Kmart Holdings, Corp.](#), No. 12-cv-11062, 2013 WL 1157339 (E.D. Mich. March 20, 2013) Pending before the court was Defendant's Motion to Dismiss Plaintiff's TCPA claim contending Defendant sent unsolicited faxes in violation of the law. Also pending before the court was Defendant's Motion to Strike class allegations based on Michigan law prohibiting such actions. Denying the Motion to Dismiss, the court stated "Plaintiff has alleged that the Defendants sent the faxes; that Plaintiff did not give his permission to receive such faxes; there was an insufficient opt-out notice; and there was no established business relationship between Plaintiff and Defendants. Defendants are on notice of the allegedly offensive conduct: the two faxes sent on April 3 and 11, 2008. There is only one count comprised of two separate violations. The Defendants do not have to guess as to who did what. The faxes were both sent from [Defendant's] Pharmacy. Defendants' motion to dismiss is denied." With respect to the Motion to Strike class allegations, the court recognized Michigan law providing that "[a]n action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action,"• which the TCPA does not. The court rejected Defendant's reliance on [Holster v. Gatco, Inc.](#), which held that [Shady Grove Orthopedic v. Allstate Ins. Co.](#), did not resolve the relationship between the TCPA and whether there is a federal cause of action, concluding that "Congress intended to give states a fair measure of control over resolving problems that the TCPA addresses" including the ability to define when a class controls. Instead, the court looked to the United States Supreme Court case of [Mims v. Arrow Financial](#), concluding that "[i]n light of [Mims](#), there is 'no room' for Defendants' requested result because, as Rule 23 regulates procedure, any substantive purpose underlying a state law limiting class actions is irrelevant." *For more information on TCPA regulation and effects, contact [Burr & Forman](#) attorney, Joshua Threadcraft, [here](#).*

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