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Seventh Circuit Splits From Sister Circuits Over Telephone Consumer Protection Act

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opposition.³⁵ From the European perspective, the deal does not open up US airlines for total foreign ownership, a central goal of the European delegation.³⁶ Nevertheless, there is a good chance that EU transport ministers will approve the agreement if the US shows a willingness to accept foreign ownership of US airlines.³⁷ Currently, the US limits the voting rights of foreign entities in domestic airlines to 25%, which is less than the 49% allowed by the EU.³⁸ In early November, the Bush administration proposed to ease restrictions on foreign ownership in US airlines, but seventy-five members of the House of Representatives have come out against the proposal.³⁹ Another potential problem is that the UK is reluctant to grant more access to London's Heathrow Airport to foreign airlines, which is currently serviced by only two US carriers – United Airlines and American Airlines.⁴⁰ Increased access to Heathrow is a major goal of the US delegation, and in turn is a major bargaining chip of the EU.⁴¹

The new open skies agreement, if finalized, will be a significant step forward for consumers. Not only will transatlantic routes be opened to “vigorous competition,” but domestic routes could potentially see the entrance of new foreign carriers. At the same time, the increased competition will indirectly benefit consumers in the form of lower cargo rates that could produce retail and other savings. The fact the Bush administration is apparently willing to grant the necessary concessions to the Europeans is a sign that an agreement is a real possibility. And that possibility should give optimism to consumers.

Seventh Circuit Splits From Sister Circuits Over Telephone Consumer Protection Act

In an opinion by Judge Easterbrook,⁴² the Seventh Circuit

³⁵ Crawley, *supra* note 3.

³⁶ BBC, *supra* note 1.

³⁷ Crawley, *supra* note 3.

³⁸ EU BUSINESS, *supra* note 5.

³⁹ Crawley, *supra* note 3.

⁴⁰ Cameron, et al, *supra* note 26.

⁴¹ Done, *supra* note 2.

⁴² Brill v. Countrywide Home Loans, Inc., 2005 U.S. App. LEXIS 22514, 1,

Court of Appeals recently ruled that federal courts have jurisdiction to hear suits alleging violations of the Telephone Consumer Protection Act (TCPA)⁴³ brought under the Class Action Fairness Act (CAFA).⁴⁴ The TCPA is the Congressional response to consumer outrage over the intrusions of telemarketers and attempts to save consumers' time and money by prohibiting unsolicited faxes.⁴⁵ Illinois state courts have presided over many TCPA cases and the state is becoming a hotbed of TCPA litigation.⁴⁶ That might change as the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.* places the Seventh Circuit, within which Illinois is located, at odds with at least six other federal appellate circuits. Additionally, the decision will have significant ramifications for individuals suing under the TCPA.

In the case, *Brill* brought a class action suit in Illinois state court under the private right of action provision created by the TCPA.⁴⁷ *Brill* alleged that he received one of 3,800 unsolicited faxed advertisements distributed by Countrywide Home Loans.⁴⁸ Countrywide admitted that an employee had sent at least 3,800 such faxes.⁴⁹ Under the TCPA, each fax constitutes a violation, and each violation can be fined by \$500.⁵⁰ Moreover, if *Brill* could prove that

427 F.3d 446 (7th Cir. 2005).

⁴³ 47 U.S.C. § 227 (2004).

⁴⁴ Pub. L. 109-2, 119 Stat. 4 (2005).

⁴⁵ For a discussion on the TCPA, see Brook M. Carey, *Fax Blasting at the OK Corral: Is the FCC Shooting From the Hip*, 18 LOY. CONSUMER L. REV. 1 (2005).

⁴⁶ Carey, *supra* note 45, at 4.

⁴⁷ 47 U.S.C. § 227(b)(3) (2004).

⁴⁸ *Brill*, 2005 U.S. App. LEXIS 22514 at 1.

⁴⁹ *Id.*

⁵⁰ 47 U.S.C. § 227(b)(3) Private right of action.

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 such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this

Countrywide “willfully or knowingly violated” the TCPA, Countrywide would be subject to treble damages of \$1,500 per violation.⁵¹ Thus, the damages claimed against Countrywide could range from \$1.9 million to \$5.7 million, or higher if more violations were found. In response to Brill’s complaint, Countrywide filed notice to remove the case to federal court under the CAFA.⁵² In doing so, Countrywide alleged that the damages exceeded the \$5 million minimum threshold articulated in the CAFA.⁵³ The district court remanded the case to state court after finding that Countrywide had failed to show that the damages at stake exceeded \$5 million and that, in any event, the federal courts could never hear case brought under the TCPA because the states have exclusive jurisdiction over such claims.⁵⁴

In reversing the district court, the Seventh Circuit first clarifies the burden placed on the removing party.⁵⁵ The Court states that Countrywide did not have to prove or present evidence that Brill would in fact recover more than \$5 million.⁵⁶ Such a burden would be difficult to fulfill during the pleading stage of litigation, when evidence has not yet been obtained.⁵⁷ In its place, the Court notes that the removing party need only demonstrate that the “amount in controversy” exceed the threshold amount.⁵⁸ Once this amount has been established, federal jurisdiction can be foreclosed only where it is a “legal certainty” that the final judgment will fall short of the threshold amount.⁵⁹ Countrywide’s admission that an employee had

subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

⁵¹ 47 U.S.C. § 227(b)(3).

⁵² *Brill*, 2005 U.S. App. LEXIS 22514 at 2.

⁵³ Pub. L. 109-2, 119 Stat. 4, Sec. 4 (a)(6) - In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$ 5,000,000, exclusive of interest and costs.

⁵⁴ *Brill*, 2005 U.S. App. LEXIS 22514 at 2.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ *Brill*, 2005 U.S. App. LEXIS 22514 at 7.

sent the 3,800 unsolicited faxes was sufficient to satisfy its burden of showing that the amount in controversy exceeded \$5 million.⁶⁰

The Court next addresses the district court's ruling that the states possessed exclusive jurisdiction to resolve private suits brought under the TCPA. Subsection (b)(3) of §227 specifically creates a private right of action, and in so doing expressly states that "[a] person or entity may, if otherwise permitted by the laws or rules of a court of a State, bring in an appropriate court of that State" an action based on the regulations of the TCPA.⁶¹ The Court states that the TCPA's failure to authorize federal jurisdiction at the same time has led some courts to infer that state jurisdiction is exclusive.⁶² However, the TCPA does not expressly proclaim that jurisdiction over TCPA claims is given exclusively to the State courts.⁶³ The Court reasons that Congress left out any mention of federal jurisdiction to avoid the argument that federal courts hold exclusive jurisdiction over TCPA claims.⁶⁴ Furthermore, the language may be an attempt by Congress to free states from the rule that they may not discriminate against federal claims.⁶⁵ Finally, the Court notes that while §227(b)(3) does not mention exclusive jurisdiction, §227(f)(2) does.⁶⁶ Section 227(f)(1) allows States to bring claims under the TCPA and §227(f)(2) grants that the federal courts shall have exclusive jurisdictions of claims brought under §227(f).⁶⁷ The Court

⁶⁰ *Id.*

⁶¹ 47 U.S.C. § 227(b)(3).

⁶² *Brill*, 2005 U.S. App. LEXIS at 10.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 13.

⁶⁵ *Id.* at 14. "Section 227(b)(3) may serve the further function of freeing states from *Testa's* rule [*Testa v. Katt*, 330 U.S. 386 (1947)] that they may not discriminate against federal claims; the clause in §227(b)(3) that the action is proper 'if otherwise permitted by the laws or rules of court of a State' implies that each state may decide for itself whether to entertain claims under the Telephone Consumer Protection Act."

⁶⁶ *Id.*

⁶⁷ 47 U.S.C. § 227 - (f) Actions by States.

(2) Exclusive jurisdiction of Federal courts. The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief,

notes “[h]ow strange it would be to make federal courts the exclusive forum for suits by states, while making state courts the exclusive forum for suits by private plaintiffs.”⁶⁸ The Court resolves this conflict by holding that the state forum mentioned in §227(b)(3) is “optional rather than mandatory.”⁶⁹ Furthermore, the implication of condition in §227(b)(3) allowing state court jurisdiction “if otherwise permitted by the laws or rules of court of a State” is that both federal question and diversity jurisdiction remain available to litigants.⁷⁰ If the states chose not to allow TCPA claims, Judge Easterbrook rhetorically asks, then where else could litigants pursue their claims?⁷¹ Thus, at least in the Seventh Circuit, the only exclusive jurisdiction implicated in TCPA claims is that of the federal courts to hear claims brought by states. In suits brought by private parties, the federal courts have jurisdiction both under federal question and diversity. Moreover, Countrywide’s removal action pursuant to 28 U.S.C. § 1441 was proper and should not have been remanded by the district court.

The Court’s decision in *Brill* places the Seventh Circuit squarely at odds with Second,⁷² Third,⁷³ Fourth,⁷⁴ Fifth,⁷⁵ Ninth,⁷⁶ and Eleventh Circuits.⁷⁷ Those Courts have previously held that jurisdiction to hear private suits brought under the TCPA belongs

commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

⁶⁸ *Brill*, 2005 U.S. App. LEXIS 22514 at 15.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432 (2nd Cir. 1998).

⁷³ *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998).

⁷⁴ *International Sci. & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997).

⁷⁵ *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997).

⁷⁶ *Murphy v. Lanier*, 204 F.3d 911 (9th Cir. 2000).

⁷⁷ *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998).

exclusively to the states.⁷⁸ In the decisions finding exclusive state jurisdictions over TCPA private claims, the courts have placed emphasis on the fact that Congress expressly granted exclusive federal jurisdiction to TCPA claims brought by states under §227(f)(2).⁷⁹ This is the same section that the Seventh Circuit used to justify its interpretation that federal courts retained jurisdiction over private TCPA claims.

How this split plays out in the federal courts is important for consumers bringing TCPA claims. As it is right now, which forum – state or federal – a plaintiff can properly bring such a claim depends in which appellate district the parties reside. Differing venues bring in the possibility of different procedural requirements which could increase disunity in standards and decisions in implementing a nationwide law.

Publishers Fight to Stop Google's Library

Google, the internet search engine giant praised for its innovation, recently unveiled a new concept that is exciting consumers and drawing the ire of international publishers. Google's next big idea is the Google Print Project,⁸⁰ an ambitious attempt to scan and digitize millions of books from the libraries at Harvard, Michigan, Stanford, and Oxford Universities and the New York Public Library.⁸¹ Under the plan, Google intends to scan over 15 million books and other documents at a cost of about \$10 per item.⁸² The scanned documents will then be made available for public searches. Fearing copyright violations, both the Association of American Publishers⁸³ (AAP) and the Authors Guild⁸⁴ have filed

⁷⁸ See *Chair King*, 131 F.3d at 512 (“Congress’s failure to address any of these matters with regard to private actions provides support for the our conclusion that Congress intended only state courts to handle these private actions”).

⁷⁹ See *Murphy*, 204 F. 3d at 913.

⁸⁰ The Google Print Project, <http://print.google.com> (last visited Nov. 26, 2005).

⁸¹ Chris Nuttall, *Publishers Try to Halt Google Library Plan*, FIN. TIMES, Oct. 20, 2005, at 20, available at 2005 WLNR 16948658.

⁸² John Markoff and Edward Wyatt, *Google is Adding Major Libraries to its Database*, NEW YORK TIMES, Dec. 14, 2004, at A1, available at 2004 WLNR 15523341.

⁸³ Press Release, Association of American Publishers, *Publishers Sue Google*