



# THE DOCKET

The Newsletter of the Michigan Association of District Court Magistrates

May, 2003

## Email Spam & the Courts

### Federal Telephone Consumer Protection Act of 1991 in Small Claims

(The following article was reprinted with permission, appearing in the 2/28/2003 edition of the Detroit Free Press)

#### Two helpings of spam and a plate full of ideas

By Mike Wendland, Free Press Columnist

Mark Reinertson hates spam as much as the rest of us. As an IT consultant and network administrator, he sees way too much junk mail clogging the computers he manages for several Detroit-area companies. So when a junk message arrived on his home PC the other day from Sears touting kitchen cabinet refacing, he decided to take action. He went down to the 44th District Court in Royal Oak and filed a small claims court complaint against Sears, accusing it of violating the federal junk fax law.

That law -- part of the Telephone Consumer Protection Act of 1991 -- makes it illegal to send unsolicited advertisements' via "any telephone facsimile machine, computer or other device" to any equipment that can print the material on paper.

"I argued that under that law, my computer is also a fax machine, and e-mail is really no different from a fax machine," says Reinertson.

The court agreed. Sears never contested the suit and, on Feb. 4, Magistrate Donald R. Chisholm awarded Reinertson \$539 -- the \$500 fine allowed under the law plus his court fees.

Sears sent Reinertson a check on Feb. 20. "I'm no attorney, but the process is pretty easy. More people need to do this," he says. "The only way for this nonsense to stop is for us to stand up and do something about it." He plans to file more suits. ...

### Telephone Consumer Protection

**Act of 1991** by Mary Ellen Brennan Staff Attorney, 44<sup>th</sup> District Court. (Editor note - this is a memorandum sent by Ms. Brennan to her judges, asking for a review of the ruling by the magistrate, to summarily overturn that decision - used with permission of Mary Ellen Brennan)

Recently, an individual filed an action in your Small Claims division under the Federal 'Junk Fax Law' (47 USC Section 227) for an unsolicited e-mail he received containing an

advertisement from Sears. Magistrate Chisholm awarded the plaintiff over \$500 on his claim against Sears. This raises two questions:

First, does the Small Claims division have jurisdiction over an action that alleges this violation of Federal law? The answer is 'Yes'.

The federal 'Junk Fax Law' is actually just one part of the larger Telephone Consumer Protection Act (TCPA). The relevant section prohibits using a fax machine, computer or other device to send an unsolicited advertisement to a fax machine (47 USC Section 227 (b)(1)(C)). Further, a person may, if otherwise permitted by the laws or rules of Court of a state, bring an action based on a violation (27 USC 227 (b)(3)).

Therefore, this law creates a private right of action to be brought in state court even though the violation is of federal law. The courts have consistently held that since the TCPA contains a specific jurisdictional provision calling for private actions to be brought in state courts, the state courts have exclusive jurisdiction over private violations of the TCPA prohibiting unsolicited facsimile advertising. In other words, the word 'may' means 'must' according to a majority of the federal courts. Foxhall Realty Law Office v Telecommunications Premium Services 156 F 3rd 432.

The courts acknowledge it is a "somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal statute" International Science & Technology Institute v Inacom Communications 106 F 3rd 1146. However, every court that has examined the issue has held the actions must be brought in state court (except the Southern District of Indiana which found concurrent jurisdiction).

Additionally, Senator Hollings, the sponsor of the TCPA discussing the private right of action

stated: "It is my hope that states will make it as easy as possible for consumers to bring such actions, preferably in small claims court." 137 Cong. Rec S16205-06 (statement of Senator Hollings)

The statute does provide the states an 'opt-out' provision by including the phrase 'if otherwise permitted by the laws or rules of court of a state'. The states can refuse to exercise the jurisdiction authorized by statute. However, I have carefully reviewed the relevant Michigan statutes and court rules including those relating to small claims actions and find nothing prohibiting the filing of the action in a Michigan state court. There are some federal decisions dealing with this issue and the approach is that if it is not specifically prohibited, it is consider [*sic*] permitted. International Science & Technology Institute previously cited.

Therefore, under this law, the small claims division does have jurisdiction over this action.

Second, was the ruling in favor of plaintiff appropriate under the facts of this case? The answer is 'No'.

This Federal law prohibits sending unsolicited ads to a facsimile machine. The purpose is to prevent the unfair shifting of advertising costs from advertiser to unwilling consumer. Destination Ventures v FCC 844 F Supp 632. The court in Destination Ventures discusses the purpose of the law. Congress was addressing the problem that fax advertising does two things, "First, it shifts some of the costs of advertising form [*sic*] the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." H.R. Rep no. 317 cited in Destination Ventures. There is also reference to the fact that the recipient bears the cost of the use of the fax machine plus the expensive paper used to print out the message. Additionally, while the

machine processes the junk fax, the receiver cannot receive legitimate messages.

Plaintiff's cause of action was based on receipt of an e-mail, not a fax. The TCPA does not prohibit sending unsolicited advertisements to a computer. Plaintiff has the option of deleting the message without cost to him. Receiving advertisements by e-mail, while irritating, does not have the same economic consequence as receiving a fax.

Judgment should have been for the defendant Sears. MCR 4.401 (C) states that "An action taken by a magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves.

(Ed. Note - Ms. Brennan has indicated the judge will be intervening in this issue and overturn the magistrate's decision)

**Transportation Trivia**, by Dennis Hall, still Magistrate of the 70th District Court.

1. Where and when was the world's first mile of rural concrete highway built?
2. Who developed the first yellow "no passing" lines on the highways?
3. Who invented the white center lines on highways?
4. Where was the nation's first roadside picnic tables installed?
5. Where was the first traffic tunnel built between two nations?
6. Where is the world's first international underwater railway tunnel located?

The answers are located elsewhere in this edition. Get all six correct and you are the transportation guru and win a fabulous prize. Fail to get one correct and we are going to request that you forward your driver's license to your local Secretary of State office for shredding.

**HB 4086**, by Sandra Hartnell, SCAO

HB 4086 has passed house and senate and is on its way to the governor. This makes expired plates a civil infraction except when the vehicle is a commercial vehicle required to be registered according to the gross vehicle weight schedule, which remains a misdemeanor, 90 days/\$500 fine or both. If signed, this would be effective 9/1/03. She is expected to sign this.

**New Legislation**, By Sandra Hartnell, SCAO

HB 4661 was just introduced in the House of Representatives, which would expand district court attorney magistrate authority on pleas. It has been referred to the Judiciary committee.

You can view the text of this bill at:

<http://michiganlegislature.org/documents/2003-2004/billintroduced/house/pdf/2003-HIB-4661.pdf>

HB 4333 would increase minimum fine on disabled parking to \$100 and increase maximum to \$250. This bill has passed the House and is over in the Senate Transportation Committee. No way to know for sure, but it looks good that this would pass.

19 bills have been introduced: SB 433-441 and 451. The impact of this group of bills discusses the \$9 state minimum cost on citations. On civil infractions the proposal is to roll all the fees plus the \$9 together and round up from \$34 to \$35. Misdemeanors are more complicated - simple misdemeanors would increase from \$9 to \$35, specified and serious (as defined in Crime Victims Act) would increase from \$9 to \$45, and felony would to \$60. The DNA sample fee and the Forensic Laboratory fee would be eliminated.

**Search Warrants by Fax**, by Tom Bleau, Magistrate, 74<sup>th</sup> District Court & MADCM Vice President.

The legislative committee of Michigan Association of District Court Magistrates has submitted legislation to amend the contradictory language of MCL 780.651 as it relates to fax search warrants. The first two sections seem to indicate that a district court magistrates have the same authority as a judge to issue a search warrant by fax. However, section 3 of the law seems to indicate that a district court magistrate may only issue a search warrant by fax if it involves a blood-alcohol search warrant under MCL 257.625a. The association is going to try to have the legislature correct this inconsistency so that district court magistrates can issue any search warrant by fax.

We are also reviewing other matters for submission to the legislature. If any magistrate feels there are other issues that you want the association to submit to the legislature to correct current problems or new legislation which would make our part of the judicial system operate more efficiently, contact Tom Bleau at (989) 895-4231 or email him at [bleaut@baycounty.net](mailto:bleaut@baycounty.net). He will forward your suggestions to the executive board for discussion and possible submission.

### **Letter of the Month**, by Steve Doak, Magistrate, Berrien County Trial Court

“Dear Magistrate,  
I admit that I was going 35 miles an hour in a 25 mile an hour zone as properly indicated by the officer. However, I have a good reason. Given the current status of the country's economy and especially the escalating gasoline prices I felt it would be wiser to continue to go 35 miles an hour rather than slow down to 25 because if I did slow down then it would take me longer to get to my destination and therefore require me to use additional expensive fuel.”

As Steve pointed out, you gotta love it!

also, from Roberta J.F. Wray, Magistrate 67-3 District Court:

“Here is the money order for the \$50.00 fine for a seat belt violation - I am sure it does not matter and of course will not change anything - but I did have my seat belt on and had dropped a whole mug of coffee down my leg which at the time I did unclick my belt to get the mug out from underneath my feet. Also I was only doing about 20 miles an (sic) in a 45 mph zone, shouldn't that have been a clue there was a problem?? Hope this never happens to the officer who issued this ticket. I felt at that moment it was a safety issue to get the coffee mug - but of course he did not seem to care - did not even ask for proof of insurance or registration. You have a Great Day.”

### **Safety Belt Ticket Dismissals**

by Alicia Sledge, OHSP

Several Michigan law enforcement agencies have expressed concern regarding safety belt tickets being dismissed by courts throughout the state. Safety belt compliance by motorists is a critical factor in decreasing the number of lives lost on Michigan roadways each year. Safety belts increase motorists chances of surviving a traffic crash by 50%. In order to promote the message that safety belt use is important, all traffic safety partners must work together and remain consistent in enforcing the safety belt law and the “Click It or Ticket” message.

Statutory authority for the mandatory waiver of fines and costs is limited to four offenses:

**No Operator's License in Possession [MCL 257.311]** The requirement for courts to waive fines and costs upon receipt of certification by a law enforcement agency that the person, before the appearance date on the citation, produced a license valid on the date of the violation is found in MCL 257.901a.

**Defective Safety Equipment [MCL 257.328]**

The requirement for courts to waive fines and costs upon receipt of certification by a law enforcement agency that repair of the defect was made before the appearance date on the citation is found in MCL 257.907(9).

**No Child Restraint System [MCL 257.710d]**

The requirement for courts to waive fines and costs upon receipt from the person receiving the citation of evidence of acquisition, purchase, or rental of a child seating system before the appearance date on the citation is found in MCL 257.907(12).

**No Proof of Registration [MCL 257.223]** The requirement for courts to waive fines and costs upon receipt of certification by a law enforcement agency that a valid registration certificate that was valid on the date of the violation was produced before the appearance date on the citation is found in MCL 257.907(14).

**No other violations are mandated to have fines and costs waived by the court.**

One violation that is no longer waivable is No Proof of Insurance. 1995 Public Act 287 deleted the waiver requirement from MCL 257.907, and inserted a requirement in MCL 257.328(3) that if an owner or operator is determined to be responsible for a violation of 257.328(1) and produces proof that the vehicle is currently insured as required by law, the court must, in addition to fines, costs, also assess a \$25.00 fee. MCL 257.328(1) includes both No Proof of Insurance, and the civil infraction violation of No Insurance. Law enforcement officers should not indicate on citations that violations of MCL 257.328(1) are waivable offenses.

Courts are not required to waive fines and costs if the required proof is not received by the appearance date on the citation. Law enforcement agencies should not sign tickets

presented for waiver/sign-off after the appearance date unless specifically instructed to do so by the local district or municipal court.

**Pilot program and new tag line headline May enforcement**

by Alicia Sledge, OHSP

A new *Click it or Ticket* tag line and a high-visibility enforcement pilot program take center stage during the two-week national safety belt mobilization May 19-June 1.

A new enforcement-themed tag line, *Buckle Up or Pay Up*, has been teamed with *Click it or Ticket* to better focus awareness of enforcement efforts. In addition, more than 500 police agencies across Michigan are making safety belt enforcement high during the enforcement blitz and 37 departments are piloting “safety belt enforcement zones” in several areas of the state. The goal is to achieve what has been eluding the state since the belt law changed in 2000 – real gains in safety belt use rates. Michigan has yet to sustain or build on its all time high of 83.5 percent belt use since the law changed in 2000. In 2002, Michigan hit 82.9 percent belt use. In 2001, 1,328 people died on Michigan roadways, and nearly 50% of them were unrestrained. The most effective way to save lives on our roads is to increase safety belt use. A series of six media events throughout the state kick off Monday, May 19 to announce the safety belt campaign. They are being hosted in the Upper Peninsula, Metro Detroit, Bay City, Grand Rapids area and Lansing on May 19. A media event in Traverse City is being hosted on May 27.

Overtime funding will be provided for intense, highly visible enforcement of the state’s safety belt law to the Drive Michigan Safely Task Force, which represents 19 counties and approximately 75 percent of the states population. All Michigan law enforcement

agencies will have the opportunity to win equipment or overtime funds for being a part of the safety belt enforcement mobilization. Radio, television, and cable advertising promoting the campaign hits the airwaves May 12. The University of Michigan Transportation Institute is conducting statewide pre and post safety belt use observation surveys to capture the effects of the two-week campaign. Phone surveys are also being used to gauge public awareness of the campaign message and enforcement presence.

To find out more information about the Click It or Ticket mobilization, please visit the OHSP website at [www.michigan.gov/msp](http://www.michigan.gov/msp) (click on Services to Governmental Agencies and then Office of Highway Safety Planning).

## Confused? Yeh, me too!

By Dennis Hall, Magistrate, 70th District Court.

Act 181 and Dismissible Citations. For those of you that have Motor Carrier Safety Regulations come through your court, there's often some confusion between the Michigan Vehicle Code defective equipment violation and the Commercial Motor Vehicle defective equipment violation.

I wouldn't spend any time on the Michigan Vehicle Code defective equipment violation unless someone e-mails me a question. (Dhall@saginawcounty.com)

As to Commercial Motor Vehicle (CVM) defective equipment violations, please be aware that there are three types.

Section 480.17 is your **basic** defective equipment violation that has a possible C.I. fine of up to \$250.00.

Section **480.17b** is a **serious safety defect** (that results in the vehicle being placed out of service) which is still a C.I. but with a possible fine of up to \$300.00.

And finally, section **48017c**, a defective equipment violation involving **hazardous material**. This has moved it into the misdemeanor category with a \$500.00 fine and one year penalty.

Only violations that fall into the first category of basic defective equipment violations (while not being placed out of service) qualify for dismissal by the court. Sounds pretty simple so far, now here's the catch. Section 480(5) states ... *issued a citation by a township, city, village or county ... the court shall dismiss the citation if the owner or operator of that CMV provides written proof to the court within 14 days after the citation is issued showing that the defective equipment indicated in the citation has been repaired.*

So, the violations issued by MSP Motor Carrier Division are **not** subject to dismissal by the court. Also, providing written proof to the court is up in the air as to what criteria is to be followed. So here is why you earn the big bucks for your decision as to what constitutes proof that the vehicle is repaired.

## Transportation Trivia

**Answers**, by Dennis Hall, Magistrate, 70th District Court

1. On Woodward Ave., between Six and Seven Mile roads in Detroit in 1909. The cost was \$13,537.
2. Fred W. Green, Michigan Governor from 1927 to 1930.
3. Edward H. Hines, a Wayne County roads commissioner, in 1911.
4. On old US 16 in Boston Township in Ionia County.
5. The mile long Detroit-Windsor tunnel under the Detroit River.
6. Between Port Huron and Sarnia, Ontario. It was opened in 1891.

## MADCM 2003 Annual Training Conference

We will be at Crystal Mountain on September 24 through the 26<sup>th</sup>. Specific details will be mailed to everyone this summer. The education committee is reporting. We have an excellent educational schedule this year and the fellowship with the other magistrates is outstanding. See you then.

**Newsletter on the Web**, By Jim Pahl, Master Chief Magistrate-Deluxe, 55<sup>th</sup> District Court & Editor of the DOCKET.

I want to thank everyone who submitted articles for this quarter's issue. It is a joy for me to put together your newsletter. Publishing on our web site also greatly reduces the expenses of printing and mailing hard copies to everyone. The costs of printing are going up, as are the postal rates.

When my children were smaller, I paid them one whole penny for each individual newsletter they processed. (Fold - seal - mailing label - stamp)

We set up a table in the living room - plugged a movie into the VCR and went to work. It was really amazing what they would (notice the past tense) do for \$3.00!!! Now the youngest is in high school. They have organized and are demanding all types of wage increases, not only for the newsletter, but lawn mowing and all of the other chores they are required to do around the house.

Management has responded by taking away car keys and bargaining is continuing. With this new method of publishing, I can cut the rug right out from under them. I am considering layoff's!

If you have a submission for the next issue of the newsletter, please have it to me by August 15, 2003. The next issue will be on the web by September 1, 2003. Email is the most ideal way, and send it to me at [dcpahl@ingham.org](mailto:dcpahl@ingham.org). Please attach the article you want printed, as I have some difficulty with cut and paste from the body of the email itself.

You can also mail items to me:

Jim Pahl, Magistrate  
55<sup>th</sup> District Court  
700 Buhl Ave.  
Mason, Michigan 48854  
Phone: (517) 676-8403 (voice mail after the third ring - please leave me a message)  
FAX: (517) 676-8308 (if you fax, call me at the same time and let me know, or it could become lost in the piles of faxes our probation officers receive from the same machine).

**2003 Edition Michigan Vehicle Code**, by Jim Pahl, Magistrate 55<sup>th</sup> District Court.

I was hoping to be able to print **GREAT NEWS!** However - it is not ready yet. I talked with representatives of the Purchasing and Contracts section of the Michigan Department of State on May 15, 2003. They report the newest edition of the vehicle code is at the printer and they are hopeful it will be ready shortly. They believe the prices will remain about the same. You can contact them directly at (517) 373-2570 - but wait a few weeks.