Advertising Client Advisory

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MAY 9, 2007

TCPA Does Not Preempt State Telemarketing Statutes

EXECUTIVE SUMMARY

A Florida Appeals Court recently upheld a permanent injunction and civil penalties under state telemarketing law against a Florida-based retail business for making prerecorded calls via an automated dialing system to 73 consumers on Florida's do-not-call list. The Florida District Court of Appeal, Fifth District upheld the lower court's rejection of the defendants' claim that the federal Telephone Consumer Protection Act, ("TCPA") 47 U.S.C. § 227, preempted Florida's more restrictive telemarketing laws. While this was a question of first impression in Florida, courts in at least two other states, Minnesota and Indiana, similarly have held that the Federal government has declined to exercise complete preemption over telemarketing.

FACTS AND CHARGES

In *TSA Stores, Inc. v. Department of Agriculture & Consumer Services,* (Fla. Dist. Ct. App., 5th Dist., No. 5D06-1775, April 20, 2007), The Sports Authority ("TSA") used an automatic dialer to make prerecorded calls from California to Florida announcing an upcoming sale in TSA stores in Orange County, Florida. It was later discovered that at least 70 of the phone numbers that were called were on Florida's do-not-call list. The phone numbers had been obtained by TSA via point-of-sale receipts where consumers voluntarily surrendered their phone numbers. Florida charged TSA with violations of:

§§ 501.059(7). Section 501.059(7) prohibits making or knowingly allowing a telephonic sales call to be made to any number on the Florida do-not-call list with an "automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection" is made, regardless of the existence of an established business relationship.

§§ 501.059(4) of the Florida code regulating telemarketing. Section 501.059(4) prohibits any unsolicited telephonic sales calls from being made to any number on the Florida do-not-call list unless a prior or existing business relationship ("EBR") exists.

TRIAL

The trial court found TSA in violation of both sections because the calls were placed to Florida consumers whose names appeared on the quarterly "no sales solicitation calls" list. As a result, the trial court entered a permanent injunction against TSA, prohibiting the defendant from making any calls to consumers whose names appeared on the Florida do-not-call list or using an automated dialer to make any sales calls, and imposed a civil penalty for statutory violations.

APPEAL

On appeal, TSA argued that it should not be subject to Florida's telemarketing rules because the statute was preempted by federal law, each consumer had an EBR,

and the phone calls were made from outside the state. When Congress passed the TCPA in 1991, it did so with a stated purpose to protect the privacy of consumers in their homes, as well as to prevent fraud, but it did not appear to intend to preempt state telemarketing laws. The TCPA authorized the creation of a national database of consumers who objected to receiving telemarketing phone calls and required the Federal Communications Commission, ("FCC") to adopt rules implementing the TCPA,[1] but not to the exclusion of other telemarketing laws.

PREEMPTION

Congress gave two indications in the TCPA that it was not occupying the field with respect to telemarketing enforcement:

- The Act authorizes the states to bring civil actions for violations of the Act in federal court (47 U.S.C. §227(f)).

- The TCPA sets only a minimum level of enforcement with respect to four specific telemarketing techniques, clearing the way for states to pass stricter regulations.

The four practices where "state law is not preempted" are listed under 47 U.S.C. § 227(e)(1): "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits:

- The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

- The use of automatic telephone dialing systems;

- The use of artificial or prerecorded voice messages; or

- The making of telephone solicitations."

In other words, when addressing the above factors, states are free to pass higher levels of regulations than exist at the federal level. Florida is one of many states that have chosen to do exactly that.

INDIANA

For example, Indiana Code §24-5-14-5(b) prohibits the use of automated dialing-announcing devices without the consumers' consent. Although there are exceptions to the Automated Dialing Machine Statute ("ADMS"), unlike the FCC's regulations, there are no broad exclusions for non-commercial calls. Thus, ADMS was upheld in 2006 when a firm was charged with violating the statute by placing pre-recorded messages to state residents about a congressional race. *Freeeats.com, Inc. v. Indiana,* 2006 U.S. Dist. LEXIS 77534 (S.D. Ind. Oct. 24, 2006). The firm argued Indiana's law was preempted by the TCPA, but a Federal District Court held the TCPA was "not an attempt to occupy the field of interstate communications or to promote national uniformity of regulation."

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[1] The Federal Trade Commission ("FTC") also adopted telemarketing rules, known as the Telemarketing Sales Rule ("TSR") (16 CFR 310.4) after the passage of the Telephone Consumer Fraud and Abuse Prevention Act ("TCFAPA") in 1992. In 2003, Congress passed implementing authority for a National Do-Not-Call Registry. Both agencies supplemented their original Rules to execute the new Registry.

MINNESOTA

Similarly, in 1995, in the United States Court of Appeals for the Eighth Circuit held that a Minnesota regulation prohibiting the use of prerecorded messages was not preempted by the TCPA. The statute made allowances for EBRs and consent by the subscriber and withstood both preemption and First Amendment challenges by a candidate for Governor that wished to use the messages as part of his campaign. *Van Bergen v. Minnesota,* 59 F.3d 1541 (8th Cir. 1995).

FLORIDA

Despite the existing federal precedent, TSA argued that §501.059(7)(a) should be preempted by the TCPA, not only because the TCPA addresses calls by automated dialers, but also because the calls in question were made from California. TSA's position was that Florida lacked the jurisdictional authority to regulate interstate calls. Although the court rejected TSA's appeal without reaching a decision on this particular issue, it did not appear to be positively disposed: TSA's theory "suggests, in essence, that the Florida statute might be fully avoided by the simple expedient of taking the automated call machine to a different state, and having the calls to Florida consumers made there." The court failed to fully address the issue though by finding "this contingency" covered by the dual regulatory schemes. However, the court explained, although the calls in question "may have emanated from an out-of-state source, the causation element underpinning this particular violation" occurred in Florida. Accordingly, in this situation, "the origination point of the automated calls is not relevant."

The Appeals Court additionally held that §501.059(7)(a) contained no EBR exemption because the statute states that **any** telephonic sales call is prohibited. The EBR exemption of the Florida statutes applies to "unsolicited telephonic sales calls," (§501.059(1)(c)), and because §501.059(7)(a) makes no reference to "unsolicited" the EBR exemption was held to not apply to the automated dialer or pre-recorded message prohibition to phone numbers on the Florida do-not-call list.

PRIOR OR EXISTING BUSINESS RELATIONSHIP

TSA was more successful with respect to the charge that it had violated §501.059(4). TSA argued that because consumers had voluntarily supplied their phone numbers to TSA at the time of making a purchase, TSA had EBRs with these consumers and, thus, should be exempt from the statutory penalties. The exemption exists for calls that are made with an "express" consent or where there is an EBR. Florida argued that simply giving over one's phone number at the point of sale was not sufficient to create express consent and, therefore, TSA should be ineligible for exemption from the statute. The Court agreed on this point, holding that while "voluntarily surrendering one's telephone number to a sales clerk might under some circumstances give an implied authority for the store to make a later telephonic sales call . . . it certainly does not give an 'express' consent."

However, because the term "prior or existing business relationship" is not defined in the §501.059(4), the court looked to the FCC's definition at 47 C.F.R. §64.1200(f)(4). The FCC's definition

creates an 18-month window for an EBR, and notes that an EBR can comprise a "purchase or transaction with the entity within 18 months" before the phone call. Because Florida stipulated that all calls had been made within the previous 18 months, and TSA could demonstrate all of the consumers had made purchases within the last 18 months from TSA, the court held an EBR existed for these calls. The injunction against TSA covering §501.059(4) was reversed.

WHAT THIS MEANS FOR BUSINESSES

The *TSA* case is yet another demonstration that state legislatures and state regulatory agencies have the authority and the ability to impose stricter requirements on telemarketers than the minimums delineated by Congress and enforced by the FCC and the FTC. Although the majority of precedent in this area concerns the TCPA, and the FCC's enforcement of the TCPA, businesses should remember that the rulemaking history to the TSR explicitly explains the FTC does not intend for the National Registry rules to preempt any state do-not-call laws.

Those choosing to telemarket must be aware of the continuing overlapping authority of both federal agencies, as well as the state attorneys general in the jurisdiction where the business is placing calls. Businesses should continue to monitor both state and federal legislation in this area and, when in doubt, consult with counsel before beginning a telemarketing campaign.

FOR MORE INFORMATION

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