



Iowa General Assembly

2003 Legal Updates

Legislative Services Agency – Legal Services Division

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Purpose. *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

NATIONAL DO-NOT-CALL TELEPHONE REGISTRY

Case 1: U.S. Security, et al. v. Federal Trade Commission

Filed by the United States District Court for Western District of Oklahoma, September 23, 2003

<http://news.findlaw.com/hdocs/docs/ftc/donotcall92303ord.pdf>

Case 2: Mainstream Marketing Services, et al. v. Federal Trade Commission

Filed by the United States District Court for the District of Colorado, September 25, 2003

<http://news.findlaw.com/hdocs/docs/ftc/mmsftc92503opn.pdf>

Stay of Registry lifted pending resolution of appeal:

Federal Trade Commission v. Mainstream Marketing Services, et al.

Filed by the United States Court of Appeals for the Tenth Circuit, October 7, 2003

<http://www.ck10.uscourts.gov/circuit/031429.pdf>

Case 3: Order denying motion for Stay of Order:

Mainstream Marketing Services, et al. v. Federal Communications Commission

Filed by the United States Court of Appeals for the Tenth Circuit, September 26, 2003

<http://www.ck10.uscourts.gov/circuit/03-9571.pdf>

Background – Facts. During 2002, the Federal Trade Commission (FTC) proposed amending its Telemarketing Sales Rule to provide for a national do-not-call registry. Previously, the FTC required only a company-specific do-not-call list pursuant to the Telemarketing and Consumer Fraud and Prevention Act (TCFPA). The FTC considered over 64,000 comments filed in response to the proposed rules before issuing the final version of the registry and other rules.

The Federal Communications Commission (FCC) also proposed amending its rules during September 2002 implementing the Telephone Consumer Protection Act (TCPA), specifically seeking, in part, comments directed to whether the FCC should revisit the option of whether to establish a national do-not-call list and how to enhance consumer privacy through rule amendment.

In March 2003, Congress enacted the Do-Not-Call Implementation Act, Pub. L. No. 108 – 10, which provides that the FTC may establish fees and regulations to implement and enforce the do-not-call registry, and that the FCC shall issue its final rule regarding the registry, in coordination with the FTC, not more than 180 days after enactment of the legislation.

Registration for the do-not-call list was opened in late June 2003. More than 51 million consumers have registered one or more phone numbers since that time.

Litigation by various parties associated with the telemarketing industry challenging the registry was initiated in federal court as early as January 2003.

Issues.

1. Does the FTC have the statutory authority to create a national do-not-call registry?
2. Does a national do-not-call registry that distinguishes among for-profit and not-for-profit callers violate the First Amendment?

Analysis. In the first case, U.S. Security, the U.S. district court ruled that it was the FCC that had the statutory authority to create a do-not-call registry under the TCPA, not the FTC. Although the FTC had argued that it also had the power to prohibit deceptive or abusive telemarketing under the TCFPA, the court rejected this general grant of authority in light of

the specific grant of authority to the FCC in the other statute. The court was also unconvinced by the statute passed by Congress in March 2003 that Congress intended to grant specific authority to the FTC. However, within a few days after the court's decision, Congress overwhelmingly voted to authorize the FTC to establish a do-not-call registry. (See An Act to ratify the authority of the FTC to establish a do-not-call registry, Pub. L. No. 108-82.)

In the second case, the U.S. district court focused primarily on the government regulations as containing an unconstitutional "content discrimination" limitation, since the regulations curtail calls by most commercial interests, but not by certain other parties that also use telemarketing to communicate with consumers, such as charitable solicitors, politicians, and polling companies. Although the FTC argued that the distinction was based on parties who were more likely to practice abuse and deception, the court disagreed, since financial solicitation was involved with both groups. The court rejected arguments that predictive dialers were within the sole jurisdiction of the FCC, and that the FTC did not have the statutory authority to regulate predictive dialers. However, the court enjoined the FTC from implementing the do-not-call registry.

On appeal to the U.S. 10th Circuit Court of Appeals, the FTC filed a motion to stay the district court's injunction, pending the circuit court's decision on the appeal. To grant the stay, the FTC must address the likelihood of success on appeal, the threat of irreparable harm if the stay is not granted, the absence of harm to opposing parties if the stay is granted, and any risk of harm to the public interest. The court concluded, without detailed analysis, that opposing parties are at risk of harm if the stay is granted, and a risk of harm exists to the privacy and expectation interests of the public if it is not granted. Therefore, likelihood of success on the merits would be the key to deciding whether or not to grant the stay. The court found a likelihood of success on the merits based upon a "reasonable fit" between the government interest in the prevention of abusive and coercive sales practices, and the use of an opt-in do-not-call list. The court appears to have a very different view of a key case on this issue than the district court, and focuses more on the privacy interest of consumers, even citing the legislative history of the TCPA and the TCFPA. The court noted that while the preponderance of problems appeared to be with commercial calls, some remedies were also available for non-commercial calls as well. Therefore, the court held that, for purposes of staying the district court's injunction, the FTC met its burden of a narrowly tailored remedy designed to protect substantial governmental interest, and a substantial likelihood of being able to show a reasonable fit between the government interest and the registry.

Future Action. In the second case the parties are on an expedited briefing schedule, and will be filing briefs during October. Argument will be held in Tulsa, Oklahoma, on November 10, 2003.

In the third case an expedited briefing schedule has also been ordered, although no specific dates are provided in the decision.

The FTC and FCC are now sharing responsibility for enforcing the National Do-Not-Call Registry. Registration for the Do-Not-Call List was opened again on October 9, 2003.

For persons registered prior to October 1, 2003, the FTC and FCC are accepting complaints if telemarketers call someone in violation of the rules. The FTC issued a Consumer Advisory on October 8 to clarify some of these issues, in light of the numerous court decisions that have been issued in recent weeks.

You may access this advisory at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239392A2.pdf.

The home page for the Do-Not-Call Registry on the FTC website is <http://www.fcc.gov/cgb/donotcall>.