

BOSTON
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www.mintz.com

*One Financial Center
Boston, Massachusetts 02111 USA
617 542 6000 / 617 542 2241 fax*

*701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004 USA
202 434 7300 / 202 434 7400 fax*

*666 Third Avenue
New York, New York 10017 USA
212 935 3000 / 212 983 3115 fax*

*12010 Sunset Hills Road
Reston, Virginia 20190 USA
703 464 4800 / 703 464 4895 fax*

*157 Church Street
New Haven, Connecticut 06510 USA
203 777 8200 / 203 777 7111 fax*

*Water Garden
1620 26th Street
Santa Monica, California 90404 USA
310 586 3200 / 310 586 3202 fax*

*The Rectory
9 Ironmonger Lane
London EC2V 8EY ENGLAND
(0)207 726 4000 / (0)207 726 0055 fax*

For questions as to how this decision could impact your business, please contact Chérie Kiser at 202 434 7325 or Susan Duarte at 202 661 8718 or the Mintz Levin attorney who ordinarily handles your communications law matters.

Advisory

February 20, 2004

COMMUNICATIONS

National Do-Not-Call Registry Upheld as Constitutional: A Summary of the Tenth Circuit's Decision in MainStream Marketing Services, Inc. v. Federal Trade Commission (10th Cir. Feb. 17, 2004).

On February 17, 2004, the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") issued a decision upholding the constitutionality of the national do-not-call ("national DNC") registry. Specifically, the court determined that the do-not-call list is a valid commercial speech regulation that directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech. In addition, the Tenth Circuit held that the registry fees telemarketers pay to access the national DNC list are permissible, reaffirmed that the Federal Trade Commission (FTC) has statutory authority to establish and implement the national DNC registry, and determined that the Federal Communications Commission (FCC) did not act in an arbitrary and capricious manner when considering the anti-competitive effects of the established business relationship (EBR) exception to its rules. It is likely that the telemarketing industry will appeal the decision to the United States Supreme Court within the next couple of months.

Background and Overview

In 2003, the FTC and the FCC promulgated rules that together created the national DNC registry. Specifically, the national DNC registry is a list containing the personal telephone numbers of telephone subscribers who have voluntarily registered their phone numbers on the national DNC list. The rules implementing the national DNC prohibit most commercial telemarketers from calling numbers on the national DNC registry and require telemarketers to pay an annual fee to access the numbers on the registry so that they can delete those numbers from their telephone solicitation lists. The national DNC registry's restrictions apply to telemarketing calls made by or on behalf of sellers of goods or services, and not to calls made by charitable or political organizations. In addition, a seller may call consumers listed on the national DNC registry if it has an EBR with the consumer or if the consumer has given that seller express permission to call, evidenced by a signed agreement, which would include an agreement using electronic and digital signatures. Telemarketers generally have three months from the date that the consumer signs up for the registry to remove the consumer's phone number from their call list. Consumer registrations remain valid for five years, and phone numbers that are disconnected or reassigned will be periodically removed from the registry.

The national DNC was to be effective on October 1, 2003. On September 23, 2003, the United States District Court for the Western District of Oklahoma issued an Order holding that the FTC did not have jurisdiction to promulgate a do-not-call registry. *U.S. Security v. FTC*, 282 F. Supp. 2d 1285 (W.D. OK 2003). Congress

responded in record time and passed legislation that ratified the FTC's plan to implement and enforce a national do-not-call registry. H.R. 316, 108th Cong. (2003). On the same day, the United States District Court for the District of Colorado held that the national DNC violated the First Amendment because the national DNC applies to commercial speech but does not apply to similar non-commercial speech (*i.e.*, calls made for political purposes and calls made by non-profits). *Mainstream Marketing Services, Inc. v. FTC*, 283 F. Supp. 2d 1151 (D. Colo. 2003). Prohibited from enforcing the national DNC requirements, the FTC promptly appealed and filed a request for stay of the Colorado district court's order pending the Tenth Circuit's resolution of the case. The Tenth Circuit granted the stay request on October 7, 2003. The Tenth Circuit consolidated the appeals of the decisions from the Western District of Oklahoma and the District of Colorado with two separate actions challenging the FCC's rules, which were already pending before the Tenth Circuit.

First Amendment Analysis

The primary issue in this case was whether the First Amendment prevents government from establishing an opt-in telemarketing requirement to allow consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls. In evaluating the issue, the Tenth Circuit applied the three-part test established in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 477 U.S. 350 (1977). Under this test, the government must assert a substantial interest to be achieved by the regulation; demonstrate that the regulation directly advances the government interest; and, although it need not be the least restrictive measure available, demonstrate that the regulation is narrowly tailored and does not restrict speech more than necessary. The Tenth Circuit determined that the governmental interests asserted — protecting the privacy of individuals in their homes and protecting consumers against the risk of fraudulent and abusive solicitations —

were “undisputedly” substantial government interests. In addition, the Tenth Circuit determined that a reasonable fit exists between the national DNC rules and the government's privacy and consumer protection interests because the national DNC registry directly advances the government's interests by blocking a significant number of the types of calls Congress sought to prevent without inhibiting any speech directed at the home of a willing listener. The Tenth Circuit also determined that the national DNC is narrowly tailored because it does not over-regulate protected speech but instead, restricts calls that are targeted at unwilling recipients.

With regard to the disparate treatment between commercial speech and noncommercial speech, the Tenth Circuit reasoned that disparate treatment was warranted because the regulation was designed to curtail the problems associated with commercial sales calls, which both Congress and the FTC had identified as the types of calls creating “far bigger problem than unsolicited calls from political or charitable organizations.” The Tenth Circuit noted that telemarketers' speech is not foreclosed entirely because they are still able to contact consumers in other ways, including sending direct mailings or by placing media advertisements. The Tenth Circuit rejected suggestions that less restrictive technological alternatives be adopted or that a company-specific regime should be the primary method of reducing unwanted calls because such requirements place undue burdens on consumers by requiring them to remember the company lists they placed themselves on and requiring that they purchase the technological alternatives.

Other Issues

Registry Fees. Telemarketers are required to pay an annual fee to access the phone numbers of consumers who have signed up for the national DNC. The telemarketers argued that such fees impose an unconstitutional tax on protected speech. The Tenth Circuit upheld the fee based on its determination that the government is permitted to exact a fee to defray the

cost of legitimate regulations, even though such a fee incidentally burdens speech. The Tenth Circuit explained that the record demonstrates that the registry fees are to be used only to pay for expenses incident to the administration of the national DNC list, to defray the costs of domestic and international law enforcement initiatives, and to pay for the additional operational and technological burdens placed on the agencies' infrastructures.

The FTC's Statutory Authority. The Tenth Circuit reversed the Western District of Oklahoma's ruling that the FTC did not have the authority to enact the national DNC registry. Looking at the relevant statutes, the Court determined that the FTC did have authority to promulgate its national DNC rules. The Tenth Circuit clarified that through subsequent legislation, Congress has expressly ratified the FTC's national DNC rules and made the FTC's statutory authority “unmistakably clear.”

Anticompetitive Effect of the EBR. The Tenth Circuit rejected arguments that the FCC had acted in an arbitrary and capricious manner when it enacted its EBR exception. Specifically, the Tenth Circuit determined that the FCC had given appropriate consideration to the anti-competitive effects the EBR exception would have on the industry by directly addressing industry concerns that incumbent local exchange carriers could create a competitive advantage over smaller carriers by marketing to large customer bases pursuant to the EBR exception. The Tenth Circuit upheld the FCC's determination that alternatives — including allowing all common carriers to contact consumers — would not fulfill Congress' mandate to protect the privacy rights of residential telephone subscribers.

Appeal of the Decision. The Supreme Court rules provide that telemarketers can file a petition for a writ of certiorari within 90 days from the release of the Tenth Circuit's decision. Although a definitive statement has not been issued, it is likely that the telemarketers will file a petition within the next couple of months.
