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10TH CIRCUIT UPHOLDS DO-NOT-CALL REGISTRY LIABILITY

***Mainstream Marketing Services, Inc. et al. v. FTC and Muris, et al.* 2004 WL 296980 (10th Cir.) (February 17, 2004)**

The United States Court of Appeals for the Tenth Circuit denied a constitutional challenge to the national do-not-call registry, which allows individuals to register their residential phone numbers on a national do-not-call list prohibiting most commercial telemarketers from calling the numbers on the list.

The appeal involved four consolidated cases. A primary issue was whether the First Amendment prevented the government from establishing an opt-in telemarketing regulation that provides a mechanism for consumers to restrict commercial sales calls, but does not provide a similar mechanism to limit charitable or political calls.

The 10th Circuit held that the do-not-call registry, which became effective on October 1, 2003, is a valid commercial speech regulation because it 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.

Four key aspects to the do-not-call registry convinced the Court that it was consistent with First Amendment requirements. First, the registry restricts only commercial speech; that is, commercial sales calls. Second, the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status. Third, the do-not-call registry is an opt-in program that puts the choice of whether or not to restrict calls in the hands of consumers. Fourth, the do-not-call registry materially furthers the government's interest in combating the danger of abusive telemarketing. Consumers who wish to restrict some, but not all commercial sales calls can also do so by using the company's specific do-not-call list, thus granting some businesses express permission to call.

The Court concluded that, just as a consumer can avoid door-to-door peddlers by placing a "No-Solicitation" sign on his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home by a telephone.

Comments: Both the Federal Trade Commission and Federal Communications Commission, under separate acts, promulgated rules which created similar do-not-call registries

effective October 1, 2003. These rules require that a company must respect a customer's request not to receive calls. This case is one of many constitutional challenges in courts around the country that have been overcome. Telemarketers will need to familiarize themselves with the rules in order to avoid liability for statutory penalties for each call to a registered number in violation of the Act.

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