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## Preemption defense rejected

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Two judges in the Western District have rejected defenses that the Telephone Consumer Protection Act, 47 U.S.C. § 227, preempts the Washington statute prohibiting solicitation telephone calls with an automatic dialing and announcing device (ADAD), sometimes called "Robo calls." Judge Robart rejected the defense in *Palmer v. Sprint Nextel Corp.*, 674 F. Supp. 2d 1224 (W.D. Wash. 2009), in an opinion dated December 7, 2009, and Judge Lasnik rejected it in *Hovila v. Tween Brands, Inc.*, 2010 WL 1433417 (W.D. Wash. 2010) (slip opinion, No. C09-0491RSL), dated April 07, 2010.

The Telephone Consumer Protection Act (TCPA) was enacted in 1991 to address abuses by telemarketers. The TCPA controls telemarketing conduct, junk faxing, and robo-calls. In particular, the TCPA makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission..." 47 U.S.C. § 227 (b)(1)(B). 47 U.S.C. § 227(b)(1)(C) prohibits unsolicited facsimile advertisements unless there is an "established business relationship" between the sender and the recipient (and certain other exceptions not relevant here).

The Washington legislature has enacted comparable statutes, as have many other states. For example, RCW 80.36.400 forbids making any prerecorded solicitation call with an ADAD.

Under both state and federal law, violations are subject to damages of \$500 for each illegal telephone call or facsimile.

In the decisions of Judges Robart and Lasnik, each defendant argued that the TCPA preempted state law. The courts' rejection of that argument is an important victory for consumers in Washington and potentially other states with stricter laws than their federal counterparts. The decisions remove an obstacle to pursuing claims as class actions on behalf of all persons telephoned by the defendant in question. The decisions are also an important expression of the ongoing preemption analysis, reflecting a trend in federal decisions to limit the impact of preemption on state action.

In *Sprint*, the plaintiff alleged that she had received prerecorded messages delivered by an automatic dialing and announcing device on both her cellular and home telephone beginning in late March 2007 and continuing into April 2007. The message identified the calls as originating from Sprint for the purpose of soliciting the plaintiff to purchase additional lines for her cellular telephone.

As noted, the TCPA makes ADADs to residential lines illegal without the called party's prior express consent, unless the call is an emergency or exempted by FCC rule or order. 47 U.S.C. § 227 (b)(1)(B). The FCC adopted an exemption to the TCPA's general prohibition of ADADs by allowing these calls if "made to any person with whom the caller has an established business relationship," a term used as an exemption from Congress's statutory prohibition of unsolicited facsimile advertisements. 47 C.F.R. § 64.1200.(a)(2)(iv); 47 U.S.C. § 227(b)(1)(C). See also 47 C.F.R. § 64.1200(f)(4) (defining "established business relationship"). In plaintiff's counsel's view, this is one of many examples of the FCC's pro-business policy to exempt from coverage calls that Congress intended to be prohibited. An "established business relationship" includes a consumer's mere purchase from a business within 18 months of the time the call is made. The FCC has chosen to equate purchasing a product with giving "prior express consent," a stretch that can only be explained as the result of telemarketers' lobbying efforts.

Fortunately, the TCPA provides a savings clause that addresses its preemptive effect on state laws:

(e) Effect on State Law

(1) State law not preempted

Except for the standards prescribed under subsection (D) of this section and subject to paragraph (2) of this subsection, 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—

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

47 U.S.C. § 227(e).

The Washington state law applicable to robo-calls prohibits them outright, so long as they are made "for purposes of commercial solicitation:"

(1) As used in this section:

(a) An automatic dialing and announcing device is a device which automatically dials telephone numbers and plays recorded message once a connection is made.

(b) Commercial solicitation means the unsolicited initiation of a telephone conversation for purposes of encouraging a person to purchase property, goods, or services.

(2) No person may use an automatic dialing and announcing device for purposes of commercial solicitation. This section applies to all commercial solicitation intended to be received by telephone customers within the state.

(3) A violation of this section is a violation of chapter 19.186 RCW and shall be presumed the damages to the recipient of commercial solicitations using anonymous dialing and announcing device are \$500.

(4) Nothing in this section shall be construed to prevent the Washington utilities and transportation commission from adopting additional rules in regulating automatic dialing and announcing devices.

RCW 80.36.400.

The Washington statute does not allow ADADs even with the called party's prior express consent. It certainly makes no exception for consumers who are called because of an "established business relationship" with the telemarketing defendant. Our statute was enacted in 1986, before the TCPA was enacted. Any analysis of the preemptive effect of the TCPA must be undertaken with respect to the "savings clause" referenced above, but also in connection with the general principles of preemption discussed below.

Both Judges Robart and Lasnik premised their analysis on a fundamentally important principle: the presumption against preemption. In another case in the Western District, Judge Zilly had ruled that the state law regarding ADAD calls was preempted, concluding the presumption against preemption did not apply and the savings clause was "ambiguous." That case was appealed to the Ninth Circuit, which affirmed on another basis but did not reach the preemption issue. Judge Zilly's ruling was reflected only in the transcript of oral argument, without any written opinion ever issued.

The presumption against preemption affirms the importance of the states' right to protect their citizens especially with respect to privacy and other interests. Both Judge Robart and Judge Lasnik also concluded that "field preemption" did not apply because Congress did not intend to occupy the field when it enacted the TCPA. Finally, both judges interpreted the savings clause, 47 U.S.C. § 227(e), as preserving the states' right to prohibit certain interstate telecommunications.

Judge Lasnik ruled that Washington and other states have the ability to regulate interstate telecommunications in some circumstances, a position *Twenn Brands* sought to defeat. Judge Lasnik further ruled that the Washington statute did not stand as an obstacle to accomplishing Congress's purposes and objectives, and that the FCC had not issued and most likely could not issue regulations or orders preempting Washington law.

Judges Robart and Lasnik's application of the TCPA's savings clause is entirely consistent with the United States Supreme Court's recent confirmation of the "two cornerstones of our pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case.... Second, in all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009) (internal quotation marks and citations omitted). "We rely on the presumption because respect for the states as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action. The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* at 1195 n.3 (internal quotation marks and citation omitted).

Applying the presumption against preemption to an implied conflict preemption argument, *Wyeth* held that federal law does not preempt a state-law tort claim asserting that an FDA-approved label for a drug did not contain an adequate warning. The Court concluded, "all evidence of Congress' purposes is ... contrary" to the proposition that "Congress thought state-law suits posed an obstacle to its objectives." *Id.* at 1199-1200. Congress's purpose was "to bolster consumer protection against harmful products." Its "silence on the issue [of preemption over FDA-approved drugs], coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.* The Court concluded, "all evidence of Congress' purposes is ... contrary" to the proposition that "Congress thought state-law suits posed an obstacle to its objectives." *Id.*

There is conclusive evidence that Congress never intended the TCPA to be the exclusive means of consumer protection against interstate ADAD telemarketing: 1) the absence of explicit and strong legislative history supporting an intent to completely supplant state law over interstate telemarketing; 2) the savings clause; and 3) the overwhelming record of state enforcement actions against telemarketers whether they are either headquartered or placing calls from within or outside the state.

The Supreme Court recently issued two other major opinions addressing implied conflict preemption, each holding state laws are not preempted: *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008) (Federal Cigarette Labeling and Advertising Act does not preempt a state-law action for deceptive advertisement; "When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption"); *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S.Ct. 2710, 2717-18, 2721 (2009) (recognizing "many other mixed state/federal regimes in which the Federal Government exercises general oversight while leaving state substantive law in place" (citing *Wyeth*)).

The presumption is stronger regarding administrative regulations:

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

*Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 717 (1985). See also *New York Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The decisions of Judges Robart and Lasnik continue the trend rejecting defense efforts to restrict strong state laws regulating telemarketers and businesses' conduct.

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