

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
Rules and Regulations Implementing) CG Docket No. 02-278
the Telephone Consumer Protection of)
1991)

SUBMISSION FOR THE RECORD

Please find enclosed a very recent court decision from the Missouri circuit court case styled as *Margulis v. P&M Consulting, Inc.*, No. 01AC-1268 (Mo. Cir. Ct., Jan 28, 2003). Because of its direct relevance to this proceeding, I wish to submit this document for inclusion in the record of this proceeding.

I thank the Commission for its time. I remain,

Sincerely,

/s/
Robert Biggerstaff

enclosures

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

MARILYN MARGULIS,

Plaintiff,

v.

P&M CONSULTING, INC.,

Defendant.

Cause No. 02AC-1268

Division 39 - Tuesday

Over \$3,000

FILED

JAN 28 2003

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

JUDGMENT AND ORDER

This matter came before the Court on December 10, 2002 on Defendant's Motion for Summary Judgment. Parties have agreed that and procedural defects in Defendant's Motion for Summary Judgment are waived and that the court will consider that cross Motions for Summary judgment have been filed. The parties have filed memoranda of law and the Court has heard the arguments of both parties. For the reasons set forth below, Defendant's Motion is DENIED and Plaintiff's Motion is granted..

STANDARD OF REVIEW

The rationale behind summary judgments as permitted under Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure is to facilitate the expeditious determination of a controversy when there is no genuine issue as to any material fact. Rockwell International, Inc. v. West Port Office Equipment Company, 606 S.W.2d 477, 479 (Mo.App. 1980). ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). All facts are construed in the light most favorable to the nonmoving party. Once the moving party sets out competent evidence establishing sufficient facts to entitle him to judgment, the nonmoving party must com forth with competent evidence to demonstrate the existence of a material factual dispute.

Issues of law and statutory construction do not constitute questions of fact, and in the interest of economy, a court denying summary judgment should determine what facts are not material or not in dispute, and address issues of law so as to narrow issues for trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff brought suit against Defendant under the private right of action provided in 47 U.S.C. § 227(b), the Telephone Consumer Protection Act, (“TCPA”). Plaintiff alleges that Defendant made a prerecorded telemarketing call to her residence in violation of the TCPA. Defendant raised the issue of standing but any resident of the private residence would have standing to file suit under the TCPA. Defendant admits making the call in question, but disputes whether the call violated the statute. The parties have stipulated to a transcript of the call in question, so the content of the call is undisputed. Defendant’s arguments raise a number of issues of law, and the Court will address each in turn.

I. Damages Are Set by the Statute.

As a preliminary matter, Defendant argues that “Plaintiff [has not] alleged trespass, petty theft, or any other definable expense cause by her voluntary participation in the call.” Def. Memo. at 24. This misapprehends the nature of the remedial damages provision of the statute. Plaintiff need allege no injury or actual damages. The statute mandates fixed statutory damages in lieu of actual damages. “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though **no** injury would exist without the statute.” Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3, (1973) (emphasis added). This “ground” raised by Defendant is without merit.

II. The Call Is Not an Exempted “Survey”

Defendant argues that a blanket exemption to the TCPA exists for calls that ask questions like a survey. Whether such an exemption exists is an issue of statutory construction. The statute

and applicable regulations prohibit calls delivering pre-recorded messages to residences unless the caller obtains the “prior express permission or invitation” of the called party or qualifies for the narrow exemption permitted by the statute.¹ That exemption permits the FCC to exempt calls made for a commercial purpose, only if they, inter alia, do not “adversely affect the privacy rights that this section is intended to protect.” 47 U.S.C. § 227(b)(92)(B)(ii)(I). Indeed, the statute originally did not have such an exemption - all unsolicited prerecorded calls of **any** nature were flatly prohibited. The legislative history of the statute is quite clear. A late amendment was made at the request of Congressman Bryant of Texas to permit the FCC to exempt some calls, so that his constituent, MessagePhone, could continue offering its service of letting callers from pay phones record a personal message to be delivered in the event the person they were calling was not available. 137 Cong. Rec 11,311-12 (Nov. 26, 1991) (statement of Mr. Bryant). The intent of Congress was clearly to permit message delivery systems that used prerecorded messages to store and forward personal messages, and other similar messages that were not invasive of privacy. It was emphasized that “[i]n considering whether to exempt certain calls, however, the bill states that the FCC may not exempt telephone solicitations. These calls are certainly commercial calls and the evidence before the Congress leaves no doubt that these types of calls are an invasion of privacy and a nuisance.” 137 Cong. Rec 18,784 (Nov. 27, 1991) (statement of Mr. Hollings). That conclusion was well founded.

One of the foundational principles of statutory construction is set forth in the very first paragraph of the Missouri Revised Statutes, that “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.” R.S.Mo. § 1.010. This conclusion is reinforced by the fact that the TCPA is a remedial consumer protection statute and

¹ There are technical exceptions such as for calls made for an “emergency purpose” and by non-profit entities that are not at issue in the case at bar.

“should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial federal statutes “are to be construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994); See, also, 3 N. Singer, Sutherland Statutory Construction § 60.01. To adopt Defendant's argument would be to effectively gut the TCPA, so telemarketers would be free to engage in unlimited prerecorded calling if they simply prefaced their missive with a couple of bogus “survey” questions. Such a construction would clearly conflict with the intent of the statute, and violate one of the oldest canons of construction. See, Heydon's Case, 76 Eng. Rep. 637, 638 (1584) cited in Cummins v. Kansas City Public Service Co., 334 Mo. 672, 698-99 (Mo. banc 1933).

Congress expressly contemplated that telemarketers may exploit any exemption with “pretext” surveys, and made clear:

A call encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to be conducting a survey.

S. Rep. No. 102-177, p. 5, Oct. 8, 1991. The FCC recognized this, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752 note 77 (1991). “[M]arket research or surveys would be prohibited under § 227 of the TCPA and § 64.1200(a)(1) if the called party were charged for the call without the party's prior express consent or if such calls contain unsolicited advertisements.” The reasoning for this is clear. Consumers found such pretextual calls offensive. The watershed statistical analysis which Congress had in front of it in drafting the TCPA was the Field Research Study. See S. Rep. 102-177 at 2, n1 (1991) citing Field Research Corp., The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls, at 9 (March 1978) (attached as an exhibit to Plaintiff's reply

memorandum). Table II-1 of the Field Research Study shows that calls purporting to be conducting a survey as a pretext for selling something were even **more** objectionable than prerecorded solicitations. Only crank and obscene calls were more objectionable. Id. Even calls from bill collectors were less annoying. Id.

The ultimate question is whether the call in question a legitimate survey entitled to the exemption in the statute, or whether it is a ruse and subterfuge attempting to evade the statute. This is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1337 (11th Cir., 1998). Indeed, this very Court applied the test in a similar TCPA case in Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., No. 00AC-023289 (Mo. Cir. Ct. Aug. 28, 2001). Defendant is not a survey company - it is a telemarketing company.

Defendant argues that the call does not meet the definition of “telephone solicitation” in the statute. Instructive here is the recent case of Irvine v. Akron Beacon Journal, 770 N.E.2d 1105 (Ohio App. 2002). That case concerned computer made telemarketing calls made to a consumer’s home where no solicitation was actually made in the calls, but they were made as part of a process to determine if a future solicitation should be made.²

The fact that these particular calls were one step removed from the actual sales pitch does not mean that the purpose of the calls was not to, ultimately, attempt to sell a subscription to the Beacon Journal. This court is not persuaded by Beacon Journal's argument that the calls it generated by the autodialer, with no intention of connecting them to a telephone solicitor, did not qualify as “telephone solicitations.” Whether a solicitor is at the other end of the phone or not, when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at

² The newspaper was calling to see if the number called was a working phone where someone lived so a subsequent call could be made to attempt to sell the newspaper.

the other end of the line.

Id. at 1118-19. This reasoning is sound. Furthermore, the definition of “unsolicited advertisement” includes not only solicitations, but also mere “advertisements” that property, goods, or services are available:

(4) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

As this very Court has previously held, “advertise” in the context of the TCPA means “to make something known to : notify.” Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., No. 00AC-023289 (Mo. Cir. Ct. Aug. 28, 2001), citing Webster’s dictionary. The text of the call itself announces:

[A] complimentary vacation package including round trip airfare for two and two nights hotel accommodations to your choice of either Orlando Florida or Las Vegas Nevada. There is absolutely no obligation to purchase or join anything to receive your vacation.

Were this phrase in a magazine or newspaper, it would undoubtedly be considered an “advertisement.” The Court holds that the transcript of the call in question meets the definitions of “telephone solicitation” and “unsolicited advertisement” as set forth in the statute.

III. Plaintiff Did Not Give “Express Consent” to Receive Prerecorded Messages.

Defendant argues that Plaintiff voluntarily “participated” in the call. But nowhere does Defendant claim that Plaintiff gave “prior express consent” to receive the call, which is required by the statute. 47 U.S.C. § 227(b)(1)(B). Congress did not allow “implied” consent - it required “express” consent. A simple review of Black’s Dictionary reveals that “express” means:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., 34 F.2d 270, 274 (8th Cir). Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The

word is usually contrasted with “implied.”

Black's Law Dictionary (Revised 6th ed.). This court has adopted the same definition in other TCPA cases. As with other waivers of rights, the laws generally require such waivers to be “express” or they are not valid. To be “express” the person giving consent must be completely informed about what he is consenting to. If a caller asks “may we deliver an message with an advertisement to you by prerecorded message?” then an affirmative response is express consent to do just that. If a caller merely asks “press ‘1’ for more details” or “please hold if you want more information” such a request does not inform the other party that the subsequent “information” will be an advertisement, nor that it will be delivered by a prerecorded message.

Furthermore, the FCC (on whom Defendant relies) has explicitly stated that when a telemarketer calls a person’s home “to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation from that telemarketer.” Memorandum Opinion and Order, 10 FCC Rcd 12391 ¶15 (1995). So to the extent that Defendant seeks to frame his call as obtaining permission to make a subsequent solicitation, it is simply not possible to conduct permission-based telemarketing calls in that manner. See, also, Id., at ¶11. This emphatically rejects Defendant’s argument and shows that merely “participating” in the call is insufficient to constitute prior “express” permission to make a prerecorded call. Consent must be obtained before initiating the call itself.

IV. Vagueness Challenge

Defendant also raises a vagueness challenge to the statute, expressly limiting this challenge to an “as applied” posture. Here, Defendant’s burden is high, having to overcome the foundational principle that acts of Congress are presumed valid against such challenges. United States v. National Dairy Corp., 372 U.S. 29, 32-3 (1963).

Defendant need do nothing more than read the statute, and refrain from making prerecorded

messages that announce property, goods, or services are available. The claim that the TCPA's definition of "unsolicited advertisement" is somehow vague is simply rhetoric of someone "intent on finding fault at any cost." "There are limitations on the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); United States Civil Svc. Comm. v. Nat. Assoc. of Letter Carriers, 413 U.S. 548, 578-79 (1973) (Hatch Act's ban on "political activity" by federal employees was not unconstitutionally vague). Nor is a heightened scrutiny applicable here because the TCPA is not a speech restriction - it is a restriction of a delivery practice. A speaker can still make his speech by other methods. The cases relied upon by Defendant, such as Cantwell v. Connecticut, 310 U.S. 296 (1940) (criminal statute prohibiting soliciting for charities unless approved as "bona fide" charity) regarded penalties for pure speech, not commercial speech. City of Chicago v. Morales, 527 U.S. 41 (1999) regarded criminal loitering ordinance, also not commercial speech. "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." Board of Trustees of State University of N. Y. v. Fox, 492 U.S. 469, 477 (1989), quoting Ohrlik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978)

V. There Is No Chilling Effect on Speech Here.

There is no "chilling" of protected speech here. As a threshold matter, the "chilling effect" argument can only be raised in a facial challenge, because this Defendant was not "chilled" from making prerecorded calls. Therefore Defendant's argument is inapposite in this "as applied" challenge.

Only when the content of the speech is restricted in all venues is a speaker faced with the sole choices of either 1) altering his content in order to steer clear of the law, or 2) possibly violating the statute. The TCPA leaves *other* options. The speaker is immune from the TCPA's proscriptions if he simply obtains consent of the recipient, or sends his message by any of a plethora of other delivery methods.

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), is instructive in vagueness cases:

These standards [for vagueness] should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.

Id., at 498-99 (internal footnotes omitted). The TCPA is an economic regulation of advertising conduct. The TCPA is a civil statute, and not criminal. Nor is a "more stringent" standard due here simply because speech is involved. Any heightened vagueness review has only been applied to "pure" speech cases, and **not** commercial speech. Defendant has presented no case otherwise.

VI. First Amendment

Defendant raises an "as applied" challenge to the TCPA on free speech grounds. As a threshold matter, the Court must determine whether the statute's prohibition on placing unsolicited advertising calls with a prerecorded message to persons' homes is "content-based" or "content-neutral" for First Amendment purposes. It is not disputed that Defendant's purported "speech" is commercial, so any decisions regarding "core" speech are inapposite for Defendant's arguments.

Defendant has argued that the Court must analyze of the TCPA under Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). This standard only

applies to content-based restrictions of commercial speech, that are “truthful and nonmisleading” Because this is an “as applied” challenge, we only consider Defendant’s conduct, and not that of others covered by the statute. This statute is not content-based for First Amendment purposes, and in this case, Defendant’s message is misleading. Both of which disqualify the TCPA from scrutiny under Central Hudson.

The facts of this particular call quickly dispose of any First Amendment challenge. To receive First Amendment protection, commercial speech must be truthful and non-misleading. In re R.M.J., 455 U.S. 191, 203 (1982) (“Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.”) Conducting a bogus “survey” as a pretext for time share promotions is deceitful and misleading. The First Amendment does not protect such speech.

Nor does the “ease of use” of prerecorded calls by advertisers confer constitutional protection. “[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” Heffron v. Int’l Soc. For Krishna Consc., 452 U.S. 640, 647 (1981) “That more people may be more easily and cheaply reached . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.” Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949). “There is simply no First Amendment right to trespass upon private property, even when access to that property may be the only, or most effective, way to reach the intended audience.” Pro-Choice Network of Western New York v. Project Rescue Western New York, 799 F.Supp. 1417, 1434 (W.D.N.Y.1992) aff’d in relevant part, & rev’d in part, sub nom., 519 U.S. 357 (1997). It is not inconsistent with the concepts of private property, especially the high regard placed on the sanctity of the quiet repose of a family’s home, to find the nightly ritual of telemarketing calls that

is all too common, to be an unwanted and uninvited trespass.³

A. The TCPA Is Content Neutral and a Time, Place, and Manner Restriction

1. Other Courts have held the TCPA and other prerecorded telemarketing restrictions are valid time, place, and manner restrictions

This question has come before the courts before. The leading case on the TCPA's restrictions on prerecorded calls is Moser v. FCC, 46 F.3d 970 (9th Cir. 1995), cert. denied, 115 S. Ct. 2615 (1995). The Ninth Circuit unanimously concluded:

The provision in the Telephone Consumer Protection Act of 1991 banning automated, prerecorded calls to residences is content-neutral. Congress adequately demonstrated that such calls pose a threat to residential privacy. The ban is narrowly tailored to advance that interest, and leaves open ample alternative channels of communication. Thus, it does not violate the First Amendment.

Id. at 975. In fact, in making this finding, the Ninth Circuit expressly rejected the exact same arguments advanced by Defendant here. Other courts have reached the same conclusion with regards to state laws nearly identical to the TCPA. Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir.1995); Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996). This Court agrees, and holds that the restrictions on placing prerecorded telemarketing calls to homes is content neutral.

2. The TCPA Easily Meets the Test for Content Neutrality

Even if this Court was to reach a First Amendment analysis, the aforementioned decisions on restrictions on prerecorded telemarketing calls have all held they are content-neutral time, place and manner restrictions. The Supreme Court has recently reiterated the test for content neutrality:

³ This conclusion also makes clear that Defendant's arguments with regard to standing are without merit. Regardless of which member of the household actually answered the call, the TCPA is intended to protect all, and the invasion of privacy is consummated but he interruption of the ringing phone. Any victim in that household may assert standing to bring the TCPA claim arising out of a call to that household. See Charvat v. AT&T, No. 98CVH-12-9334 (Dist. Ct. Ohio, Nov. 30, 1999).

As we explained in Ward: “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Hill v. Colorado, 530 U.S. 703, 719 (2000) citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). “The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech and not because of offensive behavior identified with its delivery.” Id., at 737 (citation omitted) (Souter, O’Connor, Ginsberg, Breyer, JJ, concurring).

“Thus, the essence of time, place, or manner regulation lies in the recognition that various **methods** of speech, regardless of their content, may frustrate legitimate governmental goals.” Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 535 (1980) (applying “time, place, and manner” tests to commercial speech) (emphasis added). The prerecorded call “method of speech” fits that description. Said more directly, time, place, and manner restrictions are those unconcerned with influencing the speaker’s message:

The essence of time, place, and manner restrictions is content neutrality. The disregard of content is why such restrictions are given more deferential review than are other speech restraints. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29 (1986). Their intent is not to influence what a speaker has to say, only when, where, or how he says it. Their focus is on the effects of the act of speaking, not on the information conveyed by the speech. Id. at 930. In one sense, the restrictions in question do not regulate the content of appellant’s solicitation -- it may make any sales pitch it pleases – they merely dictate where and how appellant may make its pitch.

Nat’l Funeral Svcs., Inc. v. Rockerfeller, 870 F.2d 136, 145 (4th Cir. 1989) cert. denied 493 U.S. 966 (1989). Furthermore, Congress expressly intended the TCPA as regulation of the “means used to deliver the message” and not the content:

The bill I am introducing today falls well within the scope of the first amendment.

The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when necessary to protect consumers from a nuisance and an invasion of their privacy. . . . The bill does not ban the message; it bans the means used to deliver that message.

137 Cong.Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings).

The “offensive delivery” method is the evil addressed by the TCPA, and thus it is a content-neutral purpose. There is no indication that Congress enacted the TCPA because of any “disagreement with the message.” It is thus content-neutral.

B. The TCPA Meets the Requirements of the “Time, Place and Manner” Test

The most significant difference between the Central Hudson test and the time, place, and manner test, is that all prongs of the time, place, and manner test are subject to less rigorous “reasonable” scrutiny (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.” Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984); “[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)), and greater deference is given to judgments of the drafters when analyzing time, place, and manner restrictions. Clark, 468 U.S. at 299; Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (“[We] hesitate to disagree with the accumulated, commonsense judgments of local lawmakers...”).

1. Elements of Time, Place, and Manner Restrictions

The elements of permissible time, place, and manner restrictions are 1) content neutrality, 2) serving a significant government interest, 3) narrowly tailored, but not least restrictive means, and 4) leaving open ample opportunity for speech in alternative fora. The same restriction can be valid for commercial speech but invalid for non-commercial speech. Metromedia, 453 U.S. at 503.

a. Significant State Interest

With regard to a significant state interest, the Court has held as a matter of law “solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In Ohralik, we made explicit that protection of the public from these aspects of solicitation is a legitimate and important state interest.” Edenfield v. Fane, 507 U.S. 761, 769 (1993). Review of the legislative history of the TCPA reveals that victims prerecorded calls undisputedly vexatious and harassing. This easily satisfies the significant government interest prong of the time, place, and manner doctrine.

Independently, it is black letter law that protection of residential privacy is not only important, but a compelling government interest. “Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different.... [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.” Frisby v. Schultz, 487 U.S. 474, 484-85 (1988). “The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” Id. at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

b. Narrow Tailoring

“[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” Ward, 491 U.S. at 799. Although alternatives can be considered, alternatives that are “less effective” are not relevant to this prong of the time, place, and manner analysis. What is required is “a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable.” Ward, 491 U.S. at 797. Congress did not ban all prerecorded messages. Based on the thorough research before it, Congress only directed the TCPA at the most

problematic calls. This is very narrowly tailored.

As for the TCPA's restrictions being reasonable, the Supreme Court pointed out in Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 50-51 (1983), that a restriction on speech is "reasonable" when it is "consistent with the [state's] legitimate interest in preserving the property for the use to which it is lawfully dedicated." This is precisely what the TCPA does.

c. Availability of Other Fora

As for the availability of other fora, there can be no serious debate that ample other fora for commercial solicitations are present, and have been used for decades. Indeed, advertisers can continue to use prerecorded messages if they simply get permission from the resident of the home they want to target.

VII. Conclusion

A government action is judged "on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." Assoc. of Community Organizations for Reform Now, v. St. Louis County, 930 F.2d 591 (8th Cir. 1991). When viewed as a whole, the TCPA stands as a bullwark against an invasion of nightly robot-calls into everyman's home. Any lesser scheme would be less effective. The fit is reasonable, which is all that is required.

CONCLUSION

For the reasons stated herein, and having considered all of Defendants's arguments, Defendant's Motion for Summary Judgment is DENIED and Plaintiff's Motion for Summary Judgment is granted. The court orders a judgment for the plaintiff in the amount of \$500 plus court costs..

IT IS SO ORDERED.


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Dkt 39
1/28/13