

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STONEBRIDGE LIFE	.	
INSURANCE COMPANY	.	DOCKET NUMBER: CA 03-739
	.	
Plaintiff,	.	
	.	
vs.	.	Washington, D.C.
	.	March 28, 2003
FEDERAL TRADE COMMISSION	.	11:15 AM
	.	
Defendant.	.	
.	

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER
BEFORE THE HONORABLE GLADYS KESSLER
A UNITED STATES DISTRICT JUDGE

APPEARANCES:

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 Official Court Reporter
 United States District Court
 333 Constitution Avenue, N.W.
 Room 6824
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Computer aided transcript prepared with the aid of
SpeechCAT.

1 plaintiff first.

2 I have read everything everybody, and so I think
3 I'm pretty up on what the major issues are. Mr. Corn-
4 Revere, why don't you begin. You have about fifteen
5 minutes.

6 MR. CORN-REVERE: Thank you, Your Honor. With the
7 court's permission, I would like to reserve two minutes of
8 my time for rebuttal.

9 THE COURT: All right.

10 MR. CORN-REVERE: I would like to begin by
11 thanking Your Honor for scheduling this hearing so quickly
12 in light of the pending rules going into effect. In light
13 of that the relief that Stonebridge Life Insurance Company
14 is asking for is really straightforward.

15 The plaintiff seeks a ruling that bars the FTC
16 from enforcing its amended telemarketing sales rule against
17 third-party telemarketers who are engaged in the business of
18 insurance.

19 Our position is that such calls are a part of the
20 business of insurance, and therefore exempt from FTC
21 jurisdiction under the McCarran-Ferguson Act.

22 Since you have read the briefs I am sure you are
23 aware that the current dispute seems to arise from a simple
24 difference of opinion as what the FTC actually said in its
25 rulemaking order about the scope of its rules.

1 The FTC claims that it has never asserted
2 jurisdiction over third-party telemarketers who make calls
3 on behalf of insurance companies. And yet, if you examine
4 both the statement of basis and purpose, and the
5 government's opposition brief in this case, that position is
6 not clearly supported.

7 In fact in a 100 page rulemaking that was
8 published in the Federal Register, you will find two pages
9 that mention the issue of the insurance exemption at all.
10 They are pages 4587 in volume 68 of the Federal Register,
11 and page 4598.

12 Neither of which discusses at all the difference
13 between a status based exemption, like the exemptions that
14 exist for banks or common carriers, and a functional
15 exemption that goes to the business of insurance as is
16 provided under the McCarran-Ferguson Act.

17 I think the confusion in this case becomes really
18 clear if you look at pages 9 to 10 of the government's
19 opposition brief where it says that:

20 "Stonebridge incorrectly
21 drew the inference that the
22 third-party call centers
23 hired by insurance companies
24 are not covered by the
25 McCarran-Ferguson exemption."

1 And it is based on the FTC's statement at page 587 of the
2 statement of basis and purpose that says -- and the
3 government goes on to say that:

4 "Our arguments all spring from
5 that error."

6 But again, Your Honor, if you look at the Federal
7 Register publication, it is not clear at all that the FTC
8 extended the McCarran-Ferguson exemption to third-party call
9 centers.

10 In fact the government's argument in this case
11 simply is not plausible. For example, the first reference
12 that it --

13 THE COURT: I don't believe the FTC has ever
14 denied that it didn't have jurisdiction under the McCarran
15 statute, has it?

16 MR. CORN-REVERE: They have never questioned the
17 McCarran statute at all, but they have never had rules under
18 the telemarketing sales rule that really affected the
19 business of insurance like this. Now they are extending
20 rules to pre-acquired account information.

21 THE COURT: Well they never had rules that cover
22 quite the issues that this rule covers. But they certainly,
23 I do believe, have regulations in effect before this
24 covering telemarketers.

25 MR. CORN-REVERE: Certainly covering

1 telemarketers, but the exemption for the business which the
2 --

3 THE COURT: And those who telemarketers hire, I'm
4 sorry. Go ahead.

5 MR. CORN-REVERE: That is right. The exemption
6 has extended to telemarketers who call on behalf of
7 insurance companies.

8 THE COURT: Right.

9 MR. CORN-REVERE: The reason it comes out now is
10 because of what the FTC is saying.

11 THE COURT: Wait a minute. Are you saying that in
12 the previous regulations, or the earlier regulations, that
13 the government, the FTC, exempted from coverage of those
14 regulations those telemarketers hired by insurance
15 companies? I don't think that is right.

16 MR. CORN-REVERE: The government has taken the
17 position that the exemption extends to the business of
18 insurance. But the previous telemarketing sales rule did
19 not cover areas that affected the kind of operations
20 Stonebridge has mentioned in its brief.

21 THE COURT: All right.

22 MR. CORN-REVERE: The example that the government
23 --

24 THE COURT: But you are not saying that the FTC is
25 taking an inconsistent position with its previous

1 regulations.

2 MR. CORN-REVERE: Right. But that it did not come
3 up --

4 THE COURT: I understand that.

5 MR. CORN-REVERE: Because they now -- they have
6 extended it to new operations. And the example that the
7 government gives, for example, in its brief is to say that
8 if an insurance company or its telemarketer were engaged in
9 credit repair, then obviously the telemarketing sales rule
10 would apply.

11 But that is not the business of insurance.
12 Whereas the new rules and the new rules that apply to pre-
13 acquired account information, and free-to-pay conversions,
14 go to the heart of the insurance transactions of
15 Stonebridge.

16 The reason that we are concerned about the FTC's
17 order is because of the language at page 4598 of the Federal
18 Register which says -- and this is a quote from that page:

19 "The Commission has -- the
20 Commission has made it very
21 clear that the rule does not
22 apply to entities --"

23 THE COURT: Slow down, please.

24 MR. CORN-REVERE: I am sorry. I will slow down.

25 "The Commission has made it

1 very clear that the rule does
2 not apply to entities or
3 activities that fall outside
4 the Commission's authority
5 under the FTC act such as banks,
6 savings associations and federal
7 credit unions regulated to
8 common carriers and the business
9 of insurance. However, the
10 Commission has also made it
11 very clear that the exemption
12 enjoyed by those entities does
13 not extend to any third-party
14 telemarketers who may make or
15 receive calls on behalf of the
16 exempted entities."

17 So the explanation in the Federal Register would
18 extend the amended telemarketing sales rules to those third-
19 party telemarketers.

20 THE COURT: No question about that. I do not
21 think the FTC would deny that.

22 MR. CORN-REVERE: The problem is that those calls
23 on behalf of third-party telemarketers, as we explained in
24 our papers, are the business of insurance, and the examples
25 we give of insurance regulators in every state regulating

1 the telemarketing sales on behalf of Stonebridge and other
2 insurance companies now brings the FTC's new regulations
3 into conflict with the state regulations.

4 THE COURT: Has any court granted your industry
5 the injunctive relief it has been seeking since I guess
6 December of 2002? You have been in a lot of courts, haven't
7 you?

8 MR. CORN-REVERE: Well, not on behalf of the
9 insurance industry. This is the only case that raises the
10 specific McCarran-Ferguson issue.

11 THE COURT: But there have been a lot of cases
12 brought to enforce these -- I am sorry, to enjoin these
13 regulations.

14 MR. CORN-REVERE: There are two other cases
15 pending, one of which that I am engaged in personally on
16 behalf of the broader telemarketing industry, the American
17 Teleservices Association.

18 THE COURT: Did you cite that case in you brief?

19 MR. CORN-REVERE: Yes, we do.

20 THE COURT: All right.

21 MR. CORN-REVERE: It is the Mainstream Marketing
22 case.

23 THE COURT: What is the status of that one?

24 MR. CORN-REVERE: There is a motion for
25 preliminary injunction pending. The hearing has just been

1 set for April 9.

2 THE COURT: For April 9th?

3 MR. CORN-REVERE: Yes.

4 THE COURT: Did you file a TRO in that, or just
5 preliminary injunction?

6 MR. CORN-REVERE: We filed for preliminary
7 injunction in that case. The snow in Denver and other
8 scheduling issues have prevented the hearing from taking
9 place before now.

10 The other case, and this is one in which I'm not
11 involved, on behalf of the Direct Marketing Association, is
12 the U.S. Security versus the FTC, and that is in the
13 District Court in Oklahoma.

14 That hearing was just held earlier this week, Your
15 Honor, and the preliminary injunction request was denied in
16 the case.

17 But both of those cases dealt with broader issues,
18 and none of them have raised the specific questions that
19 have come up under the McCarran-Ferguson Act.

20 As I mentioned in particularly, if you look at the
21 affidavit of Brian Smith that was filed with our motion at
22 paragraphs 5 to 12, you will find the discussion of how the
23 business of insurance includes those third-party
24 telemarketing calls, and in fact is regulated by the state
25 insurance regulators in each of those cases.

1 Here the FTC's claim that Stonebridge was late in
2 seeking relief, and that our claims are unripe, is simply
3 incorrect.

4 Just as a baseline argument, it is difficult to
5 argue that we are both too late to file and the claims are
6 unripe and we are filed too soon. The filing in this case
7 was not dilatory.

8 Stonebridge, as described in the Smith affidavits
9 spent some weeks assessing --

10 THE COURT: Well, there is a big difference
11 between arguing that, as the FTC argues, that your claims
12 are not ripe, and arguing that you were very last-minute
13 about racing into court with this TRO. Those are two very
14 different arguments.

15 MR. CORN-REVERE: There were general requests to
16 the agencies to stay the implementation of its rules, and we
17 only found out last Friday, Your Honor, that the stay
18 requests were denied in primary part -- there was some
19 relief granted, but they did not go to the McCarran-Ferguson
20 issue.

21 We did file within a week of hearing from the FTC
22 on the stay issue. Not that Stonebridge filed in that case,
23 but was watching it very closely. Those requests were
24 filed.

25 Once the FTC denied the general stay requests,

1 then we immediately filed, as soon as we practically
2 could, but I am also sure that had we filed earlier before
3 we had gone through the process of assessing what the
4 impact would be, Mr. Wagman is going to be standing before
5 you to today arguing that we would not be able to show you
6 the necessary showing to justify a temporary restraining
7 order.

8 THE COURT: I think he would argue that.

9 MR. CORN-REVERE: I think we can be confident of
10 that.

11 Nor does the government's claim that this case is
12 unripe have any validity either. This is precisely the type
13 of claim considered ripe under Abbott Labs versus Gardner
14 where you have an agency pronouncement of its rule that is
15 going to have general applicability, and the industry has
16 the risk of having significant enforcement and fines
17 assessed against it.

18 That is precisely the dilemma that the Declaratory
19 Judgment Act was designed to ameliorate. As we indicated in
20 the papers, and as supported by the affidavit of Mr. Smith,
21 Stonebridge would suffer irreparable harm if the rules
22 relating to third-party call centers are allowed to go into
23 effect on March 31st.

24 For that reason, both the public interest and the
25 equities in this situation favor granting a temporary

1 restraining order.

2 Among other things, the government is arguing that
3 their interpretation of the McCarran-Ferguson Act, although
4 it is not the interpretation they stated in their rulemaking
5 order, is the same as ours, in which case a temporary
6 restraining order is simply telling them that to enforce the
7 rules in this way would cause absolutely no impact, adverse
8 impact on the government.

9 In addition, on the same reason, the public
10 interest would support a ruling from this court that makes
11 clear what the interpretation of the law is.

12 For those reasons we would ask this court to grant
13 the requested relief.

14 THE COURT: Thank you.

15 Mr. DeMille-Wagman.

16 MR. DeMILLE-WAGMAN: Thank you, Your Honor.

17 Your Honor, this is the most confounded case. I
18 think that perhaps it was presaged at some point in the
19 middle of the last century in a very short poem written by
20 Hughes Mirrens.

21 "As I was walking up the
22 stairs, I met a man who wasn't
23 there. He wasn't there again
24 today. I wish, I wish he would
25 stay away."

1 Your Honor, the specter that they see on the
2 staircase is the Federal Trade Commission enforcing its
3 telemarketing sales rule against activities that are outside
4 the Commission's jurisdiction.

5 This rule has been in effect for more than seven
6 years. The Commission has brought more than 100 complaints.
7 We have never once challenged an activity that is subject to
8 the McCarran-Ferguson Act exemption. We have no intention
9 of doing so now.

10 However, as we explained in our papers, the
11 McCarran-Ferguson Act exemption is a complicated one. It
12 involves a three-part fact based inquiry looking to whether
13 the activity spreads risks, whether it is part of the policy
14 relationship, whether it is limited to entities in the
15 insurance industry.

16 And even once you are through that three-part
17 inquiry, you still have to determine whether the activity is
18 subject to state regulation. We don't know the status of
19 regulations in every single state. Some activities that may
20 be exempt in Vermont might be subject to our jurisdiction in
21 Hawaii. There is just no way to know.

22 For that reason, there is nothing more we can do
23 than to concede, as we did in our statement of basis and
24 purpose, that the exemption of the McCarran-Ferguson Act
25 continues to apply to our rule even as we will -- even as it

1 has now been amended.

2 The one sentence, the one paragraph they cite in
3 our statement of basis and purpose in no way says what they
4 say it says. We say that the Commission has made it very
5 clear that the rule does not apply to entities or activities
6 that fall outside the Commission's authority under the FTC
7 Act.

8 Now the FTC Act specifically exempts certain
9 entities from Commission jurisdiction under the FTC Act, and
10 thus also under the telemarketing sales rule. These
11 entities, as the Commission goes on:

12 "Such as banks, savings
13 associations and federal
14 credit unions, regulated
15 common carriers, and the D
16 business of insurance."

17 That is an activity that is outside of our
18 jurisdiction. However -- so there are entities that are
19 outside of our jurisdiction and activities. The Commission
20 goes on.

21 "However, the Commission has
22 made it very clear that the
23 exemption enjoyed by those
24 entities does not extend to
25 any third-party telemarketers

1 who may make or receive calls
2 on behalf of those entities."

3 We recognize that telemarketers -- telemarketing
4 on behalf of banks, or common carriers, or whatever, may in
5 certain situations be subject to the Federal Trade
6 Commission Act's jurisdictions.

7 But with respect to activities that are protected
8 by the McCarran-Ferguson Act, they are protected whether
9 they are engaged in by insurance companies or those
10 telemarketing on behalf of insurance companies. It is
11 necessary to determine whether those activities meet the
12 three-part test, and whether they are subject to state
13 regulation.

14 THE COURT: Isn't your basic argument that this is
15 a pre-enforcement challenge, the kind of pre-enforcement
16 challenge that the courts have struck down or denied, let me
17 put it that way, over the years?

18 MR. DeMILLE-WAGMAN: Absolutely, Your Honor.

19 And it would be totally inappropriate for this
20 court to enter a temporary restraining order so that if the
21 Commission were to bring such an action, one that it's never
22 brought before, not only could the defendant in such an
23 action move to have the case dismissed, they could also move
24 to have the Commission held in contempt.

25 If they were entitled to this sort of temporary

1 restraining order, presumably every other exempt entity or
2 organization could also come in and get a TRO against the
3 Commission so that they could not only walk away free from
4 any inappropriate enforcement actions we might bring, but
5 also kick the Federal Trade Commission with a contempt
6 action.

7 Your Honor, it is totally inappropriate. This
8 case is not ripe, and their request for a restraining order
9 should be denied.

10 THE COURT: Do you have anything to say on the
11 issue of irreparable harm?

12 MR. DeMILLE-WAGMAN: Yes, Your Honor.

13 There is no irreparable harm here. We have never
14 enforced this rule against anyone outside our jurisdiction.
15 We have no intent of doing so in the future.

16 We have procedures in our rules of procedure that
17 allow an entity considering a course of conduct to approach
18 the Federal Trade Commission and ask for guidance as to
19 whether the Federal Trade Commission would consider it
20 within our jurisdiction.

21 I'm not sure the Federal Trade Commission would be
22 entitled to any particular deference in interpreting the
23 McCarran-Ferguson Act, but again, this is something that we
24 have never done before.

25 THE COURT: Are you saying by the way, and I am

1 not all that familiar with the internal workings of the FTC,
2 but are you saying that there is an in-agency or intra-
3 agency procedure for getting advisory opinions?

4 MR. DeMILLE-WAGMAN: There is, Your Honor.

5 THE COURT: I see.

6 MR. DeMILLE-WAGMAN: It is in our rules of
7 practice. It is either section 1.3 -- or it is 16 C.F.R.
8 1.3 or 1.4. I can't remember. It is in that range in
9 C.F.R.

10 That procedure is available to anyone considering
11 a course of conduct. The TRO is inappropriate, and it
12 should be denied.

13 Do you have further questions, Your Honor?

14 THE COURT: No, I don't think so.

15 I will hear from plaintiff again who reserved two
16 minutes, I think.

17 MR. DeMILLE-WAGMAN: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 MR. CORN-REVERE: Thank you, Your Honor.

20 It would have been nice if the agency, in its
21 order, had been as clear as Mr. Wagman was today about the
22 agency's intentions, but in fact the order was not.

23 THE COURT: Well, he may not have written it.

24 MR. CORN-REVERE: I think we are all poorer for
25 that.

1 The National Association of Insurance and
2 Financial Advisers, in fact, asked the FTC for
3 clarification as to how the McCarran-Ferguson exemption
4 applies during the rulemaking procedure. That request was
5 denied.

6 Again, the Commission's discussion of how the
7 exemption does not apply to third-party telemarketers who
8 make calls on behalf of insurance was then contained in the
9 text of the order itself.

10 There is more discussion in the government's
11 opposition brief of this issue than there is in this 100
12 page order, and it has left the industry convinced
13 uniformly that third-party call centers that make
14 insurance calls are no longer exempt from the business of
15 insurance.

16 And again, it comes up because of the way in which
17 the FTC has extended its rules to cover the very kind of
18 activities that those call centers make.

19 THE COURT: I don't think by the way that Mr.
20 DeMille-Wagman is saying as a -- maybe I misunderstood him,
21 but I don't think he is saying that it is a flat guarantee
22 that third-party telemarketers, using that phrase the way we
23 all understand it, are exempt, if they are operating on
24 behalf of the insurance industry.

25 MR. CORN-REVERE: If I understand him correctly,

1 what he is saying is they are exempt when they are engaged
2 in the business of insurance.

3 THE COURT: Correct.

4 MR. CORN-REVERE: And that that is the
5 clarification that we would seek that is not in the order,
6 and as a matter of fact we give examples in the brief of
7 state regulations of the scripts of telemarketers that are
8 at odds with the FTC's rules.

9 There is no discussion of that in the government's
10 opposition.

11 THE COURT: Since they have this advisory opinion
12 procedure, why don't you use it?

13 MR. CORN-REVERE: I have discussed that with Mr.
14 DeMille-Wagman, and I'm glad that that has come up. One
15 difficulty with the advisory opinion process at the FTC is
16 that it is not binding on the agency.

17 So if they issue an opinion, it is not like
18 having something in the rules themselves that describe that
19 this is the limit of the FTC's authority. So it is not
20 quite as good as if the agency had made this clear in the
21 rules.

22 But that being said, I think it would be
23 appropriate for this court to issue a temporary
24 restraining order to make clear that telemarketers engaged
25 in the business of insurance are covered by the McCarran-

1 Ferguson exemption. and then during the period of the TRO
2 for us to seek clarification from the agency so that they
3 can make clear what they left opaque in the rulemaking
4 itself.

5 As I said, the industry did seek clarification of
6 that in the rulemaking, and that clarification was not
7 forthcoming.

8 The discussion now in Mr. DeMille-Wagman's
9 argument that there is a clear difference between entity-
10 based exemptions and functional-based exemptions is not
11 raised at all in the discussion before the agency.

12 The industry is left to guess whether or not they
13 are going to be subject to the rules, and they have
14 uniformly concluded that they will have to curtail those
15 activities or risk the heavy penalties that the FTC has
16 promised.

17 When Chairman Muris of the FTC announced the rule
18 in December at a press conference, he made clear that the
19 FTC was planning to aggressively enforce this rule, and
20 there would be a dozen FTC members detailed to doing nothing
21 but enforcing this rule.

22 Under those circumstances, and given the fact
23 that the agency denied the request to clarify the scope of
24 this exemption, we believe it is incumbent upon them to make
25 that clear, and if they are unwilling to do so for this

1 court to compel the agency to define the scope of this
2 exemption.

3 Thank you.

4 THE COURT: Well, counsel, I think first of all
5 you are going to get an oral ruling. You are not going to
6 get a written ruling, because I think you need a ruling
7 fast, and you probably would not get it in time.

8 I know that everybody in this room is familiar
9 with the four-part test that is used in the District of
10 Columbia Circuit for determining whether a temporary
11 restraining order is justified or appropriate, and of course
12 I will examine the factors under that four-part test, and I
13 am referring to, among many, many other cases, Wisconsin Gas
14 Company versus Federal Regulatory Commission, 758 Fed. 2nd
15 669.

16 That is a 1985 case, and there is much, much more
17 recent case law, and our basic test has not changed over the
18 years.

19 Initially, I need to note for the record that
20 plaintiffs bear a heavy burden when they come into court --
21 any plaintiff, of course, requesting a temporary restraining
22 order.

23 That is by definition extraordinary relief, and
24 the case comes in in a posture that is obviously not fully
25 briefed, and in a posture so that the judge hearing it has

1 the least possible opportunity to give the issues the kind
2 of extended and in-depth consideration that is usually
3 warranted. So the plaintiffs do bear a real burden on that
4 issue.

5 Turning to the four questions that must be
6 answered under our case law, let me first examine the issue
7 of irreparable harm. And of course that is an absolute
8 requirement for the granting of a temporary restraining
9 order.

10 I have read the plaintiff's papers and their
11 affidavit. I don't think that there has been any
12 establishment of irreparable harm in this case, and when I
13 say irreparable harm, I am really referring to both
14 irreparable harm and imminent harm.

15 And the particular statement from our Court of
16 Appeals is that the injury referred to in irreparable injury
17 must be both certain and great, and that is Wisconsin Gas,
18 758 Fed. 2nd at 674.

19 Number one, the injury, if there is any, is not
20 irreparable. It is, at best, monetary injury. And there is
21 ample case law that monetary injury per se does not
22 constitute the kind of irreparable injury that must be shown
23 for purposes of a TRO.

24 Second the injury, if there is any, is by no means
25 imminent -- by no means. The regulations go into effect on

1 Monday.

2 Even if there were to be enforcement proceedings,
3 I am well aware from other FTC cases, that those enforcement
4 proceedings go through many, many phases, and many, many
5 months before anything gets decided by anybody at the FTC,
6 to say nothing about the courts, and there is nothing in the
7 record to indicated, as the FTC has strongly emphasized,
8 that the FTC is going to violate, or vary perhaps is the
9 more accurate word, any of its prior regulations, or this
10 regulation in terms of bringing inappropriate actions
11 against insurers who are exempt under the McCarran-Ferguson
12 Act.

13 There is simply no dispute about the exemption.
14 There is a dispute and a difference of opinion, I suspect,
15 about how that exemption is to be construed and interpreted
16 as to third-party telemarketers.

17 But the basic principle behind that exemption, or
18 contained in that exemption is not disputed at all. And
19 based on this record I see no either imminent or irreparable
20 harm.

21 On the issue of irreparable harm, by the way, the
22 final point is that the plaintiffs have an option. It is
23 not an option they like. I understand that. It may not be
24 good business practice. It may not be convenient. It may
25 not be a lot of things from the plaintiff's point of view.

1 But they do have the option, and the option is to
2 bring all of these telemarketing activities in-house, and
3 let the insurance companies hire their own people, pay them
4 minimum wage, provide benefits to those people and be exempt
5 from the eagle eye of the FTC.

6 The second factor that we must examine under the
7 four-part test in this circuit is whether plaintiff has
8 substantially established a likelihood of success. And
9 again, based on the record as it stands now, and the
10 briefing that counsel have done, and of course this is
11 always done under time pressures, but I think that the
12 issues have been adequately presented.

13 I don't see any substantial likelihood of success
14 on the merits. And of course it will go back to Judge Leon,
15 who may have a different view of the merits when they are
16 fully fleshed out in front of him.

17 But at this point, as I posed the question to FTC
18 counsel, I think that this is basically a standard, if you
19 will, pre-enforcement challenge to federal regulations, and
20 over many, many years there have been many decisions in this
21 circuit which have rejected such challenges.

22 In particular, in this case it is very clear that
23 the decisions that the FTC will have to make as to the
24 extent of the McCarran-Ferguson exemption are decisions that
25 are going to be -- that are going to be complex and above

1 all will be fact based.

2 The FTC is going to have to decide in many
3 different factual scenarios whether the activities of
4 certain telemarketers constitute the business of insurance.
5 And as I have indicated, that is a decision and a
6 determination that will be uniquely fact based and that at
7 this point the results of those decisions certainly will not
8 be clear.

9 I want to -- and for that reason the argument
10 that the issues being presented by plaintiffs are not ripe
11 at this point, that argument, in my view, is very well
12 taken.

13 Plaintiff raises a number of other issues which I
14 only want to touch on very lightly. An argument is made
15 that enforcement of these rules is going to involve the
16 First Amendment violations. And plaintiff cites a number of
17 cases that I have recently decided in this area, and those
18 are the Vitamin Supplement cases.

19 The lesson -- one of the lessons to be learned
20 from those cases is the constitutional treatment of
21 commercial speech is dramatically different than the
22 constitutional treatment of non-commercial speech.

23 The tests are clearly very different. This is, of
24 course, commercial speech, and certainly the case was not
25 made out adequately to me that there would be First

1 Amendment violations because the FTC, under its rule, would
2 be trying to regulate and would be regulating the statements
3 and the scripts of third-party telemarketers.

4 There is also an argument that there would be a
5 violation of equal protection because telemarketers employed
6 directly by insurance companies would not be covered by the
7 Act, and telemarketers who were operating on their own but
8 under contract to the insurance companies would be covered
9 by the regulations.

10 I think the essential question is whether -- under
11 the equal protection clause is whether those two groups of
12 people are similarly situated, and again I certainly don't
13 think plaintiff has established that they are similarly
14 situated or that there is a substantial likelihood of
15 showing that they are similarly situated.

16 And for all of those reasons, I do not find that
17 plaintiff has established a substantial likelihood of
18 success on the merits.

19 Finally, the two other factors that we have to
20 address are, at least in this case, very much related. And
21 they are whether the public interest favors the granting or
22 the denial of a TRO, and whether the entity against whom a
23 TRO would be entered, namely the FTC, would be harmed by the
24 granting of such a TRO.

25 As I said, in this case I think those two factors

1 are very intertwined. On this point I think that Judge West
2 stated it particularly well in his decision this week, and
3 that was issued March 26, and he is the District Judge in
4 the Western District of Oklahoma.

5 And he indicated -- and I would adopt his
6 reasoning, that quote:

7 "The court finds in balance
8 that the potential harm of
9 abusive and unfair telemarketing
10 acts and practices that
11 consumers will suffer if
12 enforcement of these two
13 amendments is delayed
14 outweighs any potential
15 financial harm to the
16 plaintiffs."

17 And he had emphasized earlier as well as I did
18 that the harm, if any, to the plaintiff was financial, not
19 irreparable.

20 He also went on to find, and again I certainly
21 agree with his reasoning that:

22 "There is a strong public
23 interest against abusive
24 and invasive acts by the
25 telemarketing industry.

1 And the court finds that
2 public interest is best
3 served by the immediate
4 enforcement, i.e., March 31st,
5 of these two regulations,
6 the primary purposes of
7 which are to protect consumers
8 against these practices and
9 acts."

10 So the court concludes that none of the required
11 tests under our case law has been satisfied in this case.
12 And therefore the temporary restraining order will be
13 denied.

14 In terms of procedure everyone, I am simply going
15 to send this case back to Judge Leon. I don't have any idea
16 what kind of scheduling he wants to follow, and indeed
17 plaintiff may have to make some decisions about where you
18 want to go with the case as well.

19 So from here on in it is back on Judge Leon's
20 docket, and I want you to be clear on that.

21 Thank you very much everyone.

22 MR. DeMILLE-WAGMAN: Thank you.

23 MR. CORN-REVERE: Thank you, Your Honor.

24 THE COURT: Parties may be excused.

25 (Whereupon, the proceedings were adjourned.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript of
the proceedings in the above-captioned case.

SUSAN PAGE TYNER, CVR-CM
OFFICIAL COURT REPORTER