

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

MAX MARGULIS, Plaintiff,

v.

FAIRFIELD RESORTS, INC., Defendant.

Cause No. 03AC-008703 V CV

Division 43

August 3, 2004

NOTICE: The rules of some jurisdictions may impose limitations on the use of materials not designated for publication in certain officially sanctioned reporters. Consult the rules of the applicable jurisdiction regarding use and citation of this opinion.

DISPOSITION:

Defendants motion to compel denied.

SYNOPSIS:

Plaintiff brought suit under the Telephone Consumer Protection Act for prerecorded telemarketing calls to his home. Defendant sought discovery of plaintiff’s telephone and business records arguing that the telephone number which received the telemarketing calls was used for business, and thus the call to that number was not in violation of the TCPA. The court held that inquiry into the quantity or nature of business activities conducted by plaintiff in his home was irrelevant to whether the telephone line was registered with the phone company as a “residential” line and denied defendant’s discovery.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

none

APPEARANCES:

JUDGES:

Hon. Michael T Jamison

HOLDINGS:

[☛1] **Telephone Solicitation**

The plain language of “residential telephone subscriber” is simply someone who subscribes to telephone service from the phone company that serves as a residence and is registered as a “residential” line.

[☛2] **Telephone Solicitation**

How the telephone line is registered with the telephone company is a reasonable bright line test and consistent with the plain language of the statute.

[☛3] **Actual Damages/Injury**

Discovery calculated to reveal the extent of “business” a plaintiff conducts out of his home is not relevant to whether the TCPA applies to the call.

[☛4] **Telephone Solicitation**

Whether or how much home business activities are conducted in Plaintiff’s residence is completely irrelevant to whether it is his and other family members’ residence.

[☛5] **Telephone Solicitation**

Because the quantity of business activities that have occurred in the home are irrelevant to the question of whether the calls at issue were made to a “residential telephone subscriber,” discovery of those business activities is simply irrelevant.

OPINION:

ORDER ON DEFENDANT’S MOTION TO COMPEL

[*1] This matter came before the Court on May 19, 2004 on Defendant’s motion to compel responses to discovery. Additional argument was heard on June 16, 2004 Defendant propounded discovery on August 26, 2003. Plaintiff objected to questions seeking what can generally be described as the details of business activities by Plaintiff in his residence and what telephone numbers he has used in his business, arguing that the information sought is irrelevant to this case.



It is not disputed that the telemarketing calls in this case were received on telephone lines at Plaintiff's residence. It is also not disputed that Plaintiff has multiple telephone lines serving his residence where the telemarketing calls in this case were received. Defendant argues that because Plaintiff conducts his law practice out of his home and possibly other business activities, the telephone numbers to which the calls were placed are "business" telephone numbers. Defendant argues that if the calls were received by "business" telephone numbers, Plaintiff's cause of action fails. Plaintiff argues that regardless of the presence of business activities in his home, it is still his residence, he is a "residential telephone subscriber" and the telephone lines are registered with the telephone company as "residential" telephone numbers. Plaintiff argues that no amount of "business" activities conducted in the home or on the phone in the home changes the fact that the telephone lines are registered with the telephone company as "residential" telephone numbers or his status as a "residential telephone subscriber" and thus the TCPA applies to these calls and the discovery sought by Defendant is irrelevant. Plaintiff has supplied a copy of his phone bill to defendant showing all phone numbers in question are residential phone numbers

Discussion

The TCPA has multiple prongs. One portion of the statute deals with prerecorded calls. Another portion deals with junk faxes. Some provisions, such as the prohibition on junk faxes, apply equally to all telephone lines regardless of their classification as residential or business. For this case however the distinction is in the FCC regulations. The statute itself creates no explicit limits on "live" telemarketing calls, and instead directed the FCC to make its own rules and the statute makes violations of those FCC rules actionable. 47 U.S.C. § 227(c)(5). The FCC rules that are the subject of Plaintiff's cause of action are found at 47 CFR 64.1200(e) which reads: [FN1]

(e) No person or entity shall initiate any telephone solicitation to a **residential telephone subscriber**:

(1) Before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), and

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining

a do-not-call list.

(ii) Training of personnel engaged in telephone solicitation. Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a **residential telephone subscriber** not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(v) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a **residential subscriber's** do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being

advertised.

(vi) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made.

(emphasis added).

FN1. These rules were amended in 2003, and those changes generally took effect on August 24, 2003. The calls in this case all preceded the new rules so reference and quotation to the CFR are to the rules in effect prior to August 24, 2003.

In its brief, Defendant intermixes and contrasts terms “residential telephone subscriber” and “business telephone numbers” claiming that the former are covered by the TCPA and the latter are not. The term of art at issue is not “business telephone number.” That term is not part of the statute or the CFR. The dispositive inquiry is whether Defendant called a “residential telephone subscriber.”

Plain Language

Since the term “residential telephone subscriber” is not defined by the TCPA or FCC rules, the first step in any analysis is the plain language of the statute. [1] The Court agrees with Plaintiff that the plain language of “residential telephone subscriber” is simply someone who subscribes to telephone service from the phone company that serves as a residence and is registered as a “residential” line.

FCC Interpretation

Recently, the FCC was encouraged to adopt a definition of “residential subscribers” to mean “telephone service used primarily for communications in the subscriber's residence.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 at ¶ 34 (2003). The FCC rejected that definition as “is far too restrictive and inconsistent with the intent of section 227. Specifically, there is nothing in section 227 to suggest that only a customer's ‘primary residential telephone service’ was all that Congress sought to protect through the TCPA.” *Id.* at ¶35. The FCC clearly believes the term can not be restricted to mean only the customer's “primary residential telephone service.” While not dispositive, it seems to indicate that the FCC would reject the argument that Defendant is making in seeking to distinguish between Plaintiffs “main” residential telephone number and other telephone numbers serving Plaintiff's residence.

Use in Similar Statutes

“Residential Telephone Subscriber” and “Residential Subscriber” are the terms used by many telemarketing laws, including Missouri's. According to the FCC, the terms are synonymous. [FN2] Missouri's NoCall law, Section 407.1095 RSMo, defines “Residential subscriber” as:

a person who has subscribed to residential telephone service from a local exchange company or the other persons living or residing with such person;

Many other state telemarketing statutes use similar definitions. These are consistent with the plain language analysis, *supra*, and give additional support for the conclusion that the calls made to Plaintiff were made to a “residential subscriber” as contemplated by the TCPA.

FN2. The FCC held that these terms are synonymous. “We note that section 227(c)(1) uses the phrase “residential telephone subscribers” and that section 227(c)(3), which more specifically discusses the do-not-call database, uses the phrase ‘residential subscribers.’ Neither of these terms is defined in the TCPA. Thus, we see no basis in the legislative language or history for considering them to be materially different. Nor do we see a basis for distinction in common usage. Therefore, we will interpret them to be synonymous and will refer to both by using the term ‘residential subscribers.’” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 note 132 (2003).

A bright line test

Besides fitting the plain language of the term “residential telephone subscriber,” applying the TCPA to a person who has subscribed to “residential” telephone service regardless of subjective inquiry into the types of activities taking place in that residence also makes practical sense. Phone listings in directories are generally segregated into residential listings and business listings. Residences and businesses are registered differently with the phone company and charged different rates. [2] How the telephone line is registered with the telephone company is a reasonable bright line test and consistent with the plain language of the statute.

Many people conduct some “business” on their residential telephone lines. If a teenager posts signs in the neighborhood advertising babysitting services and includes her parent's phone number, it does not convert

the phone at his home into a “business” telephone line.

Defendant is correct that discovery is permitted if it is reasonably calculated to lead to relevant and admissible evidence. [3] Defendant’s line of discovery however is calculated to reveal the extent of Plaintiff’s law practice and other “business” he conducts out of his home. Such information is simply not relevant. [4] Whether or how much home business activities are conducted in Plaintiff’s residence is completely irrelevant to whether it is his and other family members’ residence. It does not lose the character under the TCPA as a residence, on a residential street, where the family resides, merely because any amount of business is conducted there.... no more so than living in the back room of a business complex turns that complex into a residence for purposes of the TCPA. [5] Because the quantity of business activities that have occurred in the home are irrelevant to the question of whether the calls at issue were made to a “residential telephone subscriber,” discovery of those business activities is simply irrelevant.

Defendant relies on the discussion in *Adamo v. AT&T*, 2001 TCPA Rep. 1087, 2001 WL 1382757 (Ohio App. Nov. 8, 2001) to support its contention that inquiry into business activities at Plaintiff’s home is relevant to this case. However, *Adamo* does not support that proposition. In *Adamo*, the plaintiff “presented his phone bills that categorize the number as residential.” The court did not conduct an inquiry into what business activities were conducted in that residence.

What is relevant is whether Plaintiff, with respect to the specific telephone numbers called by Defendant, is a “residential telephone subscriber” and that is determined by the manner in which the telephone service is subscribed with the telephone company. For that reason, Defendant is entitled to know how the telephone numbers to which the telephone calls subject to this suit were made are registered with the telephone company, and Defendant is entitled to documentation of that information in the form of the portion of the telephone bills, service orders, or other information evidencing the nature of the telephone service subscribed to those telephone numbers. Plaintiff has already provided redacted telephone bills to Defendant to demonstrate that the numbers where the telemarketing calls were received are subscribed as residential numbers with the phone company, and the Court finds this reasonable. As the Court is mindful of the privacy interests of both Plaintiff and, as Plaintiff is a practicing attorney, the privacy interests his clients, all portions of phone bills or other documents that identify telephone numbers or other identifying information of persons other than Plaintiff may be redacted before being provided to Defendant.

Conclusion

Because Plaintiff has already offered the redacted documents the Court finds sufficient to reply to the discovery at issue, Defendant’s Motion to Compel is DENIED.

IT IS SO ORDERED, this the 3rd day of August, 2004.

/s/ Hon. Michael T Jamison
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