

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

In the Matter of)	CG Docket No. 02-278
)	
State Law Preemption Petitions)	
)	
Filed by Numerous Pro)	
)	
Telemarketing Advocates and)	
)	
Pro Unsolicited Fax Ad Advocates)	

COMMENTS OF JOE SHIELDS

I respectfully submit these comments to the Commission in reply to the letter from a Mark A. Grannis on behalf of the American Teleservices Association to Marlene H. Dortch of the Commission dated October 20th, 2005.

Less than 5 years ago the most widely used defense in a TCPA claim was that the TCPA did not apply to intrastate calls. In Shields v. Hensley et al, Cause No. 2001-32094, 280th District Court, Harris County, Echostar Satellite Corporation filed a motion for summary judgment and claimed: "...the Federal Communications Commission ("FCC"), the federal agency directed to adopt rules and regulations implementing the Federal statute, has opined that the statute only applies to interstate telemarketing activity." The Telemarketing industry has long made such material misrepresentations to the courts, the public and the Commission.

The letter in question is a prime example – banking laws have absolutely nothing to do with the Telephone Consumer Protection Act and are not on point in the preemption issue before the Commission. A recent Utah case that is exactly on point and contains an excellent discussion on the merits of state law preemption is enclosed.

On a more personal note and to put into perspective what the telemarketing industry's real objective is – I was informed today that I will be facing four attorneys from the same law firm at trial. All represent the same defendants in a claim I filed for an automatically dialed and prerecorded telephone solicitation to my cellular telephone number. The law firm is spending a perverse amount of money and time to secure case law that a telemarketer can claim to be calling someone else thereby skirting liability for any TCPA violation. The law firm has pulled out all stops to succeed - they have engaged in misrepresentations of the facts and the law, withheld evidence properly requested during discovery and have even made criminal allegations against the victim of their client's illegal telemarketing activity. This law firm has even refused to provide a copy of their

defendant's do not call policy! I am enclosing a letter I received that is typical of the misrepresentations made by the telemarketing industry and their legal representatives¹.

The telemarketing industry will not stop until all telemarketing laws, state and federal, have been neutered. And we have all seen how effective telemarketers can be. One needs only to look at the Junk Fax Prevention Act. The telemarketing industry efforts in that area of the TCPA has legalized theft of private property and commandeering of private property for advertising purposes.

I respectfully request that the Commission review the decision I am providing the Commission and that the Commission take the state law preemption petitions for what they really are – a determined telemarketing industry assault to neuter all state and federal telemarketing laws.

Respectfully submitted,

_____/s/_____

Joe Shields
Texas Government & Public Relations Spokesperson for Private Citizen Inc.
16822 Stardale Lane
Friendswood, Texas 77546

¹ For clarification: Max Sutter submitted the refinance inquiry on November 7, 2002, the web site did not have the referenced disclaimer at that time, I was the subscriber to the cellular telephone number for more than 30 days at the time of the call and Mr. Sutter had not been the subscriber to the cellular number for more than 2 years when the unlawful call was initiated to my cellular telephone number.

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Utah Division of Consumer
Protection,
Plaintiff and Appellant,

No. 20040172

v.

Flagship Capital dba Integrated
Credit Solutions,
Defendant and Appellee.

F I L E D

November 8, 2005

Third District, Salt Lake
The Honorable Stephen L. Henriod
No. 030901239

Attorneys: Mark L. Shurtleff, Att'y Gen., Jeffrey S. Buckner,
Asst. Att'y Gen., Salt Lake City, for plaintiff
Richard D. Burbidge, J. Ryan Mitchell, Jefferson W.
Gross, Salt Lake City, William E. Raney, Kansas City,
MO, for defendant

NEHRING, Justice:

¶1 The Utah Division of Consumer Protection brought an enforcement proceeding against Flagship Capital, a telemarketing company, for failure to comply with sanctions imposed when Flagship violated Utah law. The district court dismissed the case citing a lack of subject matter jurisdiction because it determined that certain provisions of the Utah Telephone and Facsimile Solicitation Act, Utah Code Ann. §§ 13-25a-101 to -107 (2001), and the Utah Telephone Fraud Prevention Act, Utah Code Ann. §§ 13-26-1 to -11 (Supp. 2004), are preempted by the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991). The Division appealed the district court's dismissal. We reverse.

BACKGROUND

¶2 Flagship Capital, a Florida based telemarketing company, placed an unsolicited telephone call to a Utah resident.¹ The Utah Division of Consumer Protection issued an administrative citation against Flagship for violation of the Utah Telephone and Facsimile Solicitation Act, Utah Code Ann. §§ 13-25a-101 to -107 (2001), and the Telephone Fraud Prevention Act, Utah Code Ann. § 13-26-3 (Supp. 2003) (collectively, "the Utah laws"). The Division's citation stated that Flagship was in violation of Utah law because it used an automated dialer to place the call, in violation of Utah Code section 13-25a-103(1), and also because Flagship failed to register as a telephone soliciting business, as required by Utah Code section 13-26-3. Flagship challenged the citation. In an enforcement hearing, the Division ruled that Flagship violated the Utah laws, and that the laws were not preempted by the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 (1991). The Division fined Flagship \$2,000 and enjoined Flagship to comply with the registration requirement.

¶3 Flagship appealed the Division's order to the Utah Department of Commerce, claiming again that the federal TCPA preempts the Utah laws. The Department of Commerce determined that the question of preemption is a matter of constitutional law which must be decided by the courts and was therefore outside the scope of the Division's review. The Department upheld all of the Division's conclusions unrelated to preemption and ordered Flagship to register and pay the fine.

¶4 When Flagship failed to comply with the Department's order, the Division filed a civil complaint in the district court seeking enforcement of the Department's order. Flagship moved to dismiss the enforcement proceeding, again claiming that the Utah laws were preempted by the TCPA, and contending that the district court therefore did not have subject matter jurisdiction over the case. The district court agreed with Flagship and dismissed the case for lack of subject matter jurisdiction based on federal preemption. The Division appealed. We reverse.

¹ The call was placed through a related company called Integrated Credit Solutions and was made on behalf of Lighthouse Credit Foundation, a non-profit credit counseling and debt management organization.

ANALYSIS

¶5 The Division challenges the district court's dismissal on three grounds: (1) that preemption does not deprive a state court of subject matter jurisdiction to enforce the Department's determination that Flagship was in violation of state law; (2) that Flagship waived its preemption defense because it did not pursue judicial review; and (3) that Flagship is barred by res judicata from asserting a preemption defense because that issue was already decided by the Department. Flagship presents a fourth issue on cross-appeal: that the appeal is moot because the legislature has modified the relevant laws in such a way that Flagship is now exempt from them. Before addressing any of the Division's claims, we first analyze whether the district court erred in finding that the Utah laws were preempted. Since we find that they were not preempted, there is no need to address the Division's other claims. Finally, we address Flagship's mootness claim.

I. FEDERAL PREEMPTION

¶6 The primary issue before us is whether the district court erred in determining that it did not have subject matter jurisdiction over the enforcement proceeding between the Division and Flagship. Whether a district court has subject matter jurisdiction is a question of law which we review for correctness. Hous. Auth. v. Snyder, 2002 UT 28, ¶ 10, 44 P.3d 724.

¶7 State courts generally have subject matter jurisdiction over cases arising under federal law. However, an action filed in a state court might be removed to federal court if it involves a federal question that "aris[es] under the Constitution, laws, or treaties of the United States." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); see 28 U.S.C. § 1441(b) (authorizing any claim that arises under federal law to be removed to federal court). To determine whether a cause of action brought in state court is eligible for removal to federal court, the United States Supreme Court has established the "well-pleaded complaint rule," in which "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metro. Life, 481 U.S. at 63-64.

¶8 There is, however, an exception to the well-pleaded complaint rule. A cause of action arising under state law might be removed to federal court "when a federal statute wholly displaces the state-law cause of action through complete preemption." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8

(2003). This exception is necessary because “[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.” Id.

¶9 The district court invoked this exception to determine that it lacked subject matter jurisdiction over the Division’s case. The district court’s ruling was premised on its underlying conclusion that Utah Code sections 13-25a-103(1) and 13-26-3 (Supp. 2003) are preempted by the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).

¶10 Although the parties elected to not appeal the question of preemption, we must nevertheless address it. If we conclude that the Utah laws are preempted by the TCPA, we must go on to address the question of whether Utah courts may nevertheless exercise jurisdiction over Flagship’s alleged violations of the TCPA. If we conclude that the Utah laws are not preempted by the TCPA, then the state court clearly retains jurisdiction and we need not address the question further.

¶11 The United States Supreme Court has identified two types of preemption: express and implied. English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990). Express preemption, often referred to as “complete preemption,” exists where a federal statute states an intent to preempt state law. Id. By contrast, the Supreme Court has “recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law.” Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (citations omitted). These scenarios of implied preemption have acquired their own labels and have become known as “field preemption” and “conflict preemption,” respectively. For reasons we explain below, we conclude that Flagship can look to none of these preemption doctrines, not complete preemption, nor field preemption, nor conflict preemption, to support its assertion that the TCPA preempts Utah law.

A. Complete Preemption

¶12 The United States Supreme Court has found complete preemption in only two circumstances: certain causes of action under the Labor Management Relations Act of 1947, 29 U.S.C. § 185, Avco Corp. v. Machinists, 390 U.S. 557 (1968), and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58

(1987). In each of these cases, "the federal statute at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003). The preemptive power of those statutes was described as "unusually 'powerful,'" because they provided an express federal remedy for plaintiffs' claims to the exclusion of state remedies. For example, ERISA section 514, now codified at 29 U.S.C. § 1144, clearly states that "the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

¶13 While the message of complete preemption is delivered in a clear congressional voice, Congress remained mute on the subject of the federal TCPA's preemption of state law in the context of interstate phone calls. Because the TCPA does not meet the requirements necessary to show express preemption, we conclude that the TCPA does not completely preempt the Utah laws.

¶14 This does not, of course, conclude the preemption inquiry. We next consider the more complex question of whether the TCPA impliedly preempts the Utah laws, either by conflict or by showing an intent to "occupy the field."

B. Implied Field Preemption

¶15 Generally, the presence of implied field preemption does not result in exclusive federal jurisdiction. Even if a federal statute preempts the state cause of action through field preemption, the case can be brought in state court. Field preemption empowers a party to remove the action to federal court. However, Flagship insists that in this case field preemption has clear jurisdictional consequences. The TCPA assigns exclusive jurisdiction to the federal district courts in cases brought by states or their representatives. 47 U.S.C. § 227(f)(2). Therefore, Flagship claims that if the TCPA displaces Utah statutes through field preemption the district court would be stripped of jurisdiction.

¶16 The key element of an implied field preemption analysis is congressional intent. The United States Supreme Court has explained:

[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred

from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (citations omitted). To summarize the Supreme Court in English, there are two ways in which congressional intent can be inferred: (1) the scheme of federal regulation must be so pervasive as to show Congress left no room for supplementation by states, or (2) the act concerns a field in which the federal interest dominates irrespective of the pervasiveness of regulatory schemes.

¶17 As the facts of this case reveal, Congress did not craft the TCPA as an all-pervasive regulatory scheme. Flagship violated the Utah statutes by using an automated dialer to place a call to a residence and by failing to register in Utah as a telephone solicitation business. Under the TCPA, it is illegal to place a call to a residence using an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(B). However, the subsection governing calls to residences does not, unlike the Utah laws, expressly prohibit the use of automatic telephone dialing systems.² The TCPA specifically proscribes the use of automatic telephone dialing systems in other instances, such as to an emergency phone line, hospital room, pager, cell phone, or simultaneous use of multiple lines of a multi-line business. 47 U.S.C. § 227(b)(1)(A), (D). The Utah law, however, is more comprehensive, prohibiting the use of an automated telephone dialing system in any instance, including, as here, to a residence. Thus it is apparent that Congress has left some room to the states to exercise legislative discretion to further protect its citizens from solicitation by automatic dialers.

¶18 The second way to infer congressional intent is if the act concerns a field in which federal interests dominate. While it is unquestioned that telemarketing is national, in fact global, in its scope, this confluence of commerce and technology, despite its power to inspire widespread annoyance and worse, throughout our nation, has not necessarily thereby created an

² Both the Utah laws and the TCPA define automatic telephone dialing systems as systems capable of storing or generating phone numbers and then calling those numbers. 47 U.S.C. § 227(a)(1); Utah Code Ann. § 13-25a-102(2).

exclusive federal interest. The Supreme Court has stated that "every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." Hillsborough County v. Automated Labs., Inc., 471 U.S. 707, 716 (1985). An apt analogy is the regulation of interstate highways. There, the interstate nature of the field is so undisputable that the subject has the word "interstate" in its name. However, this does not mean that federal interests dominate in the regulation of this interstate system. Instead, most of the regulation of the highways is left to the individual states to regulate through their police power to protect their citizens' health, welfare, and safety. Interstate telemarketing fits a similar niche. Like interstate highways, there is a federal interest, as illustrated by the TCPA, to define the basic parameters within which interstate telemarketing may occur. Within those walls, however, the states are left with discretion to determine whether the welfare of their citizens requires greater protection and to act on that determination.

¶19 Furthermore, when exercising the police power, Congress legislates in a realm jealously guarded by the states, one that if easily ousted by implied congressional acts would erode fundamental notions of federalism. In such an instance, the Supreme Court has established a demanding burden for showing congressional intent, insisting that it must be easily recognizable:

Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where . . . the field which congress [sic] is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest."

English, 496 U.S. at 79 (quoting Jones v. Rate Packing Co., 430 U.S. 519, 525 (1977)). Rate specifically states that the police power is such an area traditionally occupied by the states, therefore requiring clear and manifest preemptive language. 430 U.S. at 525.

¶20 Where the police power is at issue, there is a presumption that the regulations can constitutionally coexist, with a resulting burden of proof placed on the party claiming preemption. Hillsborough County, 471 U.S. at 716. We conclude

that Flagship has failed to establish that the TCPA clearly intended to preempt state laws concerning interstate telephone calls. Thus, we determine that Congress did not intend to "occupy the field" such that the Utah laws are preempted.

C. Implied Conflict Preemption

¶21 We next consider whether the federal TCPA and the Utah laws are so incompatible as to render the Utah laws preempted by conflict preemption:

[S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English, 496 U.S. at 79 (citations omitted).

¶22 Close examination of the Utah laws shows that they are not in conflict with the TCPA, nor do they stand as an obstacle to the accomplishment and full objective of federal law. We see no reason why telemarketing companies would be unable to comply with both the Utah laws and the federal statutes. This intention of the Utah legislature is made clear by Utah Code section 13-25a-103(4), which reads: "A person may not make or authorize a telephone solicitation in violation of Title 47 U.S.C. 227." The telemarketing standards set by our legislature are stricter than, but do not directly conflict with, the federal standards. A telemarketer who complies with the Utah standards will have little difficulty complying with the federal standards. Moreover, the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents. Therefore, the Utah law does not force a telemarketer to conform its nationwide practices with Utah standards in order to prevent an inadvertent violation.³ The

³ This is in contrast to some other forms of mass advertising, most notably advertising through e-mail. E-mail solicitors have argued that varying state regulations make it virtually impossible to comply with all the regulations because it is usually impossible for them to know into which state an e-mail will be sent. That, however, is not true here, where the
(continued...)

telemarketer can simply identify those calls that would be made to Utah and choose to not make those calls or to conform those calls to the Utah regulations. That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

¶23 Having concluded that the TCPA does not preempt the Utah laws either expressly or impliedly, we need not address the question of whether preemption is a jurisdictional question. Rather, because the Utah laws are independently valid, the district court had subject matter jurisdiction over this case.

II. MOOTNESS

¶24 Finally, Flagship argues that this case is moot because the Utah laws have been amended to exclude charities. We reject this argument because it was not raised below, and was thus not properly preserved. Even had this argument been preserved, mootness would not be a factor because charities were not exempt at the time Flagship was cited. The exemption for charities was enacted in 2003 after the citation issued but was short-lived, being repealed less than a year later. Utah Code Ann. § 13-25a-103(2)(c) (2003) (repealed 2004).

CONCLUSION

¶25 Although the issue was not directly raised before us, we conclude that the district court erred in determining that Utah Code sections 13-25a-103(1) and 13-26-3 were preempted by the federal TCPA. Accordingly, we also conclude that the district court had subject matter jurisdiction over the case. Due to this conclusion, we need not address the Division's arguments concerning res judicata and waiver, and we reject Flagship's argument that the case is now moot.

¶26 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Durrant, and Justice Parrish concur in Justice Nehring's opinion.

³ (...continued)
destination state can be discerned by merely identifying the phone number's area code.



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January 18, 2005

Via Facsimile 281-992-1165

Joe Shields
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Michael L. Mallow

Fax: 310.552.5061
mmallow@klnk.com

Re: Live Link adv. Shields

Dear Mr. Shields:

This office serves as counsel to Direct Link, Inc. d/b/a Live Link Technologies ("Live Link"). I am writing to you behalf of Live Link and Americor Lending Group, Inc. ("Americor"). This letter is in response to your correspondence of December 30, 2004 to David Botton at Live Link and Jeremy Foti at Americor.

In your letter, you assert my clients violated various provisions of the Telephone Consumer Protection Act ("TCPA"), the FCC regulations promulgated under the Act and parallel Texas state law. Although I share and appreciate your aggravation related to receiving a call from my clients, as someone who appears to be very familiar with the TCPA, you know the calls you received do not constitute any violation as set forth in your correspondence.

Under federal law, it is entirely proper to leave pre-recorded message on a residential telephone number if the message if the call is initiated "with the prior express consent of the called party." 47 CFR 64.1200(a)(1).

In your letter you indicated that you did not consent to having a call initiated to your cellular telephone number, which you indicated was (713) 494-0877. While this may be true, the telephone number you identified was nonetheless used by an individual named Max Sutter in an on-line application he submitted through MoneyNest.com's website. You can review the site for yourself at <http://www.moneynest.com>. If you review the application, you will note at the bottom that it states:

Once you have completed this form, your information will be sent to one or more of our participating lenders who will contact you by phone and/or by email with competing quotes enabling you to save the most money. By submitting this form you are consenting to receive telephone calls and/or emails from our participating lenders.



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Americor, through Live Link, is one of the participating lenders referenced above. In short, Max Sutter, using the subject telephone number, consented to my client's initiating a call to the subject telephone number.

As you know from the telephone call you initiated to my client, an application had been submitted by Max Sutter, who provided the telephone number which now belongs to you. During the call, my client specifically asked whether you were Max Sutter and you indicated that you were. You also asked my client if it had "your" application and you were told that the application was in my client's possession and the telephone representative actually read to you the information contained on the application. The information on the application indicated that Mr. Sutter was interested in a refinance, the value of his home and the outstanding mortgage balance. My client's representative also confirmed Mr. Sutter's address which you stated was correct. In short, you knew that my client had Mr. Sutter's application in its possession after the telephone call you initiated to my client.

If you wish to verify my client's position, you need only run a "Google" search of the subject telephone number. As you will note, a number of web pages establish that Max Sutter, with an email address of maxsutter@msn.com (which is also identified in his on-line application), is associated with the subject telephone number. For your convenience, the following are some of the websites noting the relationship:

<http://www.dnso.org/clubpublic/ga/Arc12ch/msg01628.html>; and

<http://www.completewhois.com/hijacked/files/160.122.0.0.txt>.

We can discuss the other aspects of your claims if, after considering the above, you feel the need to pursue this matter further. But given your claim arises out of your statement that my client did not have consent to initiate a call to the subject telephone number, the remainder of your claims appear secondary.

Also, the material you sent to my client suggests you sent letters to various governmental entities. The letters are not signed, however, and consequently, I am not sure whether the letters were sent or not. Please confirm which, if any, letter were sent and to which entities so I can represent my client's position related to your claims.

The facts of this dispute are not the routine TCPA violation. My client has possession of any application that identified the subject telephone number and indicated that calling the number was appropriate. My client was trying to reach Max Sutter, not you. Unfortunately, it appears the subject number no longer is used by Mr. Sutter and it is now your number. To the extent you have been contacting instead of Mr. Sutter, on behalf of my client, I apologize for your inconvenience related to this issue. Per your request, my client has made the necessary notations related to your telephone number and you will not be hearing from them again outside the pending dispute.



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That said, you should know that my client actually appreciates your attempt to hold companies responsible for TCPA violations. My client expends significant time and substantial money to ensure it is in compliance with all telemarketing laws and regulations. It would be far less expensive to make random cold calls to consumers using the white pages, which is the method of operation for many of my client's competitors. Obviously, such companies have a distinct, albeit unfair and unlawful competitive advantage over companies, like my client, who follow the rules. To the extent that you are helping to stop these unfair methods of competition by my client's competitors, my client thanks you.

I trust we will be able to work through your issues in short order. To that end, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael L. Mallow'. The signature is fluid and cursive, with a long horizontal line extending to the right.

Michael L. Mallow

cc: David Botton
Jeremy Foti
Nicole M. Lee