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Federal Jurisdiction over Interstate Telemarketing (CG 02-278)

January 11, 2006

Overview:

Three Fundamental Points

1. Congress gave the FCC *exclusive jurisdiction* over interstate communications, and made clear in the TCPA that telemarketing regulation was a form of communications regulation. There is, therefore, no question of preempting state authority over interstate telemarketing because *there is no state authority to preempt*.
 2. While this is an easy case under Section 2 of the Communications Act, getting it right here has broad implications for the FCC's authority to regulate all forms of interstate communications.
 3. Defending the FCC's jurisdiction will not deprive states of the ability to protect their consumers.
- The scope of federal jurisdiction is too important, in too many areas, for the FCC to permit the states to invade it in the field of telemarketing.

1. The Commission Has Exclusive Jurisdiction to Regulate Interstate Telemarketing.

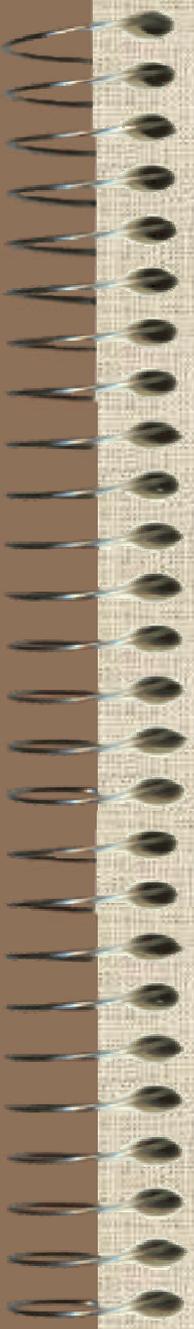
- Section 2 of the Communications Act grants the FCC exclusive jurisdiction over interstate communications.
- In the TCPA, Congress
 - amended Section 2(b) to *expand* federal jurisdiction over *intrastate* calls;
 - did nothing to recognize or create additional *state* jurisdiction over *interstate* calls;
 - enacted a “savings clause,” Section 227(e), that applies only to state regulation of *intrastate* telemarketing
- There is nothing ambiguous about Section 227(e).
- The FCC’s 2003 Order correctly recognized this jurisdictional divide but stopped short of stating its logical consequence.

2. The Section 2 Context: An Easy Case With Broad Implications.

- Difficult Section 2 cases arise where *both* federal and state regulators have the authority to regulate. In this case, Section 2(a) gives exclusive authority to the FCC over the interstate calls at issue.
- The Commission must protect federal jurisdiction because of its implications for other issues of telecommunications regulation.
- The jurisdictional conflict is already spreading to other types of telemarketing
 - Faxes
 - Non-profit telefunding
 - B2B calls
 - Inbound calling
- Proper definition of the jurisdictional boundaries is also necessary to prevent state encroachment into other areas of FCC regulation under Section 2, such as VoIP and other enhanced services.

3. The TCPA Defined a Clear *but Non-Legislative* Role for the States

- States are fully able to protect consumers under the TCPA.
- Congress expected the states:
 - To regulate *intrastate* telemarketing (more restrictively if they wished)
 - To apply their “general civil or criminal statute[s]”
 - To enforce *federal* telemarketing rules as applied to interstate telemarketers.
- What states *cannot* do is precisely what they have done: adopt their own, state-specific rules and apply them to *interstate* telemarketing without regard for federal uniformity.

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