Exclusive Federal Regulatory Jurisdiction over Interstate Telemarketing Calls

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Overview

- Congress gave the FCC exclusive jurisdiction over interstate telemarketing, and the states have no authority to regulate it.
- The states are encroaching on federal jurisdiction over interstate telemarketing, instead of playing the *enforcement* role that Congress created for them in the interstate arena.
- The patchwork of incompatible state regulations of interstate telemarketing frustrates the balance and uniformity that Congress placed at the heart of federal policy on telemarketing.

Overview

- At the very least, the FCC must preempt all state requirements that are more restrictive than the Commission's requirements

- FCC's case-by-case approach to the problem has created confusion among consumers, telemarketers, and courts regarding the boundaries of state and federal authority in this area.

The Commission Has Exclusive Jurisdiction Over Interstate Telemarketing.

- Section 2(a) 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
- The FCC's 2003 Order correctly recognized this jurisdictional divide but stopped short of stating its logical consequence.
- Federal court agreed that savings clause does not provide states with ability to overly restrict interstate telemarketing.
- ND Supreme Court muddied waters by holding that TCPA did not preempt more restrictive state laws.

States Continue to Encroach on Federal Jurisdiction

- States have enacted a patchwork of incompatible regulations, largely refusing to distinguish between interstate and intrastate calling
- State regulation is less "harmonized" with federal regulation than it was in 2003, and the situation is getting worse.
  - Established Business Relationships
  - Disclosure rules
  - Calling hours and holidays
  - Not-for-profit restrictions
  - Prerecorded messages.
- Some proposals go even farther, expanding do-not-call rules and requiring the rerouting of calls.

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

- 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.

Balance and Uniformity Lie at the Heart of Federal Telemarketing Policy.

- In the TCPA, Congress struck a balance to accommodate both individual privacy and truthful commercial speech.
- As the FCC has already recognized, Congress also showed a "clear intent . . . to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."
- Telemarketers fully support uniform national standards for interstate telemarketing and are willing to work with the FCC to ensure that the federal rules are responsive to consumers needs and strike the appropriate balance.

Patchwork Regulation Frustrates Federal Policy.

- Incompatible state regulations disrupt the balance Congress struck and the uniformity Congress sought.
- Incompatible state regulations increase compliance costs:
  - Manual suppression of calls in otherwise national campaigns
  - Tracking and interpreting the ever-growing number of state regulations
  - Researching baseless complaints
- Compliance risks are multidimensional, including litigation risks, regulatory risks, and reputational risks.

The Case-by-Case Approach Has Produced Confusion.

- Consumer confusion about the scope of federal and state do-not-call laws produces a high percentage of unfounded complaints.
- Confusion of telemarketers trying to comply with a multitude of different state laws.
- Courts are also confused about the extent of federal supremacy over interstate telemarketing.
  - North Dakota/FreeEats.com