■ FREE SPEECH TESTS

Muzzling telemarketers

By Gordon Schnell SPECIAL TO THE NATIONAL LAW JOURNAL

WHY WON'T those telemarketers just leave us alone? Well, depending on how a three-judge panel from the 10th U.S. Circuit Court of Appeals soon rules, they finally just might. Pending before the court is a constitutional challenge to the Federal Trade Commission's recently instituted National Do Not Call Registry, under which individuals can shield themselves from telemarketers. (They are prohibited from calling phone numbers listed on the registry, on pain of fines of $11,000 per call).

Sounds great, right? The 50 million people who have so far signed up for the registry think so. So do the 45 states that have jointly filed with the 10th Circuit a brief supporting the registry. And so does Congress, which in a rare showing of bipartisan accord, voted almost unanimously to grant the Federal Trade Commission the authority to create the registry after the commission was found wanting by a federal district court in Oklahoma.

But not everyone's view of the registry is so cheery—in particular, that of the $300 billion telemarketing industry. They claim that the registry will wipe out their business and the millions of jobs that go with it.

And they claim that the registry violates their First Amendment right to free speech. Only commercial calls are covered by the registry. Charitable calls are not. The industry argues that distinguishing between commercial and noncommercial speech in this way, when both are equally invasive of our privacy, is constitutionally improper. A federal district court in Denver agreed and struck down the registry—that decision is now before the 10th Circuit on appeal.

Can 50 million people, 45 states and the entire U.S. Congress be wrong? Absolutely, in theory. Indeed, the Constitution was designed to protect the minority voice. But are the multitudes wrong here? No way. Here's why.

Restrictions on commercial speech are evaluated under a two-part test. First, the challenged restriction must be designed to protect a substantial government interest. Second, there must be a "reasonable fit" between the restriction and the asserted interest. Protecting the privacy rights of those not wanting to receive telemarketing calls is clearly a substantial government interest. There is little dispute about that. There is a rich history of Supreme Court precedent espousing the sanctity of the home and the absolute right to be left alone.

The industry's gripe with the registry is that it sanctifies the home only with respect to the intrusion of commercial calls. It does nothing to dampen what they view as the equally invasive flow of charitable calls. Since both types of speech annoy us in equal measure, the industry argues—and the district court agreed—the registry is not a "reasonable fit" with the goal of protecting us from the pesky telemarketer; it attempts to distinguish the indistinguishable.

More annoying calls

But this argument ignores the evidence that commercial calls actually do bother us more than noncommercial calls. The legislative history leading up to the registry bears out how much more prolific, abusive, coercive and invasive commercial calls are. In a clear signal of where it is leaning, the 10th Circuit pointed to this evidence in deciding to permit the registry to go forward pending its ultimate resolution of the matter. That was a huge slap to the industry and the lower court that had declared the registry dead. Victory for the beleaguered masses is all but assured.

But will it be a total victory? Not necessarily. That is because the 10th Circuit appears unwilling to accept a more fundamental reason for upholding the registry that has nothing to do with whether commercial calls are more intrusive than noncommercial calls. It has to do with the lesser protection afforded commercial speech under the First Amendment. Commercial speech occupies a subordinate position in the hierarchy of First Amendment concerns because it is driven by economic self-interest, not by any desire for social or political change. The registry's restriction on commercial, but not charitable, speech is properly grounded in this lower degree of constitutional protection.

The 10th Circuit will not embrace this argument though, because the U.S. Supreme Court has said it can't. While there is some disagreement within the high court, a majority believes that distinguishing between commercial and noncommercial speech can never be justified based only on the "lower value" of commercial speech.

In light of the ever-increasing commercial assault on our personal privacy, it's time for the Supreme Court to re-evaluate its thinking on this. This case will provide the chance, it is to be hoped. Only then will there be a total victory. Only then can we be assured that the right of a company to thrust its wares upon us will never trump our right to be left alone. NLJ

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