STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 1, 2005

VIA OVERNIGHT DELIVERY

Ms. Erica McMahon
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Consumer Bankers Association*
CG Docket No. 02-278

Dear Ms. McMahon:

Enclosed for filing please find the Comments by the Attorney General of the State of Wisconsin, Motion by the State of Wisconsin Pursuant to 47 C.F.R. § 1.41 to Dismiss Petition of the Consumer Bankers Association on Grounds of Sovereign Immunity, Comments of the Wisconsin Attorney General in Support of Their Motion to Dismiss Petition of the Consumer Bankers Association on Grounds of Sovereign Immunity, and Affidavit of James L. Rabbitt in the above matter. A copy is being mailed to counsel for Consumer Bankers Association.

Sincerely,

Cynthia R. Hirsch

Cynthia R. Hirsch
Assistant Attorney General

CRH:pp

Enclosures

c: Charles H. Kennedy

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:	)	
	)	
CONSUMER BANKERS ASSOCIATION	)	
	)	CG Docket No. 02-278
Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	)	

MOTION BY THE STATE OF WISCONSIN PURSUANT TO 47 C.F.R. § 1.41 TO DISMISS PETITION OF THE CONSUMER BANKERS ASSOCIATION ON GROUNDS OF SOVEREIGN IMMUNITY

Pursuant to 47 C.F.R. § 1.41, the Attorney General of the State of Wisconsin hereby moves the Federal Communications Commission and requests dismissal of the petition of the Consumer Bankers Association challenging portions of Wis. Stat. § 100.52 and administrative regulations promulgated pursuant thereto.

Dated this 1 day of February, 2005.

PEGGY A. LAUTENSCHLAGER
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Cynthia R. Hirsch

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Assistant Attorney General
State Bar #1012870

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COMMENTS OF THE WISCONSIN ATTORNEY GENERAL IN SUPPORT OF THEIR MOTION TO DISMISS PETITION OF THE CONSUMER BANKERS ASSOCIATION ON GROUNDS OF SOVEREIGN IMMUNITY

On or about November 19, 2004, the Consumer Bankers Association ('CBA") filed a petition seeking a declaratory ruling from the Federal Communications Commission ("Commission") asking the Commission to preempt certain provisions of the Wisconsin Do No Call law and the regulations promulgated thereunder. The Attorney General of the State of Wisconsin files this motion for the limited purpose of asserting the Commission's lack of jurisdiction over the issues raised by CBA's petition by respectfully submitting that the Eleventh Amendment bars the Commission from considering the petition. By filing this motion, the Attorney General is not submitting herself to the jurisdiction of the Commission, and expressly reserves her right to argue the merits of the dispute. The State of Wisconsin respectfully requests that CBA's petition be dismissed.

The declaratory ruling sought by CBA's petition is an adjudicative proceeding. The petitioners ask the Commission to interpret provisions of Wisconsin's No Call law, at Wis. Stat. § 100.52, and determine whether the federal No Call rule preempts certain

provisions of that law. If the Commission rules in favor or CBA, Wisconsin's law will be adversely impacted.

The fundamental principle that the Eleventh Amendment sets forth is that states, including their agencies and their officials, cannot be prosecuted or sued in that they are sovereign entities. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Fed. Maritime Com'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (citing *In re Ayers*, 123 U.S. 443, 505 (1887)). Unconsenting states are immune from suit in federal court by citizens of any state. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). The Eleventh Amendment confirms the fundamental principle that each state is a sovereign entity in the federal system, limiting the judicial authority of the federal courts with respect to states. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

While there are several exceptions to the doctrine of sovereign immunity, none of them are applicable to this case. The federal No Call rule was not enacted by Congress pursuant to the remedial provisions of the Fourteenth Amendment. The State of Wisconsin has not waived its sovereign immunity by consenting to this lawsuit or by submitting itself to recommissioned jurisdiction. Finally, CBA's petition does not seek injunctive relief against a state official for constitutional or federal law violations.

CBA's petition is a direct assault on the doctrine of sovereign immunity. The State of Wisconsin is entitled under the Eleventh Amendment to be free from such lawsuits. The state is entitled to not have to defend its state laws before an adjudicator who might interpret those laws at the request of a private entity in such a way that would adversely impact the state.

Dated this 1 day of February, 2005.

PEGGY A. LAUTENSCHLAGER
Attorney General

Cynthia R Hirsch

CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

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COMMENTS BY THE ATTORNEY GENERAL OF THE STATE OF WISCONSIN

The Consumer Bankers Association ("CBA") has respectfully requested the Federal Communications Commission ("Commission" or "FCC") to issue a declaratory ruling that certain sections of the Wisconsin Statutes and Wisconsin Administrative Code are preempted as applied to interstate telephone calls. The Attorney General of the State of Wisconsin strongly argues that Wis. Stat. § 100.52 and the implementing regulations are not preempted by federal law and are consistent with Wisconsin's authority to enact laws protecting its consumers.

ARGUMENT

I. THERE ARE STRONG PRESUMPTIONS AGAINST PREEMPTION OF STATE LAW.

The Supremacy Clause of the United States Constitution states: "Where Congress and the State have concurrent power that of the State is superseded when the power of Congress is exercised [if] the action of Congress [is] specific." *Meier v. Smith*, 254 Wis. 70, 77, 35 N.W.2d 452, 456 (1948) (citing *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612 (1908); *Southern R. Co. v. Reid*, 222 U.S. 424, 425 (1911). In order for federal law to preempt state law, the federal legislation must be specific.

There are strong presumptions against preemption of state law. In general, courts have long presumed that Congress does not intend to displace state law, particularly where the state law concerns traditional areas that come within the police power.

> Where . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States . . . "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Jones v. Rath Packing Co., 430 U.S. 519 (1977) (quoting *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947) (citations omitted). In Wisconsin, clear evidence of legislative intent to preempt state law is required. *See Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 215-16, 533 N.W.2d 746, 752 (1995).

Consumer protection laws like Wisconsin's "Do Not Call" list enjoy an even stronger presumption against preemption. Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and are thus subject to this heightened presumption against preemption. "Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." (*See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (footnote omitted) (unfair business practices). "The "'historic police powers of the States'" extend to consumer protection." *Smiley v. Citibank*, 11 Cal.4th 138, 148 (Cal. 1995) (citing *California v. ARC America Corp.*, 490 U.S. at 101.

II. PREEMPTION OF WISCONSIN'S NO CALL LAW IS NEITHER EXPRESS NOR IMPLIED.

The existence of preemption is a question of law. *National Bank of Commerce v. Dow Chemical Co.*, 165 F.3d 602, 607 (8th Cir. 1999). Courts find federal preemption of state law where Congress expressly demonstrates its intent to preempt state law or, in some cases, where there is implicit field or conflict preemption.

With express preemption Congress will, in the statute at issue, expressly prohibit states from imposing state regulations to the contrary of the federal regulation. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). "Express preemption occurs where Congress has seen fit to speak directly to the preemptive effect of a particular statute." *Gorton*, 533 N.W.2d at 752. The CBA does not and could not argue the Telephone Customer Protection Act ("TCPA") expressly preempts state law because there is no language in the Act that would support this.

Arguably, this in itself precludes preemption especially because the TCPA has a savings clause indicating Congress considered, and rejected, express preemption of state laws. This express savings clause precludes preemption of state regulations of intrastate telephone solicitations. The TCPA savings clause is found at 47 U.S.C. § 227(e):

> **(e) Effect on State Law**
>
> **(1) State law not preempted**
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—
>
> **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> **(B)** the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

The Eighth Circuit noted this lack of Congressional intent in *Van Bergen v. State of Minn.*, 59 F.3d 1541 (8th Cir. 1995), where the court decidedly ruled out preemption of state law under the TCPA. "If Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision." *Id.* at 1548. If Congress intended to create a uniform regulatory system it would not have included the savings clause expressly precluding preemption of state regulation in one area of telephone solicitations. Congress took the time to spell out that state regulation of intrastate telephone solicitations is not preempted, and did not include any express language preempting regulation by the states.

Implied preemption is even more difficult to establish. A court must determine whether Congress implicitly preempted state law through field preemption (where Congress intended to occupy an entire field of regulation exclusively) or conflict preemption. The TCPA is not in conflict with and does not implicitly preempt Wisconsin's "Do Not Call" list. Without citing any law or expressly stating so, the CBA appears to argue that Wisconsin's "Do Not Call" law is implicitly preempted by the TCPA under the theory of conflict preemption. "Conflict preemption occurs where there is an actual conflict between federal and state law." Veronica Judy, *Are States Like Kentucky Dialing the Wrong Number Enacting Legislation That Regulates Interstate Telemarketing Calls?*, 41 Brandeis L.J. 681, 685 (Spring 2003). In conflict preemption, compliance with both federal and state law is impossible *or* the state law "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *See*

Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 368-69 (1986). In the event the state law conflicts with the federal law, preemption occurs. Veronica Judy, *Are States Like Kentucky Dialing the Wrong Number Enacting Legislation That Regulates Interstate Telemarketing Calls?*, 41 Brandeis L.J. 681, 685 (Spring 2003).

In order for Wisconsin law to implicitly be in conflict with the TCPA it must either make it physically impossible for an individual or business to comply with both laws (*see Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)) or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). However, Wisconsin's law does not conflict with or obstruct the purpose of the TCPA and therefore is not implicitly preempted.

III. IT IS NOT PHYSICALLY IMPOSSIBLE TO COMPLY WITH BOTH WISCONSIN LAW AND THE TCPA.

The CBA asserts that Wisconsin's law imposes on CBA members "substantial costs" and "legal risks" and that it prevents CBA members from "responding promptly . . . to inquiries from Wisconsin residents." Consumer Bankers Association, Petition for Declaratory Ruling, CG Docket No. 02-278 at 3-6 (November 19, 2004) ("CBA Petition"). None of these factors, even if true, warrant preemption of state law. In order for a court to consider whether Wisconsin law is implicitly preempted because it conflicts with federal law it must either be physically impossible to comply with both the state and federal law or the state law must obstruct the execution of the federal law.

Compliance with Wisconsin law does not make it physically impossible to comply with the TCPA. Additional costs or preparation before calling Wisconsin residents does not interfere with compliance with the less stringent TCPA. CBA

members need only comply with Wisconsin law, which does not contradict TCPA regulations, in order to comply with both.

Nor does Wisconsin law stand as an obstacle to the execution of the TCPA. In the conclusion of the CBA's Petition the group makes a sweeping declaration, citing only one authority, that Wisconsin's "Do Not Call" list is preempted by the TCPA because it frustrates Congressional intent to "create a single, uniform regime of interstate telemarketing regulation." CBA Petition at 7. Here the CBA appears to argue there is implicit conflict preemption because Wisconsin law frustrates Congress's intent to create a uniform, single law covering interstate telemarketing. This argument is fundamentally flawed because the CBA's interpretation of the purpose of the TCPA is wrong. Wisconsin law does not stand as an obstacle in the execution of the full purpose of the TCPA because Wisconsin law and the TCPA share the same purpose: consumer protection from unwanted telemarketing.

"Where a statute is silent or ambiguous, courts generally have required clear evidence of legislative intent to preempt state law." *Gorton*, 533 N.W.2d at 752. Even a cursory look at the legislative history of the TCPA demonstrates that the purpose of the law was not to "unify regulation" of interstate telemarketing. The TCPA is part of the Communications Act of 1934 which was created to "'regulat[e] interstate and foreign commerce in communication by wire and radio' and to create the FCC. Congress's purpose was to create a '[n]ation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges' to promote 'safety of life and property.'" Veronica Judy, *Are States Like Kentucky Dialing the Wrong Number*

Enacting Legislation That Regulates Interstate Telemarketing Calls?, 41 Brandeis L.J. 681, 690 (Spring 2003) (footnotes omitted).

"A state's No Call list does not interfere with the 1934 Act's purpose. It supports the purpose by protecting consumers from telemarketing abuses. Therefore, there is no implied conflict between a state No Call list and the purposes of the 1934 Act." *Id.*

> The TCPA was culminated from H.R. 1304, Senate Bill 1410 and Senate Bill 1462, all of which set forth privacy as one of its main purposes. A state No Call list supports the TCPA's goal of protecting residential privacy. Therefore, there would be no conflict between a state No Call list and federal regulations in the area of telecommunications.

Id. (footnotes omitted).

Congress enacted the TCPA as a measure of consumer protection against unwanted and intrusive telemarketing. Courts in numerous jurisdictions have concluded, after extensive review of the legislative history of the TCPA that its purpose was consumer privacy.[1] ("The TCPA was enacted to 'protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile ([f]ax) machines and automatic dialers.'" *Intern. Science & Tech. Institute v. Inacom Comm.*, 106 F.3d 1146, 1150 (4th Cir. 1997) (citing S. Rep.

[1]Nine decisions have held that (i) the TCPA exists to protect privacy interests, and thus (ii) claims alleging violations of its provisions by sending unsolicited facsimiles trigger coverage that is available for invasions of the right to privacy. *See, e.g., Park Univer. Enter. v. Am. Cas. Co., Reading, PA.*, 314 F. Supp. 2d 1094 (D.Kan. 2004); *Registry Dallas Assocs. v. Wausau Bus. Ins. Co.*, 2004 WL 614836 (N.D.Tex. Feb.26, 2004); *TIG Ins. Co. v. Dallas Basketball, Ltd.; Universal Underwriters v. Lou Fusz Auto. Network*, 300 F. Supp. 2d 888 (E.D.Mo. 2004); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, Docket No. 02-00975-DRH, 2003 WL 23278656 (S.D.Ill. Dec.9, 2003); *Hooters of Augusta, Inc. v. American Global Ins.*, 272 F. Supp. 2d 1365 (S.D.Ga. 2003); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N.D.Tex. 2003); *Merchants & Business Men's Mut. Ins. Co. v. A.P.O. Health Co., Inc.*, 228 N.Y. L.J. 22 (N.Y.Sup.Ct. Aug. 29, 2002); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744 (M.D.N.C. 2002).

No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N.1968). ("One of the stated purposes of the Act is to protect the privacy rights of telephone service customers by prohibiting the transmission of unwanted advertisements. . . . Before passing the Act, the United States Congress specifically found that '[u]nrestricted telemarketing ... can be an intrusive invasion of privacy . . . .'" *TIG Ins. Co. v. Dallas Basketball, Ltd.* 129 S.W.3d 232, 238 (Tex.App.-Dallas 2004) (citing H.R. Rep. No. 102-317, at 2 (1991)). ("The stated purposes of the TCPA are 'to protect the privacy interests of residential telephone subscribers . . . and to facilitate interstate commerce by restricting certain uses of facsimile machines and automated dialers.'" *Accounting Outsourcing v. Verizon Wireless Pers.*, 294 F. Supp. 2d 834, 840 (M.D.La. 2003).

Congress intended that the TCPA reinforce already existing state laws in the area of consumer privacy. "By 1991, over half the states had enacted statutes restricting the marketing uses of the telephone. However, Congress recognized that 'telemarketers can evade [state] prohibitions through interstate operation; therefore Federal law is needed to control residential telemarketing practices.'" *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d.Cir. 1998) (citing 47 U.S.C. § 227, Congressional finding No. 7; *see also* S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1973). Congress enacted the TCPA to protect privacy interests of residential telephone subscribers. S. Rep. No. 102-178 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970; 47 U.S.C. § 227, Congressional Statement of Findings (7). This finding suggests "the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines." *Van Bergen*, 59 F.3d at 1548. Congress made it clear that the predominate purpose of the TCPA was consumer

protection.[2] The CBA cites just one authority, an FCC Order, to support its contention that the TCPA was enacted solely "to create a single, uniform regime of interstate telemarketing regulation." CBA Petition at 7. The CBA has misinterpreted the Order. The Order does not support Congressional intent to override state telemarketing laws. The uniformity the Order is addressing is consistency between the two federal agencies that were granted jurisdiction over no call issues: the FCC and the Federal Trade Commission. This Order does not reflect any intent by Congress to preempt state law.

IV. THE PURPOSE OF THE WISCONSIN LAW IS CONSISTENT WITH THE PURPOSE OF THE TCPA.

The fact that Wisconsin law differs from the TCPA in certain technical regards does not lead to the conclusion that the law then frustrates the purpose of the TCPA. A state law is not invalid under the Supremacy Clause merely because it differs from a federal law. *See generally Florida Lime and Avocado Growers*, 373 U.S. at 146-47. The test is whether Wisconsin law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It does not. Wisconsin law and the TCPA have the same objective, to protect consumers from uninvited and bothersome telemarketing practices. The aspects of Wisconsin's law that vary or are more stringent that the TCPA only demonstrate the State's desire to have state remedies and enforcement measures to effectuate the goals of both laws.

Moreover, the Supreme Court has held that deference will be granted to an agency's interpretation of an ambiguous statute if the interpretation is one that reasonably

[2]"The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. No. 102-178 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

can be inferred. *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 844 (1984). Although we argue that the TCPA unambiguously does not preempt state law, if the FCC does find ambiguity on this matter it must reasonably interpret the TCPA.

As mentioned, the CBA's primary argument is that Wisconsin's law creates an obstacle to the execution of the TCPA's alleged intent to "create a single, uniform regime of interstate telemarketing regulation." The FCC cannot reasonably infer this as the sole purpose of the TCPA so the CBA's argument must fail.

Furthermore, because obstacle preemption requires an interpretation of an implicit intent on the part of Congress, an agency must be especially cautious to infer meaning in the statute which is unreasonable or at odds with true Congressional intent. "[S]tatutory interpretation often requires the interpreter to define and reconcile issues of policy. This lesson is especially evident in the context of obstacle preemption where congressional intent is largely a fiction." Paul E. Mcgreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 Case W. Res. L. Rev. 823, 853, (Spring 1995) (footnotes omitted).

There are strong policy reasons that suggest that even to the degree that Wisconsin law varies from the TCPA it is not to the point of upsetting the balance established by the TCPA. The State of Wisconsin has a long history of consumer protection of its citizens. Like the Eighth Circuit ruled on Minnesota's Do Not Call law, Wisconsin's law also works with the TCPA "to promote an identical objective, and that there is nothing in the two statutes that creates a situation in which an individual cannot comply with one statute without violating the other." *Van Bergen*, 59 F.3d at 1548.

> The general reason for the creation of No Call lists in each state has been for the purpose of consumer protection. Such legislation is

> historically within the realm of state police power, so, courts are unlikely to preempt state legislation in this area. Unless Congress has clearly manifested intent to preempt, courts presume that the historic police powers of states are not to be preempted.
>
> Consumer protection is a traditional state function:
>
> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily and historically, . . . matter[s] of local concern," the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons . . . ."

Veronica Judy, *Are States Like Kentucky Dialing the Wrong Number Enacting Legislation That Regulates Interstate Telemarketing Calls?*, 41 Brandeis L.J. 681, 689 (Spring 2003) (footnotes omitted) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

V. WISCONSIN'S NO CALL PROGRAM REFLECTS THE REASONABLE EXPECTATIONS OF WISCONSIN CONSUMERS.

The people of Wisconsin have overwhelmingly embraced Wisconsin's No Call program. Households representing an estimated 80% of Wisconsin's population have registered for Wisconsin's No Call list.[3] The people of Wisconsin overwhelmingly support the Wisconsin No Call program because it works, and they oppose any changes that may weaken current protection against unwanted telemarketing calls.

Wisconsin's No Call program effectively protects consumers against unsolicited and unwanted telemarketing calls. It also helps protect Wisconsin consumers, including elderly and vulnerable consumers, from telemarketing frauds. Compliance has generally been good, partly because the rules are clear and even-handed. The program has not had

[3] *See* Affidavit of James K. Rabbitt (attached).

any undue adverse impact on Wisconsin business or the Wisconsin economy. Moreover, one Wisconsin court has already upheld most of Wisconsin's administrative rule, as correctly implementing Wisconsin's No Call law. (*See* attached decision in *Wisconsin Realtors Association, et al. v. Department of Agriculture, Trade and Consumer Protection, et al.*, Case No. 03-CV-1409, Dane County Circuit Court (June 29, 2004).)

The people of Wisconsin support the Wisconsin No Call program because it gives them control over their own telephones (and family lives), while allowing businesses to make calls to consumers who truly want or expect them. Both the Wisconsin and federal No Call programs are broadly intended to protect consumers from unsolicited and unwanted telemarketing calls. Both programs create a voluntary registry of telephone numbers and prohibit telemarketing to those numbers, subject to certain exemptions. The Wisconsin exemptions, though possibly less expansive than the federal exemptions, are reasonably designed to avoid unnecessary burdens on the business community.

The Wisconsin program, like the federal program, exempts not-for-profit calls.[4] The Wisconsin program also exempts the following calls, whether or not the calls promote for-profit sales[5]:

- Calls made by an individual acting on his or her own behalf, and not as an employee or agent for any other person.
- Calls made in response to a consumer's affirmative request.

[4]The Wisconsin law applies only solicitations that promote the sale of products, goods or services, so it does not apply to charitable or political solicitations. Department rules also exempt calls promoting not-for-profit sales of property, goods, or services. *See* Wis. Admin. Code § ATCP 127.80(10)(a).

[5]*See* Wis. Admin. Code § ATCP 127.80(10).

- Calls made to a consumer with whom the business has a current agreement to provide property, goods, or services of the same general type (not necessarily the *exact* type) promoted by the call.
- One call to determine whether a former client mistakenly allowed a contractual relationship to lapse.
- Calls made to determine a former client's level of satisfaction.
- Calls needed to complete an existing contract (even if the caller is not a contracting party).

In their brief, petitioners complain of four communications that they claim would not be allowed under Wisconsin law. The petitioners mistakenly allege that the Wisconsin program prevents sellers from responding promptly, by means of telephone calls, to inquiries from Wisconsin residents. CBA Petition at 3. As noted above, where a consumer makes an inquiry that a person could reasonably expect would generate a telephone response, the Wisconsin program exempts the response.

Second, the petitioners allege that calls made to consumers who have completed their purchases or transactions are prohibited. Their example regarding a bank transaction is somewhat misleading. The Wisconsin law allows banks to call consumers with any ongoing service relationship with the bank. Only customers who have absolutely no remaining relationships with the bank, *i.e*, no remaining accounts, would be entitled to the benefit of No Call. And even those customers could be called by the bank to verify that they have no further interest in bank services.

The petitioners also allege that the Wisconsin program prohibits the telemarketing of "different or additional" products or services to current clients. That is incorrect. The

Wisconsin program allows telemarketing calls to current clients for different or additional products or services that are reasonably related to the current agreement.

Finally, the petitioners claim that affiliates will not be able to call a bank's customers. The Wisconsin statute allows customers to consent to calls from affiliates. This is particularly reasonable in view of the fact that the primary caller has a current relationship with the customer and is in a position to request such consent. In essence, Wisconsin law does not prohibit, it simply requires the caller to ask the customer if additional calls are acceptable.

There are potential points of difference between the Wisconsin and federal No Call programs. The degree of difference will depend on how the federal program is administered. But even if real differences exist, those differences do not warrant preemption of the Wisconsin program. The Wisconsin program, like the federal program, fulfills its purpose by providing protection for consumers against unsolicited calls.

VI. THE PEOPLE OF WISCONSIN OPPOSE BROADER EXEMPTIONS FOR TELEMARKETERS.

The Wisconsin Department of Agriculture, Trade and Consumer Protection held over 15 public hearings and listening sessions before it implemented Wisconsin's No Call rules. Hundreds of individuals appeared and submitted comments. None of the individual consumers asked to expand exemptions for telemarketers. On the contrary, most thought the rules should be more restrictive, and many urged a complete ban on all telemarketing calls.[6]

[6] *See* Affidavit of James K. Rabbitt (attached).

At the hearings, consumers did *not* favor unsolicited telemarketing calls for products or services completely unrelated to those initially requested or purchased. Consumers did *not* favor unsolicited telemarketing calls from sellers, merely because they had contacted or bought something from those sellers within the last 18 months. Consumers did *not* favor unsolicited telemarketing calls, for unrelated products and services, from potentially far-flung and unknown "affiliates" of a seller. Since the Wisconsin No Call list became operational, Wisconsin households have voluntarily registered telephones lines serving 80% of Wisconsin's population.

Many businesses support Wisconsin's No Call provisions (even if they oppose the overall concept of a No Call law), because the Wisconsin provisions are even-handed in their impact on competitors. Many businesses oppose exemptions that would give *some* sellers a competitive advantage. Selective "loopholes" could confer an exclusive telemarketing franchise on some businesses, to the exclusion of competitors. "Loophole" beneficiaries could use their advantage to defeat competitors, increase market share, or extend market power in a wide range of product markets.

During the Wisconsin hearing process, for example, AT&T supported Wisconsin's "current client" exemption as it is now written. AT&T warned that a broader exemption would give an unfair competitive advantage to companies (such as primary providers of local telephone service) that already have a large customer base, and would allow those companies to extend their competitive advantage into new and unrelated product and service markets. AT&T urged Wisconsin to limit the "current

client" exemption to clients that are truly *current*, and to calls that promote similar types of products. Other businesses made similar comments.[7]

Expansion of the "current client" exemption could have a particularly serious effect when combined with the federal provision extending that exemption, not just to the company that has the "current client" relationship, but to all of its potentially far-flung "affiliates." Under the federal program, businesses that are not "affiliated" with a large and diverse network could be placed at serious competitive disadvantage. Broadly "affiliated" businesses may enjoy a considerable advantage if they can telemarket, for their own purposes, the customers of all their so-called "affiliates."

VII. THE HARM CAUSED BY PREEMPTING WISCONSIN'S NO CALL PROGRAM WILL GREATLY OUTWEIGH THE INCONVENIENCE, IF ANY, THAT THE PETITIONERS EXPERIENCE UNDER THAT PROGRAM.

Wisconsin's current No Call program is working well, and is hugely popular with consumers. About 80% of the people in Wisconsin are protected by the current program. The program is reasonably designed to provide the protection that is *intended and expected.* The program has not had any grave effect on Wisconsin's business or economy.

The preemption proposed by the petitioners would effectively "gut" much of the protection offered by the Wisconsin program. It would allow telemarketers, under a variety of questionable pretexts, to telemarket an unlimited range of products or services unrelated to any current customer relationship.

The proposal would open the door to unscrupulous, as well as legitimate, telemarketers. It would start a new wave of telemarketing that Wisconsin consumers

[7] *Id.*

simply do not want. The telephones of millions of Wisconsin consumers would start ringing again with unwanted calls.

The petitioners will argue that consumers receiving unwanted telemarketing calls may ask the *telemarketer* to place them on the *telemarketer's* No Call list. But it is unreasonable to expect consumers to do this with every business contact, and the FCC has already found that this does not effectively protect consumer rights.[8] The petitioners are in effect asking the FCC to restore what were, for Wisconsin consumers, the "bad old days" prior to the state No Call list.

Federal preemption would also undermine fair competition between businesses. Some businesses would be allowed to telemarket, while their direct competitors would be prohibited from doing so. Businesses that have a large customer base, or are part of a broad "affiliate" network, would gain an important competitive advantage. New market entrants, businesses with smaller existing customer bases, businesses that offer a smaller range of products and services, and businesses that lack a broad "affiliate" network would be put at a disadvantage. This unfair competitive dynamic could undermine voluntary compliance with the No Call program.

Under the Wisconsin No Call law, a seller may ask a customer (at the time of initial sale, for example), whether the customer wishes to receive telemarketing calls for unrelated products or services. But a seller may not presume that every consumer who contacts or makes a purchase from the seller has, by that act alone, agreed to unlimited telemarketing by the seller. The petitioners would have the FCC create such an outrageous presumption, enshrine it in federal law, and force Wisconsin and other states to accept it.

The petitioners have presented little evidence to show that Wisconsin's No Call program has crippled, or even seriously inconvenienced, the legitimate operations of the banking industry. On this flimsy record, it would be irresponsible of the FCC to override the clearly expressed wishes of the people of Wisconsin. The Wisconsin program is fully consistent with the expressed intent of the federal No Call law.

The fact that interstate businesses must operate in accord with the reasonable provisions of different state laws does not, by itself, justify federal preemption of those laws. There is nothing in the federal No Call law to compel preemption, or even authorize it in this case.

The fact that federal banking operations are governed by federal law likewise provides no justification for the wholesale preemption of state telemarketing and No Call laws, which have a much broader scope and are unrelated to core banking operations.

There is nothing in the record to show that Wisconsin's No Call program violates federal banking laws. The petitioners instead seek preemption by the Federal Communications Commission, under the Commission's No Call rules. Nothing in those rules provides for special treatment of the banking industry.

Preemption of Wisconsin's No Call program would cause great harm to consumers, businesses, and fair competition in the marketplace. It would also fly in the face of the clearly expressed and codified wishes of the people of Wisconsin.

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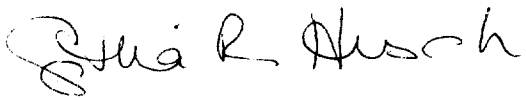
[8]TCPA Order, ¶ 3.

That harm would greatly outweigh the inconvenience that the petitioners claim to experience as a result of Wisconsin law. If the petitioners truly believe that their customers wish to receive unlimited telemarketing calls, for a potentially unlimited array of products and services, they need only ask them. If the customers say yes, Wisconsin's law does not prevent the petitioners from honoring their wishes.

Dated this 1 day of February, 2005.

PEGGY A. LAUTENSCHLAGER
Attorney General



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STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DANE
BRANCH 2

WISCONSIN REALTORS ASSOCIATION, a nonprofit trade association, WISCONSIN NEWSPAPER ASSOCIATION, a nonstock trade association, WISCONSIN ASSOCIATION OF HEALTH UNDERWRITERS, a nonprofit trade association, BLISS COMMUNICATIONS, INC., a Wisconsin Corporation, MARY RIPP, a homemaker And part-time salesperson, EDWARD CHAMBERLAIN, a licensed real estate broker, and PAUL BUNCZAK, a licensed independent auctioneer,

Plaintiffs,

Vs.

Case No. 03CV1409

DEPARTMENT OF AGRICULTURE TRADE and CONSUMER PROTECTION, and SECRETARY ROD NILSESTUEN in his official capacity only,

Defendants.

DECISION AND DECLARATORY JUDGMENT

INTRODUCTION

Plaintiffs seek a declaratory judgment that the Department of Agriculture, Trade and Consumer Protection exceeded its authority in adopting administrative rules to implement Wisconsin's telephone solicitation "no-call list" program. Plaintiffs, who are trade associations, a corporation and individuals, allege that the rules conflict with the