



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
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)
)
Petition for Declaratory Ruling with Respect to) CG Docket No. 02-278
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
Attorney General



CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

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Post Office Box 7857
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(608) 266-3861

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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 of 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 _____ day of February, 2005.

PEGGY A. LAUTENSCHLAGER
Attorney General



CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

Attorneys for State of Wisconsin

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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.

¹Nine 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 than 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

³See 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 sales⁵:

- 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.

⁴The 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).

⁵See 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 TELEMARETERS.

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

⁶See 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 telephone 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.

⁸TCPA 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.

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**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

enabling statute, Wis. Stats. § 100.52, and impair their rights to lawfully use telephone solicitation to sell products, goods and services to the public. Plaintiffs have moved for summary judgment because there are no factual issues requiring a trial. Defendants agree that the court has jurisdiction to determine the validity of the administrative rules pursuant to Wis. Stat. § 227.40, that there are no disputes of material fact and that this case should be decided as a question of law on summary judgment.

Plaintiffs advance eight claims upon which they ask the court to find that the Department exceeded its authority in promulgating Wis. Admin. Code §§ ATCP 127.80—84. These are: (1) the rule treatment of non-profit organizations; (2) the definition of current client; (3) the definition of residential customer; (4) the telephone solicitation registration fee structure; (5) the definition of telephone solicitor; (6) the definition of telephone solicitation as including a “plan or scheme” to encourage sales; (7) the creation of a private right of action; and (8) increased forfeitures and fines. These last two claims arise as a consequence of DATCP’s reliance on Wis. Stat. § 100.20(2) as additional enabling authority for its no-call rules.

For the reasons set forth in this Decision, the court upholds the validity of the no-call rules on the first six claims. The court concludes, however, that the rules cannot authorize a private cause of action nor can they permit forfeitures greater than those established by Wis. Stat. § 100.52(10). Although the original legislation, 2001 Wisconsin Act 16, provided a private cause of action for people suffering damages as a result of a no-call violation and established stronger penalties, then-Governor McCallum vetoed those provisions. The Legislature did not override the governor’s vetoes, and the

statute must therefore be interpreted as it is now written, including vetoes. When a statute and a rule conflict, the statute prevails.

FACTS

The parties agree on the pertinent facts (plaintiffs' brief at 2-6; defendant's brief at 6) and they need not be restated in detail here. It is important to note that this lawsuit addresses only the Wisconsin no-call program, not national no-call programs administered by the Federal Trade Commission and the Federal Communications Commission. Wisconsin's no-call statute, § 100.52, effective August 30, 2001, established a non-solicitation directory of residential telephone customers who do not want to receive telephone solicitations. Customer placement in the directory is voluntary but telephone solicitor compliance with it is not. The law requires telephone solicitors to register with DATCP and pay a registration fee. Once registered, telephone solicitors receive the nonsolicitation directory (which is not a public document) and may not solicit individuals whose names are in it.

Wisconsin Statutes §100.52 directs the Department of Agriculture, Trade and Consumer Protection to administer the no-call program and to promulgate rules concerning telephone solicitor registration, the creation and maintenance of the nonsolicitation directory and the procedure for listing residential customers in the directory. In addition, Wis. Stats. § 93.07(1) grants broad authority to DATCP to promulgate "such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93-100, which regulations shall have the force of law."

Upon completion of statutory rule-making procedures, DATCP on November 30, 2002 published the final telephone solicitation—no-call rule as Subchapter V of Wis. Admin. Code Chapter 127. The first no-call directory was sent to telephone solicitors in December 2002.

DECISION

STANDARDS FOR REVIEW OF ADMINISTRATIVE RULES

This is a declaratory judgment action for judicial review of the validity of administrative rules commenced pursuant to Wis. Stat. § 227.40. Subsection (4)(a) provides that the reviewing court “shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.” In this case, plaintiffs allege no constitutional or procedural infirmity. They instead place their focus on the boundaries of the agency’s authority. Review of an administrative rule begins by asking what standards govern court analysis of an agency rule, whether the agency’s interpretation is entitled to any deference, whether any party bears a burden of proof, and what method of analysis should be used.

Wisconsin Statutes § 227.11(2)(a) grants administrative agencies authority to promulgate rules “interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.” And § 227.10(2) bluntly states that “[n]o agency may promulgate a rule which conflicts with state law.” Both statutes provide a basis for parties challenging the validity of administrative rules on the grounds that the rule exceeds the statutory authority of the agency. *Seider v. O’Connell*,

2000 WI 76, ¶ 24, 236 Wis. 2d 211, 225. Administrative agencies have only those powers given to them by the legislature, and agencies may not issue rules that are not expressly or impliedly authorized by the legislature. *Mallo v. Wisconsin Dept. of Revenue*, 2002 WI 70, ¶ 15, 253 Wis. 2d 391, 407.

Defendants contend that the court should give “great weight deference” to DATCP’s interpretation of its own authority (brief at 8-9). The Wisconsin Supreme Court has made it abundantly clear, however, that courts should apply a *de novo* standard of review in “exceeds agency authority” cases. *Seider v. O’Connell*, 2000 WI 76, ¶ 25. It would defeat the purpose of independent judicial review if courts were obligated to give great weight deference to the agency’s definition of its own power. As the Court stated in *Seider*, 2000 WI 76 at ¶ 26:

Independent review is the appropriate standard in these circumstances because it preserves the ultimate authority of the judiciary to determine questions of law, seeking to discern and fulfill the intent of the legislature . . . Our first duty is to the legislature, not the agency.

In *Wisconsin Citizens for Cranes and Doves v. Department of Natural Resources*, 2004 WI 40 (April 6, 2004), the Court reaffirmed these principles. Moreover, contrary to defendants’ argument (brief at 11-12), the Court rejected the proposition that the party challenging the validity of the rule bears the burden of proof: “Unlike factual questions, or questions where legal issues are intertwined with factual determinations, neither party bears any burden when the issue before this court is whether an administrative agency exceeded the scope of its powers in promulgating a rule.” 2004 WI 40, ¶ 10.

The Wisconsin Supreme Court has adopted the “elemental” method of determining whether an agency has exceeded the scope of its authority. The court first identifies the elements of the enabling statute, then matches the promulgated rule against

those elements. *Mallo v. Dept. of Revenue*, 2002WI 70, ¶ 19. “If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule. *Grafft v. DNR*, 2000 WI App 187, ¶ 7, 238 Wis. 2d 750, 618 N.W. 2d 897. However, if an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. *Seider*, 236 Wis. 2d 211, ¶¶ 72-73.” *WCCD v. DNR*, 2004 WI 40, ¶ 14. The enabling statute need not spell out every detail of the rule in order to expressly authorize it. *Grafft v. DNR*, 2000 WI App 187, ¶ 7, and the exact words used in the rule need not appear in the statute.

If the statute expressly authorizes the rule, the inquiry ends. If, however, the enabling statute does not expressly authorize the rule, the court next considers whether the statute implicitly empowers the agency to adopt the rule. *WCCD v. DNR* at ¶ 33. Ambiguous terms require a court to use canons of statutory construction to determine if the legislature implicitly authorized the rule. *Id.* at ¶ 34; *Grafft v. DNR*, 2000 WI App ¶ 9.

An administrative rule is not valid simply because it “clarifies” a statute. Need for clarification does not provide a complete justification for a rule and the agency’s reliance on it sidesteps the appropriate analysis. Indeed, “clarification” is precisely the rationale the Court rejected in *Seider v. O’Connell*, 2000 WI 76, ¶ 4-5.

As noted in the Introduction, plaintiffs challenge eight separate provisions of the telephone solicitation rules as exceeding the agency’s authority under Wis. Stat. § 100.52. Six of those claims relate to definitions within the rules, and they will be addressed first. The remaining two—creation of a private cause of action and increased penalties for violations—arise from the Prefatory Note to the rules, which states that the telephone solicitation provisions are adopted under both Wis. Stats. §§ 100.20(2) and 100.52

(Affidavit of James L. Rabbitt, p. 15). These claims will be addressed separately in this Decision.

I. Exemption for nonprofit organizations

The original legislation, 2001 Act 16 section 2443b, included a provision prohibiting nonprofit organizations from making telephone solicitations if a residential customer has provided notice to the nonprofit that it did not want telephone solicitations. The original legislation also defined "nonprofit organization," section 2439b. Both of these sections were vetoed by then-Governor McCallum. In addition, the governor vetoed a portion of § 100.52(1)(i) so as to delete from the definition of "telephone solicitation" the words "or to make a contribution, donation, grant, or pledge of money, credit, property, or other thing of any kind of value" (section 2819b, 2001 Wisconsin Act 16). A separate provision survived veto, however:

100.52(1)(j) "Telephone solicitor" means a person, other than a nonprofit organization or an employee or contractor of a nonprofit organization, that employs or contracts with an individual to make a telephone solicitation.

In his veto message Governor McCallum explained "I am vetoing sections 2439b and 2443b and partially vetoing sections 2444b and 2819b because I object to the regulation of requests for contributions by nonprofit organizations and charities."¹ The practical effect of the veto, however, whether intended or not, was to leave a freestanding reference in § 100.52 to "nonprofit organizations" without either defining the term or distinguishing between solicitations for contributions or solicitations for sales.²

¹ The 2001 Wisconsin Act 16 veto message can be found at <http://folio.legis.state.wi.us>.

² None of the parties contend that the partial vetoes rendered the statute incomplete or unworkable. See: *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 708, 264 N.W. 2d 539 (1978), noting that cases "have repeatedly pointed out that, because the Governor's power to veto is coextensive with the legislature's power to enact laws initially, a governor's partial veto may, and usually will, change the policy of the law."

Wisconsin Administrative Code § ATCP 127.80(10) defines “telephone solicitation” as follows:

“Telephone solicitation” means an unsolicited telephone call for the purpose of encouraging the call recipient to buy property, goods or services, or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services. “Telephone solicitation” does not include any of the following:

(a) A telephone call encouraging the call recipient to buy property, goods or services from a nonprofit organization if all of the following apply:

1. The nonprofit organization complies with subch. III of ch. 440, Stats., if applicable.
2. Sale proceeds, if any, are exempt from Wisconsin sales tax and federal income tax.

Plaintiffs complain that this rule provision eliminates the nonprofit organization exemption from the definition of “telephone solicitor” in Wis. Stats. § 100.52(1)(j) by imposing a stringent condition on the applicability of the exemption. Plaintiffs’ argument, however, confuses the purpose of the telephone call with the identity of the caller.

There is no question that the no-call statute, § 100.52, regulates conduct “for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services.” That is the definition of “telephone solicitation” in both the statute and the rule. On the other hand, requests for contributions or donations are not regulated by either the statute or the rule regardless of the identity of the requester. The administrative rule does not re-define “nonprofit organization” in defiance of the governor’s veto; rather, it delineates the circumstances under which the *sales* activities of nonprofits are subject to regulation as telephone solicitation. Plaintiffs seem to argue that both the legislature in the original bill and the governor by his veto intended to exempt *all*

solicitation activities by nonprofit organizations, whether for sales or contributions, from the reach of the no-call statute. No reasonable reading of the statute, either pre- or post-veto, supports this contention. The veto message reinforces that the purpose was to assure that the charitable solicitation of contributions would remain untouched by the no-call program. That is the effect of both the statute as it now reads and the administrative rule. There is no conflict with Wis. Stats. § 100.52(1)(j), nor has the Department exceeded its authority by stating the circumstances under which a nonprofit organization may lawfully use telephone solicitation for the sale of property, goods and services.

II. Exemption for contact with current clients

Wisconsin Statutes § 100.52(6)(b) provides that the telephone solicitation prohibitions do not apply if “[t]he telephone solicitation is made to a recipient who is a current client of the person selling the property, goods or services that is the reason for the telephone solicitation.” The statute thus describes three conditions for the exemption: (1) a pre-existing caller/client relationship; (2) a relationship that has not lapsed; and (3) the reason for the telephone solicitation.

Wisconsin Administrative Code § ATCP 127.80(2) defines “client” as follows:

“Client” means a person who has a current agreement to receive, from the telephone caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call.

Plaintiffs assert that the phrase “of the type promoted by the telephone call” adds a limitation on the subject of the solicitation that is not authorized by the statute. The court disagrees. The plain words of the statute set forth three conditions for the exemption, not two. The legislature could have simply stated that the recipient “is a current client of the caller,” but it did not. It added the phrase “that is the reason for the

telephone solicitation.” The phrase must modify “property, goods or services” and is reasonably read to mean that the subject of the call is limited to the property, goods or services for which the client is an existing customer—in other words, completion of the existing agreement. The administrative rule expands the exemption beyond the completion of the current agreement to allow solicitation for calls promoting sales of the “type” originally promoted. Plaintiffs’ argument makes the statutory language “that is the reason for the telephone solicitation” surplusage, a result to be avoided. *State v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46. In this case, the statute and the implementing rule are nearly identical and the statute expressly authorizes the rule.

III. Definition of residential customer

The no-call statute allows only “residential customers” to be listed in the nonsolicitation directory. Section 100.52(1)(f) defines residential customer as “an individual who is furnished with basic local exchange service by a telecommunications utility, but does not include an individual who operates a business at his or her residence.” The administrative rule, §ATCP 127.80(10)(e), provides that the term “telephone solicitation” does not include “a telephone call made to a number listed in the current local business directory.”

Plaintiffs object that the rule eliminates the statutory exclusion from the nonsolicitation directory of businesses operated from the individual’s residence. But the rule and the statute address two different activities: the statute establishes who is eligible to be included on the no-call list, while the rule permits otherwise prohibited telephone solicitations if they are made to telephone numbers listed in the business directory. The rule does not contradict or conflict with the statute, nor does it in any way disturb the

statutory mandate that *only* residential customers are eligible for inclusion on the no-call list. The rule provides assurance that a telephone call to a residential customer listed in the nonsolicitation directory will not be considered a violation if that telephone number is also listed in a business directory. The legislature has expressly authorized the Department to adopt rules "necessary and proper" for the enforcement of Wis. Stats. Chapter 100 in § 93.07, and this rule properly spells out conduct that cannot constitute a violation.

IV. Registration fee structure

The enabling statute, § 100.52(3), directs the Department to promulgate rules governing the registration of telephone solicitors, including payment of a registration fee:

The amount of the registration fee shall be based on the cost of establishing the nonsolicitation directory, and the amount that an individual telephone solicitor is required to pay shall be based on the number of telephone lines used by the telephone solicitor to make telephone solicitations. The rules shall also require a telephone solicitor that registers with the department to pay an annual registration renewal fee to the department. The amount of the registration renewal fee shall be based on the cost of maintaining the nonsolicitation directory.

Wisconsin Administrative Code § ATCP 127.81 establishes the fee structure for first and subsequent annual registrations. Subsection (3) establishes a maximum annual fee of \$20,000 regardless of the number of telephone lines used to make telephone solicitations. The basic first year registration fee is \$700 and \$500 for each subsequent year, plus \$75 for each telephone line if there are more than three lines used, § 127.81(3)(a) and (b). There are additional fees for copies of the nonsolicitation directory, subsecs. (c), (d) and (e). Section ATCP 127.81(3m) requires registrants to pay the fees in quarterly installments. Finally, § ATCP 127.81(5) authorizes the Department to reduce

or waive one or more quarterly installments in a uniform manner if fee revenues exceed expenditures by at least 15 percent.

Plaintiffs take issue with the \$20,000 maximum fee because it requires smaller businesses to shoulder the costs of the no-call program. Furthermore, they assert that the rule impermissibly shifts the Department's enforcement costs to registrants. Plaintiffs do not address the provision authorizing waiver or reduction of quarterly fees.

Defendants respond that the legislature authorized fees based on the costs of creating³ and maintaining the nonsolicitation directory, and that those costs legitimately include administration and enforcement costs. The Department points out that the legislature authorized program costs beyond just the clerical expenses of establishing and maintaining the directory by assigning all of the program's staff positions to the appropriation established by Wis. Stats. § 20.115(8)(jm). That appropriation consists of "[a]ll moneys received from telephone solicitor registration and registration renewal fees paid under the rules promulgated under s. 100.52(3)(a) for establishing and maintaining the nonsolicitation directory under s. 100.52(2)."

The relevant elements of the enabling statute, § 100.52(3), are that the fees must be "based on" the cost of "establishing" the initial directory and "maintaining" the directory once established, and individual fees must be "based on" the number of telephone lines used by the telephone solicitor. Courts are to apply the ordinary meaning of language in statutes, *Seider v. O'Connell*, 236 Wis. 2d at 228, and may consult dictionary definitions to give words their ordinary meanings. *Swatek v. County of Dane*,

³ Defendants use the word "creating" (brief at 21-22) but the exact word used in Wis. Stats. § 100.52(3) is the cost of "establishing" the nonsolicitation directory.

192 Wis. 2d 47, 61, 531 N.W. 2d 45 (1995). The ordinary meaning of each of these terms demonstrates that the rule matches the statutory elements.

Webster's *Third New International Dictionary* defines "base," when used with "on," as "to make or form a foundation." Fees must be "based on" the initial and subsequent costs of establishing and maintaining the directory but need not be identical to those costs. They are the starting point. Similarly, the individual registration fee a telephone solicitor pays must take into account but need not correspond exactly to the number of telephone lines that the solicitor uses. Other factors may be used to fairly apportion the costs among users as long as the foundation remains the number of telephone lines. The everyday usage of "based on" allows the consideration of more than one factor in creating the intended result.

The same dictionary defines "establish" as "to bring into existence, create, make, start, originate, found or build" and "maintain" as "to keep in a state of repair, efficiency or validity: preserve from failure or decline." Plaintiffs' narrow reading of these terms would reduce the function of the registration fees to merely supporting the printing and updating of the nonsolicitation directory. The common usage of the words "establish" and "maintain" is broader, authorizing the Department to set registration fees to fund program expenses. As noted above, the appropriation language in Wis. Stats. § 20.115(8)(jm) supports the plain language of the enabling statute, § 100.52(3) by funding all program expenses through the registration fees. Statutes relating to the same subject matter should be read together and harmonized when possible. *Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 98.

The Department did not exceed its authority in establishing registration fees to support program administration and enforcement costs or in setting the \$20,000 cap. Significantly, the rule provides its own mechanism for preventing overcharges of any class of users by authorizing waiver or reduction of fees under specified conditions. Wisconsin Administrative Code § ATCP 127.81(5) provides that the Department “may reduce or waive one or more quarterly installments under sub. (3m) if the department’s projected fiscal-year-end cash balance in the appropriation under s. 20.115(8)(jm), Stats., exceeds the department’s projected fiscal year expenditures from that appropriation during that fiscal year by at least 15%.” Having established in its rule the specific conditions for fee reduction or waiver, the Department lacks authority to grant itself discretion to waive (or refuse to waive) quarterly payments when those conditions are met, i.e., when fee revenues exceed projected expenditures. To that extent, the use of the word “may” in Wis. Admin. Code § ATCP 127.81 exceeds the Department’s authority.

V. Registration by individuals

Plaintiffs next contend that the Department’s rule conflicts with the enabling statute by defining “telephone solicitor” to include individuals making calls who are not employees or contractors of another. Section 100.52(4)(a), Wis. Stats., prohibits telephone solicitations by an “employee or contractor of a telephone solicitor.” The rule, § ATCP 127.81(1)(c), provides that “[n]o individual may make a telephone solicitation to a residential telephone customer unless the telephone solicitation is covered by a registration under this section.” Plaintiffs claim that this language erases the statutory exemption for individual telephone solicitors.

Wisconsin Administrative Code § ATCP 127.80(10)(b), however, expressly states that telephone solicitation does not include a “telephone call made by an individual acting on his or her own behalf, and not as an employee or agent for any other person.” This language explicitly preserves the statutory definition, and the two exceptions that follow do not contradict the statutory definition. These exceptions provide that the definition of “individual” does not include a caller who “sells or promotes the sale of property or goods for another person” or “sells or promotes the sale of goods that the caller buys from another person who controls or limits the caller’s sales methods.” Wis. Admin. Code § ATCP 127.81(10)(b)1. and 2.

These exceptions do nothing more than repeat the substantive definition set forth in the enabling statute: an employer/employee or contractual relationship, meaning one in which the caller is acting in concert with another person or under the control of another person. That is exactly the telephone sales conduct the statute regulates. The statute does not require a formal employment relationship or a written contract. The Department did not overstep its bounds in establishing telephone solicitor registration requirements.

VI. Definition of “solicitation” to include plan or scheme

Section 100.52(1)(i), Wis. Stats., defines “telephone solicitation” as the “unsolicited initiation of a telephone conversation for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services.” The administrative rule, § ATCP 127.80(10) repeats the statutory definition but adds the words “. . . or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services.” Plaintiffs object to the added language as impermissibly

expanding the reach of the no-call statute. They contend that the rule definition converts a business's innocent goodwill call into a violation.

Again, the starting point must be the plain language of the statute. The statute must be read to give meaning to each word. *Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 98. If the legislature had intended to proscribe only the caller's direct request to purchase property, goods or services, it would have said so. Instead, the legislature added the words "for the purpose of encouraging the recipient of the telephone call to purchase." Webster's *Third New International Dictionary* defines "purpose" as "something that one sets before himself as an object to be attained" and "encourage" as "to spur on: stimulate, incite." Together these words introduce the concept that a future event is anticipated or expected to occur as a result of present action. The Department did not stray from its enabling authority by using the phrase "part of a plan or scheme" because it states the same concept.

Even if the words of the statute were ambiguous and in need of interpretation,⁴ application of a familiar doctrine of statutory construction—*in pari materia*—leads to the same result. The doctrine requires courts to read, apply and construe statutes relating to the same subject matter together. *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶ 9, 239 Wis. 2d 26, 31. In the context of charitable solicitations, Wis. Stats. § 440.41(8) states that "solicit" means "to request, directly or indirectly, a contribution and to state or imply that the contribution will be used for a charitable purpose or will benefit a charitable organization." Section 134.73(1)(c), Wis. Stats., governing telephone solicitations by prisoners, incorporates the same statutory definition. The words "directly

⁴ The plain meaning rule normally precludes resort to extrinsic aids to construction of statutes, but courts "may consult legislative history to support our reading of the plain meaning of the statute," *WCCD v. DNR*, 2004 WI 40, ¶ 8.

or indirectly” and “state or imply” suggest that the legislature intended to include a range of conduct more subtle than outright requests to purchase items.⁵

Plaintiffs’ narrow interpretation of “telephone solicitor” would frustrate legislative intent, for all that a telephone solicitor would need to avoid is the direct request that the call recipient purchase goods or property. The caller could achieve indirectly what the statute directly prohibits. Accordingly, the rule does not impermissibly enlarge the statute.

VII. Promulgation of the no-call rules under the trade practices statute

The prefatory note to Wis. Admin. Code Chapter 127 states:

This chapter is adopted under authority of s. 100.20(2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.20(6) or s. 100.26(3) and (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20(5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys’ fees. Subchapter V is also adopted under authority of s. 100.52, Stats.

The last (underlined) sentence was added when the Department promulgated the no-call rules. The Department’s analysis of the proposed no-call rules cited both §§ 100.52 and 100.20(2) as statutory authority for the rules (Rabbitt affidavit, Exhibit 1, p. 10)⁶.

Plaintiffs object to the Department’s reliance on § 100.20(2) as a source of authority for the no-call rules. That statute authorizes the Department to issue “general orders” determining specific business trade practices or methods of competition fair or

⁵ It is worth noting that Wis. Admin. Code § ATCP 127.01(22) also defines “solicitation” as a communication “in which a seller offers or promotes the sale of consumer goods or services to a consumer, or which is part of a seller’s plan or scheme to sell consumer goods or services to a consumer.”

⁶ Wis. Stats. § 227.14(2)(a) requires the agency to provide an analysis of each proposed rule which must include reference to the statutory authority for the rule.

unfair, and to forbid unfair practices and prescribe fair practices. Subsection (5) provides:

Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

Subsection (6) authorizes state enforcement actions to address violations of any order issued under § 100.20. The applicable penalty provisions for Wis. Stats. Chapter 100, § 100.26(6) and (3), establish civil forfeitures of \$100 to \$10,000 for each violation of an order issued under § 100.20, and fines and imprisonment in the county jail for intentional violations of such orders.

Plaintiffs assert that the Department's unwarranted dependence on § 100.20(2) harms them by resuscitating the private cause of action that the governor vetoed in the original bill, and by subjecting them to fines and forfeitures greater than those established in the no-call statute itself. The Department strenuously contends that it has ample authority to promulgate the no-call rules as trade practices, adding that "there is nothing in Wis. Stat. § 100.52 that limits DATCP's rulemaking authority under Wis. Stat. § 100.20" (brief at 28). The Department references the numerous trade practices rules that have already been adopted under the authority of § 100.20(2) and discusses the federal unfair trade practices criteria. This analysis, although interesting, does not address the central question plaintiffs raise: can the agency promulgate a rule that causes a conflict with a statute? The court concludes that it cannot.

Wisconsin cases establish that the legislature may delegate its authority to an administrative agency to define unfair trade practices by rule as long as those rules bear a

reasonable relationship to the elimination of unfair trade practices. *Petition of State ex rel. Attorney General*, 220 Wis. 25 (1936); *State v. Lambert*, 68 Wis. 2d 523, 229 N.W. 2d 662 (1975); *HM Distributors of Milwaukee v. Dept. of Agri.*, 55 Wis. 2d 261, 198 N.W. 2d 598 (1973). The authority to issue “general orders” under § 100.20(2) includes administrative rule-making authority. *Jackson v. DeWitt*, 224 Wis. 2d 877, 888, 592 N.W. 2d 262 (Ct. App. 1999). And it was the legislature, not the agency, which placed the no-call statute in Chapter 100 of the Wisconsin Statutes, titled “Marketing and Trade Practices.”

Nevertheless, agencies may not concoct rules that conflict with unambiguous statutes. *Seider v. O’Connell*, 2000 WI 76, ¶ 28. The court next considers whether the enforcement mechanisms in Wis. Stats. § 100.52 are ambiguous.

A. Penalties

Wisconsin Statutes § 100.52(10) sets the penalties for no-call violations:

- (a) Except as provided in par. (b), a person who violates this section may be required to forfeit \$100 for each violation.
- (b) A telephone solicitor that violates sub. (4) may be required to forfeit not more than \$100 for each violation.

The statute specifically applicable to no-call violations does not authorize fines or imprisonment, nor does it distinguish between willful and non-willful violations. It is plain on its face. On the other hand, § 100.26, the general statute applicable to violations of any order issued under § 100.20(2), provides more stringent penalties, including criminal sanctions for intentional violations.

Where a statute prescribes a specific penalty for a specific offense, the specific penalty takes precedence over a general provision. *State ex rel. Gutbrod v. Wolke*, 49 Wis. 2d 736, 747, 183 N.W. 2d 161 (1971). Moreover, the most recently enacted statute

controls and exists as an exception to a general statute covering the same subject. *Nicolet Minerals Co. v. Town of Nashville*, 2002 WI App. 50, ¶ 17, 250 Wis. 2d 831, 845. Because the penalty provision in § 100.52(10) is specific to no-call violations and more recently enacted than the general provisions in § 100.26, it prevails. The Department cannot, through its prefatory note to the rule, change the no-call statute.

The result in this case finds support in legislative history. As noted, the legislature passed a bill that provided for stronger penalties: 2003 Wisconsin Act 16, section 2446f provided that a person violating § 100.52 shall forfeit not less than \$100 nor more than \$500 for each violation, and a telephone solicitor or a non-profit organization making a prohibited call stood to forfeit between \$1000 and \$10,000 for each violation. The governor vetoed those penalties, leaving in place the letters and numbers to create a straight \$100 forfeiture. The veto message states:

I am vetoing section 2429d and partially vetoing section 2446f [as it relates to penalty amounts] to provide for penalties of \$100 per violation because the penalties included in the bill are excessive. Each call in violation of the law is a separate offense, so with my veto, frequent violators face large total forfeitures while businesses that make occasional mistakes will not face penalties that could threaten their ability to remain in business.

Because the legislature did not override the partial veto, the no-call penalty provisions must remain as finally enacted.

B. Private cause of action

Section 100.52(9), Wis. Stats., provides the sole enforcement mechanism for no-call violations: "The department shall investigate violations of this section and may bring an action for temporary or permanent injunctive or other relief for any violation of this section." The statute is silent as to other methods of enforcement, including private

remedies. The prefatory note to the administrative rule, however, states that a “person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20(5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys’ fees.” Plaintiffs challenge the Department’s authority to recognize by rule a private cause of action for violations of § 100.52.

2001 Wisconsin Act 16, section 2446b, originally included § 100.52(8), which stated:

PRIVATE CAUSE OF ACTION. Any person who suffers damages as a result of another person violating this section may bring an action against the person who violated this section to recover the amount of those damages.

This provision, however, was also vetoed. In his veto message the governor stated:

I am vetoing section 2446b because it is unnecessary. The bill allows the department to investigate violations and bring actions to prohibit further violations or collect forfeitures. Since individual monetary damages from telephone solicitation are generally low, the allowance of a private cause of action could encourage frivolous litigation.

In *Grube v. Daun*, 210 Wis. 2d 681, 563 N.W. 2d 523 (1997), the Wisconsin Supreme Court considered whether Wis. Stats. Chapter 144 created a private cause of action for individuals suffering damages from hazardous substance discharges. Concluding that it did not, the Court stated that there must be a “clear indication of the legislature’s intent to create such a right.” The court held that “a private right of action is only created when (1) the language or the form of the statute evinces the legislature’s intent to create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the public,” 210 Wis. 2d at 689.

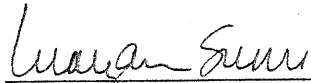
Neither of these tests can be met in this case. The agency cannot restore vetoed provisions by rule.⁷

DECLARATORY JUDGMENT

For the reasons stated in this Decision, pursuant to Wis. Stats. § 227.40(4)(a), the court hereby renders judgment declaring Wis. Admin. Code §§ ATCP 127.80—84 valid except insofar as the rules authorize a private cause of action and establish penalties greater than those established by § 100.52(10). In addition, the Department of Agriculture, Trade and Consumer Protection lacks authority to refuse to waive or reduce registration fees when program revenues exceed projected expenditures. In all other respects, the court declares that the Department did not exceed its statutory authority in promulgating the no-call rules.

Dated this 29th day of June 2004.

BY THE COURT



Maryann Sumi, Judge
Circuit Court Branch 2

Cc: Atty. Josh Johanningmeier
AAG Cynthia Hirsch

⁷ See also: *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F. Supp. 2d 959, 971-972 (E.D. Wis. 1998).

**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)

AFFIDAVIT OF JAMES L. RABBITT

JAMES L. RABBITT, being first duly sworn on oath, deposes and says:

1. Your affiant is an adult resident of the State of Wisconsin.
2. Your affiant has been employed since 1988 with the Division of Trade and Consumer Protection in the Wisconsin Department of Agriculture, Trade and Consumer Protection (the "Department"), with offices at 2811 Agriculture Drive, Madison, Wisconsin.
3. During his employment with the Department, your affiant served as a consumer protection investigator, investigator supervisor, policy program analyst, and acting division administrator. Your affiant has been the Director of the Bureau of Consumer Protection since 2004.
4. The Wisconsin Legislature created the Wisconsin No Call program by promulgating Wis. Stat. § 100.52 on July 1, 2001. As part of this law, the Legislature directed the Department to promulgate administrative rules to interpret and administer the Wisconsin No Call program.

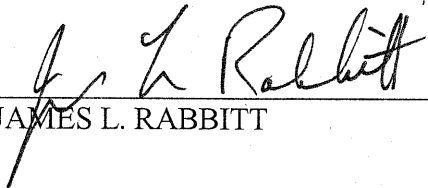
5. Accordingly, between July 1, 2001, and December 1, 2002, your affiant directed and participated in the administrative rule process that resulted in the Department's promulgation of the Wisconsin Administrative Code Chapter ATCP 127, Subchapter V.

6. As part of the administrative rule process, the Department held over 15 public hearings and listening sessions concerning the proposed administrative rule in 6 different locations throughout the state of Wisconsin.

7. During the hearings, over 300 persons testified either in person or by submitting written testimony. The individual consumers and consumer groups that submitted testimony either supported the No Call rules that were eventually adopted, or supported rules that more restrictively limited businesses' ability to make telemarketing calls to former customers on the No Call list. Some businesses also testified in support of the adopted rules.

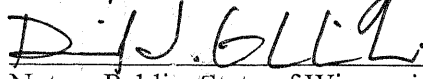
8. During meetings with the chairs of the legislative committees charged with review of the final draft rules, AT&T requested and supported the interpretation of the "current client" exception that was eventually adopted in the administrative rule. AT&T said that companies should only be allowed to call current clients to sell goods or services which are of the type currently provided to the client. Otherwise, AT&T stated, local

telephone companies, which have a much larger customer base than long distance telecommunications providers, would have an unfair competitive advantage when telemarketing different new services, such as long distance services, to its customers.



JAMES L. RABBITT

Subscribed and sworn to before me
this 31st day of January, 2005.



Notary Public, State of Wisconsin
My commission: permanent.