

## CHAPTER 8

# Consumer Protection Law

In this chapter, we consider some of the major sources of consumer protection law. A *consumer* is any individual who purchases goods or services for personal or household consumption. Consumer protection laws arise at all levels of government, and involve numerous agencies. In addition, these laws may apply to very specific types of activities and often overlap. As a result, firms marketing to consumers face a very complex regulatory environment.

### Overview

Consumer protection laws are found at the federal, state, and local levels of government. State laws are usually governed through the state attorney general's office or through an office of consumer affairs. State laws can be very comprehensive and may offer more protection than federal legislation in specific instances. However, we will focus our discussion here on federal law, which itself is very varied and is found in many different statutes and regulations.

“Consumer protection law” has no clear definition. The term encompasses a wide range of legislative and regulatory measures. Many of the topics that we discuss in Chapter 7, such as false or deceptive advertising or business practices and bait-and-switch tactics, can be viewed as consumer protection legislation. The Federal Trade Commission's (FTC's) *Policy Statement on Unfairness*, for example, which is discussed in the context of unfair advertisements in Chapter 7, applies equally to unfair business practices that adversely affect consumers (see Case Illustration 8.1).

In this chapter, we focus specifically on legislation addressing direct marketing, labeling and packaging regulation, health and safety regulation, and statutes relating to consumer credit transactions, such as the Truth-in-Lending Act and the Consumer Credit Protection Act.

### Direct Marketing Activities

*Direct marketing* refers to marketing efforts designed to persuade consumers to make a purchase from their home, office, or other nonretail setting. Examples include direct mail, catalogs, telemarketing, and electronic retailing (including solicitations made via e-mail). Because operating costs are lower, direct marketing can be less expensive for retailers than selling through a retail outlet. Direct marketing can also be much more convenient for consumers.<sup>1</sup>

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<sup>1</sup>Information about direct marketing activities is available at the website of The Direct Marketing Association, Inc., [www.the-dma.org](http://www.the-dma.org)

## CASE ILLUSTRATION 8.1

**ORKIN EXTERMINATING CO. v. FTC,  
849 F.2D 1354 (11TH CIR. 1988)**

**FACTS** Between 1966 and 1975, Orkin Exterminating Company sold “lifetime” guarantees for extermination services. The contracts provided that the customer could renew his or her “lifetime” guarantee by paying an annual renewal fee in an amount specified in the contracts. The contracts did not provide for any increase in this fee.

By 1980, Orkin had determined that increasing costs and inflation rendered the contracts disadvantageous to Orkin. Orkin thus informed the customers that their annual renewal fees were going to be increased by 40 percent. Although many customers complained, they did not have any viable alternatives as switching to other competitors would have been no cheaper than paying Orkin’s increased rates.

The FTC issued an administrative complaint that Orkin had committed an unfair act or practice in violation of Section 5 of the FTC Act. The ALJ agreed and issued an order requiring Orkin to roll back all fees in pre-1975 contracts to the levels specified in the contracts. Orkin appealed to the Commission, which affirmed the ALJ’s decision. Orkin then appealed to the U.S. Court of Appeals.

**DECISION** The U.S. Court of Appeals noted that the FTC’s *Policy Statement on Unfairness* provides:

*[T]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to*

*consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.*

The court then reviewed the Commission’s findings. The Commission had found that the first prong of the standard, requiring a finding of substantial injury to consumers, had been met. The Commission had stated: “The harm resulting from Orkin’s conduct consists of increased costs for services previously bargained for and includes the intangible loss of the certainty of the fixed price term in the contract.” In fact, Orkin’s increase in annual fees generated more than \$7 million in additional renewal fees.

In examining the second prong, the Commission had determined that the increase in annual fees did not result in any benefits to consumers, as it was not accompanied by an increase in the level or quality of the service provided.

Finally, with regard to the third prong, the Commission had found that the consumers could not have reasonably avoided the injury. The contracts had not given the consumers any indication that Orkin might raise the annual fees; thus “[a]nticipatory avoidance through consumer choice was impossible.” Nor could consumers have avoided their injuries by switching their business to one of Orkin’s competitors.

The Court of Appeals found no error in the Commission’s findings and affirmed the Commission’s cease-and-desist order.

These types of marketing techniques can also result in several types of abuses. Direct marketing thus tends to be fairly heavily regulated at the federal, state, and even local levels. The following discussion focuses on some of the more common forms of direct marketing regulation. Companies engaged in direct marketing should consult an attorney, however, to be certain that their proposed activities do not run afoul of any specialized laws, including any state or local laws, that might apply.

### Telemarketing

*Telemarketing* refers to the selling of goods or services by telephone or fax machine. It can consist of either sales calls (usually unsolicited) by the marketer or orders placed by consumers, often through toll-free 800 numbers.

Telemarketing is regulated at both the federal and state levels. Not surprisingly, regulation of telemarketing has focused primarily on unsolicited sales calls, as opposed to customer-initiated sales orders.

Most states have statutes regulating telephone solicitation. State regulation may, in fact, impose more stringent requirements upon telemarketers than does federal regulation, such as requiring that the consumer give permission in writing before a telemarketing call may proceed or requiring telemarketers to create a “no-call list” of consumers who do not want to be contacted.

At the federal level, the *Telephone Consumer Protection Act* (TCPA),<sup>2</sup> which was passed in 1991, regulates telemarketing activities. This Act prohibits telephone solicitation using an automatic telephone dialing system or a prerecorded voice. The TCPA also regulates direct marketing via fax transmissions. Unlike “junk” mail, which can be easily thrown out, unsolicited fax advertisements impose costs upon the recipients in terms of paper, toner, and tied-up telephone lines. The TCPA thus makes it illegal to transmit fax ads without first obtaining the permission of the recipient.

The TCPA is enforced by the Federal Communications Commission (FCC). The TCPA also provides consumers with a private cause of action. Consumers sue in state court for violation of the TCPA and can recover either actual monetary damages resulting from a violation of the Act or \$500 for each violation, whichever is greater. The court may treble the damage award if it determines that the defendant willfully or knowingly violated the TCPA.

The FTC also has a role to play in regulating telemarketers. Under the *Telemarketing and Consumer Fraud and Abuse Prevention Act*,<sup>3</sup> the FTC has authority to establish rules regarding telemarketing and to bring actions against fraudulent telemarketers. The FTC’s *Telemarketing Sales Rule*<sup>4</sup> covers most types of interstate telemarketing calls to consumers, including calls to pitch goods, services, sweepstakes, prize promotions, and investment opportunities. It also applies to calls that consumers make in response to postcards or other materials that they receive in the mail (except catalogs), unless the materials contain the information that is required to be disclosed under the Rule. If a solicitation occurs via an e-mail inviting the sender to place an order via a telephone call, that call and any subsequent sale must comply with the Telemarketing Sales Rule requirements. The Rule does not apply to transactions that occur entirely online, however.

The Rule also does not apply to entities that are specifically exempted from FTC jurisdiction, including: (1) banks and other financial institutions; (2) long-distance telephone companies, airlines, and other common carriers; (3) nonprofit organizations; and (4) insurance companies that are otherwise regulated by state law. In addition, the Rule does not apply to certain types of calls, including: (1) 900-number calls; (2) calls placed by consumers in response to a catalog; (3) calls related to the sale of a franchise or certain business opportunities; (4) unsolicited calls from consumers; (5) calls that are part of a transaction involving a face-to-face sales presentation; (6) business-to-business calls that do not involve retail sales of nondurable office and cleaning supplies; and (7) most calls made in response to general media or direct mail advertising.

The Rule requires telemarketers, before they make their sales pitch, to inform the recipient that the call is a sales call and to identify the seller’s name and the product or services being sold. The telemarketer must inform the recipient of the total cost and quantity of the product being sold; any material restrictions, limitations, or conditions on using or obtaining the goods; and whether the sale is final or nonrefundable. It is illegal for the telemarketer to misrepresent any information about the product, including cost, quantity, and other aspects or attributes of the product. Telemarketers are also

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<sup>2</sup>47 U.S.C. § 227.

<sup>3</sup>15 U.S.C. §§ 6101 *et seq.*

<sup>4</sup>16 C.F.R. §§ 310.1 *et seq.*, available at [www.ftc.gov/os/2002/12/tsrfinalrule.pdf](http://www.ftc.gov/os/2002/12/tsrfinalrule.pdf). See generally *Facts for Business: Complying with the Telemarketing Sales Rule*, available at [www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm](http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm)

prohibited from calling before 8 A.M. or after 9 P.M. and from calling customers who have previously indicated they do not want to be called.

Violations of the Telemarketing Sales Rule can result in civil penalties of up to \$10,000 per violation, injunctions, and potential redress to injured consumers. The Rule is enforceable by the FTC and also by the state attorneys general, who can obtain nationwide injunctions against fraudulent telemarketers. Prior to the Rule, a state attorney general might have succeeded in closing down a fraudulent telemarketer within her own state but had no ability to prevent the telemarketer from relocating to a different state. The Rule has made it much more difficult for fraudulent telemarketers to simply relocate their operations. Private persons may also bring suit in federal court to enforce the Rule if they have suffered \$50,000 or more in actual damages (see Case Illustration 8.2).

The FTC's *Mail or Telephone Order Merchandise Rule*<sup>5</sup> applies to the sale of merchandise that is ordered by mail, telephone, fax, or computer "regardless of the method used to solicit the order."<sup>6</sup> Under the Rule, the marketer must have a reasonable basis for stating or implying that it can ship within a certain time when it advertises mail or telephone order merchandise. If the marketer does not make a specific statement regarding shipping, it must have a reasonable basis for believing that it can ship within 30 days of the order. If the marketer later discovers that it cannot ship within the specified time period, it must obtain the customer's consent for the delayed shipment or refund all money paid. Online merchants may send delay notices via e-mail.

The FTC created the *National Do Not Call Registry*<sup>7</sup> in 2004 in an effort to assist consumers in reducing unwanted telemarketing calls. Once a consumer registers his or her residential phone number, the telemarketer must cease calling that number within 31 days. Cell phone numbers do not need to be included on the registry, as FCC regulations prohibit telemarketers from calling cell phone numbers with an automatic dialer. The registry does not apply to business lines and does not prohibit certain types of unsolicited nonmarketing calls, such as calls from political organizations and charities, or calls from companies with which the receiver has had a previous business relationship (such as purchase or inquiry).

Telemarketers and trade groups challenged this Registry as a violation of commercial free speech rights, but their challenge failed. Commercial free speech is discussed in more detail in Chapter 7.

◀ **See Discussion Case 8.1.**

## Electronic Retailing and Advertising

*Electronic retailing* includes activities such as shop-at-home television networks and online retailing. Obviously, there has been tremendous growth in Internet-based retailing in recent years, as online retailers expand their operations and as consumers become more familiar and comfortable with this alternative method of purchasing goods and services.

While the Internet has opened up myriad new opportunities for retailing activities, it has also offered many possibilities for abusive retailing practices. Unsolicited commercial e-mail, also known as *junk e-mail* or *spam*, has proliferated in recent years. Many

<sup>5</sup>16 C.F.R. Part 435. See generally *Facts for Business: A Business Guide to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule*, available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus02.shtm>

<sup>6</sup>16 C.F.R. § 435.2(a).

<sup>7</sup>See [www.donotcall.gov](http://www.donotcall.gov) See generally *FTC Business Alert: Q&A for Telemarketers and Sellers about the Do Not Call Provisions of the FTC's Telemarketing Sales Rule*, available at [www.ftc.gov/bcp/edu/pubs/business/alerts/alt129.shtm](http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt129.shtm)

## CASE ILLUSTRATION 8.2

**FTC v. GLOBAL MARKETING GROUP, INC.,  
594 F. SUPP. 2D 1281 (M.D. FLA. 2008)**

**FACTS** This case arose out of the activities of eight Canadian advance-fee telemarketers, who would telephone consumers and induce them to purchase unsecured credit cards and credit card loss protection services. The consumers were charged fees, payable in advance, of up to \$249. The consumers did not receive either the credit cards or the loss protection services they had paid for, however.

Ira Rubin was an owner or corporate officer of 24 corporations that assisted these Canadian telemarketers. The 24 corporations shared officers, employees, and office space, commingled funds, and were under common control. Rubin was actively involved in the day-to-day operations of these 24 corporations, including soliciting new telemarketer clients and managing existing clients; serving as the primary contact with the bank that provided the telemarketers with access to the Automated Clearing House Network (the electronic funds transfer system that provides for interbank clearing of electronic funds); reviewing, editing, and approving sales scripts used by the telemarketers; and handling law enforcement inquiries regarding the telemarketers. In the four-year period that Rubin and his corporations were involved with the eight telemarketers, he and his corporations netted over \$8.6 million.

The FTC filed a complaint against Rubin, alleging that he personally violated the Telemarketing Sales Rule.

**DECISION** The court found that Rubin had violated the Telemarketing Sales Rule. The Rule provides, in relevant part:

*It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates ... this Rule.*

The court determined first that the telemarketers had violated the Rule by making misleading statements to induce consumers to purchase goods or services. Although they promised consumers credit cards and loss prevention services in exchange for payment of

advance fees, they never intended to follow through with providing such services, and in fact, never did. The court further found that Rubin assisted the telemarketers in this scheme by processing the more than \$26 million in payments made by consumers; by reviewing, editing, and approving the sales scripts; and by handling customer complaints and law enforcement inquiries. Rubin also received periodic reports of the telemarketers' returns, which were as high as 71.5 percent.

The court concluded that "at a minimum, Rubin consciously avoided knowing the telemarketers were engaged in deceptive acts and practices given the extraordinary high return rate and Rubin's substantial involvement in the telemarketing scheme."

Moreover, the corporate form did not shield Rubin from individual liability. The court stated:

*An individual may be held liable for corporate violations if the FTC can show "that the individual defendants participated directly in the practices or had authority to control them [and] that the individual had some knowledge of the practices." Authority is established by proof that the individual participated in corporate activities by performing the duties of a corporate officer. Knowledge may be proven by "evidence that the individual[] had ... an awareness of a high probability of fraud along with an intentional avoidance of the truth."*

Here, the telemarketer's sales scripts, which Rubin reviewed, clearly revealed an intent to engage in illegal conduct. Moreover, the periodic financial reports showing the unusually high returns, and Rubin's handling of law enforcement inquiries regarding the telemarketers' illegal activities, indicate that Rubin "either had actual knowledge of the illegal activity or that he was aware of a high probability of fraud and chose to avoid the truth."

The court issued a permanent injunction "restraining Rubin from engaging, directly or indirectly, in any and all future involvement with telemarketing operations." The court also issued a monetary judgment of \$8,615,185 against Rubin.

Internet users are outraged at the use of spam, but it remains a common direct marketing tool.

Firms who use unsolicited commercial e-mail as a marketing tool face a complex regulatory environment. The states moved more quickly than the federal government on addressing the issue of spam, and several states, such as California, Nevada, and Washington, passed their own regulations to control unsolicited commercial e-mail.

In 2003, the federal government enacted the *Controlling the Assault of Non-Solicited Pornography and Marketing Act* (CAN-SPAM),<sup>8</sup> which took effect on January 1, 2004. It regulates and criminalizes a number of unsolicited commercial e-mail activities, but allows the sending of bulk commercial e-mail, provided certain opt-out and other requirements are met. Unsolicited commercial e-mail that is subject to the Act must: (1) have accurate header information (i.e., the “to,” “from,” and routing information on the e-mail must accurately identify the sender); (2) contain an accurate “subject” line; (3) be labeled as an advertisement; (4) provide a valid physical postal address for the sender; and (5) conspicuously provide the recipient with an opportunity to opt out of any further communications from the sender. The Act is generally enforced by the FTC through regulatory actions, or by litigation in federal court brought by the FTC, state attorneys general, or other government officials. Violations are punishable by fines and/or imprisonment of up to five years.

Because of the existence of state regulation of spam, the CAN-SPAM Act raises issues of preemption. The Act preempts any state statute, regulation, or rule that expressly regulates commercial e-mail messages, except to the extent the state law prohibits falsity or deception in the e-mail, such as prohibiting fraud or computer crimes. Marketers who send unsolicited commercial e-mail thus must be very carefully to ensure that they comply not only with the federal law, but with the laws and regulations of all of the states to which they direct such e-mail. There have been several court challenges to state legislation brought on preemption grounds, with mixed results.<sup>9</sup>

### ◀ See Discussion Case 8.2.

While the United States adopted an “opt-out” approach to unsolicited commercial e-mail, the European Union took the opposite approach. A 2002 European Directive requires that recipients must opt in before being sent unsolicited commercial e-mail.<sup>10</sup>

## Home Solicitations

*Home solicitation* or *door-to-door sales* are regulated extensively at the state and federal levels. These are sales that are made at the buyer’s home or in a place other than the seller’s usual place of business. These types of sales are less likely to result in repeat transactions, so sellers have less incentive to seek to develop the goodwill of the customer and may engage in abusive or aggressive behavior.

The FTC’s *Cooling-off Rule*<sup>11</sup> requires sellers to give consumers three days to cancel and receive a full refund on certain purchases of \$25 or more made at the consumer’s

<sup>8</sup>15 U.S.C. § 7701 *et seq.* See generally *Facts for Business: The CAN-SPAM Act: Requirements for Commercial Emailers*, available at [www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus61.shtm](http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus61.shtm)

<sup>9</sup>See *Asis Internet Services v. Vistaprint USA, Inc.*, 617 F. Supp. 2d 989 (N.D. Cal. 2009) (finding California anti-spam act was not preempted by CAN-SPAM); *Omega World Travel Inc. v. Mummagraphics Inc.*, 469 F.3d 348 (4th Cir. 2006) (Oklahoma spam statute was preempted by CAN-SPAM); *Free Speech Coalition, Inc. v. Shurtleff*, 2007 U.S. Dist. LEXIS 21556 (D. Utah 2007) (finding UTAH Child Protection Email Registry is not preempted by CAN-SPAM).

<sup>10</sup>Directive 2002/58 on Privacy and Electronic Communications.

<sup>11</sup>See [www.ftc.gov/bcp/edu/pubs/consumer/products/pro03.shtm](http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro03.shtm)

home or at certain locations other than the seller's normal place of business, such as hotel or motel rooms, convention centers, and fairgrounds. The seller must provide the buyer with: (1) a summary of the right to cancel; (2) two copies of a cancellation form; and (3) a contract or receipt, which must be in the same language as that used in the sales transaction.

Most states also have cooling-off laws that allow the buyers of goods sold door-to-door to cancel the contract within a specified time period (usually 48 to 72 hours). While the federal Cooling-Off Rule does not apply to sales involving real estate, state statutes often do (see Case Illustration 8.3).

↔ **See Discussion Case 8.3.**

### CASE ILLUSTRATION 8.3

#### **KAMPOSEK v. JOHNSON, 2005 OHIO 344 (OHIO APP. 2005)**

**FACTS** Phillip and Vickie Johnson operated a construction company. In response to an inquiry from Albin and Carol Kamposek, Vickie Johnson went to the Kamposeks' home and offered a proposal for construction work. The proposal included construction of a pole barn, an addition to the residence, new windows, conversion of a garage into living space, and siding of the entire house. The parties agreed upon a price of \$28,800. The Johnsons did not provide the Kamposeks with a notice of their right to cancel this contract as required by the Ohio Home Solicitations Sales Act (HSSA).

The Kamposeks paid part of the contract price to the Johnsons, but were unhappy with the quality of the work, and refused to make the final payment. The Johnsons ceased work at that point.

The Kamposeks filed suit against the Johnsons for breach of contract. Seven months later (before the trial), the Kamposeks sent a letter to the Johnsons canceling the contract.

The trial court granted the Kamposeks' motion for summary judgment, finding that the contract was subject to the HSSA. The trial court ordered the Johnsons to return the \$20,152.64 that the Kamposeks had paid toward the project.

**DECISION** The appellate court affirmed the outcome. The HSSA states, in relevant part:

(A) "Home solicitation sale" means a sale of consumer goods or services in which the seller or person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement

*or offer to purchase is made at a place other than seller's place of business.\*\*\**

Here, the contract was offered and accepted at the Kamposeks' residence, and previous case law had established that home improvement contracts generally fall within the HSSA. Thus, this contract was subject to the HSSA.

The HSSA further provides that a buyer in a home solicitation sale may cancel the sale within three days of signing the agreement. The seller must provide the buyer with notice of this right of cancellation, and the three-day period begins only when notice is given. The buyer may cancel the sale at any time prior to receiving notice of the right of cancellation. If the buyer cancels, the seller must return all payments to the buyer, and the buyer must, upon demand, allow the seller to reclaim the goods from the sale.

If the contract involves services, the HSSA does not permit the seller to begin performance of the contract until the three-day cancellation period has run. If the seller begins work before the expiration of the buyer's right to cancel, the seller bears the risk of loss should the buyer choose to cancel.

Home improvement contracts are classified as service contracts, and hence the Johnsons bore the risk of starting work prior to the end of the cancellation period. Moreover, the physical items involved in a home improvement contract are typically of little value to the seller if reclaimed, and removal of them often causes damage to the buyer's property that is difficult to restore without subjecting the buyer to additional hardship.

Thus, the court concluded, the Kamposeks were not liable for compensating the Johnsons for the partial work performed. Rather, the Kamposeks were entitled to a full return of all money paid to the Johnsons

(Continued)

because the Kamposeks exercised their right of cancellation in a timely fashion; nor were the Kamposeks required to return any materials received.

The appellate court explicitly noted that the “HSSA is intended to be a ‘shield’ for the consumer, not a ‘sword.’” Where a consumer entered into a contract

for the sole purpose of taking advantage of the seller’s possible failure to provide adequate notice of the right of cancellation, the trial court would “have the discretion to make an equitable determination of damages.”

There was no evidence that the Kamposeks had misused the HSSA in this manner, however.

### Unsolicited Merchandise, Merchandise on Approval, and Negative Option Plans

Legally, only two types of unsolicited merchandise may be sent through the mail: (1) free samples, which must be clearly and conspicuously marked; and (2) merchandise mailed by a charitable organization that is seeking contributions. In both instances, the recipient may treat the merchandise as a gift. Under the Postal Reorganization Act of 1970,<sup>12</sup> the mailing of any other type of unsolicited merchandise is considered an unfair trade practice and is illegal. The recipient of such merchandise is entitled to retain, use, discard, or otherwise dispose of the merchandise and is not obligated to either pay for it or return it. The recipient may also mark unopened packages “Return to Sender,” and the Postal Service will return the packages with no additional postage charge to the recipient. In addition, a merchant who ships unordered merchandise knowing that it is unlawful to do so can be subject to civil penalties of up to \$16,000 per violation.<sup>13</sup>

However, marketers may engage in *sales on approval* transactions under certain circumstances. Under the FTC Act, the marketer must obtain the customer’s express agreement to send merchandise on approval. Under this sales mechanism, the customer may return merchandise, usually after a “no obligation” or “free trial” period, and does not have to pay for the merchandise until it is received and approved. Suppose, for example, that the marketer is selling a 30-volume set of encyclopedias with the understanding that a volume will be sent on approval to the customer each month. The marketer must explain the program in detail when soliciting the order and must obtain the customer’s express agreement that a failure to return the cancellation document will be treated by both parties as a request to send the volume.

In addition, many music, book, and video club companies operate as *prenotification negative option plans*. Essentially, these marketers sell subscription plans to consumers who have agreed in advance to become subscribers. Under the FTC’s *Prenotification Negative Option Rule*,<sup>14</sup> the marketer must provide certain information in the promotional materials, including how many selections the customer must buy, how and when the customer can cancel the membership, how and when to return the “negative option” form to cancel shipment of a selection, and how often a customer can expect to receive announcements and forms. Customers enrolled in the plan are then obligated to either return the negative option form within 10 days after receiving it or pay for the merchandise after receiving it.

<sup>12</sup>39 U.S.C. § 3009.

<sup>13</sup>See generally *Facts for Business: A Business Guide to the Federal Trade Commission’s Mail or Telephone Order Merchandise Rule*, available at [www.ftc.gov/bcp/edu/pubs/business/adv/bus02.shtm](http://www.ftc.gov/bcp/edu/pubs/business/adv/bus02.shtm)

<sup>14</sup>16 C.F.R. Part 425. See generally *Facts for Consumers: Prenotification Negative Option Plans*, available at [www.ftc.gov/bcp/edu/pubs/consumer/products/pro09.shtm](http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro09.shtm)



## 900 Numbers

Providers of pay-per-call services (900 numbers) must comply with the FTC's *900-Number Rule*.<sup>15</sup> If the call to the 900 number costs more than \$2, the provider must disclose the name of the 900-number company and the cost of the call in the introductory message of the call and must give the caller the opportunity to hang up without charge. Additional advertising disclosures must be made for services that promote sweepstakes or games of chance, provide information about a federal program but are not sponsored by a federal agency, or target children under the age of 18 years. Pay-per-call services and advertisements for them may not be targeted at children under the age of 12 years unless the advertisement is for a "bona fide educational service" as defined in the Rule.

## Warranties and Guarantees

Under the FTC's *Rule on Pre-Sale Availability of Written Warranty Terms*,<sup>16</sup> sellers must make all written warranties on consumer products costing more than \$15, whether extended by the manufacturer or by the seller, available to consumers before they purchase the product. If the marketer solicits orders for warranted consumer products through the mail or by telephone, it must either include the warranty in the catalog or advertisement or include a statement informing customers how they may obtain a copy. Door-to-door sales companies must offer the consumer a copy of the written warranty before the transaction is completed. Online merchants may use a clearly labeled hyperlink to lead to the full text of the warranty, but that text itself should be capable of being downloaded or printed so that the consumer can retain a copy. Warranties are discussed in more detail in Chapter 10.

Under the FTC Act, it is an unfair or deceptive practice for a marketer to fail to honor "satisfaction" and "money-back" guarantees fully and promptly. This requires return of the purchase price, shipping, handling, and other fees. Any limitations on the guarantee, such as requiring the customer to supply proof of purchase, requiring the return of the unused portion of the product, or time restrictions on the offer, must be stated clearly and conspicuously.<sup>17</sup>

## Labeling and Packaging Regulation

Labeling and packaging issues are regulated heavily at both the state and federal levels. Generally, these laws are designed to ensure that accurate information is provided about the product and that adequate warnings are given regarding the dangers of use or misuse.

Among the major federal labeling statutes are: the *Fair Packaging and Labeling Act*,<sup>18</sup> which requires that labels on consumer goods identify the product, the net quantity of the contents, the manufacturer, and the packager or distributor; the *Flammable Fabrics Act*,<sup>19</sup> which sets safety standards for flammable fabrics and materials in clothing; the *Federal Cigarette Labeling and Advertising Act*,<sup>20</sup> which requires specific warnings on cigarette packaging and most related advertising and which bans advertising on television and radio;

<sup>15</sup>See generally *Facts for Business: Complying with the 900-Number Rule*, available at [www.ftc.gov/bcp/edu/pubs/business/marketing/bus06.shtm](http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus06.shtm); *Facts for Consumers: 900 Numbers*, available at [www.ftc.gov/bcp/edu/pubs/consumer/telemarketing/tel04.shtm](http://www.ftc.gov/bcp/edu/pubs/consumer/telemarketing/tel04.shtm)

<sup>16</sup>16 C.F.R. Part 702. See generally *A Businessperson's Guide to Federal Warranty Law*, available at [www.ftc.gov/bcp/edu/pubs/business/adv/bus01.shtm](http://www.ftc.gov/bcp/edu/pubs/business/adv/bus01.shtm)

<sup>17</sup>16 C.F.R. Part 239 (*Guides for the Advertising of Warranties and Guarantees*).

<sup>18</sup>15 U.S.C. §§ 1451 *et seq.* See generally [www.ftc.gov/os/statutes/flpa/outline.shtm](http://www.ftc.gov/os/statutes/flpa/outline.shtm)

<sup>19</sup>15 U.S.C. § 1191 *et seq.*

<sup>20</sup>15 U.S.C. § 1331 *et seq.*

the *Smokeless Tobacco Health Education Act*,<sup>21</sup> which requires specific health warnings on chewing tobacco packaging and most related advertising and which bans advertising on television and radio; and the *Wool Products Labeling Act*,<sup>22</sup> which requires that most wool and textile products be labeled as to fiber content, country of origin, and identity of manufacturer or other business responsible for marketing or handling the item. Special labeling requirements also apply to food and drug products, as discussed below.

There are numerous other federal and state labeling requirements. A marketer should always check to see if any specific labeling regulations apply to the particular products it is producing or selling. Two particular issues arise in the labeling context: (1) the use of the “Made in USA” label and (2) “green” marketing claims.

### “Made in USA” Labeling

United States content must be disclosed on automobiles and on textile, wool, and fur products. Most other products marketed in the United States are not required to disclose their amount of U.S. content. Many marketers choose to use the “Made in USA” label, however, as a way of distinguishing or marketing their goods.

The FTC, under its power to prevent deception and unfairness in the marketplace, requires that products advertised as “Made in USA” be “all or virtually all” made in the United States.<sup>23</sup> This means that all significant parts, processing, and labeling that go into the product must be of U.S. origin, with no or negligible foreign content. Products that contain a nonnegligible amount of foreign content should use a qualified “Made in USA” claim, such as “70% U.S. content” or “Made in USA of U.S. and imported parts” (see Case Illustration 8.4).

#### CASE ILLUSTRATION 8.4

### **UNITED STATES v. THE STANLEY WORKS, CIV. DOCKET 3: 06-CV-00883-JBA (D. CONN. JUNE 13, 2006), AVAILABLE AT WWW.FTC.GOV/OS/CASELIST/C3876/STANLEY\_CON\_DEC\_1.PDF**

**FACTS** The FTC alleged that The Stanley Works, a U.S. tool manufacturer, falsely claimed that its Zero Degree ratchets, made under Stanley’s MAC Tools trademark, were Made in USA. The FTC alleged that the ratchets contained a substantial amount of foreign content.

**DECISION** The FTC and The Stanley Works entered into a Consent Decree in which The Stanley Works agreed to pay a \$205,000 civil penalty. In addition, The Stanley Works agreed not to violate a 1999 FTC Order issued against it to resolve earlier claims that the company had made false Made in USA claims. The 1999 Order had prohibited The Stanley Works

from misrepresenting the extent to which any of its professional-grade hand tools were made in the United States. The expiration date of the 1999 Order was extended to 20 years from the date of the Complaint in the current action. (The Complaint was filed in June, 2008.)

In addition, for a period of 10 years, The Stanley Works must provide a copy of the Consent Decree and 1999 FTC Order to, and receive a signed acknowledgment of receipt from, all current or future officers and directors and all current or future employees, agents, or representatives responsible for “marking, labeling, packaging, advertising, or promoting any product covered” by the Consent Decree.

<sup>21</sup>15 U.S.C. § 4401 *et seq.*

<sup>22</sup>15 U.S.C. § 68 *et seq.*

<sup>23</sup>See *Facts for Business: Complying with the Made in the USA Standard*, available at [www.ftc.gov/bcp/edu/pubs/business/adv/bus03.shtm](http://www.ftc.gov/bcp/edu/pubs/business/adv/bus03.shtm)

The requirement applies to any U.S. origin claims that appear on products, labeling, advertising, or other promotional materials, including online marketing efforts. The requirement also applies to both express claims of U.S. origin and implied claims that might arise through the use of U.S. symbols (such as an American flag or eagle) or geographic references.

The FTC enforces the “Made in USA” standard. The U.S. Customs Service has responsibility for enforcing requirements that imported goods be marked with their country of origin (e.g., “Made in China”).

Many other countries have their own country-of-origin labeling requirements. Marketers must thus be aware of the rules applicable in the countries to which they intend to export their goods.

### “Green” Marketing

It has become very common for marketers to claim that their products are “environmentally safe,” “recyclable,” “degradable,” or “ozone friendly.” Because many consumers place great weight on environmental claims and because these claims are often open to interpretation and abuse, the FTC, with the cooperation of the Environmental Protection Agency (EPA), has developed *Guides for the Use of Environmental Marketing Claims*<sup>24</sup> for advertisers to ensure that green-marketing claims do not mislead consumers. The FTC has issued documents entitled *Complying with the Environmental Marketing Guide*<sup>25</sup> and *Sorting Out “Green” Advertising Claims*<sup>26</sup> to assist businesses and consumers. Generally, marketers may not exaggerate the environmental benefits of their products or packaging. Claims regarding environmental benefits must be specific and substantiated.

The Guides apply to environmental claims, whether explicit or implicit, made in labeling, advertising, promotional materials, and all other forms of marketing, including marketing through the Internet or e-mail. The Guides are not enforceable regulations and do not have the force and effect of law. However, failure to comply with the Guides may result in FTC investigation, which can lead to corrective action under Section 5 of the FTC Act if the FTC determines that the marketer’s behavior leads to unfair or deceptive acts and practices.

If a product or package is labeled “recycled,” for example, unless the product is 100 percent recycled, it must state how much of that product or package is recycled. This helps ensure that consumers are not misled into buying a product that contains only minimal recycled content. Similarly, if a product is labeled “nontoxic,” “essentially nontoxic,” or “practically nontoxic,” the manufacturer must have reason to believe that the product does not pose any significant risk to people or the environment.

In 2009, for example, the FTC charged Kmart Corp. and Tender Corp. with making false and unsubstantiated claims that certain of their paper products were “biodegradable.” The Green Guides provide that marketers can make unqualified statements about the biodegradability of their products only if they have scientific evidence that their products will completely decompose within a reasonably short time frame under normal disposal conditions. The FTC alleged that Kmart’s American Fare brand disposable plates and Tender Corp.’s Fresh Bath brand moist wipes are typically disposed of in landfills, incinerators, or recycling facilities, where it is impossible for them to biodegrade in a reasonably short time period. Both companies settled with the FTC, agreeing not to make deceptive claims regarding biodegradability of their products and agreeing to

<sup>24</sup>16 C.F.R. Part 260.

<sup>25</sup>See generally *Facts for Business: Complying with the Environmental Marketing Guides*, available at [www.ftc.gov/bcp/edu/pubs/business/energy/bus42.shtm](http://www.ftc.gov/bcp/edu/pubs/business/energy/bus42.shtm)

<sup>26</sup>See generally [www.ftc.gov/bcp/edu/pubs/consumer/genera/gen02.shtm](http://www.ftc.gov/bcp/edu/pubs/consumer/genera/gen02.shtm)

obtain competent and reliable evidence to support their environmental claims about their products.<sup>27</sup>

### International Labeling Considerations

Marketers who sell their products overseas need to be concerned with the labeling laws of each of the countries in which they market their products. First, marketers need to be certain that ingredient, promotional, and instructional information on labels is translated accurately and into the appropriate language or languages. Some countries, such as Belgium and Finland, require labeling to be bilingual. Second, failure to adhere to local requirements can have severe consequences. For example, an Italian judge banned the distribution of bottled Coca-Cola in Italy because the ingredients were listed on the bottle caps rather than on the bottles.<sup>28</sup> Finally, international marketers should be aware that laws vary substantially from country to country. Venezuela, for example, requires prices to be printed on the label while Chile prohibits this practice. Thus, the marketer must be certain to seek competent local counsel when making decisions about labeling in foreign countries.

*Eco-labeling* also raises numerous international issues. Eco-labeling is the practice of including information on the labels of goods regarding the environmental quality of the production process. The first environmental label was issued in Germany in 1978. Canada initiated a similar program in 1988 and Japan in 1989. The European Union adopted a Community Regulation authorizing its Member Countries to issue eco-labels in 1992. Agenda 21 of the Rio Earth Summit in 1992 urged governments to expand “environmental labeling ... to assist consumers to make informed choices.” In addition, some developing countries, such as India, the Republic of Korea, and Singapore, have adopted eco-labeling programs.

Some forms of eco-labeling are voluntary and are undertaken by companies because of their appeal to consumers. The “dolphin-safe” label on canned tuna in the United States, for example, indicates that the company uses dolphin-safe methods of harvesting tuna—an issue of great interest and importance to many consumers.

While voluntary eco-labeling is seen as posing few, if any, serious trade implications, mandatory eco-labeling is a very controversial subject in the international arena, where it is often viewed as an illegal trade barrier. Many products can be produced with a variety of production processes, which may vary greatly from country to country. Eco-labeling, however, assumes that there is a global standard for production. Many developing countries argue that mandatory eco-labeling can be used as a trade barrier to keep such nations from participating in the global marketplace.

Countries that engage in mandatory eco-labeling need to be concerned about running afoul of the General Agreement on Tariffs and Trade (GATT). In 1992, for example, a GATT panel held that mandatory provisions of U.S. legislation regarding dolphin-safe tuna harvesting techniques were intended not only to protect dolphins but also to protect the U.S. fishing industry. The Panel found that the U.S. legislation was in violation of GATT Article III because it discriminated against imported products in favor of domestic products. The GATT Panel held that the primary goal of any environmental measures that affect trade must be to protect the environment rather than the domestic market. The Panel explained that if individual countries were allowed to impose their national environmental standards on other states:

each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their

<sup>27</sup>See [www.ftc.gov/opa/2009/06/kmart.shtm](http://www.ftc.gov/opa/2009/06/kmart.shtm)

<sup>28</sup>See Information Bank Abstracts, *Wall Street Journal*, Nov. 18, 1977, at p. 35, col. 2.

rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.<sup>29</sup>

Thus, the Panel concluded, “a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own.”<sup>30</sup>

Efforts to create international standards for eco-labeling have been hampered by the fact that there is no obvious forum for setting such standards. The World Trade Organization, for example, is primarily a trade forum and lacks expertise in environmental issues. Governmental agencies and nongovernmental organizations (NGOs) that do have environmental expertise, on the other hand, often lack a trade focus.

## Health and Safety Regulation

In addition to labeling requirements, specific laws govern consumer health and safety issues. The two major federal statutes in this area are the federal *Food, Drug and Cosmetic Act* (FDCA),<sup>31</sup> administered by the Food and Drug Administration (FDA),<sup>32</sup> and the *Consumer Product Safety Act* (CPSA),<sup>33</sup> administered by the Consumer Product Safety Commission (CPSC).<sup>34</sup> As the following discussion illustrates, however, a number of additional federal statutes address health and safety issues as well.

### Food, Drug, and Cosmetic Laws

While the FTC regulates the *advertising* of food products, the FDA regulates the *safety* and *labeling* of such products. The federal FDCA governs the testing, manufacture, distribution, and sale of food, drugs, cosmetics, and medicinal products and devices. Under the FDCA, certain food additives, drugs, and medicinal devices may not be sold to the public unless they first obtain FDA approval.

The FDCA is administered by the FDA. The FDA is a large federal agency with extensive powers and is located within the Department of Health and Human Services. The FDA regulates over \$1 trillion worth of products annually.

If the inspectors or investigators discover a violation of the FDCA, the FDA can encourage the firm to voluntarily correct the problem or to recall the product from the marketplace. However, the FDA has no authority to order recalls on its own initiative.

In the absence of voluntary cooperation, the FDA can seek legal sanctions. The FDA has broad powers to obtain search warrants and conduct inspections. It can also seek court orders for the seizure and destruction of products, injunctions, and criminal penalties (including imprisonment) against willful violators.

The CPSC and the FDA are the two agencies with primary responsibility for regulating the safety of imported consumer products. This international oversight role is becoming increasingly important. During fiscal year 2007, CPSC announced 472

<sup>29</sup>GATT Panel Report on United States—Restrictions on Imports of Tuna, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.), at 199, para. 5.27 (1993).

<sup>30</sup>*Id.* at 204, para. 6.2.

<sup>31</sup>21 U.S.C. § 301 *et seq.*

<sup>32</sup>The FDA’s home page is found at [www.fda.gov](http://www.fda.gov)

<sup>33</sup>15 U.S.C. § 2051 *et seq.*

<sup>34</sup>The CPSC’s home page is found at [www.cpsc.gov](http://www.cpsc.gov)

recalls. Of those, 389 were recalls of imported products; 288 involved imports from China.<sup>35</sup>

**Food** The FDCA establishes food standards, specifies safe levels of various food additives, and establishes classifications of food and food advertising. The Act prohibits the shipment, distribution, or sale of adulterated food, which is food that consists in whole or in part of any “filthy, putrid, or decomposed substance” or is otherwise “unfit for food.” The Act does not require that food be pure or that it be completely free of any foreign substances. In a 1972 case, for example, a U.S. District Court concluded that a dairy corporation and its manager could not be held criminally liable for selling butter containing on average three miniscule particles of insect fragments per pound. The court concluded that “this contamination is a trifle, not a matter of concern to the law.”<sup>36</sup> In fact, the FDA itself has set standards for the number of contaminants, or “defects,” that are allowed in certain foods.<sup>37</sup>

On the other hand, substantial contamination of food can lead to civil and/or criminal liability for both the corporation and the corporate manager in charge. Thus, managers need to be aware of the potential for individual liability, as well as corporate liability, under the FDCA.

The FDCA also prohibits false and misleading labeling of food products. Most foods are required to carry nutrition labels as well, listing items such as total calories, calories from fat, total fat, saturated fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugars, and certain vitamins.

States, too, may impose labeling requirements on food products in some instances. However, the ability of either the state or federal governments to impose such requirements is constrained by the First Amendment commercial speech doctrines discussed in Chapter 7 (see Case Illustration 8.5).

The federal regulatory regime addressing food products is expansive, and many agencies other than the FDA are involved in maintaining the safety and wholesomeness of the nation’s food supply. For example, the Department of Agriculture (USDA)<sup>38</sup> inspects and grades meat and poultry that is to be consumed by humans, as well as administering various specific acts relating to agricultural marketing and inspection. The Centers for Disease Control and Prevention (CDC)<sup>39</sup> oversee issues relating to food-borne disease outbreaks. The EPA<sup>40</sup> oversees drinking water standards and regulates toxic substances and wastes to prevent their entry into the food chain, as well as regulating the use of pesticides. The Department of Commerce<sup>41</sup> inspects and certifies fishing vessels, seafood-processing plants, and retail facilities for federal sanitation standards. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)<sup>42</sup> regulates, among other things, alcoholic beverages (with the exception of wine containing less than 7 percent alcohol). U.S. Customs and Border Protection (CBP)<sup>43</sup> works with the various federal

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<sup>35</sup>See CPSC, *Import Safety Strategy* (July 2008), available at [www.cpsc.gov/BUSINFO/importsafety.pdf](http://www.cpsc.gov/BUSINFO/importsafety.pdf)

<sup>36</sup>*United States v. Capital City Foods*, 345 F. Supp. 277, 279 (D. N.D. 1972).

<sup>37</sup>See 21 C.F.R. § 110.110.

<sup>38</sup>The USDA’s home page is found at [www.usda.gov](http://www.usda.gov)

<sup>39</sup>The CDC’s home page is found at [www.cdc.gov](http://www.cdc.gov)

<sup>40</sup>The EPA’s home page is found at [www.epa.gov](http://www.epa.gov)

<sup>41</sup>The Commerce Department’s home page is found at [www.commerce.gov](http://www.commerce.gov)

<sup>42</sup>The ATF’s home page is found at [www.atf.gov](http://www.atf.gov)

<sup>43</sup>The CBP’s home page is found at [www.cbp.gov](http://www.cbp.gov)

## CASE ILLUSTRATION 8.5

**INTERNATIONAL DAIRY FOODS ASSOCIATION v. AMESTOY,  
92 F.3D 67 (2D CIR. 1996)**

**FACTS** In 1993, the FDA approved the use of recombinant Bovine Somatotropin (rBST), a synthetic growth hormone that increases milk production by cows. Because the FDA had found, “after exhaustive tests,” that dairy products derived from herds treated with rBST were indistinguishable from products derived from untreated herds and that rBST posed no human safety or health concerns, the FDA declined to require labeling of products derived from cows treated with rBST.

In 1994, the state of Vermont enacted a statute requiring that milk or milk products derived from treated herds be labeled as such. The state imposed its requirement “to help consumers make informed shopping decisions.”

International Dairy Foods Association, Milk Industry Foundation, International Ice Cream Association, National Cheese Institute, Grocery Manufacturers of America, Inc., and National Food Processors Association (collectively, the “plaintiffs”) filed suit, arguing that the statute violated their First Amendment commercial free speech rights by compelling them to speak against their will. They requested a preliminary injunction. The trial court denied the injunction and the plaintiffs appealed.

**DECISION** The U.S. Court of Appeals determined that a preliminary injunction should issue because the plaintiffs had shown: (1) irreparable harm and (2) a likelihood of success on the merits. Although First Amendment claims usually center on the purposeful *suppression* of speech, the First Amendment also encompasses the right *not* to speak. The court concluded

that compelling the plaintiffs to label their products, albeit truthfully, caused them irreparable harm.

The appellate court also found that the plaintiffs had shown a likelihood of success on the merits. The court applied the Supreme Court’s *Central Hudson* test for determining whether a restriction on commercial speech is constitutional: (1) whether the expression concerns lawful activity and is not misleading; (2) whether the government’s interest is substantial; (3) whether the disputed regulation directly serves that asserted interest; and (4) whether the regulation is no more extensive than necessary.

The appellate court found that the Vermont regulation failed the second prong of the test. The trial court had found that Vermont “does not claim that, health or safety concerns prompted the passage of the Vermont Labeling Law,” but instead defended the statute on the grounds of “strong consumer interest and the public’s ‘right to know’ ...” The appellate court found these interests “insufficient to justify compromising protected constitutional rights.” The court concluded that it was “aware of no case in which consumer interest alone was sufficient to justify requiring a product’s manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product.” Consumers interested in such information should, in the court’s view, “exercise the power of their purses by buying products from manufacturers who voluntarily reveal it.”

The appellate court thus remanded the case to the trial court for entry of a preliminary injunction enjoining enforcement of the statute.

agencies to ensure that food products entering or exiting the United States meet U.S. laws and regulations.

**Dietary Supplements** The line between food, drugs, and dietary supplements is blurring in the minds of many consumers, who are increasingly seeking health benefits from the foods they ingest. The regulatory line between these substances is blurring as well.

Traditionally, dietary supplements that made labeling claims for health or nutrition benefits were considered drugs by the FDA and were subject to rigorous preapproval, manufacturing, and labeling controls. Manufacturers who wished to avoid these expensive and time-consuming procedures could only inform the consumer of the product’s contents but could not make any statements regarding possible or purported health benefits associated with the product.

Then Congress, believing that foods and dietary supplements do not raise the same risk as drugs and should not be held to the same substantiation standards, enacted the *Dietary Supplement Health and Education Act of 1994* (DSHEA).<sup>44</sup> The DSHEA allows a manufacturer to make certain statements, such as claims about the role of a nutrient or dietary ingredient with respect to the structure or function of the human body and statements of general well-being arising from consumption of a nutrient or other dietary ingredient, without first seeking permission of the FDA, provided that the manufacturer has substantiation for the statements. The label must contain a description of the product indicating that it is a “supplement,” the name and address of the manufacturer, packer, or distributor, a complete list of ingredients, the net contents of the package, and a “Supplement Facts” panel containing nutritional labeling.

As a result of the DSHEA, most of the nutritional and safety labeling requirements that apply to food and drugs do not apply to the marketing of dietary supplements. Rather, under the DSHEA, the FDA’s role in taking action against unsafe dietary supplements occurs after they are marketed.

The *Dietary Supplements and Nonprescription Drug Consumer Act*,<sup>45</sup> which took effect in December, 2007, requires manufacturers of nonprescription drugs and dietary supplements to report “adverse events” to the FDA.

**Drugs and Medical Devices** The FDCA sets up an elaborate procedure under which drugs must be proven to be both safe *and* effective before they may be marketed to the public. Thus, the FDA has authority to regulate the testing, manufacture, distribution, and sale of drugs. The FDA does not conduct research on the efficacy or safety of new drugs but, rather, evaluates the results of studies done by the manufacturers. This evaluation process may take several years, although expedited processes are available for drugs that address incurable diseases, such as AIDS. It can be very expensive and time-consuming for a manufacturer to perform the necessary testing to show that a drug is safe and effective.

Under the FDCA, all prescription and nonprescription drugs must be labeled with proper directions for use and with warnings about potential side effects. The manufacture, sale, or distribution of adulterated or misbranded drugs is prohibited.

Under the 1976 *Medical Device Amendment* to the FDCA,<sup>46</sup> the FDA regulates medical devices, such as pacemakers; kidney dialysis machines; defibrillators; and other diagnostic, therapeutic, and health devices. Medical devices that are life supporting, life sustaining, or implanted must receive agency approval before they can be marketed. The mislabeling of medical devices is prohibited, and the FDA can remove ineffective devices from the marketplace. Even after a drug or medical device is approved for marketing, the FDA continues to collect and analyze reports on such products to monitor the products for any unexpected adverse reactions.

The *Food and Drug Administration Modernization Act of 1997*<sup>47</sup> (FDAMA) eliminated the existing prohibition on manufacturers disseminating information about unapproved uses of approved drugs, biologics,<sup>48</sup> and medical devices. When a drug or device manufacturer wants to market a new product, the manufacturer is required to submit the product, along with proposed labeling, to the FDA. The manufacturer is not required to submit labeling that indicates all possible uses of the drug or device. Rather, once the

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<sup>44</sup>Pub. L. No. 103-147, 108 Stat. 4325 (1994).

<sup>45</sup>Pub. L. No. 109-462 (2006).

<sup>46</sup>21 U.S.C. § 360(c) *et seq.*

<sup>47</sup>Pub. L. No. 105-115, 111 Stat. 2296.

<sup>48</sup>*Biologics* include blood and blood products, vaccines, allergenics, and biological therapeutics.



FDA has approved a label stating one intended use, the manufacturer may market the product.

It is common for physicians to make “off-label” uses of drugs or devices, i.e., uses that are not described on the approved label; in fact, a 2009 research report found that 20 percent of outpatient prescriptions are for off-label use.<sup>49</sup> FDAMA allows manufacturers to disseminate off-label drug use information under prescribed conditions to health care practitioners, pharmacy benefit managers, health insurance issuers, group health plans, and federal and state government agencies. Manufacturers may not disseminate such information directly to patients. The Act illustrates the balancing that marketing managers must make when faced with new regulatory requirements. On the one hand, the FDAMA allows manufacturers to market their drugs for more purposes, thus potentially increasing sales and profits. On the other hand, the manufacturer must follow very strict requirements in marketing drugs for off-label uses or run the risk of incurring criminal or civil sanctions. In addition, the firm is likely to face increased products liability risks once it markets a drug for a use not approved by the FDA. Products liability issues are discussed in Chapter 10.

**Cosmetics** Substances and preparations for cleansing, altering the appearance of, and promoting the attractiveness of a person are subject to FDA regulation. Ordinary household soap is exempted from such regulation.

The FDA may regulate cosmetics only *after* the products are released to the market. It has no authority to review or approve cosmetic products or ingredients prior to sale to the public. However, if a cosmetic product has drug properties (i.e., it cures, treats, mitigates, or prevents disease or affects the structure or function of the human body), it must be approved by the FDA as a drug.

The FDA also has no authority to require companies to do safety testing on their cosmetic products. If a product’s safety has not been substantiated, however, it must bear a label stating: “Warning: The safety of this product has not been determined.” The FDA also has no power to order recalls of a cosmetic product; rather, to remove a product from the marketplace, the FDA must prove in court that the product is unsafe, improperly labeled, or otherwise in violation of law.

## Consumer Product Safety Law

The Consumer Product Safety Commission (CPSC) is an independent federal agency, created in 1972 and charged with the task of protecting “the public against unreasonable risks of injuries and deaths associated with consumer products.” The CPSC consists of three commissioners, each nominated by the President and confirmed by the Senate, for a staggered seven-year term. Specifically, the CPSC: (1) conducts research on the safety of individual products; (2) maintains a clearinghouse on the risks associated with various consumer products; and (3) adopts rules and regulations to interpret and enforce the CPSA.

The CPSC regulates 15,000 types of consumer products used in the home or schools or for recreation, such as toys, clothing, appliances, furniture, and playground or sports equipment. It does not regulate products such as on-road motor vehicles, boats, aircraft, food, drugs, cosmetics, pesticides, alcohol, firearms, tobacco, or medical devices. The CPSC regulates every company, no matter how small, that manufactures, imports, distributes, or sells any type of consumer product covered by any law that the agency

<sup>49</sup>See Agency for Healthcare Research & Quality, *Developing Evidence-Based Research Priorities for Off-Label Drug Use*, available at <http://effectivehealthcare.gov/healthInfo/>

administers. It addresses only consumer product safety; issues relating to false advertising, fraud, and product quality are handled by the FTC.

The primary act that the CPSC administers is the *Consumer Product Safety Act* (CPSA).<sup>50</sup> Under the CPSA, the CPSC is authorized to set mandatory safety standards for consumer products and to ban the manufacture and sale of any product deemed by the Commission to pose an “unreasonable risk” to consumers. For example, the CPSC has set safety standards for bicycles and cigarette lighters and has banned the sale of lead-based paint. The CPSC also works with industry to develop voluntary industry standards.

The CPSC can require manufacturers of products it determines are “imminently hazardous” (i.e., products whose use can cause an unreasonable risk of death or serious injury or illness) to recall, repair, or replace the products or to take other corrective action.<sup>43</sup> The CPSC can seek injunctions, court orders to seize hazardous consumer products, and civil and/or criminal penalties. In addition, private parties can seek injunctions to prevent violations of the CPSA or of CPSC rules and regulations.

The CPSA imposes certain *reporting requirements* on businesses. First, any manufacturer, importer, distributor, or retailer of consumer products must notify the CPSA immediately if it concludes that one of its products: (1) has a defect that creates a substantial risk of injury to the public; (2) creates an unreasonable risk of serious injury or death; or (3) violates a consumer product safety standard or ban of the product.<sup>51</sup>

Second, a manufacturer must report to the CPSC when any of its products has been involved in three or more lawsuits in a two-year period, if such lawsuits allege death or grievous bodily injury and result in a settlement or court judgment in favor of the plaintiff. Third, a manufacturer, distributor, retailer, or importer of marbles, small balls, latex balloons, or toys or games containing such items must report to the CPSC any incidents of children choking on those items.

The CPSC also enforces several other consumer product safety laws, including the *Federal Hazardous Substances Act*,<sup>52</sup> which regulates household substances and children’s products that might be toxic, flammable, or corrosive; the *Flammable Fabrics Act*,<sup>53</sup> which applies to clothing, mattresses, carpets, and similar products; the *Poison Prevention Packaging Act*,<sup>54</sup> which requires child-resistant packaging for certain drugs and other hazardous household substances; and the *Refrigerator Safety Act*,<sup>55</sup> which requires household refrigerator doors to be easily opened from the inside to minimize the possibility of children becoming trapped.

Various well-publicized product safety issues, such as lead paint on children’s toys, has made consumer product safety a priority for Congress in recent years. The *Consumer Product Safety Improvement Act of 2008*<sup>56</sup> provides that all children’s products manufactured after August 14, 2009, and their packaging, will be required to have permanent tracking labels that would allow manufacturers and consumers to track the product’s source. The lead content limit children’s products will be lowered at the same time. The Act carries significant penalties for violators, including civil fines of up to \$100,000 for an individual violation and up to \$15 million for a series of violations, as well as

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<sup>50</sup>15 U.S.C. § 2051 *et seq.*

<sup>51</sup>15 U.S.C. § 2064.

<sup>52</sup>15 U.S.C. § 1261 *et seq.*

<sup>53</sup>15 U.S.C. § 1191 *et seq.*

<sup>54</sup>15 U.S.C. § 1471 *et seq.*

<sup>55</sup>15 U.S.C. § 1211 *et seq.*

<sup>56</sup>Pub. L. No. 110-314, 122 Stat. 3016 (2008).

criminal penalties of up to five years' imprisonment for directors, officers, and agencies of businesses dealing in consumer goods who knowingly and willfully violate the Act.

## Consumer Credit Protection

The federal government has enacted several pieces of legislation designed to protect consumers from abuses by creditors. The primary statute in this area is the *Truth-in-Lending Act*<sup>57</sup> (TILA), which was passed in 1968 as part of the Consumer Credit Protection Act.<sup>50</sup> A number of additional acts have been added as amendments to TILA in the last 40 years. Most recently, the *Mortgage Disclosure Improvement Act*, which took effect July 30, 2009, made changes to TILA. TILA and some of its more important amendments are discussed below.

### The Truth-in-Lending Act

TILA is administered by the Federal Reserve Board. The goal of TILA is to assure that creditors and advertisers engage in meaningful disclosure of consumer credit and lease terms so that consumers can shop around for the best financing arrangements. TILA's stringent disclosure requirements are intended to prevent creditors or advertisers from burying the cost of credit in the price of the goods sold. TILA does not set interest rates, but it does establish a uniform actuarial method for calculating consumer credit charges. TILA also establishes certain requirements for the advertisement of credit terms. The Act applies only to persons who, in the ordinary course of business, lend funds, sell on credit, or arrange for the extension of credit. Thus, loan transactions between two individuals are not regulated by TILA. In addition, TILA protects only *natural persons*, not artificial persons, such as corporations or other legal entities.

TILA's *disclosure* requirements are found in Regulation Z.<sup>58</sup> This regulation applies to any transaction governed by TILA involving an installment sales contract in which payment is to be made in more than four installments and the credit is primarily for personal, family, or household purposes. Generally, installment loans, retail and installment sales, car loans, student loans, home-improvement loans, and certain real estate loans are subject to Regulation Z. In particular, Regulation Z requires disclosure of the finance charge (defined as the interest charged over the life of the loan expressed as a dollar amount) and the annual percentage rate (APR), which is interest expressed as a percentage. Regulation Z also contains provisions regarding the *advertising* of credit. Any advertised specific credit terms must be available, and any credit terms mentioned in the advertisement must be fully explained. The FTC enforces these provisions of Regulation Z; consumers do not have a private cause of action to sue advertisers directly.

TILA sets forth very specific requirements regarding the procedures that must be followed in complying with the Act. If the creditor deviates from any of these procedures, the contract may be rescinded or canceled.

TILA also has specific provisions regarding credit cards. For example, the liability of a cardholder is limited to \$50 per card for unauthorized charges made before the credit company is notified that a card has been lost or stolen. There are also provisions detailing procedures for the consumer and the credit card company to follow in resolving disputes about billing errors or withholding of payment for faulty purchases. In addition, while card issuers may send out unsolicited credit cards, the addressee is not liable for any charges made on an unsolicited card that is lost or stolen prior to receipt and

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<sup>57</sup>5 U.S.C. § 1601 *et seq.*

<sup>58</sup>12 C.F.R. § 226.

acceptance by the addressee. If the addressee accepts the card, she becomes liable for any authorized charges made with it.

Finally, if advertising promotes consumer credit, the advertiser must comply with Regulation X. This provision applies to all advertisers, not merely to creditors, and so includes parties like manufacturers, real estate brokers, builders, and government agencies. It does not include the media in which the advertisements appear, however. This regulation requires disclosure of certain types of information, such as the APR, depending upon the type of credit being advertised. Advertisements promoting home equity lines of credit are subject to additional disclosure rules as well as Regulation X.

As already noted, TILA has been amended several times since its enactment. Some of these amendments are described below.

***The Equal Credit Opportunity Act*** The *Equal Credit Opportunity Act*<sup>59</sup> (ECOA) was enacted as an amendment to TILA in 1974. The ECOA prohibits the denial of credit solely on the basis of race, religion, national origin, color, gender, marital status, or age. (While the ECOA prohibits discrimination against older applicants, it does allow them to be afforded more favorable treatment.) The Act also prohibits discrimination on the basis of whether an individual receives certain forms of income, such as public assistance. Creditors may, of course, deny credit for valid reasons relating to creditworthiness, such as inadequate income, excessive debts, or poor credit history. Creditors must provide applicants with the reasons that credit was denied if the applicant so requests.

The ECOA applies to all creditors who extend or arrange credit in the ordinary course of their business, including banks, small loan and finance companies, retail and department stores, credit card companies, and credit unions. Unlike most provisions of TILA, the ECOA protects businesses as well as individuals. States may adopt equal credit opportunity acts that are more protective than the ECOA.

***The Consumer Leasing Act*** Consumer leases have become very popular in recent years, particularly automobile leases. The *Consumer Leasing Act*,<sup>60</sup> which was a 1988 amendment to TILA, and its accompanying Regulation M, offer protection to consumers who lease goods priced at \$25,000 or less for personal, household, or family use, provided the lease term exceeds four months. The Act applies to anyone who advertises consumer leases and imposes specific disclosure requirements upon such parties. It does not apply to the media in which such advertisements appear.<sup>55</sup>

***The Fair Credit Reporting Act*** Congress enacted the *Fair Credit Reporting Act*<sup>61</sup> (FCRA) as part of TILA in 1970. The FCRA provides that consumer credit-reporting agencies may issue credit reports to users only for specific purposes, including the extension of credit, the issuance of insurance policies, employment evaluation, compliance with a court order, and compliance with a consumer's request for a copy of his own credit report. If a consumer is denied credit or insurance on the basis of the credit report or is charged more than others ordinarily would be for such credit or insurance, the consumer must be notified and must be given the name and address of the credit-reporting agency that issued the credit report.

In addition, consumers may request the source of any information being given out by a credit agency, as well as the identity of anyone who has received an agency report. Consumers are also entitled to access to the information about themselves contained

<sup>59</sup>15 U.S.C. § 1691 *et seq.* See [www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm](http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm)

<sup>60</sup>15 U.S.C. §§ 1667 *et seq.* See [www.ftc.gov/bcp/edu/pubs/business/adv/bus18.shtm](http://www.ftc.gov/bcp/edu/pubs/business/adv/bus18.shtm)

<sup>61</sup>15 U.S.C. § 1681 *et seq.* See [www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf](http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf)

within a credit reporting agency's files. The agency is obligated, upon the consumer's written request, to investigate and delete any unverifiable or inaccurate information within a reasonable time period. If the agency does not find an error, the consumer is entitled to file a 100-word written statement of her version of the disputed information. Any subsequent credit reports must note the disputed item and must contain the consumer's statement.

A credit-reporting agency that negligently violates the provisions of the FCRA is potentially liable for actual damages, costs, and attorneys fees. An agency that willfully violates the FCRA may be liable for punitive damages as well. A credit-reporting agency is not liable under the FCRA for reporting inaccurate information, however, if it followed reasonable procedures to assure maximum possible accuracy.

***The Fair Debt Collections Practices Act*** Congress enacted the *Fair Debt Collection Practices Act*<sup>62</sup> (FDCPA) in 1977 in an attempt to prevent collection agencies from engaging in abusive, deceptive, and unfair practices. "Debt" is defined in the FDCPA as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes ...."<sup>63</sup>

The FDCPA applies only to third-party debt collectors, i.e., to persons who routinely attempt to collect debts on behalf of other creditors (usually in return for a percentage of the amount owed), including specialized debt-collection agencies and attorneys. Creditors who attempt to collect their own debts are not covered by the FDCPA, unless they misrepresent to debtors that they are collection agencies.

In particular, the FDCPA prohibits collection agencies from:

- contacting the debtor at the debtor's place of employment if the employer objects;
- contacting the debtor during inconvenient or unusual times (the FDCPA provides that convenient hours are generally between 8 A.M. and 9 P.M. unless the debtor's particular circumstances, such as working the night shift, make those times inconvenient);
- contacting the debtor at inconvenient places, such as social events or worship services;
- contacting the debtor at all if the debtor is being represented by an attorney (the collection agency must deal with the attorney instead);
- using harassing or intimidating tactics (such as abusive language or threatening violence) or using false and misleading information (such as pretending to be a police officer); and
- any communication with the debtor after receiving written notice that the debtor is refusing to pay the debt or does not want to be contacted again, except to advise the debtor of further action to be taken by the collection agency (such as the filing of a lawsuit).

The FDCPA also requires collection agencies to provide a "validation notice" when they initially contact a debtor or within five days of that initial contact. The notice must indicate that the debtor has 30 days in which to dispute the debt and to request (in writing) a written verification of the debt from the collection agency. An agency that fails to comply with the Act is liable for actual damages, plus additional damages not to exceed \$1,000, plus costs and attorneys fees. The FTC may also seek cease-and-desist orders against debt collectors.

➡ ***See Discussion Case 8.4.***

<sup>62</sup>15 U.S.C. § 1692 *et seq.* See [www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27/pdf](http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27/pdf)

<sup>63</sup>15 U.S.C. § 1692a(5).

***The Fair and Accurate Credit Transactions Act*** Enacted in 2003, the *Fair and Accurate Credit Transactions Act*<sup>64</sup> is intended to ensure greater accuracy in consumer credit records. It enables consumers to obtain one free credit report a year from each of the credit reporting agencies,<sup>65</sup> and allows consumers to place fraud alerts in their credit files. It also has measures to prevent ID and credit theft.

## DISCUSSION CASES

### 8.1 First Amendment Challenge to the Do-Not-Call Registry *Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 358 F.3d 1228 (10th Cir. 2004)

The four cases consolidated in this appeal involve challenges to the national do-not-call registry, which allows individuals to register their phone numbers on a national “do-not-call list” and prohibits most commercial telemarketers from calling the numbers on that list. The primary issue in this case is whether the First Amendment prevents the government from establishing an opt-in telemarketing regulation that provides a mechanism for consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls. \* \* \*

#### I. Background

In 2003, two federal agencies—the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)—promulgated rules that together created the national do-not-call registry. The national do-not-call registry is a list containing the personal telephone numbers of telephone subscribers who have voluntarily indicated that they do not wish to receive unsolicited calls from commercial telemarketers. Commercial telemarketers are generally prohibited from calling phone numbers that have been placed on the do-not-call registry, and they must pay an annual fee to access the numbers on the registry so that they can delete those numbers from their telephone solicitation lists. So far, consumers have registered more than 50 million phone numbers on the national do-not-call registry.

The national do-not-call registry’s restrictions apply only to telemarketing calls made by or on behalf of sellers of goods or services, and not to charitable or political fundraising calls. Additionally, a seller may

call consumers who have signed up for the national registry if it has an established business relationship with the consumer or if the consumer has given that seller express written permission to call.<sup>7</sup> \* \* \*

The national do-not-call registry is the product of a regulatory effort dating back to 1991 aimed at protecting the privacy rights of consumers and curbing the risk of telemarketing abuse. In the Telephone Consumer Protection Act of 1991 (“TCPA”)—under which the FCC enacted its do-not-call rules—Congress found that for many consumers telemarketing sales calls constitute an intrusive invasion of privacy. Moreover, the TCPA’s legislative history cited statistical data indicating that “most unwanted telephone solicitations are commercial in nature” and that “unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.” The TCPA therefore authorized the FCC to establish a national database of consumers who object to receiving “telephone solicitations,” which the act defined as commercial sales calls.

Furthermore, in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (“Telemarketing Act”)—under which the FTC enacted its do-not-call rules—Congress found that consumers lose an estimated \$40 billion each year due to telemarketing

<sup>7</sup>The “established business relationship” exception allows businesses to call customers with whom they have conducted a financial transaction or to whom they have sold, rented, or leased goods or services within 18 months of the telephone call. Additionally, sellers can call consumers on the national do-not-call registry within three months after the consumer makes an inquiry or application. A seller who has an established business relationship with a consumer is still bound to comply with the company-specific rules if the consumer requests not to be called.

<sup>64</sup>15 U.S.C. §1681 *et seq.*

<sup>65</sup>See *Your Rights: Credit Reporting*, available at [www.ftc.gov/bcp/menus/consumer/credit/rights.shtm](http://www.ftc.gov/bcp/menus/consumer/credit/rights.shtm)

fraud. Therefore, Congress authorized the FTC to prohibit sales calls that a reasonable consumer would consider coercive or abusive of his or her right to privacy.

The FCC and FTC initially sought to accomplish the goals of the TCPA and the Telemarketing Act by adopting company-specific do-not-call lists, requiring sellers to maintain lists of consumers who have requested not to be called by that particular solicitor, and requiring telemarketers to honor those requests. Yet in enacting the national do-not-call registry, the agencies concluded that the company-specific lists had failed to achieve Congress' objectives. Among other shortfalls, the agencies explained that the large number of possible telephone solicitors made it burdensome for consumers to assert their rights under the company-specific rules, and that commercial telemarketers often ignored consumers' requests not to be called. Accordingly, the agencies decided to keep the company-specific rules as an option available to consumers, but to supplement them with the national do-not-call registry.

\* \* \*

### III. First Amendment Analysis

The national do-not-call registry's telemarketing restrictions apply only to commercial speech. Like most commercial speech regulations, the do-not-call rules draw a line between commercial and non-commercial speech on the basis of content. In reviewing commercial speech regulations, we apply the *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

*Central Hudson* established a three-part test governing First Amendment challenges to regulations restricting non-misleading commercial speech that relates to lawful activity. First, the government must assert a substantial interest to be achieved by the regulation. Second, the regulation must directly advance that governmental interest, meaning that it must do more than provide "only ineffective or remote support for the government's purpose." Third, although the regulation need not be the least restrictive measure available, it must be narrowly tailored not to restrict more speech than necessary. Together, these final two factors require that there be a reasonable fit between the government's objectives and the means it chooses to accomplish those ends.

#### A. Governmental Interests

The government asserts that the do-not-call regulations are justified by its interests in 1) protecting the privacy of individuals in their homes, and 2) protecting

consumers against the risk of fraudulent and abusive solicitation. Both of these justifications are undisputedly substantial governmental interests.

\* \* \* In *Frisby v. Schultz*, [487 U.S. 474 (1988)], the Court ... stressed the unique nature of the home and recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." As the Court held in *Frisby*:

One important aspect of residential privacy is protection of the unwilling listener .... [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

\* \* \*

Additionally, the Supreme Court has recognized that the government has a substantial interest in preventing abusive and coercive sales practices.

#### B. Reasonable Fit

A reasonable fit exists between the do-not-call rules and the government's privacy and consumer protection interests if the regulation directly advances those interests and is narrowly tailored. In this context, the "narrowly tailored" standard does not require that the government's response to protect substantial interests be the least restrictive measure available. All that is required is a proportional response.

In other words, the national do-not-call registry is valid if it is designed to provide effective support for the government's purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked just as well. These criteria are plainly established in this case. The do-not-call registry directly advances the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.

#### 1. Effectiveness

The telemarketers assert that the do-not-call registry is unconstitutionally underinclusive because it does not apply to charitable and political callers. First Amendment challenges based on underinclusiveness face an

uphill battle in the commercial speech context. As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front. \* \* \* The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that fails materially to advance the aims that it was purportedly designed to further.

\* \* \*

As discussed above, the national do-not-call registry is designed to reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation. The registry directly advances those goals. So far, more than 50 million telephone numbers have been registered on the do-not-call list, and the do-not-call regulations protect these households from receiving most unwanted telemarketing calls. According to the telemarketers' own estimate, 2.64 telemarketing calls per week—or more than 137 calls annually—were directed at an average consumer before the do-not-call list came into effect. Accordingly, absent the do-not-call registry, telemarketers would call those consumers who have already signed up for the registry an estimated total of 6.85 billion times each year.

To be sure, the do-not-call list will not block all of these calls. Nevertheless, it will prohibit a substantial number of them, making it difficult to fathom how the registry could be called an “ineffective” means of stopping invasive or abusive calls, or a regulation that “furnishes only speculative or marginal support” for the government's interests.<sup>11</sup>

Furthermore, the do-not-call list prohibits not only a significant *number* of commercial sales calls, but also a significant *percentage* of all calls causing the problems that Congress sought to address (whether commercial, charitable or political). The record demonstrates that a substantial share of all solicitation calls will be governed by the do-not-call rules.

The telemarketers asserted before the FTC that they might have to lay off up to 50 percent of their employees if the national do-not-call registry came into effect.

It is reasonable to conclude that the telemarketers' planned reduction in force corresponds to a decrease in the amount of calls they will make. Significantly, the percentage of *unwanted* calls that will be prohibited will be even higher than the percentage of all unsolicited calls blocked by the list. The individuals on the do-not-call list have declared that they do not wish to receive unsolicited commercial telemarketing calls, whereas those who do want to continue receiving such calls will not register.

Finally, the type of unsolicited calls that the do-not-call list does prohibit—commercial sales calls—is the type that Congress, the FTC and the FCC have all determined to be most to blame for the problems the government is seeking to redress. According to the legislative history accompanying the TCPA, “complaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.”

Additionally, the FTC has found that commercial callers are more likely than non-commercial callers to engage in deceptive and abusive practices. Specifically, the FTC concluded that in charitable and political calls, a significant purpose of the call is to sell a cause, not merely to receive a donation, and that non-commercial callers thus have stronger incentives not to alienate the people they call or to engage in abusive and deceptive practices. The speech regulated by the do-not-call list is therefore the speech most likely to cause the problems the government sought to alleviate in enacting that list, further demonstrating that the regulation directly advances the government's interests.

In sum, the do-not-call list directly advances the government's interests—reducing intrusions upon consumer privacy and the risk of fraud or abuse—by restricting a substantial number (and also a substantial percentage) of the calls that cause these problems. [T]he do-not-call list is not so underinclusive that it fails materially to advance the government's goals.

## 2. Narrow Tailoring

Although the least restrictive means test is not the test to be used in the commercial speech context, commercial speech regulations do at least have to be “narrowly tailored” and provide a “reasonable fit” between the problem and the solution. Whether or not there are “numerous and obvious less-burdensome alternatives” is a relevant consideration in our narrow tailoring analysis. A law is narrowly tailored if it “promotes a substantial government interest that would be achieved less

<sup>11</sup>It is unclear from the record exactly how many telemarketing calls will be blocked by the do-not-call regulations. Most significantly, we have not been provided with data as to how many of these unsolicited sales calls would be permissible under the established business relationship exception. In applying *Central Hudson*, however, we are entitled to rely on anecdotal evidence and make the common sense observation that the do-not-call list will apply to a substantial number of telemarketing calls.



effectively absent the regulation.” Accordingly, we consider whether there are numerous and obvious alternatives that would restrict less speech and would serve the government’s interest as effectively as the challenged law.

We hold that the national do-not-call registry is narrowly tailored because it does not over-regulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients. The do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute an invasion of privacy.

The Supreme Court has repeatedly held that speech restrictions based on private choice (i.e.—an opt-in feature) are less restrictive than laws that prohibit speech directly. \* \* \*

Likewise, in rejecting direct prohibitions of speech (even fully protected speech), the Supreme Court has often reasoned that an opt-in regulation would have been a less restrictive alternative. \* \* \*

\* \* \*

[T]he national do-not-call registry does not itself prohibit any speech. Instead, it merely “permits a citizen to erect a wall ... that no advertiser may penetrate without his acquiescence.” Almost by definition, the do-not-call regulations only block calls that would constitute unwanted intrusions into the privacy of consumers who have signed up for the list. Moreover, it allows consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them. Under the circumstances we address in this case, we conclude that the do-not-call registry’s opt-in feature renders it a narrowly tailored commercial speech regulation.

The do-not-call registry’s narrow tailoring is further demonstrated by the fact that it presents both sellers and consumers with a number of options to make and receive sales offers. From the seller’s perspective, the do-not-call registry restricts only one avenue by which solicitors can communicate with consumers who have registered for the list. In particular, the do-not-call regulations do not prevent businesses from corresponding with potential customers by mail or by means of advertising through other media.

From the consumer’s perspective, the do-not-call rules provide a number of different options allowing consumers to dictate what telemarketing calls they wish to receive and what calls they wish to avoid. Consumers who would like to receive some commercial sales calls but not others can sign up for the national

do-not-call registry but give written permission to call to those businesses from whom they wish to receive offers. Alternatively, they may decline to sign up on the national registry but make company-specific do-not-call requests with those particular businesses from whom they do not wish to receive calls. Therefore, under the current regulations, consumers choose between two default rules—either that telemarketers may call or that they may not. Then, consumers may make company-specific modifications to either of these default rules as they see fit, either granting particular sellers permission to call or blocking calls from certain sellers.

Finally, none of the telemarketers’ proposed alternatives would serve the government’s interests as effectively as the national do-not-call list. Primarily, the telemarketers suggest that company-specific rules effectively protected consumers. Yet as the FTC found, “the record in this matter overwhelmingly shows the contrary ... it shows that the company-specific approach is seriously inadequate to protect consumers’ privacy from an abusive pattern of calls placed by a seller or telemarketer.”

First, the company-specific approach proved to be extremely burdensome to consumers, who had to repeat their do-not-call requests to every solicitor who called. In effect, this system gave solicitors one free chance to call each consumer, although many consumers find even an initial unsolicited sales call abusive and invasive of privacy. Second, the government’s experience under the company-specific rules demonstrated that commercial solicitors often ignored consumers’ requests to be placed on their company-specific lists. Third, consumers have no way to verify whether their numbers have been removed from a solicitor’s calling list in response to a company-specific do-not-call request. Finally, company-specific rules are difficult to enforce because they require consumers to bear the evidentiary burden of keeping lists detailing which telemarketers have called them and what do-not-call requests they have made.

\* \* \*

Finally, the telemarketers argue that it would have been less restrictive to let consumers rely on technological alternatives—such as caller ID, call rejection services, and electronic devices designed to block unwanted calls. Each of these alternatives puts the cost of avoiding unwanted telemarketing calls on consumers. Furthermore, as the FCC found, “although technology has improved to assist consumers in blocking unwanted calls, it has also evolved in such a way as to assist

telemarketers in making greater numbers of calls and even circumventing such blocking technologies.” Forcing consumers to compete in a technological arms race with the telemarketing industry is not an equally effective alternative to the do-not-call registry.

In sum, the do-not-call registry is narrowly tailored to restrict only speech that contributes to the problems the government seeks to redress, namely the intrusion into personal privacy and the risk of fraud and abuse caused by telephone calls that consumers do not welcome into their homes. \* \* \*

\* \* \*

#### D. Summary

For the reasons discussed above, the government has asserted substantial interests to be served by the do-not-call registry (privacy and consumer protection), the do-not-call registry will directly advance those interests by banning a substantial amount of unwanted telemarketing calls, and the regulation is narrowly tailored because its opt-in feature ensures that it does not restrict any speech directed at a willing listener. In other words, the do-not-call registry bears a reasonable

fit with the purposes the government sought to advance. Therefore, it is consistent with the limits the First Amendment imposes on laws restricting commercial speech.

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#### QUESTIONS FOR DISCUSSION FOR CASE 8.1

1. Why does the Registry not apply to calls from political organizations or charities? Does this distinction make sense to you?
  2. In footnote 7, the court states that it is relying upon “common sense” rather than data. Does this surprise you? Do you think that the court’s practice creates any potential problems? Would requiring extensive data create any other types of problems?
  3. Do you think the court struck the right balance here between the rights of consumers and the rights of telemarketers? Does the “established business relationship” exception provide sufficient protection for the commercial interests of telemarketers? Are there other ways that the federal government could have addressed the issue of unwanted solicitation calls?
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## 8.2 CAN-SPAM, Preemption

### *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006)

Countless commercial email messages, known colloquially as “spam,” pass through the Internet every day, inspiring frustration, countermeasures, and—as here—lawsuits. Based upon eleven commercial email messages, Mummagraphics, Inc., a provider of online services, seeks significant statutory damages from Omega World Travel, Inc., a Virginia-based travel agency (“Omega”); Gloria Bohan, Omega’s president and founder; and Cruise.com, Inc., a wholly owned subsidiary of Omega (collectively, “appellees”). Mummagraphics alleges that Cruise.com sent the messages in violation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), as well as Oklahoma law.

\* \* \*

#### I.

Appellant Mummagraphics, Inc., d/b/a Webguy Internet Solutions, is an Oklahoma corporation with its only

place of business in Oklahoma City. According to Mark Mumma, the company’s president, Mummagraphics hosts web pages, registers domain names, designs web pages and logos, and sets up computer servers. Mummagraphics also operates websites devoted to opposing “spam” messages including “sueaspammer.com.” \* \* \* Mummagraphics owns the domain name webguy.net and uses the e-mail account inbox@webguy.net for company purposes.

Cruise.com operates a website selling cruise vacations and sends email advertisements—dubbed “E-deals” to prospective customers. It sent eleven “E-deals” containing travel offers to inbox@webguy.net between December 29, 2004 and February 9, 2005. Each message contained a line of text on which the recipient could click in order to be removed from future mailings, and each message also said that the recipient could opt-out of future e-mails by writing to a postal address contained in each message. Each message also contained a link to the Cruise.com website and a toll-free phone number for the company.

When Mark Mumma noticed the Cruise.com e-mails that inbox@webguy.net had received, he did not use the electronic opt-out link to remove the address from the Cruise.com e-mail list, but instead called John Lawless, Omega World Travel's general counsel, to complain. Mumma told Lawless that he had not asked to receive the "E-deal" messages. He told Lawless that he refused to use e-mail opt-out mechanisms because "only idiots do that," and he believed opt-out mechanisms just led to more unwanted messages. Mumma told Lawless that his preferred removal procedure was to sue for violations of Oklahoma law. Lawless asked Mumma for his e-mail address, but Mumma did not provide it. Instead, he asked Lawless to remove from all future mailings every address containing a domain name listed on Mummagraphics' "OptOutByDomain.com" website. \* \* \* On January 20, 2005, the day after speaking with Lawless, Mumma received another "E-deal" message at inbox@webguy.net. He sent a letter dated January 25, 2005 to Daniel Bohan of Omega World Travel, saying that he had received six unsolicited "E-deal" messages from Cruise.com, Omega's subsidiary, but again not specifying the email address at which he had received the messages. The letter claimed that the messages violated federal and state laws and said that Mumma intended to sue Bohan's company for at least \$150,000 in statutory damages unless Bohan settled the matter for \$6,250. \* \* \* After Omega World Travel failed to pay Mumma, postings on one of Mumma's "anti-spam" websites accused Omega, Cruise.com, and Daniel and Gloria Bohan of being "spammers" who had violated state and federal laws. \* \* \* On the basis of these postings, Omega World Travel, the Bohans, and Cruise.com sued Mumma and Mummagraphics in federal court, claiming [among other things] defamation .... Mummagraphics raised counterclaims against the appellees under Oklahoma and federal law, which are the only claims now before this court. Mummagraphics alleged, *inter alia*, that the Cruise.com e-mails contained actionable inaccuracies and that the appellees failed to comply with federal and state requirements that they stop sending messages to recipients who opted out through specified procedures. Both parties sought summary judgment on Mummagraphics' counterclaims, and the district court granted the appellees' motion. \* \* \* Mummagraphics now appeals.

## II.

### A.

We turn first to the district court's determination that the CAN-SPAM Act preempted Mummagraphics'

claims under Oklahoma's statutes regulating commercial e-mail messages. The basic principles of preemption are well settled .... Our inquiry into the scope of a preemption clause is shaped by "two presumptions." First, under our federal system, we do not presume that Congress intends to clear whatever field it enters. Instead, we start from "the basic assumption that Congress did not intend to displace state law," and "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." Second, from this departure point, we address preemption issues in accordance with the "oft-repeated comment ... that '[t]he purpose of Congress is the ultimate touchstone' in every preemption case." Instead of imposing the narrowest possible construction on preemptive language when read in isolation, we seek "a fair understanding of congressional purpose," looking to "the language of the pre-emption statute and the statutory framework surrounding it," while also considering "the structure and purpose of the statute as a whole."

### B.

Mummagraphics argues that it is entitled to damages because such damages are authorized by Oklahoma law and lie outside the CAN-SPAM Act's preemptive scope. The CAN-SPAM Act provides, in part,

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

The principal Oklahoma provision under which Mummagraphics seeks damages provides:

It shall be unlawful for a person to initiate an electronic mail message that the sender knows, or has reason to know:

1. Misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message;
2. Does not contain information identifying the point of origin or the transmission path of the electronic mail message; or
3. Contains false, malicious, or misleading information which purposely or negligently injures a person.

\* \* \* Congress did not intend “falsity” [as used in CAN-SPAM] to encompass bare error because such a reading would upset the Act’s careful balance between preserving a potentially useful commercial tool and preventing its abuse. The Act’s enacted findings make clear that Congress saw commercial e-mail messages as presenting both benefits and burdens. Congress found that “[t]he convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail,” but also that e-mail’s “low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce.” Congress noted that states had sought to regulate commercial e-mails, but it found that the resulting patchwork of liability standards had proven ineffective:

Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.

Congress implemented these findings by creating a national standard that would be undermined to the point of near-irrelevancy by Mummagraphics’ interpretation of the preemption clause. Rather than banning all commercial e-mails or imposing strict liability for insignificant inaccuracies, Congress targeted only e-mails containing something more than an isolated error. The CAN-SPAM Act made it a crime to “materially falsif[y] header information in multiple commercial electronic mail messages and intentionally initiate[] the transmission of such messages,” but it attached no criminal sanction to non-material errors. The Act created civil causes of action relating to error, but attached requirements beyond simple mistake to each of them. It permitted lawsuits based upon “*materially* false or *materially* misleading” header information. \* \* \* In sum, Congress’ enactment governing commercial e-mails reflects a calculus that a national strict liability standard for errors would impede “unique opportunities for the development and growth of frictionless commerce,” while more narrowly tailored causes of action could effectively respond to the obstacles to

“convenience and efficiency” that unsolicited messages present. Mummagraphics’ reading of the preemption clause would upend this balance and turn an exception to a preemption provision into a loophole so broad that it would virtually swallow the preemption clause itself. While Congress evidently believed that it would be undesirable to make all errors in commercial e-mails actionable, Mummagraphics’ interpretation would allow states to bring about something very close to that result. The ensuing consequences would undermine Congress’ plain intent. As we have noted, Congress found that because e-mail addresses do not specify recipients’ physical locations, it can be difficult or impossible to identify where recipients live and hence to determine the state laws that apply. Moreover, commercial e-mails are a bulk medium used to target thousands of recipients with a single mouse-click, meaning that the typical message could well be covered by the laws of many jurisdictions. As a result, law-abiding senders would likely have to assume that their messages were governed by the most stringent state laws in effect. The strict liability standard imposed by a state such as Oklahoma would become a de facto national standard, with all the burdens that imposed, even though the CAN-SPAM Act indicates that Congress believed a less demanding standard would best balance the competing interests at stake. \* \* \*

### III.

We turn next to Mummagraphics’ claims that the Cruise.com emails violated the CAN-SPAM Act. Mummagraphics first argues that the Cruise.com e-mails violated the Act’s requirements concerning the accuracy of header information in commercial e-mails. The Act provides, “It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message ... that contains, or is accompanied by, header information that is materially false or materially misleading.” The Act further explains,

the term “materially”, when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation, or the ability of a recipient of the message to

respond to a person who initiated the electronic message.

Mummagraphics alleges that the senders of the Cruise.com e-mails violated this provision because the messages' header information incorrectly indicated that the e-mails originated from the server "FL-Broadcast.net," and because the messages' "from" address read *cruisedeals@cruise.com*, although that e-mail address was apparently non-functional.

We agree with the district court that these inaccuracies do not make the headers "materially false or materially misleading." The e-mails at issue were chock full of methods to "identify, locate, or respond to" the sender or to "investigate [an] alleged violation" of the CAN-SPAM Act. Each message contained a link on which the recipient could click in order to be removed from future mailings, in addition to a separate link to Cruise.com's website. Each message prominently displayed a toll-free number to call, and each also listed a Florida mailing address and local phone number for the company. Several places in each header referred to the Cruise.com domain name, including one line listing Cruise.com as the sending organization.

These references come as little surprise, because the "E-deal" messages were sales pitches intended to induce recipients to contact Cruise.com to book the cruises that the messages advertised. Since the "E-deal" messages and their headers were replete with accurate identifiers of the sender, the alleged inaccuracies in the headers could not have impaired the efforts of any recipient, law enforcement organization, or other party raising a CAN-SPAM claim to find the company. If the alleged inaccuracies in a message containing so many valid identifiers could be described as "materially false or materially misleading," we find it hard to imagine an inaccuracy that would not qualify as "materially false or materially misleading." Congress' materiality requirement would be rendered all but meaningless by such an interpretation.

## V.

We respect the fact that unsolicited commercial e-mail has created frustration and consternation among innumerable users of the Internet. The proper treatment of mass commercial e-mail has provoked controversy since perhaps the first such message was sent. Our role is not to determine the best way of regulating such messages, but merely to implement the balance that Congress struck. The CAN-SPAM Act prohibits some material misstatements and imposes opt-out requirements, but it does not make every error or opt-out request into grounds for a lawsuit. The e-mails in this case are not actionable under the Act. Nor can the messages be actionable under Oklahoma's statutes, because allowing a state to attach liability to bare immaterial error in commercial e-mails would be inconsistent with the federal Act's preemption text and structure, and, consequently, with a "fair understanding of congressional purpose." Since we agree that summary judgment was warranted on Mummagraphics' various claims, the judgment of the district court is *AFFIRMED*.

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### QUESTIONS FOR DISCUSSION FOR CASE 8.2

1. How does the court explain the role of preemption? What part of the Oklahoma statute does the court find is preempted by CAN-SPAM?
2. Do you agree with the court's findings that the inaccuracies in the e-mail at issue did not constitute a violation of CAN-SPAM? Does the court's ruling decrease the incentive for commercial e-mailers to ensure the accuracy of their e-mails, or do you think it has little effect on their behavior?
3. Do you think that Congress, when it passed CAN-SPAM, would have intended the result that the court reached in this case, or do you think that Congress intended a more stringent regulation of spam? What evidence can you point to in support of your argument?

### 8.3 Home Solicitations

#### *Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 618 N.Y.S. 2d 182 (City Ct. 1994)

The plaintiff, soon to be a new bride, attended the Great Bridal Expo. \* \* \* Amongst the many exhibitors was the defendant, 21st Century Concepts, Inc. doing business

as Royal Prestige ("Royal Prestige"). Royal Prestige, a direct marketing company, displayed a variety of knives, china, glassware, water filters and cookware. \* \* \*

Royal Prestige sells its products through door-to-door sales. Royal Prestige became aware of the plaintiff and her bridal needs when she filled out a "lead" card at the Bridal Expo. Thereafter, Royal Prestige salesman Larry Kieffer called the plaintiff seeking to arrange a home sales visit. To induce the plaintiff to listen to his sales pitch, Mr. Kieffer offered plaintiff \$100 in cash, a free facial and 100 rolls of free film.

Intrigued, the plaintiff agreed and on September 28, 1993 Mr. Kieffer knocked on the plaintiff's door, gave her \$100 in cash, a free facial and one roll of free film. To obtain the remaining 99 rolls of "free" film the plaintiff had to use the first roll and have it processed by Royal Prestige's chosen film processor. After paying for her prints the plaintiff would be given one new roll of free film and so on. In addition, after the sale Mr. Kieffer offered plaintiff a reduced cost Caribbean vacation which plaintiff later rejected because of the poor quality and location of the offered hotels.

Once inside the plaintiff's home, Mr. Kieffer spent 2 1/2 hours extolling the alleged virtues of the entire line of Royal Prestige products. Most of that time (1 1/2 hours) was spent on selling plaintiff a set of pots and pans pretentiously identified as the Royal Prestige Health System (the "Health System"). The Health System consisted of several cooking pots which appeared to be small pressure cookers. These miniature pressure cookers were beautifully photographed and described in elegant terms as sauce pan, skillet, dutch oven and steamer/colander. The Health System was wildly expensive, e.g., the cost (including freight, handling and local sales tax) of the Royal Prestige "22 piece Health System" which consisted of seven pots plus accessories was \$1,505.63 or nearly \$200 a pot.

Mr. Kieffer pitched the Health System as a technically advanced means of retaining the nutritional value of cooked food. This claim was presented without any supporting documentation such as a Consumer Union Report or the like. \* \* \* In addition, Mr. Kieffer tailored his pitch to the young expectant bride by suggesting a direct relationship between using the Health System pots and preventing heart disease and having healthier babies. The plaintiff relied upon Mr. Kieffer's representations about the benefits of the Health System, agreed to purchase the 22-piece Health System and gave Mr. Kieffer a check for the total cost of \$1,505.63.

The front of the sales contract, dated September 28, 1993 contained the following: "You, the Purchaser, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an

explanation of this right." On the reverse side of the sales contract under the title of "Notice of Cancellation" there was extensive language regarding plaintiff's cancellation rights. The Notice of Cancellation contained blanks for the date, the name and address of the seller and the last possible day to cancel the contract. Mr. Kieffer failed to complete any of these blanks.

After receiving her ordered Health System on October 27, 1993, the plaintiff decided to cancel the sales contract and returned the pots with a letter demanding a full refund. Royal Prestige rejected plaintiff's cancellation of the sales contract and sent the purchased pots back to the plaintiff with a letter stating "[t]he quality of our cookware is considered by many experts to be the finest manufactured in the world today."

## Discussion

\* \* \*

The marketing of goods and services through door-to-door sales can be cost effective for manufacturers and distributors. Some manufacturers and distributors favor door-to-door sales for several reasons. *First*, the per unit cost of generating a sale is relatively low. This is because there is no retail store overhead such as rent, salaries, insurance and so forth. Instead a salesman working on a straight commission will use the consumer's living room to sell his wares and take his orders. *Second*, the selling price may be several times greater than that which would be obtainable in a more competitive environment where consumers compare different brands of the same product. \* \* \* *Third*, consumers are less defensive and more comfortable in their own homes and because of this are especially susceptible to high pressure sales tactics.

## Violation of Door-to-Door Sales Protection Act

Because of all of these factors door-to-door sales often lead to abuses, over-reaching, misrepresentations and fraud. As a consequence several States including New York have enacted remedial statutes which, within the limited context of retail sales made in the home, give consumers contractual rescission rights not otherwise available at common law. These statutes ... have as their purpose "to afford consumers a 'cooling-off' period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics."

The contract between Royal Prestige and the plaintiff violated Personal Property Law § 428(l)(b). This section provides that with respect to the required notice of

cancellation on the back of the contract, “the seller shall complete both copies by entering the name of the seller, the address of the seller’s place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction ....” Mr. Kieffer failed to fill in the required information in the Royal Prestige sales contract. A failure to properly inform the plaintiff of her cancellation rights is a violation and allows the plaintiff to cancel her contract until a reasonable time after Royal Prestige has properly informed her of her cancellation rights. Royal Prestige has yet to complete the contract as required. Plaintiff timely cancelled her contract on October 27, 1993, demanded a refund of her contract payment of \$1,505.63, returned the Health System to defendant (which she was not required to do [—] consumers may tender goods at residence), which refused to accept the rejected Health System returning it yet again to plaintiff.

The contract also violated Personal Property Law § 428 (4). This section provides that the sales contract “shall disclose conspicuously the seller’s refund policy as to all goods ... subject to the door-to-door sales agreement.” The Royal Prestige sales contract blissfully states that the “Seller promises you fair and honorable treatment.” This statement is not only not true within the facts of this case, but also it is virtually meaningless and does not rise to the level of disclosing “seller’s refund policy.” Within twenty days after receiving the Health System the plaintiff timely notified Royal Prestige of her intent to cancel and demanded a full refund.

### **Demand for Rescission**

Notwithstanding the statutory right of rescission afforded plaintiff by Personal Property Law § 428, the Royal Prestige sales contract should be rescinded based upon the application of several common-law doctrines. Whether viewed as a want of consideration or failure of consideration, it is clear that the plaintiff was grossly overcharged for the Health System she purchased.

Through high pressure sales tactics the plaintiff was induced to pay nearly \$200 a pot for cookware of dubious and undocumented nutritional, medical or technical value. Royal Prestige misrepresented, implicitly or explicitly, that its Health System provided exceptional nutritional value, that it would prevent heart disease, that it would help the plaintiff have healthier babies and that many experts consider the Health System “to be the finest manufactured in the world today.”

The Health System was grossly misrepresented, overpriced and the transaction was unconscionable.

### **Violation of General Business Law § 349**

New York General Business Law § 349 prohibits deceptive business practices. General Business Law § 349 is a broad, remedial statute directed towards giving consumers a powerful remedy to right consumer wrongs. The elements of a violation of General Business Law § 349 are (1) proof that the practice was deceptive or misleading in a material respect, and (2) proof that plaintiff was injured. There is no requirement under General Business Law § 349 that plaintiff prove that defendant’s practices or acts were intentional, fraudulent or even reckless. Nor is there any requirement under General Business Law § 349 that plaintiff prove that she relied upon defendant’s misrepresentations and deceptive practices.

Initially, the failure of Royal Prestige to comply with the disclosure requirements of Personal Property Law § 428 regarding cancellation and refund rights also constitutes an unfair and deceptive business practice under General Business Law § 349.

Secondly, Royal Prestige’s unsupported representations regarding the nutritional value of the Health System and its relationship to preventing heart disease and having healthier babies are misleading and deceptive.

Thirdly, the inducements used by Royal Prestige salesman Larry Kieffer to convince the plaintiff to open the door of her home and listen to his sales pitch were themselves misleading and deceptive. Mr. Kieffer promised plaintiff \$100 and a free facial and he delivered these two inducements. Mr. Kieffer also promised 100 rolls of “free” film and delivered only one roll while the remaining 99 were available only if plaintiff spent monies on processing exposed film, one roll at a time. This “free” offer was misleading and deceptive. Mr. Kieffer promised a reduced price vacation which plaintiff rejected after discovering the poor quality and location of the hotels offered. This vacation offer was misleading and deceptive and failed to disclose material information regarding the actual value of the vacation package.

### **Damages**

The court awards the following damages to the plaintiff.

*First*, damages will include the full contract price of \$1,505.63 which includes freight, handling and local sales tax; the cost of mailing the Health System back to Royal Prestige of \$49.70; and \$100 because Royal Prestige refused to refund the contract price.

*Second*, ... the Court finds that defendant willfully violated General Business Law § 349. Although the Court would like to treble plaintiff's actual damages of \$1,555.33, this amount exceeds the maximum \$1,000 permissible.

*Third*, pursuant to Personal Property Law § 429(3) and General Business Law § 349(h) the Court awards plaintiff attorney's fees and costs of \$344.66. Considering plaintiff's counsel's vigorous efforts during trial and an excellent post-trial memorandum of law, the Court would have awarded greater fees and costs but at the time this lawsuit was filed the jurisdictional limit of this court was \$2,000.

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### QUESTIONS FOR DISCUSSION FOR CASE 8.3

1. The court found that the defendant had violated the state cooling-off statute such that the plaintiff was permitted to cancel the contract one month after the sale had occurred. What should the defendant have done differently to have avoided this result?
  2. The court also found that the defendant's actions violated the state's statute prohibiting deceptive business practices. Which actions of the defendant were deceptive?
  3. What does the plaintiff ultimately recover? The court seems to feel that this amount is inadequate yet states that it is unable to award more to the plaintiff. Why?
- 

## 8.4 Fair Debt Collections Practices Act

### *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009)

Plaintiff-Appellant Jose Gonzalez ("Gonzalez") allegedly failed to pay his Sprint PCS Wireless cell phone bills, totaling \$448.97. Sprint turned the consumer debt over to US Asset Management Services, Inc. ("US Asset"), which in turn used the services of Defendants-Appellees Mitchell N. Kay ("Kay") and the Law Offices of Mitchell N. Kay, P.C. ("the Kay Law Firm") to collect the debt. The Kay Law Firm sent a collection letter to Gonzalez, which Gonzalez asserts violated the Fair Debt Collection Practices Act ("FDCPA or the Act"). \* \* \*

#### I. Factual Background

\* \* \* On November 21, 2007, the Kay Law Firm sent a collection letter to Gonzalez. The letter was printed on the Kay Law Firm's letterhead, but it was not signed.

\* \* \* The front of the letter states,

Please be advised that your account, as referenced above, is being handled by this office.

We have been authorized to offer you the opportunity to settle this account with a lump sum payment, equal to 65% of the balance due—which is \$291.83!

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid.

If you notify this office in writing within 30 days from receiving this notice, this office will: Obtain verification of the debt or obtain a copy of a

judgment and mail you a copy of such judgment or verification.

If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

After a large white blank space, the bottom of the letter directs the recipient to "PLEASE ADDRESS ALL PAYMENTS TO" the "Law Offices of Mitchell N. Kay, P.C." Immediately below the payment information, the letter states, "Notice: Please see reverse side for important information." A box surrounds this notice. Below the notice box is a detachable payment stub.

On the back, the letter states, in the same font and typeface as the text on the front,

This communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose.

Notice about Electronic Check Conversion: Sending an eligible check with this payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount shown on the check—as soon as the same day we receive the check—and the check will be destroyed.

At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

Kay and the Kay Law Firm assert that this "disclaimer" language is sufficient to notify Gonzalez that



lawyers were not involved in the debt collection. The parties agree that neither Kay nor any lawyers in his firm reviewed Gonzalez's file or were actively involved in sending the letter. Instead, Gonzalez asserted in his complaint that the letter was deceptive in that the Kay Law Firm "pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file." Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts.

## II. Jurisdiction and Standard of Review

\* \* \*

When deciding whether a debt collection letter violates the FDCPA, this court "must evaluate any potential deception in the letter under an unsophisticated or least sophisticated consumer standard." We must "assume that the plaintiff-debtor is neither shrewd nor experienced in dealing with creditors." "At the same time we do not consider the debtor as tied to the very last rung on the [intelligence or] sophistication ladder." "This standard serves the dual purpose of protecting all consumers, including the inexperienced, the untrained and the credulous, from deceptive debt collection practices and protecting debt collectors against liability for bizarre or idiosyncratic consumer interpretations of collection materials."

## III. Discussion

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." The FDCPA provides, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." The statute then lists several activities that violate the FDCPA. Gonzalez claims that Kay and the Kay Law Firm violated subsections (3) and (10). Subsection (3) prohibits "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney." Subsection (10) prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." There is no dispute that Gonzalez is a "consumer" under the FDCPA

and that Kay and the Kay Law Firm are "debt collectors" under the Act. A debt collector who violates the FDCPA is liable for actual damages, additional damages of up to \$1,000, and attorneys' fees.

There are sound policy reasons for the FDCPA's prohibition on a debt collector sending a collection letter that is seemingly from an attorney. Judge Evans of the Seventh Circuit adroitly explained the intimidation inherent in this type of communication:

An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking.

A letter from a lawyer implies that the lawyer has become involved in the debt collection process, and the fear of a lawsuit is likely to intimidate most consumers. "Thus, if a debt collector (attorney or otherwise) wants to take advantage of the special connotation of the word 'attorney' in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor's file." In the alternative, a lawyer acting as a debt collector must notify the consumer, through a clear and prominent disclaimer in the letter, that the lawyer is wearing a "debt collector" hat and not a "lawyer" hat when sending out the letter.

In [*Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997)], this court reversed the award of summary judgment to a defendant law firm under facts that were similar to those in the present case. The collection letter in question included a facsimile of the lawyer's signature under the law firm's letterhead, informed consumers that the creditor had retained the law firm to collect the debt, and stated that the creditor had instructed the law firm to file suit against the debtor if the debtor did not pay the debt within ten days. However, ... the lawyer and law firm were not at all involved in reviewing past due accounts or sending the letters. In reversing the award of summary judgment to the law firm/debt collector, we held that "a debt collector, who uses a mass-produced collection letter using the letterhead and facsimile signature of a lawyer who is not actually participating in the collection process, violates [the Act]."

In reaching this conclusion, we relied upon the Second Circuit's decision in *Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993). In *Clomon*, the Second

Circuit held that a lawyer violated the FDCPA when he “authorized the sending of debt collection letters bearing his name and a facsimile of his signature without first reviewing the collection letters or the files of the persons to whom the letters were sent.” This court in *Taylor* quoted the following passage from *Clomon*:

The use of an attorney’s signature on a collection letter implies that the letter is ‘from’ the attorney who signed it; it implies, in other words, that the attorney directly controlled or supervised the process through which the letter was sent .... The use of an attorney’s signature implies—at least in the absence of language to the contrary—that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent .... There will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney’s signature will comply with the restrictions imposed by [the Act].

The court in *Clomon* highlighted several factors that were important to its decision that the lawyer violated the FDCPA, e.g., that the letter was on the law firm’s letterhead, included the lawyer’s signature, and contained language stipulating that the lawyer had considered the individual debtors’ files and had made judgments on how to collect the debts.

The Second Circuit more recently decided another FDCPA case that explains how a lawyer, acting as a debt collector, can avoid liability by including a clear and prominent disclaimer in the collection letter. In [*Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 260 (2d Cir. 2005)], the consumer received a letter printed on a law firm’s letterhead but with no signature except for the firm’s name in the signature block. The letter stated that the law firm represented the creditor for “collection and such action as necessary to protect our client.” The letter also contained the following disclaimer: “At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.” The consumer filed suit, alleging that the letter violated ... the FDCPA. The district court dismissed the case ..., determining as a matter of law that the letter did not violate the FDCPA. The Second Circuit affirmed, concluding that the disclaimer explained the limited extent of any attorney involvement in collecting the debt. The court provided this important guidance:

[A]ttorneys can participate in debt collection in any number of ways, without contravening the FDCPA,

so long as their status as attorneys is *not misleading*. Put another way, our prior precedents demonstrate that an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes *disclaimers* that should make clear even to the “least sophisticated consumer” that the law firm or attorney sending the letter is not, at the time of the letter’s transmission, acting as an attorney.

\* \* \*

Finally, the Middle District of Florida recently denied summary judgment to the Kay Law Firm after considering a letter that is virtually identical to the one in this case. The court determined that the use of the law firm’s letterhead and the placement of the disclaimer on the back made the question of whether the letter was deceptive a factual dispute for the jury to decide. In particular, the court highlighted the contradiction between the law firm letterhead on the front and the disclaimer on the back of the letter. The court distinguished *Greco* by noting that the Second Circuit in *Greco* analyzed the language of the disclaimer, not its placement.

In sum, the main difference between the cases is whether the letter included a clear, prominent, and conspicuous disclaimer that no lawyer was involved in the debt collection at that time. There are some letters that, as a matter of law, are not deceptive based on the language and placement of a disclaimer. At the other end of the spectrum, there are letters that are so deceptive and misleading as to violate the FDCPA as a matter of law, especially when they do not contain any disclaimer regarding the attorney’s involvement. In the middle, there are letters that include contradictory messages and therefore present closer calls. \* \* \*

Here, the letter was printed on the law firm’s letterhead, but it was unsigned. On the back, the letter indicated that it was from a “debt collector” and included the sentence, “At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.” This is the exact same disclaimer that the court in *Greco* found dispositive. However, the disclaimer in *Greco* was part of the body of the letter on the front page; a consumer who read the main text of the letter would necessarily learn that the law firm was sending the letter but that no attorneys had reviewed the file. In contrast, the “least sophisticated consumer” reading the letter from the Kay Law Firm would not learn that the letter was from a debt collector

unless the consumer turned the letter over to read the “legalese” on the back. The disclaimer on the back of the letter completely contradicted the message on the front of the letter—that the creditor had retained the Kay Law Firm and its lawyers to collect the debt. That is, the disclaimer on the back may not have been *effective*. There was also ample room on the front of the letter to include this disclaimer so as to clearly articulate to the consumer the nature of the law firm’s involvement. Accordingly, this letter falls in that middle ground in which the letter is neither deceptive as a matter of law nor not deceptive as a matter of law. Because the “least sophisticated consumer” reading this letter might be deceived into thinking that a lawyer was involved in the debt collection, the district court prematurely dismissed Gonzalez’s complaint.

We acknowledge that this is a close case, which is why further inquiry at the district court is necessary. Based only on the allegations in the complaint and the letter itself, reasonable minds can differ as to whether this letter is deceptive. Although the mere presence of disclaimer language might be dispositive in certain circumstances, the context and placement of that disclaimer is also important. We do not construe the disclaimer in isolation but must analyze whether the letter is misleading as a whole. We caution lawyers who send debt collection letters to state clearly, prominently, and conspicuously that although the

letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time. Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the “price of poker has gone up.”

#### IV. Conclusion

We hold that the district court erred in concluding that Gonzalez failed to state a claim for relief that Kay and the Kay Law Firm violated the FDCPA. We therefore REVERSE the district court’s judgment and REMAND for further proceedings.

#### QUESTIONS FOR DISCUSSION FOR CASE 8.4

1. What role does the doctrine of precedent play in this case? Which of the earlier cases discussed by this court are actually binding upon it?
2. Do you think that this outcome is fair, or do you think that it gives the debtor too much of an opportunity to avoid his debt? Who is this Act supposed to protect? Explain.
3. Procedurally, what will happen next in this case? Why can’t this court simply resolve the case itself, instead of sending it back down to the lower court?

### DISCUSSION QUESTIONS

1. Andrew Ladick brought suit against Gerald J. Van Gemert, an attorney, alleging that Van Gemert had sent him a letter on behalf of a California condominium association demanding payment of a past-due condominium assessment fee. He alleged that the letter violated the Fair Debt Collection Practices Act (FDCPA) because it failed to give a “validation notice” and did not expressly disclose that Van Gemert was attempting to collect a debt and that any information obtained would be used for that purpose. The trial court found that the condominium assessment that Van Gemert sought to collect was not a “debt” under the FDCPA and granted summary judgment to Van Gemert. Ladick appealed. On appeal, Van Gemert argued that a condominium assessment does not involve an extension of credit

and is more like a tax than a debt. Should the FDCPA apply to this transaction?

2. On November 9, 1997, Angel, a Spanish-speaking salesperson working for Credit Express Furniture, made a sales presentation at the home of the Spanish-speaking plaintiffs, Rigoberto and Pilar Filpo. The presentation was in Spanish as the Filpos spoke little or no English. Angel showed Pilar a catalog, from which she ordered six pieces of furniture for a total of \$3,676. The contract signed by Rigoberto was in English and contained a provision stating that if the buyers cancelled their order or refused delivery, the buyers could pay 20 percent of the contract price as liquidated damages. The contract also stated that the merchandise could be exchanged only up to 30 days after delivery.

Under New York State's Door-to-Door Sales Protection Act, door-to-door sales contracts must contain, in the same language as the presentation and in 10-point type, the following notice:

You, the buyer may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction see the attached notice of cancellation form for an explanation of this right

The Act also requires door-to-door sales contracts to have attached to them "a completed form in duplicate, captioned 'NOTICE OF CANCELLATION,'" also in the language of the oral presentation, informing consumers of their right to: (1) cancel the contract within three days; (2) demand a full refund; (3) receive a refund within three days; and (4) return the unwanted goods by making them available at the consumer's home.

Rigoberto paid for the furniture in cash when the furniture was delivered the following month. When Pilar arrived home several hours later and inspected the furniture, she found several nonconformities, including loose trim, holes in the fabric, and an incorrect fabric design and color. The next day, Pilar telephoned Credit Express Furniture, reported the damage, canceled the contract, and demanded a full refund. Credit refused to refund the purchase price but offered to exchange the furniture and to give the Filpos \$300. Twice, a delivery person from Credit Express Furniture showed up at the Filpos' apartment with a replacement set of furniture and a check for \$300, but both times the Filpos refused to accept the new furniture or the check, demanding instead that Credit Express Furniture take back the original set and return their \$3,676 purchase price.

The Filpos filed suit against Credit Express Furniture. At this point, the Filpos have had the original set of furniture for two and one-half years. Should the court order Credit Express Furniture to accept the return of the furniture and to refund the Filpos' purchase price?

3. In November, 1988, Joyce Crystal purchased a waterfront home in Caroline County, Maryland. Soon afterward, she decided that a second-floor skylight should be removed for safety reasons. Her real estate agent brought a contractor named Callahan, from the firm of West & Callahan, Inc., over to the house. While Callahan was evaluating the skylight project, Crystal also asked him about remodeling her screened-in porch. She wanted the porch extended

by six to eight feet and enclosed with windows and doors. The parties did not sign an agreement, and Callahan did not provide a notice of the right to cancel the agreement.

Crystal understood that the project would cost \$10,000, while Callahan contends that he quoted a figure of approximately \$10,000 for time and did not include materials. The final construction bill was \$23,769.78, of which Crystal paid \$2,000. She refused to pay the balance, arguing poor workmanship and defects, including problems such as incorrect paint color. She had not complained during the construction project, however.

West & Callahan, Inc., sued Crystal for nonpayment, and she counterclaimed, alleging Callahan violated the door-to-door sales act by failing to give her the notice of cancellation required by the Maryland Door-to-Door Sales Act and that she had the right to cancel the agreement at any point until proper notice was given. Thus, she stated in her counterclaim that she was canceling the entire agreement. May Crystal cancel the door-to-door transaction nearly one and one-half years after the work has been completed?

4. Prior to September 1, 1994, Richard Whiteside signed a lease with Park Towne Place Apartments in Philadelphia for an apartment to be leased from September 1, 1994, to March 31, 1997. Whiteside failed to pay the rent and voluntarily vacated the apartment in early March, 1997. Whiteside owed Park Town Place \$4,342 for back rent. Park Town Place then retained National Credit Systems (NCS) to collect the back rent due.

During the first week of May, 1999, NCS telephoned Whiteside attempting to collect payment. On May 25, 1999, an NCS representative and Whiteside discussed on the telephone resolving the debt for less than the full amount owing but did not come to an agreement. Whiteside received one additional call from NCS after May 25, 1999. On June 9, 1999, NCS forwarded collection correspondence addressed collectively to Larry Hill (Whiteside's former roommate) and Whiteside to Hill and Whiteside.

Whiteside had also lost his job, had numerous other debts, and was forced to sleep on a friend's couch because of lack of money. He testified at trial that he experienced headaches and that his blood pressure increased because of these multiple problems.

Whiteside filed suit, alleging that NCS's debt collection practices violated the Fair Debt Collection Practices Act. Do they? Explain.

5. James Lee Anthony Jr. brought suit, arguing that the Top Tobacco Company negligently violated the Federal Labeling Act by failing to provide the Surgeon General's warning to purchasers of its loose-leaf tobacco products. The Federal Labeling Act provides that "it is unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes, the package of which fails to bear the Surgeon General's warning." "Cigarette" is defined under the Federal Labeling Act as: (A) "any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A)."

Anthony indicated that he smoked products from Top Tobacco Company because there was no warning on the loose-leaf products. He claims he has numerous physical problems as a result of smoking Top Tobacco products. Should Top Tobacco Company be liable under the Federal Labeling Act for failure to put the Surgeon General's warning on loose-leaf tobacco products?

6. John Stevenson began receiving a number of phone calls from bill collectors about arrearages in accounts that were not his. He spoke with TRW, Inc., a credit-reporting firm, to try to correct the problem. In August, 1989, he wrote TRW and obtained a copy of his credit report. He discovered many errors, including some accounts that belonged to an individual of the same name living in a different location and some accounts that apparently belonged to his estranged son, John Stevenson Jr. In total, Stevenson disputed approximately 16 accounts, seven inquiries, and much of the identifying information.

Stevenson wrote TRW on October 6, 1989, requesting that his credit report be corrected. On November 1, TRW began a reinvestigation by contacting subscribers that had reported the disputed accounts. As a result of this investigation, TRW removed several of the disputed accounts by November 30. TRW retained one account on the record because the subscriber insisted that the information was accurate, and investigations on several other accounts were still pending. TRW also added a warning statement to Stevenson's account in December, indicating that his son had apparently used his

Social Security number without his consent to obtain credit. By February, 1990, TRW claimed that all disputed accounts with "negative" credit information had been removed. Inaccurate information continued to appear on Stevenson's report, however, and some of the disputed information was reentered after Stevenson had had it deleted.

Stevenson filed suit, alleging that TRW had violated the Fair Credit Reporting Act. Has TRW done so? Explain.

7. In July 1990, the Bartholomew Circuit Court in Columbus, Indiana, rendered a deficiency judgment against Jeff Henson in the amount of \$4,075.54. The Clerk of the Court incorrectly recorded the judgment in the Judgment Docket, stating that a money judgment in that amount had been entered against both Jeff Henson and his brother Greg Henson.

Trans Union Corp. and CSC Credit Services, both credit-reporting agencies, listed the information on Greg Henson's credit report. Greg and his wife, Mary, filed suit against both companies, arguing that the companies had violated the Fair Credit Reporting Act by including this erroneous judgment in his account.

The agencies argued that the information that they had reported was accurate and that a judgment had been entered against Greg. Under Indiana law, the actual judgment entered by the court is the official act that renders the judgment legally binding; the entry of the judgment on the Judgment Docket is merely an administrative task undertaken by the Clerk.

While Greg alleged that he had contacted Trans Union twice in writing regarding the error and that no correction had been made, he did not allege that he had contacted CSC. Trans Union argued that it had no duty to investigate beyond the Judgment Docket to verify the accuracy of the reported information.

How should the court resolve this dispute?

8. On January 24, 1994, Frederick Hantske Jr. was telephoned at home by Paul Kallina, an employee of Brandenburger & Davis, Inc. Kallina told Hantske that he could possibly be an heir to an estate and arranged a meeting with him on the following day.

Kallina met with Hantske at his home in Charlottesville, Virginia, for one and one-half hours. Kallina explained that his firm searched official records for missing heirs. Kallina stated that the firm believed that Hantske was an heir to a certain estate

and that the firm would undertake to prove Hantske's claim and would "fight for" Hantske to receive his inheritance. Kallina then presented a contract to Hantske under which Brandenburger & Davis would receive one-fourth of the inheritance received by Hantske in exchange for locating Hantske, notifying him, and proving his interests. If Hantske did not inherit anything, he would owe the firm nothing. Kallina estimated that Hantske's interest in the estate was approximately \$30,000 and that the firm would receive a fee of \$7,500. Hantske signed the written agreement that same day.

Hantske then went to court seeking to have the contract voided, arguing that under the Virginia Home Solicitation Sales Act of 1970 he had a right to cancel the contract after it was signed. The court found that the agreement between Hantske and Brandenburger & Davis fit the definition of a sale under the Virginia Act. Home solicitation statutes of this type normally provide a three-day "cooling off" time period in which the homeowner has an unwaivable right to cancel the sale. Because the agreement signed by Hantske did not include a right to cancel, the court found that it was unenforceable under the Act.

Should a homeowner such as Hantske be permitted to take advantage of information provided to him by a seller that he would not have easily learned about on his own? Should homeowners be allowed to cancel a signed agreement and retain the financial results? Is it ethical and fair to keep the benefits, cancel the agreement, and not pay for services and

information provided? What interests is the Virginia Home Solicitation Sales Act trying to protect?

9. Laci Satterfield received a text message from Simon & Schuster, a publishing company, advertising a new Stephen King novel that it was publishing. Satterfield filed suit against Simon & Schuster for violation of the TCPA. Simon & Schuster argued that it had not violated the TCPA because an unsolicited text message is not a "call" for purposes of the TCPA. How should the court rule on this issue, and why?
10. David Wisniewski filed suit against Rodale, Inc., a publisher, alleging that Rodale had violated Section 3009 of the Postal Reorganization Act by sending him unsolicited books and then demanding payment. Rodale moved for summary judgment, arguing that Section 3009 does not create a private cause of action in consumers.

Section 3009 states:

- (a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of Title 15.

Section 45(a)(1) of Title 15 is part of the FTC Act, which gives enforcement power to the FTC, not to consumers.

Is Rodale correct in asserting that only the FTC, not consumers, may bring a case under Section 3009?