Michigan Realtors®
December 2011

DO NOT CALL REQUIREMENTS

With all of the attention given to the new consumer regulations directed at protecting homeowners facing foreclosure, some REALTORS® may have forgotten about the "do not call" rules. It could be very expensive to do so. These rules, issued by the Federal Communication Commission ("FCC") years ago, prohibit telephone solicitations to any persons registered on the national "do not call" registry. Further, persons or entities who make telephone solicitations must maintain a company-specific "do not call" list so that they can honor a person's request not to receive any further calls from that particular company. The statute provides that someone who has received more than one call within any 12-month period by or on behalf of the same entity in violation of the rules may sue for up to $500 in damages for each violation.

This article will first review the federal "do not call" requirements. The article will then discuss a recent case in which a telemarketing firm who had repeatedly contacted one particular person, allegedly in violation of the federal "do not call" rules, found potential damages in the neighborhood of $100,000.

A. Do Not Call Requirements

Since the Fall of 2003, REALTORS'® use of cold calling as a marketing strategy has been significantly restricted. First and foremost, REALTORS® are prohibited from cold calling anyone on the national "do not call" registry. (Access to the federal registry can be obtained by registering on the FTC's website https://telemarketing.donotcall.gov.) Second, firms with

agents who do make cold calls must maintain a company-specific "do not call" list so as to permit callers to make a company specific "do not call" request.

If a REALTOR® has an existing business relationship with a consumer, the REALTOR® can call that person without checking to see whether that person is on the federal "do not call" registry. An "existing business relationship" for this purpose lasts for 18 months. If a consumer does not have an existing business relationship with the REALTOR®, but that consumer has called the REALTOR® to make a specific inquiry about a property, the REALTOR® can contact that person for three months after the inquiry. With either of these relationships; however, if the consumer later asks that the REALTOR® stop calling him or her, the REALTOR® must honor that request.

The "established business relationship" exception permits the listing agent and other agents within the same firm to contact a seller for up to 18 months after the listing has expired. Agents in other firms are prohibited from contacting this seller if he or she is on the "do not call" registry.

A REALTOR® working with a buyer may call a FSBO seller about a client's interest in the home even if the FSBO seller is on the "do not call" registry. A REALTOR® may not call this same FSBO seller in an attempt to obtain the listing.

B. Penalties for Violating Requirements

The Federal Sixth Circuit Court of Appeals recently reviewed a case brought by a man who claimed to have received 33 telemarketing calls on his home phone from one solicitor during a one-year period. *Charvat v NMP, LLC,* 656 F3d 440 (CA6 2011). The calls were

for the purpose of trying to sell Philip Charvat a membership in the NASCAR Membership Club. While a couple of the calls were placed by a live person, the vast majority of the calls consisted of prerecorded messages. Mr. Charvat claimed that during one of the early calls from a live person, he had specifically asked to be placed on the solicitor's company-specific "do not call" list.

The primary issue in this case was whether Mr. Charvat could recover $500 damages for each of the multiple alleged violations made during one call. Mr. Charvat had argued that as to each call, for example, he should receive $500 damages because the solicitor failed to maintain a company-specific "do not call" list and another $500 damages because the solicitor failed to honor Mr. Charvat's request that he not be called again. In fact, Mr. Charvat's position was that each of the calls contained five separate violations, which should result in a $2,500 fine per call. The trial court had concluded that Mr. Charvat was only entitled to one $500 recovery per call and had thrown out the case because his potential damages were less than the $75,000 jurisdictional minimum for a federal court. Although the statute permits treble damages in the event of a "willful and knowing" violation, even then, the trial court found that Mr. Charvat's maximum damages would be calculated by multiplying the 31 calls by $1,500 in treble damages per call, totaling $46,000; well-below the $75,000 jurisdictional minimum threshold.

On appeal, the Sixth Circuit Court of Appeals agreed with the lower court's determination that under the "do not call" rules, Mr. Charvat could only recover statutory damages on a per-call basis, *i.e.,* $500 per call or $1,500 per call in the case of violations

committed "willfully and knowingly." However, the Court of Appeals went on to hold that there could be a separate recovery if, as was alleged here, the calls were also made in violation of the FCC's automated call rules. The Court noted that one section of the statute imposes minimum procedures for maintaining a "do not call" list that apply to all types of calls – whether live or automated – initiated for telemarketing purposes, while a separate section of the statute imposes greater restrictions on automated telephone calls and transmissions "which Congress found to be more of a nuisance and a greater invasion of privacy than calls placed by live persons."

The Sixth Circuit concluded that if Mr. Charvat could prove that the alleged violations occurred and if the violations were made "willfully and knowingly," then Mr. Charvat was entitled to statutory treble damages of $1,500 for each of the calls made in violation of the "do not call" requirements and statutory treble damages of $1,500 for each of the calls made in violation of the automated call requirements -- even if the violations occurred during the same telephone call. Thus, Mr. Charvat's maximum damages for the 31 calls that he alleged violated both sets of requirements totaled $93,000 (31 x $3,000 per call). The appellate court then sent the case back to the federal trial court for a determination as to whether the alleged violations had actually occurred and, if so, whether they were done "willfully and knowingly."

C. Conclusion

Firms who have agents that do telemarketing should reacquaint themselves with the national do not call registry and the other "do not call" regulations. There are exceptions

under these rules for consumers with whom a caller has an existing business relationship. Even then, however, if the existing customer requests no further calls, the firm must honor that request. As the *Charvat* case demonstrates, the damages for ignoring the "do not call" requirements can quickly add up. When that occurs, it becomes possible for lawyers to make money on a contingency fee basis. Further, in addition to a private suit for damages, the federal government can impose fines of up to $11,000 per call.