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TOO CLEVER BY HALF: Offer to Purchase an Asset May Also be a "Service" For Purposes of TCPA DNC Provisions

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One of the hardest lines to draw in TCPAWorld is the line between marketing and informational calling.

At the extreme ends of the spectrum the difference is rather obvious, but toward the center the two seem to blend into each other such that the divide exists–if at all–solely in the eye of the beholder.

One fairly firm TCPA rule on the subject is that the mere offer to purchase an asset is not marketing because the act of offering to buy something does not constitute an offer by the caller of a good or service for rent or sale.

But even here there is grey area. Sure where a called party has *offered* to sell something–like a house–a call to put buy that something isn't marketing. But what if the caller's offer to buy an asset is *itself* a service being offered?

That was the setting in a really interesting case out of Michigan last month. And it didn't go well for the Defendant.

In *Anderson v. Catalina Structured Funding,* Case No. 1:21-cv-197, 2021 U.S. Dist. LEXIS 24265 (W.D. Mich. December 21, 2021) the Defendant was sued for cold calling individuals and offering to purchase streams of income derived from annuities or judgments owed to the called party in exchange for an upfront lump sum.

The Defendant argued that it was not marketing anything–it was just offering to *buy* something. Specifically a stream of income.

The Plaintiff, on the other hand, argued that the Defendant was offering a service for sale–the service was the conversion of an income stream into a lump sum payment. And obviously the Defendant was going to recognize a profit on the conversion.

The Court found the issue to be an interesting one of first impression and engaged in lengthy and thoughtful analysis.

After ultimately determining that the Defendant was ultimately selling a service and was not *just* seeking to purchase an asset the Court held the case could proceed:

Here, though, where Plaintiff has expressed no interest in selling, and Defendant is in the business of offering liquidity to structured settlement holders, Defendant may be offering to make a purchase, but it is also marketing a service. To suggest it is not is too clever by half.

Interestingly, *Anderson* seems to hold that anytime a transaction can be viewed as having a "dual purpose"–uh oh–the transaction should be viewed as a service as opposed to a mere purchase of the called party's goods:

That Catalina's intention is to purchase a structured settlement does not detract from the reality of the transaction from Anderson's: that Catalina called Anderson to offer her the service of turning a long-term income stream into immediate cash. Recognizing that a transaction may permit two different interpretations does not expand the scope of the TCPA where one characterization falls squarely within the statute.

Fascinating.

Anderson represents a court's take on a close call situation–one where a message might be viewed as either an offer to purchasing an asset or the offer of a service closely related to purchasing an assert.

Companies that specialize in purchasing goods for profit should give *Anderson* a close read. Taken to its extreme, the logic of *Anderson* might convert most calls offering to purchase an item that is not presently up for sale into a marketing solicitation. Even read narrowly *Anderson* seems to convert any offer to buy that includes fees to the caller into a marketing call.

And the "dual purpose" analysis definitely stacks the deck in favor of plaintiffs in these cases.

Anyone intending to make *unsolicited* calls offering to purchase goods–even business goods–to numbers on the DNC should heed this case and seek counsel. I'm always here to chat.

In the meantime, we'll keep an eye on this.

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