

**JAMS ARBITRATION
No. 1410004210**

Diana Mey,

Claimant,

vs.

Discover Financial Services LLC,

Respondent.

FINAL AWARD

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Arbitrator :

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Place of Arbitration : Wheeling, West Virginia**Date of Final Award : November 6, 2006****I. INTRODUCTION AND PROCEDURAL STATEMENT**

On April 17, 2006, Claimant, Diana Mey, filed her complaint alleging that Respondent, Discover Financial Services LLC (hereinafter "Discover") violated the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 (hereinafter, "TCPA"), by causing to be placed to her home four telemarketing calls in January 2003. The FCC regulations governing the implementation of TCPA are found at 47 C.F.R. § 64.1200. The offending calls were placed on January 17, 24, 28 and 30. Further, the complaint states that, prior to the calls in question, Ms. Mey had requested on October 29, 2002 that Discover place her telephone number on its "Do Not Call" list as provided for in the TCPA. Complainant demands \$27,000 in damages for the four calls, alleging multiple violations of the TCPA in each call. Respondent, Discover, Inc., raises the following defenses:

- 1) The TCPA does not give rise to liability under circumstances in which the caller has:
 - a) established a written policy, available upon demand, for maintaining a do-not-call list;
 - b) trains its personnel "engaged in any aspect of telephone solicitation" in the existence and use of the do-not-call list;
 - c) place any person receiving a marketing call on the do-not-call list if the person so requests as of the time of the request.¹
 - d) provide the person called with the name of the individual caller, the name of the person or entity on whose behalf the call has been made, and a telephone number or address at which the person or entity may be contacted.
- 2) There is no evidence that the first call to Complainant was made on behalf of Discover, Inc.;
- 3) The TCPA does not provide for multiple violations arising out of a single call.

The Evidentiary Hearing: Following discovery, this matter came to hearing in Wheeling, West Virginia on September 14, 2006. Testimony at that hearing was

¹47 C.F.R. §64.1200 e (1) (I) - (iii)

provided by Tony Durst, marketing Manager for Discover. Mr. Durst, with an extensive background in telemarketing is responsible for Discover's telemarketing efforts, and the Claimant, Diana Mey.

Each side offered documentary evidence at the hearing, and such evidence was admitted: Claimant's Exhibits A through S and Respondent's Exhibits A through I. The hearing was not reported.

II. FACTS

The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. To the extent that this recitation differs from any party's position, that is the result of determinations as to credibility, determinations of relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

The parties do not dispute the essential facts surrounding this matter. Four telemarketing calls were placed to the home of Claimant, Diana Mey, on the following dates: January 17, January 24, January 28, and January 30, 2003. In three of those calls, on January 24, January 28 and January 30, the caller stated that the calls were being placed on behalf of Discover. During the period when all of the calls in questions were placed, Discover was engaged in a marketing campaign to attract new card holders, that is, in the parlance of the field, an "acquisition" campaign. The arbitrator concludes that the first call received by the Mey household on January 17, 2003 also was made on behalf of Discover as part of its acquisition campaign. By definition, as a current Discover card holder, Ms. Mey was not the target of any of the calls to her home. The evidence indicates that Discover was attempting to reach a Ms. Susan Meyer in each of the four calls.

At least two different Discover contractors placed calls to Ms. Mey's household. Discover had a robust system for placing telephone numbers on its do-not-call list from among those non-card members who notified them that they did not wish to receive marketing calls. In 2003, it had no system for cross-checking its existing card member do-not-call list against the database of non-card member telephone numbers developed for the acquisition campaign. The acquisition campaign database was developed by a Discover contractor, and under the terms of the Federal Credit Reporting Act, Discover was obligated to make an offer of a Discover card to all of those captured in the database. Each individual in that database purportedly had been pre-screened

Other facts addressed, as appropriate, in the discussion of the parties' legal claims and defenses, below.

III. ANALYSIS

Claimant bears the burden of proof by a preponderance of the evidence. The arbitration is governed by the TCPA and the law of West Virginia. JAMS Streamlined

Arbitration Rules were used in the arbitration of this consumer dispute.

Claimant seeks a recovery of \$27,000 for what she terms Discover's willful violation of the TCPA. For Claimant to reach that recovery amount, she must establish that, pursuant to the TCPA, 1) Discover's violations of the TCPA were "willful," and 2) multiple violations of the TCPA in a given call can result in a penalty assessed for each such violation.

A. The threshold issue of whether any liability attaches to Discover because it had policies in place to prevent calling those on its Do-Not-Call list.

Respondent, Discover, argues that because it had implemented a policy as required by the TCPA, no liability can attach for any of the calls placed to the Mey's residence. The specific regulatory requirements are stated above. Respondent's arguments on this point are unavailing. For Ms. Mey, Discover effectively had no policy in place to prevent the calls to her house, despite the fact that she had registered her new home telephone on Discover's do-not-call list on October 29, 2002. As Discover's witness, Mr. Tony Durst testified, Discover had no policy in place to "scrub," or review the database of potential new card holders against the list of existing card members on the do-not-call list. Put simply, the policy did not protect any card member who had moved recently and who had received a new telephone number from receiving telemarketing calls. Thus, as to that universe of individuals, Discover effectively had no policy at all.

A subsidiary issue on liability is whether, assuming liability, Discover can be penalized for the first call to the Mey residence in addition to the other three calls. Section 227(c)(5) empowers individuals who receive more than one telephone call in violation of the Commission's rules to bring an action in the appropriate state court. The arbitrator finds that the most logical interpretation of the TCPA and implementing regulations is that a second call establishes liability, and that all of the offending calls should then be used to calculate damages.

B. What is the proper quantum for damages

1. The question of "willfulness."

The TCPA provides that a "willful" violation of the Act and its implementing regulations can give rise to a trebling of the damages for each violation. The Federal Communications Commission has adopted a "knew or should have known" standard for establishing whether a violation of the TCPA was willful. The arbitrator finds that at the time of the late 2002 early - 2003 acquisition campaign Discover knew that some percentage of the telephone numbers in the acquisition database might belong to individuals other than those listed in the database. In fact, the evidence indicates that at the time of the campaign, three different individuals were listed as having the Mey's

telephone number (in addition to the Meys). The arbitrator concludes that Discover's failure to take the step of comparing the acquisition database with the database of card members who had requested to be placed on the do-not-call list constitutes a willful violation of the Act.

2. Whether damages should be constructed based on one violation per telephone call or one violation for each failure to comply with the implementing regulations.

Discover argues that it should be penalized, if at all, for three calls placed to the Mey residence. Ms. Mey argues that there were numerous violations in each call, and that Discover should be penalized for each such violation. The arbitrator agrees with Claimant. If Discover's representative had complied with all of the provisions of the Act in the January 17th call, it is unlikely that the latter three calls would have been made at all.

Having found Discover's actions to have been willful, the arbitrator will assess each violation at \$1,500, and finds the following violations for each call as listed below:

January 17, 2003: The arbitrator finds five violations, for a total penalty for the January 17, 2003 call of \$7,500. To wit:

- failure to identify person making call
- failure to identify entity on whose behalf the call was made
- failure to provide contact information
- failure to provide Discover's do-not-call list policy
- failure to provide an opportunity to be placed on the do-not-call list

January 24, 2003: The arbitrator finds four violations for a total penalty for the January 24, 2003 call of \$6,000. Specific violations are:

- failure to identify person making call
- failure to provide contact information
- failure to provide Discover's do-not-call list policy
- failure to provide an opportunity to be placed on the do-not-call list

January 28, 2003: The arbitrator finds three violations for a total penalty for the January 28th call of \$4,500. Specific violations found are:

- failure to provide contact information
- failure to provide Discover's do-not-call list policy
- failure to provide an opportunity to be placed on the do-not-call list²

January 30, 2003: The arbitrator finds one violation for a total penalty for the January

²The caller actually indicated that he would place the number on the do-not-call list but failed to do so. The evidence indicates that Ms. Mey's number was not placed on the do-not-call list until after her discussion with the caller on January 30, 2003.

30th call of \$1,500. The specific violations are:
- failure to provide contact information

FINAL AWARD

Respondent shall pay Claimant, Diana Mey, the sum of \$13,500 for its violations of the TCPA in causing four telephone calls to be placed to her home at a time that she had registered the number on Discover's do-not-call list.

DATED: November 6, 2006



Michael K. Lewis
Arbitrator

²The caller actually indicated that he would place the number on the do-not-call list but failed to do so. The evidence indicates that Ms. Mey's number was not placed on the do-not-call list until after her discussion with the caller on January 30, 2003.

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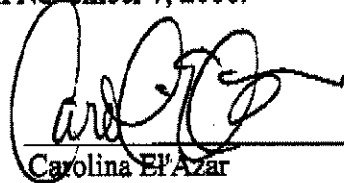
I, Carolina El'Azar , not a party to the within action, hereby declare that on November 7, 2006 I served the attached Final Award on the parties in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Washington, DISTRICT OF COLUMBIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Washington, DISTRICT OF COLUMBIA on November 7, 2006.



Carolina El'Azar