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Lifesaving Texts Survive TCPA Claims

By Mark A. Olthoff, Robert V. Spake, Jr., and Thomas J. Schenkelberg

The United States District Court for the Eastern District of Louisiana recently dismissed TCPA (Telephone Consumer Protection Act) claims filed in a putative class action against the non-profit American Heart Association, which Polsinelli represented in the case. In *Reese v. Anthem Inc., et al.*, the court found that the plaintiff had consented to the text messages she received and that the content of the messages was informational, not promotional.

The holding and result in the case should provide comfort to other organizations, particularly non-profits, and those that assist in funding and branding for text messaging campaigns for non-profits. When the messages relate to the subject of the non-profit program and are not designed to be promotional, then the organization may avoid the exposure of a TCPA action.

The case is significant for several reasons:

- When the plaintiff attended a free CPR class and demonstration, she provided her cell phone number and agreed to receive informational texts related to the program.
- Although the plaintiff did not attach the actual messages to her complaint, the defendants supplied the court with them; because the content of the messages was an essential element of the plaintiff's case, the court had authority and discretion to consider them in the motion to dismiss.
- The content of the text messages was related to the text message program which the plaintiff had agreed to accept.
- The non-profit organization's branding partner and major donor were co-defendants but the court was not swayed that including their names in the text messages sent was designed as an advertisement for insurance.

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Background Of The Case

Plaintiff Reese filed a putative class action to complain about a text message campaign designed to save lives and enhance well-being—specifically, a text message campaign that teaches and supports "hands-only" CPR. The Complaint alleged that Plaintiff received more than 20 text messages but that she had only consented to receive them from the American Heart Association, not its branding partners. Plaintiff sought to certify an uncertain class of persons who allegedly received similar messages. Defendants argued that the humanitarian and informational program—to which Plaintiff consented—complied with the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The Court agreed and dismissed the Plaintiff's Complaint with prejudice.

The Alleged Claims Did Not Violate the TCPA

Plaintiff filed her claims against Defendants under the TCPA which provides a private right of action and permits the recovery of actual losses or $500 per violation, with the potential for trebling of damages if the violation is deemed willful. Plaintiff contended Defendants sent text messages to her cellular telephone using an automatic telephone dialing system, a type of outreach governed by the TCPA. Under the TCPA, such outreach generally requires the prior express consent of the recipient.

The Court found the TCPA expressly permits the text messages at issue because Plaintiff conceded she provided prior express consent to AHA. In the Complaint, Plaintiff stated that she submitted her phone number to the AHA to contact her regarding CPR and other "healthy messaging information." AHA's website for the Hands-Only CPR program also conspicuously features Anthem Foundation's logo, so there can be no credible claim that Plaintiff did not consent to their outreach from Anthem Foundation as well. Further, Plaintiff did not allege that she subsequently revoked this consent.

Numerous courts have ruled that voluntarily providing one's cellular number constitutes prior express consent. An individual gives "prior express consent" to be called or texted at the number provided where she has provided her number to the party calling or texting her, and there is some relation between the communications and the reason for which she provided her number. Under well-settled case law, Plaintiff expressly consented to receive text messages from Defendants when she provided her cellular number and communicated with Defendants regarding CPR opportunities. The text messages here related to the same issues and opportunities for which Plaintiff provided consent, and thus, she had no viable TCPA claim.

In addition, the text messages were not an advertisement or telemarketing because the texts did not promote property, goods, or services for sale. Courts have consistently found that messages such as those sent here do not constitute telemarketing. For example, in *Smith v. Blue Shield of California Life & Health Insurance Co.,* 228 F. Supp.3d 1056 (C.D. Cal. 2017), the plaintiff sued Blue Shield arguing that calls to her cell number constituted telemarketing prohibited by the TCPA. The court determined that the messages simply provided information about insurance plans and encouragement to seek out further information, and thus concluded they were informational and not commercial. *Id.* at 1066. "Evaluating Blue Shield's call with a measure of common sense, the Court must conclude that the call is not telemarketing or advertisement within the meaning of 47 C.F.R. § 64.1200(f)(1), (12)." *Id*. at 1068 (emphasis added); see also *Phillips Randolph Enters., LLC v. Adler-Weiner Research Chicago, Inc.,* 526 F. Supp.2d 851 (N.D. Ill. 2007) (holding that a fax promoting participation in a research study was not an advertisement under the TCPA).

The Court found that Plaintiff provided her cellular number in connection with her attendance and participation at a CPR training event, and the subsequent texts at issue were directly related to and within the scope of her voluntary communications with Defendants. Even the single link for so-called "for-pay CPR courses" texted by the AHA was merely an invitation to obtain more information, and there is no allegation that the AHA conducted or financially benefited from the "for-pay CPR courses." Plaintiff expressly consented

to non-telemarketing texts or calls to that number. The Court found Defendants did not send texts to promote purchase of any specific goods or services. The Defendants did not promote or encourage the purchase, rental, or investment in any of their products, goods, or services. Consequently, the restrictions in the TCPA did not apply.

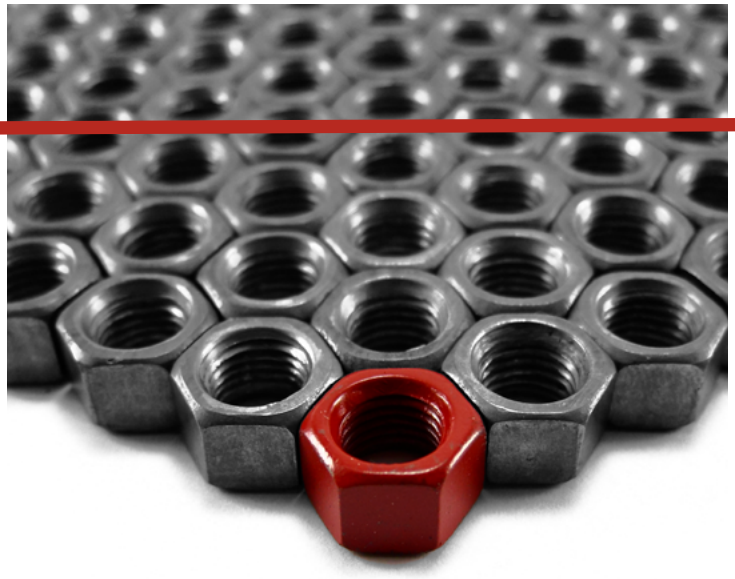
While not expressly considered, the fact that the AHA is a non-profit organization is significant. The Sixth Circuit Court of Appeals recently addressed the TCPA's tax-exempt nonprofit exemption in *Ashland Hospital Corp. v. Service Employees International Union*, 708 F.3d 737 (6th Cir. 2013). There, the plaintiff allegedly received automated calls using prerecorded messages. The defendant, a labor union representing health care and social service workers in several states, moved for dismissal, contending the allegations failed to state a claim under the TCPA, and further contending that the defendant was exempt from liability under the FCC regulation.

In affirming the district court's order of dismissal, the Sixth Circuit specifically addressed the tax-exempt nonprofit exemption in the FCC regulation and found it applicable: "While the robo-call campaign would otherwise constitute an obvious violation of § 227(b)(1)(B), the FCC has exempted calls 'made by or on behalf of a tax-exempt nonprofit organization' . . . from the general ban on artificial or prerecorded messages. The [defendant]'s status as a tax-exempt labor organization under Section 501(c)(5) of the Internal Revenue Code is not in doubt." *Id.* at 744–45 (citation omitted); see also *Fitzhenry v. Indep. Order of Foresters*, No. 2:14–cv–3690–DCN, 2015 WL 3711287 (D.S.C. June 15, 2015) (granting judgment on the pleadings due to defendant's nonprofit tax-exempt status);[1] *Nguyen v. Telefund, Inc.,* No. 13-cv-01607-BAS(WVG), 2014 WL 12167636 (S.D. Cal. Nov. 12, 2014) (granting summary judgment to for-profit entity that made calls on behalf of tax-exempt nonprofit and finding it enjoys the same TCPA exemption); *Wengle v. DialAmerica Marketing, Inc.,* 132 F. Supp.3d 910 (E.D. Mich. 2015) (granting summary judgment to for-profit telemarketer based upon nonprofit exemption). *Spiegel v. Reynolds*, 2017 WL 4535951 (N.D. Ill. Oct. 11, 2017) (same).

Conclusion

While the TCPA is considered by many as a consumer friendly statute, the Court in *Reese* recognized there are limits to its reach. Where a non-profit maintains an informational texting program to which a person has consented, then the organization should be free from the burden of TCPA liability. Nor should liability be extended merely because the non-profit seeks to join up with a branding partner who may share in the costs of the program.

[1] Importantly, the *Fitzhenry* court stated: "As an initial matter, the plain language of the [FCC] regulation seems to apply to any call made by a tax-exempt nonprofit . . . [internal citations omitted] . . . . The exemption at issue here contains no language of limitation indicating it is only applicable to non-commercial calls. It does not distinguish calls made on behalf of nonprofits based on the substance of the calls." 2015 WL 3711287 at *3.



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