COMMENTARY

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IN SHORT

The Situation: A federal court recently weighed in on some of the considerations involved in applying the Telephone Consumer Protection Act's ("TCPA") exemption for charities and the third-party services that conduct fundraising efforts on behalf of charities.

The Result: In granting summary judgment in favor of the defendant, the court applied agency principles and rejected the plaintiff's focus on the percentage of funds of donations that went to the charity.

The Facts

In *Spiegel v. Reynolds et al.*, the plaintiff, Marshall Spiegel, brought a putative class action complaint against Associated Community Services ("ACS"). Spiegel alleged that ACS violated the TCPA by calling him using prerecorded voices in its solicitations and because Spiegel's name appeared on the national do-not-call registry.

ACS is a registered professional fundraiser that had a longstanding contractual relationship with a tax-exempt charity called the Breast Cancer Society ("Society"). As part of that relationship:

- ACS was to conduct a public relations and solicitation campaign "on behalf of" the Society;
- All solicitation campaigns were to be conducted in the Society's name using materials that the Society approved; and
- The Society exercised control over fundraising scripts and informational materials that ACS distributed.

The Society suggested edits to ACS-proposed fundraising scripts. ACS did not use scripts that the Society had not reviewed and approved. During the calls, ACS emphasized to call recipients that they were donating to the Society and immediately informed donors that ACS was a professional fundraiser calling on the Society's behalf. (The Society contracted with an ACS-related entity for the processing of donations and follow-up correspondence with donors, and when donors contributed money, the funds were deposited into an account under the Society's exclusive custody and control.) The calls at issue were made using pre-recorded voices to deliver the scripted messages.

> Based on the contractual language, as well as the actual conduct of the parties, the court determined that ACS made the calls on 'behalf of' the Society, and thus the exemption applied.

The Law

The TCPA's regulations prohibit "telephone solicitation[s]" to residential telephone subscribers whose phone numbers appear on the national do-not-call registry. A "telephone solicitation," according to the relevant statute, is "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." Calls placed "[b]y or on behalf of" tax-exempt nonprofits are not considered telephone solicitations.

The court applied agency law to determine the applicability of the nonprofit exemption under the TCPA. Based on the contractual language, as well as the actual conduct of the parties, the court determined that ACS made the calls "on behalf of" the Society, and thus the exemption applied.

On summary judgment, Spiegel dropped his prior arguments that the charitable exemption could not apply because ACS retained the majority of the funds collected as compensation for its services. The court noted that Spiegel's "retreat is sensible: in addition to being a poor legal standard, interpreting the nonprofit exemption to include a percentage-of funds threshold would likely cause the TCPA to run afoul of the First Amendment," citing prior decisions relating to the percentage of funds that went to charities in other contexts. "The fact ACS kept the lion's share of the money also does not help Siegel," according to the court, and "[t]he essence of the nonprofit exemption is the recognition that some charities find it advantageous to contract out their fundraising efforts." The decision rejected the notion that courts should scrutinize nonprofits' tax-exempt status, "a job that Congress assigned to Congress, not the courts."

The court also looked to various state laws to assess whether the fundraising calls were "solicitations" under the TCPA's definition of a call "encouraging the purchase or rental of, or investment in, property, goods, or services." It concluded they were not.

THREE KEY TAKEAWAYS

1. The *Spiegel* decision supports the fundraising efforts of tax-exempt nonprofit organizations and their fundraising agents, depending on the specific facts.
2. Tax-exempt nonprofit organizations should review agreements with their fundraising agents for indemnification and agency-related issues to ensure that their goals align with the risks associated with potential TCPA or other claims involved in fundraising efforts.
3. Tax-exempt nonprofit organizations should consult relevant state consumer protection laws as well, including whether the laws' definitions encompass charitable donations or solicitations.

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