

ARTICLES

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IN LANDMARK DECISION, TCPA'S NONPROFIT EXEMPTION SURVIVES FEDERAL COURT CHALLENGE INTACT

In a recent decision, *Spiegel v. Reynolds*, No. 1:15-cv-08504, 2017 WL 4535951 (N.D. Ill. Oct. 11, 2017), the U.S. District Court for the Northern District of Illinois (Court) granted summary judgment in favor of a professional fundraiser who had been sued under the federal Telephone Consumer Protection Act (TCPA), dismissing the plaintiff's case in full. The decision—only the second federal court opinion analyzing the TCPA's nonprofit exemption—represents not only a victory for paid charitable solicitors, but useful guidance for structuring the relationship between nonprofits and their paid fundraisers.

TCPA's Applicability to Nonprofits and Their Paid Fundraisers

Congress enacted the TCPA in 1991, and delegated to the Federal Communications Commission (FCC) the power to make rules and regulations necessary to implement the law. Both the law's words (as written by Congress) and the implementing rules (as drafted by the FCC) make one thing clear: the federal government's main goal in passing the TCPA was protecting consumers from commercial telemarketing activity, more so than from nonprofit-centered calls. Congress and the FCC intentionally distinguished "telephone solicitations" (calls made by for-profit marketers seeking to induce a sale, rental, or investment in goods, services, or property) from calls lacking a commercial purpose or seeking a charitable donation.

Thus, under the TCPA, a call made "by" a tax-exempt nonprofit organization is not a telephone solicitation. The FCC's regulations broaden the exemption to include calls made "by or on behalf of" a tax-exempt nonprofit organization, because the FCC recognized that charities and other nonprofit entities with limited resources, expertise, or infrastructure might find it advantageous to outsource their fundraising efforts to third-party professionals.

Spiegel v. Reynolds: Professional Plaintiff Seeks to Narrow the Nonprofit Exemption

In *Spiegel*, the plaintiff claimed that several fundraising calls were placed to his residential telephone number in 2013 and 2014, while his number was on the national Do-Not-Call list. He sued the principals of the charity, The Breast Cancer Society (Society), as well as the Society's paid fundraiser, Associated Community Services, Inc. (ACS), alleging that such fundraising calls to him and other U.S. residents violated the TCPA.

The plaintiff was an experienced TCPA litigant, and he knew that calls made by or for nonprofit organizations are beyond the law's do-not-call reach. To get around this, he asserted that the Society was not a legitimate tax-exempt nonprofit organization, but rather was a "sham" charity (based on an unrelated federal investigation of the organization's governance and operations). At the motion to dismiss stage, the Court rejected the plaintiff's "sham charity" theory; the Society had been duly recognized as exempt from federal taxation by the Internal Revenue Service (IRS), and the Court declined an invitation to second-guess the IRS. The Court, however, did allow limited discovery on the plaintiff's alternative legal theory: that, because ACS retained a majority of the gross revenues from donors' contributions to the Society, ACS was not truly acting "on behalf of" its charity client. The fundraiser—the plaintiff posited—was really in business for itself and was not the Society's agent, thus depriving it of the nonprofit exemption's protection from TCPA liability.

The Court Declines to Narrow the Nonprofit Exemption—Grants Victory to Charity's Professional Fundraiser

In a sweeping victory in an area where, as the Court noted, "case law applying the TCPA nonprofit exemption is sparse," the Court awarded summary judgment to ACS, the defendant-professional fundraiser. The Court first concluded that ACS acted in the Society's interest and as the Society's agent and, as such, was exempt from TCPA liability for the calls. The Court specifically focused on the

AUTHORS

Eric S. Berman
Daniel S. Blynn

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contractual arrangement between ACS and the Society and how that arrangement was executed between the parties. Under the arrangement, the Society was able to exercise control over the manner of ACS's solicitations by giving it the right to review, modify, and veto the solicitation scripts. Moreover, the Society controlled the flow of cash from the fundraising campaign, and, as the Court explained, "the actual conduct of the parties reflect[ed] a genuine agency relationship."

The Court further concluded that ACS also merited summary judgment on the ground that the applicability of the TCPA's do-not-call provisions to "telephone solicitations" does not extend to requests for donations, because such donation calls do not "encourage[e] the purchase or rental of, or investment in, property, goods, or services"—the definition of telephone solicitation. This is true even if the charity will eventually use some portion of the donations it receives to purchase goods or services for charitable recipients.

Key Takeaways for Nonprofits and Their Fundraisers

While nonprofits are increasingly using innovative fundraising methods, many continue to seek financial support and disseminate information about their charitable mission via telephone. For those that do—either directly or by contracting with a professional fundraiser—the *Spiegel* ruling provides some useful lessons:

- **"Tax-Exempt" Means "Tax-Exempt."** Neither the TCPA nor the FCC's regulations define what is a tax-exempt, nonprofit organization. The *Spiegel* court, quite reasonably, deferred to the IRS. The plaintiff repeatedly referred to a joint Federal Trade Commission (FTC)-state attorneys general investigation of The Breast Cancer Society, and coopted the federal government's description of the Society as a "sham" charity. However, the Society had been designated as tax-exempt under Section 501(c)(3) of the Internal Revenue Code, and the Court refused to second-guess the IRS's determination, calling it "the only thing that matters for purposes of the TCPA."
- **Money Isn't Everything.** It was undisputed that ACS retained the majority of donors' contributions to the Society as payment for its fundraising services. *Spiegel* emphasized this fact and argued that the nonprofit exemption should apply only when the charity retains the majority of money donated to it. The Court strongly disagreed, calling the plaintiff's proposed rule of thumb a poor legal standard that would raise serious concerns under the First Amendment.
- **Traditional Agency Principles Control.** To benefit from the TCPA's nonprofit exemption, charities and their fundraisers should operate under a business relationship that evidences the fundraiser's status as the charity's agent. In other words, the fundraiser must act in the charity's interest and on its behalf. In *Spiegel*, the parties' contracts made clear that ACS acted as the Society's agent. The Society had the right to review, modify, and veto proposed solicitation materials. Telemarketing scripts identified ACS to donors as a paid fundraiser calling at the Society's behest. Donors' contributions were deposited into bank accounts under the Society's—not ACS's—control. The Court found that a genuine agency relationship existed here between charity and fundraiser, even though the fundraising contracts compensated the fundraiser generously.
- **Don't Forget about State Law.** *Spiegel*'s complaint also was dismissed because the charitable fundraising calls he allegedly received were not "telephone solicitations" under the TCPA. Charities and fundraisers should note, however, that states enforce their own telemarketing laws, and that some states include charitable donations in their definitions of "telephone solicitation."

Future challenges to the scope of the TCPA's nonprofit exemption may occur. In the meantime, charities and paid fundraisers should not lose sight of the fact that federal and state charity regulators—and charity watchdog groups—closely scrutinize (and are often suspicious of) relationships that appear to be disproportionately advantageous to the fundraiser. To navigate the complex intersection of the TCPA, state telemarketing laws, state charitable solicitation laws, the FTC's Telemarketing Sales Rule, and the federal tax code, charities and paid fundraisers would be well served to consult with experienced counsel in these areas.

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The authors served as lead counsel to Associated Community Services in the Spiegel litigation.