Published on *The National Law Review* https://natlawreview.com

Indiana Court Grants Summary Judgment in Favor of Defendant, Holding that Simply Terminating Health Insurance Is Not Revocation of Prior Express Consent Under the TCPA

Article By:

Womble Bond Dickinson (US), LLP

An Indiana couple recently discovered that cancelling your healthcare insurance plan means only that: the plan is terminated. In *Wilkes v. Caresource Mgmt. Group Co*. Case No. 4:16-CV-38 JVB, 2018 U.S. Dist. LEXIS 167107, the Indiana court held that simply canceling your insurance coverage is not enough to revoke prior express consent to be called under the TCPA.

In *Wilke*s, husband and wife Plaintiffs applied for a healthcare plan under the Affordable Health Care Act through the Health Insurance Marketplace at healthcare.gov ("Marketplace") and provided the wife's cell phone number as their contact information. The Marketplace included a disclosure that applicant's information may be shared with insurance companies that issue the applicant's plan.

When consumers select a plan and submit their application to the Marketplace, their contact information and applications are reduced to an extract file, which is then sent to the insurance provider. Plaintiffs received coverage for 2015 from Defendant Caresource through the Marketplace. In August 2015, Plaintiffs spoke to a Caresource representative seeking to add their child to the plan. During the call, the wife provided both hers and her husband's telephone number to Defendant Caresource. Plaintiffs then made their final payment in November 2015 and as mandated by the Affordable Care Act, their insurance policy was automatically renewed for 2016.

In January 2016, the wife called Defendant seeking to terminate Plaintiffs' insurance but was instructed to cancel it through the Marketplace. Plaintiffs then did so and Defendant received the extract file terminating Plaintiffs' insurance effective February 12, 2016, but continued processing claims for Plaintiffs through May 2016.

Defendant Caresource had a contract with co-Defendant Eliza Corporation to place automated "welcome calls," which were placed to 'share information with Indiana Marketplace members regarding their healthcare benefits and assist them in accessing health care providers and wellness programs.' *Wilkes* at 5. Five welcome calls were mistakenly placed to the wife's cell phone well after Plaintiffs cancelled their coverage on February 12, 2016.

On April 27, 2016, the wife called Defendant inquiring about the automated welcome calls and Defendant offered to put her on a do-not-call list – which the wife accepted. No further calls were

made to Plaintiffs yet Plaintiffs still alleged that the five welcome calls were made in violation of the TCPA.

In granting Defendant's motion for summary judgment and finding the issues presented as "simple," the court held that Defendant had consent to place the welcome calls and that the prior express consent was not revoked simply by Plaintiffs terminating their health insurance.

The court, citing *Blow v. Bijora, Inc.* 855 F.3d 793 (7th. Cir. 2017) and *Van Patten v. Vertical Fitness* 847 F.3d 1037 (9th Cir. 2017), noted that "[a]utomated calls must be 'reasonably related to the purpose for which a person provides their telephone number" and "[a]n effective consent is one that relates to the same subject matter as covered by the challenged calls." *Wilkes* at 6.

On this basis, the court found that since Plaintiffs provided the wife's number on their application for insurance, which was then transmitted to Defendants, Plaintiffs gave express consent to be called. The court further noted that though the welcome calls were mistakenly made to Plaintiffs after they terminated their insurance, the content of the messages – "health care benefits, providers, and wellness programs – were reasonably related to the insurance coverage for which Plaintiffs originally provided their cell phone number." *Id.* at 7-8.

The next issue for the court was whether Plaintiffs' termination of their insurance revoked their consent to be contacted by the Defendants. The court found the Ninth Circuit Van Patten decision to be instructive. In Van Patten, the court found that the cancellation of a gym membership did not sufficiently communicate "a desire to no longer be contacted" and held that "[r]evocation of consent must be clearly made and express a desire not to be called or texted." *Id.* at 8.

The court found that the termination of Plaintiffs' insurance through the Marketplace on February 12, 2016, "was not sufficient to revoke consent to be called under the TCPA." Id. Instead, the court found the wife "plainly and unequivocally" told Defendants she no longer wished to be called on April 27, 2016 – when she was placed on the do not call list. Therefore, the court found that the welcome calls were not in violation of the TCPA.

So under *Wilkes*, the requirement that revocation must be clearly made and express a desire not to be called requires just that – a clear expression not to be called.

National Law Review, Volume VIII, Number 276