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

"The Results Are In – You DID Consent To These Faxed Advertisements!" – TCPA Claim Against Paternity Testing Facility Fails Based On Medical Center's Decade-Old Prior Express Consent

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How long does prior express consent last? Well, TCPAWorld, you are in luck – according to the Northern District of Illinois, consent can last for around a decade, at least. In *Advantage Healthcare, Ltd. v. DNA Diagnostics Ctr., Inc.*, 2019 U.S. Dist. LEXIS 119162 (N.D. Ill. July 17, 2019), a fax-advertisement case, the court considered whether a medical center's prior express consent to receive faxed advertisements from a paternity testing company, which was first obtained in 2005, remained effective as against advertisements later sent by the same company in 2017. Because the medical center did not "clearly" revoke its consent to receive future faxed advertisements from the paternity company after providing initial consent in 2005, its years-old prior express consent remained valid in 2017, and its TCPA claims failed.

Into the nitty-gritty: DNA Diagnostics is a medical laboratory and specializes in paternity testing. Advantage Healthcare is a medical center. In 2005, DNA Diagnostics called Advantage Healthcare "to build rapport . . . with the goal of getting referrals for paternity testing services." During this 2005 phone call, DNA Diagnostics asked if it could fax information related to its services to Advantage Healthcare. A representative of Advantage Healthcare agreed, and provided the company's fax number to DNA Diagnostics, which "immediately faxed a flyer" advertising its services. In 2007, during a follow-up call, Advantage Healthcare again agreed to receive a fax of "updated materials, including materials in Spanish." In 2008, however, DNA Diagnostics sought permission to send updated materials again, but this time Advantage Healthcare declined – stating "Thank you but we have some."

Apparently, the marketing ploy worked – Advantage Healthcare did make referrals to DNA Diagnostics. Pleased with the result, DNA Diagnostics sent additional faxed advertisements to Advantage Healthcare in 2017. This time, however, Advantage Healthcare took issue with the faxes and sued under the TCPA, claiming that DNA Diagnostics lacked prior express consent to send the 2017 faxes. The court, however, disagreed.

On summary judgment, the court found it "undisputed that Advantage Healthcare gave DNA Diagnostics permission to send a fax on April 5, 2005." While Advantage Healthcare argued that the

2005 consent was limited to “a single fax,” the court rejected that argument because it contradicted the FCC’s finding that “[e]xpress permission need only be secured once.” Moreover, the court was persuaded that, because the 2005 consent related to faxes advertising paternity testing services, such consent remained effective respecting the 2017 faxes, which **also** advertised DNA Diagnostic’s paternity testing services.

The court also rejected Advantage Healthcare’s argument that its consent was “revoked” in 2008, when one of its representatives informed DNA Diagnostics that it did not need updated materials by stating “Thank you but we have some.” According to the court, “[t]his response was far from a revocation of its prior express consent” because the statement did not “clearly expresses a desire not to receive further communication[s].”

So, there we have it. A grant of prior express consent, unlimited in time, survives until it is “clearly” revoked, at least in the fax advertising space. And as long as the later-faxed advertisements concern substantially the same subject matter as the advertisements for which consent was originally obtained, a court is likely to find that the consent remains viable. While the court did note that “such a large lapse of time in between the last phone call and most recent faxes (here, from 2008 until 2017) could potentially raise a question of implied revocation,” the parties did not address the issue of “stale consent” and, therefore, the court did not opine upon it.

Until next time.

National Law Review, Volume IX, Number 200