

JOE SHIELDS

VS.

LONE STAR UTILITY SAVERS, INC.  
D/B/A HOME IMPROVEMENTS OF TEXAS;  
D/B/A MIRACLE MORTGAGE SERVICES;  
AND D/B/A KINGDOM BUILDERS AND  
DONALD STAFFORD BORDEN,  
INDIVIDUALLY AND D/B/A MORTGAGE  
MIRACLES

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IN THE COUNTY CIVIL

COURT AT LAW NO. 1

OF HARRIS COUNTY, TEXAS

**PLAINTIFF'S BRIEF IN SUPPORT OF REQUEST  
FOR INJUNCTIVE RELIEF**

1. This is an action by the plaintiff for damages and injunctive relief arising from a number of automatically dialed, usually prerecorded but some live telephone solicitations placed by Lone Star Utility Savers d/b/a Home Improvements of Texas; d/b/a Miracle Mortgage Services; and d/b/a Kingdom Builders and Donald Stafford Borden, individually and d/b/a Mortgage Miracles.

2. The Telephone Consumer Protection Act (TCPA) (47 U.S.C. §227) is a remedial, private attorney general statute that confers upon consumers the substantive right to be free of this abusive practice that creates a nuisance in their homes. Under the statute, consumers, such as the plaintiff here, are entitled as a matter of law to seek and obtain a judgment for statutory damages and injunctive relief against violators and those who benefit from such violations.

**PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF AS A MATTER OF LAW**

3. The TCPA specifically provides for a private right of action in state court to obtain an injunction to prevent further violations of the TCPA or the FCC regulations promulgated thereunder. 47 U.S.C. §227(b)(3)(A) and 47 U.S.C. §227(c)(5)(A). As the right to obtain an injunction is specifically provided for by statute, and the injunctive relief sought simply requires

the cessation of clearly illegal activity under state and federal law, this Court should, as a matter of law, grant plaintiff's request for a temporary and permanent injunction. *Green v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex.App.--Dallas 1994, no writ) (when facts conclusively show that party is violating substantive law, trial court should enjoin violation and in such case there is no discretion to be exercised). In such a situation, the temporary injunction should be granted with a very minimal bond if any at all. TEX. R. CIV. P. 684.

4. It is certainly true that, as a general rule, a plaintiff seeking an injunction must show that he or she has no adequate remedy at law and that the failure to grant injunctive relief will result in irreparable injury. However, when, as here, the statute that specifically authorizes an injunction says nothing about an adequate remedy at law or the requirement that there be an irreparable injury or where the injunction is sought to prohibit acts in violation of a statute, those requirements are eliminated. See *United States v. Federal Deposit Ins. Corp.*, 881 F.2d 207, 210 (5th Cir. 1989) (if a statutory violation is involved and the statute by necessary and inescapable inference requires injunctive relief, movant is not required to prove injury and public interest factors necessary to obtain preliminary injunction); *Bexar County v. North East Independent School District*, 802 S.W.2d 854 (Tex.App.--San Antonio 1990, writ denied) (act in violation of statute may be enjoined without showing that legal remedy is inadequate); *Groff v. Bird-in-Hand Turnpike Co.*, 128 Pa. 621, 18 A. 431, 432 (1889) (the rule as to enjoining only irreparable injuries has no application to acts entirely without authority); *American Fruit Growers v. United States*, 105 F.2d 722, 725 (9th Cir. 1939) (pleading of irreparable injury or no adequate remedy at law is not required where Congress apparently authorized an injunction upon a showing of violation alone).

5. In addition, while as a general rule a plaintiff must suffer special injury not suffered by the public generally in order to have a justiciable interest sufficient to maintain a suit for an

injunction, that is not so if the statute in question specifically authorizes injunctive relief without such a requirement. See *McKinney v. Blankenship*, 154 Tex. 632, 282 S.W.2d 691 (1955). Congress has the power to permit the issuance of an injunction without the various showings ordinarily required by equity tribunals. *Fleming v. Salem Box Co.*, 38 F.Supp. 997 (D. Or.) (Congress has the power to permit injunctions to be issued without the showings ordinarily required by equity tribunals).

6. In addition, a temporary injunction is properly issued where the relief sought changes the status quo if the injunction merely requires that the statute be enforced or obeyed. See *Wilson v. United Farm Workers of America, AFL-CIO*, 774 S.W.2d 760, 763 (Tex.App.--Corpus Christi 1989, no writ) (a temporary injunction which changes the status quo is properly issued when the only relief granted allows a statute to be obeyed); *United States v. Shafer*, 132 F.Supp. 659, 669 (D. Md. 1955) aff'd 229 F.2d 124 (1956) (when action is taken to enforce a statute or to make effective a declared policy of Congress, the standard of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief); *Rubenstein & Son Produce v. State*, 272 S.W.2d 613, 620 (Tex.Civ.App.--Dallas 1954, writ ref'd n.r.e.) (injunction is properly granted if right to injunction is granted by statute).

### **SCOPE OF INJUNCTIVE RELIEF**

7. The only question that remains regarding the issuance of an injunction in this case is whether defendants should be enjoined from initiating any further unsolicited prerecorded telemarketing calls, or should defendants only be enjoined from initiating further unsolicited prerecorded telemarketing calls to the plaintiff?

8. Like many other consumer protection statutes, the TCPA expressly provides for injunctive relief and relies principally on private citizen enforcement. See *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998) ("private enforcement provision ... puts teeth into the statute ..."). The Texas courts have also recognized the principle of a private attorney

general. See *Dillard Department Stores, Inc. v. Owens*, 951 S.W.2d 915, 918 (Tex.App.--Corpus Christi 1997, no writ) (in passing the Truth In Lending Act, Congress intended to create a system of private attorneys general who will be able to aid the effective enforcement of the Act); *Holguin v. Yeleta Del Sur Pueblo*, 954 S.W.2d 843, 852 (Tex.App.--El Paso 1997, writ denied) (in passing the Texas Dram Shop Act, the legislature intended for private plaintiffs to serve a private attorneys general function); *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 229 (Tex. 1990) (the doctrine of alter ego liability is designed to give incentives to those using the corporate form to follow state laws concerning corporate formalities by allowing a claimant to recover as a sort of private attorney general).

9. Few courts have granted the injunctive relief authorized by the TCPA. The only reported case where a private plaintiff has specifically sought and was granted preliminary injunctive relief was in a Georgia state court which granted plaintiff's request and issued "a temporary restraining order enjoining Hooters from sending further advertisements by facsimile." *Nicholson v. Hooters of Augusta*, 136 F.3d 1287, 1288 (11th Cir. 1998) (reciting the history of the case in the courts below).

10. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), the United States Supreme Court noted that when a plaintiff bring an action under the Civil Rights Act and obtains an injunction, he does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority. The Supreme Court has also held that it and other federal courts have repeatedly held that individual litigants, acting as private attorneys general, have standing as "representatives of the public interest." *Flast v. Cohen*, 392 U.S. 83, 120 (1968). The court in *Red Bull Ass'n v. Best Western Int'l*, 686 F.Supp. 447, 451 (S.D. N.Y. 1988) noted in the context of the fair housing law, that "the person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is ... the whole community." See, also, *Camenisch v. University of Texas*,

616 F.2d 127, 130-131 (5th Cir. 1980) (Rehabilitation Act [29 U.S.C. §794] confers private individual the right of action to enforce the Act through injunctive relief). See, also, *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F.Supp. 198, 211 (S.D. Tex. 1982) ("It is well settled under Texas common law that individuals have standing to seek enforcement of public statutes ... if the right to sue is specifically conferred by statute, ..." [citing *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966) and *San Antonio v. Stumberg*, 70 Tex. 366, 7 S.W. 754, 755 (Tex. 1888); among others]).

11. This same philosophy applies equally to the TCPA. It is not just the named plaintiff in this case that has suffered at the hand of defendants' continued non-consensual telephone advertising transmissions. Undoubtedly hundreds if not thousands of consumers in Texas have been and will continue to be abused by defendants' unlawful telemarketing practices unless and until the defendants are compelled to stop. The defendants are clearly undissuaded from this course of continued conduct as shown by the fact that they continue their unlawful transmissions after being made aware of the applicable federal and state laws. See, for example, *Dallas County v. Sweitzer*, 881 S.W.2d 757 (Tex.App.--Dallas 1994, writ denied); *Corpus Christi v. Gilley*, 379 S.W.2d 84 (Tex.Civ.App.--Corpus Christi 1964, writ ref'd n.r.e.).

#### **DISCRETION TO FASHION APPROPRIATE INJUNCTIVE RELIEF**

12. It is fundamental that every court has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. TEX. GOV'T CODE §21.001; *Greiner v. Jameson*, 865 S.W.2d 493, 498-99 (Tex.App.--Dallas 1993, writ denied) (court may enter any orders necessary or proper in aid of its jurisdiction).

13. Even if the relief benefits the public much more than the individual, who the primary beneficiary is is irrelevant:

"Congress often takes advantage of individual incentives to advance public policy, relying upon 'private attorneys general' to secure enforcement of public rights without the need to establish an independent enforcement bureaucracy. As long as the interests of individual plaintiffs coincide with those of the public, it does not matter whether Congress intended primarily to benefit

the individual or primarily to benefit the public.” *Evans v. Jeff D.*, 475 U.S.717, 752, note 4 (1986).

14. Defendants do not have any right to engage in conduct that clearly violates the TCPA. With that in mind, defendants deserve to have the plug pulled on their illegal telemarketing nuisance. This Court has the discretion, and the obligation, to fashion the relief to address the violative pattern of conduct and protect all citizens from defendants’ activities.

15. Even without considering the private attorney general aspect well settled in the law, the named plaintiff is entitled to the injunctive relief for his own benefit. The only way to protect the plaintiff from the rampaging dialing of the defendants is to prohibit the defendants from initiating their illegal telemarketing calls to any telephone number which defendants do not have express prior consent to call. This is the only sufficient way to properly and completely protect the plaintiff in this case. The plaintiff here is prosecuting this matter in his own name and asks for that relief to protect himself, no matter what telephone number he has or may acquire in the future. Furthermore, plaintiff should not be required to disclose his unpublished telephone numbers in order to facilitate defendants’ cessation of their illegal acts with regard to the plaintiff while they merrily blast away at all other telephone numbers. The fact that the public may benefit collaterally is a militating factor in favor of the relief sought, not a ground on which it is premised. It is well settled that an injunction is an appropriate means for the enforcement of an Act of Congress when it is in the public interest. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *Virginia R. Co. v. System Federation No. 40*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937).

16. Put another way, if a man lives downstream from a polluter and he successfully enjoins the polluter from continuing to pollute the water supply, the fact that the man’s unnamed neighbors also benefit from such an injunction does not make the remedy granted to the individual plaintiff improper. “That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protection such rights. ‘Courts of

equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” *Scripps-Howard Radio v. Federal Communications Comm’n*, 316 U.S. 4, 14-15, 62 S.Ct. 875, 882, 86 L.Ed. 1229 (1942), citing *Virginian Ry. v. System Federation*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937).

17. However, the injunctive relief granted must be explicit and may not simply state words to the effect that the enjoined party must follow the statute. See, for example, *City of Wichita Falls v. Jensen*, 221 S.W.2d 1015, 1015-16 (Tex.Civ.App.--Fort Worth 1949, no writ) (order enjoining city from discharging police chief by any means other than as set out in statutes was unenforceable because of indefiniteness; order must apprise defendant what he is required to do or refrain from doing).

### CONCLUSION

18. While certainly difficult to quantify, illegal telemarketing calls, such as those initiated by the defendants, are certainly injurious to the plaintiff as well as to all consumers throughout the state. Defendants are engaged in a massive unlawful campaign, creating a nuisance in thousands of homes that cannot be undone, trampling on consumers’ legally guaranteed rights to be free of such nuisance under both federal and state law. The public’s annoyance at these repeated and intrusive calls was of paramount importance to the Congress in drafting the Act:

The Congress finds that ... [t]he use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques. ... Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers. ... Banning such automated or prerecorded telephone calls to the home ... is the only effective means of protecting telephone consumers from this nuisance and privacy invasion. Telephone Consumer Protection Act of 1991, Congressional Statement of Findings, Section 2 of Pub. L. 102-243 (emphasis added).

19. Defendants will suffer no undue hardship by the entry of an injunction since defendants have no right to engage in unlawful conduct or unfair trade practices in the State of Texas or to collect money as a result of such conduct. Further, defendants have no right to unjustly benefit from current or prior unlawful conduct or unfair trade practices. In determining the right to an injunction where the acts sought to be enjoined are clear violations of legally guaranteed rights, there is no balancing of conveniences necessary.

20. Accordingly, plaintiff respectfully suggests that, as a matter of law, this Court should issue an order temporarily and, after trial, permanently, enjoining defendants from initiating further telemarketing calls in violation of the TCPA and for all other relief this Court deems appropriate.

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**KENNETH C. KAYE**  
Attorney at Law  
1101 West Main Street, Suite P  
League City, Texas 77573  
(281) 332-3508  
FAX NO. (281) 332-4526  
BAR NO. 11124000  
ATTORNEY FOR PLAINTIFF