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## Second Circuit Holds That the TCPA Does Not Allow a Consumer to Unilaterally Revoke Consent to Be Called That Is Part of an Executed Contract

In *Reyes v. Lincoln Automotive Financial Services*, the Second Circuit was asked to address whether the Telephone Consumer Protection Act (“TCPA”) “permits a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.” 861 F.3d 51 (2d Cir. 2017). The court held the TCPA does *not* allow revocation of consent in these narrow circumstances.

Among other restrictions, the TCPA, 47 U.S.C. § 227, prohibits any person from making any non-emergency call to a cellular phone using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice without the called party’s prior express consent. Despite this restriction, the TCPA is silent on whether a party may revoke consent it has previously provided. Generally speaking, the majority of courts and the Federal Communications Commission (“FCC”) (which has rulemaking authority over the TCPA) have concluded that a person “may revoke consent at any time and through any reasonable means,” and therefore, calls made after revocation of consent are a violation of the TCPA.

In *Reyes*, the plaintiff leased a car financed by Lincoln. In his lease application, the plaintiff provided several personal details, including his cellular number. The lease itself contained a number of provisions to which the plaintiff assented, including one provision that permitted Lincoln to contact the plaintiff’s cell phone using an ATDS or artificial or prerecorded voice. The plaintiff eventually stopped making his required payments. As a result, Lincoln called the plaintiff repeatedly using a prerecorded message in an attempt to cure his delinquency.

The plaintiff responded by filing a complaint against Lincoln in the Eastern District of New York, alleging violations of the TCPA and seeking \$720,000 in damages. The plaintiff asserted that Lincoln continued to call him even after he revoked his consent to be called on his cell phone. The district court granted summary judgment to Lincoln, holding that (1) the plaintiff had failed to produce sufficient evidence from which a reasonable jury could conclude that he had ever revoked his consent to be contacted by Lincoln, and (2) that, in any event, the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted by telephone. The plaintiff appealed.

On appeal, the Second Circuit held that (1) the plaintiff did introduce sufficient evidence from which a jury could conclude that he revoked his consent, but that (2) the TCPA does not permit a consumer to revoke his or her consent to be called when that consent forms part of a bargained-for exchange. Therefore, summary judgment in favor of Lincoln was appropriate.

In reaching its conclusion that the plaintiff could not revoke consent, the Second Circuit turned to common law contract principles. Given the TCPA’s silence as to whether a party that has consented can subsequently revoke that consent, the court reasoned “[t]he text of the TCPA evidences no intent to deviate from common law rules in defining ‘consent[.]’” Consent, according to the court, “is not always revocable under the common law.” Drawing a distinction between tort and contract law, the court stated that under tort law “‘consent’ is generally defined as a gratuitous action,” and such consent, therefore, can typically be revoked. On this basis, the Second Circuit

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attempted to distinguish two federal circuit court opinions—*Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3d Cir. 2013) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)—and the FCC's 2015 Omnibus Declaratory Ruling and Order on the TCPA. These cases and the FCC order concluded that prior express consent *is* revocable under the TCPA. The Second Circuit, however, interpreted the cases and the FCC ruling narrowly, stating the “courts in those cases found, and the 2015 FCC ruling confirmed, that consent of this kind, which is not given in exchange for any consideration, and which is not incorporated into a binding legal agreement, may be revoked by the consenting party at any time.”

In contrast, the court found the plaintiff's “consent to be contacted by telephone, however, was not provided gratuitously; it was included as an express provision of a contract to lease an automobile from Lincoln.” According to the court, in such circumstances, “consent” is not revocable. The court reasoned that “[i]t is black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of a counterparty” and that interpreting the TCPA's definition of “consent” to permit unilateral revocation would permit one party to do just that. The Second Circuit concluded the opinion by noting it is “sensitive to the argument that businesses may undermine the effectiveness of the TCPA by inserting ‘consent’ clauses . . . into standard sales contracts, thereby making revocation impossible in many instances[,]” but that such an issue would be for Congress to resolve through amendment.

### **Takeaways:**

- The *Reyes* holding is very narrow and is limited only to TCPA prior express consent that is included in an executed contract—i.e., as part of a bargained-for exchange. For example, under *Reyes*, TCPA consent included in a loan contract or in a credit card agreement may not be revocable. But any consent obtained by a company during a call with a consumer to service an existing account, or any consent obtained through a consumer accessing an existing account online, would likely be revocable under *Reyes*.
- Companies that interface with consumers should consider including conspicuous TCPA prior express consent language in all consumer contracts. If the company intends to make calls or texts to a consumer that contain advertisements or marketing of products or services, the consent obtained must comply with the FCC's specific requirements for obtaining prior express *written* consent to make telemarketing calls or texts.
- Courts outside of the Second Circuit may not follow *Reyes* and bar unilateral revocation of contractual TCPA consent. Specifically, there is a fair likelihood that a court would not view the 2015 FCC order (and *Gager* and *Osorio*) as narrowly as the Second Circuit. Nothing in the 2015 FCC order expressly limited the ruling to non-contractual consent. Moreover, in *Gager*, the Third Circuit expressly rejected the defendant's argument that principles of contract law should bar plaintiff's revocation of consent.
- *Reyes* does not address the frequent situation where a company attempts to call a number provided by the consumer in a contract but that number has—unbeknownst to the company—been reassigned to a different person. In that circumstance, the company is not liable for the first call, but would be liable for all subsequent autodialed and robocalls to the reassigned number.

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- Finally, *Reyes* did **not** hold that the FCC exceeded its rulemaking authority in concluding that consent may be revoked. Instead, the Second Circuit narrowly interpreted the 2015 order, finding that the FCC has not addressed the contractual consent issue. Therefore, the FCC could later clarify the 2015 order and rule that consent can always be revoked under the TCPA.

## Conclusion

While *Reyes* does provide some protection to callers in the narrow circumstance where a consumer provides his or her prior express consent to receive autodialed or robocalls as part of an executed contract, it is no substitute for having a robust and well-documented TCPA compliance program. For companies that regularly make outbound calls to consumers, TCPA compliance procedures are critical not only to defending against litigation, but also for preventing costly TCPA lawsuits in the first instance.

At Brownstein Hyatt Farber Schreck, we regularly defend clients in TCPA-related cases and also help our clients in developing compliance strategies to protect them from TCPA regulatory and litigation risk. Please do not hesitate to contact us with any questions.

### **Richard B. Benenson**

Shareholder

[rbenenson@bhfs.com](mailto:rbenenson@bhfs.com)

303.223.1203

### **Matthew C. Arentsen**

Associate

[marentsen@bhfs.com](mailto:marentsen@bhfs.com)

303.223.1152

*This document is intended to provide you with general information regarding the Second Circuit's recent holding concerning the TCPA and bilateral contracts. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*