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Client Alert

National Class Action Practice Group

June 27, 2017

Second Circuit Rejects TCPA Lawsuit Holding Plaintiff's Consent to Receive Calls Was Irrevocable

The Telephone Consumer Protection Act ("TCPA") generally prohibits automated or prerecorded calls to cellular phones, absent the recipient's express consent. Although other courts and the Federal Communications Commission ("FCC") have held that consent may be revoked when it was given "gratuitously," in *Reyes v. Lincoln Automotive Financial Services*, the Second Circuit Court of Appeals issued a significant opinion on June 22, 2017, holding that "the TCPA does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange."[1] The Second Circuit's opinion provides businesses with another defense to TCPA lawsuits and provides guidance for businesses to implement changes that may help protect them against potentially onerous TCPA liability.

Background

In 2012, Alberto Reyes financed a car through Lincoln Automotive Financial Services ("Lincoln").[2] Mr. Reyes provided his cell phone number on his lease application, and the lease agreement he signed contained a provision in which Mr. Reyes "expressly consent[ed]" to Lincoln's contacting him by "written, electronic or verbal means" including "contact by manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems."[3] The lease agreement permitted Lincoln to contact Mr. Reyes at "any telephone number you provide, now or in the future, including a number for a cellular phone or other wireless device, regardless of whether you incur charges as a result."[4]

When Mr. Reyes stopped making payments on the lease, Lincoln called Mr. Reyes—141 times with a customer representative on the line and 389 times with a prerecorded message.[5] Mr. Reyes claimed that he asked Lincoln to stop contacting him, but despite his alleged revocation of consent, Lincoln continued to call.[6] Mr. Reyes filed a lawsuit against Lincoln in the Eastern District of New York, alleging violations of the TCPA and seeking $720,000 in damages.

The Second Circuit's Opinion

The TCPA requires a party to obtain prior express consent before making calls with a prerecorded message or automatic telephone dialing

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system to a cellular phone, but "the statute is silent as to whether a party that has so consented can subsequently revoke that consent."[7] In *Reyes*, the Second Circuit considered "whether the 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."[8] Because Congress neither defined "consent" in the TCPA nor evidenced an intent to deviate from common law rules in defining "consent," the Second Circuit applied the common law definition to the term.[9] Drawing a distinction between tort and contract law, the Second Circuit explained that consent provided gratuitously is revocable, but consent becomes irrevocable "when it is provided in a legally binding agreement."[10] Thus, the Second Circuit held that "the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent."[11] Unlike in cases decided by the Third and Eleventh Circuits, where consumers had provided consent gratuitously in connection with consumer applications, the Court found that Mr. Reyes's consent "was included as an express provision of a contract," and held that "one party may not alter a bilateral contract by revoking a term without the consent of a counterparty."[12]

Although Mr. Reyes argued that bargained-for consent should be revocable as a matter of public policy, the Second Circuit declined to "substitute [its] own policy preferences for those of the legislature by reading a right to revoke contractual consent into the TCPA where Congress has provided none."[13] Confronted with Mr. Reyes' 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," the Second Circuit said it was Congress's job to address this public policy consideration.[14]

The Significance of *Reyes*

Reyes precludes consumers from revoking consent to receive phone calls when that consent is part of the consideration for entering into a contract. Going forward, businesses should distinguish between consent received gratuitously in an *application* from consent received as part of the valid consideration for a *contract*. That distinction is where the Second Circuit drew the line between its holding and the contrary decisions by the Third Circuit, Eleventh Circuit, and FCC. Businesses should proceed cautiously, however, as the Second Circuit's decision is binding only on federal courts in New York, Connecticut, and Vermont. Other circuits and district courts could reach contrary decisions on this same issue, absent further guidance from the Supreme Court or Congress. Nevertheless, *Reyes* provides one way for businesses to manage their risk under the TCPA—structuring their consumer agreements so that consent to receive automated calls is part of the consideration that consumers provide when entering into the agreement.

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[1] *Reyes v. Lincoln Auto. Fin. Servs.*, No. 16-2104-cv, slip op. at 4 (2d Cir. June 22, 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 4-5.
[5] *Id.* at 5.
[6] *Id.*
[7] *Id.* at 10.
[8] *Id.* at 11.
[9] *Id.* at 12.
[10] *Id.* at 12-14.
[11] *Id.* at 12.

[12] *Id.* at 13-14.
[13] *Id.* at 17.
[14] *Id.* at 16-17.