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Client Alert: TCPA Does Not Allow Consumers to Revoke Consent When Given As Part of Binding Contract, Second Circuit Holds

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The Second Circuit Court of Appeals provided a rare glimmer of hope to companies and courts inundated by the avalanche of the Telephone Consumer Protection Act (TCPA) litigation on June 22, in *Reyes v. Lincoln Automotive Fin. Serv.*, No. 16-2104. It affirmed dismissal of a putative class action accusing Lincoln of TCPA violations stemming from calls to Reyes, a delinquent borrower, who allegedly revoked his consent to be contacted by Lincoln. The court's decision was based on the distinction it drew between gratuitous unilateral consent to be contacted and consent to be contacted given as a part of bargained-for consideration in a bilateral contract. This careful differentiation in thinking about what constituted consent and revocation under TCPA can be a game-changer for companies that communicate with their consumers in furtherance of binding bilateral contracts that contain an authorization to call.

Since the Federal Communications Commission (FCC) issued its 2015 Ruling (*In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7993-95 (2015)), where it determined that prior express consent under TCPA was subject to revocation and could be revoked by any "reasonable" means, including at a brick-and-mortar location, the already-existing cottage industry of TCPA lawsuits went into overdrive. TCPA lawsuit filings went up nearly 32% from 2015 to 2016, while Fair Debt Collection Practices Act (FDCPA) lawsuit filings were down over the same period and Fair Credit Reporting Act (FCRA) filings grew only slightly. Already this year, through the end of May, TCPA lawsuit filings outpaced 2016 filings by nearly 44%. Primary drivers of these lawsuits have been claims that companies continued to call consumers after consumers communicated that they no longer wished to be contacted.

In the *Reyes* case, the plaintiff leased a vehicle financed by Lincoln and provided his cell phone number as a part of his lease application. The lease contract specified that Reyes agreed to receive communications from Lincoln made "by manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems" to "any emails address and any telephone

number” Reyes provided, regardless of any associated charges Reyes would incur. When Reyes defaulted on his lease payment obligations, Lincoln allegedly called him 141 times with a representative on the line and an additional 389 times with a pre-recorded message. Reyes filed his putative class action against Lincoln claiming that he sent a written revocation notice to Lincoln, which Lincoln denied receiving.

In the district court proceedings, the court awarded Lincoln summary judgment for two reasons: (1) the evidence of consent revocation was insufficient, and (2) TCPA does not permit revocation when consent is provided as consideration in a binding contract. The Second Circuit Court of Appeals found that the district court engaged in improper weighing of evidence with respect to its first reason, but agreed with the second reason. The Court noted that while TCPA requires prior express consent in connection with live or prerecorded calls, it is silent on whether a party can subsequently revoke that consent. It went on to describe the earlier Third and Eleventh Circuits’ decisions on the subject of revocation (decisions concerning consent provided only in an application for a particular service) and the 2015 Ruling as addressing only the narrow question whether unilateral consent by a consumer can be later revoked. That inquiry was distinct from the yet-to-be answered question “whether the TCPA also 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.”

In answering the second question, the Second Circuit distinguished between “tort” and “contract” consent concepts – while in tort law, consent is generally a voluntary gratuitous action, in contract law, consent is ordinarily given in exchange for consideration. Under common law contract principles, the latter type of consent cannot be revoked absent rescission of the entire bargain, and thus becomes irrevocable. In Reyes’ case, his consent to be called was included in his lease agreement and thus could not be treated differently from all other provisions of that bilateral agreement and unilaterally abandoned. In reaching this conclusion, the court rejected Reyes’ argument that his consent was not an “essential” term of the bargain, because the entire contract was valid and “[c]ontracting parties are bound to perform on the terms they *did* agree to, not what they *might* have agreed to under different circumstances.” No. 16-2104 at 16 (emphasis original).

The court further rejected Reyes’ suggestion that TCPA contained ambiguities that should be interpreted to further protection of consumers from unwanted calls. It found no ambiguity in TCPA’s use of the term “consent,” since the statute contained no indication that Congress intended to deviate in any way from the common law consent principles.

Finally, the court noted Reyes’ concern that TCPA protections may erode if businesses are free to make revocation impossible by inserting consent provisions into their contracts. However, the court indicated that such policy concerns are better left to the legislature to resolve.

While the *Reyes* decision for now stands alone in its conclusions, there is a potential that the D.C. Circuit’s long-anticipated ruling on the challenge to the 2015 Ruling by ACA International would further bolster TCPA defendants’ positions, depending on how the D.C. Circuit handles the FCC’s conclusion that there can be no restrictions on a consumer’s ability to revoke consent. At the very least, a showdown between the circuits in the Supreme Court may be imminent.

In any event, in light of the *Reyes* court's blessing of consent provisions incorporated into binding legal agreements, companies should review their existing customer agreements and consider whether the addition or revision of consent provisions may be advisable. However, any such review and drafting exercises should be done while keeping in mind that according to the FCC, prior express consent cannot be demanded as a condition of doing business. [16 C.F.R. § 310.4\(b\)\(1\)\(v\)\(A\)\(ii\)](#).