

Bargained-For Consent: An Increasingly Viable Defense to TCPA Claims

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Key Points

- In most TCPA cases, a threshold question is whether a called party has provided prior express consent to receive calls (or texts) using an automatic telephone dialing system.
- While numerous courts have ruled that a party may revoke such consent, the FCC is weighing the issue and two recent federal district court decisions have followed the 2nd Circuit's ruling that a party may not revoke consent to receive debt collection calls when given as part of a bargained-for contract.
- These decisions provide potential tools for businesses that communicate with their customers to help reduce the risk of exposure to TCPA litigation.

Relying on black letter contract law, two federal courts within the 11th Circuit recently held that Telephone Consumer Protection Act (TCPA) plaintiffs cannot unilaterally revoke their consents to be contacted where such consents were obtained as a part of a bargained-for contract. See *Medley v. Dish Network, LLC*, No. 8:16-CV-2534-T-36TBM, 2018 WL 4092120 (M.D. Fla. Aug. 27, 2018) and *Few v. Receivables Performance Management*, No. 1:17-CV-2038-KOB, 2018 WL 3772863 (N.D. Ala. Aug. 9, 2018).

These decisions follow the 2nd Circuit Court of Appeals' landmark decision issued last August in *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 54 (2d Cir. 2017), and add to the growing chorus of cases upholding contractual methods to establish consent and limit revocation rights in TCPA actions.

The 2nd Circuit's Decision in *Reyes*

Reyes involved an automobile lease application that contained a provision whereby the plaintiff expressly consented to be contacted by "manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems." 861 F.3d at 54. Defendant began to contact plaintiff after he fell behind in his payments, and plaintiff subsequently attempted to revoke his prior

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consent. *Id.* After defendant continued calling for debt collection purposes, plaintiff brought a TCPA revocation claim under the TCPA. *Id.*

The district court granted summary judgment in defendant's favor, which was decided in part on the grounds that "the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted by telephone. *Id.*

The 2nd Circuit agreed 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, and [it] decline[d] to read such a provision into the act." *Id.* at 56.

In so holding, the court found inapposite 3rd and 11th Circuit cases that had held that "a party can revoke prior consent under the [TCPA]." *Id.* (citing *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. 2013) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)). Equally unavailing, the *Reyes* court held, was a 2015 ruling issued by the Federal Communications Commission (FCC)—which relied on both *Gager* and *Osorio*—in ruling that "prior express consent" is revocable under the TCPA." *Id.* (quoting *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7993–94 (2015)).

As the 2nd Circuit explained:

Gager, Osorio, and the 2015 FCC Ruling considered a narrow question: whether the TCPA allows a consumer who has freely and unilaterally given his or her informed consent to be contacted can later revoke that consent. See Osorio, 746 F.3d at 1253; Gager, 727 F.3d at 270. Reyes's appeal presents a different question, which has not been addressed by the FCC or, to our knowledge, by any federal circuit court of appeal: 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.

Id.

The 2nd Circuit in *Reyes* ultimately resolved that question in the negative, holding that, under well-settled common law principles, "consent to another's actions can become irrevocable when it is provided in a legally binding agreement[.]" *Id.* at 57 (internal citations omitted).

Medley and Few Follow Reyes

The plaintiffs in *Medley* and *Few* brought TCPA actions arising out of their receipt of debt collection calls following their failure to pay their cable bills. In each case—as in *Reyes*—the plaintiffs entered agreements in which they expressly consented to the receipt of debt collection telephone calls from defendants. Identical in all material respects, these agreements provided:

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By signing above, you authorize DISH, and any debt collection agency or debt collection attorney hired by DISH, to contact you regarding your DISH Network account or to recover any unpaid portion of your obligation to DISH, through an automated or predictive dialing system or prerecorded messaging system, at the phone number (including any cellular phone number), or other contact information you have provided or subsequently provide to DISH. You understand that you do not need to provide a cellular phone number to receive DISH services.

Medley, 2018 WL 4092120, at *1; accord *Few*, 2018 WL 3772863, at *2.

Notwithstanding, both plaintiffs opposed summary judgment on the grounds that they revoked any prior consent to be called. See *Medley*, 2018 WL 4092120, at *9 (“*Medley* argues that the TCPA allows her to revoke consent, and that she did so via the faxes sent by her counsel, which stated that any consent *Medley* had previously given to receive prerecorded calls on her cellular telephone was ‘forever revoked consistent with the Florida and federal law.’”); *Few*, 2018 WL 3772863, at *2 (“Ms. *Few* contends that . . . she revoked [] consent orally on April 27, 2017.”).

Neither court agreed. Instead, relying on the pronouncements in *Reyes*, both courts held that a TCPA plaintiff may not unilaterally revoke consent to receiving debt collection calls where it was given as a part of a bargained-for contract. See *Medley*, 2018 WL 4092120, at *10 (“Nothing in the TCPA indicates that contractually-granted consent can be unilaterally revoked in contradiction to black-letter law.”); *Few*, 2018 WL 3772863, at *2 (“Ms. *Few* gave prior express consent to Receivables to make the calls and, because she offered that consent as part of a bargained-for exchange and not merely gratuitously, she was unable to unilaterally revoke that consent.”).

Notably, the court in *Medley* also held that the D.C. Circuit’s recent decision in *ACA Int’l v. Fed. Commc’ns Comm’n*, 885 F.3d 687 (D.C. Cir. 2018)—which set aside critical portions of the 2015 FCC Ruling mentioned in *Reyes*—did not alter the conclusion. Instead, the court in *Medley* found that, while the FCC’s 2015 Ruling had denied callers the right to “unilaterally prescribe the exclusive means for consumers to revoke their consent,” neither the FCC nor the D.C. Circuit in *ACA Int’l* addressed the scenario of consent obtained in a bilateral contract. See *Medley*, 2018 WL 4092120, at *12.

Takeaways

Companies that make debt collection calls should consider adding similar language to their consumer contracts. As these decisions reveal, such efforts may help forestall or defeat litigation, since TCPA actions are increasingly vulnerable to dismissal. In addition, companies should be mindful of additional TCPA Do Not Call rules and regulations that apply to telemarketing calls.

These issues will continue to percolate within the federal courts and at the FCC, which recently asked for, and received comment on, among other things, “how a called party

may revoke prior express consent to receive robocalls[,]” in light of *ACA Int’l. See FCC Public Notice, DA 18-493, at 4 (Released May 14, 2018)*. Companies should be mindful of the evolving landscape.