

2 Courts Accept Contract Terms That Limit TCPA Exposure

By **Meredith Slawe, Michael McTigue, Michael Stortz and Marshall Baker**
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Telephone Consumer Protection Act filings continue unabated, while consumer-facing businesses patiently wait for long-deserved practical guidance from the Federal Communications Commission. In the meantime, there have been some significant court decisions that endorse compliance-focused businesses' efforts to create some certainty in connection with debt collection calls as they continue to navigate this uncertain and evolving legal landscape.

In particular, some companies have included provisions into their consumer contracts that (1) establish the express consent required by the TCPA to receive autodialed and/or prerecorded debt collection communications, and (2) limit the right to revoke that consent.

While the FCC is poised to weigh in on this and other important issues, such as the definition of an "automatic telephone dialing system," bargained-for consent provisions have become an increasingly viable method through which businesses can deter manufactured "revocation of consent" claims, and are thus worth considering as tools to reduce the risk of exposure to TCPA litigation.

Consent Under the TCPA

A threshold issue in most TCPA cases is whether a called party has provided prior express consent to receive certain telephone calls (or text messages, which are treated as calls under the TCPA) using an ATDS or a prerecorded voice.

While a showing of consent negates any claim under the statute, plaintiffs sometimes attempt to assert claims by arguing that any consent provided was subsequently revoked, at an often unspecified time. While a number of courts have previously held that consumers may indeed revoke consent — at times relying on FCC orders — more recent decisions reveal that revocation is not absolute.

Further, as discussed herein, the reasoning behind these later decisions will undoubtedly find its way into the FCC's forthcoming decision on this and other TCPA issues.



Meredith
Slawe



Michael
McTigue



Michael
Stortz



Marshall
Baker

Second Circuit Upholds the Validity of Bargained-For Consent Provisions

In *Reyes v. Lincoln Automotive Financial Services*, the plaintiff signed an automobile lease application wherein he expressly consented to be contacted by the defendant using “manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems.”[1] The calls at issue were made following plaintiff’s failure to make payments, and notwithstanding his purported revocation of consent.

The district court dismissed the case, holding that “the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted by telephone.”[2]

On appeal, the Second Circuit found the plaintiff’s revocation ineffective, holding 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 declin[ing] to read such a provision into the act.”[3]

In its decision, the court expressly distinguished the Third Circuit’s decision in *Gager v. Dell Financial Services LLC*[4] and the Eleventh Circuit’s decision in *Osorio v. State Farm Bank*,[5] as well as a 2015 ruling issued by the FCC, which — relying on *Gager* and *Osorio* — held that “‘prior express consent’ is revocable under the TCPA.”[6]

As the court 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.[7]

Relying on well-settled common law principles, the court in *Reyes* resolved that latter question in the negative, observing that “consent to another’s actions can become irrevocable when it is provided in a legally binding agreement.”[8]

Reyes’ Rationale Is Extending Outside of the Second Circuit

While *Reyes* remains the law within the Second Circuit, no other appellate court has specifically followed suit. Even so, as evidenced by two recent decisions, district courts outside the Second Circuit have.

Specifically, relying on black-letter contract law, two district courts within the Eleventh Circuit recently held that consent to be contacted cannot be unilaterally revoked where such consent was obtained in a bargained-for contract.

The plaintiffs in *Medley*[9] and *Few*[10] brought TCPA actions arising out of their receipt of debt collection calls made to them after they failed to pay their cable bills. In each case, the plaintiffs entered agreements in which they expressly consented to the receipt of debt collection calls from defendants.

Both plaintiffs opposed summary judgment on the grounds that they revoked any prior consent to be

called: “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.’”;[11] “Ms. Few contends that ... she revoked [] consent orally on April 27, 2017.”[12]

In both cases, the courts flatly disagreed. Relying on the reasoning set forth in Reyes, these 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.[13]

Notably, the courts in Medley and Few also observed that the Eleventh Circuit’s holding in Osorio was limited, since that court ultimately “conclude[d] that [plaintiffs], in the absence of any contractual restriction to the contrary, were free to orally revoke any consent previously given.”[14]

These decisions add to the growing body of cases that have held that revocation of consent in TCPA actions is limited in instances where that consent was obtained through a bargained-for contract.[15]

Looking Ahead

As observed by the court in Medley and the D.C. Circuit in *ACA International v. Federal Communications Commission* — which recently vacated several critical portions of the 2015 FCC ruling mentioned in Reyes — the FCC has yet to address the scenario of consent obtained by a bilateral contract.[16]

Indeed, in response to the D.C. Circuit’s decision in *ACA International*, the FCC asked for, and received comment on, among other things, “how a called party may revoke prior express consent to receive robocalls.”[17] The comment period has ended, and the FCC is poised to rule. The FCC will likely consider the Reyes line of cases in any order that it issues.[18]

In the interim, these issues will continue to percolate within the federal courts. As they do, and recognizing that every compliance program requires due consideration — this emerging defense to TCPA revocation claims in connection with debt collection calls should be kept in mind, and companies should consider incorporating similar consent provisions into their consumer contracts. We caution companies to heed the TCPA’s other myriad regulations, viewing a consent as only one potential link in the compliance chain.

Meredith C. Slawe, Michael W. McTigue Jr. and Michael J. Stortz are partners and Marshall L. Baker is an associate at Akin Gump Strauss Hauer & Feld LLP.

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[1] Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 54 (2d Cir. 2017).

[2] Id.

[3] Id. at 56.

[4] Gager v. Dell Fin. Servs., LLC, 727 F.3d 265 (3d Cir. 2013).

[5] *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).

[6] *Reyes*, 861 F.3d at 56 (quoting *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7993–94 (2015)).

[7] *Reyes*, 861 F.3d at 56.

[8] *Id.* at 57 (internal citations omitted).

[9] *Medley v. Dish Network, LLC*, No. 8:16-CV-2534-T-36TBM, 2018 WL 4092120 (M.D. Fla. Aug. 27, 2018).

[10] *Few v. Receivables Performance Mgmt.*, No. 1:17-CV-2038-KOB, 2018 WL 3772863 (N.D. Ala. Aug. 9, 2018).

[11] *Medley*, 2018 WL 4092120, at *9.

[12] *Few*, 2018 WL 3772863, at *2.

[13] 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.”).

[14] *Medley*, 2018 WL 4092120, at *9 (quoting *Osorio*, 746 F.3d at 1255) (emphasis added).

[15] See, e.g., *Harris v. Navient Sols., LLC*, No. 3:15-CV-564 (RNC), 2018 WL 3748155, at *2 (D. Conn. Aug. 7, 2018); *Barton v. Credit One Fin.*, No. 16CV2652, 2018 WL 2012876 (N.D. Ohio Apr. 30, 2018).

[16] *ACA Int’l v. Fed. Commc’ns Comm’n*, 885 F.3d 687, 710 (D.C. Cir. 2018).

[17] See FCC Public Notice, *Consumer And Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s Aca International Decision*, DA 18-493 (May 14, 2018), available at <https://ecfsapi.fcc.gov/file/0514497027768/DA-18-493A1.pdf>.

[18] See FCC, *Statement of Commissioner Michael O’Rielly on D.C. Circuit TCPA Decision* (Mar. 16, 2018), available at <https://www.fcc.gov/document/comm-orielly-statement-dc-circuit-tcpa-decision> (“I believe there is an opportunity here for further review in order to square [the decision] with the Second Circuit’s more appropriate approach.”).