

Client Alert

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Down But Not Out: The Second Circuit Breathes New Life Into the Use of TCPA Consent Clauses to Combat Revocation of Consent Claims

On June 22, 2017, the United States Court of Appeals for the Second Circuit affirmed the district court's finding in *Reyes v. Lincoln Automotive Financial Services* that a customer could not revoke prior express consent for purposes of the Telephone Consumer Protection Act (TCPA) if that consent was provided as consideration in a binding contract.¹ In a ruling that departs from two other circuit decisions, *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746 F.3d 1242 (11th Cir. 2014), the Second Circuit held that bargained-for written consent cannot be unilaterally withdrawn by a consumer.

Background

Reyes involved a debtor who sued a creditor under the TCPA for making calls using an autodialer. Plaintiff Reyes leased a car from defendant Lincoln Automotive Financial Services (Lincoln) and, in doing so, provided his cellphone number in the lease application. The lease agreement included a provision whereby Reyes "expressly consent[ed]" to receiving prerecorded or artificial voice messages and calls via "automatic telephone dialing systems."² Reyes testified that he had revoked consent and argued that such revocation of consent was effective, relying on *Gager* and *Osorio*. But the Second Circuit distinguished *Gager* and *Osorio*, noting that those cases involved revocation of consent in the context of a customer's voluntarily furnishing their number to the creditor, but without **also** agreeing to a TCPA consent clause. The court stated:

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**. Unlike the plaintiffs in *Gager* and *Osorio*, Reyes signed a contract containing a TCPA consent clause.³

The Second Circuit agreed with the Third (*Gager*) and Eleventh (*Osorio*) Circuits that the common law meaning of consent made prior express consent revocable under the TCPA. However, the Second Circuit reasoned that the common law should also inform the limits of consent and revocability when provided in a written contract: "[t]he common law is clear that consent to another's actions can 'become **irrevocable when it is provided in a legally binding agreement...in which case any 'attempted termination is not effective.'**"⁴ Further, the court noted that a contract under the common law should be construed to give full effect to all of its provisions. "A party who has agreed to a particular term in a valid contract

¹ *Reyes v. Lincoln Automotive Fin. Servs.*, 2017 WL 2675363, at *1 (2d Cir. June 22, 2017).

² *Id.* at *2.

³ *Id.* at *4.

⁴ *Id.* at *12 citing Restatement (Second) of Torts § 892A(5) (emphasis added).

cannot later renege on that term or unilaterally declare it to no longer apply simply because the contract could have been formed without it.”⁵

Conclusion

It remains to be seen whether other circuits will follow the Second Circuit’s lead in limiting revocability to situations in which consent is provided by virtue of the customer’s simply furnishing the phone number at issue in connection with a transaction, as opposed to expressly agreeing to a TCPA consent clause in the underlying contract. At a minimum, this case will likely give new energy to the use of TCPA consent clauses. It may also motivate companies to remove any references to a consumer’s right to revoke consent in the TCPA clauses that are currently in their standard form contracts.

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⁵ *Id.* at *15.