



# Another court rules that contractual consent to be called using an ATDS cannot be unilaterally revoked

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## BACKGROUND

The Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), makes it unlawful for any person, absent the “prior express consent of the called party,” to make non-emergency calls using any Automated Telephone Dialing System (ATDS) to any telephone number assigned to a cellular telephone service. Anyone who violates the TCPA may be liable for “actual monetary loss” or \$500 in damages for each violation, whichever is greater.

In 2017, in a case of first impression, the Second Circuit ruled that a consumer who contractually consented to being contacted using an automatic telephone dialing system (ATDS) cannot unilaterally revoke that consent. *Reyes v. Lincoln Automotive Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017). In other words, if consent is contractual, for consent to be revoked both parties must agree to the revocation.

## TINA FEW V. RECEIVABLES PERFORMANCE MANAGEMENT

Although not in the Second Circuit, an Alabama federal district court recently followed *Reyes* in the absence of Eleventh Circuit authority on the same point. In *Tina Few v. Receivables Performance Management*, No. 1:17-cv-2038-KOB (N.D. Ala. Aug. 9, 2018), plaintiff Tina Few asserted the defendant debt collector violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 by contacting her at least 184 times using an ATDS in an attempt to collect a debt for satellite television and internet services.

The debt arose out of a contract between Few and DISH in which DISH agreed to provide Few television and high-speed internet services. As part of the contract, Few provided DISH with her mobile number and authorized DISH “and/or any debt collection agency and/or debt collection attorney hired by DISH” to contact her at the number provided “through an automated or predictive dialing system or prerecorded messaging system.”

In April 2017, DISH provided Few’s number to defendant Receivables Performance Management (RPM), a debt collection firm, to collect on Few’s account with DISH after it became delinquent. RPM began calling Few. On April 27, 2017, Few informed RPM during a call that she no longer wished to receive calls from RPM. Few alleges that RPM continued to call and text in excess of 184 times.

After RPM moved for summary judgment, the district court noted that courts must evaluate revocation of consent under the TCPA by considering “the common law concept of consent.” The court explained that although the Eleventh Circuit has not decided the issue, it found the Second Circuit’s reasoning in *Reyes* persuasive. Quoting *Reyes*, the district court noted that it is “black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of the counterparty.” The district court found that Tina Few gave prior express to RPM (as DISH’s agent) 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. Accordingly, the district court granted summary judgment in favor of RPM.

## TAKEAWAY

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For companies who contact consumers using ATDS, *Reyes* is a pivotal case that provides a safe harbor – at least within the Second Circuit – from TCPA liability for calls provided the consumer gave consent to be called in a written contract that is part of a bargained for exchange. The *Few* case indicates this reasoning is being applied within other circuits, which should be a welcome result for telemarketers and debt collectors, among others that face potential TCPA liability after a consumer verbally attempts to revoke consent.

This post was drafted by [Patrick McLaughlin](#), an attorney in the St. Louis, MO office of Spencer Fane LLP. For more information, visit [spencerfane.com](http://spencerfane.com).