



The Second Circuit issues potentially impactful ruling on revocation of consent to be called under the Telephone Consumer Protection Act when that consent is given as bargained-for consideration for a binding contract

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Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, (TCPA) to protect consumers from “[u]nrestricted telemarketing, which it determined to be “an intrusive invasion of privacy.”^[1] The TCPA prohibits, among other conduct, telephone calls to residential phone lines or cell phones using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.^[2] The TCPA also authorizes the Federal Communications Commission (FCC) to promulgate rules and regulations in order to further implement the Act’s provisions.^[3] While the TCPA requires prior express consent before making artificial or prerecorded calls, it is silent as to whether a consumer, having given such consent, can subsequently revoke that consent, making calls after revocation actionable.^[4] The Third^[5] and Eleventh Circuit^[6] have ruled that a party can revoke prior express consent under the TCPA. The Third Circuit reasoned that “consent,” as defined by common law, is traditionally considered to be revocable and allowing revocation of consent would further Congress’s purpose in enacting the TCPA to protect consumers from unwanted automated telephone calls.^[7] The FCC relied on these two cases in ruling that “prior express consent” is revocable under the TCPA.^[8]

Based on this authority, one might surmise that consent is always revocable under the TCPA. However, in the case of *Reyes v. Lincoln Automotive Financial Services*^[9], the Second Circuit recently considered a related but nuanced question: can a consumer 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.”^[10] Reyes leased a new Lincoln MKZ luxury sedan from a Ford dealership. Lincoln financed the lease. In his lease application, Reyes provided his cellular phone number. In the lease agreement, among other provisions, Reyes agreed to the following:

“You [Reyes] also expressly consent and agree to Lessor [Ford], Finance Company, Holder and their affiliates, agents and service providers may use written, electronic or verbal means to contact you. This consent includes, but is not limited to, contact by manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems. You agree that Lessor, Finance Company, Holder and their affiliates, agents and service providers may use any email address or any telephone number you provide, now or in the future, including a number for a cellular phone or other wireless device, regardless of whether you incur charges as a result.”^[11]

Reyes subsequently stopped making payments under his lease. Lincoln called Reyes multiple times to attempt to cure his default. Reyes subsequently filed a complaint in federal court against Lincoln, alleging Lincoln violated the TCPA by making automated or pre-recorded calls to his cell phone after he revoked consent to be called. The district court granted Lincoln summary judgment, ruling that Reyes could not revoke his consent to be called because he gave that consent as part of a bargained-for consideration of a valid contract. Reyes appealed to the Second Circuit.

On appeal, Reyes argued that the holdings of the Third and Eleventh Circuits in *Gager* and *Osorio* and the 2015 FCC Ruling applied to his situation and allowed him to revoke his consent to be called under federal common law principles and in furtherance of the purpose of the TCPA. The Second Circuit agreed that common law principles of consent applied, but explained that under common law, consent is not always revocable.^[12] The Court noted the distinction between consent given under tort law, which is generally gratuitous or voluntary in nature, versus consent

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given under contract law.^[13] The Court distinguished the consent given in the *Gager* and *Osorio* cases as being given by those consumers voluntarily by furnishing their telephone numbers to businesses in connection with loan and insurance applications, respectively.^[14] The Second Circuit explained that the “courts in those cases found, and the 2015 FCC ruling confirmed, that consent of this kind, which is not given in exchange for any consideration, and which is not incorporated into a binding legal agreement, may be revoked by the consenting party at any time.”^[15] In contrast, the Second Circuit held that Reyes’s consent to be contacted by telephone was not given gratuitously, but rather was included in a binding contract – the lease.^[16] The Court explained that under common law, consent to another’s actions can become irrevocable when it is provided in a legally binding agreement.^[17] The Court also rejected Reyes’s argument that the provision in which he gave his consent to be contacted was not an “essential term” of the lease, finding it was an enforceable provision in an otherwise binding contract.^[18] Based on this rationale, the Second Circuit affirmed the district court’s grant of summary judgment to Lincoln.

The Second Circuit conceded that its decision might allow businesses to undermine the effectiveness of the TCPA by inserting consent clauses into standard contracts, but held if such an abuse came to pass, it would be an issue for Congress to address.^[19] Certainly the *Reyes* decision theoretically gives a narrow pathway for marketers to avoid potential TCPA liability by including such consent clauses in their contracts with consumers, but it’s not certain all federal circuits would draw the same fine distinction between consent given gratuitously and consent given as part of a contract as the Second Circuit.

<http://www.courthousenews.com/wp-content/uploads/2017/06/reyes-lincoln-automotive.pdf>

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

[1] *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012)(internal quotation marks and citation omitted)

[2] 47 U.S.C. § 227(b)(1)(B)

[3] 47 U.S.C. § 227(b)(2)

[4] The TCPA provides for statutory penalties of from \$500 to \$1,500 *per call* that violates the Act.

[5] *Gager v. Dell Financial Services*, 727 F.3d 265, 267-68 (3rd Cir. 2013)(consumer who provided express consent in an application for a line of credit could subsequently revoke consent to be called)

[6] *Osorio v. State Farm Bank F.S.B.*, 746 F.3d 1242, 1253 (11th Cir. 2014)(consumer who provided express consent in application for auto insurance could revoke her consent)

[7] *Gager*, 727 F.3d at 270-71.

[8] See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Red. 7961, 7993-94 (2015)(the “2015 FCC Ruling”).

[9] No. 15-cv-560 (2nd Cir. June 22, 2017)

[10] *Reyes*, *Id.* at 11.

[11] *Id.* at 4-5.

[12] *Id.* at 12.

[13] *Id.*

[14] *Id.* at 13.

[15] *Id.*

[16] *Id.*

[17] *Id.* (citing Restatement (Second) of Torts § 892A(5)(Am. Law. Inst. 1979).

[18] *Id.* at 15.

[19] *Id.* at 16-17.