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# Contracts Do Matter Under the TCPA—At Least in the Second Circuit

*By Eduardo Guzmán*

Lawsuits are brought on a daily basis against businesses across the United States under the Telephone Consumer Protection Act ("TCPA") alleging that consent to receive telephone calls and messages was later revoked. The story is well-known to many businesses that need to communicate with their customers directly: the customer initially consents to receiving non-telemarketing calls when he or she signs up for an account or subscribes to a service, only to later sue the business under the TCPA claiming that the consent had been revoked—sometimes orally or in other difficult to disprove ways.

While some courts and even the Federal Communications Commission ("FCC") have endorsed the view that customers can revoke express consent at any time, the recent opinion by the US Court of Appeals for the Second Circuit in *Reyes v. Lincoln Automative Financial Services*, No. 16-2104 (2d Cir. June 22, 2017), imposes an important limit on this theory, at least within the Second Circuit: consent provided as part of a contract cannot be revoked unilaterally. It also highlights the continued importance of customer agreements as a tool to manage risk in TCPA litigation, and the missed opportunities that come with not updating these agreements frequently.

## Background

The TCPA requires callers to obtain "express written consent" before making non-telemarketing, informational calls or sending informational text messages to wireless telephone numbers using an automatic telephone dialing system or artificial/ prerecorded voice.[1] Businesses make these calls and send these messages regularly, *e.g.*, messages alerting that a payment has been received, informing the recipient that a package has been delivered or warning that a credit card number on file has expired and needs to be updated. For many years, the express written consent requirement was relatively uncontroversial, in large part because the FCC made it clear that persons who knowingly released their telephone numbers effectively gave consent to be called at that number for "normal business communications."[2]

Two developments, however, pulled these calls into the center of the TCPA class action storm. First, the explosion in the use of wireless devices as a replacement for landline telephones led to businesses making calls to wireless telephone numbers at a much higher rate than when the TCPA was originally enacted. Second, the plaintiffs' class action bar started arguing with some success that consumers could revoke express consent at any time and essentially by any means. This allowed plaintiffs to

1 *See* 47 C.F.R. § 64.1200(a)(1).
2 Report & Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8769 (1992).

sue under the TCPA, even when the evidence showed that they had originally consented to receiving telephone calls, by claiming that they had subsequently revoked consent in any way.

## Revocation of Consent: How Did We Get Here?

The argument that the TCPA allows for revocation of consent had a threshold problem: the statute is silent as to any right to revoke "prior express consent." This stands in contrast with other provisions of the TCPA, such as those dealing with facsimiles, which expressly allow for revocation of consent,[3] and with statutes such as the Fair Debt Collection Practices Act ("FDCPA"), which expressly provide for revocation of consent to be called.[4] Despite this statutory silence, some courts at the federal district court level started endorsing the theory that express consent could be revoked at any time.[5]

The most significant endorsement of the theory of revocation came in 2013 in *Gager v. Dell Financial Services, LLC,* 727 F.3d 265 (3d Cir. 2013). In that case the plaintiff claimed that she had revoked (by sending a letter) her consent to be called at the wireless telephone number that she initially had provided to the defendant as part of her application for credit. The court ruled that the absence of a statutory right to revoke in the TCPA did not mean that the right did not exist, and it relied on common law principles of torts to hold that consent is revocable.[6] Less than a year later, the US Court of Appeals for the Eleventh Circuit cited *Gager* and adopted its reasoning in *Osorio v. State Farm Bank F.S.B.*[7]

Fast forward two years and a petition is filed with the FCC by a financial services institution for a declaratory ruling confirming that "prior express consent" could not be revoked or, alternatively, interpreting the TCPA to allow the caller to designate one or more methods that must be used to revoke consent.[8] The petition specifically mentioned the *Gager* and *Osorio* opinions and asked the FCC to provide "specific guidance and clarity" confirming that the right to revoke express consent did not exist under the TCPA.[9]

The FCC went in the opposite direction in its Declaratory Ruling and Order of July 10, 2015,[10] where it declared that "the most reasonable interpretation of consent is to allow consumers to revoke consent if they decide they no longer wish to receive voice calls or texts."[11] The FCC noted that its decision "finds support in the well-established common law right to revoke prior consent," but declared that it was not relying on common law to interpret the TCPA to include a right of

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3 *See, e.g.,* 47 U.S.C. § 227(b)(2)(E).
4 15 U.S.C. § 1692c(c).
5 *See, e.g., Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 (W.D. Wis. 2013); *Adamcik v. Credit Control Services*, 832 F. Supp. 2d 744 (W.D. Tex. 2011). *But see, e.g., Chavez v. Advantage Group,* 959 F. Supp. 2d 1279 (D. Colo. 2013); *Saunders v. NCO Financial Systems, Inc.*, 910 F. Supp. 2d 464 (E.D.N.Y. 2012).
6 727 F.3d 265, 268-271 (3d Cir. 2013).
7 746 F.3d 1242 (11th Cir. 2014).
8 *See* Petition for Expedited Declaratory Ruling, *In re Petition for Declaratory Ruling Regarding Revocation of Prior Express Consent for Non-Telemarketing Calls,* CG Docket No. 02-278 (filed July 10, 2014).
9 *Id.* at 8.
10 *See* Declaratory Ruling & Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 30 FCC Rcd. 7961, 7992-7993 (2015).
11 *Id.* at 7992-7993.

revocation.[12] To further complicate matters from a compliance perspective, the FCC went on to declare that callers "may not control consumers' ability to revoke consent" and had to allow consumers to revoke consent "in any manner that clearly expresses a desire not to receive further messages."[13] For companies seeking guidance as to whether any particular means of revocation was reasonable, the FCC pointed to the need to assess "the totality of the facts and circumstances surrounding that specific situation"[14]— a not particularly helpful standard for companies trying to develop compliance policies. The FCC's order remains on appeal before the Court of Appeals for the D.C. Circuit.

## The Second Circuit Steps In

The *Reyes* decision marks a stark departure from these theories of revocation. In this case, the plaintiff had agreed to receive automated telephone calls from the defendant as a condition of an auto lease agreement. The plaintiff later argued that he had revoked his consent to receive calls on the telephone number that he had provided. The district court below ruled on summary judgment that the evidence of consent revocation presented by the plaintiff was insufficient and that, in any event, the TCPA did not allow for revocation when the consent was given as consideration in a contract. The plaintiff appealed the district court's decision.

On appeal, the Second Circuit affirmed the district court's decision. The court disagreed with the district court's finding as to the sufficiency of the evidence, holding that it was a triable issue of fact. When it came to whether the TCPA allowed for the revocation of consent, the court affirmed the ruling below. The court focused on a key factual distinction from *Gager* and *Osorio*: the plaintiff's consent had been given as "bargained-for consideration in a bilateral contract," as opposed to gratuitously.[15] The court relied on this critical fact to hold that common law principles of contract law—not those of tort law relied on by the courts in *Gager* and *Osorio*—controlled as to the question of consent.[16] Applying black-letter contract law, the court explained that consent is not revocable under contract law absent mutual agreement.[17] It also held that whether consent was an "essential term" of the lease agreement was irrelevant: "a contractual term does not need to be 'essential' in order to be enforced as part of a binding agreement."[18]

## Outlook and Takeaways

The *Reyes* opinion is undoubtedly a victory for the TCPA defense bar. It vindicates a black letter principle of contract law that was overlooked by the FCC and prior court decisions. It also imposes—at least within the Second Circuit—a critical limitation on the right to revoke consent at any time. Some caveats are in order, however.

First, the *Reyes* decision is still subject to rehearing or rehearing *en banc* in the Second Circuit. The plaintiff was granted until July 20, 2017, to file a motion for rehearing.

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12 *Id.* at 7995.
13 *Id.* at 7996.
14 *Id.* at 7996 n.233.
15 *Reyes*, slip op. at 11.
16 *Id.* at 12-14.
17 *Id.*
18 *Id.* at 15.

Second, courts outside the Second Circuit are not bound by the *Reyes* decision, and it is unclear whether a split will emerge among appellate courts. *Reyes* did not split from *Gager* and *Osorio* as much as it addressed an issue that was not presented in those cases: the effect of a contract governing the right to revoke consent. While the Eleventh Circuit in *Osorio* suggested in *dicta* that the presence of a contractual restriction may impact the right to revoke,[19] the Third Circuit in *Gager* suggested—also in *dicta*—that contract law would not necessarily impact the right to revoke consent, at least in the debt collection context.[20] Until appellate courts outside the Second Circuit adopt *Reyes* in the context of consent granted via contracts, relying on *Reyes* outside of the Second Circuit remains risky.

Third, it is unclear how—or even whether—the *Reyes* decision would impact the challenge to the FCC's Declaratory Ruling and Order that is still pending before the D.C. Circuit. One of the issues on appeal in that case is whether the TCPA can bar mutual agreements to particular forms of revocation of consent. Petitioners in that appeal filed a letter of supplemental authority with the D.C. Circuit shortly after the *Reyes* decision was issued, but it is still unclear what the D.C. Circuit will do—if anything—with the Second Circuit's decision.

Fourth, even if the *Reyes* ruling were adopted nationwide, businesses must keep in mind that other federal statutes, such as the FDCPA, expressly grant revocation rights that may control over any contract-based consent. Likewise, state laws regulating auto-dialed calls may grant revocation rights regardless of any contractual terms.

The *Reyes* decision still shines a light on the importance of keeping consumer agreements up-to-date. Businesses using agreements that have not been updated recently could be shooting themselves in the foot, for instance, by inadvertently including provisions limiting the scope of the consent that the customer gives when he or she provides a telephone number. They could also be missing out on the opportunity to better manage their TCPA risk by, including arbitration clauses and securing an express agreement from the consumer as to the process for revoking consent, for example. These measures may not be foolproof but, as long as there is consideration involved, they provide an additional layer of protection. At a minimum, they offer defendants in TCPA litigation a series of arguments that can be made before the discovery to dismiss TCPA suits on the merits.

**About the Author**

Eduardo Guzmán is a Partner in the Communications Practice at Squire Patton Boggs. He represents telecommunications, media and technology (TMT) companies on regulatory and dispute resolution matters in the US and Latin America. He regularly advises carriers and providers on the implications of regulatory policy involving telecommunications and emerging technologies, and defends them in litigation and other proceedings involving those issues.

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19 *See* 746 F.3d at 1255 ("We therefore conclude that Betancourt and Osorio, *in the absence of any contractual restriction to the contrary*, were free to orally revoke any consent previously given to State Farm to call No. 8626 in connection with Betancourt's credit-card debt.")

20 727 F.3d at 273-74.