

Courts Contemplate Companies' Ability to Restrict Means of Revoking TCPA Consent

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The Telephone Consumer Protection Act is notorious. It establishes rigorous consent standards to use an autodialer or a prerecorded message. It gives consumers a private right of action. It imposes ruinous statutory damages. The TCPA itself is silent as to whether consumers have the right to revoke consent once they have provided it.

Although several courts have addressed this issue over the years, the Federal Communications Commission issued the dispositive statement on consent revocation in 2015 when it announced that consumers may revoke TCPA consent at any time through any reasonable means. After that determination, several courts have considered whether companies may eliminate or restrict consumers' ability to revoke TCPA consent. The results are not uniformly consistent, but some trends have emerged from these opinions.

The FCC cited to the Third Circuit's decision in *Gager v. Dell Financial Services, LLC*, 2013 U.S. App. LEXIS 17579 (3d Cir. (M.D. Pa.) August 22, 2013), to support its position in favor of a broad right to revoke TCPA consent. The FCC referenced *Gager* in its explanation that the TCPA's silence on revocation "should be construed in favor of consumers." The FCC also pointed to common law, which holds that consumer consent is subject to the consumer's intent. Notably, the FCC took the position that callers could not "designate the exclusive means by which consumers must revoke consent" and could not "abridge a consumer's right to revoke consent using any reasonable method." The FCC concluded that "the consumer is not limited to using only a revocation method that the caller has established as the one that it will accept."

As definitive as these statements are, they have not been the last word on the issue of whether companies can eliminate or restrict the consumer's ability to revoke TCPA consent.

The most aggressive challenge to the consumer-friendly position taken by the FCC and *Gager* comes from the Second Circuit's decision in *Reyes v. Lincoln Automotive Financial Services*, 2017 U.S. App. LEXIS 11057 (2d Cir. (E.D.N.Y.) June 22, 2017).

In that case, Reyes's TCPA consent was documented in the parties' lease agreement as a condition of the transaction. Lincoln Automotive relied on that provision of the lease agreement to continue placing collection calls to Reyes after he allegedly revoked his consent. The court framed this scenario as an attempt by Reyes to unilaterally revoke

consent that he gave as "bargained-for consideration in a bilateral contract." The *Reyes* court asserted that the existence of a contract brought this fact pattern outside the scope of the FCC's 2015 statement and the *Gager* decision.

The court concluded that because Reyes's consent was established in the lease agreement, both parties to the agreement had to agree to the revocation, and Lincoln Automotive had no interest in providing such an agreement. As a result, Reyes's attempts to revoke consent were invalid.

Courts hearing post-*Reyes* cases regarding revocation of TCPA consent have not shown much interest in adopting that approach. Most have found that precedent decisions in their circuits prevented them from adopting the *Reyes* approach or have criticized the *Reyes* holding as unreasonably hostile to the TCPA's consumer protection purpose.

For example, in Florida, district courts have concluded that the Eleventh Circuit's decision in *Osorio v. State Farm Bank, F.S.B.*, 2014 U.S. App. LEXIS 5709 (11th Cir. (S.D. Fla.) March 28, 2014), which followed *Gager's* reasoning, meant that consumers could orally revoke TCPA consent even in the presence of a contract. See *Rodriguez v. DFS Services, LLC*, 2016 U.S. Dist. LEXIS 11494 (M.D. Fla. February 1, 2016), and *Patterson v. Ally Financial, Inc.*, 2018 U.S. Dist. LEXIS 15203 (M.D. Fla. January 31, 2018).

While courts have been reluctant to follow the *Reyes* court's position allowing companies to eliminate the right to revoke TCPA consent altogether, a growing number of courts have signaled a willingness to accept the argument that the parties to a contract may agree to restrict the means by which consumers can revoke TCPA consent. These courts have latched onto the *Osorio* court's statement that "in the absence of any contractual restriction to the contrary," consumers were free to orally revoke consent.

This issue also arose in the D.C. Circuit's important TCPA decision in *ACA International v. FCC*, 2018 U.S. App. LEXIS 6535 (D.C. Cir. March 16, 2018). That decision affirmed the FCC's position that consumers could revoke TCPA consent at any time through any reasonable means. However, that decision, like *Osorio*, also anticipated that callers and consumers could contractually agree to specific revocation mechanisms. The ACA court noted that the FCC had conceded that its 2015 statement on this issue did not address the existence of a mutually agreed-upon revocation procedure.

Following *ACA*, courts in several circuits have indicated that parties to a contract could agree to restrict the means by which consumers can revoke TCPA consent while affirming that companies could not use the contract to eliminate this right to revoke. One court upheld a contract that required consumers to revoke consent via a written notice that included the consumer's name, address, and phone number and the last four digits of the consumer's account number. See *Barton v. Credit One Financial*, 2018 U.S. Dist. LEXIS 72245 (N.D. Ohio April 27, 2018). See also *Few v. Receivables Performance Management, LLC*, 2018 U.S. Dist. LEXIS 192854 (N.D. Ala. November 13, 2018) ("[A] contract provision stating that [consumers] may revoke consent only in writing would be a 'contractual restriction to the contrary' of [the consumer's] right to 'orally revoke any consent previously given,' and would therefore invalidate [the consumer's] oral revocation.").

Even courts clearly hostile to *Reyes* acknowledged that a contractually agreed-upon revocation mechanism would be enforceable. See *Ammons v. Ally Financial, Inc.*, 2018 U.S. Dist. LEXIS 108588 (M.D. Tenn. June 27, 2018). See also *Thompson-Harbach v. USAA Federal Savings Bank*, 2019 U.S. Dist. LEXIS 3687 (N.D. Iowa January 9, 2019) ("Thus, if a contract prescribes a reasonable means by which a signatory may withdraw previously granted consent to be called, then that procedure must be followed. A signatory cannot unilaterally change the contract by using some other means of withdrawing consent.").

However, these courts have explained that the contract must expressly set out a reasonable means for revoking consent and must expressly state that consumers are required to use these means. The mere fact that TCPA consent is established in the contract does not give companies the right to argue that consumers cannot revoke their consent or that consumers must revoke consent in a particular way. See *Rodriguez v. Premier Bankcard, LLC*, 2018 U.S. Dist. LEXIS 149225 (N.D. Ohio August 31, 2018).

Courts addressing consent revocation have consistently held that the *Reyes* court went too far when it held that a contract could eliminate a consumer's ability to revoke TCPA consent. However, these courts have been similarly consistent in finding that a contract could require consumers to use a specific method to revoke consent, and only that method, if the method were reasonable and the contract clearly stated that consumers were required to use that method. Companies interested in addressing this issue in their customer relationships should take a fresh look at their agreements.

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