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SECOND CIRCUIT: TCPA CONSENT IN CONTRACT CANNOT BE UNILATERALLY REVOKED BY CONSUMER

The U.S. Court of Appeals for the Second Circuit has held that the Telephone Consumer Protection Act ("TCPA") does not permit a consumer to revoke his or her consent unilaterally when the consent is included in a binding contract. *Reyes v. Lincoln Automotive Fin. Servs.*, No. 16-2104, 2017 WL 2675363 (2nd Cir. June 22, 2017).

The court affirmed dismissal of a lessee's claim that a car lessor violated the TCPA by making non-telemarketing calls in connection with a defaulted lease after the lessee allegedly revoked his consent to be called. The defaulted lease included a provision through which the lessee consented to contact by the lessor by manual calling, prerecorded or artificial voice messages, text messages, emails or automatic telephone dialing system.

The TCPA is silent as to whether a party that has provided "prior express consent" can subsequently revoke the consent. The Second Circuit looked to common law to understand consent under the TCPA. Under common law, consent to another's actions can become irrevocable when it is provided in a legally binding agreement insofar as one party may not alter a bilateral contract by revoking a term without the consent of the counterparty. Since the TCPA contains no express provision altering consent under common law, the court concluded that a consumer cannot unilaterally revoke a consent provision in a binding contract.

In its opinion, the court distinguished cases from the Third Circuit and Eleventh Circuit and a Federal Communications Commission ("FCC") ruling that held that "prior express consent" is revocable under the TCPA. In those cases, the circuit courts considered consent in an application as distinct from a binding contract. The FCC's ruling is based on those cases. The Second Circuit agreed with the other circuit courts that consent obtained in an application is given gratuitously without consideration and under common law may be revoked at any time by the consenting party. On the other hand, the consent at issue in this case was included as an express provision of a contract. Such consent is not provided gratuitously and is not revocable without the agreement of the other party.

The court recognized the potential of businesses to undermine

the effectiveness of the TCPA through contractual consent clauses, but concluded that this concern is based in public policy and is for Congress to resolve not the courts.

The *Reyes* case provides more clarity to companies and their service providers who rely on "prior express consent" contractual provisions to place calls or send text messages subject to the TCPA. However, companies may be subject to other law, such as collection statutes, that require companies to cease communicating with customers upon request.

We frequently advise clients on federal and state laws regulating telemarketing and non-telemarketing communications with business and consumer customers. □

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