



July 28, 2017

UPDATE: REHEARING REQUESTED IN SECOND CIRCUIT TCPA CONSENT CASE

The lessee-plaintiff has asked the U.S. Court of Appeals for the Second Circuit to reconsider the court's decision 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); see DT ALERT of July 5, 2017. The plaintiff requested a rehearing *en banc*, where all of the court's judges will hear the case.

The plaintiff argued that rehearing is warranted for three principal reasons:

- (1) The *Reyes* decision conflicts with the Federal Communication Commission's authoritative interpretation of the TCPA and the legislative intent of the TCPA. The plaintiff proffered that for the TCPA's "prior express consent" exception to apply, consent must be freely revocable.
- (2) The *Reyes* decision conflicts with decisions from the Third, Ninth and Eleventh Circuits that the TCPA gives consumers a right to revoke consent. The Second Circuit distinguished the Third Circuit's and Eleventh Circuit's decisions stating that those courts considered consent in a credit application as distinct from a binding contract. The Ninth Circuit's decision addresses consent given as part of both an application and agreement for a gym membership. The *Reyes* decision does not discuss the Ninth Circuit case.
- (3) The *Reyes* decision is of exception importance because it opens the door to widespread fine-print waivers of substantive consumer protection law.

While the Second Circuit's decision is binding precedent only in Connecticut, New York and Vermont, well-reasoned decisions could be adopted in other jurisdictions. We will continue to monitor developments in this TCPA consent case. □

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