

August 18, 2017

## Federal Court Issues Favorable TCPA Ruling

The 2<sup>nd</sup> Circuit Court of Appeals handed down an important decision under the Telephone Consumer Protection Act (“TCPA”),<sup>1</sup> ruling that the TCPA does not permit a consumer to revoke a consent to receive telephone calls when that consent had been given as consideration under a contract.

The Plaintiff (Reyes) defaulted on a car lease, which included a provision where Reyes expressly consented to receive calls from the Defendant lessor (Lincoln) “by manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems.” Following Reyes’ default, on multiple occasions Lincoln called Reyes in an attempt to recover the debt. Reyes then requested that Lincoln cease contacting him. When Lincoln continued to call, he sued Lincoln in federal district court alleging violations of the TCPA. The court granted summary judgment to Lincoln and Reyes appealed the ruling.

The TCPA prohibits any person from initiating any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the

called party.<sup>2</sup> There is judicial precedent allowing a consumer to revoke a consent to be called where the consent had been given in an application.<sup>3</sup> These cases follow the common law where a consent once granted is considered to be revocable. However, in this case Reyes’ consent was not furnished gratuitously as in an application but as bargained-for consideration in the leasing agreement. Does the TCPA allow a consumer to alter a contract without the counterparty’s assent?

The 2<sup>nd</sup> Circuit Court considered this to be a novel question, and it agreed with the District Court that the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent. Under contract law, consent is not revocable unilaterally under the precept that every provision of a contract (including any proposed modification) has legal effect only with the mutual assent of the contracting parties.

The decision is only binding on federal district courts in the 2<sup>nd</sup> Circuit (Connecticut, New York, and Vermont), and the Court noted that no other federal circuit court has addressed this issue. Nevertheless, it is a well-reasoned decision and may have

<sup>1</sup> 47 U.S.C. Section 227. The case is *Reyes v. Lincoln Automotive Financial Services*, No. 16-2104-cv, 2017 WL 2675363 (2d Cir. June 22, 2017),

<sup>2</sup> 47 U.S.C. § 227(b)(1)(B)

<sup>3</sup> *Gager v. Dell Financial Services*, 727 F.3d 265 (3d Cir. 2013) and *Osorio v. State Farm Bank*, F.S.B. 476 F.3d 1242 (11th Cir. 2014).

persuasive authority outside of the 2<sup>nd</sup> Circuit. Thus, companies may consider adding a similar provision in their consumer contracts as a means to limit exposure to TCPA liability.

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