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Trials &TRIBULATIONS

Robocalls strike back

A few weeks ago, the Federal Court of Appeals for the Second Circuit split with its sister circuits and ruled that the federal Telephone Consumer Protection Act (TCPA) does not permit consumers to demand that they stop receiving automated calls if they entered into a contract opting into such calls.

The Second Circuit, in *Reyes v. Lincoln Automotive Financial Services,* __ F.3d __, 2017 WL 2675363 (2d Cir. 2017), affirmed summary judgment in favor of Lincoln Automotive Financial Services (Lincoln) in a suit by a car lessee (Reyes), who demanded he no longer be phoned by the car financing company after he defaulted on the lease. Prior to *Reyes*, Federal Appellate Courts determined that a party may revoke prior consent under the TCPA.

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Facts

In 2012, Reyes leased a new Lincoln luxury sedan from a Ford dealership and financed the lease. One of the lease provisions permitted Lincoln to contact Reyes by "written, electronic or verbal means," which included, but was not limited to, "contact by manual calling methods, prerecorded or artificial voice messages, text messages, e-mails and/or automatic telephone dialing systems," all in the event he failed to make any lease payments. *Id.* at *2. At some point after the lease was in effect, Reyes stopped making his required payments and, on multiple occasions, Lincoln called Reyes in an attempt to cure his default.

Reyes claimed he requested that Lincoln cease contacting him and mailed a letter to that effect, in which he wrote "I would also like to request in writing that no telephone contact be made by your office to my cell phone." *Id.* Lincoln contends that it never received the letter or any other request to cease making the phone calls. At his deposition, Reyes testified to mailing the letter and produced a copy of the letter, but it did not bear an address or postmark and referenced an incorrect account number.

Despite his alleged revocation of consent, Lincoln continued to call Reyes. In total, Lincoln had called Reyes 141 times, with a customer representative on the line, and called him with prerecorded messages an additional 389 times. *Id.* The Federal District Court for the Eastern District of New York granted Lincoln summary judgment and found that the TCPA does not permit a party to a legally binding contract to unilaterally revoke their consent.

Decision

The Second Circuit affirmed the denial of Reyes's summary judgment motion because under the TCPA, a party is not able to revoke consent that is a bargained-for term in a contract. Congress enacted the TCPA to protect consumers from "unrestricted telemarketing," which it determined could be "an intrusive invasion of privacy." *Id.* at *3. However, the statute is silent as to whether a party that has consented pursuant to a contract can subsequently revoke that consent.

Federal Appellate Courts for the Third and Eleventh Circuits have previously found that plaintiffs who had consented to receive calls from a defendant in an application for auto insurance and a line of credit were permitted to revoke their consent. See *Gager v. Dell Financial Services, LLC,* 727 F.3d 265 (3d Cir. 2013) (plaintiff who consented to be called in an application for a line of credit submitted to the defendant was permitted to later revoke that consent after receiving harassing calls upon her default on the loan); *Osorio v. State Farm Bank, F.*S.B., 746 F.3d 1242 (11th Cir. 2014) (plaintiff who had consented to receive calls from the defendant in an application for auto insurance could revoke her consent).

Based upon the aforementioned cases, the Federal Communication Commission ruled that "prior express consent" is revocable under the TCPA. See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 3 F.C.C. Rcd. 7961, 7993-7994 (2015). Despite this well-established precedent, the Second Circuit denied summary judgment because a different question was presented: whether the TCPA permits a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contact.

The Second Circuit found 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. Reyes at *4. Absent express statutory language, the Second Circuit concluded that Congress did not intend to alter

the common law of contracts.

Plaintiff argued that his consent to be contacted is revocable because the consent was not "an essential term" of his lease agreement with Lincoln. However, the Second Circuit found that argument meritless because a party who has agreed to a particular term in a valid contract cannot later renege on that term or unilaterally declare it nonessential, simply because the contract could have been formed without it.

Conclusion

The Second Circuit admitted that it is somewhat problematic that businesses may now undermine the effectiveness of the TCPA by inserting "consent" clauses of the type signed by Reyes into standard sale contracts. However, this hypothetical concern, if valid, is grounded in public policy considerations rather than legal ones and would therefore be "for the Congress to resolve—not the courts." *Id.*

Interestingly, attorneys drafting leases, credit extensions and similar agreements would be well advised to add a carefully worded provision identifying that consent is a bargained-for term, to prevent parties from later revoking their consent. However, as it stands now, once an individual signs a lease or credit card agreement, they are essentially at the mercy of the creditors and one would be wise to review the fine print of all agreements—or otherwise feel the wrath of robocalls.

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