

Second Circuit Says No to Unilateral Revocation of TCPA Consent to Contact, Citing Contract Principles

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The Second Circuit Court of Appeals has split with the Third Circuit, the Eleventh Circuit, and the Federal Communications Commission (FCC), and utilized contract principles to hold that a consumer may not necessarily have the ability to unilaterally revoke consent to contact under the Telephone Consumer Protection Act (TCPA). The decision shifts the focus of a TCPA claim from simply deciding whether the consumer revoked consent to whether consent to contact could be revoked by contract standards.

The plaintiff in [Reyes, Jr. v. Lincoln Automotive Financial Services](#), 16-cv-2104, Alberto Reyes, Jr., leased a Lincoln MKZ luxury sedan in 2012. As part of the lease agreement, Reyes gave Lincoln permission to contact him by written, electronic or verbal means, including prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems. The lease expressly permitted Lincoln to contact Reyes on his cell phone. After Reyes defaulted on the lease, Lincoln pursued the default, which included contacting him on his phone a total of 530 times: 141 times with a live customer service representative and 389 times with prerecorded messages. Reyes sued Lincoln for violations of the TCPA and in doing so claimed that he had revoked consent.

The Second Circuit affirmed judgment as a matter of law in favor of Lincoln concluding that Reyes could not unilaterally revoke consent. The Court distinguished Reyes' ability to revoke consent from the Third Circuit and Eleventh Circuit's decision, and from the FCC's 2015 Ruling, where consumers who had gratuitously given informed consent to contact could later revoke consent. The Court applied contract law to conclude that consent was irrevocable when provided in a legally binding agreement. The express terms of Reyes' lease with Lincoln allowed Lincoln to contact Reyes more than 500 times on his cell phone, allowed Lincoln to use an auto-dialer, and prohibited Reyes' unilateral revocation.

TCPA defendants will now look beyond whether there was proof of revocation of consent to their consumer contracts for similar non-revocable contract conditions. The ruling also leaves open the possibility for businesses to include a provision in their consumer contracts precluding the unilateral revocation of the consent to contact.

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Third Circuit Court Of Appeals, TCPA, FCC