

# Chapman Client Alert

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Current Issues Relevant to Our Clients

## Revocation Rulings Continue to Cloud TCPA Compliance

Compliance with the Telephone Consumer Protection Act (“TCPA”) has never been simple, and a number of conflicting and confusing rulings over the last several years have made it that much more difficult. The TCPA contains a complicated array of regulations depending on what kind of phone is being called, who is calling and what purpose the call serves, and whether the person being called has given permission. The last issue, whether the caller has given permission to call, and its corollary, whether that permission has been revoked, has been heavily litigated over the last five years, and to date, no bright-line rule has been established.

As courts noted in 2013, there was no clear direction from the TCPA statute itself or from appellate courts regarding how one could revoke consent: “[n]either the Court of Appeals for the Seventh Circuit nor any other federal appellate court has considered the issue of consent revocation, and the district courts that have considered the issue have reached varying conclusions.”<sup>1</sup>

In the years since, several appellate courts have examined the issue without consensus. Early on, the Third and Eleventh Circuits have found that TCPA consent was revocable. In 2013, the Third Circuit, in *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. 2013) found that absence of an express statutory grant of the right to revoke does not mean that the right to revoke does not exist. In 2014, the 11th Circuit, in *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), relied on common law in Florida and found that absent a contractual provision to the contrary, consent was revocable.

In its 2015 Order, the Federal Communications Commission (“FCC”) held that “a called party may revoke consent at any time and through any reasonable means, and ... that a caller may not limit the manner in which revocation may occur.”<sup>2</sup> This would only allow revocation, but also extended the means by which a party could revoke. However, the 2015 Order is currently being appealed, and its fate hangs in the balance of the U.S. Court of Appeals for the D.C. Circuit.<sup>3</sup>

In February 2017, the Ninth Circuit continued the streak of cases allowing revocation, holding in *Van Patten v. Vertical*

*Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017) that the TCPA permits consumers to revoke their prior express consent to be contacted by telephone autodialing systems.

However, in June 2017, the Second Circuit, in *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017), held to the contrary 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. The Second Circuit explained that unlike in the cases of *Gager* and *Osorio*, the consent to be called was included as an express provision of a contract to lease an automobile, and that TCPA consent given in a contract is not revocable.

Now, another Eleventh Circuit decision has injected further confusion into the revocation mix. In a decision in *Schweitzer v. Comenity Bank*, No. 16-10498, 2017 WL 3429381 (11th Cir. Aug. 10, 2017), the Eleventh Circuit concluded that the TCPA allows a consumer to provide limited, *i.e.*, restricted, consent for the receipt of automated calls. It follows, the Court explained, that unlimited consent, once given, can also be partially revoked as to future automated calls under the TCPA. The plaintiff had argued that she told the caller not to call “during the work day” or “in the morning.” The Eleventh Circuit found that this had effectively revoked her consent to be called, but only during those times. Thus, despite the fact that plaintiff’s words revoked her consent, the Eleventh Circuit has made it clear that revocation is not as clear or easy as it may have originally seemed under *Osorio*.

This morass of case law does not make for easy navigation of and compliance with the TCPA. The added difficulty of forecasting the results of the D.C. Circuit's inquiry into the 2015 Order will keep consent and whether it has been revoked a major concern for any entity employing automated telephone dialing systems.

### For More Information

If you would like further information concerning the matters discussed in this article, please contact any of the following attorneys or the Chapman attorney with whom you regularly work:

**James P. Sullivan**  
Chicago  
312.845.3445  
jsulliva@chapman.com

**Sara Ghadiri**  
Chicago  
312.845.3735  
ghadiri@chapman.com

- 1 [See \*Beal v. Wyndham Vacation Resorts, Inc.\*, 956 F. Supp. 2d 962, 976 \(W.D. Wis. 2013\).](#)
- 2 [See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, FCC 15-72, at ¶47 \(July 10, 2015\) \("2015 Order"\).](#)
- 3 [D.C. Circuit Hears Challenge to FCC's Interpretation of the Telephone Consumer Protection Act \(October 20, 2016\).](#)

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