

Consumer Finance Monitor (Season 3, Episode 26): Revoking Consent Under the Telephone Consumer Protection Act: A Discussion of Recent Case Law Developments

Speakers: Chris Willis, Joel Tasca, and Stacy Rubin

Chris Willis:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host, Chris Willis, the chair of Ballard Spahr's consumer financial services litigation practice group. And I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those of us in the industry. So to subscribe to our blog or to get on the list for our webinars, visit us at ballardspahr.com. And if you like our podcast, let us know. Leave us a review on Apple Podcasts, Google Play, or wherever you get your podcasts.

Chris Willis:

Today, I'm joined by two very experienced litigators who are members of our consumer financial services litigation group in our Las Vegas office, Joel Tasca and Stacy Rubin. And they're going to be talking about an issue that is of perennial interest to the financial services industry, and that is the telephone consumer protection act, or TCPA. We're going to be talking about an important new case law development that is very important in terms of understanding the landscape in this area. And Stacy, I'd like to ask you to tell the audience, what is the new development. What's happened?

Stacy Rubin:

Well, Chris, on May 1st, 2020, the 11th circuit issued a decision in the Linda Medley versus Dish Network matter. In the Medley case, the 11th circuit court of appeals followed the second circuit's reasoning from Reyes versus Lincoln Auto and held that the TCPA does not allow unilateral revocation of consent given in a bargain for contract. As a refresher, Reyes specifically held that absent express statutory language to the contrary, the court cannot conclude that Congress intended to alter the common law of contracts in this way, i.e. common law contract principles that do not allow unilateral revocation of consent when given as consideration and are bargained for agreement.

Chris Willis:

So Joel, the issue of consent is a pretty central one under the TCPA, but could you give the audience a better description of why the issue that Stacy just mentioned that was decided in this Medley case in the 11th circuit would be important to financial institution?

Joel Tasca:

Sure, Chris. Let me just start by saying that I've always thought of calls subject to the TCPA as falling into one of two general categories. First, there are calls by telemarketers and others that have no relationship whatsoever with the called party. The caller, the telemarketer, whoever's calling, is simply trying to call as many people as possible, whoever they are, typically to try to push them to buy something. Second, there are calls by companies that have a customer relationship with the called party already. And these companies are calling their own already existing customers, and they may be doing so for any number of

reasons. They could be trying to sell an additional product or service to their customer, or what is often the case is they're trying to collect money that the customer owes to them.

Joel Tasca:

The vast majority of the cases that we see filed against our financial institution clients fall into this second category. The call party is already a borrower or some other type of customer of the financial institution, and the financial institution is typically calling to, as I said, try to collect on amounts owed by the customer. Now, because there's either already this lender-borrower relationship or some other customer relationship between the financial institution and the call party, the call party typically is party to a written contract with the financial institution that was entered into when the relationship was formed. And in those written contracts, there are various terms, and often a term in those agreements will be the borrower's consent to be called by the financial institution about matters within the parties' relationship, such as calls to collect on the overdue amounts. And so in a lot of different loan agreements or other consumer agreements, we see these written contracts that have the prior express consent clause in it that is required for calls that are covered by the TCPA.

Joel Tasca:

Now, in our TCPA litigation, one of the most common defenses we try to rely on is that the plaintiff provided his or her consent to be called. And then one of the most common arguments we see by plaintiffs in response is that although the plaintiff may have provided consent to be called at the inception of the plaintiff's relationship with the defendant, the plaintiff will claim that he or she later revoked that consent when the plaintiff spoke to one of the defendant's customer service representatives. And this issue will often result in an ugly evidentiary battle. It will come down to a he said, she said. The plaintiff will swear up and down that he or she told the defendant's customer service representative to stop calling. In other words, the plaintiff will claim that he or she revoked consent, and there will be nothing in the customer service notes that reflects that revocation of consent.

Joel Tasca:

And so unless the defendant has made a recording of every call of every conversation with every customer and then kept those recordings for the four year duration of the TCPA statute of limitations, the defendant often can't definitively disprove that the borrower never actually revoked consent.

Joel Tasca:

Now, what the Medley holding that Stacy mentioned does is it legally strengthens the consent that's given as part of a consumer contract. And specifically, and Stacy will talk about this in more detail, the court held that if the consumer has provided his or her consent as part of a written agreement, the consumer can't unilaterally revoke the consent, such as on a conversation with a customer service representative of the defendant. And so this whole he said, she said game about whether the customer ever said to stop calling becomes legally irrelevant under the Medley holding. Even if the customer did say stop calling me, it doesn't matter under the Medley holding. Medley held, such a unilateral statement would be ineffective to revoke consent in any event.

Chris Willis:

That's interesting, Joel. And I'm curious. We have the Medley holding and it has the level of importance that you just mentioned. And Stacy mentioned that it followed a prior holding of the second circuit in the Reyes case. But more generally, before the Medley case came out just in May of 2020, how were courts and regulators handling this issue of revocation of contractually provided consent?

Joel Tasca:

Sure, Chris. And before we get into the answer to that question, let me just put the issue in context, specifically in the context of the TCPA statutory language. As many of you know, the TCPA prohibits certain types of calls without the call party's

quote, "prior express consent," end quote. Now the TCPA doesn't address in its statutory language one way or the other whether a person who has provided prior express consent can later revoke it. But the FCC and courts have held that a consumer does have the right to revoke previously given consent, and they've reasoned that it would be inconsistent with the consumer protection purpose of the TCPA if a consumer couldn't revoke previously given consent. And so in general, a consumer can revoke consent at any time and by any reasonable method, and the company to whom the consent was given can't abridge that right. So that was the general rule on consent and revocation pre-Reyes and pre-Medley.

Joel Tasca:

Now about three years ago, the Reyes decision came along, and it was a decision from the second circuit court of appeals. The full name was Reyes versus Lincoln Auto Financial Services, and Reyes involved a typical he said, she said situation about revocation. The district court held on summary judgment that the plaintiff's evidence of revocation was insufficient as a matter of law, and so the court granted summary judgment for the defendant.

Joel Tasca:

On appeal, the second circuit held that the district court erred on this part of its holding. It erred because it made a credibility determination on summary judgment regarding the plaintiff's revocation evidence, which the second circuit said it shouldn't have done. That question should have gone to the jury. But, and this is the important part, the district court in Reyes held in the alternative that the defendant also was entitled to summary judgment, even if the plaintiff had in fact revoked because the TCPA doesn't permit a party to a legally binding contract to unilaterally revoke the bargain for consent. And that part of the district court's holding the second circuit did affirm in Reyes.

Joel Tasca:

And the second circuit based its analysis, as Stacy mentioned, largely on the common law definition of consent. Under the common law, the court reasoned that consent is not always revocable, and one situation in which it's not revocable is when the consent is given as part of a legally binding agreement. The only way that consent provided in a contract can be revoked, like any term in a contract, would be by a modification of the contract. And that modification, of course, requires the assent of both parties to the contract. And so because both parties have to agree to such a modification, one party obviously can't just unilaterally do so. And the court held that the consent provided as part of a contract is no different. The second circuit held that the plaintiff has no ability to alter the contractually provided consent that he or she gave simply by unilaterally declaring on a call with a customer service representative or otherwise that he or she is revoking consent.

Joel Tasca:

So once Reyes was decided, I think a lot of people thought it was going to be a very influential decision across the country. I for one had a belief that it had the potential to really dramatically improve the TCPA landscape for businesses trying to call its customers. But outside of the second circuit, Reyes didn't really gain much traction. Some district courts followed it, but most district courts rejected it. And they reasoned that the Reyes holding couldn't be squared with the principle articulated by prior courts and the FCC, that a company can't take away a consumer's right to revoke consent using any reasonable method.

Joel Tasca:

So here we are three years later, and Reyes, as I mentioned, is not gaining any traction or very little traction. There's a mixed bag at best at the district court level with most district courts rejecting Reyes, and no other federal courts of appeals had occasion to address the relevant issue that was addressed in Reyes. So then came the 11th circuit's decision in Medley.

Chris Willis:

Joel, thanks for that background. Stacy, let me go back to you. Tell us a little bit about the facts in the Medley case that gave rise to the court's holding that we've been talking about thus far.

Stacy Rubin:

Certainly. So what happened here was that Ms. Medley entered into an agreement with Dish to receive satellite television services in exchange for monthly payments. The agreement contained a pause feature that allowed customers to temporarily suspend satellite services for up to nine months for a monthly fee, with the original term of the agreement to be extended by the length of the suspension period. As part of the agreement, Ms. Medley provided her cellular phone number and authorized Dish to contact her regarding her account or to recover any unpaid charges through an automated or predictive dialing system or prerecorded message system.

Stacy Rubin:

After several months, Ms. Medley called Dish to cancel her services. But after learning of early termination fees that would apply, she elected to suspend her services using the pause feature. Thereafter, she filed a voluntary chapter seven petition and listed an amount owed to Dish as an unsecured creditor, but did not include the Dish agreement in her list of executory contracts and unexpired leases.

Stacy Rubin:

Instead, she checked the box signifying she had no executory contracts and unexpired leases. The amount listed as owed to Dish was discharged pursuant to the bankruptcy court's discharge order. Dish wrote off that amount, but continue to bill Ms. Medley the monthly fee for the pause program. In response to emails sent by Dish to Ms. Medley seeking payment of the pause program fees, Dish received fax [mails 00:14:04] from counsel for Ms. Medley, indicating that they represented Ms. Medley with regard to her debts. The faxes also noted the TCPA prohibition against making automated calls to cellular phones, using an auto dialer, or artificial or prerecorded voice without prior consent, and stated that to the extent such prior consent existed, it was revoked consistent with Florida and federal law. Dish... It was alleged that Dish made six automated calls after receiving the first of such faxes.

Stacy Rubin:

Ms. Medley subsequently filed a lawsuit against Dish. In addition to alleging violations by Dish of Florida's debt collection law, Ms. Medley alleged that Dish had violated the TCPA by using an ATDS or prerecorded voice to call Ms. Medley on her cell phone after she revoked her consent to receive such calls. The district court granted summary judgment in favor of Dish on all claims, including Ms. Medley's TCPA claim. The district court characterized the pause debt and the satellite services debt as separate debts, ultimately finding that the services debt was discharged, but the pause debt was not. The court reasoned that the agreement was an executory contract that was not deemed rejected under bankruptcy law because Ms. Medley failed to specifically list it as an executory contract on her bankruptcy schedules. Because the agreement was not deemed rejected, the pause charges that accrued after the petition was filed were post-petition debt that was not discharged in the bankruptcy.

Stacy Rubin:

The district court further found that Dish's automated calls did not violate the TCPA because the TCPA does not allow unilateral revocation of consent to receive such calls when the consent is given in a bargain for contractual provision. The 11th circuit determined that the district court erred in finding that the pause debt was not discharged in Ms. Medley's bankruptcy. They found that the agreement was deemed rejected as a matter of law under the bankruptcy code during Ms. Medley's bankruptcy. And as a result, Dish had a pre-petition breach of contract claim for the pause debt, and that claim was discharged when the bankruptcy court entered the discharge order.

Stacy Rubin:

The 11th circuit also determined that because the TCPA is silent as to how consent can be provided or revoked, and Ms. Medley gave her consent as a mutually agreed upon term in a contract, the question of whether she revoked her consent must be analyzed under common law principles governing contracts.

Stacy Rubin:

The 11th circuit concluded that because such common law principles do not allow unilateral revocation of consent when given as consideration in a bargain for agreement, it would run counter to black letter contract law in effect at the time congress enacted the TCPA to allow Ms. Medley to unilaterally revoke a mutually agreed upon term in a contract. The 11th circuit also distinguished its 2014 decision in Osorio versus State Farm Bank, which held that a consumer could orally revoke consent to receive automated calls. In a 2015 FCC declaratory ruling that concluded that prior express consent is revocable under the TCPA, according to the 11th circuit, Osorio and the FCC ruling did not address consent given an illegally binding agreement, and instead address consent given generally and rely on common law tort principles to find that consent is revocable under the TCPA.

Chris Willis:

So having taken us through what happened in the Medley case, and of course we know that the decision that we're talking about came out on May 1st, 2020, Stacy, have there been any subsequent developments with respect to the case that the audience should be aware of?

Stacy Rubin:

Yes, Chris. Actually, Ms. Medley filed a petition for panel rehearing late last month. She argued in that petition that her consent was given voluntarily. So she was able to withdraw at any time. Additionally, Ms. Medley contended that while consent is included in a written contract in the case, the written contract was unique in that it clearly specified that such consent was gratuitous as no benefit or consideration was provided to the subscriber for his or her consent. She also argued that cancellation of her account and the discharge of her own debt invalidated the only reasons under the Dish disagreement that Dish would be allowed to contact Ms. Medley under the Dish disagreement. Additionally, beyond the petition that Ms. Medley filed late last month, since the 11th circuit's May 1st, 2020 decision one middle district Florida case has cited to Medley, in particular, with the TCPA case, for the proposition that a consumer cannot unilaterally revoke consent if there is a bargain for a contract giving consent.

Chris Willis:

Thanks very much, Stacy. So it sounds like we need to continue to pay attention to whatever the ultimate outcome and fate of the Medley case is with this petition for rehearing pending. I really want to thank you for sharing your expertise and insights on today's podcast. And the same goes for Joel, who has lots of information and lots of experience with respect to TCPA litigation and has been doing it for years. So thank you both for joining me on the podcast today.

Chris Willis:

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