

## Stop Calling Me: Can Consumers Waive The Right to Revoke Consent under the TCPA?

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*This article was published in Law360 on January 22, 2015.*

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*The Telephone Consumer Protection Act permits companies to make telephone solicitations using autodialers and pre-recorded messages once they have a consumer's consent to do so. Many authorities have suggested that such consent can later be revoked. However, it remains an open issue whether a consumer can waive his or her right to revoke consent, contractually or otherwise.*

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The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 *et seq.* (the "TCPA"), regulates telephone solicitations made using an automated telephone dialing system (also referred to as an "autodialer" or "ATDS") and pre-recorded messages. In February 2012, the Federal Communications Commission (FCC) revised its rules and regulations implementing the TCPA to further "protect consumers from unwanted telemarketing calls" while at the same time acknowledging that wireless services offer access to information that consumers find highly desirable. The revised rules and regulations require telemarketers to obtain prior express written consent before making autodialed or pre-recorded telemarketing calls.<sup>1</sup> The Ninth Circuit, in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009), found that the term "call," as used in the TCPA, includes text messages. Although the TCPA requires that a consumer give consent prior to receiving telemarketing calls or messages, the TCPA and the FCC's implementing rules and regulations are silent as to the consumer's ability to then change his or her mind and later revoke consent. Most authorities and courts agree that, under the TCPA, consumers have the right to revoke previously given consent to be called using an ATDS or pre-recorded message (also referred to as "opting out"). More recently, however, courts have been asked to decide whether a consumer is permitted to revoke this consent where it was previously given as part of an independent contractual arrangement, or whether that right to revoke can be waived.

### The FCC's Ruling in SoundBite Permits Consumers to Revoke Consent

In 2012, the FCC issued a declaratory ruling in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc.*, 27 FCC Rcd. 15391 (Nov. 26,

<sup>1</sup> The previous rules and regulations did not contain the "written" requirement. The current rules and regulations regarding prior consent for non-telemarketing, informational calls remain unchanged from their previous version. For discussion, see Pillsbury Client Alert, "[New FCC Regulations to Take Effect Regarding Telemarketing Robocalls](#)," October 3, 2013.

2012), in which the FCC, by determining that it was permissible to send a single text message confirming a user's desire to opt out, implied that the ability for consumers to revoke consent is built into the protections of the TCPA. The Third Circuit, in *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 269 (3rd Cir. 2013), interpreted the *SoundBite* decision as evidence that the FCC endorses a consumer's right to revoke his or her prior consent.

### Judicial Decisions Suggest a Trend in Favor of Revocability

The Third Circuit's decision in *Gager* is one of two Circuit Court decisions—along with the Eleventh Circuit in *Osoorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1254-56 (11th Cir. 2014)—that address a consumer's right to revoke prior consent to receive calls using autodialers and pre-recorded messages. In both *Gager* and *Osoorio*, the courts determined—for virtually identical reasons—that a consumer has the ability to revoke his or her previously given consent under the TCPA. Notably, both courts focused upon the common law principle that consent is revocable as well as the fact that the TCPA is a consumer-friendly statute.

The Tenth Circuit has only ever suggested in dicta that prior-given consent is revocable under the TCPA. In *Sartori v. Susan C. Little & Associates, P.A.*, 571 F. App'x 677, 683 (10th Cir. 2014), the Court stated that the consumer had not revoked his consent, thus implying—but not stating outright—that his consent was revocable in the first place.

The remaining circuits—including the Ninth Circuit and the Second Circuit—have not yet weighed in on this issue. Nevertheless, the majority of District Courts that have spoken to this issue—including the Southern District of California in *Hudson v. Sharp Healthcare*, 2014 WL 2892290 (S.D. Cal. June 25, 2014) and *Van Patten v. Vertical Fitness Group, LLC*, 2014 WL 2116602 (S.D. Cal. May 20, 2014)—agree that consumers are permitted to revoke their prior-given consent under the TCPA. A small number of District Courts—notably the Eastern District of New York in *Saunders v. NCO Financial Systems, Inc.*, 910 F.Supp.2d 464, 468 (E.D.N.Y. 2012), and the District of Colorado in *Chavez v. Advantage Group*, 959 F.Supp.2d 1279, 1283 (D.Colo. 2013)—have gone the other direction and have determined that consent is not revocable under the TCPA. However, these opinions appear to be in the minority, and the general trend appears to favor a finding of the right to revoke prior-given consent.<sup>2</sup>

### Are Consumers Permitted to Waive the Right to Withdraw Consent?

Recently, an issue which has mostly remained unaddressed is whether a consumer is permitted to withdraw consent to receive calls using autodialed and pre-recorded messages if he or she gave that consent as part of an independent contractual arrangement. In short, is one party to a contract permitted to unilaterally modify the contract because such revocation of consent is otherwise permitted under the TCPA and under the common law?

Authority is sparse on this issue. The current thinking appears to hinge on the courts' willingness to conclude that a provision contemplating that one party may call the other using an ATDS or pre-recorded messages is not an "essential term" in the contract. The Third Circuit in *Gager* briefly addressed this intersection between contract law and the TCPA as it related to a debt collections case, in which the company argued that the underlying credit agreement provided the consumer's consent to be autodialed. The *Gager* Court made two points on this issue: First, it held that the ability to use an autodialing system to contact a debtor was "plainly not an essential term to a credit agreement," thereby rejecting the company's argument that this clause formed part of the consideration underlying the contract. Second, it held that the existence of a contractual relationship did not waive the debtors'

<sup>2</sup> Some district court cases permitting revocation involve issues which overlap with the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1682 et seq. Because the FDCPA has its own rules about revocation, some courts have argued that decisions permitting revocation are only applicable within the debt collection context.

rights under the TCPA, including the right to revoke her prior express consent. Although the court recognized that “the level of contact that a debtor will consent to may be relevant to the negotiations of a line of credit,” the court did not explain why consent to receive autodialed calls was a non-essential term to a contract wherein debt collection may have been anticipated.

*Gager* is binding on the Third Circuit, but generally, this issue is not well developed across other circuits. The Western District of Wisconsin, in *Berg v. Verizon Wireless*, 2013 WL 8446598 (W.D. Wis. 2013), faced facts similar to those in *Gager* and came out the same way. Although the company in that case argued that the relevant autodialing clause formed part of the consideration underlying the contract, the court was unpersuaded by the company’s argument for purposes of interpreting the TCPA (although the court suggested that such an argument would be relevant for purposes of a contract dispute). Ultimately, the court in *Berg* held that a consumer could revoke their consent under the TCPA even when considered in the context of a contractual relationship.

### What Are the Practical Implications?

As a general principle, statutory rights are presumed to be waivable absent affirmative legislative intent to the contrary, and as long as the public interest is not negatively impacted. The legislative history of the TCPA does not clearly indicate any intent to disallow contractual waiver of a consumer’s rights under the TCPA. Nevertheless, courts may value the consumer-friendly nature of the TCPA over the broader rights of the freedom to contract and the waivability of statutory rights, as well as implicating a public interest.

Given the statutory-imposed civil penalty of \$500 per violation of the TCPA—even ignoring the availability of treble damages for knowing and intentional violations—businesses should carefully consider the use of autodialers and pre-recorded messages once a consumer has indicated that they no longer consent to such calls and text messages.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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