

TCPA Express Consent Can Be Revoked At Any Time

Law360, New York (August 28, 2013, 1:19 PM ET) -- The Telephone Consumer Protection Act[1] outlaws calls to a cell phone[2] using any automatic dialing system or an artificial or prerecorded voice made without the prior express consent of the called party.[3] In the recent *Gager v. Dell Financial Services LLC* decision, the U.S. Court of Appeals for the Third Circuit ruled express consent to be called can be revoked at any time. In so deciding, the court rejected a defense many creditors and debt collectors often assert: Once a debtor provides his cell phone number to you, you may call him at that number using an autodialer or prerecorded messaging for as long as the debt is owing.

The *Gager* facts are these. *Gager* gave Dell Computer her cell phone number when she applied for online credit to buy a new computer. When she got behind on payments Dell used an autodialer to call her to see when she would bring the account current. *Gager* eventually sent a letter to Dell saying stop calling. Dell disregarded the letter and continued to call — about 40 times — over a three-week period. *Gager* sued under the TCPA and the trial court dismissed her case, saying once she gave consent it could not be revoked.

The Court of Appeals reversed, holding that consent could be revoked at any time. There is no special exception for the debtor/creditor relationship. The court based its decision on these three factors:

1. Consent can be revoked at common law.
2. Any ambiguity in the TCPA should be resolved in favor of the consumer.
3. A recent FCC decision on another topic suggested revocation was possible.[4]

The court emphasized that there is nothing that prohibits Dell from continuing to call *Gager*; it just has to dial manually when it does so. The *Gager* decision will have serious consequences. It represents the first time a federal appellate court has addressed the revocation issue.

Even before the *Gager* appellate decision, many district courts addressing the issue held that a consumer can revoke her "prior express consent." Several cases require written revocation. *Starkey v. Firstsource Advantage*[5] explicitly states that verbal revocation is not sufficient under the TCPA. The *Starkey* court stated that "[t]here is nothing in either the TCPA or the FCC's December 28, 2007 Declaratory Ruling to support plaintiff's claim that a verbal request is sufficient to cease legitimate debt collection efforts." [6] *Starkey* and its progeny hold that written revocation is required.[7] This *Starkey* line of cases all involve claims under both the TCPA and the Fair Debt Collection Practices Act.[8] In each case, the court focused on the FDCPA's requirement that a request to have a collector stop calling had to be in writing and applied it to the TCPA.

Other cases, like *Gager* say even oral revocation is possible.[9] In *Adamcik*, the court

concluded that while the TCPA was silent on revocation, it just “simply means, for a host of reasons under the common law and canons of statutory construction, that oral revocation should be effective.”[10] The court in *Beal v. Wyndham Vacation Resorts Inc.* agreed:

“[C]onsumers have the right to revoke consent to receive autodialed calls under the Telephone Consumer Protection Act and ... they may do so orally or in writing. Although neither the text of the Act nor its legislative history addresses the possibility of revoking prior express consent, a traditional understanding of “consent” includes the possibility of revocation. Under common law, “[c]onsent is a willingness in fact for conduct to occur” and “consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.” “This unwillingness may be manifested to the actor by any words or conduct inconsistent with continued consent ...”[11]

Despite the above, there remains no express mechanism under the TCPA by which a consumer can revoke her “prior express consent” to receive calls.[12] Litigants advocating for revocation often claim that there is no temporal limitation to the FCC’s rule that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”[13] Despite the reversal of the lower court decision in *Gager*, there is authority in other districts holding that express consent cannot be withdrawn. In *Saunders v. NCO Financial Systems Inc.*,[14] the court eloquently articulated its rationale as follows:

[T]here is no provision of the TCPA ... that allows withdrawal of a voluntarily given, prior express consent to call a cell phone number. Nothing compels a consumer to list his cell phone number with his counterparty when he opens an account, or to open an account at all, but if that is the number he chooses to provide, then he cannot complain about being called at that number. It is not as if we are dealing with a fundamental constitutional right where a waiver may, under limited circumstances, be withdrawn. This is a narrow statutory right not to receive automated calls on a cell phone. A consumer that voluntarily gives it up need not have an opportunity to change his mind later; he has withdrawn from the protection of the statute. He is no worse off than all other consumers were before passage of the statute, because he has opted out of the statute.[15]

In addition to the *Saunders* line of cases, there are plenty of arguments still to be made about congressional intent and FCC rulings in connection with revocation. Specifically, Congress chose not to include a means to revoke consent in the TCPA. Congress knows how to provide for revocation of express consent when they want to do so. For example, Congress provided for revocation of consent in the *Junk Fax Prevention Act of 2005*, under the TCPA facsimile advertising rules, by allowing recipients of faxed advertisements to opt-out of future messages, despite having an established business relationship with the sender that allows the sender to fax such advertisements to the recipient.

Moreover, in its recent 2012 TCPA order, the FCC mandated an opt-out mechanism for telemarketing calls after an individual had provided prior written express consent to be called. It gave detailed requirements to accomplish this purpose. In the issuance of the rule, the FCC specifically declined to extend the revocation of consent opportunity and procedure to non-telemarketing calls, like debt collection, because “the record does not reveal a level of consumer frustration with non-telemarketing calls that is equal to that for telemarketing calls.”

TCPA violations carry penalties of \$500 to \$1,500 per call. The cases are on the rise. In 2008, only 14 TCPA cases were filed. Four years later, in 2012, that number exploded to over 1,100.[16] This year will see even more. While the Third Circuit *Gager* decision is only controlling in Delaware, New Jersey and Pennsylvania, it should be considered a potential harbinger of decisions to come. Companies seeking to avoid litigation should examine their

policies and procedures to account properly for the customer who revokes.

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[1] 47 U.S.C. § 227.

[2] 47 U.S.C. § 227(b)(1)(A)(iii). This applies unless the call is initiated for an emergency purpose.

[3] The TCPA also forbids initiating any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(B). It does not prohibit nonmarketing autodialed calls to residential lines. The issues raised in this article apply equally to residential calls.

[4] SoundBite Communications, Inc., 27 FCC Rcd. 15391, 15394 (2012).

[5] No. 07-cv-662A(Sr), 2010 U.S. Dist. LEXIS 60955 at 16 (W.D.N.Y., Mar. 11, 2010).

[6] *Id.*; see also *Moore v. Firstsource Advantage, LLC*, No. 07-CV-770, 2011 U.S. Dist. LEXIS 104517, at *33 (W.D.N.Y. Sept. 15, 2011) (“[A] verbal request to cease debt collection calls to a cellular phone will not be sufficient to revoke ‘prior express consent’ under the TCPA”).

[7] *Starkey*, 2010 U.S. Dist. LEXIS 60955, at *17. See also *Cunningham v. Credit Mgmt., L.P.*, No. 3:09-CV-1497-G(BF), 2010 U.S. Dist. LEXIS 102802 at *1 (N.D. Tex., Aug. 30, 2010) (following *Starkey*); *Moore*, 2011 U.S. Dist. LEXIS 104517, at *33 (same); *Moltz v. Firstsource Advantage, LLC*, No. 08-CV-239S, 2011 U.S. Dist. LEXIS 85196 at *1 (W.D.N.Y., Aug. 3, 2011) (citing *Starkey* and noting that the FDCPA “overrides” the TCPA); *Sengenberger v. Credit Control Servs., Inc.*, No. 09-C-2796, 2010 U.S. Dist. LEXIS 43874, at *10-12 (N.D. Ill., May 5, 2010) (noting that consent was revoked by written request).

[8] 15 U.S.C. § 1692 et. seq.

[9] See e.g., *Adamcik*, 832 F. Supp. 2d at 749; *Gutierrez v. Barclays Group*, No. 10-CV-1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, at *11-12 (S.D. Cal. Feb. 9, 2011) (determining that because the FCC indicated that prior express consent need not be in writing, a consumer could revoke consent orally – while failing to point to any provision that authorized revocation).

[10] *Adamcik*, 2011 U.S. Dist. LEXIS 150107, at *12. See also *Gutierrez*, 2011 U.S. Dist. LEXIS 12546, at *9-10.

[11] *Beal*, 2013 U.S. Dist. LEXIS 89840 at *41 (citation omitted).

[12] See *Gager v. Dell Fin Servs. LLC*, No. 3:11-CV-2115, 2012 U.S. Dist. LEXIS 73752, at *15 (M.D. Pa. May 29, 2012) (stating that revocation of consent was not permitted); *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 468 (E.D.N.Y. 2012) (holding that “there is no provision in the TCPA ... that allows withdrawal of a voluntarily-given, prior express consent to call a cell phone number”).

[13] In re Rules and Regulations Implementing The Tele. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769.

[14] 910 F. Supp. 2d at 468-69 (citations omitted). See also Chavez v. Advantage Group, No. 12-CV-02819, 2013 U.S. Dist. LEXIS 110522 ("Consent [once given] ... could not be ... effectively withdrawn."); Kenny v. Mercantile Adjustment Bureau, No. 10-CV-1010, 2013 U.S. Dist. LEXIS 62415 (W.D.N.Y. 2013) (Suggesting in dicta that revocation is not possible).

[15] Id.

[16] WebRecon LLC Report

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