

Does a Consumer Revoke TCPA Consent by Requesting Mailed Statements?

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Aylix K. Jensen offers analysis and insights for the debt collection industry in her monthly newsletter, *The Safe Harbor: Debt Collection Law Update by Aylix Jensen*. This monthly newsletter provides an update of changes and developments in the law that impact the debt collection industry. It highlights new debt collection laws and practices, discusses what these may mean for the collection industry, and provides tips to ensure compliance. This article is featured in the May 2022 edition.

The basic principle of the Telephone Consumer Protection Act (“TCPA”) is that it seeks to prohibit a company from making “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). While the provision of consent is not a new topic in the TCPA, revocation of consent is still a developing concept.

The TCPA is silent on whether and how a consumer may revoke consent that’s been previously granted. However, in 2015, the Federal Communications Commission (“FCC”) – the entity charged with prescribing regulations to implement the requirements of the TCPA – ruled that consumers have a right to revoke consent by using any reasonable method, which includes oral and written communications. In its ruling, the FCC further clarified that the TCPA does not require a clear expression of a desire to no longer be called. To determine whether a consumer’s revocation is reasonable, the FCC suggested looking to the totality of the facts and circumstances surrounding the specific situation.

On March 3, 2022, a district judge in the Western District of Kentucky granted in part and denied in part a defendant’s motion for summary judgment finding that the plaintiff’s request to have information sent to him via mail and refusal to speak with a collector after choosing mailed delivery gave rise to a genuine issue of fact as to whether the plaintiff revoked consent. *Barnett v. First National Bank of Omaha*, Civil Action No. 3:20-cv-337-CHB, 2022 WL 627028 (W.D. Ky. March 3, 2022). In *Barnett*, the plaintiff opened a credit card account with the defendant and provided his cellular number as a way for the defendant to contact him. After the plaintiff failed to make payments, the defendant started to contact the plaintiff using the number provided when the account was opened.

The plaintiff filed a complaint alleging, among other things, that the defendant violated the TCPA by contacting him via an ATDS before and after he allegedly revoked consent to be contacted. In support of his revocation of consent argument, the plaintiff focused on the following evidence: (1) deposition testimony in which the plaintiff testified that he told the defendant to not call him on

multiple occasions; (2) audio recordings of conversations between the plaintiff and the defendant in which he instructed the defendant to mail his billing statements and/or hung up prior to the natural conclusion of the call; and (3) an official log produced by the defendant of all the calls and texts made by the defendant, which provided numerous details as to form and reception of the type of contact made. The plaintiff argued that a reasonable jury could conclude he revoked consent by expressly directing the defendant to put anything they had to say in the mail and repeatedly hanging up on them. In response, the defendant argued that the plaintiff did not provide “clear revocation” of consent.

In examining the totality of the circumstances, the court found that the plaintiff raised a triable issue of fact because the evidence could lead reasonable minds to differ as to whether the plaintiff expressly revoked his prior consent to be contacted by the defendant.

This decision reaffirms that a lack of express revocation of consent does not equate to automatic success on a summary judgment motion. Rather, certain actions and requests by the plaintiff, when considered in their totality, may be enough for a court to find that there are remaining disputed issues of fact. Thus, it’s worth considering this decision when determining strategy in a revocation of consent case.

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Practice Areas

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