Business Litigation Update

May 2020

Eleventh Circuit Agrees With Second Circuit That Individuals Cannot Revoke Bargained-For Consent Under the TCPA

Introduction

On May 1, 2020, in *Medley v. Dish Network*, the United States Circuit Court for the Eleventh Circuit adopted the reasoning of the Second Circuit and held that a consumer cannot unilaterally revoke consent to call under the Telephone Consumer Protection Act (TCPA) when consent was given as part of a bargained-for exchange. These decisions may serve as the death knell for many TCPA lawsuits (such as those against lenders that autodial borrowers who fall behind on their payment obligations) but could also result in increased forum-shopping by the plaintiff's bar. Additionally, since there is no uniformity on this issue given that district courts in Washington, California and Illinois have rejected the Second Circuit's approach, businesses should exercise caution in relying on these decisions as part of their day-to-day business activities, especially if those businesses call individuals outside of the Second and Eleventh Circuits.

Background

The TCPA prohibits any person from making calls using an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service, unless the call is made with the prior express consent of the called party. Because the TCPA provides for statutory damages of $500 to $1,500 per telephone call (and because calls placed using an ATDS are often placed en masse), TCPA litigation, especially in the class action context, has been on the rise for years.

As part of her 24-month contract with Dish Network (Dish), Linda Medley (Medley) provided her cell phone number and expressly authorized Dish to contact her using an automated or predictive dialing system or prerecorded message. The contract also included an option for Medley to "pause" her services in exchange for an additional monthly fee, with the time during which the contract was "paused" being added to the contract's term. After learning of the fees associated with terminating the contract, Medley exercised the pause option.

Medley subsequently filed for bankruptcy. Although the bankruptcy court discharged Medley's debts, including the aggregated amount owed to Dish for satellite services, Medley did not identify her agreement with Dish as an executory contract that was being rejected or otherwise list the pause fee in the debts to be discharged. As a result, Dish continued to bill the monthly pause fee and began calling Medley to collect those amounts.

After Medley's counsel sent Dish a fax stating that Medley no longer consented to Dish calling her using an ATDS, Dish continued to make automated calls to Medley's cell phone.

Medley filed suit in the Middle District of Florida, claiming Dish violated the TCPA by using an ATDS or prerecorded voice to call her on her cell phone after she revoked consent. The district court found that the amount incurred for satellite services was distinct from the pause fee debt, that Medley's agreement with Dish was an executory contract that was not rejected, and that Medley did not otherwise list the pause fee debt in her bankruptcy

schedules. As a result, the district court held that the pause fee debt was not discharged, the agreement between Medley and Dish was not rejected, that additional pause charges accrued after Medley's bankruptcy petition, and that Medley could not unilaterally revoke her consent to be called when such consent was given in a bargained-for exchange. Medley appealed to the Eleventh Circuit.

Eleventh Circuit Decision

The Eleventh Circuit reversed the portions of the district court's decision that held that the pause debt was not discharged and that the agreement with Dish was not rejected. Nonetheless, the Eleventh Circuit held that Medley could not unilaterally revoke consent to be called under the TCPA when that consent was given as part of a bargained-for exchange.

The court noted that the text of the TCPA is silent as to consent and "evidenced no intent to deviate from common law rules defining 'consent.'" Adopting the rationale of the Second Circuit, the court held that bargained-for consent cannot be unilaterally revoked because Eleventh Circuit common law dictates that "an 'agreement is a manifestation of mutual assent on the part of two or more persons,' [and thus] it is black-letter contract law that one party to an agreement cannot, without the other party's consent, unilaterally modify the agreement once it has been executed."

The court distinguished other Eleventh Circuit and Federal Communications Commission cases relied upon by Medley because those cases involved revocation of consent in the context of common law tort principles, as opposed to consent given as part of a bargained-for contractual relationship.

Finally, the court concluded that its decision would not defeat the purpose of the TCPA because Congress knew and understood when the TCPA was enacted that "consent becomes irrevocable when it is integrated into a binding contract, and we find no indication in the statute's text that Congress intended to deviate from this common-law principle in its use of the word 'consent.'" Accordingly, the court held that permitting Medley to unilaterally revoke a mutually agreed upon contract term would run counter to black-letter contract law in effect at the time Congress enacted the TCPA.

Concurring Opinion

In a concurring opinion, Judge Britt C. Grant agreed that a consumer cannot unilaterally revoke bargained-for consent that was given as part of a bargained-for exchange but wrote separately to note that the discharge of Medley's debt in bankruptcy may have taken Dish's actions outside the consent provision's scope. Judge Grant emphasized that the consent provision did not grant Dish an unrestricted right to contact Medley for any reason, let alone for a debt that she no longer owed. Nonetheless, because the parties "ignored the logical follow-on question: whether, given the discharge of Medley's debt, Dish's phone calls were permitted by the consent provision[,]" Judge Grant concurred with the outcome of the case.

Conclusion

Although the Second and Eleventh Circuits are now in agreement that individuals cannot unilaterally revoke bargained-for consent under the TCPA, those who autodial should exercise caution in relying on these decisions as part of their business practices. Indeed, district courts in Washington, California and Illinois have distinguished the Second Circuit's approach and stated that bargained-for consent may be revoked under the TCPA. Until there is uniformity among the courts (or even a majority rule upon which a business may rely), businesses are encouraged to abide by an individual's revocation of consent, especially when there is a possibility that the individual is located outside of the Second or Eleventh Circuit. That said, businesses should review their customer contracts to ensure they include bargained-for consent, including consideration of whether those contract provisions should expressly state that unilateral revocation is not permissible, and those businesses whose contracts contain governing law provisions should analyze whether the principles espoused by the Second and Eleventh Circuits apply in the state whose law the business has specified as governing its contracts with consumers.

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