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Oral Revocation of TCPA Consent Ineffective Where Agreement Required Written Notice, Court Rules

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A consumer's alleged oral revocation of consent to receive autodialed or prerecorded calls to his cell phone was ineffective under the Telephone Consumer Protection Act (TCPA) when his credit card agreement provided that written notice was required to revoke such consent, an Ohio federal district court has ruled.

In *Barton v. Credit One Financial*, the plaintiff had obtained a credit card from Credit One and, by using the card, had agreed to the terms of the cardholder agreement, which stated that he was "providing express written permission authorizing Credit One Bank...to contact you at any phone number (including mobile cellular/wireless, or similar devices) ...for any lawful purpose. The ways in which we may contact you include live operator, automatic telephone dialing systems (auto-dialer), prerecorded message, text message or email." The agreement contained another provision titled "Communication Revocation," which stated, "if you do not want to receive communication as described [herein], you must (i) provide us with written notice revoking your prior consent [and include certain specified information.]"

The plaintiff claimed that Credit One had violated the TCPA by making an autodialed collection call to his cell phone after he had allegedly, by telephone, told a Credit One representative to stop calling him. After the company subsequently received correspondence from the plaintiff's attorney revoking his prior consent to be contacted regarding his account, Credit One placed a cease-and-desist flag on the plaintiff's account and stopped contacting him.

As an initial matter, the court rejected the plaintiff's argument that he had not given "prior express consent" to receive autodialed collection calls from Credit One as required by the TCPA but only gave "implied consent." In the court's view, "the terms of the Cardholder Agreement make it clear that [the plaintiff], by knowingly and voluntarily providing his cell number as part of the application, provided his prior express consent to be contacted."

The court then rejected the plaintiff's alternative argument that he had revoked his consent by orally asking Credit One's agents to stop calling him, concluding that "the revocation clause within the Cardholder Agreement is valid and enforceable, and [the plaintiff] cannot unilaterally alter the terms of the agreement to claim that his oral revocation of consent was valid."

The court noted that when Credit One received correspondence from the plaintiff's attorney that "adhered to the revocation language in the Cardholder Agreement," it flagged the plaintiff's account and made no further calls to him.

As support for its conclusion, the court cited the U.S. Court of Appeals for the Second Circuit's [2017 Reyes decision](#), which held that TCPA consent cannot be revoked when it is part of the bargained-for exchange memorialized in the parties' contract. In its March 2018 decision in *ACA International v. FCC*, the U.S. Court of Appeals for the D.C. Circuit sustained the Federal Communication Commission's (FCC) conclusion in a 2015 ruling that a called party can revoke consent to receive autodialed calls at a wireless number "at any time and through any reasonable means that clearly expresses a desire not to receive further messages."

In so doing, the D.C. Circuit highlighted the potential for contractual revocation limits, but did not rule on the ability

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LLP

Article By [John L. Culhane, Jr.](#)
[Alan S. Kaplinsky](#)[Mark J. Furletti](#)
[Daniel JT McKenna](#)[Ballard Spahr LLP](#)
[Legal Alerts](#)
[Communications, Media & Internet](#)
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to agree upon revocation rules, leaving the Second Circuit's Reyes decision as the only circuit court ruling on the issue. (A coalition of trade organizations recently [filed a Petition for Declaratory Ruling](#) with the FCC seeking clarification of the TCPA definition of "automatic telephone dialing system" (ATDS) in light of the D.C. Circuit's guidance in *ACA International* regarding when a dialer will qualify as an ATDS.)

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