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TCPA Update: Courts Deliver Mixed Bag on Customer Consent and Call Outsourcing

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Having increased in number each of the past seven years, lawsuits alleging violations of the Telephone Consumer Protection Act of 1991 (TCPA) continue to plague the consumer finance industry. As should be expected with an already complex statutory scheme, recent decisions have had a decidedly mixed effect, increasing potential exposure in some jurisdictions, while limiting it in others. The Courts have generally focused on a couple of areas.

First, the bulk of the TCPA focuses on situations in which companies are required to obtain consent from consumers in order to use automated dialing equipment or pre-recorded voices to call consumer's cellular telephones (generally, marketing calls require written consent where non-marketing calls require oral consent). Most cases thus hinge on whether consent was given and when and how it was allegedly revoked. In one recent ground-breaking decision, *Reyes v. Lincoln Automotive*, the Second Circuit Court of Appeals held that consent may not be revoked where that consent forms part of the bargained-for exchange. The borrower in *Reyes* financed the purchase of a car and signed a lease agreement which included a provision expressly permitting telephone calls made by prerecorded or artificial voice messages as well as calls using an automatic telephone dialing system. In affirming the denial of the borrower's TCPA claim, the Second Circuit concluded that if the decision led to the consumer finance industry including similar provisions in all consumer contracts – thereby arguably eviscerating the protections under the TCPA – that is a public policy issue that should be resolved by Congress.

While the *Reyes* decision was helpful to the industry, the Eleventh Circuit Court of Appeals reached a recent decision that was markedly less helpful. In *Schweitzer v. Comenity Bank*, the Eleventh Circuit found that a borrower was entitled to a jury trial on the issue of partial or conditional revocation of consent where she stated the following in a telephone call with her credit card company: "if you guys cannot call me, like in the morning and during the work day, because I'm working, and I can't really be talking about these things while I'm at work. My phone is ringing off the hook with you guys calling me." The trial court granted the lender summary judgment on the ground that the statement was so vague and unspecific that no reasonable jury could find that it effectively revoked her consent. The Eleventh Circuit overturned this decision and remanded the case for a jury trial. While the Court acknowledged the logistical challenges that could arise from a lender's efforts to comply with such a complicated revocation, the Court simply stated that a creditor can always decide to simply stop making telephone calls to the borrower at all.

Another issue receiving attention from Courts across the country is third party or vicarious liability under the TCPA. These cases typically arise when a company outsources marketing activity to a third party. The Ninth Circuit Court of Appeals just issued an opinion in *Jones et al. v. All American Auto Protection, et al.* that included a lengthy analysis on this very issue. The Court concluded that a company's liability for a third party's calls is a fact specific question that focuses on the control executed by the company. Rather than issue a bright line rule, the Court cited ten factors that should be considered including, inter alia, the control and supervision exerted by the company, whether the third party is engaged in an independent business, whether the company provides tools and instrumentalities, and the length of the contract. While the company avoided third-party

TCPA liability in this specific case, the message is clear. Consumer finance companies must remain vigilant and require all third-party marketing companies with whom they contract to comply with the TCPA.