

Context Matter: Court Uses Deposition Testimony to Find Revoking TCPA Plaintiff Re-Consented to Calls By Asking for A Single Call Back

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For those struggling to understand the contours of express consent and revocation in TCPA cases—and who isn't— a new decision out of the Southern District of Texas is well worth a read. It turns out that when a customer asks for a return call—even after declining to provide express consent in the same phone call—that customer has provided express consent to be called using an ATDS moving forward.

In *Tyler v. Mirand Response Sys.*, CIVIL ACTION NO. H-18-1095, 2019 U.S. Dist. LEXIS 81808 (S.D. Tx. May 15, 2019) the Plaintiff maintained a deposit account with the Defendant bank, accepting a TCPA consent provision in the deposit agreement. Despite the fact that the bank already had express consent to call the Plaintiff under the TCPA it still, for some reason, decided to ask the Plaintiff for consent to call him using an ATDS again when its agents reached him for collection purposes following an overdraft. Perhaps unsurprisingly, this did not end well—Plaintiff responded “no because they callin’ me every day.”

Although these facts already raise some interesting questions, the case really gets started later in the same phone call when Plaintiff specifically asked the Defendant to call him back regarding the account. To be clear, the Plaintiff asked to be called on a specific date and a specific time. The Defendant did call him back at that specific date and time—but then it kept calling him using an ATDS afterward.

Plaintiff sued under the TCPA contending that he revoked consent when he declined the ATDS script the defendant’s agent read to him and argued that he re-consented solely for the limited purpose of a single phone call. Thus, Plaintiff argued, all subsequent dialer calls after the one call he expressly invited were made without consent.

The *Tyler* court disagreed and granted summary judgment to the Defense. In the first instance the *Tyler* court was not entirely sure that the Plaintiff had revoked his consent in the first instance. Although the Plaintiff did say “no” when asked whether the Defendant could call him using an automatic dialer the Court noted that the Plaintiff’s refusal seemed to be tied to concerns over call volume rather than dialing technology. As the court put it: “it is unclear, however, because the context was Plaintiff’s complaints about the frequency of the calls, not the method used to make the

calls.”

Even assuming consent was validly revoked however, the Court had little trouble concluding that consent was re-granted later in the same phone call when the Plaintiff asked for a return call. This is true because Plaintiff asked to be called back and Plaintiff testified in her deposition that she wanted to speak with the Defendant so she could resolve her debt, and that she did not care what kind of technology they used to make the calls. Since providing a phone number to a caller in connection with a debt amounts to re-consent, the Court concluded that all calls made after the date of the requested return call were lawful under the TCPA.

Tyler is an interesting case for a couple of reasons. First, notice that the Defendant created its own headache by seeking consent when it already had consent. Undoubtedly this was done in an effort to maintain a “conservative” TCPA-compliant practice but, as so often happens, the practice met with operational difficulty when the customer declined the consent but the agent failed to change the consent quality for the cell phone in the system of record. Luckily for Defendant, however, it was bailed out when the Plaintiff asked to be called back.

That, of course, leads to the very interesting holding of *Tyler*—that merely asking for a call back at a specific date and time amounts to a re-consent for all purposes. Probably not every decision would come out the same way as *Tyler* did on that issue, but notice how the content of Plaintiff’s deposition was so critical to the outcome. The Court focused on the Plaintiff’s *subjectivemindset* in requesting a call back—rather than on the objective scope of the request to be called. That is, although Plaintiff only asked to be called back once, her deposition suggested that she wanted to speak with the bank and had little concern as to *how* calls to her would be made.

More broadly, *Tyler* highlights the myriad questions that arise in these revocation cases. TCPA revocation cases are about context and Defendants should be sure to look at their case holistically—resisting the temptation to listen to a call recording in isolation. A deposition is a must in these cases and, as *Tyler* demonstrates, spending the time and money to fully explore the context and state of mind of a TCPA Plaintiff often reaps benefits in the form of defense verdicts.

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