

## **Gager Strikes Again: Defendant Survives Plaintiff's MSJ Effort—But Court Finds Contractual Consent Revocable**

Article By:

Eric J. Troutman

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It's weird that this is still an issue.

For those of you who caught our final Masterclass this month, you know that the seesaw battle over contractual consent provisions carries on. This is so although precisely ZERO appellate courts have found that contractual consent provisions are revocable. Instead, both appellate courts to consider the issue to date have found that contractual consent provisions are NOT unilaterally revocable by consumers.

Nonetheless, nearly four years to the day since the Second Circuit's *Reyes* decision (should have) resolved the issue for all of us, a district court just this week has held contractual consent provisions are revocable.

In *Allen v. First Nat'l Bank of Omaha*, 3:18-CV-1216, 2021 U.S. Dist. LEXIS 119631 (M.D. Pa. June 28, 2021) the Court rejected the Defendant's argument that contractual consent is irrevocable. Instead, relying on the old *Gager* decision, the Court found that a consumer can always revoke consent—even when they agree to be contacted via an enforceable contractual term.

The reliance on *Gager* is simply baffling to me. There was no contractual consent provision at issue in that case. Instead, the Defendant argued (badly) that a business can *always* call its customer just because it has a contractual relationship with the customer, period. It was a terrible argument—and properly rejected. But it is light years away from the situation where a consumer has actually accepted a contractual term giving the caller the right to call.

Courts are generally very good at distinguishing inapplicable authority but *Gager* has been relied upon time and again by courts that simply can't see the difference between a contractual consent provision, on the one hand, and a contract with no consent provision, on the other.

Le sigh, and all that.

*Allen* isn't all bad news, however. Interestingly the Court denied summary judgment to a Plaintiff who appeared to have set up his case pretty well. He asked the defendant's rep: "I ask that you please stop calling any phone number regarding any account, but you can contact me by mail." (If that

language sounds scripted it's because (Defendant claims) the Plaintiff's lawyer scripted it.)

Despite the request the defendant called plaintiff over 200 additional times using prerecorded voices (not a great look.)

But Defendant didn't lose (yet) because its agent tried to clarify the scope of Plaintiff's revocation. Because Plaintiff dropped off the line before Defendant's agent could obtain additional information the Defendant chose to treat the revocation as valid for marketing only—and left consent in place for collection calls.

While this “interpretation” of Defendant's request may seem self-serving, the Court determined it was for the jury to decide whether Plaintiff's request qualified as a valid revocation under all of the circumstances. The Court found the matter a “close call” but Defendant managed to eek past summary judgment and is headed to trial.

We'll keep a close eye to see if this one tries or (more likely) ends up in settlement. Either way, the fact that courts are still splitting on *Reyes* is cause for concern here in TCPAWorld.

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