Published on *The National Law Review* https://natlawreview.com

TCPA REVOCATION NOTICE MUST GO TO EL PASO?: Court Refuses to Permit Bank of America to Enforce Odd Unilateral Revocation Provision at Pleadings Stage

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Imagine you have a credit card agreement with a major bank and it begins to bombard you with prerecorded robocalls.

You hire a lawyer who writes letters to the bank on your behalf, asking the calls to stop. But they continue.

Eventually you file suit only to have the bank show up and claim they added a fine-print provision to your credit card agreement–after you signed up for the card, no less–that specified all requests to stop robocalls have to be sent to some address in El Paso, Texas.

This is exactly the circumstance allegedly facing a consumer named Lidia Jenkins in her battle against Bank of America. And so far, the Court does not seem pleased with the Bank.

In *Jenkins v. Bank of America,* 2023 WL 2939349 (S.D. Cal. April 13, 2023) Plaintiff alleged Bank of America continued sending robocalls to her cell phone after her lawyer asked them to stop.

Remarkably, the Bank moved to dismiss–a pleadings-stage motion that generally requires courts to only accept the allegations of the complaint–arguing that a change-in-terms made to the credit card agreement with the Plaintiff required her to ONLY send revocations to an address in El Paso, Texas (which her attorney had, apparently, not done.)

The Court handily rejected Bank of America's motion on both procedural and substantive grounds.

Procedurally, the Court refused to take "judicial notice" of the agreement since private documents are not subject to such notice.

The Court also correctly refused to accept the change in terms under the incorporation by reference doctrine since the document was unauthenticated.

Eesh, one mistake after another.

Nonetheless, for the sake of efficiency–i.e. for the sake of quickly rejecting the Bank's position–the Court decided to consider the terms of the CCA in denying the motion.

While the Court refused to directly reject the Bank's gambit here, it is not looking good:

Even if the Court determined that consent revocation contract provisions did not contravene the TCPA, there are too many factual questions to dismiss the dispute at this stage. Indeed, it is unclear whether the Amendment to the CCA is enforceable under common law contract doctrine. For instance, the Court may find after discovery that the Amendment is an invalid unilateral modification of the original contract without consideration. Further, it is not clear whether Plaintiff received the Amendment, whether there are other relevant amendments to the CCA, whether Plaintiff's method of revocation was reasonable, and whether Defendant received Plaintiff's revocation. All of these ambiguities require factual exposition and cannot be resolved at the pleadings stage.

Not looking good folks.

The take aways here are pretty clear, however. While contractual revocation provisions are enforceable in many jurisdictions, using a fine print disclosure requiring revocation to be sent only via mail to an obscure address is going to meet with judicial scrutiny. Truthfully I'm surprised the Bank is seeking to use such a disclosure–and raising it early in this suit. Losing that issue could result in a massive TCPA revocation class action–which are generally very difficult for a Plaintiff.

So this is a high stakes game of poker here. Now that the genie is out of the bottle the Bank is going to have to defend this process on the big stage, and with $500.00 a call on the line this is not a battle the Bank can afford to lose…

We'll keep an eye on this…

National Law Review, Volume XIII, Number 107