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Common Law Rules: Applying Common Law Principles to Reassigned Phone Number Disputes Under the TCPA

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COMMON LAW RULES: APPLYING COMMON LAW PRINCIPLES TO REASSIGNED PHONE NUMBER DISPUTES UNDER THE TCPA

MONICA FRITSCH*

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I. INTRODUCTION

Senator Ernest Hollings once described automated calls as “[t]he scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”¹ With advances in technology and the increased popularity of cellphones and smartphones, the frequency of these disturbances has only increased.² Automated callers, or “autodialers,” can now call and text cellphone users anywhere at any time, reaching them outside of the home, at work, on their morning commute, on a date, or even in a quiet theater. The growing popularity of cellphones has coincided with an increasing rate of phone number reassignments. Good faith autodialers now find themselves calling a phone number’s previous, consenting owner only to reach the phone number’s new, unconsenting owner.³ In response, courts have struggled to determine when the law prohibits autodialers from making such calls to a phone number’s new owner.⁴

1. 137 CONG. REC. 30,821 (1991) (statement of Sen. Ernest Hollings).

2. See ERNEST HOLLINGS, AUTOMATED TELEPHONE CONSUMER PROTECTION ACT, S. Rep. No. 102-178, at 2 (1991) (finding that calls were made to “more than 7 million Americans every day” in 1991); *TNS Report: Americans Now Receive 300 Million Unwanted Robocalls Per Day*, BUSINESSWIRE (Mar. 4, 2020, 9:03 AM), <https://www.businesswire.com/news/home/20200304005116/en/TNS-Report-Americans-Now-Receive-300-Million-Unwanted-Robocalls-Per-Day> (citing 2020 TNS ROBOCALL INVESTIGATION REPORT) (stating that in 2019, Americans received almost 300 million unconsented calls per day).

3. See William Dolan et al., *FCC Establishes Reassigned Phone Number Database*, JONES DAY (Jan. 2019), <https://www.jonesday.com/en/insights/2019/01/fcc-establishes-reassigned-phone-number-database> (explaining that 35 million phone numbers are reassigned yearly in the United States); Tim Bauer, *JPMorgan Chase to Pay \$3.75 Million to Settle TCPA Suit on Calls to Reassigned Phone Numbers*, INSIDEARM (June 27, 2016, 7:35 AM), <https://www.insidearm.com/news/00041956-jp-morgan-chase-to-pay-375-million-to-set/> (reporting that JPMorgan Chase called 675,000 reassigned phone numbers and had to pay an almost \$4 million settlement).

4. See, e.g., *Medley v. Dish Network, LLC*, 958 F.3d 1063, 1069–70 (11th Cir.

The Telephone Consumer Protection Act (“TCPA”)’s autodialing ban generally restricts a business or other commercial entity from using an automatic telephone dialing system (“ATDS”), to make unconsented calls or texts.⁵ Section 227(b)(1)(A)(iii) of the TCPA, codified at 47 U.S.C. § 227, requires that any call from an ATDS must have the prior express consent of the phone number’s owner.⁶ While the TCPA expressly provides that phone number owners must consent to receive calls from autodialers, it does not explicitly address whether phone number owners can revoke their consent.⁷ However, as the TCPA’s implementing agency, the Federal Communications Commission (“FCC”) interprets the TCPA to allow for revocation “at any time and through any reasonable means.”⁸ Courts have upheld this FCC interpretation as permissible.⁹ Furthermore, some courts take this interpretation a step further, holding that consent given as part of a bargained-for exchange cannot be unilaterally revoked.¹⁰

When a phone number owner who previously gave consent as part of a bargained-for exchange discontinues ownership over the phone number, the wireless carrier may subsequently reassign the phone number.¹¹ The caller may be unaware of the change in ownership. However, the TCPA still allocates the burden of ensuring proper consent to the caller.¹²

2020) (holding that consent cannot be unilaterally revoked in a bargained-for exchange); *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1255 (11th Cir. 2014) (holding that consent is revocable under the TCPA). *See generally* Zachary D. Miller et al., *Effective Revocation of Consent Under the Telephone Consumer Protection Act Following Reyes v. Lincoln Automotive Financial Services*, 72 CONSUMER FIN. L.Q. REP. 453 (2018) (stating that there should be a special interpretation of consent in TCPA context because of the statute’s remedial purpose for consumers who receive unwanted calls).

5. Telephone Consumer Protection Act, 47 U.S.C. § 227(a)–(b).

6. *Id.* § 227(b)(1)(A)(iii); *see also id.* § 227(b)(1)(B) (listing a few enumerated exceptions to the consent requirement, including in the case of an emergency).

7. *See id.* § 227 (failing to create revocation of consent provisions).

8. *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7990 (2015) (establishing that regardless of how consent was given, the caller carries the burden of proving that it has the required prior express consent).

9. *See, e.g., Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1048 (9th Cir. 2017) (concluding that revocation “must be clearly made and express a desire not to be called or texted”).

10. *See generally* *Medley v. Dish Network, LLC*, 958 F.3d 1063 (11th Cir. 2020) (holding that when consent is given as part of a bargained-for exchange, common law contract principles prevent one party from unilaterally revoking consent); *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017) (holding that where consent is not freely given, but is part of a contract’s consideration, that consent cannot be unilaterally revoked).

11. *See Dolan et al., supra* note 3.

12. *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. at 7990, 7994.

When a caller previously obtained proper consent from a wireless phone number's previous owner, and the phone number is later reassigned to a new owner, courts should apply the common law of consent to determine whether the reassignment effectively revokes the previous owner's consent. The TCPA requires the caller obtain the current phone number owner's prior express consent before making automated calls, however new owners of reassigned numbers were not privy to the previous owner's bargained-for consent with the caller.¹³ Thus, autodialers cannot secure the requisite prior-express consent.¹⁴ Accordingly, callers should face TCPA liability when calling reassigned phone numbers because of the burden of proof and Congress's intent to protect private phone number holders from automated calls when it passed the TCPA.¹⁵

This Comment will first explore the purpose of the TCPA and the role of the FCC in implementing the law, the TCPA's consent requirement and the inferred revocation of consent procedure, and the permissibility and applicability of common law doctrines to federal law. It will then analyze whether courts should apply contractual consent law and the TCPA's text to establish a standard for consent revocation in the case of reassigned phone numbers. Finally, this Comment will argue that courts must apply common law consent principles to disputes over calls made to reassigned phone numbers when the previous owner gave consent to be contacted and suggest that the FCC continue its efforts to implement the Reassigned Number Database to ease the burden on callers of confirming consent.

II. THE TCPA'S CONSENT REQUIREMENT TO PROTECT CITIZENS FROM AUTOMATED CALLS AND THE SPECIAL DIFFICULTIES OF REASSIGNED PHONE NUMBERS

Congress passed the TCPA to curb the increasing prevalence of unsolicited, automated telephone calls to residential phone users to protect

13. See 47 U.S.C. § 227(b)(1)(A)(iii) (requiring prior express consent). See generally *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017) (finding that because Reyes entered into an agreement the consent cannot be unilaterally revoked); RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981) (defining "bargained-for exchange").

14. See 47 U.S.C. § 227(b)(1)(A)(iii).

15. See *id.*; *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd at 7790. See generally Kimberly J. Winbush, Annotation, *Unsolicited Calling and Messaging Under Communications Act of 1934, as Amended by Telephone Consumer Protection Act of 1991, as Amended, (TCPA) (47 U.S.C.A. § 227) and Regulations Thereunder (47 C.F.R. § 64.1200) — Federal Cases*, 52 A.L.R. Fed. 3d Art. 1 (2021) (stating that Congress's purpose in enacting the TCPA was to restrict "proliferation of unsolicited phone calls" to residential phone numbers to protect phone number owners' privacy).

those users' privacy interests.¹⁶ While the TCPA requires consumers to give consent to receive automated calls, it fails to address revocation of consent.¹⁷ Nevertheless, by applying common law consent principles, the FCC and courts interpret the TCPA to allow revocation when consent is freely given.¹⁸ However, questions arise when applying this standard to reassigned phone numbers.

A. The TCPA's Purpose and the Role of the FCC

When Congress enacted the TCPA in 1991, the country was experiencing a massive increase in the use of telemarketing, with “over 300,000 telemarketing solicitors call[ing] more than 18 million Americans every day.”¹⁹ At the time of enactment, caller ID was not common, so recipients could not identify the caller, whether it be a telemarketer, a family member, or a friend, before answering.²⁰ Companies utilized autodialers to telemarket because they were more efficient than having a human make the same calls.²¹ Referring to the unrestricted telemarketing phenomenon as “an intrusive invasion of privacy,” Congress noted that consumers were “outraged” over the increase in these “nuisance calls” when it enacted the TCPA.²²

One of the TCPA's primary purposes is to prohibit the use of autodialers to call phone numbers without the phone number owner's prior express consent.²³ To achieve this goal, Congress tasked the FCC with issuing

16. See 47 U.S.C. § 227; see also Winbush, *supra* note 15.

17. See 47 U.S.C. § 227.

18. See *Medley v. Dish Network, LLC*, 958 F.3d 1063, 1069–70 (11th Cir. 2020) (holding that Congress intended common law consent to apply to TCPA; therefore, consent is only freely revocable when it is not given as part of a bargained-for exchange); *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7993–94 (2015) (failing to find any proof Congress intended special consent principles to apply to TCPA).

19. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018) (quoting 137 CONG. REC. S16,971 (daily ed. June 27, 1991) (statement of Rep. Larry Pressler)).

20. Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOK. L. REV. 1, 2 (2018).

21. See *Marks*, 904 F.3d at 1043 (citing H.R. REP. NO. 102-317 at 6, 10 (1991)) (finding that an autodialer could call and deliver the exact same message to 1,000 telephone numbers without the cost and time of having a human do the same).

22. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227).

23. Hurwitz, *supra* note 20, at 2. See generally 47 U.S.C. § 227(a)(1) (“The term ‘automatic telephone dialing system’ means equipment which has the capacity — (A) to store to produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”).

regulations interpreting and applying the statute.²⁴ However, the FCC's regulations are subject to judicial review, and a court may set aside or suspend orders or regulations that the FCC issues.²⁵ Since the TCPA's enactment, the FCC has issued several major regulations to aid in enforcement.²⁶ Most notably, the FCC further broadened the TCPA in 2015 to address new trends that did not exist when Congress implemented the Act, such as increased cellphone usage and the reassignment of phone numbers.²⁷

i. Section 227(b)(1)(A)(iii)'s Consent Requirement and Evolution

The TCPA's consent requirement laid out in § 227(b)(1) makes it unlawful to make a call within the United States using "any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service . . ." ²⁸ However, the FCC allows autodialed calls when the phone number's owner has given his prior express consent to be called.²⁹ While the TCPA does not expressly define "prior express consent," the FCC interprets it to mean that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."³⁰

Courts further interpret both the TCPA's consent subsection and the FCC's orders.³¹ In examining when a phone number owner gives prior express consent, the Ninth Circuit held that knowingly releasing a phone

24. 47 U.S.C. § 227(b)(2) (giving the FCC power to "prescribe regulations to implement the requirements of this subsection" and guidance on what these regulations may entail, make exceptions for, and ban).

25. 28 U.S.C. § 2342(1).

26. See generally Marissa A. Potts, Note, "Hello, it's me [Please don't sue me!]: Examining the FCC's Overbroad Calling Regulations Under the TCPA, 82 BROOK. L. REV. 281 (2016) (summarizing the FCC's orders interpreting and administering the TCPA).

27. *Id.* at 291 (citing *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7989–8000 (2015)).

28. 47 U.S.C. § 227(b)(1) (excepting calls made to collect debt owed to the United States and for emergencies). *Contra* Barr v. Am. Ass'n Pol. Consultants, 140 S. Ct. 2335, 2346–48 (2020) (holding the government-debt exception unconstitutional and severing it from the rest of the statute).

29. 47 U.S.C. § 227(b)(1)(A); *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8768–69 (1992).

30. *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. at 8769.

31. See Zachary D. Miller & Rachel R. Friedman, *TCPA Litigation Update: Courts Take the Reins in Defining the Statute's Limits*, 73 BUS. LAW. 431, 434 (2018) (stating that courts take a "common sense approach" to the scope of "prior express consent" in finding that the consent only applies to matters "relate[d] to the context in which consent" was originally given).

number for a transaction-related communication meets the prior express consent requirement established by the FCC.³² For the automated call to be lawful, the prior express consent must relate to the same subject matter as the call or text.³³ The phone number owner is essentially giving consent to be contacted only for “use in normal business communications.”³⁴

B. Revocation of Consent Under the TCPA

The TCPA does not address the revocation of consent; however, in its 2015 Order, the FCC interpreted the TCPA to allow revocation through “any reasonable means.”³⁵ The FCC noted that any other interpretation of the TCPA could subject consumers to an unlimited number of unwanted calls, contradicting the TCPA’s purpose and consent as defined by common law.³⁶ To further support this interpretation, the FCC argued that Congress’s failure to craft a limited form of consent revocation into the TCPA indicates that it intended for common law consent concepts to apply.³⁷ The FCC concluded that revocation does not place an unreasonable burden on callers to record and respect the consent revocation, and included examples of reasonable revocation methods.³⁸ In the same order acknowledging the permissibility of consent revocation, the FCC affirmed that the caller has the burden of proving it had the required prior express consent in the face of a dispute.³⁹

32. *See* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1044–45 (9th Cir. 2017).

33. *See id.* (interpreting the FCC’s 1992 Order alongside Congress’s intent and the TCPA’s legislative history to mean that giving the phone number does not give express consent to be contacted for any purpose, but rather the contact must relate to the transaction that gave rise to consent).

34. *See id.* at 1045 (using an example from the FCC’s 2008 Order in which the FCC ruled that giving a cellphone number to the debtor only reasonably gives prior express consent to be contacted about the debt).

35. *See In re* Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7993–95 (2015) (finding that this interpretation is most reasonable considering the TCPA’s purpose and stating that the statutory silence on the right to revoke should be interpreted to favor consumers).

36. *See id.* at 7993–94.

37. *Id.* at 7994 (noting that “nothing in the language of the TCPA or its legislative history support the notion that Congress intended to override a consumer’s common law right to revoke consent”).

38. *See id.* at 7996 (listing examples of revocation methods: “a consumer-initiated call, directly in response to a call initiated or made by the caller, or at an in-store bill payment location, among other possibilities” and stating that callers cannot hinder “a consumer’s right to revoke consent using any reasonable method”).

39. *Id.* at 7994 (emphasizing that under “longstanding Commission precedent,” the caller bears the burden of proving consent, regardless of how the consent was originally given).

In 2018, the D.C. Circuit Court of Appeals upheld the permissibility of the FCC's interpretation that consent is revocable through "any reasonable means."⁴⁰ The court refused to agree with concerns that this standard is too broad, stating that strictly and narrowly defined revocation standards would harm both the caller and the phone number owner.⁴¹ The D.C. Circuit also noted that the 2015 Order did not affect contracting parties' ability to contractually determine revocation procedures for themselves.⁴²

Courts also hold that phone number owners may revoke consent under the TCPA, reasoning that Congress did not create a specific understanding of consent within the TCPA, and as a result, common law principles allow the revocation of consent.⁴³ The Supreme Court held that when Congress uses a term that has a "settled meaning . . . under the common law," unless it expressly provides otherwise, it intended to apply the term's settled meaning.⁴⁴ Under this rule of statutory interpretation, the Ninth Circuit considered the TCPA's purpose and the FCC's interpretations of the law to find that Congress intended to allow consumer revocation of consent.⁴⁵ In further clarifying and establishing the process for revoking consent, the court held that a caller must clearly and expressly convey their revocation.⁴⁶

40. *ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018) (upholding the FCC's interpretation of the TCPA, which allows a person to "revoke consent through any reasonable means clearly expressing a desire to receive no further calls or texts").

41. *See id.* at 709–10 (finding that phone number owners should be able to easily revoke consent to remain consistent with the TCPA's purpose of protecting citizens from unwanted automated calls and callers should want easily applied opt-out procedures to avoid possible TCPA liability).

42. *See id.* at 710 (stating that the 2015 Order only prevents callers from unilaterally determining revocation procedures and imposing those on the called party).

43. *See, e.g., Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047 (9th Cir. 2017) (supporting this interpretation by finding that under common law consent is revocable); *see also Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270–71 (3d Cir. 2013) (quoting *Neder v. United States*, 527 U.S. 1, 21 (1999)) (stating that Congress did not establish another meaning of consent so the common law understanding should be applied, under which consent that is freely given is revocable)

44. *See id.*; *see also Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014) (finding that Congress intended for the TCPA to incorporate common law consent principles, including revocation, under which consent may usually be revoked orally).

45. *Van Patten*, 847 F.3d at 1047 (referring to the TCPA as a "remedial statute intended to protect consumers from unwanted telephone calls" and noting that the FCC's "endorse[ment]" of this interpretation supports the court's conclusion that consent is revocable under the TCPA); *see also Gager*, 727 F.3d at 271 (stating that as a consumer "remedial statute," any silence or ambiguity in the TCPA should be permissibly interpreted in favor of the consumer).

46. *Van Patten*, 847 F.3d at 1048.

Additionally, other courts have found that no time limit applies to when the phone number owner must revoke consent.⁴⁷

i. Revocation of Consent in a Bargained-for Exchange

While courts have generally reached a unanimous consensus that freely given consent may be revoked under the TCPA, they vary when consumers give consent as part of a bargained-for exchange.⁴⁸ A bargained-for exchange, is “[a contractual] agreement to exchange promises or to exchange a promise for performance or to exchange performances.”⁴⁹ Under black letter contract law, a party cannot unilaterally modify an agreement once it is completed without the other party’s consent.⁵⁰

In *Medley v. Dish Network, LLC*,⁵¹ the phone number owner expressly consented to be called as part of her agreement with her television provider and later attempted to unilaterally revoke this consent, but the television provider still contacted her.⁵² The Eleventh Circuit held that an agreement manifests the parties’ mutual assent, and under contract common law, one party cannot change the agreement without the other party’s consent to the change.⁵³ To square this holding with its previous holding in *Osorio v. State*

47. See, e.g., *Gager*, 727 F.3d at 272 (concluding that the TCPA’s silence on temporal limits to give or revoke consent does not limit the consumer’s right to give or revoke consent).

48. See generally *Medley v. Dish Network, LLC*, 958 F.3d 1063 (11th Cir. 2020) (holding that consent may not be revoked under the TCPA when it is given as part of a contract); *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017) (holding that the TCPA does not allow unilateral revocation of consent when the consent is given as part of a bargained-for contract). But see *Miller et al.*, *supra* note 4, at 462–66 (acknowledging some courts that refuse to follow the *Reyes* analysis, but who instead apply the broader *Gager* and *Osorio* analyses and focus on the broad intent of the TCPA to hold that there should be a special consent standard for the revocation of consent in a bargained-for exchange under the TCPA).

49. RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981).

50. See 13 CORBIN ON CONTRACTS § 67.8 (2020) (stating that when there is a contractual obligation, the release of that obligation must be shown by “mutual agreement” or some other contract right of release); see also Kasia Solon Cristobal, *From Law in Blackletter to “Blackletter Law”*, 108 L. LIBR. J. 181, 182 (2016) (quoting THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 1547 (desk ed. 2012)) (defining black letter law as “basic principles of a subject in the law”).

51. 958 F.3d 1063 (11th Cir. 2020).

52. *Id.* at 1064–66, 1069.

53. See *id.* at 1069–70 (citing *Kuhne v. Fla. Dep’t of Corrs.*, 745 F.3d 1091, 1096 (11th Cir. 2014)) (stating that an agreement is the “manifestation of mutual assent” between the parties to the agreement; accordingly, black letter contract law prohibits one party to an agreement from unilaterally changing the terms of the agreement once the agreement has been agreed to).

Farm Bank F.S.B.,⁵⁴ where it held that consent may be revoked, the court differentiated between consent given freely under the TCPA and consent given as part of a bargained-for exchange under the TCPA.⁵⁵ Further, the court refused to create a special exception for contractual consent given under the TCPA even though it characterized the statute as a remedial consumer protection statute.⁵⁶ The court relied on its interpretation that Congress intended common law consent principles to apply to the TCPA, and therefore, it could not permissibly alter the understanding of consent.⁵⁷

Similarly, in *Reyes v. Lincoln Automotive Financial Services*,⁵⁸ the phone number owner agreed as part of his lease to receive phone calls from the car dealer about the lease.⁵⁹ He later attempted to revoke this consent after he defaulted on his loan.⁶⁰ The Second Circuit determined that Congress intended for the term “consent” to have the same meaning under the TCPA as it does under common law.⁶¹ Thus, analyzing the consent under common law, the court concluded that consent could not be unilaterally revoked under the TCPA when given as part of a bargained-for exchange.⁶² The court concluded that any other result would be inconsistent with the common law understanding of consent because the other party to this agreement, the car dealer, did not assent to changing the terms of the contract.⁶³

The Third Circuit weighed in with its support for applying common law consent principles to TCPA disputes in *Gager v. Dell Financial Services*.⁶⁴

54. 746 F.3d 1242 (11th Cir. 2014).

55. Compare *id.* at 1255 (holding that consent may be orally revoked under the TCPA), with *Medley*, 958 F.3d at 1070–71 (holding that consent may not be unilaterally revoked when it is given as part of a contract).

56. See *Medley*, 958 F.3d at 1070–71.

57. See *id.* (stating that when Congress enacted the TCPA, consent was not unilaterally revocable when part of a contract and there is no proof in the TCPA’s legislative history that Congress intended consent to have a meaning different from that of the common law).

58. 861 F.3d 51 (2d Cir. 2017).

59. *Id.* at 53–54.

60. *Id.*

61. *Id.* at 56–57 (citing *Neder v. United States*, 527 U.S. 1, 21 (1999)) (stating that unless Congress establishes otherwise, when it uses a term with a “settled meaning under the common law,” Congress intends for the term to have the meaning it has at common law).

62. *Id.* at 57 (establishing that consent is only revocable under common law when it is freely given; however, when consent is given as a provision of a contract, any modification must be made with the “mutual assent” of every party to the contract).

63. See *id.* at 58 (stating that without express legislative intent by Congress to change the meaning of consent within the TCPA, courts cannot infer that Congress intended a different meaning).

64. 727 F.3d 265 (3d Cir. 2013).

In this case, the court rebuffed the caller's argument that because Congress explicitly established specific consent standards in other consumer protection statutes, consent is likewise limited in the TCPA.⁶⁵ The court held that Congress's choice to make specific consent rules in those statutes, but not in the TCPA, supported the finding that common law consent principles apply to TCPA consent.⁶⁶

ii. Revocation of Consent and Reassigned Phone Numbers

There are millions of wireless number reassignments every year.⁶⁷ A caller may place a call to a phone number presuming that the phone number's owner is unchanged and intending to reach the prior owner who consented to the call.⁶⁸ Because automated callers typically do not receive notice of when an ownership change has occurred, it is difficult for them to ensure that they still have the proper consent.⁶⁹ Currently, no established database or procedures exist for callers to affirm an owner's prior express consent or that the owner still holds domain over that phone number.⁷⁰ However, if automated callers fail to obtain the requisite consent consumers can recover up to \$1,500 per violation, meaning per call or text.⁷¹ These violations can quickly add up if autodialers are calling reassigned numbers under the good faith impression that they have consent.⁷²

In a blow to callers, the FCC's 2015 Order elucidated "that the TCPA requires the consent not of the intended recipient of the call, but of the current

65. *Id.* at 270 (pointing to the Fair Debt Collection Practices Act 1977 amendments, the CAN-SPAM 2003 amendments, and the Junk Fax Prevention Act of 2005 where Congress created explicit procedures whereby the consent could be revoked).

66. *Id.* (concluding that Congress's choice to craft specific consent rules in other statutes, but not the TCPA, means that "Congress did not intend to depart from the common law understanding of consent").

67. *See Dolan et al., supra* note 3.

68. *See ACA Int'l v. FCC*, 885 F.3d 687, 705 (D.C. Cir. 2018) (questioning whether, under these circumstances, the caller becomes liable under the TCPA for making an automated call without the requisite prior express consent).

69. *See Alysia Z. Hutnik et. al., TCPA Litigation: Key Issues and Considerations*, PRACTICAL LAW LITIGATION, Westlaw (database updated April 2021) (suggesting this creates compliance issues for callers and challenges for customer class action certification).

70. *See id.* (acknowledging the FCC's encouragement to businesses that they implement procedures to stem calls to reassigned phone numbers).

71. *See Tanya L. Forsheit & Daniel M. Goldberg, New FCC Rules Affect Companies that Use Automated Dialing Systems*, L.A. LAW., Dec. 2015 at 15, 15 (using the example that sending 100,000 messages without consent could result in \$50 million worth of liability, regardless of whether the caller intended to make unconsented calls).

72. *See id.*

subscriber.”⁷³ The FCC defined a “called party” as “the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call.”⁷⁴ Courts have upheld the FCC’s interpretation, reasoning that a natural reading of the TCPA justifies this interpretation.⁷⁵

The FCC attempted to mitigate the high burden that ensuring consent placed on callers by creating a “one-call safe harbor.”⁷⁶ Under this safe harbor, autodialers who call without notice of the phone number’s reassignment and have reason to believe they still have the necessary consent may make one call after the phone number’s reassignment without facing TCPA liability to attempt to clear any ownership ambiguity.⁷⁷ However, while the D.C. Circuit agreed with the FCC’s interpretation of “called party,” it set the agency’s one-call safe harbor rule aside, finding it “arbitrary and capricious.”⁷⁸

Continuing its analysis in *ACA International v. FCC*,⁷⁹ the D.C. Circuit analyzed the FCC’s interpretation of “reasonable reliance” on the prior express consent given by a party.⁸⁰ The court struggled to understand how the FCC concluded that one call was enough to end reasonable reliance on the prior phone number owner’s consent.⁸¹ The court reasoned that one call or text may not be enough to determine whether the phone number has been reassigned and the consent revoked.⁸² The court further found that the one-call safe harbor was inconsistent with the TCPA’s statutory scheme,

73. *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7999–8000 (2015).

74. *Id.* at 8000–01 (finding that the term “called party” within the statute means the phone number’s current owner, not any prior owner that the caller might be intending to reach).

75. *See, e.g., N.L. ex rel. Lemos v. Credit One Bank, N.A.*, 960 F.3d 1164, 1167 (9th Cir. 2020) (concluding that the caller’s intent to reach a consenting customer does not preclude TCPA liability when the caller reaches someone else by reading the statute according to its “ordinary and natural meaning”).

76. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. at 8007–10.

77. *See id.* (noting that the one call will provide the caller with an additional opportunity to gain knowledge of the reassignment, but, if the one call does not clear the ambiguity, the caller will be said to have had constructive knowledge of the reassignment). *Contra ACA Int’l v. FCC*, 885 F.3d 687, 705 (D.C. Cir. 2018) (setting aside the one-call exception).

78. *See ACA Int’l*, 885 F.3d at 705–06.

79. 885 F.3d 687 (D.C. Cir. 2018).

80. *See id.* at 707.

81. *See id.* (noting that if the call does not give the caller reason to suspect reassignment, the caller may be justified in making a second call while still under reasonable reliance of consent).

82. *See id.*

questioning how it aligned with the TCPA if the caller became aware of the reassignment before the one call or if the one call occurred months after reassignment.⁸³ The court ruled that the FCC failed to reasonably explain its rationale for deeming that the one-call exception was not arbitrary.⁸⁴

The *ACA International* court concluded that setting aside the FCC's entire interpretation of reassigned numbers would avoid imposing the strict liability standard that the FCC intended to avoid.⁸⁵ Looking to the future, the court noted that the FCC is working to implement a comprehensive database that would make it easier for callers to identify reassigned phone numbers.⁸⁶

C. Permissibility of Applying Common Law to Federal Statutes

Words or phrases used in a federal statute should be interpreted under the definition that Congress provided in the statute or in the U.S. Code or by their "accepted meaning in the area of law addressed by the statute."⁸⁷ Justice Jackson justified this approach:

[W]here Congress borrows terms of art which [have] accumulated the legal tradition and meaning of centuries of practice it presumably knows and adopts the cluster of ideas [A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as [a] departure⁸⁸

This approach aligns with the "Clear Statement Rule," which requires Congress to make its intent to give a particular statutory provision an interpretation different than the traditional legal interpretation with "unmistakable clarity."⁸⁹ As a result, when Congress enacts a law, the meaning of a term under related common law presumptively applies to the

83. *See id.* at 707–08 (stating that "reasonable reliance" may become unreasonable if the call is made months after reassignment or if the caller learns of the reassignment before calling, and, noting that the traditional understanding of the caller's burden of proof is inconsistent with subjecting consumers to unconsented calls).

84. *Id.* at 708.

85. *See id.* at 708–09 (noting that if only the one-call exception was set aside, then callers would be strictly liable for all calls made to a reassigned number without renewed consent, even if the caller is unaware of the reassignment, which is likely a harsher penalty than the FCC intended when trying to craft an approach to reassigned numbers).

86. *See id.* at 709 (indicating the court would find that these further, more developed, and tailored methods would create a permissible reasonable reliance standard).

87. LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 7 (2014).

88. *Id.* at 7–8.

89. *See id.* at 20 n.119 (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Term*, 68 Iowa L. Rev. 198, 208 (1983)) (referring to Judge Wald's statement that Congress should "signal [] its intention in neon lights" when it wants to depart from an accepted legal meaning of a term).

statute's terms unless Congress clearly states otherwise.⁹⁰ The Supreme Court acknowledged and supported interpreting a statutory term under its "accumulated settled meaning under . . . the common law."⁹¹ Thus, both courts and the FCC must follow these principles when interpreting the TCPA.

III. APPLYING CONTRACT COMMON LAW TO CONSENT DISPUTES WITH REASSIGNED PHONE NUMBERS

Where Congress does not explicitly establish a specialized definition of a statutory term that already has a recognized legal meaning, such as consent, courts will interpret the term by inferring that Congress intended that term's pre-established meaning to apply to the statute.⁹² In the case of "consent" as used in the TCPA, Congress did not create a specialized legal meaning, thus signaling its intent for established common law consent principles to apply.⁹³ As a result, in the case of reassigned phone numbers, common law consent requires that any prior express consent be terminated upon reassignment unless a phone number's new owner gives his prior express consent.

A. Permissibility of Applying Common Law Contracts to Consent Under the TCPA

When deciding a dispute about consent under the TCPA, courts should apply the common law definition of consent, defined as a "voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose . . ."⁹⁴ When interpreting the meaning of Congress's choice of the word consent in the TCPA, courts must follow recognized canons of statutory interpretation to ensure that they are applying TCPA provisions as Congress intended.⁹⁵ In choosing to use the term

90. *Id.* at 20 (requiring Congress to make its intent to change such common law principles specific).

91. *Neder v. United States*, 527 U.S. 1, 21 (1999) (holding that when Congress chooses a term that has "an accumulated settled meaning at common law," unless Congress explicitly states otherwise, it means to adopt the common law meaning of the term and courts should interpret the term in this way).

92. *See id.*; *see also* EIG, *supra* note 87, at 2, 7–8 (stating that courts must interpret terms of a statute according to their established legal meaning unless Congress makes clear its intent for another legal meaning to apply).

93. *See Neder*, 527 U.S. at 21; EIG, *supra* note 87, at 2, 7–8. *See generally* 47 U.S.C. § 227 (failing to further define consent beyond "prior express consent").

94. *Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

95. *See* EIG, *supra* note 87, at 1 (stating that the canons of statutory interpretation allow Congress to draft legislation knowing how its language and word choice may be interpreted by the courts in the future).

“consent,” which has a recognized meaning under common law, without providing an alternative definition, Congress signaled to the courts that they must rely on consent’s “accumulated settled meaning.”⁹⁶

Further, in applying the “Plain Meaning Rule” to consent in the context of the TCPA, courts must interpret consent by its definition in the statute or by its accepted meaning at common law unless Congress explicitly makes clear otherwise.⁹⁷ If Congress intended for the TCPA’s statutory term of consent to take on a different or unique meaning from its established legal meaning, Congress would have done so with “unmistakable clarity.”⁹⁸ Congress did not take this action with the term consent in drafting the TCPA; therefore, courts must interpret the term according to common law principles.⁹⁹

Within the TCPA, aside from requiring callers to obtain a phone number owner’s prior express consent, the law does not define how consent may be given or revoked.¹⁰⁰ This further indicates that Congress did not intend to deviate from the common law understanding of the term.¹⁰¹ As the TCPA’s implementing agency, the FCC in its 2015 Order, affirmed that Congress’s failure to establish a specialized consent standard for the TCPA indicated its approval of courts applying the common law of consent to TCPA disputes.¹⁰² Statutory interpretation requires that courts give deference to an implementing agency’s reasonable interpretations of the statute.¹⁰³ To reach this conclusion, the FCC considered the TCPA in its entirety, as well as its

96. See *Neder*, 527 U.S. at 21 (establishing that when Congress is silent regarding a term with an established legal meaning this choice indicates its intent not to deviate from that term’s established legal meaning).

97. See EIG, *supra* note 87, at 2, 7–8 (noting that if the language is plain and unambiguous this interpretation must be applied and noting that looking to other areas of the statute is important in discerning this).

98. See *id.* at 19–20 (presuming Congress has knowledge of related common law when it enacts a statute and intends for those principles to be applied unless a specific meaning is otherwise established).

99. See 47 U.S.C. § 227 (choosing not to define consent beyond requiring “prior express consent;” therefore, not clearly signaling Congressional intent to establish a specialized consent definition).

100. See *id.*

101. See generally *Medley v. Dish Network, LLC*, 958 F.3d 1063 (11th Cir. 2020) (finding no congressional intent to establish a specialized meaning of consent within the TCPA); *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017) (agreeing with the FCC and other courts who have found it appropriate to apply common law consent to the TCPA).

102. See *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Red. 7961, 7994 (2015).

103. See EIG, *supra* note 87, at 27; see also 47 U.S.C. § 227(b)(2) (giving the FCC the power to “prescribe regulations implementing the requirements of this subsection”).

legislative history, and found no indication that Congress intended to craft a specialized understanding of consent.¹⁰⁴

The Third Circuit supports this conclusion by comparing Congress's choice not to further expand or limit the concept of consent within the TCPA with other consumer protection statutes in which Congress did establish a unique consent standard.¹⁰⁵ In *Gager*, the caller pointed to Congressional action that established explicit statutory procedures barring unwanted communications and argued that the TCPA likewise limits consent revocation.¹⁰⁶ The court, however, disagreed and concluded that Congress's choice to make specific consent standards in the pointed-to acts, but its choice not to do the same in the TCPA, meant that "Congress did not intend to depart from the common law understanding of consent" in crafting the TCPA.¹⁰⁷

For example in its 1977 amendments to the Fair Debt Collection Practices Act, Congress created a specific procedure a consumer must follow to revoke consent.¹⁰⁸ Congress crafted similar consent revocation rules in the CAN-SPAM Act of 2003 and the Junk Fax Prevention Act of 2005.¹⁰⁹ However, in the TCPA's regulation of automated calls to wireless numbers, Congress only requires "the prior express consent of the called party."¹¹⁰ While the TCPA does not further define prior express consent, the FCC is satisfied when a person knowingly gives their phone number without further instructions not to be contacted on it, reflecting the understanding under

104. *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. at 7994.

105. *See Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013).

106. *See id.* (arguing that the limited consent principles in the amendments to the Fair Debt Collection Practices Act in 1977, Congressional amendments to the CAN-SPAM Act of 2003, and the Junk Fax Prevention Act of 2005 mean consent is also limited under the TCPA).

107. *Id.*

108. *See id.*; *see also* Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 805(c), 91 Stat. 877 (1977) (codified as amended at 15 U.S.C. § 1692c) (requiring the consumer to "notif[y] the debt collector in writing" of her desire that the debtor no longer contact her).

109. *See Gager*, 727 F.3d at 270; *see also* CAN-SPAM Act, Pub. L. No. 108-187, § 5(3)(A)(i), 117 Stat. 2707 (2003) (codified as amended at 15 U.S.C. § 7704(a)(3)(A)(i)) (establishing that the email message must include a return email that the recipient can use to send a response email requesting not to be contacted again); Junk Fax Prevention Act, Pub. L. No. 109-21, § 2(d), 119 Stat. 360 (2005) (codified as amended at 47 U.S.C. § 227(b)(2)(E)) (listing the requirements that "a request not to send future unsolicited advertisements to a telephone facsimile machine" must include to be effective).

110. 47 U.S.C. § 227(b)(1)(A)(iii).

common law of when a party has given consent.¹¹¹ Because Congress did not create a specialized meaning of the term “consent” in the TCPA, courts must apply the term’s common law principles in their interpretations.¹¹²

i. Interpreting Revocation of Consent into the TCPA

While the TCPA does not address the revocation of consent, the common law consent rules indicate that revocation must be allowed.¹¹³ According to black letter law, consent is revocable when it is freely given and is only revocable when given as part of a bargained-for exchange when all parties to the agreement mutually agree to the revocation.¹¹⁴ The FCC interprets revocation as permissible under the TCPA, and courts generally agree with this conclusion.¹¹⁵ The FCC supports its interpretation by returning to Congress’s choice not to create a specific consent standard for the TCPA and concluding that it intended for the application of common law consent rules.¹¹⁶ This interpretation is consistent with the Third Circuit’s holding in *Gager*.¹¹⁷ Further, the D.C. Circuit specifically upheld the permissibility of the FCC’s interpretation that consent can be revoked through any

111. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 (1992); *see also* *Consent*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining consent as a “voluntary yielding” or “permission regarding some act or purpose”).

112. *See* *Neder v. United States*, 527 U.S. 1, 21 (1999); 47 U.S.C. § 227(a) (failing to establish a specialized definition of consent under the TCPA).

113. *See* RESTATEMENT (SECOND) OF TORTS § 892A (AM. L. INST. 1981) (stating that at common law, consent is generally revocable).

114. *See id.* (finding consent revocable when it is freely given); 13 CORBIN ON CONTRACTS § 67.8 (2020) (stating that release of an obligation as part of a bargained-for agreement requires “mutual agreement”).

115. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7993, 7994–95 (2015) (finding revocation of consent permissible by “any reasonable means” and concluding that this interpretation is most consistent with the TCPA’s overall purpose as any other conclusion could result in consumers receiving unlimited calls after they no longer wish to); *see, e.g.,* *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047 (9th Cir. 2017) (stating that under common law and relevant case law, consent is revocable, sometimes freely and sometimes subject to the parties meeting certain standards); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270–71 (3d Cir. 2013) (noting that TCPA silence on revocation does not automatically exclude the right, and relying on the TCPA’s status as a consumer remedial statute); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014) (finding that Congress intended to incorporate revocation into the TCPA as part of the common law understanding of consent).

116. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7994.

117. *Gager*, 727 F.3d at 270 (acknowledging other consumer protection statutes where Congress explicitly created specialized consent terms and concluding that if Congress had the same intent for the TCPA, it would have acted similarly but did not).

“reasonable means,” finding that a broad standard is best for both callers and consumers.¹¹⁸

Courts’ acceptance of revocation of consent rests primarily on two reasons: (1) understanding common law consent principles to apply to the TCPA and (2) following the FCC’s interpretation that revocation is permissible. First, when Congress enacts a statute and includes a term with an established legal meaning at common law, that meaning will apply unless Congress clarifies that it should not.¹¹⁹ Because Congress did not establish a special meaning of consent in the TCPA, even though other statutes make clear that Congress knew it could do so, courts must apply the common law meaning of consent to the statute, which allows revocation.¹²⁰ Second, as the agency tasked with interpreting and promulgating further regulations consistent with the TCPA, courts must give deference to the FCC’s reasonable interpretation of the law.¹²¹ Thus, courts must acknowledge the FCC’s approval of consent revocation under the TCPA.¹²² Because of Congress’s choice not to create a specialized definition of consent for the TCPA, common law consent principles rule, which allow for revocation of consent in varying methods depending on the context in which the consent was obtained.¹²³

B. Affirming the Differing Revocation of Consent Standards Under the TCPA Depending on the Consent’s Context

To consistently apply the common law meaning of revocation of consent to the TCPA, courts must acknowledge the differing standards for revoking consent at common law. While the common law of consent allows revocation, depending on the circumstances surrounding the consent, a person may not be able to revoke that consent unilaterally, and the same rules apply to the TCPA.¹²⁴ Black letter contract law prevents a party from

118. See *ACA Int’l v. FCC*, 885 F.3d 687, 695, 709 (D.C. Cir. 2018) (stating that “reasonable means” is any clear expression of the desire to no longer be called or texted).

119. See *EIG*, *supra* note 87, at 20.

120. See *Gager*, 727 F.3d at 270–71 (citing *Neder v. United States*, 527 U.S. 1, 21 (1999)) (concluding that because Congress did not create a specific meaning of consent for the TCPA, the common law meaning must be applied and acknowledging other statutes where Congress established a specialized consent revocation procedure).

121. See *EIG*, *supra* note 87, at 27.

122. See, e.g., *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047 (9th Cir. 2017) (supporting its holding by pointing out that the FCC “endorses” TCPA consent revocation).

123. See *Gager*, 727 F.3d at 270–71 (citing *Neder v. United States*, 527 U.S. 1, 21 (1999)); *Van Patten*, 847 F.3d at 1047.

124. See RESTATEMENT (SECOND) OF TORTS § 892A (AM. L. INST. 1981) (stating that when consent is freely given it may be revoked at any time; however, when consent is

unilaterally modifying the terms of an agreement once the agreement is finalized.¹²⁵ For instance, in *Reyes*, the plaintiff leased a car from the defendant and assented to a lease term that allowed the lessor to call him regarding his auto lease.¹²⁶ The court held that under the common law understanding of contractual consent, *Reyes* could not unilaterally revoke consent because the lessor obtained it as part of a bargained-for agreement, the lease.¹²⁷

Conversely, consider if *Reyes* was only thinking about leasing a car and signed up for texts from the dealership to hear about specialized lease deals. In this scenario, because *Reyes* freely gave his consent, not as part of any agreement with the dealership, his consent would be freely and unilaterally revocable under common law consent standards, and therefore, the TCPA.¹²⁸ The outcomes of these slightly different factual scenarios regarding automated messages under the TCPA remain consistent with established common law consent principles.

Understanding that Congress did not intend a different standard or understanding of consent from the common law, courts should conclude that when a phone number owner gives consent as part of a bargained-for exchange, that consent is not unilaterally revocable.¹²⁹ Some plaintiffs argue that this interpretation is inconsistent with decisions that find consent revocable under the TCPA; however, as demonstrated in the *Reyes* hypothetical above, there is a distinct difference between the revocation of consent standards for freely given and bargained-for consents.¹³⁰ Therefore, such decisions are not contradictory and are consistent with common law consent principles because without further explicit guidance from Congress, courts must fully apply common law consent principles.

given as a term of an agreement, revocation is subject to the laws of contract or the terms of the agreement).

125. RESTATEMENT (SECOND) OF CONTRACTS § 287 cmt. a (AM. L. INST. 1981) (requiring an alteration of the agreement to be manifested by the party wishing a change and the other party to demonstrate its acceptance of the wished-for alteration).

126. *See Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53–54 (2d Cir. 2017).

127. *See id.* at 57.

128. *See id.* (stating that consent is only unilaterally revocable when it is freely given).

129. *See Medley v. Dish Network, LLC*, 958 F.3d 1063, 1070 (11th Cir. 2020) (holding that consent cannot be unilaterally revoked under the TCPA when given as part of a contract).

130. *Compare id.* at 1070 (differentiating this case from its prior case, *Osorio*, by applying common law consent principles to consent given as part of a bargained-for exchange), *with Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (holding consent to be called freely revocable under the TCPA when the number was given only as an emergency contact).

Related conclusions by courts support the application of the different common law consent revocation standards to TCPA disputes. For example, the Eleventh Circuit refused to create a special exception for consent given as part of a bargained-for exchange.¹³¹ The court noted that even though the TCPA is a remedial consumer protection statute, Congress chose not to amend the common law understanding of consent to make an exception for the TCPA.¹³² Further, the D.C. Circuit noted that the FCC's 2015 Order allowing consent to be revoked by "any reasonable means" does not affect the ability of contracting parties to determine specific revocation procedures for themselves through mutual assent.¹³³

This standard becomes more difficult to apply in the case of a consumer who gives consent as part of a bargained-for exchange, then later disconnects that phone number, and the wireless carrier subsequently reassigns the phone number to a new user where the caller is not aware of this change in ownership. In the black and white case where a consumer has given consent to be called as part of a bargained-for exchange, the common law of contracts does not allow the consumer to revoke this consent unilaterally.¹³⁴ This is true even in the context of the TCPA and its purpose as a consumer protection statute because Congress did not establish a specialized meaning of consent for TCPA disputes.¹³⁵

131. See *Medley*, 958 F.3d at 1070–71 (stating that while the terms of the TCPA should be read in a light favorable to consumers, courts cannot craft understandings of these terms that are different from their settled meaning without explicit permission from Congress).

132. See *id.* *Contra* Miller et al., *supra* note 4, at 462, 465 (pointing out that some courts refuse to follow the *Reyes* and *Medley* standard, which prevents unilateral revocation of consent when it is given as part of a bargained-for exchange, and instead choose to allow a special interpretation of consent under the TCPA because of its purpose as a consumer protection statute, even though this result is contrary to common law consent rules).

133. See *ACA Int'l v. FCC*, 885 F.3d 687, 710 (D.C. Cir. 2018) (interpreting the 2015 Order to only prevent callers from unilaterally establishing revocation procedures). *Cf.* Scott J. Hyman et al., *Unconscionability and Contractual Consent-to-Call Clauses Under the Telephone Consumer Protection Act*, 73 CONSUMER FIN. L.Q. REP. 25, 28 (2019) (explaining that in instances where the caller has imposed consent terms in a consumer contract of adhesion, it may be appropriate for courts to apply contractual unconscionability principles to allow consumers to revoke consent).

134. RESTATEMENT (SECOND) OF CONTRACTS § 287 cmt. a (AM. L. INST. 1981).

135. See *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7994 (2015) (inferring Congress's failure to establish a specialized meaning of consent in the TCPA as implicit approval for resolving TCPA disputes under the common law); EIG, *supra* note 87, at 19–20 (explaining the "Clear Statement Rule" in the case of Congress establishing a specialized meaning for a term that already has an established legal meaning).

Returning to the facts in *Reyes*, however, what if Reyes had given consent to be called regarding his auto-lease as part of the terms of his agreement with the lessor but then disconnected his phone number, and the lessor subsequently placed an automated call or text to Reyes's old phone number, instead reaching the phone number's new owner?¹³⁶ The TCPA fails to provide a clear answer to whether this triggers TCPA liability. The caller technically violated the TCPA because it did not have the prior express consent of the new phone number owner, and the new phone number owner was not privy to the bargained-for agreement between Reyes and the lessor.¹³⁷ This eliminates the stricter revocation of consent standard required in a bargained-for agreement under common law.¹³⁸ Although there was no mutual assent between Reyes and the lessor to release him from the contractual agreement, the TCPA's main purpose of protecting consumers from unconsented automated calls would protect the phone number's new owner from being subjected to calls from the lessor.¹³⁹ Still, it is likely that the lessor/caller is unaware of the phone number's reassignment and did not intend to make an unsolicited automated call.¹⁴⁰ Neither the TCPA, FCC orders, nor court decisions offer a clear answer as to the outcome of this scenario.

*C. Applying Common Law Consent to Callers of
Reassigned Phone Numbers*

To remain consistent with the common law consent principles that Congress intended the TCPA to embody, callers must still be held liable when making a call to a reassigned phone number. The reassigned phone number owner has not given prior express consent to be called and was not privy to any contractual consent that may have arisen as part of an agreement between the caller and the previous phone number's owner.¹⁴¹ Furthermore,

136. See generally *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017) (summarizing that the consumer gave consent to be contacted regarding his lease as part of the lease agreement).

137. See 47 U.S.C. § 227(b)(1)(A)(iii) (requiring prior express consent for automated calls placed to wireless numbers).

138. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981) (defining agreement as "a manifestation of mutual assent" between parties); 13 CORBIN ON CONTRACTS § 67.8 (2020) (stating that release from a contractual obligation can only occur upon "mutual agreement" of the parties).

139. See *Winbush*, *supra* note 15 (noting the Congressional purpose of the TCPA: to protect consumers from "unsolicited phone calls").

140. See *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. at 7994 (stating that even if the caller is unaware of a change in phone number ownership, it still has the burden of ensuring consent).

141. See 47 U.S.C. § 227(b) (requiring callers to have the prior express consent of the

the TCPA has long placed the burden of ensuring prior express consent on the caller.¹⁴²

However, this standard creates a high burden on callers.¹⁴³ Callers facing TCPA liability have attempted to avoid responsibility for placing calls to a reassigned number by arguing that a “called party” under the TCPA refers to a call’s intended recipient, not the person they reach.¹⁴⁴ However, both the FCC and courts rejected this argument and upheld the strict liability standard and caller’s burden of ensuring proper consent.¹⁴⁵ To mitigate the potentially high cost of the strict liability standard, the FCC created a “reasonable reliance” exception via the one-call safe harbor for callers who place a call while reasonably relying on the consent given by the previous phone number owner.¹⁴⁶

While a reasonable reliance standard may be acceptable, the FCC’s attempted mitigation is inconsistent with the TCPA’s primary purpose of protecting consumers from unconsented automated calls.¹⁴⁷ The one-call safe harbor was too broad because a caller may learn of reassignment before placing the call and still avoid liability.¹⁴⁸ Further, the rule had no temporal

called party for an autodialed call to escape TCPA liability); EIG, *supra* note 87, at 19–20 (stating that unless Congress explicitly states or establishes otherwise, it intends for terms in its statutes to be interpreted in accordance with their traditional legal meaning).

142. See *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7994 (emphasizing that this standard is consistent with “longstanding Commission precedent”).

143. See Hutnik et al., *supra* note 69 (stating that applying liability for lack of consent is a difficult issue because the caller may not be aware that it no longer has consent and there is currently no clear set of procedures or database that would allow a caller to easily carry its burden of ensuring it still has consent); Forsheit & Goldberg, *supra* note 71, at 15 (employing an example to demonstrate how quickly damages liability can add up for the entity making calls without consent).

144. See *N.L. ex rel. Lemos v. Credit One Bank, N.A.*, 960 F.3d 1164, 1166 (9th Cir. 2020) (summarizing the defendant’s argument that if the caller did not intend to place an unconsented call it should not be subject to TCPA liability).

145. See *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 8000–01 (defining “called party” as “the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call”); see, e.g., *N.L. ex rel. Lemos*, 960 F.3d at 1168–70 (examining other times that the term “called party” is used in the TCPA and concluding it is meant to refer to the person who receives the call).

146. See *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 8000 (establishing a “one-call safe harbor” for callers who place a call to a reassigned phone number under “reasonable reliance” that they still have consent and do not have “actual or constructive knowledge of the reassignment” and allowing the caller to make one call to the phone number without facing TCPA liability).

147. See *ACA Int’l v. FCC*, 885 F.3d 687, 707–08 (D.C. Cir. 2018) (finding that the one-call safe harbor method is inconsistent with protecting people from unconsented calls).

148. See *id.* (reasoning it is inconsistent with the TCPA’s purpose of prohibiting

limit, meaning a caller could place a call years after the reassignment of a phone number when it would no longer be reasonable to rely on the former owner's prior express consent.¹⁴⁹ In focusing on the one-call safe harbor's efficacy, the D.C. Circuit questioned how one call could be enough to end reasonable reliance, arguing that if the one call did not allow the caller to become aware of the phone number's change in ownership, the caller may be just as justified in placing another call.¹⁵⁰

In making the one-call safe harbor rule, the FCC rightfully acknowledged the heavy burden placed on callers as phone number reassignments continue to increase in frequency.¹⁵¹ There is currently no established method for a caller to learn of a number reassignment short of placing the call and reaching a different party.¹⁵² Congress implemented the TCPA to regulate unconsented automated calls, not prohibit all automated calls.¹⁵³ Thus, the FCC's choice not to enforce a strict liability standard is consistent with the TCPA; however, the FCC must determine a way to ensure that both the caller's and the consumer's rights under the TCPA are protected in its approach to crafting guidance for calls placed to reassigned numbers.

Generally, courts signaled their willingness to support the FCC's reasonable reliance standard for TCPA liability because as the implementing agency, the FCC has the power to interpret the TCPA.¹⁵⁴ The courts only disagreed that the one-call safe harbor was an adequate method of establishing the reasonable reliance standard.¹⁵⁵ The D.C. Circuit concluded that it had to set aside the FCC's entire interpretation of reassigned numbers to avoid imposing a harsher penalty than the FCC intended.¹⁵⁶ The D.C. Circuit stated that it would be willing to support a reasonable reliance standard, so long as the FCC worked to further develop and tailor the

unconsented calls if the caller finds out about the reassignment but may still make one call to the phone number's new owner).

149. *See id.* (wondering if it is truly "reasonable" to rely on consent that was given many years ago and not since acted upon).

150. *See id.*

151. *See, e.g.,* Bauer, *supra* note 3 (emphasizing the high settlements that callers may have to pay for violating the TCPA).

152. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7994 (2015).

153. *See* 47 U.S.C. § 227.

154. *See ACA Int'l*, 885 F.3d 687 at 708–09.

155. *See id.*

156. *See id.* (concluding that if only the one-call safe harbor were set aside, the strict liability standard would effectively be reimposed, which the FCC signaled it did not support in attempting to create a "reasonable reliance" standard).

methods by which callers ensured reasonable reliance while still protecting consumers.¹⁵⁷

In 2018, the FCC announced its plans to establish a Reassigned Number Database to address the increasing phenomena and disputes arising when reassigned phone numbers receive automated calls.¹⁵⁸ As this approach is consistent with common law consent principles and the TCPA, and the courts indicated approval of a detailed, reasonable reliance standard and procedure, the FCC should continue its efforts to establish this database.

IV. SOLVING REASSIGNED NUMBER TCPA CONSENT DISPUTES WITH THE PROPOSED REASSIGNED NUMBER DATABASE

The Reassigned Number Database would give callers a straightforward way to ensure they have the proper consent before placing a call and allow callers to avoid TCPA liability if they place a call to a reassigned number after reasonably relying on the information from the Database.¹⁵⁹ Currently, there is no established database or set of easily applicable procedures that callers can use to determine whether a phone number has been reassigned, thus terminating the prior express consent required by the TCPA.¹⁶⁰

Returning to the *Reyes* hypothetical, if Reyes gave the car lessor consent to call him as part of the contractual agreement for his car lease and later disconnected the phone number, and the wireless carrier reassigns that phone number to John, for example, there is no clear mechanism for the car lessor to learn of the reassignment. Thus, the car lessor may place a call to the phone number on the record under the reasonable reliance that the call will reach Reyes, but instead reach John, who did not consent to the call and was not a party to Reyes's bargained-for agreement.

Under the TCPA, the caller has the burden of ensuring it has consent to call.¹⁶¹ Thus, making the call and reaching John would expose the lessor/caller to TCPA liability, which could total as much as \$1,500 per call.¹⁶² The FCC's orders do not prohibit parties to such an agreement from establishing their own consent terms in the agreement, such as requiring

157. *See id.* at 709.

158. *In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12024, 12025 (2018).

159. *See id.* at 12025, 12043.

160. *See* Hutnik et al., *supra* note 69 (demonstrating that there is currently no easily applicable methodology for callers to carry their burden of establishing prior express consent when a phone number has been reassigned).

161. *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7994 (2015).

162. Forsheit & Goldberg, *supra* note 71, at 15.

Reyes to inform the car lessor if he changes his phone number.¹⁶³ However, as a consumer remedial statute, the provisions should be read as favorably as possible for Reyes, and courts may interpret such terms as the car lessor unlawfully attempting to place the burden of knowing consent on the consumer.¹⁶⁴ However, the FCC does not support a strict liability standard for callers who place a call to a reassigned phone number when they reasonably rely on prior express consent.¹⁶⁵

To square the TCPA's requirement that callers ensure that they have the necessary prior express consent with the difficulties that arise in determining prior express consent for a reassigned phone number, the FCC should continue to establish the Reassigned Number Database and clarify its "reasonable reliance" standard.¹⁶⁶ The database would create a set of easily applicable procedures for callers to follow to ensure that they are not contacting reassigned phone numbers, and hence no longer have the consent of the phone number's owner: (1) check the database, and (2) do not contact the phone numbers that appear in the database as now having a new unconsenting owner.¹⁶⁷

The FCC began to establish this database by requiring telephone and wireless companies to keep records of phone number disconnection dates, so it will be functional for callers upon implementation.¹⁶⁸ Thus, in the *Reyes*

163. *See* *ACA Int'l v. FCC*, 885 F.3d 691, 710 (D.C. Cir. 2018).

164. *See id.* (stating that the 2015 Order does not prevent parties from establishing consent terms contractually so long as the caller does not unilaterally make the terms); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013) (stating that as a consumer remedial statute, any silence or ambiguity in the statute should be permissibly interpreted in favor of the consumer); *see also* *Hyman et al.*, *supra* note 133, at 28 (finding that in the case of contractual consent, unconscionability principles may be able to be applied to allow the consumer to unilaterally revoke consent).

165. *See ACA Int'l*, 885 F.3d at 708–09 (stating that imposing a strict liability standard is likely a harsher penalty than the FCC intended when trying to solve consent issues with reassigned numbers and supporting this conclusion by pointing to the FCC's attempted one-call safe harbor).

166. *See generally In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12024 (2018) (proposing a database in which wireless carriers would be required to keep track of and report numbers that have been reassigned, these numbers would be uploaded to the database, and callers would have to check the database to ensure numbers on their call lists do not appear on the reassigned numbers list).

167. *See id.*

168. *FCC Creates Reassigned Phone Number Database with Safe-Harbor Against TCPA Liability for Users*, DAVIS WRIGHT TREMAINE LLP: PRIVACY & SECURITY LAW BLOG (July 9, 2020), <https://www.dwt.com/blogs/privacy--security-law-blog/2020/07/fcc-tcpa-safe-harbor-reassigned-number-database> (stating that when the database goes live, disconnections will be reported every month and carriers must wait forty-five days or more before reassigning the number to allow callers time to check the database and remove the number from the call campaign before it is reassigned).

hypothetical, when Reyes disconnects his number, the carrier would report this discontinuation to the FCC's database and be required to wait at least forty-five days before reassigning the phone number to John.¹⁶⁹ This procedure allows the car lessor time to check the database and remove the number from its call campaigns. This accomplishes Congress's goal of preventing John from being subjected to unconsented automated calls and the FCC's attempt to lessen the heavy strict liability burden on callers. The proposal would also create a new safe harbor for callers under which the caller would avoid TCPA liability if it consults the database and does not find the number.¹⁷⁰ This exception remains consistent with the FCC's reasonable reliance standard, the TCPA's overall purpose, Congress's intention for common law consent principles to apply to the TCPA, and the FCC's interpretation of the TCPA.¹⁷¹

V. CONCLUSION

Applying common law consent principles as Congress intended, when a consumer who gave consent as part of a bargained-for exchange later disconnects that phone number, and the wireless carrier reassigns that phone number to an unconsenting, non-party to the bargained-for agreement, the caller lacks the required prior express consent to make the call. The caller remains liable for any calls placed to the reassigned phone number even if it is unaware of the reassignment. To resolve this issue, the FCC should implement its Reassigned Number Database and clarify the "reasonable reliance" standard.

169. *See id.*

170. *See id.* (stating that the caller must be able to prove that it looked at the database as well as that it could still reasonably rely on the prior express consent of the prior phone number owner).

171. *See* 47 U.S.C. § 227; *ACA Int'l v. FCC*, 885 F.3d 687, 708–09 (D.C. Cir. 2018) (noting that the FCC does not seem to support a strict liability standard); *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7994 (2015).