Unconscionability and Contractual Consent-To-Call Clauses Under the Telephone Consumer Protection Act

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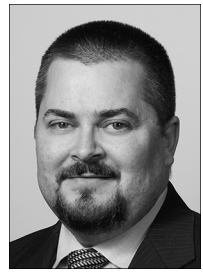

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I. Introduction

The Telephone Consumer Protection Act (TCPA) restricts telephone calls to cellular and conventional telephone lines of consumers.[1] In part, the TCPA prohibits any person from making a telephone call to any cellular telephone line "using an automatic telephone dialing system or an artificial or prerecorded voice" to deliver a non-emergency message, without "the prior express consent of the called party."[2] One way businesses ensure that they have consent to contact their customers is by including a "consent-to-call" clause in their standard-form customer contracts. A dispute arises when the customer later contends that he or she revoked consent to be called and that subsequent calls violate the TCPA, but the business claims that the contract permits calls and prohibits amendments, changes, or revisions to the contract—including revoking consent-to-be-called—unless signed by both parties. Because of the TCPA's statutory penalty of $500 per call and the availability of treble damages,[3] calls made after a proper revocation of consent can give rise to large damages.[4] Prior express consent is a complete defense to a TCPA claim.[5] As such, whether or not the customer can unilaterally revoke consent that has been contractually bargained for is now a hotly contested issue.

The TCPA itself does not address the propriety of revocation of contractual consent-to-call. Rather, courts and the Federal Communications Commission (FCC) (which has rule-making authority with respect to the TCPA), have only addressed whether the TCPA permits a customer to revoke consent—namely, non-contractual consent provided by virtue of the customer providing their telephone number to the caller. Those rulings held that consent may be revoked by "any reasonable means," including in writing or orally.[6] Before 2017, neither the FCC nor judicial decisions distinguished between contractual and non-contractual consent.

1. 47 U.S.C. § 227 (2019).
2. *Id*. § 227(b)(1).
3. *Id*. § 227(b)(3)(C).
4. *See* Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313, 321–22 (2018) (explaining that because of the strict liability nature of the TCPA, what once was a "cottage industry" has become "a vicious circle of litigation abuse" with businesses regularly paying millions of dollars to settle class actions).
5. *E.g.*, Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1044 (9th Cir. 2017).
6. Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 592 (M.D. Tenn. 2018); Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7996 (June 18, 2015) [hereinafter 2015 FCC Ruling].

In 2017, however, in *Reyes v. Lincoln Automotive Financial Services*,[7] the Court of Appeals for the Second Circuit found that, because the contract contained a "prior express consent" clause as defined by the TCPA, the customer could not unilaterally amend and revoke the contractually bargained-for consent to be called by an autodialer.[8]

California courts have had little opportunity to apply *Reyes*,[9] and the case has received a mixed reception outside the Second Circuit. Rather than

7. Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51 (2d Cir. 2017).
8. *Id*. at 57–58.
9. At least one court within the Ninth Circuit has addressed and distinguished the issue presented in *Reyes*. In *Singer v. Las Vegas Athletic Clubs*, No. 2:17–cv–01115–GMN–VCF, 2019 U.S. Dist. LEXIS 48838, at *19–22 (D. Nev. Mar. 25, 2019), the district court found the Second Circuit's *Reyes* decision to be incompatible with Ninth Circuit precedent, explaining:

> Preliminarily, the Court is bound by the Ninth Circuit's ruling in *Van Patten*. To the extent *Reyes* may serve as persuasive authority, the Court finds it cannot be reconciled with *Van Patten*, *ACA Int'l*, or the 2015 FCC Order. First, the 2015 FCC Order states that "callers may not abridge a consumer's right to revoke consent using any reasonable method." 30 FCC Rcd. at 7996 ("[C]onsumers must be able to respond to an unwanted call—using either a reasonable oral method or a reasonable method in writing—to prevent future calls."). The D.C. Circuit subsequently endorsed the "[FCC's] approach to revocation of consent, under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller." *ACA Int'l*, 885 F.3d at 692. As to whether the *Reyes* Court properly applied common-law understandings of consent revocation, this contention is immaterial. The 2015 FCC Order explicitly sets forth a statutory, rather than common law, right of revocation. *See 2015 FCC Order*, 30 FCC Rcd. at 7995 ("We do not rely on common law to interpret the TCPA to include a right of revocation. We simply note our conclusion is consistent with the common law right of revocation and do not attempt to substitute common law for statutory law."). Last, LVAC asserts that *Reyes* is in harmony with *ACA Int'l* because the D.C. Circuit noted that the FCC has yet to address "revocation rules mutually adopted by contracting parties," or "parties' ability to agree upon revocation procedures." *ACA Int'l*, 885 F.3d at 710. This argument, even if credited, has no bearing on this case as the Membership Agreement is without any revocation mechanism. *See* Membership Agreement, Ex. 1-B to LVAC's MSJ, ECF No. 24-1; *see also Ammons v. Ally Fin., Inc*., 326 F. Supp. 3d 578, 600 (M.D. Tenn. 2018) ("The parties here did not contractually agree to a revocation mechanism. In the absence of such an agreement, *ACA International* supports the FCC's objection to the very type of unilateral imposition of irrevocable consent that was sanctioned in *Reyes* and is advocated by [the defendant] here."); *Rodriguez v. Premier Bankcard, LLC*, No. 3:16-cv-2541, 2018 WL 4184742, at *11 (N.D. Ohio Aug. 31, 2018) ("[T]he FCC's clarification does not help Premier in this case, because here, there is also no 'particular revocation procedure' set by 'mutual agreement'

attacking *Reyes* directly, recent decisions instead suggest that courts should apply an unconscionability analysis to the contractual consent-to-call clause pursuant to traditional state-law unconscionability law, relying, in part, on language contained in both the *Reyes* decision and the 2015 FCC Ruling.[10] This article provides a detailed description of the *Reyes* holding regarding bargained-for consent-to-be-called under the TCPA, an overview of district courts' treatment of *Reyes* throughout the country, and whether the bargained-for consent in contractual consent-to-call clauses at issue in *Reyes's* progeny ought to be subject to an independent unconscionability analysis, unrelated to TCPA jurisprudence.

II. Revoking Consent to be Called by an Autodialer Under the TCPA

The TCPA prohibits any person from making a call (other than for emergency purposes) using an automated telephone dialing system or an artificial prerecorded voice, without the prior express consent of the person being called.[11] The TCPA provides for a private right of action for violation of the Act, permitting the called party to recover actual damages or $500, whichever is greater.[12] Treble damages are available to a called party for a knowing or willful violation of the Act.[13] Accordingly, customer contracts often include provisions providing that the customer consents to contact regarding the goods or services being provided, particularly in the event of a default by the customer under the terms of the contract.

The TCPA itself is silent on the question of whether or not previously-granted contractual consent-to-call can be revoked.[14] Yet courts addressing the issue have largely held that consent may be revoked under the TCPA, and if calls continue after consent is revoked, those calls violate the Act.[15]

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between the parties."). In sum, the Court declines LVAC's invitation to follow the Second Circuit's holding in *Reyes*.

10. In *Reyes*, the court stated that recent decisions and the 2015 FCC Ruling addressed only the "narrow" question whether, under the TCPA, "a consumer who has freely and unilaterally given his or her informed consent to be contacted can later revoke that consent." 861 F.3d at 56. *Reyes* framed the issue as "whether the TCPA also permits a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract." *Id.*

11. 47 U.S.C. § 227(b)(1)(A)–(B) (2019).

12. *Id.* § 227(b)(3)(B).

13. *Id.* § 227(b)(3)(C).

14. *See Reyes*, 861 F.3d at 59 ("We are not free to substitute our own policy preferences for those of the legislature by reading a right to revoke contractual consent into the TCPA where Congress has provided none.").

15. *See, e.g.*, Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 269 (3d Cir. 2013) (discussing FCC rulings regarding the scope of customer consent and one's ability to opt-out of certain communications).

For example, in *Osorio v. State Farm Bank, F.S.B.*,[16] one of the seminal circuit-level cases on revocation of consent under the TCPA, the Court of Appeals for the Eleventh Circuit held that a customer may orally revoke consent under the TCPA because "[c]ommon-law notions of consent generally allow oral revocation," and "allowing consent to be revoked orally is consistent with the 'government interest articulated in the legislative history of the [TCPA that] enabl[es] the recipient to contact the caller to stop future calls.'"[17]

Thereafter, in 2015, the FCC issued its omnibus ruling (the 2015 FCC Ruling), confirming that a consumer may revoke previously-given consent under the TCPA by "any reasonable means."[18] The relevant portion of the 2015 FCC Ruling responded to a petition from Santander Consumer USA, Inc., asking the FCC to find that a consumer cannot revoke consent where the customer voluntarily provided the phone number at issue as part of a business transaction.[19] Consistent with "the well-established common law right to revoke prior consent," the FCC confirmed that customers may revoke their gratuitous consent in the TCPA context.[20] The FCC's conclusion, like the *Osorio* decision, was based on principles of common law—as opposed to principles of contract: "Nothing in the language of the TCPA or its legislative history supports the notion that Congress intended to override a consumer's common law right to revoke consent."[21] Similarly, leading up to *Reyes*, courts holding that TCPA consent can be revoked did not address the question of whether or not *bargained-for consent*, as part of a consent-to-call contractual clause, could be revoked.

III. The *Reyes* Ruling and Contractual Consent-to-Call Clauses

In *Reyes*, the Court of Appeals for the Second Circuit addressed the question of whether consent can be revoked under the TCPA, despite a contractual consent-to-call clause.[22] In *Reyes*, the plaintiff leased a new ve-

16. Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. 2014).
17. *Id*. at 1255 (quoting Maryland v. Universal Elections, Inc., 728 F.3d 370, 376–77 (4th Cir. 2013)).
18. 2015 FCC Ruling, *supra* note 6, at 7996.
19. *See* Petition for Expedited Declaratory Ruling Regarding Revocation of Prior Express Consent for Non-Telemarketing Calls at 2, 5–8, 2015 FCC Ruling, 30 FCC Rcd. 7961 (2015) (CG Docket No. 02–278) [hererinafter Santander Petition].
20. *Gager*, 727 F.3d at 270; 2015 FCC Ruling, *supra* note 6, at 7995.
21. *Gager*, 727 F.3d at 270; 2015 FCC Ruling, *supra* note 6, at 7995.
22. Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 55 (2d Cir. 2017). *See generally* Chris Fry, *Court Won't Let Car Lessee Revoke Robocall Consent*, Courthouse News Serv. (June 23, 2017), https://www.courthousenews.com/court-wont-let-car-lessee-robocall-consent/ [https://perma.cc/GVZ4-HJGU] (detailing the factual and procedural history of Alberto Reyes' TCPA lawsuit); Dawn Causey,

hicle from the defendant.[23] In his application for the lease, the plaintiff listed his cellular telephone number, and agreed to a provision that permitted the defendant to contact the plaintiff.[24] Specifically, the lease's consent-to-call clause provided:

> You [Reyes] also expressly consent and agree to Lessor [Ford], Finance Company, Holder and their affiliates, agents and service providers may use written, electronic or verbal means to contact you. This consent includes, but is not limited to, contact by manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automated telephone dialing systems. You agree that Lessor, Finance Company, Holder and their affiliates, agents and service providers may use any email address or any telephone number you provide, now or in the future, including a number for a cellular phone or other wireless device, regardless of whether you incur charges as a result.[25]

The plaintiff signed the lease, and later defaulted.[26] The defendant made multiple calls to the plaintiff to encourage him to cure his default.[27] The plaintiff claimed he mailed a letter to the defendant asking it to stop contacting him and, when the telephone calls continued, he sued the defendant.[28] After the district court granted summary judgment in favor of the defendant, the plaintiff appealed to the Court of Appeals for the Second Circuit.[29]

The court of appeals addressed the question of whether or not the plaintiff was permitted to revoke the consent he gave in the lease under the TCPA. As the court of appeals stated, the Third and Eleventh Circuits[30] permitted consumers to revoke consent under the TCPA, "and the 2015 FCC Ruling considered a narrow question: whether the TCPA allows a consumer who has freely and unilaterally given his or her informed con-

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Thomas Pinder, Jonathan Thessin & Andrew Doersam, *Don't Call Me, Maybe*, A.B.A. Banking J. (Jan. 5, 2018), https://bankingjournal.aba.com/2018/01/don't-call-me-maybe/ [https://perma.cc/6DZQ-UX53] ("So is *Reyes* a silver bullet to protect a bank against a claim of revocation of consent? Not so fast. *Reyes* is binding precedent only in the Second Circuit—Connecticut, Vermont and New York—and, as noted above, conflicts with decisions from two of its sister circuits and the FCC's order. But Reyes suggests that, when faced with a claim that autodialed calls were made without consent, a caller will be better positioned if the customer previously provided consent as part of bargained-for consideration, instead of providing that consent unilaterally.").

23. *Reyes*, 861 F.3d at 53.
24. *Id.*
25. *Id.* at 53–54.
26. *Id.* at 54.
27. *Id.*
28. *Id.*
29. *Id.*
30. Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. 2014); Gager v. Dell Fin. Servs., LLC, 727 F.3d 265 (3d Cir. 2013).

sent to be contacted can later revoke that consent."[31] In the court of appeals' view, Reyes's case presented a different question: "whether the TCPA also permits a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract."[32]

The court of appeals answered in the negative, stating, "'[c]onsent' . . . is not always revocable under the common law."[33] The court of appeals noted that the plaintiff's "consent to be contacted by telephone, . . . was not provided gratuitously," as in *Osorio*, *Gager*, and the scenario presented in the 2015 FCC Ruling.[34] Instead, "it was included as an express provision of a contract to lease an automobile" from the defendant.[35] As such, the court of appeals held that, under the TCPA's definition of "consent," the circumstances meant that Reyes's consent-to-be-contacted was irrevocable.[36] The court of appeals expanded further on the significance of Reyes's contractual consent in that it is well-settled in the common law of contracts that bilateral contracts require the consent of the counterparty before they can be altered or revoked.[37] In light of congressional intent and interpretation of "consent" under the TCPA, allowing the plaintiff to unilaterally revoke his consent would directly contradict the common law of contracts, "[a]bsent express statutory language to the contrary[.]"[38]

Finally, the plaintiff argued that the trial court's summary judgment order should be overturned despite the court's holding because his consent-to-be-contacted by telephone was not an "essential term" of the contract.[39] Rejecting this argument, the court of appeals stated that whether a contract term is "essential" is not the dispositive factor for enforcing certain terms.[40] Rather, where there is an offer, acceptance, and consideration, "parties may bind themselves to any terms[.]"[41] The court of appeals concluded:

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31. *Reyes*, 861 F.3d at 56.
32. *Id.*
33. *Id.* at 57.
34. *Id.*
35. *Id.*
36. Reyes's consent was binding because it involved a lease contract, unlike a tort action whereby voluntary consent lacking consideration allows the consenting party a right to revoke. The court of appeals therefore distinguished gratuitous consent under contract and tort theories. *Id.* ("The common law is clear that consent to another's actions can 'become irrevocable' when it is provided in a legally binding agreement." (citing Restatement (Second) of Torts, § 892A(5) (Am. Law. Inst. 1979))).
37. *Id.* at 57.
38. *Id.* at 57–58.
39. *Id.* at 58.
40. *Id.* ("[A] contract should be construed so as to give full meaning and effect to *all* of its provisions." (quoting Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., 773 F.3d 110, 114 (2d Cir. 2014)) (emphasis in original)).
41. *Id.* at 58.

> A party who has agreed to a particular term in a valid contract cannot later renege on that term or unilaterally declare it to no longer apply simply because the contract could have been formed without it. Contracting parties are bound to perform on the terms that they *did* agree to, not that they *might* have agreed to under different circumstances.[42]

Interestingly, the court of appeals did not rely on a provision, common in automobile leases and most consumer contracts, that the lease could not be amended except by a writing signed by the lessor. Instead, the court of appeals relied on the simple existence of the lease's consent clause as the basis for the clause being an essential term that could not be modified unilaterally.[43]

IV. Treatment of *Reyes* in Other Courts

Reyes remains the only circuit-level decision that addressed the issue of the revocability of contractually bargained-for consent under the TCPA. A number of district court decisions have considered *Reyes*, and the majority of these have followed it.[44]

In *Rodriguez v. Student Assistance Corp.*,[45] the United States District Court for the Eastern District of New York followed *Reyes* and granted summary judgment in favor of the defendant-caller, Navient. The plaintiff had a student loan serviced by Navient.[46] The plaintiff alleged that she had "continuously" asked for automated calls to her cell phone to stop.[47] However, because plaintiff was a member of a prior Sallie Mae, Inc., class action settlement with a "class consent" clause, the court held that she could not unilaterally revoke consent.[48]

In *Barton v. Credit One Financial*,[49] the plaintiff entered into a "Cardholder Agreement" that provided:

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42. *Id.* (emphasis in original).
43. *Id.* ("[B]usinesses may undermine the effectiveness of the TCPA by inserting 'consent' clauses of the type signed by Reyes into standard sales contracts, thereby making revocation impossible in many circumstances.").
44. *See, e.g.*, Ford v. Bluestem Brands, Inc., No. 18 CV 2695 (VB), 2019 U.S. Dist. LEXIS 34636, at *7–8 (S.D.N.Y. Mar. 4, 2019) ("Plaintiff fails plausibly to allege defendant called him after the parties agreed to revoke plaintiff's prior consent to receive calls. Plaintiff concedes he consented to receive calls when he applied for an account with defendant. Although plaintiff alleges he repeatedly revoked that consent, under the TCPA, a party cannot 'unilaterally' revoke prior express consent to be contacted." (citing *Reyes*, 861 F.3d at 56)).
45. Rodriguez v. Student Assistance Corp., No. 17–CV–01577 (BMC), 2017 U.S. Dist. LEXIS 183588 (E.D.N.Y. Nov. 6, 2017).
46. *Id.* at *2.
47. *Id.*
48. *Id.* at *8–9.
49. Barton v. Credit One Fin., No. 16CV2652, 2018 U.S. Dist. LEXIS 72245 (N.D. Ohio Apr. 30, 2018).

> [Y]ou are providing express written permission authorizing Credit One Bank or its agents to contact you at any phone number (including mobile cellular/wireless, or similar devices) or email address you provide at any time, for any lawful purpose. The ways in which we may contact you include live operator, automatic telephone dialing systems (auto-dialer), prerecorded message, text message or email.[50]

Plaintiff alleged that he "revoked any prior consent he may have given [Credit One] to call him by telling defendant's representative not to call him anymore."[51] The Cardholder Agreement also provided the following:

> COMMUNICATION REVOCATION: If you do not want to receive communication as described [herein], you must (i) provide us with written notice revoking your prior consent, (ii) in that written notice, you must include your name, mailing address, and the last four digits of your Account number . . . (iv) if you are requesting communications to cease via telephone(s) and/or email, please provide the specific phone number(s) and email address.[52]

The district court found that "on September 29, 2016, Credit One received correspondence from Mr. Barton's counsel that adhered to the revocation language provided in the Cardholder Agreement. When Credit One received this revocation correspondence, it flagged the account and no further calls were made to Mr. Barton."[53] The district court further found that "[t]he revocation clause within the Cardholder Agreement is valid and enforceable, and Mr. Barton cannot unilaterally alter the terms of the agreement to claim that his oral revocation of consent was valid."[54]

In *Harris v. Navient Solutions, L.L.C.*,[55] the United States District Court for the District of Connecticut followed *Reyes*. In *Harris*, the plaintiff obtained a student loan from the defendant.[56] In the promissory note, the plaintiff agreed as follows:

> I understand that you may use automated telephone dialing equipment or an artificial or prerecorded voice message to contact me in connection with this loan or loan application. You may contact me at any telephone number I provide in this application or I provide in the future, even if that number is a cellular telephone number.[57]

50. *Id.* at *2.
51. *Id.* at *3 (alteration in original).
52. *Id.* at *8.
53. *Id.* at *9.
54. *Id.*
55. Harris v. Navient Sols., LLC, No. 3:15–cv–564 (RNC), 2018 U.S. Dist. LEXIS 140317 (D. Conn. Aug. 7, 2018).
56. *Id.* at *1.
57. *Id.* at *2.

The plaintiff claimed that she asked the defendant's representatives to "stop calling [her]," but that they continued to do so, and, as a result, she brought suit alleging violation of the TCPA.[58] The district court applied *Reyes* without detailed analysis, holding that "[here], as in *Reyes*, the issue is 'whether the TCPA also permits a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.' *Reyes* answered this question in the negative."[59]

And, in *Medley v. Dish Network*,[60] the plaintiff obtained television service from the defendant, DISH Network (DISH).[61] In the contract, the plaintiff "authorize[d] DISH and its affiliates, and its and their third-party representatives, to contact [her]: (i) regarding [her] account; (ii) to recover any unpaid portion of any obligation to DISH or its affiliates; and/or (iii) for any other purpose not prohibited by law."[62] After experiencing financial hardship, the plaintiff filed for bankruptcy, listing DISH as an unsecured creditor.[63] After the bankruptcy was discharged, the plaintiff's attorney wrote a letter to DISH stating that any further contact with the plaintiff would violate the TCPA.[64] After DISH continued to contact her by telephone, the plaintiff sued.[65] The United States District Court for the Middle District of Florida agreed with *Reyes*, holding that "[n]othing in the TCPA indicates that contractually-granted consent can be unilaterally revoked in contradiction to black-letter law."[66] The court concluded that the plaintiff "granted prior express consent as part of a contractual provision that could not be unilaterally revoked."[67]

In *Lucoff v. Navient Solutions, LLC, et al.*, the United States District Court for the Southern District of Florida followed both *Rodriguez* and *Reyes*.[68] The court held that the plaintiff was a member of a class action settlement containing a "class consent" clause (i.e. contractually bargained consent) and that, as a result, plaintiff could not unilaterally revoke.[69]

58. *Id.*
59. *Id.* at *5–6.
60. Medley v. Dish Network, LLC, No: 8:16–cv–2534–T–36TBM, 2018 U.S. Dist. LEXIS 144895 (M.D. Fla. Aug. 27, 2018).
61. *Id.* at *3 (alterations in original).
62. *Id.* at *3–4.
63. *Id.* at *6.
64. *Id.* at *8.
65. *Id.* at *9–10.
66. *Id.* at *31.
67. *Id.* at *31–32.
68. Lucoff v. Navient Sols., LLC, No. 18-60743-CIV, 2019 U.S. Dist. LEXIS 89879 (S.D. Fla. May 28, 2019).
69. *Id.* at *10.

V. Attacks on *Reyes*

A. Disagreement.

While some courts have demurred and deferred decision,[70] others simply disagree with the *Reyes* opinion.[71] For example, in *Ammons v. Ally Financial, Inc.*, the plaintiff purchased an automobile and financed the purchase through the defendant.[72] The retail installment sales contract signed by the plaintiff provided:

> You agree that we may try to contact you in writing, by e-mail, or using prerecorded/artificial voice messages, text messages, and automatic telephone dialing systems, as the law allows. You also agree that we may try to contact you in these and other ways at any address or telephone number you provide us, even if the telephone number is a cell phone number or the contact results in a charge to you.[73]

Similar to the cases adopting *Reyes*, the plaintiff defaulted on the loan, and the defendant failed to stop calling even after the plaintiff asked the defendant to stop.[74] The United States District Court for the Middle District

70. Sharp v. Ally Fin., Inc., 328 F. Supp. 3d 81, 105 (W.D.N.Y. 2018) ("The Court agrees with Plaintiff's initial argument that the dismissal of the TCPA claims based upon the holding in *Reyes* would be premature without additional discovery. Plaintiff's assertion that *Reyes* does not apply to the facts of this case due to the nature of the credit applications and the retail installment contract raises new arguments that touch upon the merits of Defendant's *Reyes* contention."); Weed v. SunTrust Bank, No. 1:17–cv–3547–WSD, 2018 U.S. Dist. LEXIS 76234, at *7 (N.D. Ga. May 3, 2018) ("SunTrust's express consent defense does not clearly appear on the face of the Amended Complaint and does not otherwise support SunTrust's motion to dismiss. Consideration of Weed's consent is simply premature at this stage of the litigation.").

71. *See* Singer v. Las Vegas Athletic Clubs, No. 2:17–cv–01115–GMN–VCF, 2019 U.S. Dist. LEXIS 48838, at *19 (D. Nev. Mar. 25, 2019) ("Preliminarily, the Court is bound by the Ninth Circuit's ruling in *Van Patten*. To the extent *Reyes* may serve as persuasive authority, the Court finds it cannot be reconciled with *Van Patten*, *ACA Int'l*, or the 2015 FCC Order."); *see also* Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 595 (M.D. Tenn. 2018); Rodriguez v. Premier Bankcard, LLC, No. 3:16CV2541, 2018 U.S. Dist. LEXIS 149225, at *35 (N.D. Ohio. Aug. 31, 2018) ("In short, 'adopt[ing] the prohibition on revocation in *Reyes* . . . would result in the effective circumvention of the TCPA in the debtor-creditor context.'" (quoting Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (2017))); McBride v. Ally Fin., Inc., No. 15–867, 2017 U.S. Dist. LEXIS 142804, at *5 n.4 (W.D. Pa. Sept. 5, 2017) (acknowledging "the detailed common-law and statutory interpretations in *Reyes* are not without logical appeal" and reflect "a potential sea-change in the area of TCPA-litigation," yet declining to adopt *Reyes* "absent clearer indications in the law of [the Third] Circuit.").

72. *Ammons*, 326 F. Supp. 3d at 580.

73. *Id.* at 581.

74. *Id.* at 582–83.

of Tennessee found the *Reyes* decision "highly problematic for a number of reasons."[75] The district court held that *Reyes* is "at odds with" the 2015 FCC Ruling and the *Gager* and *Osorio* opinions.[76] The district court also considered that "the unilateral-provision-of-number versus number-in-bargained-for-contract dichotomy that *Reyes* has set up is really 'a distinction without a difference where[, in reality,] consumers' provision of their telephone numbers represents the *same* express consent as their signature on a contract' containing a consent clause."[77] Accordingly, the district court rejected the *Reyes* holding.

The *Ammons* decision is erroneous for two reasons. First, *Ammons* is simply wrong in holding that "the unilateral-provision-of-number versus number-in-bargained-for-contract dichotomy that *Reyes* has set up is really 'a distinction without a difference[.]'"[78] As *Reyes* recognized, "the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent[.]"[79]

Second, the *Ammons* court incorrectly relied on *Gager*, *Osorio*, and the 2015 FCC Ruling in refusing to follow *Reyes*.[80] As detailed here, these authorities did not distinguish between contract law and tort law, and *Reyes* distinguished *Gager* and *Osorio* on that basis:

- In *Gager*, the court held the fact that "the TCPA allows consumers to revoke their prior express consent is consistent with the basic common law principle that consent is revocable."[81]
- *Osorio* allowed for revocation of consent only "in the absence of any contractual restriction to the contrary."[82]
- The 2015 FCC Ruling—relying on *Osorio* and *Gager*—also concluded consent is revocable in the context of analyzing gratuitous, non-contract-based consent.[83]

75. *Id.* at 595.
76. However, the *Ammons* court overlooked the fact that *Reyes* took care to distinguish between *Gager*, *Osorio*, and the 2015 FCC Ruling. *Compare* Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 57 (2d Cir. 2017), *with Ammons*, 326 F. Supp. 3d at 595.
77. *Ammons*, 326 F. Supp. 3d at 595 (alterations in original) (emphasis in original) (quoting Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448, 455 (E.D.N.C. Jan. 14, 2016)).
78. *Id*.
79. *Reyes*, 861 F.3d at 56.
80. *Ammons*, 326 F. Supp. 3d at 591–593, 595, 599–600.
81. Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 270 (3d Cir. 2013). In *Gager*, plaintiff signed a loan application and provided her cell phone number, but did not deny defendant use of an automated telephone dialing system (ATDS) to call her at the number provided. *Id.* at 267.
82. Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255 (11th Cir. 2014).
83. 2015 FCC Ruling, *supra* note 6, at 7993–94.

- The Second Circuit in *Reyes*, after carefully considering all three prior rulings, made a critical distinction between common law notions of tort law consent versus contractual consent to answer the narrow question of whether customers could unilaterally revoke their prior contractual consent.[84]

The district court's opinions in the *Few v. Receivables Performance Management* litigation reflect both the conflict and indecision with respect to revocation of contractual consent-to-call clauses.[85] In *Few*, the United States District Court for the Northern District of Alabama first agreed with *Reyes*, and then, on motion for reconsideration, changed its mind, purportedly on the basis that "its Memorandum Opinion . . . failed to correctly follow *Osorio v. State Farm Bank, F.S.B.*,"[86] concluding that *Osorio* permits parties to revoke contractually provided consent "in the absence of any contractual restriction to the contrary."[87]

In *Few*, the plaintiff purchased DISH television and internet service from the defendant.[88] In the contract for service, the plaintiff agreed that "DISH 'and/or any debt collection agency and/or debt collection attorney hired by DISH,'" could contact her at a telephone number she provided in the application.[89] After the plaintiff defaulted, the defendant made numerous telephone calls to her despite her claim that she told the plaintiff "she no longer wished to receive calls[.]"[90] In ruling on the defendant's motion for summary judgment, the district court agreed that the plaintiff could not revoke bargained-for consent to receive calls under the TCPA.[91] According to the district court, "[c]ourts should evaluate the revocation of consent under § 227(b)(1)(A) by considering 'the common law concept of consent.'"[92] The district court noted that "[t]hese common law concepts allow the unilateral revocation of consent, but only 'in the absence of any contractual restriction to the contrary[.]'"[93] Applying *Reyes*, the district court held that the plaintiff "gave prior express consent to [the defendant] to

84. Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 56–58 (2d Cir. 2017) (distinguishing *Gager*, 727 F.3d at 265 and *Osorio*, 746 F.3d at 1253).
85. Few v. Receivables Performance Mgmt. (*Few I*), No. 1:17–CV–2038–KOB, 2018 U.S. Dist. LEXIS 134324 (N.D. Ala. Aug. 9, 2018), *vacated*, 2018 U.S. Dist. LEXIS 192854 (N.D. Ala.), *and reconsidered by* 2018 U.S. Dist. LEXIS 192850 (N.D. Ala. Nov. 13, 2018).
86. Few v. Receivables Performance Mgmt., LLC (*Few II*), No. 1:17–CV–2038–KOB, 2018 U.S. Dist. LEXIS 192854, at *6 (N.D. Ala. Nov. 13, 2018).
87. *Id*. at *7 (quoting Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255 (11th Cir. 2014)).
88. *Few I*, 2018 U.S. Dist. LEXIS 134324, at *3.
89. *Id*.
90. *Id*. at *4.
91. *Id*. at *7.
92. *Id*. at *5 (quoting *Osorio*, 746 F.3d at 1255).
93. *Id*.

make the calls and, because she offered that consent as part of a bargained-for exchange and not merely gratuitously, she was unable to unilaterally revoke that consent."[94] Then, however, the district court changed its mind. Despite its prior opinion, on November 13, 2018, the *Few* court granted the plaintiff's motion for reconsideration and held that it erroneously relied on *Reyes*.[95] The district court entered a separate opinion and order denying the defendant's alternative TCPA argument as premature because the parties had not yet engaged in discovery.[96]

On March 25, 2019, the first court in the Ninth Circuit weighed in on the *Reyes* issue.[97] In *Singer v. Las Vegas Athletic Clubs*, plaintiff signed up for a gym and authorized defendant to call him on his cell phone "by any method, including use of a predictive dialer."[98] Plaintiff fell behind on membership payments and defendant called his phone to collect payments.[99] Relying heavily on *Van Patten*,[100] Judge Navarro found *Reyes* incompatible with Ninth Circuit precedent and held that the plaintiff could revoke contractually provided consent.[101] However, *Van Patten* permits revocation under common-law principles, not contract law principles.[102]

The plaintiff in *Van Patten* also provided his cell phone number at the time of his gym membership, but did not agree to a separate contractual clause providing consent-to-be-called by an auto-dialer.[103] Giving one's number at the time of a contract does not equate to a term in the contract that specifically states the lender can contact the borrower at any number provided using an auto-dialer.[104] There are no facts in *Van Patten* to suggest

94. *Id*.
95. *See Few II*, No. 1:17–CV–2038–KOB, 2018 U.S. Dist. LEXIS 192854, at *9 (N.D. Ala. Nov. 13, 2018) ("Although the *Reyes* decision applies solid 'black-letter law,' the law of the Eleventh Circuit, not the Second Circuit, binds this court.").
96. Few v. Receivables Performance Mgmt., LLC (*Few III*), No. 1:17–CV–02038–KOB, 2018 U.S. Dist. LEXIS 192850, at *6–7 (N.D. Ala. Nov. 13, 2018).
97. Singer v. Las Vegas Athletic Clubs, No. 2:17–cv–01115–GMN–VCF, 2019 U.S. Dist. LEXIS 48838 (D. Nev. Mar. 25, 2019).
98. *Id*. at *2.
99. *Id*.
100. Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017).
101. *Singer*, 2019 U.S. Dist. LEXIS 48838, at *19–20.
102. *Van Patten*, 847 F.3d at 1047 ("Courts have given three main reasons for concluding that consumers may revoke their consent under the TCPA. First, such a holding is consistent with the common law principle that consent is revocable. Courts have found that Congress did not depart from the common law understanding of consent, and at common law, consent may be withdrawn.") (citations omitted).
103. *Id*. at 1040. These facts are similar to those of *Gager*, which as noted above is also distinguishable. *See* discussion *supra* Part V.A and accompanying note 84.
104. Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 56 (2d Cir. 2017); *see also* Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 273–74 (3d Cir. 2013) ("[T]hough . . . the level of contact that a debtor will consent to may be relevant to the

that those customers could not put limitations on the use of their phone number or that they could not later revoke. Without a contractually negotiated term in the contract, the provided consent was arguably gratuitous and governed by common-law principles allowing revocation.

B. Unconscionability.

1. *Unconscionability Analysis Applied to TCPA Consent-to-Call Clauses.*

Unconscionability attacks on contractual consent have started to appear in TCPA litigation, particularly in TCPA arbitrations, where the contract signed by the consumer contains a consent-to-call clause as well as a clause requiring that the parties submit all disputes to binding arbitration.

For example, in arbitration "*Award No. 1*,"[105] a respondent-lender appealed, and the case was reheard before a panel of three arbitrators. The claimants provided a cell phone number at the time of their online application.[106] Claimants alleged that they tried to cancel the accounts but that, unbeknownst to them, additional fees were charged when the lender failed to comply with the closure request.[107] Collection calls then began.[108] Claimants alleged that they continued to try to cancel the accounts and requested that the lender stop calling.[109] The account contracts included the following consent clause: "You are providing express written permission authorizing [RESPONDENT] or its agents to contact you at any phone number (including mobile, cellular/wireless, or similar devices) or email address you provide at anytime for any lawful purpose."[110] The panel found the consent clause to be ambiguous "because it seems to imply" that a "separate consent document" would follow as opposed to the clause itself substantiating consent.[111] The panel also found that the contract was a "non-negotiated adhesion contract."[112] Nonetheless, the panel held that by providing the cell phone number at issue at the time of the application, claimants consented to receiving calls made using an auto-dialer.[113]

Respondent argued that under *Reyes*, claimants could not unilaterally revoke consent.[114] The panel disagreed for several reasons. First, the panel pointed to its finding that the contract was one of adhesion and therefore, was not a bargained-for contract.[115] Second, relying on the 2015 FCC Rul-

negotiation of a line of credit, the ability to use an autodialing system to contact a debtor is plainly not an essential term to a credit agreement.").

105. 2018 WL 3972083 (AAA) (July 19, 2018). Due to the confidential nature of arbitration proceedings, the parties' and case names are unavailable.

106. *Id.* at *2–3.

107. *Id.* at *3–4.

108. *Id.* at *4.

109. *Id.* at *6.

110. *Id.* at *7.

111. *Id.* at *8.

112. *Id.*

113. *Id.*

114. *Id.* at *17.

115. *Id.*

ing, *Gager*, and *Osorio*, the panel held that claimants could revoke consent at any time in a reasonable manner.[116] Third, the panel pointed to its finding that the respondent's own practices include honoring a customer's verbal request to stop calling.[117] As a result, the panel held that claimants had factually and legally revoked consent-to-be-called using an auto-dialer.[118]

Award No. 1 was wrongly decided for three reasons. First, the panel failed to demonstrate a finding of substantive unconscionability that would render the consent clause unenforceable.[119] The panel seemed to end its inquiry on a finding of procedural unconscionability—i.e. that a form consumer contract is one of adhesion and is, therefore, unconscionable. This is wrong because a finding of unconscionability requires a finding of both procedural *and* substantive unconscionability, and "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."[120] Second, as discussed above, the 2015 FCC Ruling, *Gager*, and *Osorio* all differentiate between gratuitous and contractual consent. Third, whether or not a respondent honors verbal requests to stop calls does not mean that they are now required to do so. Instead, it only shows that the lender did more than they were obligated to do—a complimentary customer service that the lender can choose to cease at any time.

In arbitration "*Award No. 2*,"[121] a claimant-customer appealed an arbitration award in favor of respondent, a wireless carrier. The original award dismissed claimant's TCPA claim, in part, on the grounds that claimant had contractually consented to receive calls with an auto-dialer or using an artificial voice or prerecorded message.[122] The original award held that claimant could not unilaterally revoke the contractually provided consent.[123] The contract included the following consent-to-call clause:

> You consent to allow [REDACTED] Wireless and anyone who collects on our behalf to contact you about your account status, including past due or clment (sic) charges, using prerecorded calls, emails and calls or messages delivered by an automatic telephone dialing system to any wireless phone number or email address you provide.[124]

116. *Id.*
117. *Id.*
118. *Id.* at *18.
119. *Id.* at *8 and 17 (concluding the contract was one of adhesion without completing an unconscionability analysis to determine if the contract was subtantively unconscionable and still enforceable).
120. Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1232 (Cal. 2012); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).
121. 2018 WL 6069222 (AAA) (Oct. 5, 2018).
122. *Id.* at *1.
123. *Id.*
124. *Id.* at *7.

The panel rejected respondent's *Reyes* argument for two reasons. First, the contract did not expressly state that the consent was irrevocable.[125] The panel found that "[i]f revocation is not even mentioned in the contractual setting, it is at best ambiguous as to whether the consumer intends to waive a right of revocation by signing the contract as opposed to providing a phone number in the application."[126] Second, the panel found that "the reasoning and result [in the original award] . . . was not consistent with the remedial purpose of the TCPA."[127] Instead, the panel pointed to the 2015 FCC Ruling—allowing customers to revoke in any reasonable manner—and *Ammons* to support their finding that the TCPA statutory scheme provides for revocation.[128]

In *Award No. 2*, the panel mistakenly equated the contractual consent clause with merely providing the cell phone number at the time of application.[129] Because the contract failed to expressly mention revocation, the panel took away any legal effect of the contract clause.[130]

Determining the intent of the parties is a fundamental goal of contract law.[131] The panel did not ask why the parties included a consent clause if it was indistinguishable from gratuitous consent. Contracting for consent will always be useless if revocation is not part of the equation. Contracting parties would only include a consent clause if they intended for it to have a legal effect, i.e., a different outcome than gratuitous consent. The way contractual and gratuitous consent differ is in how, whether, and when revocation can occur. Gratuitous consent permits gratuitous revocation—"through any reasonable means."[132] Contractual bargained-for consent-to-call by its terms, and by necessity, precludes revocation, and does not permit the consumer to unilaterally alter the contract "by any reasonable means."[133]

125. *Id.*
126. *Id.* at *9.
127. *Id.* at *7.
128. *Id.* at *8 (stating that it was "the TCPA's statutory scheme, not contract law, which formed the basis for the FCC's ruling proving for a *right* of revocation") (citing *Ammons*, 326 F. Supp. 3d at 595).
129. *Id.* at *9.
130. *Id.* ("If the intention to waive a right is not clear, unambiguous and free from doubt, then 'all doubts about the waiver must be resolved in favor [of no waiver].'") (quoting Metro. Fed. Bank of Iowa v. A.J. Allen Mech. Contractors, 447 N.W.2d 668, 670 (Iowa 1991)).
131. M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 937 (2015) (Ginsburg, J., concurring) ("Under the 'cardinal principle' of contract interpretation, 'the intention of the parties, to be gathered from the whole instrument, must prevail.'" (quoting 11 Richard A. Lord, Williston on Contracts § 30:2, at 27 (4th ed. 2012))).
132. 2015 FCC Ruling, *supra* note 6, at 7989–90.
133. Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 56 (2d Cir. 2017).

Moreover, the irony of a simple syllogism apparently escaped the arbitrators applying an unconscionability analysis to a contractual consent-to-call clause. The arbitrators had jurisdiction solely because the consumer contract contained an arbitration clause that waived the consumer's right to a jury trial, limited the consumer's right to recovery, and required all disputes to be adjudicated in arbitration by the arbitration panels who decided *Arbitration No. 1* and *Arbitration No. 2*. The same contract containing a jurisdiction-conferring arbitration clause, which the California Supreme Court deemed not unconscionable, was found unconscionable by the arbitrators when evaluating the consent-to-call clause.[134] It is thus perhaps not surprising that the unconscionability attacks on *Reyes* have come in arbitration, where the arbitrators' errors of law and fact are not subject to judicial review.[135]

But, outside of arbitration and contractually bargained-for consent-to-call clauses, the TCPA and consent-to-call is no stranger to an unconscionability analysis. For example, in *Chladni v. University of Phoenix, Inc.*,[136] the United States District Court for the Eastern District of Pennsylvania tackled whether non-contractual bargained-for consent under the TCPA is subject to an unconscionability analysis. When she submitted an online application, the plaintiff checked a box giving prior express consent to be contacted on her cell phone using an autodialer.[137] The website consent language stated:

> By submitting this form, you are giving your express written consent for University of Phoenix to contact you regarding our educational programs and services using email, telephone or text—including our use of automated technology for calls or texts to any wireless number you provide. This consent is not required to purchase goods or services and you may always call us directly at 866-766-0766.[138]

134. 2018 WL 6069222 at *9; *cf.* Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741 (Cal. 2015).

135. 9 U.S.C. §§ 9, 10, 11 (2019); Cal. Civ. Proc. Code Ann. §§ 1285.8, 1286.2, 1286, 1286.6, 1288 (Deering, LEXIS through ch. 5 of 2019 Reg. Sess.). Arbitration awards generally are not subject to attack in court merely because the arbitrator makes an error of law. Moncharsh v. Heily & Blase, 832 P.2d 899, 903–04 (Cal. 1992) ("This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one. The arbitrator's decision should be the end, not the beginning, of the dispute . . . . Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons. First, by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute.") (citations omitted).

136. Chladni v. Univ. of Phoenix, Inc., No. 5:15–cv–4453, 2016 U.S. Dist. LEXIS 154603 (E.D. Penn. Nov. 7, 2016).

137. *Id.* at *2.

138. *Id.* at *2–3.

In opposing defendant's motion for summary judgment,[139] the plaintiff argued that she unwillingly *"had* to check that box," i.e., it was unconscionable.[140] The court disagreed, finding the plaintiff was not required to submit the job application and checking "the box was voluntary."[141] The court also found that because the consent language was "short and clear," plaintiff was not "coerced or tricked into checking the box."[142] Based on these factual findings and because the plaintiff was able to revoke (and actually did so three days later), the "terms of the consent . . . are enforceable and constitute prior express consent under the TCPA."[143]

2. *Unconscionability Generally: Why Consent-to-Call Clauses Should Not Be Placed on a Pedestal Above Any Other Clauses in Consumer Financing Documents.*

Recent unconscionability jurisprudence from California Supreme Court decisions suggests that *Reyes* should not be side-stepped by using an unconscionability analysis to strike down a consent-to-call clause, at least in California. The party resisting enforcement of a contractual clause bears the burden of proving unconscionability.[144] Under the widely used *A & M Produce* test,[145] to sustain its burden, the party resisting enforcement of a contractual term on unconscionability grounds must show the term is both substantively and procedurally unconscionable.[146] Substantive and procedural unconscionability need not be present in the same degree, however. Rather, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."[147]

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided."[148] The unconscionable benchmark for "one-sided" terms is if a term is so one-sided that it "shock[s] the conscience."[149] Unconsciona-

139. The court ultimately denied the defendant's motion for summary judgment on other grounds. *Id.* at *21.
140. *Id.* at *8 (emphasis added).
141. *Id.*
142. *Id.* at *8–9.
143. *Id.* at *9.
144. Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1224 (Cal. 2012); Ajamian v. CantorCO2e, L.P., 137 Cal. Rptr. 3d 773, 792–93 (Cal. Ct. App. 2012); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 866 (Cal. Ct. App. 2002).
145. A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121–23 (Cal. Ct. App. 1982).
146. *Pinnacle Museum*, 282 P.3d at 1232; Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (citing *A & M Produce*, 186 Cal. Rptr. at 121–22).
147. *Pinnacle Museum*, 282 P.3d at 1232 (quoting *Armendariz*, 6 P.3d at 690).
148. *Id.*
149. *Id.* (quoting 24 Hour Fitness, Inc. v. Super. Ct., 78 Cal. Rptr. 2d 533, 541 (Cal. Ct. App. 1998)).

bility also depends on an "absence of justification" for an such inequitable result.[150] Thus, "a contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable."[151] To shock the conscience, an arbitration clause must lack even a "modicum of bilaterality."[152] The "shock the conscience" test may be applied to an individual contract term only after it is viewed in the context of the whole agreement.[153] Viewed alone, many contractual provisions might seem both non-mutual and extreme, such as an inequitable obligation to pay for goods that imposes a substantial financial obligation. But a buyer's non-mutual promise, in context, is given in exchange for a seller's sale, delivery, and, sometimes, financing of the agreement. In other words, non-mutual promises, in context, are reasonable. Thus, a contract "will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'"[154] Similarly, California Civil Code section 1670.5(b) requires a court to give parties a "reasonable opportunity to present evidence as to [the contract's or a clause's] commercial setting, purpose, and effect to aid the court" in deciding whether it is unconscionable.[155]

The procedural element of unconscionability, on the other hand, "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power."[156] "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."[157] A procedural unconscionability analysis also includes consideration of the factors of surprise and oppression.[158] Merely labeling a contract "adhesive" does not advance the unconscionability analysis, particularly when the contract must be standardized to conform to statutory requirements.[159] "[T]he times in which consumer contracts were anything other than adhesive are long past."[160]

150. *Armendariz*, 6 P.3d at 692 (quoting *A & M Produce*, 186 Cal. Rptr. at 122).
151. *Id*. at 691 (quoting Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 148 (Cal. Ct. App. 1997)).
152. *Pinnacle Museum*, 282 P.3d at 1238 (Werdegar, J., concurring) (quoting *Armendariz*, 6 P.3d at 692).
153. *See* Cal. Civ. Code Ann. § 1641 (Deering, LEXIS through ch. 5 of 2019 Reg. Sess.) ("The whole of a contract is to be taken together . . . .").
154. *Armendariz*, 6 P.3d at 689 (quoting Graham v. Scissor-Tail, Inc., 623 P.2d 165, 173 (Cal. 1981)).
155. Cal. Civ. Code Ann. § 1670.5(b).
156. *Pinnacle Museum*, 282 P.3d at 1232.
157. *Id*. (quoting Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 805 (Cal. Ct. App. 2005)).
158. Parada v. Super. Ct., 98 Cal. Rptr. 3d 743, 757 (Cal. Ct. App. 2009).
159. *Pinnacle Museum*, 282 P.3d at 1233 ("Thus, while a condominium declaration may perhaps be viewed as adhesive, a developer's procedural compli-

California courts have applied unconscionability analyses to preserve, as not-unconscionable, terms in standard form consumer contracts with a higher proportion of the benefit of the bargain than a consent-to-call clause. For example, in *Discover Bank v. Super. Ct.*,[161] the California Supreme Court applied an unconscionability analysis to strike down a class action waiver in an arbitration provision in a consumer contract.[162] The California Supreme Court later overturned *Discover Bank*, holding in *Sanchez v. Valencia Holding Co., L.L.C.*, that the arbitration clause and class-action waiver in the standard automobile retail installment sales contract (RISC) was not unconscionable.[163]

In *Sanchez*, the California Supreme Court addressed the issue of whether certain procedures for the resolution of disputes that the parties agreed to in an arbitration agreement contained in a consumer contract were unconscionable under California law. As noted by the *Sanchez* court, unconscionability "refers to 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'"[164] The *Sanchez* court laid out the elements of unconscionability under California law: "'[T]he doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.'"[165] Both procedural and substantive unconscionability must be established in order for a court to refuse to enforce a contractual provision on unconscionability grounds.[166]

> [T]he adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability. Yet "a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided."[167]

In addition to procedural unconscionability, "unconscionability requires a substantial degree of unfairness *'beyond a simple old-fashioned bad bargain*.'"[168] Substantively unconscionable terms include those that:

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ance with the Davis-Sterling Act provides a sufficient basis for rejecting [a] claim of procedural unconscionability.").

160. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011).

161. Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005).

162. *Id.* at 1108.

163. Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 746 (Cal. 2015). The U.S. Supreme Court reversed *Discover Bank* in *Concepcion* holding it was preempted by the Federal Arbitration Act. *Concepcion*, 563 U.S. at 347–48.

164. *Id.* at 748 (quoting Sonic-Calabasas A, Inc. v. Moreno (*Sonic II*), 311 P.3d 184, 194 (Cal. 2013)).

165. *Id.* (quoting Sonic-Calabasas A, Inc. v. Moreno (*Sonic I*), 247 P.3d 130, 145 (Cal. 2011)).

166. *Id.*

167. *Id.* at 751 (quoting Gentry v. Super. Ct., 165 P.3d 556, 572 (Cal. 2007)).

168. *Id.* at 749 (quoting *Sonic II*, 311 P.3d at 214) (emphasis in original).

> [I]mpair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or otherwise central aspects of the transaction.[169]

Following closely with their ruling in *Sanchez*, the California Supreme Court in *De La Torre v. CashCall Inc.*,[170] held that when evaluating the presence of procedural unconscionability,

> [t]he court must consider whether there was (1) undue oppression arising from "an inequality of bargaining power," including the various factors tending to show relative bargaining power such as the parties' sophistication, their cognitive limitations, and the availability of alternatives; and (2) surprise owing to, for example, the "terms of the bargain [being] hidden in a prolix printed form" or pressure to hurry and sign.[171]

Some degree of "oppression" and procedural unconscionability is likely present when a consumer contract containing a consent clause is one of adhesion, i.e., contains standard, non-negotiable terms to which the consumers have to agree if they wish to obtain the service, such as obtaining a credit card from a bank.[172] However, when "there is no other indication of oppression or surprise, 'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high.'"[173]

The adhesive nature of a form consumer contract containing a consent-to-call clause suggests a similar, non-fatal procedural unconscionability analysis performed with respect to the automobile RISC at issue in *Sanchez*.[174] As to procedural unconscionability, again, "the times in which consumer contracts were anything other than adhesive are long past."[175] Thus, while a standard form lending or finance contract may, by itself, not permit a consumer to bargain to amend the standard terms, the adhesive nature of such a contract does not end the inquiry.[176] Instead, the analytical focus

169. *Id.* at 748 (quoting *Sonic II*, 311 P.3d at 202–03).
170. De La Torre v. CashCall, Inc., 422 P.3d 1004 (Cal. 2018).
171. *Id.* at 1014 (citing A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121–22 (Cal. Ct. App. 1982)).
172. *See Sanchez*, 353 P.3d at 751–52.
173. Serpa v. California Sur. Investigations, Inc., 155 Cal. Rptr. 3d 506, 512 (Cal. Ct. App. 2013) (quoting Ajamian v. CantorCO2e, L.P., 137 Cal. Rptr. 3d 773, 794 (Cal. Ct. App. 2012)).
174. Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1261–62 (9th Cir. 2017) ("[T]he adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most.").
175. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011).
176. *See* Todd J. Zywicki, *The Law and Economics of Debt Collection and its Regulation*, 28 Loy. Consumer L. Rev. 167, 200 (2016) [hereinafter Zywicki] ("If lenders do possess bargaining power over borrowers, it is not clear why they would

of a standard form consent-to-call clause would be on substantive unconscionability.[177]

Undeniable business needs justify the need for a contractual consent-to-call clause.[178] If a customer purchases a vehicle and fails to make the monthly payments, the lender must be able to call the customer to arrange payments on the account. Similarly, a lender's ability to contact the customer benefits the customer by keeping the customer in the vehicle. It is a simple syllogism that, without the ability to contact the customer, the lender's only available collection right would be repossession of the collateral. The same is true of any financial services product on which a customer may default. The lender is providing money in exchange for the customer's promise to repay. Repayment does not always go as planned. The lender has a legitimate business interest in receiving the money owed under the relevant contract.

The single clear element of the substantive unconscionability analysis is surprise or oppression.[179] There is no surprise or oppression regarding a customer or borrower's understanding that if he does not pay, the lender will contact them to remind them of their contractual obligation(s) and the consequences of any default. Simply put, a consumer expects its creditor

use that power only to oppress the small number of consumers who default rather than using their alleged power to oppress all borrowers through higher interest rates or other loan terms. In short, as a theoretical supposition, the argument that consumer credit contracts are contracts of adhesion does not hold together because it fails to explain why an imbalance in bargaining power would be exercised only with respect to the collection terms of the contract.").

177. De La Torre v. CashCall, Inc., 422 P.3d 1004, 1009 (Cal. 2018) ("[T]he unconscionability doctrine is concerned . . . with [among other things] 'unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction'" (quoting Sonic-Calabasas A, Inc. v. Moreno (*Sonic II*), 311 P.3d 184, 202–03 (Cal. 2013))).

178. Justification for consent-to-call provisions lies not only in privilege arguments, but in economic ones. Zywicki, *supra* note 176, at 201–02 ("[E]mpirical evidence overwhelmingly demonstrates that when access to collection remedies is restricted, prices, such as interest rates and down payments, increase and the overall equilibrium quantity of credit declines.").

179. *De La Torre*, 422 P.3d at 982 ("It is true that unconscionability has been subject to 'various nonexclusive formulations.'" (quoting *Sonic II*, 311 P.3d at 213)). The *De La Torre* court chronicled various cases that employed differing analytical approaches. *See* Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 804–06 (Cal. Ct. App. 2005) (noting use of two approaches in California); Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 512 n.9 (Cal. 1985) (comparing *A & M Produce* and *Graham*, then stating either method "should lead to the same result"); A & M Produce Co., v. FMC Corp., 186 Cal. Rptr. 114, 121–22 (Cal. Ct. App. 1982) (considering an alternative framework that conforms with the Uniform Commercial Code); Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171–72 (Cal. 1981) (using methodology developed by Justice Tobriner in 1961). The court concluded that, regardless of method, a bright-line benchmark is insufficient alone to declare a term unconscionable. *De La Torre*, 422 P.3d at 1013–14.

to call him or her if the consumer fails to pay. There is no surprise, nor is there any expectation, that a consumer can use goods for free without paying for them or being reminded to do so. Nor would a consumer be surprised that technology is used by the creditor to call him or her, particularly when customers themselves use technology to contact the creditor—such as smartphones, VoIP, e-mail, or texting. In other words, modern customers do not expect creditors to call them by using rotary telephones—particularly when many famously do not even know what an analog, rotary telephone is.[180]

Nor would consumers be surprised to learn that they cannot alter the contract without the creditor's written permission. Contractual permission to contact a customer to service an account is clearly not substantively unconscionable. The fact that contractual consent permits the use of technology to contact the customer does not render the contractual clause substantively unconscionable.[181] Such a provision does not "impair the integ-

180. Videos, *Watch Two Teenagers Try to Dial a Number on an Ancient Rotary Phone*, Interesting Eng'g (Jan. 2019), https://interestingengineering.com/video/watch-two-teenagers-try-to-dial-a-number-on-an-ancient-rotary-phone [http://perma.cc/8BE4-7PVH] ("For the uninitiated and the young, rotary phones are what older people used to use before the emergence of smartphones or even wireless phones. Attached to a landline, the phones' [sic] included a rotary dial that centered around the revolutionary engineering and technological feat of pulse dial. The first iteration of the phone was introduced in 1904 and gained in popularity during the first half of the 20th century only to be supplanted by push dialing. In short, the phones are really old, yet there is a good chance one of your grandparents may still have one laying around their home in the attic. As seen in the video, using rotary phones were tedious and sometimes completely unreliable. For the smart-phone raised teenagers in the video, it is probably inconceivable that people used to have to use phones like this.").

181. The distinction between autodialed and manually dialed calls—with only the former being governed by the TCPA—should play no role in the unconscionability analysis. It is true that a small minority of decisions denied *Spokeo* standing where the injury was the same regardless of whether the call was manually or automatically dialed. Ewing v. SQM US, Inc., 211 F. Supp. 3d 1289, 1293–94 (S.D. Cal. 2016); Romero v. Dep't Stores Nat'l Bank, 199 F. Supp. 3d 1256, 1265 (S.D. Cal. 2016). Most courts have rejected those decisions in regard to standing, however, on the basis that the autodialed calls can confer different annoyances than manually dialed calls. Kalmbach v. Nat'l Rifle Ass'n of America, No. C17–399–RSM, 2017 U.S. Dist. LEXIS 117113, at *3 (W.D. Wash. July 26, 2017); Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc., No. 16–CV–05486–JCS, 2017 U.S. Dist. LEXIS 26457, at *16–18 (N.D. Cal. Feb. 24, 2017); Mohamed v. Off Lease Only, Inc., No. 15–23352–Civ–COOKE/TORRES, 2017 WL 1080342, at *6–7 (S.D. Fla. Mar. 22, 2017); DeClue v. United Consumer Fin. Servs. Co., No. 16cv2833 JM (JMA), 2017 U.S. Dist. LEXIS 59995, at *6–7 (S.D. Cal. Apr. 19, 2017); Mbazomo v. ETourandtravel, Inc., No. 2:16–cv–02229–SB, 2016 U.S. Dist. LEXIS 170186, at *3–4 (E.D. Cal. Dec. 8, 2016); LaVigne v. First Cmty. Bancshares, Inc., 215 F. Supp. 3d 1138, 1147 (D.N.M. 2016).

rity of the bargaining process" any more than the standard term in an automobile RISC permitting repossession of a vehicle on default.[182] Restricting the right to revoke consent under the TCPA is not contrary to the public policy because, as the *Reyes* court correctly pointed out, the TCPA does not address the revocation of consent, and under common law, contractual consent is not revocable without the consent of both parties to the contract. Accordingly, a contractual term permitting a creditor to contact its customer on default, and to use technology to do so, does not "alter in an impermissible manner fundamental duties otherwise imposed by the law."[183] It is not "unduly oppressive," "so one-sided as to shock the conscience," or "unfairly one-sided."

VI. Conclusion

Reyes provides companies with a powerful tool in the seemingly never-ending battle against TCPA claims. Nonetheless, defendants in TCPA actions in California can expect an all-out attack on the *Reyes* holding, and on bargained-for consent provisions in consumer contracts similar to the decades-long attack on arbitration provisions, which the California Supreme Court finally settled in *Sanchez*. However, neither the Court of Appeals for the Ninth Circuit nor a California Court of Appeals should find a provision permitting contact under the TCPA unconscionable under *Sanchez* and its progeny.

182. *See e.g.*, The Reynolds and Reynolds Co., Retail Installment Sale Contract–Simple Finance Charge (With Arbitration Provision): Form LAW 553-CA-ARB-e 7/16, at 4 (2016), http://www.fnicentral.com/SalesForms/pdf/law_553CA_ARB_ecp.pdf ("We may take the vehicle from you. If you default, we may take (repossess) the vehicle from you if we do so peacefully and the law allows it. If your vehicle has an electronic tracking device, you agree that we may use the device to find the vehicle.").

183. Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 911 (2015) (citing Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1145 (2013).