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Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer financial services and has

Ninth Circuit Weighs in on Prior Express Consent and Revocation of Consent

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The Ninth Circuit recently weighed in on the limitations of prior express consent and revocation under the Telephone Consumer Protection Act (the "TCPA"). In *Van Patten v. Vertical Fitness Group, LLC,* the consumer provided his cell number when meeting with a fitness gym about joining. *Van Patten v. Vertical Fitness Group, LLC,* 2017 U.S. App. LEXIS 1591 (9th Cir. Jan. 30, 2017. The gym was owned by the defendant but was operated as a Gold's Gym franchise. Shortly after joining, the plaintiff canceled his membership and moved to California, but kept his cell number. After a brand change, the defendant worked with its marketing partner to announce the change of brand and invite former members to return. The plaintiff received two text members from the defendant as part of this marketing campaign and filed a putative class action asserting the text messages violated the TCPA.

The district court granted the defendants' motions for summary judgment and the plaintiff appealed. In reviewing the TCPA claims, the court first determined that the plaintiff had standing under Article III. In doing so, the court held that the plaintiff had established the concrete injury-in-fact necessary to pursue his TCPA claim. The court held that "[t]he TCPA establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent. Congress identified unsolicited contact as a concrete harm, and gave consumers a means to redress this harm. We recognize that Congress has some permissible role in elevating concrete, de fact injuries previously inadequate in law "to the status of legally cognizable injuries." *Id.* at *10-11. The court distinguished *Spokeo* by noting that *Spokeo* dealt with a procedural requirement which might not actually case actual harm while the telemarketing messages at issue in this case, absent consent, presented the precise harm the statute was enacted to protect against.

Moving on to the merits of the TCPA claims, the court looked at two issues: prior express consent and revocation of consent. As most know, prior express consent is an affirmative defense to TCPA claims and is not defined in the statute. The court therefore turned to the FCC interpretation of prior express consent in its prior rulings and orders. Relying in part on the FCC's prior orders discussing the scope of prior express consent, the court concluded that "an effective consent is one that relates to the same subject

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matter as is covered by the challenged calls or text messages." *Id.* at *14. In doing so, the court did not read the 1992 FCC Order to mean that by providing a cell number, a consumer consented to be contacted for any purpose whatsoever. Instead, the court read it to be more restrictive, holding that transactional context matters in determining a consumer's consent to contact. Applying its conclusion to the facts of the case before it, the court concluded that the consumer had provided express consent to be contacted about reactivating his gym membership. In giving his phone number for the purpose of his gym membership agreement, the plaintiff "gave his consent to be contacted about some things, such as follow-up questions about his gym membership application, but not to all communications. The scope of his consent included the text messages' invitation to 'come back' and reactivate his gym membership." *Id.* at *19.

Having concluded that the plaintiff had provided his prior express consent to receive the text messages, the court turned its attention to the plaintiff's argument that by canceling his gym membership, he had effectively revoked his consent to be contacted. The court, while acknowledging consent can be revoked, concluded that revocation of consent "must be clearly made and express a desire not to be called or texted." *Id.* at *23-24. The court concluded that plaintiff, in canceling his gym membership, did not clearly express his desire not to receive further text messages. The court, therefore, affirmed the lower court's ruling.

The opinion should be welcomed by defense counsel defending TCPA actions in the Ninth Circuit as it provides a fairly expansive interpretation of prior express consent while setting a restrictive view on revocation of consent.

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