



# WHAT DOES THE TCPA ACTUALLY SAY?

- **(b) Restrictions on use of automated telephone equipment**

- (1) Prohibitions

**It shall be unlawful** for any person within the United States, or any person outside the United States if the recipient is within the United States—

**(A) to make any call** (other than a call made for emergency purposes or made with the prior **express consent of the called party**) using any automatic telephone dialing system or an artificial or prerecorded voice—

**(i) to any emergency telephone line...;**

**(ii) to the telephone line of any guest room or patient room of a hospital...; or**

**(iii) to any telephone number assigned to a paging service, cellular telephone service... or any service for which the called party is charged for the call.**





# WHO IS THE “CALLED PARTY”?

- **Four possibilities:**
  1. Person caller was trying to reach;
  2. Person who answered the phone;
  3. Subscriber to the phone line;
  4. Regular user of the phone.
- **FCC has said 3 and 4 are “called party” and not 1 or 2.**
  - **LIKELY NOT ENTITLED TO DEFERENCE!**
- **Courts have mostly said 3 and 4– but Ninth Circuit has said ONLY 3 (probably errantly.)**
- **Raises incredibly difficult compliance issues around fat-fingered numbers, obtaining consent of correct party and re-assigned numbers.**





# WRONG NUMBER TCPA CASES ARE DEADLY

4 OCT  
2022

OUT NOW—THE ONE  
YOU’VE BEEN WAITING  
FOR: *Deserve to Win* (Ep.  
5)—With MR. NUMBER ONE  
Mike Greenwald

ADD A COMMENT



- Courts have been ruthless about applying **STRICT LIABILITY** to companies that do **NOT** have the correct party’s consent
- That means **YOU** are liable for calling wrong numbers even if you did nothing wrong and did not know the number was wrong.
- And Plaintiff’s lawyers make a killing on these issues.







rnq

Reassigned Numbers Database





# KEY TCPA SUBSTANTIVE ISSUES

- For 227(b) Claims:
  - What is regulated technology?
  - Whose consent is needed?
  - **What level of consent is needed?**
  - What is express written consent and how can it be captured properly?
  - How can consent be revoked and how must revocation be honored?
- For 227 (c) Claims:
  - Is the call a telephone solicitation?
  - Is the phone being called residential?
  - What is prior express invitation or permission?
  - What is an Established Business Relationship?
  - How can consent be revoked and how must revocation be honored?



# LEVEL OF CONSENT FOR REGULATED TECHNOLOGY DEPENDS ON TYPE OF CALL!



- Informational calls to cell phones— regular “express consent” is sufficient.
  - Under FCC rule express consent for regulated technology is “presumed” anytime consumer provides number to caller for reasons “closely related” to the purpose of the call.
    - This **rule may not be entitled to deference under Chervon!**
- Informational prerecorded calls to landlines— no consent required for up to 3 calls per month (healthcare calls up to 7 calls per month).
- Marketing calls to cell phones using ATDS or prerecorded calls— express written consent is required
- Prerecorded marketing calls to landlines: express written consent is required
- Calls to landlines using ATDS—fire away (but DNC rules).







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# WHAT IS EXPRESS WRITTEN CONSENT? (TODAY 47 CFR 64.1200(F))



(9) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.





# EXPRESS WRITTEN CONSENT CANNOT BE ORAL!



7 JUN 2024

4 COMMENTS

## CLARITY: Critical New TCPA Case Confirms Express Written Consent Cannot Be Obtained In A Recorded Phone Call Under E-SIGN—And I Told You So

Published by Eric J. Troutman  
The Czar of TCPAWorld  
Eric Troutman is one of the country's prominent class action defense lawyers and is nationally recognized in Telephone Consumer Protection Act (TCPA) litigation and compliance. He has served

The answer is no.

The question: Does the Czar ever get tired of being right?

No. No I don't.

The other question: Can you obtain TCPA permissible express written

Cannot use recorded oral communications as consent.

“Signature” can be oral but agreement to consent must be in writing .

Many lawyers were wrong about this and many companies are in trouble right now.

*Bradley v. Dentalplans.com*, 2024 WL 2865075 (D. Md. June 6, 2024)



# MARKETING PARTNER PAGES PERMISSIBLE TODAY?



16. In addition, the consent logs apparently fail to provide adequate disclosure that would constitute effective consent as required by the FCC's rules. For example, for telemarketing calls, the Commission requires the caller to provide a "clear and conspicuous disclosure" when obtaining prior express written consent.<sup>43</sup> The websites included TCPA consent disclosures whereby the consumer agreed to receive robocalls from "marketing partners." These "marketing partners" would only be visible to the consumer if the consumer clicked on a specific hyperlink to a second website that contained the names of each of 5,329 entities.<sup>44</sup> We find that listing more than 5,000 "marketing partners" on a secondary website is not sufficient to demonstrate that the called parties consented to the calls from any one of these "marketing partners." Consequently, because: (1) the websites that Urth Access has thus far referenced do not seek or obtain consent to receive robocalls about student loans; (2) the consent was accessible only if the consumer clicked on a hyperlink and reviewed a second webpage; and (3) the second webpage listed 5,329 ostensible "marketing partners," we conclude that the Student Loan Robocall Operation apparently lacked consent for the robocalls it made to consumers.<sup>45</sup> We direct voice service providers to Attachment A of this *Order*, which contains examples of traceback data (from October 2022 to the present) of suspected illegal robocalls made by the Student Loan Robocall Operation, for further and more detailed specifics of the suspected illegal traffic.<sup>46</sup>

In the Matter of Urth Access, LLC, File No. EB-TCD-22-00034232 ORDER Adopted: December 8, 2022

Common industry practice currently is to list thousands of "partners" on a page

About to change anyway, but at least one court recently refused enforce a form using hyperlinks.



# POWERFUL FORCES ADVOCATING FCC LIMIT CONSENT



- Special interest group Public Knowledge was first to make request that consent not be transferrable in December, 2022
- National Consumer Law Center jumped on board shortly after NPRM was issued;
- 28 state attorneys general joined in the request in May, 2023
- Just this month 12 Democratic Senators have joined in and made the same request





# MEANWHILE THESE GUYS ARE ON THE TAKE!



16 AUG 2023

ADD A COMMENT

## IT PAYS TO BE CY PRES: NCLC Among Consumer Groups Set to Collect \$16MM Windfall from Dish Judgment

The Court will enter a separate order disbursing unclaimed funds as follows:

Organization Name	Recommendation	Cy Pres Distribution
Attorneys General/National Association of Attorneys General	2,000,000	2,000,000
National Legal Aid and Defender Association	3,454,238	2,961,567
National Consumer Law Center, Inc.	1,708,810	1,708,810
San Francisco Consumer Action	675,000	675,000
Columbia University – Technical Research	254,223	254,223
National Association of Consumer Advocates Charitable Fund, Inc.	450,000	450,000
Electronic Privacy Information Center	700,000	700,000
Public Justice Foundation	369,000	369,000
United States Public Interest Research Group Education Fund	250,000	250,000
Public Knowledge	102,400	102,400
Consumer Reports, Inc.	1,000,000	1,000,000
Consumer Federation of America, Inc.	79,000	79,000
<b>Total Distribution</b>	<b>\$11,042,671</b>	<b>\$10,550,000</b>



# THIS IS WHAT I PREDICTED WOULD HAPPEN



From "Directly Disputed" Blog on [TCPAWorld.com](http://TCPAWorld.com) – March 22, 2023



So let me make this absolutely crystal clear so there can be no further mistake about it (and if you hear anyone else speak on this subject without addressing this issue—call them out as a phony and tell them to hush up and stop misleading people.)

*The issue in the NPRM is the Public Knowledge proposal “**that prior express consent to receive calls or texts must be made directly to one entity at a time.**”*





# WHY WAS NO ONE FOCUSED ON THIS?

## FCC Buried the Lead

60. We propose to ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent.

+++

63. We seek comment on amending our TCPA consent requirements to require that such consent be considered granted only to callers logically and topically associated with the website that solicits consent and whose names are clearly disclosed on the same web page.<sup>175</sup> The Commission has not addressed this aspect of consent in the past. Would our proposal better protect consumers from receiving large numbers of calls and texts they do not wish to receive when they visit websites such as comparison shopping websites? Consumers may find comparison shopping websites helpful; how can we ensure that they can consent to obtain further information from the site without receiving numerous calls and texts from unrelated companies? Commenters should discuss whether our proposal would limit the value of comparison-shopping sites to consumers. Are there alternatives to our proposal that would better protect consumers from the harms we have identified? We also seek comment on Public Knowledge's request that prior express consent to receive calls or texts must be made directly to one entity at a time

