



Those annoying robo calls and the changing standard of prior express consent

A look at The Telephone Consumer Protection Act

BY JASON IBEY

Tired of receiving unwanted robo-calls to your cell phone? In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”). As one court explained, “[t]he TCPA is a remedial statute that was passed to protect consumers from unwanted automated telephone calls.” (*Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. Pa. 2013).)¹

Telephone calls, and even text messages, placed using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice to a number assigned to certain services, such as a cellular telephone service, are unlawful unless “prior express consent” of the called party has been obtained. Prior express consent, therefore, serves as an affirmative defense to TCPA claims under section 227(b)(1)(A).² But what is prior

express consent? This article sheds light on both present and prior meanings of prior express consent.

Statutory text of The TCPA

The principal defense asserted by defendants in TCPA litigation is prior express consent.³ However, the statute itself does not define “prior express consent,” which leaves the term open to interpretation by the Federal Communications Commission (“FCC”) and the courts. Over time, this lack of a definition resulted in an unsurprising amount of differently articulated standards.

1992: Voluntary provision of one’s cellular telephone number

Shortly after the statute was enacted, the FCC issued a ruling in 1992 stating, “[p]ersons 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.”⁴ Some courts held the FCC was attempting to define “prior express consent.”⁵ However, the express text of the TCPA requires “express consent,” which led other courts to take a contrary view that the FCC was not offering a definition of “prior express consent,” because implied consent will not suffice.⁶ Interestingly, the FCC promulgated a 1995 rule concerning the sending of facsimiles that stated: “[w]e do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements...”.⁷ Regardless, 1992, and 1995, was a long time ago in TCPA jurisprudence. The prior standards have significantly changed since the early rulings on the definition of “prior express consent,” and the definitions that follow are the current state of the law.



2008: Voluntary provision of one's cellular telephone number during the transaction that resulted in the debt

In 2008, the FCC clarified that prior express consent to place “debt collection” calls to cellular telephone numbers requires that the “[1] wireless number was provided by the consumer to the creditor, and [2] that such number was provided during the transaction that resulted in the debt owed.”⁸ Providing an example, the FCC stated, “the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”⁹

This was a much clearer explanation of what it means to obtain prior express consent in prior rulings, at least as far as it concerns calls in the debt collection context. The FCC final rulings are binding on the courts unless invalidated pursuant to the Administrative Orders Review Act, more commonly known as the Hobbs Act.¹⁰ As explained by the Ninth Circuit Court of Appeal in *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042, “[p]ursuant to the [2008 TCPA] FCC ruling, prior express consent is consent to call a particular telephone number in connection with a particular debt that is given before the call in question is placed.”

Following the 2008 ruling, at least one court held debt collection calls were not placed with the requisite prior express consent of the called party where the cell phone number was not provided in connection with the existing debt but rather sometime afterwards in an effort to close the account of the intended recipient of the debt collection calls. (See *Nigro v. Mercantile Adjustment Bureau, LLC* (2d Cir. N.Y. 2014) 769 F.3d 804, 806-807 (the plaintiff “provided his number long after the debt was incurred and was not in any way responsible for – or even fully aware of – the debt,” and therefore, the plaintiff “did not consent to the calls”).

2009: Clear and unmistakably stated consent in the Ninth Circuit

In 2009, looking to a dictionary definition, the Ninth Circuit Court of Appeal in *Satterfield v. Simon & Schuster, Inc.* (9th Cir. Cal. 2009) 569 F.3d 946, 955 held that express consent means consent that is “clearly and unmistakably stated.” Since then, numerous courts adopted this pronouncement as a definition of prior express consent for TCPA purposes.¹¹ See e.g., *Lemieux v. Schwan's Home Serv.* U.S. Dist. LEXIS 127032,*18 (S.D. Cal. Sept. 5, 2013). However, the court in *Baird v. Sabre Inc.* (C.D. Cal. 2014) 995 F. Supp. 2d 1100, 1107 (disagreed that the *Satterfield* Court defined prior express consent, and stated, “[w]hile the court mentioned the dictionary definition of ‘express consent’ in support of its conclusion that a person’s consent to receive calls from one business does not constitute consent to receive calls from a different business, the issue of whether the mere act of providing a cellphone number constitutes ‘express consent’ did not arise in *Satterfield*.”

Despite the *Baird* opinion, the *Satterfield* decision remains an important guide for analyzing the affirmative defense of prior express consent in Ninth Circuit TCPA cases.

February 2012: Prior express written consent, for marketing calls

In its February 15, 2012, declaratory ruling, the FCC effectuated a major change to the consent requirement as it concerns marketing calls and text messages. Companies must now obtain “prior express written consent” to contact cellular and residential telephones for marketing purposes by means that would otherwise be prohibited.

The FCC stated, “[b]ased on substantial record support and evidence of continued customer frustration with unwanted, telemarketing robocalls ..., [the FCC] require[s] prior express written consent for all telephone calls using an automatic telephone dialing

system or a prerecorded voice to deliver a telemarketing message to wireless numbers and residential lines.”¹²

Furthermore, the FCC went on to require written consent “must be signed and be sufficient to show that the consumer: (1) received ‘clear and conspicuous disclosure’ of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) after receiving this information, agree unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained ‘without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.’”¹³

The reason for this ruling is that “consumers who provide a wireless phone number for a limited purposes – for service calls only – do not necessarily expect to receive telemarketing calls that go beyond the limited purpose for which oral consent regarding service calls may have been granted.”¹⁴

The February 2012 ruling also refers to “unambiguous consent” when stating, “should any question about the consent arise, the seller will bear the burden of demonstrating that ... unambiguous consent was obtained.”¹⁵ Although the FCC seems to have been focusing on which party bears the burden of proof regarding the consent defense, the “unambiguous consent” language further supports the position that implied consent (which is sometimes argued by TCPA defendants) is inadequate to avoid liability. If the FCC meant that, back in 1992, implied consent was sufficient for the consent defense under the TCPA, that no longer appears to be true.

This FCC ruling did not change the standard for prior express consent as it concerns calls or text messages for non-marketing purposes, such as notification purposes. Those types of calls are still governed by the lesser “prior express consent” standard. Additionally, it is



important to note that for debt collection calls, prior express consent still requires the cell phone number be provided during the transaction that resulted in the debt owed, pursuant to the FCC's 2008 ruling, since the 2013 ruling focused on marketing calls.

2014: For non-marketing calls, voluntary provision of one's cellular telephone, but context matters

With the issuance of the FCC's GroupMe declaratory ruling in March of 2014,¹⁶ the FCC removed any doubt that context is important to the consent defense; the scope of the consent matters. This makes practical sense, as a person may give express consent for one type of calls (i.e., informational calls) but not others (i.e., marketing calls). As explained by the court in *Kolinek v. Walgreen Co.*, 2014 WL 3056813,* (N.D. Ill. July 10, 2014), "the Court should have taken from the 2012 Order an indication that the FCC considers the scope of a consumer's consent to receive calls to be dependent on the context in which it is given – contrary to what the Court had seen in the 1992 Order as a general rule that consent for one purpose means consent for all purposes. Any doubt in this regard is removed by the GroupMe Order, issued after the Court's February 2014 ruling.".

Voluntary provision of one's cell phone number remains a requirement of prior express consent, however, courts should take into consideration the scope of the consent given. Thus, disclosing one's cell phone number does not mean that the individual has consented to be contacted at that number for *any and all* purposes. This should be no surprise, as the FCC treats calls differently depending on whether they concern debt collection (the 2008 ruling) or marketing (the 2013 ruling).

Conclusion and recommendations

Despite the changing standards of prior express consent over time, one

thing remained constant: the voluntary provision of one's cell phone number is necessary, but is not necessarily sufficient to confer "prior express consent" under the TCPA.

Consumers should be aware that they may place limitations on the scope of their consent, and should do so in writing whenever they provide their cell phone number to a company or organization. If there is no option to place a limitation on the scope of consent, or to decline consent to automated calls or text messages (such as a person may find when filling out a credit card or membership application using an online form), it may be a good idea to revoke¹⁷ or limit consent in writing shortly after disclosing the cell phone number and to keep a personal record.

To help ensure compliance, companies would be wise to seek, and actually obtain, prior express written consent to place calls and/or send text messages for specific purposes. Even back in 2008, the FCC encouraged creditors "to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving auto dialed and prerecorded message calls from the creditor or its third party debt collector at that number."¹⁸ Companies may also wish to place the initial call by means of a live person, obtain consent or verify consent, and then place subsequent calls by automated means, if desired. See *Breslow v. Wells Fargo Bank, N.A.* (S.D. Fla. 2012) 857 F. Supp. 2d 1316, 1322 ("[T]he moral is that companies who make automated calls bear the responsibility of regularly checking the accuracy of their account records or placing intermittent live verification calls.").

Calls placed in violation of the TCPA are worth \$500 per call or \$1,500 per call placed knowingly or willfully without consent. The TCPA also provides for injunctive relief prohibiting further unlawful calls.



Ibey

Jason A. Ibey is an associate attorney at Kazerouni Law Group, APC, practicing in the area of consumer rights with a focus on claims under the Telephone Consumer Protection Act. Jason is licensed to practice law in the State of California, including all federal district courts in California. He received his law degree with high honors from Whittier Law School in 2012.

Endnotes

¹ Citing S. Rep. 102-178, at 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1972; and *Satterfield v. Simon & Schuster, Inc.*, (9th Cir. Cal. 2009) 569 F.3d 946 (discussing TCPA's purpose of curbing calls that are a nuisance and an invasion of privacy).

² *Grant v. Capital Mgmt. Servs., L.P.* (9th Cir. Cal. 2011) 449 Fed. Appx. 598, 600, fn. 1 ("express consent" is not an element of a TCPA plaintiff's prima facie case, but rather is an affirmative defense for which the defendant bears the burden of proof."). Also, the FCC ruled as early as 2007 that "the creditor should be responsible for demonstrating that the consumer provided prior express consent." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (Dec. 28, 2007) 23 F.C.C.R. 559, 565, released January 4, 2008.

³ The defense of "emergency purpose," which is defined by the statute, virtually never comes into play in TCPA litigation.

⁴ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Oct. 16, 1992) Report and Order, 7 FCC Rcd 8752, 8769 ¶ 31.

⁵ See e.g., *Olney v. Job.Com, Inc.* (E.D. Cal. May 1, 2014) 2014 U.S. Dist. LEXIS 60843, 15 ("the FCC's pronouncement of what constitutes 'prior express consent' under the TCPA, as stated in paragraph 31 of the FCC Order, controls").

⁶ See *Travel Travel Kirkwood, Inc. v. Jen N.Y., Inc.* (Mo. Ct. App. 2006) 206 S.W.3d 387, 392 ("If consent is not manifested by explicit and direct words, but rather is gathered only by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties, it is not express consent. Rather, it is merely implied consent."); see also *In re Jiffy Lube Int'l, Inc.* (S.D. Cal. 2012) 847 F. Supp. 2d 1253, 1258 (the court expressed that it was "not persuaded that a customer's provision of a telephone number on the invoice in question would constitute prior express consent" to marketing messages).

⁷ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 F.C.C.R. 12391, 12408 ¶ 37 (1995).

⁸ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C. Rcd 559, ¶ 10 (Jan. 4, 2008).

⁹ *Id.* at ¶ 9.

¹⁰ "Courts of this circuit have recognized that the FCC's pronouncement [regarding prior express consent in the 2008 ruling] constitutes rulemaking within the meaning of the TCPA and immune from challenge in federal district court pursuant to the Hobbs Act..." *Moriarty v. Nationstar Mortgage, LLC*, 2014 U.S. Dist. LEXIS 26169, *10 (E.D. Cal. Feb. 27, 2014).



¹¹ See *Mashiri v. Ocwen Loan Servicing, LLC*, 2013 U.S. Dist. LEXIS 154534, *14 (S.D. Cal. Oct. 28, 2013) (“arguing that the Plaintiff provided prior express consent is an affirmative defense which does not defeat the elements of Plaintiff’s claim.”); *Stemple v. QC Holdings, Inc.*, 2013 U.S. Dist. LEXIS 99582, *19 (S.D. Cal. June 17, 2013) (“Prior express consent is an affirmative defense and thus Defendant bears the burden of proof.”); *Sepehry-Fard v. Dep’t Stores Nat’l Bank*, 2013 U.S. Dist. LEXIS 175320, *36 (N.D. Cal. Dec. 13, 2013) (“consent is a defense that does not need to be plead by plaintiff.”); *Horton v. Calvary Portfolio Servs., LLC*, 2014 U.S. Dist.

LEXIS 102572, *11 (S.D. Cal. July 24, 2014) (“the Court concludes that Defendant has the burden of proof to show prior express consent”).

¹² 27 F.C.C.R. at 1838 ¶ 20.

¹³ 27 F.C.C.R. at 1844, ¶ 33.

¹⁴ *Id.* at 1839, ¶ 24.

¹⁵ *Id.* at 1844.

¹⁶ *In re Group Me/Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3442, 2014 WL 12607 (2014).

¹⁷ See *Gager, supra*, 727 F.3d at 270 (“Our holding that the

TCPA allows consumers to revoke their prior express consent is consistent with the basic common law principle that consent is revocable.”); *Gutierrez v. Barclays Group*, 2011 U.S. Dist. LEXIS 12546, *11 (S.D. Cal. Feb. 9, 2011) (“this Court agrees with Plaintiffs that prior express consent may be revoked orally and need not be in writing.”).

¹⁸ 23 FCC Rcd at 565.