
Elements of Proving Express Invitation or Permission for Texts



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We will cover:

- DNC rules apply to text messages (we are not talking about 227(b) rules)
- TCPA's requirements for *prior express invitation or permission* (consent) for telephone solicitation texts under 227(c).
- How TCPA requirements—
 - a) only allow consent to be provided to **the seller**, and
 - b) only to **one seller** at a time;
 - c) require an **affirmative action** indicating consent.
- Federal E-Sign's definition of an *electronic signature* requires that –
 - a) the consumer must have an **intent** to sign the agreement with the seller,
 - b) the electronic signature must be **attached to or logically associated with** the agreement with the seller.

Why is this important?

If the FCC agrees with these interpretations, the result should be that no calls or texts sent to lines subscribed to the DNC Registry will be legal, unless –

- Consent has been provided to the seller individually, not through lead generators.
- Providers who place telemarketing calls or texts can then require these callers to demonstrate that they have these consents before they process these calls or texts to DNC lines .

Assume Lily receives multiple text messages, like these:

- Lily, do you want to save hundreds of dollars on **car insurance**, click here [URL link] to find out how. . . .
- Lily, apply for a **Medicare Advantage Plan** through the nation's largest provider. [URL link]
- Lily, crime is going up in your neighborhood. Get your discounted **home security system** today! [URL link]
- Investigation reveals that the sender of these text messages is XYZ Telemarketer. A lawsuit is brought against the telemarketer. The telemarketer says it had the requisite consent for these messages.

Texts are “calls” under the TCPA

Cell phones can be residential lines

- FCC in 2003 and 2015 orders: as TCPA “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls.”
- 47 CFR 64.1200(e) applies DNC rules to cell phones.
- FCC and cases hold that cell phones are residential lines (subject to proof that they are not)

Lily was searching the web for car insurance quotes, and comes upon this website:

← → ↻ auto.free-insurance-quotes.us/?ueid=glsr_mdgtl_auto&segment=GSEARCH2&c2cnumber=844-955-4151&campaignid=11847578621&adgroupid=114841171323&targetid=kwd-976... ☆ □



Fill out this last step to compare rates

Street Address:

Primary Phone:

Are you interested in also receiving a FREE Extended Vehicle Protection quote via phone call or email?

Get My Auto Quotes

By clicking the button above, I consent to receive emails, calls and/or text messages, for marketing purposes, regarding insurance quotes, or other products and services on behalf of [Free Insurance Quotes US Partners](#), using my provided telephone number even if it's on a federal, state or corporate do-not-call list. I acknowledge calls may be pre-recorded messages using artificial voice and/or placed using an automated telephone dialing system. I understand consent is not required to purchase and that I may revoke my consent at any time. Applicable text messaging rates may apply. I agree to the [Privacy Policy](#) and [Terms of Service](#) provided.

Button

- “Get My Auto Quotes”
- Pressing that button may have consequences
- See the tiny language under the button

Close Up of *tiny* language under button (with emphasis added)

- By clicking the button above, I **consent to receive emails, calls and/or text messages, for marketing purposes**, regarding insurance quotes, or other products and services on behalf of [Free-insurance-quotes.us partners](#), using my provided telephone number even if it's on a federal, state or corporate do-not-call list. I acknowledge calls may be pre-recorded messages using artificial voice and/or placed using an automated telephone dialing system. **I understand consent is not required to purchase** and that I may revoke my consent at any time. Applicable text messaging rates may apply. I agree to the [Privacy Policy](#) and [Terms of Service](#) provided.

And the hyperlink brings you to a list. .

. .

- Free-insurance-quotes.us partners

That hyperlink links you to 8423 different sellers

but only the first 95 of them fit on this slide

*ADT	1800 Remodel	1st Mariner Bank	2financelt Inc.	3D Solar	A and N Mortgage	A.I. Solar	A1 Energy, LLC
*ADT Solar	1800Remodel	1st Mariner Mortgage	2Four6 Solar	4MortgageQuotes.com	A Better Mortgage Company Inc	A.M. Sun Solar	A1 Mortgage Group LLC
*SunPro	1ShopMall LLC.	1st Nationwide Mortgage	2insure4less	4SURECARE	A Clear Alternative	A&A Auto Warranty LLC	A1 Solar Power
& Harris P.A.	1st Advantage Mortgage	1st US Energy LLC	2K Solar	4th Dimensional Leads	a division of Barrington Bank & Trust Company	A&M Energy Solutions	A1A Solar
00 Solar Panels	1st Choice Solar	1st US Energy, LLC	2the Max Media (Solar NY)	5 Mile Media	A Division of GMI Home Loans LLC	A&R Solar	A1A Solar Contracting
1 Peklava LLC	1st Class Energy	2020 Insurance Group LLC	3 Four 5 Group Inc	5 Star Auto Protection	A Division of Mechanical Energy Systems	A&B Insurance	AA Auto Protect
1 Solar	1st Colorado Mortgage Solutions	21 Solar Tech.	3 Guys Solar	60 Month Loans	A National Electric Service Inc.	A&B Insurance and Financial	AA Auto Protection
1-800-SOLAR-USA	1st Guaranty Mortgage	21st Century Insurance	310 Solar, LLC	90 Auto Repair Club	A National Electric Service, Inc.	A&G Electric Company	AA Auto warranty
100insure	1st Heritage	21st Century Power Solutions	31Solar, LLC	93 Energy	A-1 Electric	A&M Energy Solutions	AA Solar Mike
1010 ADS	1st Light Energy	23 Ventures	320 Solar, LLC	A -Best Energy Power	A. Zamler, Inc.	A&R Solar	AA Solar Services LLC
1111leads - Tendencias Innovadoras S.A.	1st Light Energy-Dean Santa	24/7 Real Estate Loans	360 Mortgage Lending Group LLC	A & E Vehicle Services	A.D. Charles Inc.	A+ Auto Glass Inc	AA Solar Services, LLC
123merchants	1st Light Energy-WS	247PaydayLoanCenter	360 Solar	A & R Solar	A.D.D. Solar Connect	A1 Energy LLC	Etc....

Has Lily consented to calls from telemarketers making calls on behalf of the sellers?

1. Does the language on the website, once Lily types in the requested information and clicks on the button that says “Get My Auto Insurance Quote” provide the necessary indication of consent for Free Insurance.com to call to Lily?
2. Do TCPA consent rules *permit consents to multiple sellers* at a time?
3. With the check mark and the press on the box “Get My Auto Quotes” has Lily applied a signature that satisfies the requirements for an “electronic signature” under federal law to Free.Insurance.com?
4. How about to the 8423 other sellers listed in the hyperlink?

What laws apply in answering this question:

- TCPA regulations on telephone solicitations to lines registered on the DNC registry (227(c) calls).
- Federal E-Sign law allowing electronic records and signatures to satisfy requirements for 1) a **writing**, and 2) a **signature**.

**Telephone solicitations to DNC lines – 47 USC 227(c)
Prior express invitation or permission
– 47 CFR 64.1200(c)(2)(E)**

(ii) Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if: . . .

(iii) It has obtained the subscriber's **prior express invitation or permission**. Such permission must be **evidenced by a signed, written agreement between the consumer and seller** which **states that** the consumer agrees to be contacted by **this seller** and includes the telephone number to which the calls may be placed;

First – apply TCPA rules assuming real world consent

227(c) rules for calls—

- Requires that “permission must be **evidenced by a signed, written agreement** between the consumer and seller which states that the consumer **agrees to be contacted by this seller**”
- *Does the language in the tiny font on this website clearly authorize Free.Insurance.com to call Lily?*
- *Is it **signed** by Lily?*
- *Can this “agreement” authorize the other 8423 sellers? Does it?*

”Seller” is defined

- **(10)** The term ***seller*** means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person. 47 CFR 64.1200(f)(10)
- Seller does not include the caller.
- **Point One** – the agreement can only be between the *seller* and the consumer – not telemarketers or agents or lead generators.

Has Lily entered a “signed, written agreement” with any seller?

- Does pressing a button that says “Get My Auto Quotes” (along with the tiny print below it) satisfy the requirements for express invitation in regs?
 - “(ii) It has obtained the subscriber's **prior express invitation or permission**. Such permission must be **evidenced by a signed, written agreement between the consumer and seller** which **states that the consumer agrees to be contacted by this seller . . .**
- If in the real world, does clicking that button equal a signature?
 - Possibly for Free Insurance Quotes, but it does not appear to be a seller.
- What about the other 8423 sellers? Does the reg permit multiple agreements at once?
 - The reg requires that there be an agreement with “this seller” indicating that the agreement can only be with **one seller at a time**.
- **Point Two** – a consumer can only agree with one seller at a time, not multiple sellers.

These transactions are not in physical world – they are entirely electronic

Applicable law -- Electronic Signatures in Global and National Commerce Act (**E-Sign**). 15 USC 7001 *et seq.*

(a) In general. Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II), with respect to any transaction in or affecting interstate or foreign commerce—

(1) a **signature, contract, or other record** relating to such transaction **may not be denied legal effect**, validity, or enforceability **solely** because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability **solely** because an **electronic signature or electronic record** was used in its formation.

(b) Preservation of rights and obligations. This subchapter does not—

- (1) **limit, alter, or otherwise affect any requirement** imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form;

Two separate issues for evaluating consent required by TCPA when consent is provided electronically

1. Is a writing required to be provided to the consumer? And if so, has E-Sign's consent requirement be met?
 - We are going to ignore this issue for now
2. Is the consumer's signature required? And if so, does the electronic click meet the definition of "electronic signature" so that the click equals a legal signature?

When does an electronic *click* satisfy a requirement for a signature under E-Sign.

- E-Sign definition of an electronic signature:

The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record. 15 U.S.C. 7006(5).

- Four separate factors to an “electronic signature”

1. Electronic sound, symbol or process – here the click on the button
2. Attached to or logically associated with a contract – Is that click attached to an agreement with a seller, or actually logically associate with it?
3. Executed or adopted by person – Who actually made the click? Lily admits clicking
4. With intent to sign the record – Lily did not (and could not) have had the intent of signing any agreement with the 8423 other sellers.

Express invitation or permission requires the consumer's signature

- Clicking on a box that says *only* “Get My Auto Quote” does not show that the person clicking *intended to agree to the calls that were alluded to in the tiny writing under the box.*
 - Likewise, clicking through a series of prefilled in websites does not show this intent.
 - An affirmative, deliberate act is required to show intent for an act to be equivalent to an “electronic signature” under E-Sign.
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- **Point 3**— When signed electronically, the agreement with the seller must be signed by the consumer *with the intent to sign that agreement.*
 - This rule invalidates the supposed consents provided through lead generator efforts to collect multiple consents at a time.

Authenticity Issues in Electronic Records and Signatures

- Burden of showing consent is on the caller
- Cases illustrate that lead generator consents are rife with flawed data.
- Showing consent should require that each separate aspect of the consent requirements must be affirmatively shown by callers for each call.
- Lead generators are the cause of hundreds of millions of illegal telephone solicitation calls.
- See cases (e.g. McCurley v. Royal Seas Cruises, PA AG complaint against lead generator)

Impacts of this interpretation

- The agreement to call must be with the seller, but the seller can provide information about those consents, and as agent of the seller, the telemarketer can make the calls.
- Consumers can still go online and request solicitation calls from multiple sellers at a time, but --
 - there must be a separate agreement with each seller (could be on the website), and
 - one click (representing a separate signature) on each agreement