The Eleventh Circuit Invalidates TCPA Rules: Lessons for Companies Subject to the TCPA and Administrative Law

January 30, 2025

On January 24, 2025, the Eleventh Circuit Court of Appeals issued an opinion in *Insurance Marketing Coalition v. Federal Communications Commission* (No. 24-10277) in which it vacated a legislative rule issued by the Federal Communications Commission ("FCC") that had interpreted the term "prior express consent" as it is used in the Telephone Consumer Protection Act ("TCPA"). This opinion is significant for telemarketers because it removes two requirements imposed by the FCC that are above and beyond the statutory requirement to obtain "prior express consent" before placing calls and text messages that are subject to the TCPA. This opinion is also an important administrative law precedent: the Eleventh Circuit invalidated an agency action notwithstanding that Congress expressly granted the agency rulemaking authority to interpret the applicable statute, because the regulations at issue exceeded the scope of the statutory terms they purported to interpret.

The TCPA and the FCC's 2023 Order. As is relevant here, the TCPA prohibits placing calls using an "automatic telephone dialing system"[1] ("ATDS") or an artificial or pre-recorded voice without the "prior express consent" of the called party.[2] The TCPA expressly gives the FCC authority to "prescribe regulations to implement" the TCPA.[3]

In 2012, the FCC issued a regulation stating that if a call (or text message) is placed for telemarketing purposes, "prior express consent" means "prior express written consent."[4] In 2023, the FCC issued a legislative rule that claimed to interpret the "prior express

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1 As we discussed here, an opinion from the United States Supreme Court in 2021 rejected attempts by plaintiffs' counsel to expand the definition of an ATDS far beyond its plain statutory meaning—to encompass virtually any automated dialer.

2 47 U.S.C. §227(b)(1)(A)(iii).

3 47 U.S.C. §227(b)(2)(A).

4 The FCC defines "prior express written consent" as "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 [ATDS] or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, No. 12 02-278, 27 FCC Rcd 1830 (2), Appx. A, ¶ 8 (2012).

consent" requirement with respect to telemarketers (the "2023 Order").[5] First, it provides that a consumer cannot grant consent unless they consent to calls from one entity at a time (the "One to One Consent" rule).[6] This requirement, if implemented, would have been particularly burdensome for "lead generators" who often provide consumers with a website where they can engage in comparison shopping with respect to specific goods or services—and then are contacted by the website's partners. It would have required the "lead generator" to obtain separate consent to be contracted by each such partner.[7] Second, it provides that a consumer can consent only to calls whose subject matter is "logically and topically associated with the interactions that prompted the consent."[8] The FCC took a narrow view of what constituted "logically and topically associated," noting that a consumer's consent on a car loan comparison shopping website would not suffice for consent to automated calls regarding loan consolidation.[9] In the FCC's view, these restrictions applied even in a case where it was clear from the applicable facts and circumstances that the consumer had consented to receiving the calls at issue.[10]

The Eleventh Circuit's Opinion. IMC, a consortium of insurance industry stakeholders, challenged the portion of the 2023 Order related to prior express consent on the basis that the FCC's two new requirements conflicted with the ordinary statutory meaning of "prior express consent"—and the Eleventh Circuit agreed.[11] The Eleventh Circuit explained that Congress's grant of rulemaking to the FCC gave it "authority to fill gaps" in the regulatory regime—but did not give the FCC authority to "alter" the statutory regime.[12] The Eleventh Circuit presumed that "prior express consent" incorporated the "common law concept of consent," namely that consent is given voluntarily—and that express consent "depends 'heavily' on the facts of each case."[13] The court held that the One-to-One Consent Rule was inconsistent with the plain definition of "prior express consent," which requires only that the recipient "clearly and unmistakably" state that they are willing to receive the calls in question.[14] There is no requirement that consent be separately obtained for each party that may call the consumer (provided that it is clear from the consent that it applies to the calling parties in question).[15] The Eleventh Circuit similarly rejected the argument that consent

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5 *See* Second Report and Order, Second Further Notice of Proposed Rulemaking in CG Docket Nos. 02-278 and 21-402, and Waiver Order in CG Docket No. 17-59, 23 F.C.C. Rcd. 107 (2023).

6 *Id.*, ¶ 31.

7 *Id.*, ¶ 35.

8 *Id.*, ¶ 35.

9 *Id.*, ¶ 36.

10 *Id.*, ¶ 36.

11 *IMC v. FCC*, No. 24-10277, slip op. at 3, 12 (11th Cir., Jan. 1, 2025).

12 *Id.* at 14.

13 *Id.* at 16–17.

14 *Id.* at 16, 18.

15 *Id.* at 18–19.

must be "logically and topically associated with the interaction that prompted the consent" because there is no reason that consent cannot cover subject matter unrelated to the website (provided that it is provided in a clear and unmistakable manner).[16] The Eleventh Circuit also rejected the FCC's policy arguments in support of its regulations—explaining that policy did not matter because the FCC's regulations conflicted with the plain statutory text.

Lessons for Telemarketers. The Eleventh Circuit opinion is a win for telemarketers who place calls or text messages subject to the TCPA because it frees them from specific prescriptions regarding how they must obtain consent (and from litigation that would have inevitably followed alleging that these rules were not satisfied). That said, the opinion makes clear that the FCC's original rules governing "prior express written consent" remain in full force. Telemarketers should be prepared for courts to conduct a careful inquiry into the consent language on a website (or other form), including whether the consent is clear and conspicuous and covers the types of calls at issue. That inquiry (if relevant) may well cover the issues raised by the FCC, including whether it is clear that the consent language encompasses (i) all parties that may be placing telemarketing calls to the consumer and (ii) the subject matter of the telemarketing calls in question. Telemarketers should consider reviewing their TCPA consent language periodically to consider whether it clearly covers the types of calls that a consenting consumer may be receiving.

Lessons for Challenges to Government Regulations. In the Supreme Court's landmark ruling in *Loper Bright Enterprises v. Raimondo*, in which it abolished Chevron deference (discussed here), the court observed that an agency may be "authorized to exercise a degree of discretion" where a statute expressly delegates to an agency the authority to give meaning to a particular term or enables the agency to "prescribe rules to 'fill up the details' of a statutory regime."[17] The Eleventh Circuit opinion makes clear, however, that even when the agency has such express authority—as was the case here—the court will nonetheless carefully examine whether the agency is actually interpreting the statutory text or is altering it by imposing rules that conflict with the statute's plain meaning. This opinion will likely be used to support challenges to agency rules—even where the agency has delegated rulemaking authority. That may be beneficial to companies that are seeking to abolish what they believe to be problematic regulations—but harmful to companies whose legal and risk mitigation strategies are dependent on compliance with existing regulatory regimes that may now be subjected to challenge.

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[16] *Id.* at 21.

[17] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024).

Please do not hesitate to contact us with any questions.

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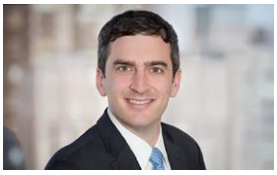

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