

Insights

Eleventh Circuit Strikes Down FCC's One-to-One Consent Rule Under the TCPA

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By: David A. Bowen

On January 24, 2025, the Eleventh Circuit Court of Appeals reversed the Federal Communications Commission's (FCC) one-to-one consent rule¹ issued in 2023 under the Telephone Consumer Protection Act (TCPA). In *Insurance Marketing Coalition, Ltd. (IMC) v. Federal Communications Commission*, the Court ruled that the FCC exceeded its authority by limiting businesses' ability to get prior express consent from consumers to one entity at a time and by restricting the scope to those calls logically and topically related to interaction that prompted the consent.

Background

The TCPA, enforced by the FCC, regulates telemarketing and informational calls and text messages. These restrictions are based on the type of equipment used, the message content, and whether the recipient has given proper consent. The TCPA requires, but does not define, "prior express consent" from the recipient for calls and texts to wireless lines that use artificial or prerecorded voice recordings or an automatic dialing system (ATDS). An earlier Order issued by the FCC in 2012 established that "prior express consent" means "prior express written consent" when the call or text at issue involves telemarketing or advertising.

The FCC's "one-to-one" consent rule further expanded the definition of "prior express consent" by requiring that marketers obtain individual consent from a consumer for each advertiser (e.g., financial institution) prior to the advertiser sending marketing calls or texts to the consumer. This regulation was designed to close the "lead generator loophole," which had previously allowed a single consumer consent to apply to multiple advertisers. Under the "one-to-one" rule, lead generators and comparison-shopping websites could no longer secure consent for advertisers by merely including a hyperlink to a list of all financial companies in one consent. Requiring consumers to click a checkbox to provide consent for each advertiser is operationally challenging and results in a poor customer experience. The rule also required that the calls and texts that covered by the consent be "logically and topically associated with the interaction that prompted the consent." For example, a consumer's consent obtained on a comparison-shopping website for credit cards could not be used by lenders to offer debt consolidation loans.

11th Circuit Court Decision

The FCC's 2023 Order was challenged by IMC, arguing that the FCC exceeded its authority under the TCPA. IMC contended that the FCC's interpretation of "prior express consent" was inconsistent with the TCPA's statutory text and created unnecessary distinctions between telemarketing and non-telemarketing calls.

In the decision vacating the "one-to-one" rule, the 11th Circuit Court agreed with IMC that the FCC exceeded its authority with the 2023 Order because the Order's "prior express consent" restrictions are inconsistent with

the ordinary statutory meaning of “prior express consent” in the TCPA. Because the TCPA does not define “prior express consent,” the Court turned to the common law meaning of the term. The Court found that prior case law supports that a consumer can consent to receive calls from multiple parties, as long as the consent “clearly and unmistakably” states that the consumer is willing to receive those calls. The FCC’s assertion that the 2023 Order is necessarily lawful based on its favorable policy implications did not persuade the Court to override the TCPA’s statutory text.

Similarly, the Court found that the logically-and-topically-related restriction impermissibly altered the ordinary statutory of “prior express consent.” A consumer gives “prior express consent” under the TCPA if they clearly agree to receive the call before it is made, the context in which the consent is made is irrelevant.

The Court’s decision was shaped by last year’s Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, which ended the requirement for courts to defer to an agency’s reasonable interpretation of an ambiguous (known as Chevron deference). The Court was free to disregard the FCC’s interpretation of the TCPA and use their own judgement.

Impact of the Decision

The decision does not affect other sections of the FCC’s 2023 Order, including:

- Extending the National Do-Not-Call (DNC) Registry’s protections to text messages.
- Requiring terminating mobile wireless providers to block text messages from a particular number following notification from the FCC.
- Encouraging mobile wireless providers to make email-to-text, often a source of illegal texts, a service that consumers proactively opt into.
- A limited waiver to allow mobile wireless providers to use the Reassigned Numbers Database (RND) to determine whether a blocked number has been permanently disconnected, which helps prevent blocking of lawful texts to new subscribers with a reassigned number.

Other regulations could face legal challenges based on the reasoning in the *IMC* decision, such as the FCC’s 2012 rule requiring consent for telemarketing calls to be “in writing.” If the FCC cannot add requirements that conflict with the ordinary statutory meaning of “prior express consent,” then adding an “in writing” requirement where none existed in the statutory text of the TCPA is also vulnerable to scrutiny in judicial review.

Institutions should continue to review their telemarketing practices to ensure they stay in compliance with the TCPA and other applicable laws. States also have “mini-TCPA” laws that also place restrictions on telemarketing calls and texts, often more stringent than federal law.

Krieg Devault’s Financial Services attorneys are monitoring developments in this area of law, and able to assist your institution with compliance.

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¹Second Report and Order, *In the Matter of Targeting and Eliminating Unlawful Text Messages, Rules and Reguls. Implementing the Tel. Consumer Prot. Act of 1991, Advanced Methods to Target and Eliminate Unlawful Robocalls*, 38 FCC Rcd. 12247, 12258–69 (2023)