LOPER BRIGHT STRIKES AGAIN: ELEVENTH CIRCUIT HANGS UP ON FCC'S ONE-TO-ONE CONSENT RULE, CALLING THE VALIDITY OF OTHER TCPA RULES INTO QUESTION

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US Policy and Regulatory Alert

The Eleventh Circuit Court of Appeals recently vacated the Federal Communications Commission's 2023 “one-to-one consent rule” under the Telephone Consumer Protection Act (TCPA). In *Insurance Marketing Coalition, Ltd. v. Federal Communications Commission*,[1] the Court struck down the order that (1) would have limited businesses' ability to obtain prior express consent from consumers to a single entity at a time, and (2) would have restricted the scope of such calls to subjects logically and topically related to “interaction that prompted the consent.”[2] In particular, the Court held that the FCC exceeded its authority under the plain language of the statute.[3] In the wake of the *IMC* decision, other TCPA regulations may well face the chopping block.

The FCC's order sought to curtail the practice of “lead generation,” which offers consumers a “one-stop means of comparing [for example] options for health insurance, auto loans, home repairs, and other services.”[4] In its ruling, the Court looked to the authority Congress had extended to the FCC through the TCPA. In general, the TCPA prohibits calls made “using any automatic telephone dialing system or an artificial or prerecorded voice” without “the prior express consent of the called party.”[5] The statute does not define “prior express consent.”[6] Congress gave the FCC authority to “prescribe regulations to implement” the TCPA, and to exempt certain calls from the TCPA's prohibitions.[7] In its 2023 order, the FCC sought to restrict telemarketing calls by imposing the one-to-one consent restriction and the logically-and-topically related restriction.[8]

Applying the Supreme Court's decision in *Loper Bright Enters. v. Raimondo*,[9] the Eleventh Circuit ruled that in promulgating the 2023 order, the FCC exceeded its statutory authority. The Court found that the plain meaning of the term “prior express consent” nowhere suggests that a consumer can only give consent to one entity at a time and only for calls that are “logically and topically related” to the consent. Rather, the Court ruled, in the absence of a statutory definition, the common law provides that the elements of “prior express consent” are “permission that is clearly and unmistakably granted by actions or words, oral or written,” given before the challenged call occurs.[10] Nothing under the common law restricts businesses from obtaining consent from consumers to receive calls from a variety of entities regarding a variety of subjects in which they are interested.

In the wake of the *IMC* decision, other TCPA regulations may be ripe for challenge, including the FCC's 2012 determination that calls introducing telemarketing or solicitations require prior express written consent. For example, in *IMC*, the Court held that the FCC cannot create requirements for obtaining prior express consent beyond what the plain language of that term will support. And the Court delineated the common law elements of prior express consent, which the Court found can be “granted by actions or words, oral or written.”[11] Under this reasoning, the Court held that “the TCPA requires only 'prior express consent'—not 'prior express consent'

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plus."[12] This reasoning may well support a challenge to the prior express written consent rules. After all, nothing in the plain meaning of the term "prior express consent" requires a writing versus oral consent, and the common law does not appear to support such a distinction. Rather, the requirement of written consent clearly adds to the statutory requirement and for that reason, appears to exceed the FCC's authority.

Notwithstanding the fact that the FCC imposed the prior express written consent rule more than 10 years ago, another recent decision from the Supreme Court suggests that new entrants to the lead-generation industry have standing to file a challenge. In *Corner Post, Inc. v. Board of Governors of Federal Reserve System*,[13] the Supreme Court ruled that new market entrants impacted by federal rules have standing to challenge those rules within the statutory period that runs from the date of market entry. The firm will continue to follow challenges to the FCC's rulemaking authority, including any challenges to the prior express written consent rule.

FOOTNOTES

[1] No. 24-10277, --- F. 4th ---, 2025 WL 289152 (11th Cir. Jan. 24, 2025) (IMC decision).

[2] *See Second Report and Order, In the Matter of Targeting and Eliminating Unlawful Text Messages, Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, Advanced Methods to Target and Eliminate Unlawful Robocalls*, 38 FCC Rcd. 12247 (2023).

[3] FCC orders have perennially exceeded the agency's authority under the TCPA. For instance, beginning in 2003, the FCC took the position that a predictive dialer—a common tool used by business customer service centers—was an "automatic telephone dialing system," even if the technology in question did not have the characteristics described in the statutory definition, namely the "the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The United States Supreme Court threw out the FCC's flawed rulings in *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021).

[4] *IMC*, 2025 WL 289152, at *2.

[5] 47 U.S.C. § 227(b)(1)(A), (B).

[6] *See id*.

[7] 47 U.S.C. § 227(b)(2)(B) and (C).

[8] The Court observed that since 2012, the FCC has distinguished non-telemarketing calls for which the FCC has required prior express consent from calls that introduce telemarketing or solicitations for which the FCC has required prior express written consent. 47 C.F.R. § 64.1200(a)(2), (3); *see also In re Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1838 (2012). The regulations define "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 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. 47 C.F.R. § 64.1200(f)(9). The written agreement must "include a clear and conspicuous disclosure informing" the signing party that he consents to telemarketing or advertising robocalls and robotexts. 47 C.F.R. §

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64.1200(f)(9)(i)(A).

[9] 603 U.S. 369, 391–92 n.4, 413 (2024).

[10] *IMC*, 2025 WL 289152, at *6.

[11] *Id*.

[12] *Id*.

[13] 603 U.S. 799 (2024).

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