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Eleventh Circuit Re-Opens TCPA "Lead Generator Loophole" and Signals Further Erosion of Judicial Deference to Administrative Rules

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In *Insurance Marketing Coalition Ltd. v. FCC*, ?— F.4th —-, 2025 WL 289152 (11th Cir. Jan. 24, 2025)?, the U.S. Court of Appeals for the Eleventh Circuit came to the rescue of the lead generation industry, striking down new regulations that were set to go into effect on January 27. Under the Telephone Consumer Protection Act (TCPA), ?47 U.S.C. § 227?, sellers and telemarketers are prohibited from making certain telemarketing calls using an automatic telephone dialing system (ATDS) or artificial or prerecorded voice messages without "prior express consent." On December 18, 2023, the Federal Communications Commission (FCC) issued an order adopting rules aimed at closing what it termed the "lead generator loophole" (2023 order). The FCC objected to lead generators using a single webform to obtain prior express written consent for a list of marketing partners. The FCC also objected to webforms that obtained broad consent for marketing calls about a wide-range of products and services. ? The 2023 order adopted a new definition of "prior express written consent" that would have prohibited consumers from giving consent to receive marketing calls from more than one company at a time or about products and services that were not "logically and topically associated with" those promoted on the website. The Eleventh Circuit held that the FCC exceeded its authority under the TCPA because the consent restrictions conflicted with the ordinary meaning of "prior express consent." This decision is consistent with the recent shift in the willingness of federal courts to review administrative decisions after the Supreme Court overruled *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)?.

Background

The TCPA prohibits calls, including telemarketing calls, to wireless telephone numbers using an ATDS or prerecorded or artificial voice messages without the "prior express consent" of the consumer. ? The TCPA also prohibits telemarketing calls to residential telephone numbers using a prerecorded or artificial voice message without "prior express consent." The FCC has interpreted "calls" to include text messages.

The TCPA does not define "prior express consent." Congress gave the FCC the authority to "prescribe ?regulations to implement" the TCPA. In 2012, the FCC declared by regulation that ?robocalls that "include[ ] or introduce[ ] ?an advertisement or constitute[ ] telemarketing" require "prior express written consent." ? 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).?

Some comparison shopping websites obtain prior express written consent by having consumers agree to receive telemarketing calls from a list of marketing partners. These websites generally clearly disclose the companies through a hyperlink. Courts around the U.S. consistently applied well-settled law interpreting internet click-wrap agreements to uphold the enforceability of consumers' consent when the consumers clicked on a button agreeing to be contacted by the marketing partners using an ATDS or artificial/prerecorded messages.

The FCC's new requirements in the 2023 order were an attempt to rewrite internet contract law for leads. Under the proposed new rules, companies and lead generators that use comparison shopping websites were prohibited from obtaining prior express written consent for multiple companies with a single click. Instead, websites would be required to obtain consent "a single seller at a time." The 2023 order also limited prior express written consent to products and services "logically and topically associated" with the website. The FCC declined to adopt a definition of "logically and topically associated", leaving it to the courts and juries to decide.? The FCC suggested that when in doubt, companies should err on the side of limiting the scope of the subject matter on websites "to what consumers would clearly expect." Order, ¶ 36. The FCC did offer one example of what would not meet the new "logically and topically associated" standard: "a consumer giving consent on a car loan comparison shopping website does not consent to get ?robotexts or robocalls about loan consolidation.?" *Id.*

Prior to the Eleventh Circuit's decision, the FCC had issued an order postponing implementation of ?its 2023 order for 12 months, until ?January 26, 2026. The Eleventh Circuit's opinion ?rendered that date and order ?moot.

Eleventh Circuit's Decision

The court evaluated the new rules applying ordinary principles of statutory interpretation. When a statute leaves a phrase undefined, courts ordinarily give that phrase its "plain and ordinary meaning." However, ?where Congress uses terms that have accumulated ?settled meaning under the common law, a court will presume, absent clear direction, that ?Congress meant to incorporate the established ?meaning of the terms.? Because the TCPA did not define "prior express consent," courts have consistently held that Congress intended to incorporate the common law concept of consent. Under the common law, express consent must be given voluntarily and be clearly and unmistakably stated.

Applying these principles, the court held that the 2023 order's one-to-one consent and logically and topically associated restrictions conflicted with the common law meaning of "prior express consent" and improperly converted consent to "prior express consent *plus*." The one-to-one consent restriction would have barred calls to consumers even where they had clearly and unmistakably stated that they were willing to receive marketing calls from multiple companies because consent had to be given independently and separately to each caller.

The court further assailed the FCC's attempt to justify its expansions of the consent requirements because the restrictions were good policy. Adhering to the idea that "atextual good policy cannot overcome clear text," the Eleventh Circuit admonished the FCC for decreeing "a duty [on lead generators] that the statute does not require and that the statute does not empower the FCC to impose." The court concluded that vacatur of the FCC regulation was appropriate. Because the case was brought to the Eleventh Circuit on a direct petition for review of the FCC ruling under the Hobbs Act, the Eleventh Circuit's decision applies to all courts unless overturned by the

U.S. Supreme Court.

Do Not Call Restrictions Still Apply

Although the Eleventh Circuit struck down the one-to-one consent and "logically and topically related" rules for marketing calls using an ATDS or artificial or prerecorded voice messages, the opinion did not address the rules governing telephone solicitations to numbers on the federal and state Do Not Call Registries. The TCPA prohibits telephone solicitations to numbers on the DNC Registry without the consumer's "prior express invitation or permission" or unless the caller has an established business relationship with the consumer. ?47 U.S.C. § 227(b)(1)(B).? The FCC adopted a definition of "permission" requiring that "[s]uch 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." ?47 C.F.R. § 64.1200(c)(2)((ii).?

Although the FCC has not issued any rules requiring one-to-one consent for prior express permission for calls to numbers on the DNC Registry, the 2023 order strongly implies that the DNC rules require one-to-one consent. The Telemarketing Sales Rule (TSR) adopted by the Federal Trade Commission (FTC) prohibits marketing calls to numbers on the DNC Registry unless the "seller has obtained the express agreement, in writing" for the calls. The written agreement must "clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person." ?16 C.F.R. § 210.4(b)(iii)(B)(1).? The FTC has already interpreted the TSR to require one-to-one consent for calls to numbers on the Do Not Call registry. In a publication titled "Complying with the Telemarketing Sales Rule," the FTC explained that the "TSR requires that the written agreement identify the single 'specific seller' authorized to ?deliver prerecorded messages. The authorization does not extend to other sellers, such as ?affiliates, marketing partners, or others."?
See https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule.

Sellers and callers should assume that the FCC, FTC, and plaintiff's attorneys will continue to argue that one-to-one consent is still required for calls to DNC numbers even after *Insurance Marketing Coalition*. They will point to the slight differences in language governing calls to numbers on the DNC Registry, the TSR language requiring the written agreement authorize calls "by or on behalf of a specific party," and the TCPA regulations requiring permission be evidence by an "agreement between the consumer and seller" as support for requiring on-to-one consent.

The same principles of statutory construction used by the Eleventh Circuit support rejecting one-to-one restrictions for DNC numbers. The ordinary meaning of "permission" and "agreement" and the common law developed by the courts should allow for callers to obtain consent/permission/agreement for marketing calls through intermediaries. The Eleventh Circuit's ruling does not address the DNC restrictions. As a result, companies should expect that the reasoning of the Eleventh Circuit will be tested in district courts outside that circuit on claimed DNC violations, as well as other interpretations of related regulatory text such as what it means to "make a call" under the statute, which the FCC has interpreted to include not only physically placing the call, but also either of a "high degree of involvement" or "actual notice of an illegal use and failure to take steps to prevent such transmissions." *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. ??Rcd. 8752, ¶ 54 (1992).? Until the Supreme Court issues its decision in *McLaughlin Chiro. Assocs, Inc. v. McKesson Corp.*, No. 23-1226,? addressing the limits of the FCC's "gap-filling" ability under the TCPA, sellers,

telemarketers, and lead generators should remain wary of the litigation risks.

The Eleventh Circuit's decision should bring increased peace of mind to health insurance companies and companies operating through multiple subsidiaries. While the FCC focused solely on lead generators, the one-to-one consent rule was not limited to lead generators, leaving companies uncertain about the best way to comply with the FCC's new expectations. The uncertainty was compounded by a ?2024 FTC rule ?requiring companies to disclose the "specific seller" by its legal name to obtain valid prior express written consent for telemarketing calls. *See* 89 FR 26760-01, 2024 WL 1620594 (Apr. 16, 2024). Requiring companies to list out every potentially marketing subsidiary with a separate checkbox and then managing the individualized consents obtained would have imposed a substantial burden on companies and, in the case of health insurance companies, made it significantly more difficult to inform members about other, better options to meet their needs, particularly when those options were offered by different subsidiaries.

Compliance Going Forward

Companies that place telemarketing calls and lead generators should take the following actions to try to minimize exposure to TCPA litigation:

- Review webforms used by lead vendors to ensure consent disclosures are clear and conspicuous — font size, close to the submit button, use action words ("I agree," "I consent"), demonstrate an intent to provide an electronic signature, highlighted hyperlinks, etc.).
- Review the webforms used by your lead sources to confirm the company that will be calling consumers is getting one-to-one consent or is included on the list of marketing partners.
- Revise your contracts with lead vendors to require one-to-one permission and consent.
- Revise your contracts to include indemnification language for breaches of the representations and warranties about permission and consent.
- Revise contracts with lead vendors to obtain copies of the consent language for each lead.
- Revise telemarketing contracts to ensure compliance with the record-keeping requirements, including specifying which party is responsible for keeping the records.
- Implement a review or audit process to ensure lead sellers continue to police their lead sources for one-to-one compliance.

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