CLIENT ALERTS & INSIGHTS

# Eleventh Circuit Axes FCC's One-to-One Consent Rule, Citing Agency Overstep

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Authors: Mark S. Eisen, Ruddy S. Abam

On January 24, 2025, only 48 hours before the Federal Communications Commission's ("FCC") FCC 23-107 Order was set to go into effect, the United States Court of Appeals for the Eleventh Circuit in Insurance Marketing Coalition Limited v. FCC, et al., 24-10277, struck down the FCC's "one-to-one consent" rule under the Telephone Consumer Protection Act ("TCPA").

As we previously covered, the one-to-one consent rule in the telemarketing context required each business to obtain its own separate consent. It mandated that: (i) consumers give "prior express written consent" directly to a single entity at a time; and (ii) consented-to calls be "logically and topically related" to the original interaction that prompted the consent (e.g., a website visit).

The Eleventh Circuit ruled on whether the TCPA allows consumers to give "prior express consent" for telemarketing or advertising robocalls to multiple parties simultaneously, even those not logically and topically related to the website where consent was obtained. The court analyzed the statutory term "prior express consent," finding that it has a "settled meaning" at common law. The term "consent" hinges on it being given "voluntarily," while "express consent" requires "consent that is clearly and unmistakably stated."

The court evaluated the one-to-one consent rule, recognizing that, while the FCC has certain implementation powers under the TCPA, it cannot *alter* the statutory requirements. The court determined that the "one-to-one consent" rule offended this fundamental principle. It held, in sum:

> ***The FCC has impermissibly exceeded its statutory authority by attempting to redefine "prior express consent" to include [ ] additional restrictions. And exceeding statutory authority is a serious defect.***
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> ***. . .***
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> ***Congress drew a line in the text of the statute between "prior express consent" and something more burdensome. Rather than respecting the line that Congress drew, the FCC stepped right over it.***

The court vacated the one-to-one consent rule, resolving that "here, the TCPA's text is clear: Callers must obtain 'prior express consent'**-not 'prior express consent'** ***plus***."

The *IMC* decision provides a critical roadmap to defendants pushing back against agency overreach, particularly with respect to the TCPA. The court's analysis is succinct in cabining the FCC's ability to implement the TCPA, just as forthcoming opt out rules are set to go into effect in April.

The *IMC* decision is particularly useful on the heels of the Supreme Court's 2024 decision in *Loper Bright Enterprises et al. v. Raimondo*, which eliminated *Chevron* deference. However, given that the *IMC* decision arose in the context of a Hobbs Act direct appeal from an FCC order, it

will also be important to follow the Supreme Court's anticipated ruling this term in *McLaughlin Chiropractic Associates, Inc. v. McKesson Corporation*. In *McLaughlin*, the Supreme Court is expected to address head on whether the Hobbs Act precludes district courts from entertaining enforcement actions challenging FCC final orders.

The confluence of *IMC*, the elimination of *Chevron* deference and a defense-friendly outcome in *McLaughlin* may enable TCPA defendants a full-range of unexplored defenses in attacking FCC overreach. It is important, though, not to overreact in the short term to the elimination of the one-to-one consent rule. It will now be for trial courts to evaluate specific consents obtained in specific circumstances, and following this evolution will be necessary to having an appropriate understanding of prior express consent.

Businesses should review their telemarketing practices to ensure they are in compliance with the TCPA and other applicable laws. They should also consider seeking legal advice to understand the potential risks and liabilities associated with their telemarketing activities. As the legal landscape continues to evolve, staying informed and proactive is the best defense.

**Mark Eisen is a Partner and Co-Chair of Benesch's Privacy Litigation & Compliance Group. He can be reached at 312.212.4956 or meisen@beneschlaw.com.**

**David Krueger is a Partner and Co-Chair of Benesch's Privacy Litigation & Compliance Group. He can be reached at 216.363.4683 or dkrueger@beneschlaw.com.**

**Ruddy Abam is a Managing Associate in the Litigation Practice Group. She can be reached at 312.212.4949 or rabam@beneschlaw.com.**