

Eleventh Circuit Vacates TCPA 1:1 Consent Rule

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On January 24, 2025, the U.S. Court of Appeals for the Eleventh Circuit issued a ruling which vacated the so-called “one-to-one” consent requirement for marketing calls and texts adopted by the Federal Communications Commission (FCC) in its implementing rules for the Telephone Consumer Protection Act (TCPA). In its ruling, the court held that the rule adopted by the FCC exceeded the agency’s statutory authority because it conflicted with the plain meaning of “prior express consent” in the TCPA. Below we summarize the court’s ruling and explain what it means for businesses going forward.

Background

As enacted by Congress in 1991, the TCPA, among other things, requires callers to have “prior express consent” when making the following types of calls: (1) non-emergency calls to cell phones using an automatic telephone dialing system or artificial or prerecorded voice, and (2) calls to residential telephone lines using an artificial or prerecorded voice (with certain exceptions). With authority from Congress to “implement” the TCPA, the FCC had previously established in 2012 that when one of the above types of calls (or texts) was being made for marketing purposes, the caller was required to have “prior express *written* consent,” which the FCC defined 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.”

At issue in this case was a December 2023 FCC order that amended the definition of “prior express written consent” by requiring a consent agreement to be specific to “no more than one identified seller” and be “logically and topically associated with the interaction that prompted the consent.” The FCC’s intent with this change was to close what it called the “lead generator loophole” wherein a consumer would sign a single consent form to be contacted by multiple callers. The Insurance Marketing Coalition challenged the amendment before the Eleventh Circuit, calling for it to be overturned on various grounds.

The Decision

A unanimous three-judge panel for the Eleventh Circuit Court of Appeals, all of whom were appointed by President Trump, held that “the FCC exceeded its statutory authority under the TCPA because the 2023 Order’s new consent restrictions impermissibly conflict with the ordinary statutory meaning of ‘prior express consent.’” In reaching this conclusion, the court explained that because the TCPA itself does not define “prior express consent,” it would look to “common law” principles to interpret the term. The court then analyzed independently the two new requirements adopted by the FCC.

One-to-one consent. Upon review of Eleventh Circuit precedent, the court found “our cases show that to give ‘prior express consent’ to receive a robocall, one need only ‘clearly and unmistakably’ state, before receiving the robocall, that he is willing to receive the robocall. ... One-to-one consent is not required. ... Because the one-to-one-consent restriction attempts to alter what we have said is the ordinary common law meaning of ‘prior express consent,’ the restriction falls outside the scope of the FCC’s statutory authority to implement the TCPA.” The court then went on to say that “the FCC’s own brief provides even more support for our conclusion” because it “concedes that a consumer could give ‘prior express consent’ [to multiple named intermediaries] under the TCPA where its 2023 Order categorically says a consumer could not.” The court then criticized the FCC’s public policy argument for the one-to-one consent rule, calling it a “Hail Mary,” and observing that “[a]textual good policy cannot overcome clear text.”

Logically and topically related. Turning to the second new element adopted by the FCC, the court repeated its analysis, and concluded that, here too, the FCC had exceeded its authority under the TCPA. In particular, the court rejected an argument by the FCC that a consumer cannot be “presumed ‘voluntarily’ or ‘willingly’ to invite robocalls” from entities on a website “when the listed entities have no logical or topical connection to the website.” On this point, the court observed “whether a consumer can be ‘presumed’ to consent to robocalls in a particular situation says nothing about whether a consumer has in fact consented to robocalls in that situation. As long as the consumer clearly and unmistakably states, before receiving the robocall, that he is willing to receive the robocall, he has given ‘prior express consent’ under the TCPA.”

In its ruling, the court commented that it was not addressing an alternative argument made by the petitioner that FCC “exceeded its statutory authority by impermissibly defining ‘prior express consent’ to mean one thing for telemarketing and advertising robocalls, and another thing for non-telemarketing and non-advertising robocalls.” This effectively means that the heightened consent standard adopted by the FCC in 2012 remains in force. Curiously though, the court commented three separate times in the opinion that the standard demanded by the TCPA is “‘prior express consent’—not ‘prior express consent’ *plus*.”

FCC Remand and Next Steps

The Eleventh Circuit ruling vacated the portion of the December 2023 TCPA order that announced the 1:1 consent rule and remanded the matter to the FCC for further proceedings.

Just minutes before the court issued its ruling, the FCC’s Consumer and Governmental Affairs Bureau (CGB) had separately released an order to “postpone the effective date for the revisions of” the specific rule sections that would have carried out the 1:1 consent requirement. The CGB order made clear that the postponement was tied to the pending court case – “it is in the interest of justice to provide a limited postponement of the effective date of the rule to avoid imposing new burdens on parties while the court is adjudicating IMC’s challenge to the rule and to avoid subjecting texters and callers acting in good faith to the risk of having to defend themselves against private suits seeking statutory damages for a period in which the rule is still undergoing judicial review.”

In the interim, CGB explained, “the previous requirements for prior express written consent ... will ... remain in effect.”

The FCC will likely move quickly to announce its response to the Eleventh Circuit ruling, and we do not expect that they will appeal the decision.

Importantly, the CGB order was clear that other rule changes stemming from the December 2023

order, including text blocking requirements for wireless carriers and the extension of the National DNC Registry's protections to text messages, were not affected by its decision to postpone the 1:1 consent rule. The order did not, however, address other pending TCPA rule changes, including new rules on revocation of consent that are scheduled to go into effect on April 11, 2025. We will continue to monitor the FCC's open TCPA proceedings for future announcements on these rules.

What Businesses Need to Know

Following the Eleventh Circuit's ruling – and bolstered by the explicit statement by CGB that the “previous requirements for prior express written consent” will continue – the 1:1 consent rule that was set to go into effect on January 27, 2025 is effectively erased.

However, many carriers and texting platforms, as a business rule, have required businesses to demonstrate their compliance with 1:1 consent, as well as other business partners. Time will tell whether those business requirements are rolled back. Many businesses also have invested significant time and resources in preparation for the new requirements and have agreed to partner contract terms making such commitments. As such, each company will need to assess for itself how best to move forward in the short- and long-term. We encourage our clients to contact their usual Kelley Drye attorney for further guidance.