TCPA Tracker: December 2024-January 2025

February 19, 2025

Eleventh Circuit Strikes Down FCC's TCPA 1:1 Consent Rule

The Eleventh Circuit recently held that the Federal Communications Commission ("FCC") exceeded its statutory authority when it issued a 2023 Order interpreting the TCPA to require one-to-one consent with consumers. Just prior to the Eleventh Circuit's ruling, the FCC released its own order, delaying the effective date of the rule section changes that would bring about the one-to-one consent requirement. The FCC's postponement and the Eleventh Circuit's decision in *Insurance Marketing Coalition Ltd. v. FCC* are described more fully in Kelley Drye's AdLaw News and Views newsletter.

U.S. Supreme Court Hears Argument on TCPA Case

On January 21, 2025, the U.S. Supreme Court heard oral argument in *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.* The Court considered whether district courts must give absolute deference to the FCC's declaration that the TCPA excluded online fax services from its coverage under the Hobbs Administrative Orders Review Act ("Hobbs Act"). Over more than an hour of argument, the Court heard from attorneys for plaintiff-appellants McLaughlin Chiropractic, defendant-respondents McKesson Corp., and the federal government on behalf of McKesson Corp. While several Justices seemed receptive to McLaughlin Chiropractic's argument against deferring to the FCC's declaration, potential swing votes—Justice Barrett and Chief Justice Roberts—remained silent, casting doubt on the likely outcome of the litigation.

The case initiated in the U.S. District Court for the Northern District of California, where the Court denied class certification and bifurcated the plaintiffs into two classes: one class of plaintiffs who received online faxes and another who received physical faxes. The Court determined it was bound by a 2019 FCC declaratory ruling that defined faxes received through an online fax service as outside the scope of the TCPA, and granted summary judgment for defendants against the online fax class of plaintiffs. The Ninth Circuit agreed, finding the District Court bound by the FCC declaratory ruling under the Hobbs Act because the statute grants exclusive jurisdiction to the federal courts of appeals to review and determine the validity of final orders of the FCC. The Ninth Circuit affirmed the grant of summary judgment, and McLaughlin Chiropractic appealed to the U.S. Supreme Court, arguing that the Hobbs Act does not require absolute deference to FCC orders. The Supreme Court granted certiorari and agreed to hear oral argument.

During oral argument, the Justices pressed both sides on the arguments presented. On the one hand, several Justices seemed hesitant to embrace McKesson Corp.'s position, expressing concern that a decision upholding Hobbs Act deference may unfairly foreclose future litigants from contesting agency determinations in private disputes, even though these litigants may not have had a fair opportunity to challenge an FCC order during the 60-day window allowed under the Hobbs Act. This group of Justices skeptical of Hobbs Act deference included the same constituency (Justices

Kavanaugh, Thomas, Alito, and Gorsuch) who signed on to Justice Kavanaugh's concurrence in *PDR Network v. Carlton & Harris Chiropractic, Inc.* expressing many of the same concerns. Justice Gorsuch in particular also raised concerns that a finding for McKesson Corp. would require the Court to create a "jurisprudence of adequacy," ensnaring the High Court in disputes over what constituted a fair and adequate opportunity to challenge the regulatory orders for entities that were not in business or potentially even alive at the time of issuance. The advocates for both McKesson Corp. and the government responded to Justice Gorsuch's questioning by arguing that, in this case, McLaughlin Chiropractic had conceded that it had an adequate opportunity to challenge the FCC order but did not do so.

By contrast, however, Justices Sotomayor and Jackson pushed back on McLaughlin Chiropractic's arguments that absolute deference to FCC orders would leave litigants without any mechanism to challenge the validity of a determination. The two Justices noted that the Hobbs Act specifically granted federal appellate courts exclusive jurisdiction to review such orders. Justice Sotomayor also asked whether a ruling in McLaughlin Chiropractic's favor would create a problematic result potentially undermining any notion of finality or reliance. She provided an example in which a regulated party could secure an agency order allowing a certain course of conduct (like the sending of electronic faxes here) and then after years of relying on that order and engaging in the permitted conduct, a litigant that chose not to challenge the order under the Hobbs Act could sue in district court and hold the regulated party liable for damages.

As a result of the silence from Chief Justice Roberts and Justice Barrett, the oral argument provided little insight into how the Court will rule. Court watchers were keen to see whether these two Justices —who helped form the majority that eliminated *Chevron* deference in *Loper Bright Enterprises v. Raimondo*—will join the four concurring Justices from *PDR Network* and subject Hobbs Act deference to the same fate.

Although the Supreme Court may decide the case in a manner that clarifies what degree of deference (if any) is owed to the FCC, some have speculated that the Court may instead seek an off-ramp and issue a narrow ruling on the availability of judicial review for cases presenting similar facts to McLaughlin Chiropractic, rather than overruling Hobbs Act deference in totality. Under this potential outcome, judicial review of agency orders would not be available to litigants like McLaughlin Chiropractic, who had an adequate opportunity to challenge the FCC order under the Hobbs Act but opted not to, but might be available to other entities who could show that their inability to challenge an agency order unfairly hindered their due process rights. A decision is expected from the Court in the late spring of 2025, at the conclusion of the October 2024 Term.

McLaughlin Chiropractic Associates, Inc. v. McKesson Corporation, 2025 WL 44228, 2025 U.S. LEXIS 3 (Jan. 8, 2025).

Arizona Court Compels Arbitration on TCPA Claim

The U.S. District Court for the District of Arizona granted Defendant Rocket Mortgage LLC's motion to compel arbitration against Plaintiff Darren MacDonald because it found MacDonald consented to the arbitration agreement on Rocket Mortgage's website.

In June 2022, MacDonald used a Rocket Mortgage website, www.quickenloans.com, to voluntarily submit a request for information about one of Rocket Mortgage's products. MacDonald entered his information on a series of eighteen webpages, each of which contained a footer with hyperlinks to Rocket Mortgage's 'Terms of Use.' On the final webpage, MacDonald found a button entitled 'Click to

See your Results!' as well as a section of text titled 'Communication Consent' in bold black font. The text in the 'Communication Consent' section was smaller than the other text on the page and was in black font on a white background, with hyperlinks in blue font. The first sentence of the 'Communication Consent' section read, "By submitting your contact information you agree to our Terms of Use and our Security and Privacy Policy." The 'Terms of Use' hyperlink led users to a ten-page PDF document that stated on page nine that users were required to "arbitrate TCPA claims."

MacDonald voluntarily entered his contact information and clicked the 'Click to See your Results!' button. Using this information, Rocket Mortgage called and sent a text message to MacDonald's phone number that was registered on the Do-Not-Call list. MacDonald then sued Rocket Mortgage, alleging a single TCPA claim. In response, Rocket Mortgage moved to compel arbitration and to dismiss the claim.

The Court, without deciding which state's law applied, analyzed the modified clickwrap arbitration agreement on Rocket Mortgage's website under a two-part test to see (1) if the website provided "reasonably conspicuous notice of the terms" and (2) whether the consumer took some action that unambiguously manifested assent to those terms. Because the parties did not dispute that MacDonald submitted his contact information and clicked the 'Click to See your Results!' button, the Court found that this action was sufficient to manifest his consent. The Court thus focused its evaluation on the notice prong of the two-part test.

After weighing the five factors supporting "reasonably conspicuous notice of the terms," the Court found that four of the five weighed in Rocket Mortgage's favor. The Court determined that the size and color of the 'Communication Consent' section text weighed in Rocket Mortgage's favor, as did the obviousness of the hyperlinks and overall layout of the page. While the Court stated the location of the text below the 'Results' button was not ideal, it held that a prudent internet user would have seen the small—but not indecipherable—text in black font on a white background, with blue hyperlinks in the first sentence that did not require any scrolling to be visible.

As such, the District of Arizona held that Rocket Mortgage's webpage provided reasonably conspicuous notice to a prudent internet user and determined that the arbitration agreement was enforceable against MacDonald. Accordingly, the Court granted Rocket Mortgage's motion to compel arbitration and denied the motion to dismiss as moot.

MacDonald v. Rocket Mortgage, LLC, 2024 WL 5200480, 2024 U.S. Dist. LEXIS 231522 (D. Ariz. Dec. 23, 2024).

FCC Issues Show Cause Order to 2,411 Voice Service Providers to Prove Compliance with Robocall Mitigation Database or Face Certification Removal

On December 10, 2024, the Enforcement Bureau of the FCC issued an Order directing 2,411 voice service providers to either cure the deficiencies in their Robocall Mitigation Database ("RMD") certifications and notify the Bureau that the deficiencies have been cured or file a response explaining why the Bureau should not remove each company's certification for failure to comply with the Commission's rules. According to the Enforcement Bureau, the companies listed in the Order's Appendix have deficient certificates because a robocall mitigation plan was not provided or the provided plan lacks newly required information. Removal of a company's certification means that all other voice service providers would be prohibited from accepting call traffic from the deficient providers, effectively cutting them out of domestic telephone networks.

The FCC established the RMD in 2021 to promote transparency and improve preventative efforts by service providers against the proliferation of unlawful, automated "spoofed" calls on their networks. The Commission amended its rules in 2023 to require enhanced information reporting requirements for companies to obtain or maintain RMD certification, which went into effect on February 26, 2024. The amended rules require voice service providers to (1) certify the level of implementation of their Secure Telephone Identity Revisited and Signature-based Handling of Asserted information using toKENs ("STIR/SHAKEN") attestations, (2) describe the specifics of their robocall mitigation plans, (3) provide contact information for a person dedicated to the mitigation of unlawful automatic calls, and (4) commit to responding to traceback requests within twenty-four hours. The STIR/SHAKEN attestations are the voice service providers' verification and authentication of the caller identification information for calls transmitted through their networks.

The Enforcement Bureau of the FCC may remove a provider's certification from the RMD that does not meet these requirements. To remove a provider's RMD certification, the Commission first contacts the provider to provide notification that its certification is deficient, describes the nature of the deficiency, and gives the provider an opportunity to cure. Upon a failure to cure, the Bureau releases an order finding that the provider's certificate is deficient and directing the provider to cure the deficiency within fourteen days, or otherwise explain why the Bureau should not remove the provider's RMD certificate. If there is still no cure or sufficient explanation after the fourteen-day period, the Bureau will release an order removing the provider's certificate from the RMD.

In this matter, the Wireline Competition Bureau, (an operating bureau of the FCC with a policy and advisory role granted via delegated authority), reviewed the RMD certifications after the February 26, 2024, deadline for the new reporting requirements and informed each non-compliant company they had until April 29, 2024, to submit an updated certification and robocall mitigation plan with the required information. After the April 29, 2024, deadline passed, the Wireline Competition Bureau referred any remaining non-compliant companies to the Enforcement Bureau for removal proceedings. The Enforcement Bureau then issued this December 10, 2024 Order, affording each of the service providers a final opportunity to cure these deficiencies before removal. The 2,411 companies listed in Appendix A of the Order have fourteen calendar days from the date of publication of the Order in the Federal Register to cure the deficiencies in their certifications. Removal of a company's certification from the RMD will require all other service providers to cease accepting calls directly from that company and will bar that company from refiling with the RMD until both the Enforcement Bureau and Wireline Competition Bureau determine that the company has resolved all outstanding deficiencies.

This is the largest RMD enforcement action taken by the FCC to date and demonstrates the Commission's focus on policing automated or "spoofed" call traffic on U.S. phone networks. This effort follows a November 12, 2024 letter from forty-seven state attorneys general calling on the FCC to strengthen the RMD. During the Order's press release, FCC Chairwoman Jessica Rosenworcel commented, "providers must be active partners in the fight against unwanted and illegal robocalls. If they are not, they should not be allowed to participate in our phone networks. Full stop."

In the Matter of 2,411 Robocall Mitigation Database Filers, Order Adopted, FCC DA 24-1235, 2024 WL 5090088, 2024 FCC LEXIS 3446 (F.C.C. Dec. 10, 2024).

Florida Court Dismisses TCPA Claim for Failure to Plead Status as a Residential Subscriber and to Connect Specific Phone Number to Do-Not-Call Registry

A Magistrate Judge issued a report and recommendation to the U.S. District Court for the Southern District of Florida, recommending that the Court dismiss, with prejudice, Plaintiff Andrew Lawson's third attempt to re-plead alleged TCPA claims. The Magistrate Judge found that Plaintiff's second amended complaint lacked factual allegations relating to his status as a residential subscriber and to the relevant phone number's presence on the National Do-Not-Call Registry.

Lawson alleged that Defendant Nation's Health Group, Inc. called him four times in January 2023 without his consent and despite his presence on the National Do-Not-Call Registry. Lawson claimed that he answered one of the four calls and told the caller he was not interested in their proffered health insurance. Lawson also claimed that he spoke with the caller who identified himself as "Scott" from "Nation's Health Group, Inc." on a second of the four calls. He then filed a putative class action against Nation's Health Group, alleging violations of the TCPA. In response, Nation's Health Group moved to dismiss Lawson's complaint.

On August 8, 2024, the Court issued an opinion and order partially dismissing Lawson's claims without prejudice, finding his allegations to be an impermissible shotgun pleading that failed to put Nation's Health Group on notice as to the specific claims raised. The Court offered Lawson an opportunity to file a second amended complaint because the amended complaint referenced the entirety of the TCPA statute and did not specify which specific provision Lawson claimed Nation's Health Group violated. The Southern District of Florida also notified Lawson of his pleading deficiencies and directed him to add more specific allegations clarifying the residential nature of the telephone number he claims received the calls and any relevant Do-Not-Call list information associated with that number. Lawson then re-filed a second amended complaint and Nation's Health Group moved again to dismiss the claims, this time with prejudice.

On December 11, 2024, Magistrate Judge Reinhart recommended that the Court grant Nation's Health Group's second motion to dismiss with prejudice for failure to state a claim. The Report and Recommendation acknowledged the FCC's rule and regulation categorizing wireless telephone numbers registered on the National Do-Not-Call list as presumptively residential but clarified that subscribers do not register their names on the Do-Not-Call list, they register their specific telephone numbers. The report found that Lawson's second amended complaint failed to grasp this distinction in that it alleged only that Lawson himself was on the Do-Not-Call list, but not which telephone number or numbers he registered.

The report also recommended dismissal with prejudice because of Lawson's failure to comply with the Court's August 8, 2024 order. Despite the Court's previous instruction to "use clear and direct allegations regarding the residential telephone number implicated and any relevant do-not-call registry information associated with that specific number," the second amended complaint neglected to plead facts identifying which wireless number received the unwanted calls and whether that number was registered on the Do-Not-Call list.

Lawson filed an objection to the Magistrate Judge's report and recommendation on December 26, 2024. The Court is currently considering both the recommendation and Lawson's objection but has not yet issued an order or adopted the report.

Lawson v. Nations Health Group, Inc., 2024 WL 5103503, 2024 U.S. Dist. LEXIS 141179 (S.D. Fla. Aug. 8, 2024); *Lawson v. Nations Health Group, Inc.*, 2024 U.S. Dist. LEXIS 225143 (S.D. Fla. Dec. 11, 2024) (Report and Recommendation).

New Jersey Dismisses TCPA Claim as Conclusory and Outside the

Ambit of the TCPA’s Solicitation Restrictions

The U.S. District Court for the District of New Jersey granted Defendant’s motion to dismiss Plaintiff’s TCPA Claims where Plaintiff made contradictory and conclusory allegations of behavior not covered by the TCPA.

Plaintiff alleged that Capital Management Services L.P. (“CMS”) contacted him at least twenty-nine times between May and July 2023, seeking to recover a debt from a different individual. As alleged by Plaintiff, CMS called his personal cell phone, which had been registered to the National Do-Not-Call list since February 2023, and left Plaintiff “scripted voicemails of an impersonal nature.” Plaintiff brought suit against CMS alleging violations of the TCPA’s prohibitions on the use of an automatic telephone dialing system (“ATDS”) and artificial/prerecorded voices to deliver calls, as well as the TCPA’s implementing regulations.

First, the Court held that Plaintiff’s allegations of CMS’s ATDS use were too conclusory to properly state a claim under the statute. While Plaintiff opposed dismissal, citing “tell-tale signs of automation” in the calls received, the Court made clear that Plaintiff could not succeed by simply parroting the definition of ATDS when asserting a claim.

Next, the Court dismissed Plaintiff’s claim as to CMS’s use of artificial/prerecorded voices to deliver calls. Specifically, the Court pointed to the complaint’s contradictory allegations that at times Plaintiff received calls on his personal cell phone from an artificial and prerecorded voice, and at other times, Plaintiff spoke directly with CMS representatives, and asked them to stop calling. Given Plaintiff’s conflicting allegations, the Court dismissed the claim on the grounds that it failed to put CMS on fair notice of the underlying facts.

Lastly, the Court held that Plaintiff failed to state a claim because the communications described in the complaint were not “solicitations” under the TCPA. The Court noted the FCC’s explicit guidance that calls made in reference to debt collection or payment recovery are not covered under the TCPA’s restrictions on telephone solicitations. Given that the calls at-issue concerned an alleged debt, the Court found no basis upon which Plaintiff’s TCPA claim could succeed as pled.

The Court dismissed the claims without prejudice, allowing Plaintiff the opportunity to file an amended complaint.

Frato v. Cap. Mgmt. Servs. L.P., 2025 WL 73286, 2025 U.S. Dist. LEXIS 5454 (D.N.J. Jan. 8, 2025).