CARLTON FIELDS

The Eleventh Circuit Will Hear The IMC Petition on the FCC's One-to-One Consent Rule

December 17, 2024

As anyone who follows the Telephone Consumer Protection Act (TCPA) knows by now, the FCC's one to consent rules are scheduled to go into effect on Jan. 27, 2025. For someone who has been heavily involved in this space for more than 15 years, I'm comfortable saying that this is probably the most impactful issue in the industry in that time. So, yeah, it is a really big deal. The FCC's order is available here: https://docs.fcc.gov/public/attachments/FCC-23-107A1.pdf. Probably every defense side law firm that has a TCPA practice has covered the new rule in depth. I've spoken on so many webinars and calls about this that I think there is a good chance my four-month old son will learn to say "logically and topically related" before "Dada." And while the effective date of the new rules are exactly a week after Inauguration Day, this is simply not going to be a situation where the change in administration will make any immediate difference. So if you are thinking about whether the new rules will actually go into effect on Jan. 27, 2025, the answer is "yes." Except for one potential monkey wrench. And that is the Insurance Marketing Coalition's challenge to the rule, which will be heard by a panel of the Eleventh Circuit on Dec. 18, 2024 in Atlanta, Georgia. For some fairly complicated reasons, the ruling should be binding across the country. **The IMC Petition** The Insurance Marketing Coalition (IMC), has asked the Eleventh Circuit to set aside portions of the FCC's order. Under the new rule, consumers may only consent to receive marketing calls from one caller at a time, and may only consent to marketing calls that are "logically and topically related" to the website that solicits their consent. The IMC has argued that the proposed consent requirements are unlawful because they:

- exceed the FCC's authority by interpreting the phrase "prior express consent" in a way that conflicts with the TCPA;
- violate the First Amendment by employing content-based discrimination against commercial marketing calls; and
- are arbitrary and capricious under the Administrative Procedure Act (APA).

In its appellate brief, the FCC has responded that the additional consent requirements are:

- consistent with the FCC's statutory authority and congressional intent;
- consistent with the First Amendment because they only affect commercial speech and survive intermediate scrutiny; and
- not arbitrary and capricious under the APA because they are supported by the record and reasoned decision making.

The Additional Consent Requirements and the FCC's Authority The IMC's first argument—and perhaps its most promising argument—is that by imposing new requirements for automated marketing calls, but not other types of calls, such as informational calls, the order creates different definitions of the term "prior express consent." The IMC contends that this result is unlawful because agencies may not apply different definitions to the same statutory term within a single provision. Some have wondered why the IMC filed their petition in the Eleventh Circuit, as opposed to the D.C. Circuit, which is the more traditional locus of so called Hobbs Act petitions. Here is one possible explanation: The IMC cites numerous Eleventh Circuit cases stating that the term "prior express consent" in the TCPA should be interpreted according to its ordinary meaning and common-law principles of statutory construction. The IMC notes that the Eleventh Circuit has, on numerous occasions, ruled that the ordinary meaning of express consent is merely "consent that is clearly and unmistakably stated." While not mentioned in the briefs, the law on this issue is far less developed in the D.C. Circuit. The FCC's response is that Congress recognized a distinction between commercial and non-commercial calls in the text and design of the TCPA. The FCC identifies language in the TCPA that grant it flexibility to design different rules for automated calls that "are not considered a nuisance … or for noncommercial calls." And then in perhaps the most complicated part of the case, the FCC argues that consent requirements have differed for commercial calls since 2012 when the FCC began requiring callers to obtain written consent before making marketing calls. So lets unpack that part. In 2012, the FCC issued an order that established different types of consent for marketing calls versus informational / service calls. This has been the TCPA regime that everyone in the industry has been operating under for the last dozen years. In a super simplified nutshell: marketing calls need an actual written consent; informational / service calls only need the voluntary provision of the phone number. The FCC also argues that the new consent requirements are consistent with the ordinary meaning of "prior express consent." The FCC contends that per its ordinary meaning, consent must be given voluntarily and indicate a willingness for a certain conduct to occur. From this premise, the FCC argues that consumers should not be presumed to "voluntarily" or "willingly" invite robocalls from hundreds or thousands of entities by filling out a web form, particularly if those entities have no logical or topical connection to the website soliciting consent. Therefore, the additional requirements are consistent with the ordinary meaning of consent because they help consumers better understand the conduct that they are authorizing. The IMC, however, responds that the FCC's additional requirements conflict with the ordinary meaning. Namely, the order prevents several types of consent that otherwise satisfy "prior express consent," as even the FCC

concedes that consumers could provide willing, informed consent to receive automated calls from multiple service providers at once. As someone who has practiced under the 2012 rules for the last dozen years, I do find the IMC's argument interesting. This issue will probably hinge upon how much the Eleventh Circuit is willing to essentially reopen the 2012 rule. **The Additional Consent Requirements and the First Amendment** The IMC also argues that the additional consent violate the First Amendment. The IMC argues that this differential treatment constitutes content-based discrimination, which is unconstitutional unless it is narrowly tailored to meet a compelling state interest. In response, the FCC argues that the problems posed by the "lead generator loophole" are not speculative and are based on submissions from law enforcement bodies, legislators, consumers, and various trade groups. Much of the argument here hinges on the record of submissions and also which type of First Amendment scrutiny will be afforded. While the court may be inclined to examine the record with a fine tooth comb, this may be an issue where the FCC can claim something of a moral high ground. To go back to the sort of real word issue, a lot ordinary people may be surprised to find out that they are deemed to have given consent to dozens (or maybe even more) companies to call them because a hyperlink (that wasn't even clicked on) happened to have an extensive list of marketing partners. As lawyers, we are taught to argue the law when the law is on our side and argue the facts when the facts are on our side. I guess what I'll say here, is that whenever I've had to make this argument in TCPA cases, I've focused on the law as opposed to facts. As far as timing, the Eleventh Circuit expedited the appeal, so I would expect a ruling before Jan. 27, 2025. For those interested, the live stream of the hearing is available at https://video.ibm.com/channel/ggNZ2kD8k2x. The case is the third case scheduled for the day, which means it would be a good idea to log on by about 9:45 a.m. And the oral recordings are typically posted the next day. Now, at the beginning of this summary, I noted that this case really is where the action will be if the rule is to be rejected. And that is mostly true. But there is one stayed tuned thing to mention: On Oct. 8, 2024, the U.S. Supreme Court granted certiorari in *McLaughlin Chiropractic Associates v. McKesson Corporation and McKesson Technologies,* (No. 23-1226) to specifically address whether the Hobbs Act requires district courts to follow the FCC's interpretation that the Telephone Consumer Protection Act (TCPA) does not prohibit faxes received via "online fax services." But the *McLaughlin Chiropractic* will really address whether the Hobbs Act is binding in TCPA cases. It is certainly possible that the the Eleventh Circuit rejects the IMC petition but the Supreme Court rules that a district court is not bound by the Hobbs Act to follow the agency. If this happens, there will be a good chunk of litigation to decide the fallout.

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