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Call Me, Maybe? TCPA Jurisprudence Post-*Loper Bright*

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"Hey, I just met you, and this is crazy

But here's my number, so call me maybe"

I'm not willing to admit how many times I've listened to Carly Rae Jepsen's hit "Call Me Maybe," but I'm well enough versed in its lyrics to safely conclude she likely provided her romantic interest prior express consent to call her. Picking up on subtle hints may not be my strong suit, but voluntarily providing your number and belting out "call me maybe" 11 times makes me think that's a sound conclusion. While that may be easy for me to say within the context of a pop song, what constitutes prior express consent within the context of the Telephone Consumer Protection Act ("TCPA") is another matter. This is particularly true in the wake of the Supreme Court overturning the *Chevron* deference doctrine in *Loper Bright Enterprises v. Raimondo* in June 2024.[1]

Indeed, since its enactment in 1991, the TCPA has evolved into a Frankenstein of statutes, regulations, and judicial and regulatory decisions. As anyone with TCPA experience knows, deciphering years of often inconsistent or contradictory case law and regulatory decisions, can be a mind-numbing experience. And because TCPA cases often involve alleged noncompliance with regulations promulgated by the Federal Communications Commission ("FCC"), now that *Chevron* deference is overturned, the TCPA is one area where longstanding law may be subject to challenge. In this article, we'll examine some recent decisions that may offer guidance about the types of questions that may be litigated following *Loper Bright*.

How We Got Here

Prior to *Loper Bright*, courts employed the *Chevron* deference doctrine to determine the lawfulness of an agency's rules and decisions.[2] Under the *Chevron* doctrine, if a statute was deemed vague or ambiguous, the reviewing court would defer to the agency's interpretation of the statute so long as such interpretation was "based on a permissible construction of the statute."[3]

In *Loper Bright*, however, the Supreme Court overturned the *Chevron* deference doctrine and held that "courts must exercise independent judgment in determining the meaning of statutory provisions."[4] In essence, it is within the purview of the courts to determine the "single, best meaning" of an ambiguous statute, irrespective as to whether an agency's interpretation is permissible or reasonable.[5] That is not to say courts can't look to an agency's interpretation for guidance. To the contrary, the Court acknowledged that agency interpretations

"'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[6]

Moreover, *Loper Bright* does not signal that hunting season is open for every TCPA-related regulation or decision made by the FCC. *Loper Bright* should have no effect on FCC interpretations of certain terms where Congress delegated it express authority to do so.[7] In addition, Chief Justice Roberts unequivocally conveyed that prior cases decided under *Chevron* were "still subject to statutory stare decisis" — "mere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on Chevron is, at best, 'just an argument that the precedent was wrongly decided.'"[8]

Recent Decisions

In the wake of *Loper Bright*, a handful of cases have addressed challenges to FCC regulations concerning the TCPA. Here we will examine how various courts applied *Loper Bright's de novo* review to the FCC's interpretation of the terms "residential telephone subscriber" and "prior express consent."

Residential Telephone Subscriber

Three district courts – the Southern District of New York, the Northern District of California, and the Northern District of Ohio – addressed the meaning of the term "residential telephone subscriber" under Section 227(c), which is undefined by the TCPA.[9] All of the plaintiffs in these cases alleged that the defendants violated Section 227(c) of the TCPA and its implementing regulations by placing telemarketing calls to their wireless numbers despite such numbers being on the national Do-Not-Call Registry.[10] The defendants, however, argued that distinctions in the language between Sections 227(b) and (c) indicated that Congress did not intend to include wireless numbers within the meaning of "residential telephone subscriber."[11]

Section 227(b) of the TCPA makes it "unlawful for any person…to make any call… using any automatic telephone dialing system or an artificial or prerecorded voice" to several categories of phones, including "any telephone number assigned to a … cellular telephone service."[12] Section 227(b) also requires the FCC to "prescribe regulations to implement the requirements of this subsection," which it did at 47 C.F.R. § 64.1200(a)-(b).[13]

Section 227(c), on the other hand, seeks to protect the privacy rights of subscribers from unwanted telephone solicitations.[14] Rather than spell out the contents of regulations like it did in Section 227(b), in Section 227(C), Congress directed the FCC to promulgate regulations "to implement methods and procedures for protecting the privacy rights" of "residential telephone subscribers."[15] Section 227(c) also directs the FCC to promulgate regulations to establish a do-not-call registry and national database compiling "a list of telephone numbers of residential subscribers who object to receiving telephone solicitations" and prohibiting such solicitations to subscribers in the database.[16]

The relevant FCC regulation, 47 C.F.R. § 64.1200(c), provides:

> No person or entity shall initiate any telephone solicitation to: ... (2) A *residential telephone subscriber* who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal

> Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.[17]

Finally, through § 64.1200(e), the FCC added that the rules set forth in § 64.1200(c), include telephone solicitations to *wireless telephone numbers* "to the extent described in the [FCC's] Report and Order, CG Docket No. 02–278, FCC 03–153, 'Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991'" (the "2003 TCPA Report and Order").[18] The 2003 TCPA Report and Order referenced in the regulation effectively creates a presumption that wireless numbers on the Do-Not-Call Registry are "residential subscribers."[19]

In *Cacho v. McCarthy & Kelly, LLP*, the Southern District of New York was the first court to address whether a plaintiff, who received telemarketing calls on their cellphone despite being the National Do-Not-Call Registry, qualified as a "residential telephone subscriber" under Section 227(c).[20] In *Cacho*, the defendant argued that, under the canon of statutory interpretation, *expressio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of another), that the "absence of any reference to cellular telephones in Section 227(c)," despite explicitly referencing them in Section 227(b), was evidence of "Congress' intent to exclude cell phone users from the definition of 'residential subscribers.'"[21]

However, "after applying all relevant interpretive tools" espoused in *Loper Bright*, the court found that the defendant's reliance on *expression unius* was misplaced.[22] The court noted that section 227(b) "forbids the use of artificial and prerecorded messages to enumerated *categories* of phone technologies," which includes "cellular telephone[s]."[23] In contrast, Section 227(c), uses the term "residential subscriber" not in reference to particular category of technology, but to the "the type or identity of the *subscriber* to the technology."[24]

The court also pointed out that the defendant was presuming that the term "residential," as it is used in "residential subscriber," refers to a landline, when in truth the term "'residential subscriber' is ambiguous as to whether it is limited to landlines."[25] Moreover, the court reasoned that excluding cellphone users from the meaning of "residential telephone subscriber," would lead to absurd consequences, such as depriving homebound individuals relying solely on cellphones of privacy protections, contrary to Congressional intent.[26] Interpreting the TCPA holistically, the court noted that Congress distinguished between "residential telephone line" in Section 227(b), which refers to equipment or technology, and "residential subscriber" in Section 227(c), which focuses on the type of user and their phone's function, rather than the specific device.[27] The omission of "line" in Section 227(c) underscores that the statute protects individuals based on their use of the phone for personal, domestic purposes, irrespective of whether it is a landline or cellphone.[28] Construing "residential subscriber" functionally, the court concluded that the term includes any individual using their phone for household purposes, aligning with the TCPA's goal of safeguarding privacy.[29]

Facing the same arguments the defendant made in *Cacho*, the Northern District of California and Northern District of Ohio arrived at the same conclusion, albeit with some notable differences, in *Lyman v. QuinStreet Inc.* and *Lirones v. Leaf Home Water Solutions, LLC,* respectively. Unlike in *Cacho*, the *Lyman* court rested its decision on "both binding Ninth Circuit precedent and the applicable regulation."[30] The Ninth Circuit precedent the court was referring to was *Chennette v. Porch.com, Inc*., which held that cellphones used for "personal and business purposes [are] presumptively residential" under Section 227(c), a conclusion reinforced by FCC regulations presuming cellphones registered on the Do Not Call Registry to be residential phones.[31] Despite the

Chennette court's application of *Chevron* deference to rule as it did, the *Lyman* court's inclination to respect its established precedent is consistent with *Loper Bright* given Chief Justice Roberts' emphasized that statutory *stare decisis* should be respected.[32]

Both the *Lyman* and *Lirones* courts also highlighted to a greater degree the "due respect" owed to the FCC's interpretation of 227(c), noting that "Congress expressly conferred discretionary authority on the agency to flesh out the TCPA."[33]

Prior Express Consent

In *Insurance Marketing Coalition Limited v. Federal Communications Commission*, the Eleventh Circuit Court of Appeals addressed a challenge to the FCC's interpretation of the meaning of "prior express consent" within the context of telemarketing robocalls.[34] Unlike the three cases above, this case falls under Section 227(b) of the TCPA.[35] The relevant FCC regulation, § 64.1200(a)(1), provides: "No person or entity may…initiate any telephone call (other than a call made for an emergency purpose or is made with the *prior express consent* of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice" to various categories of phones.[36]

Because the TCPA itself does not define "prior express consent," the FCC has provided differing interpretations of what constitutes "prior express consent" depending on the nature of the call.[37] As the court pointed out, a regulation promulgated by the FCC in 2012 (the "2012 Order") provides that "'prior express consent' means 'prior express *written* consent' when the robocall in question constitutes telemarketing or advertising."[38] At issue in this case, however, was a legislative rule promulgated by the FCC in 2023 (the "2023 Order") that further expanded on the meaning of prior express consent.[39] Under the 2023 Order, the FCC proscribed that "a consumer cannot consent to a telemarketing or advertising robocall unless (1) he consents to calls from only one entity at a time, and (2) he consents only to calls whose subject matter is 'logically and topically associated with the interaction that prompted the consent.'"[40] These additional requirements, petitioners argued, exceeded the scope of the FCC's statutory authority.[41] First, because the 2023 Order "impermissibly interprets the phrase 'prior express consent' to mean 'two different things'" depending on the nature of the call (*e.g.*, telemarketing vs. non-telemarketing).[42] And second, because "the two restrictions conflict with the ordinary statutory meaning of 'prior express consent.'"[43] The Eleventh Circuit agreed.

In conducting its post-*Loper Bright* independent analysis, the Eleventh Circuit found that the FCC had indeed exceeded its statutory authority by imposing the additional requirements in the 2023 Order – "[n]otably, the TCPA requires only 'prior express consent' — not 'prior express consent' *plus*."[44] Moreover, the court pointed out that Section 227(b)(2) gave the FCC power to *implement* regulations to prohibit robocalls consistent with Congress' directive, not alter them or impose additional requirements.[45] Accordingly, the court turned to the traditional rules of statutory interpretation under common law to determine the "plain and ordinary meaning" of "prior express consent."[46] And under the common law, to give "prior express consent" one only has to "clearly and unmistakably" state that he or she is willing to receive a call.[47] Therefore, because the additional requirements imposed by the 2023 Order to provide "prior express consent," fell outside the bounds of the term's common law meaning, the court found that the FCC had exceeded its statutory authority to "implement" the TCPA and vacated that part of the 2023 Order.[48]

Notably, because the FCC's interpretation of “prior express consent” in its 2012 Order was not at issue in the case, the court's decision left intact the FCC's interpretation that “prior express consent” means “prior express *written* consent” for telemarketing robocalls.[49] While that may be the case, the requirement that consent be written is at odds with the court's finding under the common law that “express consent” is “[c]onsent that is clearly and unmistakably given.”[50] The court also cited to precedent defining “express permission” under 227(a)(5) to mean “permission that is clearly and unmistakably granted by actions or words, oral or written.”[51] Accordingly, some might view the court's analysis in this case as an invitation to further challenge the FCC's interpretation of “prior express consent” under its 2012 Order.

Conclusion

In the wake of *Loper Bright*, courts have begun to reexamine longstanding interpretations of the TCPA with a fresh lens, applying de novo review to statutory ambiguities that were previously resolved under the *Chevron* deference framework. As demonstrated in recent cases, this shift has already begun to reshape the legal landscape for key TCPA terms, such as “prior express consent,” highlighting the importance of statutory text and common-law principles.

The decisions analyzed above underscore several critical takeaways. The courts' analyses drawing distinctions between the authority Congress granted to the FCC under Sections 227(b) and (c) suggest that, moving forward, FCC regulations promulgated under the former may be more vulnerable to challenge. As the *Cacho* court noted, Congress dictated contents of the regulations in Section 227(b), whereas Congress granted the FCC much more leeway to flesh out Section 227(c).[52] In addition, to the extent a particular term or phrase interpreted by the FCC already has an established meaning under the common law, counsel should consider the extent to which the FCC's interpretation strays from that meaning. Nonetheless, counsel should bear in mind *Loper Bright's* warning about statutory *stare decisis*, as courts may be more inclined to adhere to established precedent upholding an FCC interpretation, even if such precedent relied on *Chevron* to reach that conclusion.

In any event, given *Loper Bright* was just decided this past summer, the full weight of its impact on TCPA regulations is yet to be seen. To the extent your business continues to grapple with TCPA issues, please feel free to reach out and call me, ~~maybe.~~

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[1] *See generally* 603 U.S. 369 (2024).

[2] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, *Inc.*, 467 U.S. 837, 842-43 (1984).

[3] *Id*.

[4] *Loper Bright*, 603 U.S. at 394.

[5] *Id* at 400.

[6] *Id* at 394 (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)).

[7] *Id* at 394-95.

[8] *Id* at 412 (citing *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 266 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000))).

[9] *Cacho v. McCarthy & Kelly, LLP*, 739 F. Supp. 3d 195 (S.D.N.Y. 2024); *Lyman v. QuinStreet, Inc.*, No. 23-CV-05056-PCP, 2024 WL 3406992 (N.D. Cal. July 12, 2024); *Lirones v. Leaf Home Water Sols., LLC*, No. 5:23-CV-02087, 2024 WL 4198134 (N.D. Ohio Sept. 16, 2024).

[10] *Cacho*, 739 F. Supp. 3d at 198 – 199; *Lyman*, 2024 WL 3406992 at *1; *Lirones*, 2024 WL 4198134 at *1.

[11] *Cacho*, 739 F. Supp. 3d at 202 – 203; *Lyman*, 2024 WL 3406992 at *3; *Lirones*, 2024 WL 4198134 at *4.

[12] 47 U.S.C. § 227(b)(1).

[13] § 227(b)(2); 47 C.F.R. § 64.1200(a)-(b) (2025).

[14] *See* § 227(c).

[15] *Cacho*, 739 F. Supp. 3d at 201 (citing § 227(c)(3)).

[16] § 227(c)(3).

[17] 47 C.F.R. § 64.1200(c) (emphasis added).

[18] 47 C.F.R. § 64.1200(e).

[19] *Lirones*, 2024 WL 4198134 at *4 (quoting *In Re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14039 (2003)).

[20] 739 F. Supp. 3d at 200 – 201.

[21] *Id* at 203 (internal quotations marks omitted).

[22] *Id* at 204.

[23] *Id* at 204 (emphasis added).

[24] *Id* at 205 (emphasis added).

[25] *Id*.

[26] *Id.*

[27] *Id* at 205 – 206.

[28] *Id.*

[29] *Id* at 206 – 207.

[30] *Lyman*, 2024 WL 3406992 at *3.

[31] *Id*.

[32] *See Loper Bright*, 603 U.S. at 412 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

[33] *Lyman*, 2024 WL 3406992 at *4; *see also Lirones*, 2024 WL 4198134 at *7.

[34] 127 F.4th 303, 307 (11th Cir. 2025).

[35] *Id*.

[36] 47 C.F.R. § 64.1200(a)(1) (emphasis added).

[37] *Insurance Marketing Coalition Ltd. v. FCC*, 127 F.4th 303 at 309.

[38] *Id.*

[39] *Id* at 307, 309 – 310.

[40] *Id* at 307.

[41] *Id*.

[42] *Id.*

[43] *Id.*

[44] *Id* at 311 – 312.

[45] *Id*.

[46] *Id* at 313.

[47] *Id*.

[48] *Id* at 314 – 318.

[49] *Id* at 307, 309 (emphasis added).

[50] *Id* at 313 (internal quotations marks omitted) (quoting *Black's Law Dictionary* (12th Ed. 2024)).

[51] *Id*. (internal quotation marks omitted) (citing *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1100 (11th Cir. 2019)).

[52] *Cacho*, 739 F. Supp. 3d at 201.

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