

In 2012, the Federal Communications Commission (FCC) revised its [rules under the Telephone Consumer Protection Act \(TCPA\)](#) to draw a regulatory line in interpreting the consent requirements of the 1991 statute.

Prerecorded calls made to cellphones for telemarketing purposes required more than just “prior express consent”; rather, the called party must have provided “prior express written consent” as defined in the rules. So while a customer’s provision of their cellphone number or an oral OK satisfied the former requirement for “informational” calls, the latter “written” standard was mandated to place prerecorded marketing calls to wireless phones.

Over the years, the federal courts, under US Supreme Court precedent, have deferred to this regulatory “add-on” by the FCC, which nowhere appeared in the statutory language of the law itself. However, the current Supreme Court repealed the underpinnings of that deference doctrine. Further, it made clear that in private federal court cases under the TCPA, no such deference to the FCC need be applied.

That brings us to [Radley Bradford v. Sovereign Pest Control of TX, Inc.](#), a recent decision of the US Court of Appeals for the 5th Circuit. Mr. Bradford contracted pest control services and provided his cellphone number to Sovereign. Over the years, the company used prerecorded calls to contact him at that number about renewing his contract and he did so four times. But for whatever reason, Mr. Bradford decided to sue Sovereign under the TCPA, claiming that all those renewal-related calls were telemarketing calls and he had never provided his “prior express written consent” to receive them. Thus, Sovereign was liable under the TCPA.

In a seminal decision in the world of the TCPA, the 5th Circuit panel followed the Supreme Court directive to “interpret the meaning of Congress’s enacted text according to ordinary principals of statutory interpretation, without deference to an agency’s reading.” Reading the statutory language, the panel noted that “the statute provides no basis for concluding that telemarketing calls require prior express *written* consent... . Whether Sovereign Pest’s pre-recorded calls to Bradford qualify as telemarketing or informational calls, those calls required only prior express consent from Bradford.” And he gave it. So under this analysis, prior express consent is all you need to make prerecorded marketing calls to cellphones. The FCC’s 2012 regulatory revision is inapplicable, at least in the 5th Circuit.

But, of course, this is but one of 11 federal courts of appeals. And the 5th Circuit, relying on *Black’s Law Dictionary*, of course, provided its view of Congress’ meaning of “express consent” as “positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning.” Look for that standard to be applied in the federal courts in that circuit.

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