

Is this a signal of more such things to come? Perhaps, as a second court – the Federal District Court in Maryland in *Deborah Bradley v. DentalPlans.com et al* – has ruled that “Congress has required only prior express consent” to receive automated and prerecorded telemarketing calls under the Telephone Consumer Protection Act (TCPA). No prior express written consent was required.

## Background Facts

Deborah Bradley signed up for a Cigna dental plan through a telephone call with DentalPlans.com. During the call she orally agreed to receive automated and prerecorded calls, ostensibly to “keep her updated with any plan information.” Later after indicating that she did not want the plan to auto-renew, she received prerecorded calls telling her that her membership would expire soon and she could renew her plan; she ignored those calls and her plan expired. However, she continued to receive “win back” prerecorded calls encouraging her to repurchase. There were 10 such post-expiration calls before they stopped. She brought a class action alleging that DentalPlans and Cigna violated the TCPA by “placing unauthorized telemarketing calls to her and the proposed class.”

The court initially determined that the “win-back” calls were telemarketing, denied DentalPlans summary judgment motion and certified a class. But DentalPlans asked the court to reconsider and decertify the class, arguing that the original determination was no longer permissible after the Supreme Court decisions in *Loper Bright Enters. v Raimondo* and *McLaughlin Chiropractic Associates, Inc. v McKesson Corp.* DentalPlans motion claimed that in light of those decisions, the court could not apply the Federal Communications Commission (FCC) interpretive regulations imposing a prior express written consent for telemarketing calls.

## The Court’s Analysis and Rulings

The *Loper Bright* and *McLaughlin* decisions both addressed the role of the courts in assessing whether an agency has acted within its statutory authority. As ultimately held in the latter, now “District Courts are not bound by the agency’s interpretation” of the statute, but must “independently determine for itself, whether that interpretation is correct.”

Armed with that framework, the court addressed two central issues: (1) whether the FCC could impose an additional writing requirement to the TCPA’s “prior express consent” and (2) in the end did Ms. Bradley provide prior express consent. The court answered “no” to the first and “yes” to the second. As result the court granted Dental Plan’s motion for reconsideration and decertified the class.

**FCC could not impose** – The court considered two appellate court decisions by the 11th Circuit (*Insurance Marketing Coalition Ltd v. FCC*) and 5th Circuit (*Bradford v. Sovereign Pest Control of TX, Inc.*). The former found that the Congress’ delegation of authority to the FCC did not include the ability to “interpret” the TCPA’s prior express standard as the agency had done – “Rather than respecting the line that Congress drew, the FCC stepped right over it.” The latter concluded that “contrary to the FCC’s regulation, Congress permits either written or oral consent for any auto-dialed or prerecorded call,” subject to having prior express consent. Considering these precedents and the facts at hand, the Court held that “[b]ecause Congress has required only prior express consent, not prior express written consent, that is all that is required to overcome an alleged TCPA violation” in this case.

**Requisite consent was given** – The court noted that Congress had not, for consent purpose, made a distinction between telemarketing and informational calls. It was the FCC that did so, in the context of deciding which standard governs the calls at issue, prior express consent or prior express written consent. The court, however, looking at the “plain language of the statute” could not discern any distinction warranting applying the FCC interpretation. Since Ms. Bradford had agreed initially to receive automated or prerecorded calls in the context of signing up for the plan, she had provided the requisite consent and “DentalPlans did not violate the TCPA as a matter of law.”

## Implications Going Forward?

**What are the implications of this decision going forward?**

There are now two specific precedents in different federal circuits on this issue. Certainly other courts in other jurisdictions can pick up on this analysis when it is presented to them. Defendants in TCPA class action cases have a tool to employ in cases involving similar fact settings.

These decisions may instigate other challenges to FCC generated “interpretations” under the TCPA. Further following on the guidance to district courts in *Loper* and *McLaughlin*, other FCC-generated interpretations and regulations can be attacked. The *Bradley* court specifically noted “[t]here may be cause to reevaluate the availability of vicarious liability under the TCPA.”

These decisions could impact the FCC's own formulation of its regulations in interpreting and applying the components of the TCPA going forward. They might give the FCC pause when it is presented with the option of engrafting a requirement that is not clearly expressed in the statutory language.

Finally, the *Bradley* Court also clearly implied if there was to be a prior express written consent requirement, it was for Congress not the FCC to impose such a rule – "It is for Congress to respond to the issues presented in this case and to address whether the TCPA, as written, adequately addresses the contemporary realities of American life." In the immediate future that seems unlikely, but it certainly bears watching.

We expect there will be additional progeny of *Loper* and *McLaughlin* for the application of the TCPA, not only with respect to consent issues. We will be monitoring closely.

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