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TCPA & Consumer Privacy Alert

February 27, 2026

Fifth Circuit holds the TCPA does not require prior express *written* consent—Even for telemarketing calls

By Troy K. Lieberman

A major Fifth Circuit TCPA ruling just reshaped consent rules: in *Bradford v. Sovereign Pest Control*, the court held that written consent is not required for prerecorded/autodialed calls to cell phones—even for telemarketing—rejecting established FCC rulings.

What's the impact?

- The court read "prior express consent" to include oral or written consent, rejecting the FCC's telemarketing-only written-consent rule.
- Businesses with oral or relationship-based consent (e.g., providing a number during signup) may have stronger TCPA defenses—even in marketing contexts.
- Expect more fact-heavy disputes and stronger arguments against class certification, making documentation (call logs, recordings, agreements) more important than ever.

On February 25, 2026, the US Court of Appeals for the Fifth Circuit issued a significant decision in *Bradford v. Sovereign Pest Control of TX, Inc.*, holding that the Telephone Consumer Protection Act of 1991 (TCPA) does not require prior express *written* consent for pre-recorded or autodialed calls to wireless numbers—regardless of whether those calls constitute telemarketing. This ruling represents a substantial shift in the TCPA compliance landscape and carries important implications for any company that engages in outbound calling or texting campaigns.

Background

Radley Bradford entered into a service-plan agreement with Sovereign Pest Control, a Texas pest-control company, and provided his cell-phone number on the agreement. Bradford later acknowledged that he had given his phone number so that Sovereign Pest could "get in contact" with him. During the life of the agreement, Sovereign Pest placed multiple pre-recorded calls to Bradford, including calls seeking to schedule a "renewal inspection." Bradford scheduled inspections after receiving those calls and ultimately renewed his service plan four times.

Notwithstanding the ongoing relationship, Bradford filed a putative class-action lawsuit alleging that Sovereign Pest violated the TCPA by sending him "unsolicited prerecorded calls . . . for years" without obtaining his "prior express written consent." The district court granted summary judgment in favor of Sovereign Pest, concluding that the calls did not constitute telemarketing and that Bradford had provided prior express consent. Bradford appealed to the Fifth Circuit.

The 5th Circuit's holding: *Loper Bright* and the statutory text

The Fifth Circuit affirmed the district court's judgment, but on broader and more consequential grounds. The decision begins by invoking the Supreme Court's landmark decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and its progeny, emphasizing that courts must interpret the meaning of Congress's enacted text "according to ordinary principles of statutory interpretation, without deference to an agency's reading."

Turning to the statutory text itself, the court observed that the TCPA makes it unlawful to "make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to any cellular telephone number. Congress's statute refers only to "prior express consent"— it does not say "prior express *written* consent."

The requirement for written consent originated not from Congress, but from the Federal Communications Commission. The FCC's implementing regulation, 47 C.F.R. § 64.1200(a)(2), added a prohibition not contained in the statute: it forbids initiating any pre-recorded call that "includes or introduces an advertisement or constitutes telemarketing" without "the prior express written consent of the called party." The FCC thus drew a distinction between

"telemarketing" calls (requiring written consent) and "informational" calls (requiring only oral or other express consent).

The Fifth Circuit rejected this agency-created distinction. Applying the plain text of the statute, the court determined that when Congress enacted the TCPA, "express consent" encompassed consent "directly given, either viva voce or in writing," meaning "[p]ositive, direct, unequivocal consent, requiring no inference or implication to supply its meaning." Accordingly, "Congress permits either written or oral consent for any auto-dialed or pre-recorded call." The court stated directly: "The statute provides no basis for concluding that telemarketing calls require prior express written consent but not oral consent."

This holding is a direct application of the *Loper Bright* framework. Rather than deferring to the FCC's longstanding regulatory distinction between telemarketing and informational calls, the court independently examined the statutory text and concluded that the agency's regulation imposed a requirement that Congress never enacted.

Implications for companies making outbound calls and texts

This decision opens a meaningful new defense for companies engaged in outbound calling and texting. Under the Fifth Circuit's reading of the TCPA, a company that has obtained any form of prior express consent—whether oral, implied from conduct, or written—has a viable defense to a TCPA claim, even if the calls at issue are telemarketing in nature.

In *Bradford*, the court found that the plaintiff had provided prior express consent by furnishing his cell-phone number when he entered into the service-plan agreement and by expressly stating that he gave the number so the company could reach him. The court further noted that Bradford confirmed during later conversations that Sovereign Pest could call him on his cell phone, never objected to the calls, and renewed his service-plan agreement four times—all of which supported a finding of express consent.

For companies that have historically relied on oral consent, implied consent through business relationships, or other non-written indicia of permission, this decision provides a potentially powerful shield against TCPA liability in the Fifth Circuit.

The fact-intensive nature of the consent inquiry and class certification

While *Bradford* represents a very positive development for TCPA defendants, it is important to recognize that the decision also underscores the highly fact-intensive nature of the consent defense. Whether a particular individual provided "prior express consent"—through oral statements, conduct, the provision of a phone number, or an ongoing business relationship—will

necessarily depend on the specific circumstances of that individual's interactions with the company.

This individualized inquiry has significant implications for class certification in TCPA litigation. Where written consent is the standard, the question of whether consent was obtained can often be resolved on a class-wide basis by examining a company's records for signed consent forms. By contrast, where oral or implied consent is sufficient, the inquiry becomes inherently particularized: Did this specific caller provide his or her phone number? Under what circumstances? Did the caller verbally authorize future contact? Did the caller object at any point? Did the caller take actions—such as renewing a contract or scheduling an appointment—that support a finding of ongoing consent?

These questions are unlikely to yield common answers across a putative class, and defendants should consider arguing that the individualized nature of the consent inquiry defeats the predominance and commonality requirements necessary for class certification. *Bradford* thus provides a potential basis not only for defeating individual TCPA claims but also for resisting class-wide adjudication.

That said, companies should be mindful that establishing non-written consent on an individualized basis is inherently more resource-intensive than pointing to a written consent record. Building a defense around oral or implied consent requires the ability to marshal provable facts—call logs, recorded conversations, contractual provisions, evidence of ongoing business relationships, and testimony regarding the circumstances under which phone numbers were provided. Companies should evaluate their existing record-keeping practices and consider whether their systems capture sufficient evidence to substantiate a consent defense on a case-by-case basis.

Key takeaways

The TCPA does not require written consent. The Fifth Circuit has held that the statute's reference to "prior express consent" encompasses both oral and written consent, for both telemarketing and informational calls. The FCC's regulation requiring written consent for telemarketing calls exceeds the statutory text.

This is a direct consequence of *Loper Bright*. The court reached this conclusion by independently interpreting the statutory text without deference to the FCC's regulatory framework—precisely the analytical approach mandated by the Supreme Court's decision in *Loper Bright*.

A new defense is available. Companies that obtained oral or implied consent for calls and texts now have a viable defense to TCPA claims in the Fifth Circuit, even for calls that constitute telemarketing.

The consent inquiry is individualized and fact-intensive. This creates both an opportunity and a challenge. On one hand, the individualized nature of the oral-consent inquiry can be leveraged to defeat class certification. On the other hand, establishing consent without written records requires significant factual development and supporting evidence.

Record-keeping is critical. Companies should review and strengthen their practices for documenting all forms of consent—including oral consent, phone number provision, and ongoing business relationships—to ensure they can substantiate a consent defense if challenged.

We will continue to monitor developments in this area, including whether other circuits adopt the Fifth Circuit's reasoning and whether the FCC takes any responsive action. Please do not hesitate to reach out to discuss how this decision may affect your outbound calling and texting practices.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Troy K. Lieberman
+1 617.345.1306
tlieberman@nixonpeabody.com