

# Call Me Maybe?: The New TCPA Position Announced by The Federal Communications Commission in *Nigro v. Mercantile Adjustment Bureau*

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As federal courts continue to grapple with the explosion of litigation brought by plaintiffs under the **Telephone Consumer Protection Act ("TCPA")**, the **Federal Communications Commission ("FCC")** is increasingly being called upon to address complex questions arising from the application of this analog statute to the digital world. The latest example is a brief *amicus curiae* filed by the FCC in ***Nigro v. Mercantile Adjustment Bureau, LLC***. In that case, Albert Nigro contacted a power company in New York to discontinue the service of his recently deceased mother-in-law and provided the company with his cell phone number in doing so. Thereafter, a debt collector (acting on behalf of the power company) called Nigro 72 times over a nine month period to collect on a \$67 delinquency that remained on his mother-in-law's account.

Nigro brought suit in federal court in the **Western District of New York**, alleging that, among other things, the debt collector violated the TCPA because it had not obtained his prior express consent to be contacted. The court granted the debt collector's motion for summary judgment, relying, in part, on the FCC's *1991 Rulemaking Order*, which stated that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."

Nigro subsequently appealed the district court's summary judgment ruling to the Second Circuit, which sought the FCC's view of whether the facts that Nigro (i) was not the consumer responsible for the debt and (ii) the "consent" given to the power company occurred in relation to the termination of the mother-in-law's account (not during the transaction that resulted in the debt owed) mattered for determining if his prior express consent had been obtained. In response, the FCC submitted a brief that concluded that the district court's analysis was faulty. Invoking its *2008 Clarification Order* – in which the FCC held that "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed" – the FCC concluded that Nigro had not given his prior express consent because he provided his cell phone number *after* his mother-in-law had incurred the debt at issue.

The position that the FCC put forward to the Second Circuit is noteworthy in light of language in an FCC decision earlier this year suggesting that the voluntary provision of a wireless number remained a valid method for obtaining prior express consent. *In the Matter of GroupMe, Inc./Skype Communications S.A.R.L, Petition for Declaratory Ruling*, CG Docket No. 02-278, FCC 14-33 (rel. Mar. 27, 2014). In its *GroupMe* decision, the FCC indicated that its 2008 Order made “clear that consent to be called at a number in conjunction with a transaction extends to a wide range of calls ‘regarding’ that transaction, even in at least some cases where the calls were made by a third party.” Based on *GroupMe*, it would have appeared that providing a number to cancel an account that had a remaining balance would qualify as prior express consent to calls to collect on the remaining balance. But in light of the position espoused by the FCC in *Nigro* – a position that is entitled to judicial deference going forward, see, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001) – that is less clear. And now what appeared to be a clear rule for companies to follow has been rendered far more nuanced and fact-intensive – and fraught with peril given the stiff penalties for missteps. As a result, companies must exercise caution in contacting wireless numbers because the voluntary provision of a wireless number by a consumer in connection with a certain transaction may not qualify as prior express consent under the TCPA depending on how broadly the “transaction” is understood.

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