

Circuit Courts Examine Prior Express Consent under the TCPA

Two recent circuit decisions, *Mais v. Gulf Coast Collection Bureau, Inc.*¹ and *Nigro v. Mercantile Adjustment Bureau, LLC*,² addressed the scope of prior express consent to receive autodialed and prerecorded calls to cell phones under the Telephone Consumer Protection Act (“TCPA”). The relevant portion of the TCPA prohibits:

any person . . . 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 telephone number assigned to a . . . cellular telephone service.³

Although they reach different conclusions about express consent in light of the unique facts in each case, both decisions rely on the Federal Communication Commission (“FCC”) ruling, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (“2008 FCC Ruling”), 23 FCC Rcd. 559 (2008).

Eleventh Circuit: Prior Express Consent

In *Mais*, the plaintiff’s wife listed his cell phone number on a hospital admission form and agreed to the hospital’s privacy practices when her husband sought treatment in the emergency room.⁴ Mais was subsequently treated by a hospital-based radiologist, Florida United Radiology, L.C. (“Florida United”) that forwarded Mais’ unpaid bill for radiological services to an affiliated debt collector, Gulf Coast Collection Bureau, Inc. (“Gulf Coast”).⁵ While attempting to collect the debt, Gulf Coast used a predictive dialer to call Mais’ cell phone between 15 and 30 times.⁶

Mais filed a class action against Florida United, Gulf Coast, and their parent company.⁷ After the district court granted Mais’ motion for partial summary judgment and rejected Defendants’ cross motion for summary judgment on the issue of prior express consent, the Eleventh Circuit accepted Gulf Coast’s interlocutory appeal.⁸

On appeal, the Eleventh Circuit held that, under the Hobbs Act,⁹ the 2008 FCC Ruling is only reviewable by an appellate court and that this ruling also covers medical debts.¹⁰ Applying the 2008 FCC Ruling to the medical debt at issue here, the court concluded that Mais did not need to give express consent directly to Florida United because his wife “made his number

¹ 768 F.3d 1110 (11th Cir. 2014).

² --- F.3d ---, 2014 WL 5286002 (2nd Cir. Oct. 15, 2014).

³ 47 U.S.C. §227(b)(1) (emphasis added).

⁴ *Mais*, 768 F.3d at 1113.

⁵ *Id.* at 1114.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1115-16.

⁹ 28 U.S.C. § 2342.

¹⁰ *Mais*, 768 F.3d at 1121-22.

available to Florida United by granting the Hospital permission to disclose it in connection with billing and payment.”¹¹ In reaching this conclusion, the court looked closely at the hospital’s privacy notice, which stated that “[w]e may also use and disclose health information . . . [t]o business associates we have contracted with to perform the agreed upon services and billing for it.”¹² Thus, the court held that Mais’ wife “specifically authorized the transfer of health information for billing purposes”¹³ and that, pursuant to the terms of the privacy policy, “health information” included Mais’ cell phone number.¹⁴

Second Circuit: No Prior Express Consent

In *Nigro*, the plaintiff called National Grid after his mother-in-law died in order to discontinue electrical service at her home.¹⁵ National Grid told Nigro that a phone number was necessary to disconnect service, so Nigro provided his cell phone number. Subsequently, in an effort to collect the \$68 balance left on his mother-in-law’s account, National Grid hired Mercantile Adjustment Bureau (“Mercantile”) to collect the debt.¹⁶ Nigro received 72 automated telephone calls from Mercantile in nine months.¹⁷

After Nigro filed suit, the district court granted summary judgment for Mercantile, concluding that Nigro consented to the calls by providing his number. The Second Circuit reversed, relying on the portion of the 2008 FCC Ruling that states:

prior express consent [for automated debt collection calls] is . . . granted only if the wireless number was provided by the consumer to the creditor, and . . . such number was provided during the transaction that resulted in the debt owed.¹⁸

The Second Circuit concluded that Nigro did not consent because: 1) he did not provide his number “during the transaction that resulted in the debt”; 2) he provided his number long after the original debt was incurred; and 3) he was not legally responsible for the debt.¹⁹ Because Nigro did not consent to the calls, they violated the TCPA.²⁰ In so holding, the Second Circuit reject Mercantile’s argument that Nigro had consented because he voluntarily gave his number to National Grid without expressly limiting the purposes for which the number could be used.

¹¹ *Id.* at 1123 (The court also held that consent could be provided through an intermediary.).

¹² *Id.* at 1124.

¹³ *Id.* at 1125 (The .

¹⁴ *Id.*

¹⁵ *Nigro*, 2014 WL 5286002, at *1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 23 FCC Rcd. 559 ¶ 10.

¹⁹ *Nigro*, 2014 WL 5286002, at *2.

²⁰ *Id.*