

Class Action Alert

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Telemarketers Dial Quickly - TCPA Class Action Dismissed For Now

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On March 12, 2013, Judge William F. Kuntz II of the Eastern District of New York entered a memorandum and order in *Bank v. Independence Energy Group LLC*, which *sua sponte* dismissed claims arising under the Telephone Consumer Protection Act, and its accompanying rules and regulations, (collectively, the "TCPA") for lack of subject matter jurisdiction. Citing Second Circuit precedents, the Court held that state courts have exclusive jurisdiction over private actions brought under the TCPA, and that of the New York Civil Practice and Rules (the "CPLR") bars TCPA class actions in the federal courts. Specifically, the Court found that, by its terms, the TCPA creates a private right of action only "if otherwise permitted by the laws or rules of a State," but that New York's CPLR prohibits class actions predicated on statutory damages. *Bank v. Independence Energy Grp. LLC*, No. 1:12-cv-1369 (WFK), slip op. at 3 (E.D.N.Y. Mar. 12, 2013).

New York telemarketers should not rev up their auto-dialers just yet, however. The decision lacks any discussion of the Supreme Court's decision in *Mims v. Arrow Financial Services, LLC*, which held that federal and state courts have concurrent jurisdiction over private actions brought under the TCPA. ("We find no convincing reason to read into the TCPA's permissive grant of jurisdiction to state courts any barrier to the U.S. district courts' exercise of the general federal-question jurisdiction they have possessed since 1875."). We expect that plaintiff will seek reconsideration of the decision and/or appeal to the Second Circuit, based on the *Mims* decision.

Plaintiff's Claims and Defendants' Motion to Dismiss

Plaintiff Todd Bank is an attorney who has previously represented parties asserting TCPA claims, including in both of the cases that were upheld in a Second Circuit decision cited by the court.¹ Representing himself in this action, Plaintiff alleged that the defendants placed one call, using an artificial or pre-recorded voice, to his residential telephone line, advertising the defendants' electricity-related services. According to his complaint, the defendants also placed calls to at least 10,000 other residential telephone lines within the TCPA statutory period, all of which conveyed an identical or nearly identical message to the one Bank received. No. 1:12-cv-1369 (WFK), slip op. at 2. Bank claimed that neither he nor any other member of the putative class had expressly invited or permitted the defendants to place pre-recorded phone calls to them and that defendants therefore violated the TCPA.

On behalf of the putative class, Bank sought statutory and double damages, and an order enjoining the defendants from further violating the TCPA. The complaint alleged that federal question jurisdiction existed under 28 U.S.C. § 1331. *Id.*

Defendants moved to dismiss the complaint, for failure to state a claim, under Federal Rule 12(b)(6). According to the defendants, the TCPA proscribes the initiation of pre-recorded calls to "residential telephone line[s]," but not calls to home business lines. Attendant FCC regulations do not extend any further protections to businesses; home-business lines do not enjoy the same protections as residential telephone lines. Because Bank used the telephone line at issue for business purposes (his legal practice), the defendants argued, he could not assert a claim under the TCPA.²

The Court's Jurisdictional Analysis

The Court began its jurisdictional analysis by noting that federal courts are courts of limited jurisdiction. As such, the absence of subject matter jurisdiction cannot be waived, and may be raised at any time by any party—or by the federal court *sua sponte*. *Id.* Such was the case here: the parties had not addressed the issue of federal jurisdiction in their briefing on the motion to dismiss.

The Court noted Second Circuit cases holding that the CPLR prohibits TCPA actions in federal court. Indeed, the court found that Second Circuit precedent "unequivocally" holds that "state courts have exclusive jurisdiction over private actions under the TCPA and...that, pursuant to 28 U.S.C. § 1331, federal courts lack federal question jurisdiction over such claims." No. 1:12-cv-1369 (WFK), slip op. at 3

(citing *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006)).

In view of this binding precedent, the Court held, Bank's putative class action seeking statutory damages under the TCPA could not proceed. No. 1:12-cv-1369 (WFK), slip op. at 3.

No Mention of *Mims*

The decision does not mention the U.S. Supreme Court's recent decision in *Mims v. Arrow Financial Services, LLC*. In a unanimous opinion authored by Justice Ginsburg, the *Mims* court held that federal question jurisdiction over private actions to enforce the TCPA is proper under 28 U.S.C. § 1331.

In fact, the Supreme Court granted certiorari in the *Mims* case specifically to "resolve a split among the Circuits as to whether Congress granted state courts exclusive jurisdiction over private actions brought under the TCPA," citing one of the Second Circuit cases upon which *Independence Energy* is based.³ The Supreme Court held that "Congress did not deprive federal courts of federal-question jurisdiction over private TCPA suits."

Will Plaintiff Redial?

While the *Independence Energy* decision may be distinguishable from *Mims*, it is not evident why on the face of the decision. *Mims* emphasized the primacy of federal courts enforcing federal law, and the desire for uniform enforcement. One possible way to harmonize the decisions would be that *Independence Energy* implicitly held that *Mims* did not overrule the Second Circuit precedent upon which *Independence Energy* turns. Assuming plaintiff seeks reconsideration or appeal of this decision, it will be interesting to see whether judicial consideration of *Mims* alters the outcome in *Bank*. For now, at least, in the Eastern District of New York, the *Independence Energy* decision may revitalize a critical jurisdictional question that had seemingly been put to rest.

If you have any questions regarding this case or this alert, please contact one of our authors or any member of [Venable's Class Action Defense Group](#).

¹ No. 1:12-cv-1369 (WFK), slip op. at 4 n.1 (citing *Holster III v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010)).

² Among other places, Bank used the telephone number in the signature block of his complaint and in the summons, and listed it on his attorney registration with the New York State Unified Court System and in the Business Yellowbook. *Id.* at 6-7.

³ See 132 S.Ct. at 747 (citing, among others, *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 434 (2d Cir. 1998); *Independence Energy Grp. LLC*, No. 1:12-cv-1369 (WFK), slip op. at 3 (same)).