

## A Question Worth Answering Under the Telephone Consumer Protection Act: U.S. Supreme Court to Hear Whether the TCPA Contemplates Suits in Federal Courts

Author: Judith L. Harris, Partner, Washington, D.C.

Author: Amy S. Mushahwar, Partner, Washington, D.C.

**Publication Date: July 08, 2011**

There is no question that Congress contemplated a private right of action under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(3), and the plaintiffs' bar has taken full advantage of that right. It has been less clear, however, which courts have jurisdiction over such suits. The U.S. Supreme Court recently granted certiorari on this very issue in *Mims v. Arrow Financial Services*.

### Background

Under Section 227 of the TCPA, a person "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State..." an action for a TCPA violation. *Id.* (emphasis added). The statute is silent, however, regarding whether, in granting jurisdiction to state courts under certain conditions, Congress meant to divest U.S. district courts of their federal question jurisdiction and bar the filing of such suits in federal courts.

The Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have all held that federal courts lack federal question jurisdiction over TCPA private actions. See,

- *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432 (2nd Cir. 1998) (holding state courts have exclusive jurisdiction over a cause of action created by the TCPA)
- *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998) (holding Congress intended to refer private litigants under the TCPA to state court, and to preclude federal question jurisdiction)
- *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997) (holding state courts have exclusive jurisdiction over TCPA private actions)
- *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997) (holding Congress granted state courts exclusive subject matter jurisdiction over TCPA private actions)
- *Murphy v. Lanier*, 204 F.3d 911 (9th Cir. 2000) (holding state courts have exclusive jurisdiction over a private cause of action created by TCPA)

- *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998), modified, 140 F.3d 898 (11th Cir. 1998) (holding Congress intended to assign the TCPA private right of action to state courts exclusively)

On the other hand, the Sixth and Seventh Circuits have ruled that federal courts do have federal question jurisdiction over private TCPA suits. See,

- *Charvat v. Echostar Satellite, LLC*, 630 F.3d 459 (6th Cir. 2010) (holding federal district courts have subject matter jurisdiction over TCPA private actions)
- *Brill v. Countrywide Home Loans Inc.*, 427 F.3d 446 (7th Cir. 2005) (holding state courts do not have exclusive jurisdiction over TCPA private actions)

### ***Mims v. Arrow Financial Services***

Enter plaintiff Marcus Mims...and, ultimately, the U.S. Supreme Court. Mims sued in federal court in Florida under the TCPA private right of action provision after he allegedly received multiple calls to his cell phone from a student loan debt collector who used an autodialer to place the calls and left prerecorded voicemail messages. The court, however, decided it lacked federal question jurisdiction to hear the case and dismissed it. The dismissal was affirmed by the Eleventh Circuit. Mims petitioned for certiorari, which the Court granted June 27. *Mims v. Arrow Financial Services*, No. 10-12077, 2010 U.S. App. LEXIS 24622 (11th Cir. 2010), cert. granted, 79 U.S.L.W. 3727 (U.S. June 27, 2011) (No. 10-1195).

While in his cert petition Mims discussed common grounds for granting certiorari, such as the split among the federal circuits and the high volume of federal cases that have grappled with this jurisdictional issue (according to Mims, 19 district court cases between 2010 and 2011 alone), he also invoked two of the Justices' own prior opinions on TCPA jurisdiction. Both Justices Alito and Sotomayor, before joining the Court, had ruled on cases deciding TCPA jurisdiction; Justice Alito had actually agreed with Mims' position that federal courts should have federal question jurisdiction over TCPA private actions. *ErieNet, Inc.*, 156 F.3d at 521 (3rd Cir. 1998) (Alito, J. dissenting). Justice Sotomayor authored a Second Circuit opinion that concluded that federal courts could hear TCPA private actions through diversity jurisdiction (where the parties are citizens of different states and the amount in controversy is greater than \$75,000). *Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2nd Cir. 2006).

Mims' petition discusses several other problems - from a plaintiff's perspective - with the majority interpretation of § 227(b)(3) of the TCPA as divesting federal courts of federal question jurisdiction. Mims argues that such an approach leaves the state courts with great power to interpret federal law and to oversee an issue that has national scope. Mims' second issue goes back to the statutory language of the TCPA. A private TCPA action can only be brought in a state court if it is "permitted by the laws or rules of court of a State." A state could theoretically, and several already do, prohibit private TCPA actions.

Mims makes a number of brief arguments as to why the majority approach (federal courts lack federal question jurisdiction) is legally wrong on its merits. These arguments have been invoked and dismissed in a number of cases that have concluded that federal courts lack jurisdiction to hear TCPA private actions. These arguments include:

- The majority approach ignores the plain language of the statute creating federal question jurisdiction. 28 U.S.C. § 1331. The TCPA private right of action is a civil action that "aris[es] under the Constitution, laws, or treaties of the United States." While Mims argues that the TCPA is a federally created law, and without it there would be no private right of action, Mims fails to take into account that federal courts are courts of limited jurisdiction and that Congress can limit jurisdiction as it sees fit.
- The majority approach drew the wrong inference when comparing the private right of action with the TCPA's grant of authority to the states to sue in federal courts for TCPA violations. When a state attorney general sues for a TCPA violation, the statute explicitly states that the federal courts have exclusive jurisdiction, 28 U.S.C. § 227(f)(2), while the same statute says only that a private party "may...bring [an action] in an appropriate court of that State." Mims argues the term "may" permissively grants state courts jurisdiction and does not divest federal question jurisdiction from the federal courts.
- Congress only spoke of state court jurisdiction in the private right of action section so as not to create the impression that only federal courts had jurisdiction over private claims. In other words, the statute was supposed to make sure state and federal courts had concurrent jurisdiction. However, state courts generally already have concurrent jurisdiction: State courts can hear claims arising under federal laws without any explicit authorization from Congress. Interpreting § 227(b)(3) of the TCPA as Mims does would make the statute's language redundant.

Arguments in *Mims v. Arrow Financial Services* will not take place until the Supreme Court reconvenes for its 2011 Term in October. As the petition and grant of certiorari highlights, telephonic marketing is still on the national agenda. In addition to potentially increasing the number of forums in which TCPA private actions could be brought, the case could also provide a forum for the plaintiffs' bar to generate interest among consumers in pursuing TCPA claims. For



organizations that abide by TCPA regulations, examining the impact *Mims v. Arrow Financial Services* could have on your business could be worth the time.

### About Reed Smith

Reed Smith is a global relationship law firm with more than 1,600 lawyers in 22 offices throughout the United States, Europe, Asia and the Middle East.

The information contained herein is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained herein as if it were legal or other professional advice.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Reed Smith Richards Butler. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website <http://www.reedsmith.com/>.

© Reed Smith LLP 2011. All rights reserved.