

Class Action Alert

May 2, 2013

Redial Unsuccessful - TCPA Claims Still Unavailable in New York

Plaintiffs still cannot dial up TCPA claims in New York.

On May 1, 2013, Judge William F. Kuntz, II of the Eastern District of New York denied a motion to reconsider his earlier decision dismissing claims arising under the Telephone Consumer Protection Act and its accompanying rules and regulations for lack of subject matter jurisdiction. *See Bank v. Independence Energy Grp. LLC*. The *Bank* Court had dismissed the TCPA claims in reliance on a Second Circuit precedent, which interpreted the TCPA to bar claims in New York federal court because New York State's civil procedure rules do not permit statutory class actions. *See Holster III v. Gatco, Inc.*

In denying the motion to reconsider, *Bank* addressed an issue not covered in its prior decision, and held that the Second Circuit's *Holster III* decision was still good law after the Supreme Court's subsequent decision in *Mims v. Arrow Financial Services, LLC*. *Mims* had held that federal and state courts have concurrent jurisdiction over private actions brought under the TCPA. The *Mims* decision contains language that would appear to undermine *Holster III*, for example: "Congress did not deprive federal courts of federal-question jurisdiction over private TCPA suits." *Bank* found that such language was dicta, noting that the issue in *Mims* was whether TCPA claims could be brought in state court, not whether they could be brought in federal court. The *Bank* Court also found that the statutory interpretations in *Mims* and *Holster III* did not conflict. For these and other reasons, *Bank* concluded that *Holster III* remains the law in the Second Circuit until further notice.

The *Bank* plaintiff has stated publicly that his next call is to the Second Circuit. Stay on the line for further developments.

If you would like to read our client alert on the initial decision dismissing the TCPA claims, [click here](#).

If you have any question regarding this alert or our alert on the initial decision dismissing the TCPA claims, feel free to contact the authors or any member of our [Class Action Defense Practice Group](#).

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