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Second Circuit Answers Call from TCPA Plaintiff

After two failed calls in the Eastern District of New York, the Second Circuit last week opened the line for one TCPA plaintiff to plead his case.

On March 12, 2013, Judge William F. Kuntz II of the Eastern District of New York sua sponte dismissed putative class action 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 Group LLC*. Relying on Second Circuit precedents, the Court held that state courts have exclusive jurisdiction over private actions brought under the TCPA, and that New York's procedural rules bar TCPA class actions in the federal courts. In what appeared to be a missed call, Judge Kuntz did not discuss the Supreme Court's more recent decision in *Mims v. Arrow Financial Services, LLC*, which held that federal and state courts have concurrent jurisdiction over such actions. In later denying a motion for reconsideration, however, the Bank court said there was no connection: the *Mims* language was merely dicta, and the law in the Second Circuit remained unchanged.

Plaintiff got better reception on appeal. In a *per curiam* opinion issued on December 3, the Second Circuit vacated the March 12 judgment of the District Court and held that "Federal Rule of Civil Procedure 23, not state law, governs when a federal TCPA suit may proceed as a class action." Reviewing the underlying dismissal de novo, the appellate court noted that its most recent TCPA decisions expressly recognized that *Mims* had "uprooted" existing Second Circuit precedent. The District Court's dismissal had come after *Mims*, but before the Second Circuit cases that acknowledged its abrogative effects.

The Second Circuit's message now seems crystal clear: federal courts should evaluate TCPA claims under federal, and not state, rules.

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