

## Client Alert.

---

January 18, 2012

# Supreme Court Opens the Federal Court Doors to TCPA Claims

By Tiffany Cheung

Today, the United States Supreme Court issued an opinion regarding the proper forum for cases arising under the increasingly popular Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. Before today, the majority of circuits considering the issue had found that private actions brought under the TCPA could be brought only in state court. In *Mims v. Arrow Financial Services, LLC*, 565 U.S. \_\_\_\_ (2012), the Supreme Court resolved the circuit split and held that state and federal courts have concurrent jurisdiction over private actions brought under the TCPA. Defendants now have expanded opportunities to remove TCPA claims to federal court.

### BACKGROUND ON THE TCPA

In enacting the TCPA, Congress sought to protect the public from certain telemarketing activities. Focusing on the TCPA's provisions for consumers, the Act generally prohibits, among other things, automatically-dialed calls or artificial or prerecorded messages to cell phones without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A). The Act also generally prohibits using artificial or prerecorded voice messages to call residential phone lines without prior express consent and sending unsolicited advertisements to fax machines. *Id.* §§ 227(b)(1)(B), 227(b)(1)(C). With the expansion of marketing and debt collection efforts through calls and text messages to consumers, plaintiffs have seized on the TCPA as their claim of choice to leverage the significant statutory penalties that may be imposed for proven violations of the Act.

### TODAY'S SUPREME COURT'S DECISION

Today's unanimous Supreme Court opinion makes clear that both federal and state courts have jurisdiction over private suits arising under the TCPA. Although the TCPA expressly states that a private right of action may be brought in state court, the Act's permissive grant of jurisdiction to state courts does not mean that state court jurisdiction is exclusive. Given the absence of any language demonstrating that Congress intended to vest jurisdiction "only" in state court or "exclusively" in state court, federal-question jurisdiction for claims arising under federal law remains intact. Because "federal law creates the right of action and provides the rules of decision" for TCPA claims, such claims plainly arise under the laws of the United States. Thus, TCPA claims may be pursued in federal court based on federal-question jurisdiction under 28 U.S.C. § 1331.

### IMPACT OF TODAY'S DECISION

After today's decision, defendants can no longer successfully argue that a TCPA claim filed in federal court must be dismissed because the TCPA confers exclusive jurisdiction on the state courts. The decision, however, likely will not significantly impact defendants' ability to defend against TCPA claims. Even when a defendant could successfully move to dismiss for lack of subject matter jurisdiction, that dismissal may not have ended the case in light of plaintiffs' ability to refile cases in state court (absent any statute of limitations defenses). Moreover, the vast majority of TCPA cases filed in

## Client Alert.

---

federal court have been filed as putative class actions. For class actions filed pursuant to the TCPA, defendants may have preferred the procedural rules in federal court, and thus, abstained from playing the subject-matter-jurisdiction card if it would simply lead to defending the case in state court.

The real impact of today's decision is the increased opportunity for removal to federal court. Before today, in several circuits, defendants could remove TCPA actions filed in state court only if the requirements for diversity jurisdiction, either under 28 U.S.C. § 1332(a) or the Class Action Fairness Act ("CAFA"), could be satisfied. To support a removal based on diversity jurisdiction, among other things, the requisite amount-in-controversy had to be established. After today's decision, defendants now have expanded opportunities to remove pursuant to diversity and/or federal question jurisdiction. Prepare for an uptick in TCPA actions litigated in federal court.

To view the Court's decision, please click [here](#).

### Contact:

**Tiffany Cheung**

(415) 268-6848

[tcheung@mofo.com](mailto:tcheung@mofo.com)

**Dan Marmalefsky**

(213) 892-5809

[dmarmalefsky@mofo.com](mailto:dmarmalefsky@mofo.com)

### About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*