Can You Hear Me Yet?: The Right of Irritated Consumers to Sue in Federal Court Under the Telephone Consumer Protection Act

CASE AT A GLANCE

In this appeal, the U.S. Supreme Court will decide whether consumers have a right to sue in federal court for violations of the Telephone Consumer Protection Act, or whether consumer remedies are confined solely to state courts.

Mims v. Arrow Financial Services, LLC
Docket No. 10-1195

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From: The Eleventh Circuit

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ISSUE

Did Congress, in creating a private right of action for violations of the Telephone Consumer Protection Act, confer jurisdiction on state courts and divest federal courts of federal question jurisdiction over such claims? Or, may plaintiffs bypass state courts and sue in federal court?

FACTS

Arrow Financial Services (Arrow) is a debt collection agency that placed several calls to Marcus D. Mims's cell phone in its efforts to collect on a delinquent debt allegedly owed by Mims. Arrow used an auto-dialer and placed these calls without Mims's prior consent. In August 2009, Mims filed a lawsuit in the federal district court for the Southern District of Florida, alleging violations of the Telephone Consumer Protection Act (TCPA), the Fair Debt Collection Practices Act, and the Florida Consumer Collection Practices Act. The latter two claims were dismissed and are not involved on appeal to the Supreme Court. Mims asserted that under 28 U.S.C. § 1331 (the "federal question" jurisdiction statute), the federal court had proper federal question jurisdiction over his TCPA complaint about Arrow's alleged abusive robocalls.

In 1991, Congress enacted the Telephone Consumer Protection Act to address voluminous citizen complaints about the abuses of telephone and Telecopier technology. In particular, Congress sought to address complaints about auto-dialing technology that clogged phone lines with unwanted and unsolicited "robocalls," abusive telemarketing practices, prerecorded messages, and "junk faxes" that often interfered with the transmission of legitimate messages. In enacting the legislation, Congress noted that residential telephone subscribers were outraged over the proliferation of such intrusive calls to their homes from telemarketers, and viewed these calls as a nuisance and invasion of privacy.

Prior to the 1991 enactment of the TCPA, more than 40 states had enacted restrictions on abusive or invasive telecommunication practices, with violations of state law subject to state enforcement. In order to evade these intrastate restrictions, many companies merely moved the site of their operations to another state and continued their abusive practices from across state lines. The enactment of the TCPA was spurred by a congressional desire to fill this gap in consumer protection and enforcement remedies.

The TCPA outlaws four practices: (1) using automatic dialing equipment, prerecorded messages, or artificial voices to call emergency telephone lines, hospital rooms, mobile phones, or any service charged to a receiving party, (2) making nonemergency calls using prerecorded messages or artificial voices to residential phone lines without prior consent, (3) sending unsolicited faxes without a preexisting business relationship, and (4) using auto-dialers to tie up multiple telephone lines of a commercial establishment. See 47 U.S.C. § 227(b)(1). The statute also authorized the Federal Communications Commission (FCC) to establish a regulation mandating "do not call protection" for residential telephone subscribers who wished to avoid commercial solicitation calls. 47 U.S.C. § 227(c).

The TCPA provides several enforcement mechanisms for violations. First, state attorneys general may bring actions against alleged violators; the statute specifically provides that federal courts shall have exclusive jurisdiction over state AG actions. State AGs may seek both injunctive relief as well as statutory damages on behalf of individuals who receive calls or faxes in violation of the statute. The FCC may participate in such state AG enforcement actions, but also independently may seek enforcement of the TCPA. 47 U.S.C. § 227(f)(1)–(3), (7).

In addition to state AG and FCC enforcement, the TCPA also creates a private right of action for citizens. Thus, a consumer who believes

that he or she has been a victim of a prohibited telecommunications practice can bring an action seeking an injunction as well as actual or statutory damages of $500 per violation, or up to $1,500 per willful or knowing violation. The TCPA states that such an action "may, if otherwise permitted by the laws or rules of court of a State," be brought "in an appropriate court of that State." 47 U.S.C. § (b)(3).

Mims filed his TCPA complaint against Arrow in federal court rather than state court. He invoked the district court's jurisdiction under 28 U.S.C. § 1331, the so-called "federal question" jurisdiction statute. Relying on Eleventh Circuit precedent holding that federal courts lacked jurisdiction over TCPA claims, Arrow moved to dismiss. See *Nicholson v. Hooters of Augusta, Inc.,* 136 F.3d 1287 (11th Cir.), modified, 140 F.3d 898 (11th Cir. 1998). Relying on Eleventh Circuit precedent and the settled law of five other circuits, the district court agreed and dismissed Mims's TCPA claim for a lack of subject matter jurisdiction. The Eleventh Circuit affirmed on appeal in a short per curiam decision, citing its prior *Nicholson* decision.

CASE ANALYSIS

The appeal in *Mims* focuses on the statutory language of the TCPA that provides "A person or entity may, if otherwise permitted by the laws of rules of a State, bring an action in an appropriate court of that State." The statutory language is unclear on its face concerning which courts (either state or federal) have appropriate jurisdiction of private rights of action brought under the TCPA. Thus, the nub of the issue is whether this language requires private TCPA lawsuits to be brought in state court only, thereby divesting federal courts of jurisdiction to adjudicate private rights of action. Or, alternatively, the Court may determine that the statutory language permits individuals to bypass state courts and pursue their relief for TCPA violations in federal court.

The debate in *Mims* centers on whether federal courts have federal question jurisdiction under 28 U.S.C. § 1331, enacted in 1875. This statute provides that the federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Because the litigation does not involve either the Constitution or a treaty, a federal court can have "arising under" jurisdiction in *Mims* only if the TCPA (a federal law) is interpreted to confer subject matter jurisdiction on the federal courts.

While § 1331 provides a broad jurisdictional grant to federal courts, the jurisprudence has also recognized that federal courts are courts of limited jurisdiction. Since 1980, and unlike federal diversity actions, federal question claims may be asserted without having to satisfy a jurisdictional amount in controversy. In eliminating the amount-in-controversy requirement for federal question claims, Congress indicated that federal courts should have the primary responsibility for deciding all questions of federal law.

Federal statutes vary in the language used to confer subject matter jurisdiction on federal courts, and well-established principles govern interpretation of statutory mandates. For example, some statutes specifically confer *exclusive* jurisdiction on federal courts, indicating that substantive claims for violations of the law may only be brought in federal court and not in state court. Other statutes contain language indicating that substantive claims for violation of the law may be brought in *either* federal or state court—this is conventionally known as "concurrent jurisdiction." Furthermore, it is well-settled federal jurisprudence that where a federal statute is silent concerning subject matter jurisdiction, then both federal and state courts may exercise concurrent jurisdiction. Finally, it is equally well-established that state courts are competent to hear claims created by federal statutes, if the courts have concurrent jurisdiction and the parties agree to have a federal claim adjudicated in state court.

The TCPA presents the court with a somewhat unique problem of interpretation because it is not clear on the face of the statutory language whether TCPA creates exclusive jurisdiction in state courts, or concurrent jurisdiction in state and federal courts. Moreover, it is unclear whether the TCPA's statutory language provides valid "arising under" jurisdiction of 28 U.S.C. § 1331. Because the TCPA is silent concerning federal jurisdiction, *Mims* involves complicated problems of statutory construction and legislative intent centering on whether the TCPA "creates" a federal claim for adjudication in federal court.

Since its enactment in 1991, federal courts of appeals have divided over whether the TCPA provides federal question jurisdiction under 28 U.S.C. § 1331. Six Circuits—the Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits—have held that the forum provision in the TCPA does not confer federal question jurisdiction on federal courts and therefore private TCPA claims must be brought in state court. The Sixth and Seventh Circuits, in contrast, have concluded that the TCPA jurisdictional language does not divest federal courts of federal question jurisdiction under 28 U.S.C. § 1331. Further muddying the TCPA problem, a Third Circuit panel in 2011 divided three ways on the jurisdictional meaning of the TCPA language. As a consequence, the Third Circuit has granted a rehearing en banc.

In addition to the circuit split, all federal courts have concluded that they have good diversity jurisdiction to hear TCPA violations. See 28 U.S.C. § 1332. Thus, cases involving a plaintiff and defendant from different states and an amount in controversy exceeding $75,000 may be brought in federal court.

The TCPA's legislative history has played an influential role in lower court interpretations of the jurisdictional provision. In particular, courts have relied heavily on the statement by the bill's sponsor, Senator Ernest Hollings, who indicated: "Nevertheless it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court."

On appeal, Mims presents both statutory construction and policy arguments in favor of federal court jurisdiction. Mims argues that there is valid federal question jurisdiction over TCPA claims because when federal law creates a right of action and provides the substantive rules of decision for the action, then the claim arises under federal law. The TCPA, Mims argues, creates a private right of action and contains various detailed substantive provisions for compliance. Consequently, there is valid federal question jurisdiction under § 1331, unless Congress has withdrawn that jurisdiction by statute. Mims further argues that the Court has held that even where state law creates a right of action, if that claim requires the resolution of contested and substantial issues of federal law that are essential to the plaintiff's claim, then the case may arise under § 1331 federal question jurisdiction.

The decisive question in this case, Mims argues, is whether the terms of a statute divest the district courts of their authority under § 1331.

There is no language in the TCPA, Mims points out, that manifests a Congressional intention to divest federal courts of their jurisdiction under § 1331. The TCPA's provision creating a private right of action does not purport to address federal court jurisdiction at all.

Mims suggests that interpreting the TCPA to preclude federal jurisdiction is not necessary to effectuate the statute's reference to state court jurisdiction. Instead, the language Congress used in the TCPA eliminates any possibility that the TCPA could be read to make federal jurisdiction over private rights of action *exclusive*. The TCPA's authorization of state court litigation is *permissive* and not mandatory. Moreover, the TCPA nowhere states that an action must be brought in state court, and it contains no language making state court jurisdiction exclusive, or otherwise ousting federal courts of their concurrent jurisdiction over federal claims under § 1331. In addition, the TCPA jurisdictional provision should be read to mean that states may not discriminate against federal causes of action.

Mims also urges policy reasons in support of exercising federal question jurisdiction over TCPA claims. Mims points out that Congress enacted the TCPA to protect citizens against abusive telecommunications practices and invasions of privacy, which embody important federal interests. These important federal interests would be impaired or impeded if consumers were forced to rely on the good graces of state courts to enforce these federal interests. Congress did not intend that citizens would have to rely on the availability of state courts, or the accident of diversity jurisdiction, to provide effective remedies to combat abusive telemarketing practices. Thus, precluding federal court jurisdiction would undermine the policies of the TCPA. Moreover, the Court has held on several occasions that federal courts have an interest in the uniform interpretation of federal statutes that is significant enough to preclude concurrent jurisdiction.

Mims further argues it is anomalous to open federal courts to TCPA claims based on diversity jurisdiction, while closing the courthouse doors to individuals who seek a federal forum under § 1331. In this view, there is no reasonable basis for holding that federal courts should give preferential treatment to diversity cases over federal question cases.

Finally, Mims argues that the Court should not rely on the TCPA's legislative history to override a congressional grant of jurisdiction to federal courts. Mims suggests that reliance on legislative history to find a clear indication of congressional intent is highly suspect when the statutory language itself does not even address federal jurisdiction. Furthermore, the TCPA legislative history reflects only the views of a single member of Congress and contains no clear suggestion that the TCPA was intended to embrace state court jurisdiction exclusively.

In response, Arrow contends that the TCPA's private right of action appears to be uniquely state-law centered. Thus, the TCPA jurisdictional provision is an innovative approach to creating a federal claim that operates like state law and provides an example of cooperative federalism—of Congress helping the states to help themselves. Moreover, Arrow argues that the TCPA right of action is not like any other cause of action created by federal law, as Mims suggests.

The heart of Arrow's argument is that the text, structure, legislative history, and purpose of the TCPA confirm that Congress intended private TCPA actions to be brought in state court "where permitted by state law." In contrast, Congress did not intend for plaintiffs to simply bypass state court and gain access to federal court by invoking federal question jurisdiction under § 1331.

Thus, Arrow argues that all available evidence suggests that Congress believed that private TCPA actions, with damages set at $500, would be appropriate for state small claims court. Congress intended for the TCPA to deal with the problem of telemarketers evading state prohibitions through interstate operation.

Construing the statutory language of the TCPA jurisdictional provision ("A person or entity *may, if otherwise permitted by the laws or rules of a State* . . ."), Arrow contends that the way in which Congress qualified the word *may* makes the private right of action uniquely state-court focused. Thus, Congress's decision to expressly condition the private right of action not only on state law but also on the state rules of court, underscores that Congress intended state courts to play an indispensable role in shaping the private right of action. Arrow urges that the limiting use of the word *may* counsels strongly in favor of reading the TCPA as requiring any claims to be brought in state courts, and in state courts alone.

Arrow further argues textually that there was no reason for Congress to go out of the way to frame the TCPA as a private right of action in terms of state law and state courts, unless Congress meant the references to state law and courts to limit the private right of action. To read the statute to authorize federal court jurisdiction would render this language superfluous, and for all practical purposes gratuitous. Moreover, Congress's focus on state law and state courts is entirely consistent with its objective in enacting the TCPA, which was to supplement state law where there were perceived jurisdictional gaps. Thus, Arrow argues that the Court should adopt the interpretation of the TCPA that gives effect to the entire text of the law Congress enacted to address a genuine problem.

Apart from the statute's text, Arrow asserts that the legislative history strongly indicates that Congress did not have in mind just state court forums. Citing Senator Hollings's testimony, Arrow argues that the legislative history manifests congressional preference for channeling TCPA claims into state small claims courts to ensure that the relatively small damages available for violations would not be swallowed by the cost of litigation.

Arrow also advances various policy arguments in support of its thesis that would limit jurisdiction over TCPA claims to state court. Arrow suggests that if the court interprets the TCPA to allow federal court jurisdiction, this then would permit defendants to force consumers into more costly federal court litigation by removing actions filed in state court. Given the small stakes in most TCPA cases, then, defendants could use access to federal jurisdiction under § 1331 to defeat TCPA claims because consumers might conclude that litigating in federal court was not worth it.

Furthermore, confining private TCPA claims to state court is consistent with the enormous potential volume of such claims. According to Arrow, there is no reason to believe that Congress intended to subject federal courts to a flood of private $500-per-violation claims. Moreover, Arrow asserts that by providing for separate enforcement by state attorneys general in federal court, Congress recognized that this federal enforcement mechanism would not impose as significant a burden on states as it would be on private litigants.

Additionally, Arrow argues that congressional intent to keep TCPA cases in state court is further indicated by the fact that Congress has amended the TCPA several times between 1992–2010. During this period, Congress was well aware that numerous federal courts had interpreted the TCPA's jurisdictional provision to require TCPA claims be pursued in state court. Consequently, Congress had many opportunities to modify or alter the TCPA's jurisdictional language, but it chose not to. Therefore, Congress should be presumed to have ratified the prevailing—until recently—and uniform view of federal courts.

Arrow suggests that adopting Mims's view that the TCPA affords a private right of action in federal court would divest states of the authority that Congress granted to them to determine whether private TCPA claims should be permitted by the laws or rules of state courts. This position would be inconsistent with Court precedents narrowly construing private rights of action. And finally, Arrow argues that judicial recognition that TCPA claims may be pursued under federal court's diversity jurisdiction is not inconsistent with holding that federal question jurisdiction does not exist. In this view, Congress intended private TCPA claims to be treated the same as other state law claims for the purposes of diversity jurisdiction.

SIGNIFICANCE

The *Mims* appeal is significant because it deals with the fundamental rights of private litigants to have access to federal courts. Mims, who is represented by counsel at the Public Citizen Litigation Group, is arguing for the broadest interpretation of the TCPA in order for aggrieved consumers to be able to pursue enforcement and relief in federal courts. To date, federal courts in six circuits have closed the federal court doors to TCPA claims brought by private citizens. The Court will have to resolve the conflict raised by the two circuits that have concluded that the TCPA does afford a private right of action under federal question jurisdiction.

Arrow, on the other hand, desires to cabin TCPA cases in state court, and incidentally, to cabin the $500-per-violation remedy to small claims courts. Buried in a footnote in Arrow's brief is the lurking concern of many corporate defendants who have been and might be subject to TCPA claims: that alleged TCPA violations can balloon into class action litigation, with potentially catastrophic damages. Many states have already taken different positions concerning whether TCPA actions may be pursued in the form of a class action. On the other hand, many states have concluded—based on the same legislative history—that the TCPA contemplates litigation in state small claims courts, and not in the form of class actions.

Because the TCPA statutory language is facially unclear about whether it confers exclusive state jurisdiction or concurrent federal-state jurisdiction, the Court is likely to resolve the issue based on an array of canons of statutory construction. One may expect a careful parsing of the jurisdictional language, including the meaning of how the subjunctive clause following the word *may* signifies—or not—exclusive state court jurisdiction. Moreover, it is fairly predictable that Justice Scalia will eschew arguments from legislative history as a means of diving congressional intent, especially based on the single statement of Senator Hollings.

The Court also may address the anomaly that TCPA cases currently can be brought in federal court under diversity jurisdiction. Because diversity cases must satisfy a $75,000 amount-in-controversy requirement, the federal courts may not to date have had to adjudicate a large number of TCPA cases in their diversity jurisdiction. It remains to be seen, then, whether the Court opening the federal courts to TCPA claims based on federal question jurisdiction will cause federal courts to be flooded with voluminous complaints alleging violations of the TCPA.

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PREVIEW of United States Supreme Court Cases, pages 104–107.

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