



Supreme Court to Determine Whether TCPA Presents Federal Question

July 12, 2011

After granting a petition for a writ of certiorari late last month, the Supreme Court is poised to resolve the issue of whether federal courts have federal question jurisdiction to hear cases brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). The circuit courts are split on whether federal question jurisdiction exists for private TCPA claims, with the Seventh Circuit standing alone in holding that a TCPA claim can be brought in federal court. But the Supreme Court presumably will settle this issue upon considering *Mims v. Arrow Fin. Servs., LLC*, 2010 WL 4840430 (11th Cir. Nov. 30, 2010).

What Happened

In *Mims*, the plaintiff brought a private action in the U.S. District Court for the Southern District of Florida, alleging, *inter alia*, that the defendant violated the TCPA by using an autodialer to make unwanted calls to his cell phone. After the parties stipulated to dismissal of Mims' other claims, the district court granted the defendant's motion to dismiss the remaining TCPA claim for lack of subject matter jurisdiction, holding that the statute granted state courts exclusive jurisdiction over TCPA claims absent diversity. The plaintiff appealed, arguing that this holding was inconsistent with the Supreme Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990). In *Tafflin*, the Court held that the federal RICO statute providing that plaintiffs "may" sue in federal court was "plainly permissive, not mandatory, for the statute does not even suggest that such jurisdiction shall be exclusive." *Id.* at 460-61. Applying this standard to the TCPA -- and relying on a dissent by then-Judge Alito in *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998) -- Mims argued that the language of the TCPA is insufficient to divest district courts of their federal question jurisdiction. Mims also noted that the Seventh Circuit in *Brill v. Countywide Home Loans, Inc.*, 427 F.3d 446, 450-51 (7th Cir. 2005), had held that TCPA claims fall within the umbrella of federal question jurisdiction. However, the district court's decision was affirmed by the Eleventh Circuit, which followed the lead of five other circuits (the Second, Third, Fourth, Fifth, and Ninth Circuits) in holding that federal question jurisdiction does not apply to TCPA claims. The plaintiff filed a petition for a writ of certiorari, which was granted by the Supreme Court on June 27, 2011. The Court is expected to address only the issue of federal question jurisdiction for TCPA claims, as it is generally accepted that diversity jurisdiction applies to TCPA claims.

What It Means

The decision to hear *Mims* suggests that the Court intends to resolve the split between the circuits on



whether federal question jurisdiction exists for TCPA cases. Although the majority of circuits has held that there is no federal question jurisdiction for TCPA cases, attorneys in the Seventh Circuit -- which has long been a hotbed for TCPA litigation -- have regularly relied on *Brill* to secure jurisdiction in federal courts (both at the time of filing and in instances of removal). The Court's ruling in *Mims* therefore could have significant implications on early case strategy for attorneys who regularly handle TCPA cases.

What You Should Do

If you have any questions about how the *Mims* decision might impact your company or if you have any other questions about TCPA defense or compliance, contact your Lathrop Gage attorney, or one of the attorneys listed above.