

IN PRACTICE

CONSUMER PROTECTION

TCPA Class Actions in Federal Court: Fate Still Uncertain

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Congress enacted the Telephone Consumer Protection Act (TCPA) in response to the increased number of unsolicited telephone calls and faxes for commercial marketing. Finding that telemarketing practices are intrusive, disruptive and burdensome, many states established statutes regulating such activities. However, the states' inability to regulate "nuisance calls" and "junk faxes" beyond state lines necessitated federal action.

The potential for a large monetary judgment, even in the absence of actual damages, from an aggregate of statutory penalties invites class actions. Consumers are entitled to recover a minimum of \$500 for each violation, or actual damages if such amount exceeds \$500. Treble damages are available for willful or knowing violations.

A private party may bring suit pursuant to the TCPA "in an appropriate court of [a] State," if such an action is "otherwise permitted by the laws or rules of court of [that] State." The unique wording of this provision that creates a private right of action, and the right to

seek redress in state court, if state law allows, has caused confusion in federal courts resulting in conflicting decisions as to: 1) whether state courts have exclusive jurisdiction under the TCPA; and 2) whether Federal Rule of Civil Procedure (FRCP) 23 or state statutes that preclude and/or limit class actions apply to TCPA cases brought by private parties.

While not a TCPA case, in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010), the U.S. Supreme Court answered, in part, the latter of the two questions. In *Shady Grove*, the plaintiff instituted an action, pursuant to New York insurance law, to recover statutory interest from the defendant's alleged untimely payment of insurance benefits. Because the case involved a state law claim, the district court applied New York's Civil Practice Law and Rule (CPLR) 901, which precludes the recovery of statutory penalties by way of a class action unless the penalty-imposing statute specifically allows class actions, and, therefore, dismissed the action for lack of jurisdiction.

In a plurality opinion, the U.S. Supreme Court reversed the Second Circuit's affirmation of the dismissal. The court held that FRCP 23, not CPLR 901, governs the issue of whether a class should be certified. The court reasoned that FRCP 23 pre-empts CPLR 901 because they both provide a rule con-



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cerning the same subject matter — the ability to bring a class action. The court explained that when a federal procedural rule conflicts with state law, the federal procedural rule prevails unless it violates the Rules Enabling Act (REA), which grants the U.S. Supreme Court the power to "prescribe general rules of practice and procedure," so long as those rules do not "abridge, enlarge or modify substantive rights." The court concluded that FRCP 23 was valid under the REA since no substantive rights were affected, hence, FRCP 23, not CPLR 901, controlled whether the plaintiff's claims may proceed as a class action.

After *Shady Grove*, the U.S. Supreme Court remanded the Second Circuit's affirmation of the dismissal of the plaintiff's TCPA class action in *Holster v. Gatco* for lack of jurisdiction pursuant to CPLR 901, for reconsideration in light of the *Shady Grove* decision.

In *Holster*, the plaintiff invoked diversity jurisdiction pursuant to the Class Action Fairness Act in New York federal court for alleged violations un-

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der the TCPA for himself and others. Initially, the Second Circuit held that CPLR 901 barred the TCPA class action for two reasons. First, the court read the TCPA's private action provision to imply that a TCPA claim is a state law claim. Therefore, under the *Erie* doctrine, CPLR 901 applied, and precluded the plaintiff from pursuing his claim as a class action. Second, focusing on the explicit language of the TCPA, the court found that Congress left the states the power to decide whether a person may bring a lawsuit under the TCPA. Since the TCPA allows private actions only if state law so permits, and since New York law (CPLR 901) prohibits class actions in this instance, the court concluded it lacked jurisdiction.

On remand, in *Holster v. Gatco*, 618 F.3d 213, 216 (2d Cir. 2010), the Second Circuit conceded that its first basis for dismissing the class action could not stand based on the holding in *Shady Grove*. However, it determined that its second reason remained undisturbed. The court noted that *Shady Grove* involved a FRCP 23 versus CPLR 901 question, however, its second rationale did not "implicate[] the relationship between the Federal Rules and state rules." It was based on a matter of statutory construction as to what Congress meant by stating TCPA actions are allowed only if permitted by state law or rule. The court interpreted that provision "as a delegation by Congress to the states to decide which causes of action lie under the TCPA." Since the New York legislature has prohibited private parties from bringing class actions unless a penalty-imposing statute, like the TCPA, specifically allows for class action litigation, the plaintiff's class action was still barred.

Two years later, the U.S. Supreme Court in *Mims v. Arrow Fin. Servs.*, 132 S.Ct. 740, 744 (2012), found that the TCPA's private action provision confers state courts with concurrent, not exclusive jurisdiction, over TCPA claims. The court noted that unless there is "an explicit statutory directive, by unmistakable implication from legislative history," federal courts have jurisdiction over claims arising under federal law. If Congress intended to strip federal courts of federal-question jurisdiction over TCPA cases, it would have inserted mandatory language such as "only" or "exclusively," but chose

not to do so. The court further noted that Congress adopted a federal regulatory scheme and "enacted detailed, uniform, federal substantive prescriptions." Since [n]othing in the text, structure, purpose, or legislative history of the TCPA call[ed] for displacement of federal courts' federal-question jurisdiction," the court concluded that state and federal courts have concurrent jurisdiction over TCPA cases.

In October, and more recently on Dec. 14, the issue of a plaintiff's ability to pursue a class action under the TCPA in federal court, when state law precludes such a class action, was presented to the District of New Jersey in *Bais Yaakov of Spring Valley v. Peterson's Nelnat*, 2011 U.S. Dist. LEXIS 150210 (D.N.J. Oct. 17, 2012), and in *Goodrich Mgmt. Corp. v. AFGO Mechanical Serv.*, 2012 U.S. Dist. LEXIS 177143 (D.N.J. Dec. 14, 2012). The state law at issue in *Bais Yaakov of Spring Valley* was New York's CPLR 901, while *Goodrich Mgmt. Corp.* involved New Jersey law. Despite the TCPA's reliance on state law as to whether a private party may bring suit, Judge Thompson in *Bais Yaakov* ruled that based on *Shady Grove* and *Mims*, state law is irrelevant, and FRCP 23 alone controls the issue of whether a plaintiff may pursue its action as a class action in federal court. Citing to *Bais Yaakov*, and for the same reasons set forth therein, Judge Martini in *Goodrich Mgmt. Corp.* held that the TCPA "does not require a federal court to apply state law to a TCPA class action."

In *Bais Yaakov*, the court noted that FRCP 23 "normally governs whether a suit in federal district court may proceed as a class action," unless there is a clear "expression by Congress of its intent to depart from" that default rule. The plaintiff argued that since the *Shady Grove* court found FRCP 23 "applies even where a federal court is sitting in diversity on a state law claim," FRCP 23 must apply to federal law claims. The plaintiff further argued if Congress intended for FRCP 23 not to apply, it would have included such language in the TCPA. In response, the defendant argued that because *Shady Grove* involved a state law claim, the issue presented in that case (FRCP 23 versus CPLR 901) and in this case (CPLR 901 as a part of the TCPA) are distinguishable. The de-

fendant argued the TCPA precludes the application of FRCP 23 because "Congress expressly provides that any suit brought thereunder should be governed by state law," and the relevant state law precludes the class action.

Judge Thompson stated that "[i]f *Shady Grove* remained the only authority on this case, [d]efendant might have a winning position," but that "*Mims* has changed the landscape." The court emphasized that the Supreme Court's rejection of the reading of the legislative history as "favoring state control of statutory enforcement," and statement that the TCPA is a "federal law [that] gives rise to the claim ... and specifies the substantive rules," provide support that Congress intended for the "uniform enforcement" of the TCPA by having federal courts apply federal law. Accordingly, the court found that [i]n light of *Mims*, it "does not believe it appropriate to interpret [TCPA's private action provision] as requiring federal courts to follow state law."

The *Shady Grove* court held that federal courts sitting in diversity must apply FRCP 23 in all class actions arising out of a state claim. But, as the *Holster* court noted, *Shady Grove* involved a choice-of-law question between the application of a federal procedural rule and state substantive law on a state claim, not a federal law requiring the application of state law. The Second Circuit ruled in *Holster* that the TCPA directs courts to apply state law, and New York law, which limits the recovery of statutory penalties as a class action, bars TCPA class actions in federal courts. In contrast, both Judge Thompson and Judge Martini have held that in connection with a claim brought under the TCPA, FRCP 23 is the sole authority that dictates whether a class action may be pursued in federal court, notwithstanding any state law to the contrary.

Although the Third Circuit has not ruled on this issue, there exist conflicting opinions between the Second Circuit and the New Jersey District Court as to whether a plaintiff can pursue a TCPA claim as a class action in federal court when a state law would limit or eliminate such an act. Only further decisions will shed light on this issue. For now, the question remains open as to whether a class action under the TCPA is viable when state law may say otherwise. ■