

# Second Circuit Ruling Opens Door to Telephone Consumer Protection Act Class Actions in New York

**December 12, 2013**

Litigation under the Telephone Consumer Protection Act (TCPA) has skyrocketed in recent years, with an estimated eighty percent of all cases filed in or transferred to federal court under the statute occurring in the past five years.<sup>[1]</sup> Because of the availability of statutory penalties, these cases often proceed as class actions, aggregating thousands of claims at once. A recent decision from the Second Circuit will likely increase the trend. On December 3, 2013, the United States Court of Appeals for the Second Circuit ruled that class actions under the TCPA can be brought in New York federal court, a reversal from earlier Second Circuit precedent.

## **Background**

The Telephone Consumer Protection Act ("TCPA") was passed in 1991 to protect consumers from aggressive telemarketers.<sup>[2]</sup> Among other things, the statute prohibits the use of an auto dialer or an artificial or pre-recorded voice to make a non-emergency call without the prior express consent of the called party to a cellular phone or other similar device or service.<sup>[3]</sup> A more burdensome "prior express written consent" requirement applies if the call is a sales call, or if it consists of an artificial or pre-recorded sales message to a residential line. Under the statute, "call" includes the sending of a text message.<sup>[4]</sup>

The statute further prohibits the transmission of unsolicited advertisements to fax machines, unless there is an established relationship with the recipient, the fax number was voluntarily provided or obtained from a public source, and the fax contains a compliant opt-out notice.<sup>[5]</sup> A company who violates the Act's provisions is liable for statutory damages of \$500.00<sup>[6]</sup> and up to \$1,500.00 for violations found to be willful and knowing.<sup>[7]</sup>

***Bank v. Independence Energy Group LLC et al.***

On March 19, 2012, Todd C. Bank ("Plaintiff") filed a putative class action against defendants Independence Energy Group and Independence Energy Alliance LLC ("Defendants").<sup>[8]</sup> The complaint alleged that, in January 2012, Defendants called Plaintiff's residential telephone line using an artificial or pre-recorded line that delivered a message advertising Defendants' electricity-related services.<sup>[9]</sup> The complaint further alleged that Defendants placed at least 10,000 similar calls during the four years preceding the lawsuit.<sup>[10]</sup> The complaint sought statutory damages on behalf of all individuals to whose residential telephone lines Defendants placed one or more telephone calls in violation of the TCPA.<sup>[11]</sup> Plaintiff also sought an order enjoining Defendants from further violations.<sup>[12]</sup> Defendants moved to dismiss for failure to state a claim.

On March 12, 2013, the United States District Court for the Eastern District of New York dismissed the complaint *sua sponte* for lack of subject matter jurisdiction.<sup>[13]</sup> The district court relied on the decision in *Foxhall Realty Corp. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432 (2d Cir. 1998), in which the Second Circuit held that state courts have exclusive jurisdiction over private actions under the TCPA and that, pursuant to 28 U.S.C. § 1331, federal courts lack federal question jurisdiction over such claims."<sup>[14]</sup> The district court also cited *Holster III v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010), in which the Second Circuit held that § 901(b) of the New York Civil Practice Law and Rules bars TCPA class actions in federal court. Section 227(b)(3) of the TCPA creates a private right of action only "if otherwise permitted by the laws or rules of a court of a State."<sup>[15]</sup> New York state law prohibits class actions predicated on statutory damages.<sup>[16]</sup> Thus the district court ruled that Plaintiff's class action seeking statutory damages pursuant to the TCPA could not proceed.<sup>[17]</sup>

On appeal, the Second Circuit reversed and remanded.<sup>[18]</sup> The court acknowledged that most of its TCPA jurisprudence was altered by the U.S. Supreme Court's decision in *Mims v. Arrow Fin. Servs.* 132 S.Ct. 140 (2012), which concluded that, despite the state-centric language of §227(b)(3), there was no convincing reason to read into the TCPA's permissive grant of jurisdiction to state courts any barrier to the U.S. district courts' exercise of general federal-question jurisdiction.<sup>[19]</sup> More recently the Second Circuit's decision in *Giovanniello v. ALM Media, LLC*, 726 F.3d 107 (2d Cir. 2013), recognized that prior interpretation of §227(b)(3) as giving state courts the authority to set the terms of TCPA claims no longer held true.<sup>[20]</sup> Based on those precedents, the court held that Federal Rule of Civil Procedure 23, not state law, governs when a federal TCPA suit may proceed as a class action.<sup>[21]</sup> The court remanded for further proceedings.

### **Takeaway**

The availability of New York as a forum for TCPA class action will inevitably lead to a number of complaints being filed in the state. Companies should review their telemarketing practices and procedures to ensure that they are in compliance.

<sup>[1]</sup> Zach Warren, *Telephone Consumer Protection Act Attracting More Litigation*, Inside Counsel, Nov. 18, 2013 available at: <http://www.insidecounsel.com/2013/11/18/telephone-consumer-protection-act-attracting-more> (noting that, according to a search of court records, roughly 80% of all TCPA cases filed in or transferred to federal court since the act's inception have occurred within the past five years).

<sup>[2]</sup> 47 U.S.C. §227

<sup>[3]</sup> *Id.* at §227(b)(1)(A)(iii).

<sup>[4]</sup> Exceptions apply.

<sup>[5]</sup> *Id.* at §227(b)(1)(C).

<sup>[6]</sup> *Id.* at §227(c)(5)(B).

<sup>[7]</sup> *Id.* at § 227(c)(5).

[8] Class Action Complaint, *Bank v. Independence Energy Group LLC et al.*, No. 1:12-cv-01369 (E.D.N.Y. Mar. 19, 2012)

[9] *Id.* at ¶ 8.

[10] *Id.* at ¶ 10.

[11] *Id.* at ¶ 14.

[12] *Id.* at ¶15.

[13] Memorandum and Order, *Bank v. Independence Energy Group LLC et al.*, No. 1:12-cv-01369 (E.D.N.Y. Mar. 12, 2013)

[14] *Id.* at 3.

[15] *Id.*

[16] *Id.* (citing NY CPLR § 901(b)).

[17] *Id.* at 4.

[18] *Bank v. Independence Energy Group LLC et al.*, No. 13-1746-cv (2d Cir. Dec. 3, 2013)

[19] *Id.* at 3-4.

[20] *Id.* at 4.

[21] *Id.* at 5.