NOTE

Federal Court Jurisdiction over Private TCPA Claims: Why the Federal Courts of Appeals Got It Right

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I. INTRODUCTION

In their first-year civil procedure class, law students learn that a federal statute grants federal district courts jurisdiction over cases "arising under" federal law.[1] Yet, section 1331 is not nearly as encompassing—or as potent—in its grant of federal question jurisdiction to federal courts as its language suggests.[2] The law governing the extent to which Congress must act before federal courts will decide that Congress intended to grant jurisdiction to federal courts over particular cases is far from well-settled. The unique provision for jurisdiction over private claims brought under the Telephone Consumer Protection Act of 1991 (TCPA)[3] put this amorphous body of law, with its equally amorphous application by individual courts, to the test.

The TCPA is a federal statute enacted to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home" and to "facilitate interstate commerce by restricting certain uses of facsimile [fax] machines and automatic dialers."[4] The statute accomplishes this end by prohibiting certain unsolicited phone calls and calls using an automated or prerecorded voice to deliver a message without the prior express consent of the party receiving the call.[5] In addition, the statute prohibits the sending of unsolicited advertisements to telephone fax machines.[6]

These provisions may be enforced by either of two mechanisms. First, private citizens may bring a private action to enjoin a violation of the Act and to recover damages. These damages may either be actual damages or $500 per violation, whichever is greater.[7] Second, the Attorney Generals of the various states are authorized to bring a civil action on behalf of their residents who have been subjected to violations of the Act.[8]

The key portion of the Act, for the purposes of this Note, is the clause in the statute that provides jurisdiction over the private actions brought to enforce the TCPA.[9] This portion of the statute provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a [s]tate,

1. 28 U.S.C. § 1331 (1994).

2. *See* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 495 (1983).

3. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2364 (codified as amended at 47 U.S.C. § 227 (1994)).

4. S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

5. *See* 47 U.S.C. § 227(b)(1)(A) (1994).

6. *See id.* § 227(b)(1)(C).

7. *See id.* § 227(b)(3)(A), (B).

8. *See id.* § 227(f)(1).

9. *See id.* § 227(b)(3).

bring in an appropriate court of that [s]tate" an action to enforce the statute.[10] Two aspects of this provision are noteworthy. First, for a court of any particular state to have jurisdiction over private TCPA claims, the legislature of that state must have authorized its courts to exercise jurisdiction. Congress inserted this provision into the statute to eliminate the potential problems caused if Congress effectively ordered state courts, and only state courts, to enforce federal statutes.[11] The second aspect of this provision consumes the remainder of this Note. While the statute expressly provides for jurisdiction by those state courts whose legislatures allow them to hear TCPA cases, the statute is silent regarding federal district court jurisdiction over private TCPA claims.

Whether the federal district courts have jurisdiction over private TCPA claims remains an open question. Since the TCPA's enactment in 1991, five federal courts of appeals have concluded that the district courts do not have jurisdiction over these claims.[12] One district court concluded that federal district courts do have jurisdiction over private TCPA claims.[13]

In the final analysis, the courts of appeals are correct. Congress did not grant jurisdiction over private TCPA claims to the federal district courts. However, these courts overlooked important justifications for this result. These courts failed to consider the possibility that defendants would remove TCPA cases to the federal courts if federal jurisdiction was permitted. The removal of these cases is contrary to the public policy found in the legislative history of the TCPA. Coupled with the uniqueness of language granting jurisdiction of private TCPA claims in the statute, the arguments posited by the courts in opposition to federal jurisdiction over TCPA claims are more than sufficient to refute the claim that federal district courts have jurisdiction over private TCPA claims.

Part II of this Note provides an overview of federal question jurisdiction and the jurisdictional issue raised by the unique language of the TCPA. Part III discusses the approach that the federal circuit courts have taken in resolving the question of whether federal district courts have jurisdiction over private TCPA claims. Part IV discusses the criticisms of the federal circuit courts' approach and why these are unfounded. Part V

10. *Id.*

11. *See* 137 CONG. REC. S30,821 (1991) (statement of Sen. Hollings).

12. *See* Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Serv., Ltd., 156 F.3d 432 (2d Cir. 1998); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir. 1998); International Science & Tech. Inst., Inc. v. Inacom Comm., Inc., 106 F.3d 1146 (4th Cir. 1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997).

13. *See* Kenro, Inc. v. Fax Daily, Inc., 904 F. Supp. 912 (S.D. Ind. 1995), *recons. denied*, 962 F. Supp. 1162 (S.D. Ind. 1997).

discusses and applies the correct approach to federal jurisdiction questions in the TCPA. Part VI demonstrates that a proper consideration of the possibility of removing TCPA cases to federal court requires that state courts exercise exclusive jurisdiction.

II. FEDERAL QUESTION JURISDICTION AND THE TCPA

A. Federal Question Jurisdiction

Federal courts are courts of limited jurisdiction.[14] The limits of federal jurisdiction find their origins in Article III of the U.S. Constitution.[15] Article III specifically limits the jurisdiction of the federal courts to enumerated circumstances.[16] The genesis of federal question jurisdiction lies in Article III's grant of power to the federal courts to hear cases "arising under" federal law.[17] As the Supreme Court has recognized, however, Article III's grant of power is "not self-executing."[18] With the passage of the Judiciary Act of 1875,[19] Congress granted the federal courts general federal question jurisdiction.

The question then becomes: to what extent must Congress act to grant jurisdiction to federal courts over cases arising under a particular federal statute? Of course, this is primarily a determination of whether Congress intended to grant federal district courts jurisdiction over cases arising under a particular statute.[20] The law responding to this question, however, is not well-settled. The approaches that courts and the scholarship in this area have taken in resolving this issue fall into two camps, as the case law illustrates, depending upon the significance attached to section 1331. The first approach, exemplified by *Kenro, Inc. v. Fax Daily, Inc.*,[21] reads section 1331 very broadly. Under this view, section 1331 grants federal district courts the power to hear *all* cases in which federal law creates the

14. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

15. U.S. CONST. art. III.

16. These situations include cases "arising under this Constitution, the [l]aws of the United States, and [t]reaties made . . . under their [a]uthority," cases affecting ambassadors and other official representatives of foreign sovereigns, admiralty and maritime cases, controversies to which the United States is a party, cases between different states or a state and a citizen of a different state, cases between citizens of different states, and cases between citizens or states in this country and foreign states or citizens. U.S. CONST. art. III, § 2.

17. *See id.*

18. Merrell Dow Pharm. v. Thompson, 478 U.S. 804, 807 (1986).

19. *See* 28 U.S.C. § 1331 (1994).

20. *See* International Science & Tech. Inst., Inc. v. Inacom Comm., Inc., 106 F.3d 1146, 1151 (4th Cir. 1997).

21. 962 F. Supp. 1162 (S.D. Ind. 1997).

cause of action, even if the statute in question is silent regarding the issue of federal jurisdiction.[22] In this way, courts using the *Kenro* approach read section 1331 as creating a refutable presumption in favor of the existence of federal question jurisdiction for every cause of action created by federal law. As a result, under this approach, the only way that a court may properly conclude that Congress did not intend to give federal courts jurisdiction over cases arising under a federal statute is to discover a contrary intent on the part of Congress—either via express prohibition of federal jurisdiction in the language of the statute or the legislative history.

The second approach, exemplified by *International Science & Technology Institute, Inc. v. Inacom Communication, Inc.*,[23] views section 1331 as insufficient to provide the sole basis for conferring jurisdiction to district courts over cases brought to enforce a statute that expressly confers jurisdiction to courts other than district courts.[24] Courts subscribing to this approach rely on Supreme Court precedents that have interpreted the phrase "arising under" in section 1331 more narrowly than its constitutional counterpart in Article III.[25] These courts interpret section 1331 to be sufficiently narrow as to require an additional signal from Congress to give rise to the conclusion that Congress intended to grant federal courts jurisdiction over cases arising under federal law.[26] The *International Science & Technology Institute* approach takes the view that section 1331 creates a much weaker presumption of federal jurisdiction over these cases than does the *Kenro* approach.[27] These different views of the role that section 1331 plays in expressing the intent of Congress to confer federal jurisdiction account for the different conclusions reached concerning whether Congress intended to grant federal courts jurisdiction over cases brought under the TCPA.

B. Jurisdictional Possibilities and the Novelty of the TCPA

Federalism creates interesting jurisdictional conundrums for cases founded upon federal law due to the potential availability of both state and

22. *See* Kenro, Inc. v. Fax Daily, Inc., 904 F. Supp. 912, 914 (S.D. Ind. 1995), *recons. denied*, 962 F. Supp. 1162 (S.D. Ind. 1997).

23. 106 F.3d 1146 (4th Cir. 1997).

24. *See id.* at 1155.

25. *See* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983).

26. *See International Science & Tech. Inst., Inc.*, 106 F.3d at 1153-54.

27. Later in *International Science & Technology Institute*, the court somewhat abandons this view, but only after it is well on its way to concluding that federal courts do not have jurisdiction over private actions brought to enforce the TCPA. *See id.* at 1154. Other courts, including the progeny of *International Science & Technology Institute*, maintain this approach. *See, e.g.*, ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998).

federal courts.[28] Depending upon the language of the particular statute under which the cause of action is brought, the cause of action may encounter three possible jurisdictional scenarios. The first and most prevalent situation is referred to as concurrent jurisdiction.[29] A statute granting concurrent jurisdiction allows both state courts and federal district courts to hear cases brought to enforce rights created by federal law.[30] In fact, Supreme Court precedents have effectively created a presumption of concurrent jurisdiction, unless "excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case."[31]

The second jurisdictional scenario includes only those statutes providing for exclusive federal jurisdiction. As the name suggests, only federal district courts are permitted to hear cases brought under these statutes.[32] As the Supreme Court noted in *Charles Dowd Box Co. v. Courtney*,[33] "exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule," due in part to the effective presumption of concurrent jurisdiction discussed above.[34] Even so, the vast majority of federal statutes provide for either concurrent jurisdiction or exclusive federal jurisdiction.[35]

The last possible scenario occurs when federal law grants jurisdiction exclusively to state courts. As the Third Circuit noted, this situation is "unique."[36] As a result, the federal courts are unaccustomed to the task of interpreting statutes with language suggesting that state courts alone are empowered to hear cases arising under federal law. This becomes obvious after a thorough examination of *International Science & Technology Institute* and its progeny.[37]

28. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962) (stating that "nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law").

29. *See id.*

30. *See id.* at 513.

31. Claflin v. Houseman, 93 U.S. 130, 136 (1876).

32. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 23, at 101 (2d ed. 1994).

33. 368 U.S. 502 (1962).

34. *Id.* at 507-08.

35. *See* ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 515 (3d Cir. 1998).

36. *Id.* at 515.

37. The cases following *International Science & Technology Institute* include *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Service, Ltd.*, 156 F.3d 432 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular, Inc.*, 131 F.3d 507 (5th Cir. 1997).

III. THE FEDERAL CIRCUIT COURTS' APPROACH

In *International Science & Technology Institute*, the Fourth Circuit wrote the first circuit court opinion to address the question of whether the TCPA divested federal district courts of jurisdiction over private TCPA claims. In the interim, four other circuit courts have addressed the issue.[38] All of the subsequent cases rely to differing degrees on *International Science & Technology Institute* for one proposition or another, yet each one explains its supporting arguments in its own way. To avoid unnecessary confusion, the following analysis discusses what the Author considers to be the best version of each argument from among the five cases, rather than choosing one case and discussing all of the arguments posited therein, or attempting to discuss each version of each argument presented in the five cases.

The Third Circuit's decision in *ErieNet* does the most complete job of explaining the relationship of section 1331 to the language in individual statutes conferring jurisdiction to courts other than federal district courts. The court begins by noting that section 1331 does not grant federal district courts the power to hear all cases created by federal law.[39] Instead, section 1331 functions as a general grant of jurisdiction to district courts over cases brought to enforce federal law, and does not trump other statutes and doctrines of judicial administration that *preclude* federal courts from exercising jurisdiction over particular cases.[40] Accordingly, the court cited case law requiring plaintiffs to show "first that their action . . . 'arises under' . . . [federal law] and second that section 1331 jurisdiction is not preempted by a more specific statutory provision conferring exclusive jurisdiction elsewhere."[41] The court then concluded that the language of the TCPA providing for state court jurisdiction is a statutory provision conferring exclusive jurisdiction elsewhere.[42] The court noted two examples of federal statutes that specifically assign jurisdiction over particular cases to other federal courts[43] and concluded that Congress's specific reference to a particular court "negates district court jurisdiction

38. *See Foxhall Realty Law Offices, Inc.*, 156 F.3d 432; *ErieNet, Inc.*, 156 F.3d 513; *Nicholson*, 136 F.3d 1287; *Chair King, Inc.*, 131 F.3d 507.

39. *See ErieNet, Inc.*, 156 F.3d at 518.

40. *See id.* (citing First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 694 (3d Cir. 1979)).

41. *Id.* (quoting Connors v. Amax Coal Co., 858 F.2d 1226, 1229-30 (7th Cir. 1998)).

42. *See id.* at 519.

43. *See id.* These statutes include 28 U.S.C. § 1491(a)(1) (1994) (assigning to the Court of Federal Claims jurisdiction over certain takings claims) and 29 U.S.C. § 160(f) (1994) (assigning original jurisdiction to the federal circuit courts to review agency orders under the National Labor Relations Act).

under [section] 1331."[44] The court based this conclusion on its observation that the federal courts have never required Congress to expressly exclude district court jurisdiction or to grant jurisdiction only to expressly mentioned courts.[45] Thus, the Third Circuit views the divestment of federal district court jurisdiction not as a *repeal* of section 1331, but as a *preemption* of section 1331. Because Congress may preempt section 1331 via the express mention of another court without expressly excluding federal district courts, Congress must have intended to provide only for state court jurisdiction in the TCPA.[46]

While the previous discussion of section 1331 jurisdiction concerns the backbone of the circuit courts' approach to the jurisdiction provision in the TCPA, the other courts cite two other significant reasons for their conclusions that the federal district courts do not have jurisdiction over private TCPA actions. The first reason concerns the specificity of the language providing for jurisdiction over claims in the remainder of the TCPA, as well as in the entire Communications Act of 1934.[47] In other provisions of the TCPA, Congress expressly provided for exclusive federal jurisdiction over claims brought by state Attorney Generals on behalf of residents of their states.[48] The court in *International Science & Technology Institute* used this precise language providing for exclusive federal jurisdiction in the remainder of the statute to conclude that Congress would have expressly provided for federal jurisdiction had it intended to grant jurisdiction over private TCPA claims to district courts.[49] Similarly, the court noted other instances in the remainder of the Communications Act in which Congress explicitly provided for concurrent jurisdiction.[50] Because the statute expressly mentioned only state court jurisdiction over private claims brought under the TCPA, the court reasoned that Congress must not have intended to give federal courts jurisdiction over private TCPA claims.[51]

44. *Id.*

45. *See id.* (citing Public Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622, 627 (9th Cir. 1985)).

46. *See id.*

47. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

48. *See* 47 U.S.C. § 227(f)(2) (1994).

49. *See* International Science & Tech. Inst., Inc. v. Inacom Comm., Inc., 106 F.3d 1146, 1152 (4th Cir. 1997).

50. *See id.* (citing 47 U.S.C. §§ 214(c), 407, 415(f) (1994)).

51. One critic of the result in *International Science & Technology Institute* has disapprovingly noted this approach to statutory construction. *See ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 523 (3d Cir. 1998) (Alito, J., dissenting). However, one member of the current Supreme Court applauded this approach when used by the Court. *See* Patterson

The other major reason cited for the courts' conclusions that the federal courts do not have jurisdiction over private TCPA claims concerns the legislative history of the statute. The circuit courts, following the lead of *International Science & Technology Institute*, all cite essentially the same section of the legislative history. The Fourth Circuit quotes a statement made by Senator Hollings, the bill's sponsor:

> The bill does not, because of constitutional restraints, dictate to the States which court in each [s]tate shall be the proper venue for such an action, as this is a matter for [s]tate legislators to determine. Nevertheless, it is my hope that [s]tates will make it as easy as possible for consumers to bring such actions, preferably in small claims courts . . . .
>
> Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.[52]

The court then concluded that the "clear thrust of [Senator Hollings'] statement was consistent with the bill's text that state courts were the intended fora for private TCPA actions," despite the fact that the legislative history did not expressly reveal state court jurisdiction as the only appropriate jurisdiction.[53]

The circuit courts' approach to the jurisdiction question in the TCPA may be summarized as follows. In the views of these courts, section 1331 does not grant district courts the authority to hear all cases brought to enforce federal law. Instead, section 1331 may be preempted by another statute or doctrine that requires jurisdiction to reside elsewhere. In addition, Congress referred explicitly to federal courts in other sections of the TCPA and Communications Act when it intended to grant jurisdiction to federal courts. The absence of any mention of federal courts in section 227(b)(3) thus signifies an intent to preclude federal court jurisdiction. Finally, the legislative history supports the view that Congress intended for state courts to exercise exclusive jurisdiction over private TCPA claims. All of these considerations support these courts' contentions that federal courts do not have jurisdiction over private TCPA claims.

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v. Shumate, 504 U.S. 753, 766 (1992) (Scalia, J., concurring).

52. 137 CONG. REC. S30,821-22 (1991) (statement of Sen. Hollings); *see also International Science & Tech. Inst., Inc.*, 106 F.3d at 1152-53.

53. *International Science & Tech. Inst., Inc.*, 106 F.3d at 1153.

IV. CRITICISMS OF THE CIRCUIT COURTS' APPROACH

A. Kenro, Inc. v. Fax Daily, Inc.

The only published opinion to hold that federal district courts have jurisdiction over private TCPA claims is *Kenro, Inc. v. Fax Daily, Inc*.[54] *Kenro* is the only TCPA opinion that explicitly incorporates a consideration of section 1441 removal doctrine into its analysis. Unfortunately, even though the *Kenro* court appropriately considered the impact of the removal doctrine, its consideration of the removal doctrine led to an improper result.

The court's conclusion in *Kenro* rests on the presumption in favor of federal jurisdiction in the absence of an express statutory provision to the contrary. The court read section 1331 broadly to confer federal question jurisdiction over claims brought to enforce federal law.[55] Because the TCPA is a federal law and provides for a private cause of action, the court concluded that federal district courts have jurisdiction over TCPA claims.[56] The court disposed of the possibility that Congress intended to confer exclusive jurisdiction on state courts by stating that "had Congress intended to supercede the federal question jurisdiction provided by [section] 1331, . . . it could and would have done so with clear language to that effect."[57] Because there is no explicit statutory preclusion of federal jurisdiction over private TCPA claims, the *Kenro* court concluded that district courts may exercise jurisdiction.

The *Kenro* court justified its approach—that federal jurisdiction is presumed over cases arising under federal law absent an express prohibition to the contrary—not only by reading section 1331 broadly, but also by making an analogy to section 1441 removal doctrine. The court cited a Seventh Circuit holding that a statute's express provision for a particular venue to which a case may be removed did not prohibit the defendant from removing cases to other district courts.[58] Relying on the same principle as the Seventh Circuit—that "repeals by implication are not

54. 904 F. Supp. 912 (S.D. Ind. 1995), *recons. denied*, 962 F. Supp. 1162 (S.D. Ind. 1997).

55. *See id.* at 913. The court's analysis for the question of remand to remedy an invalid removal begins with whether plaintiff's complaint states a claim "cognizable under federal law," thus apparently satisfying section 1331, in the court's view. *Id.*

56. *See id.* at 914.

57. *Kenro, Inc.*, 962 F. Supp. at 1164. This opinion, on reconsideration, effectively responded to *International Science & Technology Institute*.

58. *See Kenro, Inc.*, 904 F. Supp. at 914 (citing Resolution Trust Corp. v. Lightfoot, 938 F.2d 65, 67 (7th Cir. 1991)).

favored"[59]—the *Kenro* court refused to assume that section 227(b)(3) was meant to repeal the federal question jurisdiction granted by section 1331.[60]

The most serious flaw in the *Kenro* analysis is its failure to distinguish the precedents suggesting that section 1331 grants federal jurisdiction unless a specific statute assigns jurisdiction elsewhere.[61] Further, the court fails to recognize other precedents stating that Congress is not required to expressly prohibit district court jurisdiction when assigning jurisdiction to another court.[62] Instead, the *Kenro* court attempts to fly in the face of strong precedent by making a weak analogy to section 1441 doctrine in which the possibility of removal is presumed unless the particular statute sought to be enforced explicitly prohibits removal.[63] Such an analogy is unconvincing, however, when higher courts have interpreted section 1331, resting on its own bottom, to confer jurisdiction to federal courts only if another statute does not confer jurisdiction elsewhere.[64] In particular, the *Kenro* position relies on a principle—that "repeals by implication are not favored"—extracted from a substantive area of law, not procedural.[65] Because the *Kenro* court did not adequately address the existing precedent in its decision, its position is not as convincing as that of the other five circuit courts of appeals.

Another flaw in the *Kenro* opinion is its failure to include an analysis of the legislative history of the TCPA.[66] If the court had fully considered the legislative history of the TCPA, it might have been aware of the very real policy choices made by Congress in favor of conferring jurisdiction only to state courts. Couple these policies with a consideration of the effect that allowing for removal would have on the cheap and easy enforcement

59. *Id.* at 914-15 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987)).

60. *See id.* at 915.

61. *See* Connors v. Amax Coal Co., 858 F.2d 1226, 1229-30 (7th Cir. 1988); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 694 (3d Cir. 1979).

62. *See* Public Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622, 627 (9th Cir. 1985) (stating that "jurisdiction over a specific class of claims which Congress has committed to the court of appeals generally is exclusive, even in the absence of an express statutory command of exclusiveness"). For a partial list of federal statutes that have been construed to confer jurisdiction only to courts other than district courts without expressly prohibiting district court jurisdiction, see *International Science & Tech. Inst., Inc. v. Inacom Comm., Inc*., 106 F.3d 1146, 1154-55 (4th Cir. 1997).

63. *See Kenro, Inc.*, 904 F. Supp. at 914-15 (citing Resolution Trust Corp. v. Lightfoot, 938 F.2d 65, 67 (7th Cir. 1991)).

64. *See Connors*, 858 F.2d at 1229-30; *First Jersey Sec., Inc.*, 605 F.2d at 694.

65. *Kenro, Inc.*, 904 F. Supp. at 914-15 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987)).

66. Instead, the court completely ignored the legislative history of the TCPA.

of the TCPA,[67] and the *Kenro* court's conclusion becomes even more difficult to support. In short, the *Kenro* decision fails to adequately consider all of the factors that would lead to the conclusion that Congress intended to confer jurisdiction over private TCPA claims to state courts only.

B. Scholarly Criticism

Recent scholarship[68] and dissenting opinions[69] in the five circuit court opinions concluded that the five circuit courts erred in holding that federal district courts do not have jurisdiction over private TCPA claims. These criticisms focus not only on the courts' interpretations of the legislative history, as discussed earlier, but also on their interpretations of section 1331.[70]

One critic has contended that the effect of section 1331 is to create federal district court jurisdiction in every federal statute providing for a private right of action.[71] Under this approach, the only way that Congress can divest federal district courts of jurisdiction over claims arising under federal law is to effectively repeal section 1331 as it applies to the statute providing for the claim.[72] Because repeals by implication are disfavored,[73] statutes that can be reconciled must be left to coexist.[74] As a result, because the express provision of permissive state court jurisdiction over TCPA claims does not, in this view, conflict with federal court jurisdiction, the TCPA and section 1331 can be reconciled. Thus, under this approach, the TCPA does not divest the federal district courts of their jurisdiction over private TCPA claims under section 1331.[75]

This view, however, necessarily rests on two flawed premises. The first premise is that an express provision for permissive state court jurisdiction is analogous to an express provision for permissive federal

67. This is a policy preference expressed in the legislative history of the TCPA. *See infra* Part V.

68. *See, e.g.*, Fabian D. Gonell, Note, *Statutory Interpretation of Federal Jurisdictional Statutes: Jurisdiction of the Private Right of Action Under the TCPA*, 66 FORDHAM L. REV. 1895 (1998).

69. *See, e.g.*, ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 521 (3d Cir. 1998) (Alito, J., dissenting).

70. *See* Gonell, *supra* note 68, at 1929-30.

71. *See id.* at 1903.

72. *See id.* at 1909.

73. *See id.* (citing Traynor v. Turnage, 485 U.S. 535, 547 (1988); Kremer v. Chemical Const. Corp., 456 U.S. 461, 468 (1982); United States v. Borden Co., 308 U.S. 188, 198 (1939)).

74. *See id.* at 1909-10 (citing Morton v. Mancari, 417 U.S. 535, 550 (1974)).

75. *See id.* at 1930.

court jurisdiction, with its associated presumption of state court jurisdiction unless expressly prohibited. The critics came to this conclusion after reviewing three Supreme Court cases holding that a federal statute's provision for permissive federal court jurisdiction does not preclude state courts from exercising jurisdiction as well.[76] While assuming that symmetry exists between federal and state court jurisdiction in this regard, Gonell concluded from these cases that a statute's provision for permissive state court jurisdiction does not preclude federal court jurisdiction.[77]

The second flawed premise of the idea that section 1331 creates federal district court jurisdiction in every federal statute providing for a private right of action is that section 1331 must effectively be repealed with respect to particular statutes if the district courts are to be divested of jurisdiction over claims arising under those statutes.[78] This repeal framework for determining the existence of federal question jurisdiction over particular cases is contrary to existing case law. As a result, this conflict seriously undermines the argument that permissive state court jurisdiction does not preclude federal court jurisdiction.

The scholarship critical of the circuit courts' approach presumes that the Supreme Court's holdings in *Gulf Offshore Co. v. Mobil Oil Corp.*,[79] *Tafflin v. Levitt*,[80] and *Yellow Freight System, Inc. v. Donnelly*[81] shed some light on the question of whether the language of the TCPA divests federal district courts of jurisdiction over private TCPA claims. However, important differences between the language of the statutes and the nature of state and federal question jurisdictions distinguish these precedents cited by Gonell.

Gulf Offshore, *Tafflin*, and *Yellow Freight* concern federal statutes providing for permissive federal jurisdiction.[82] The question in these cases is whether Congress ousted state courts from jurisdiction, given the silence of the statute in this regard.[83] In each case, the Court found that there was

76. *See id.* at 1906-09. The Supreme Court presumes that state courts have jurisdiction unless the language of the statute says otherwise. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

77. *See* Gonell, *supra* note 68, at 1934 (stating that *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) "teaches that even a universally shared expectation that claims would be brought in one court cannot be an adequate substitute for a legislative decision to defeat jurisdiction in another court").

78. *See id.* at 1908-09.

79. 453 U.S. 473 (1981).

80. 493 U.S. 455 (1990).

81. 494 U.S. 820 (1990).

82. *See id.* at 823; *Tafflin*, 493 U.S. at 460; *Gulf Offshore Co.*, 453 U.S. at 482-83.

83. *See Yellow Freight Sys., Inc.*, 494 U.S. at 823; *Tafflin*, 493 U.S. at 460; *Gulf Offshore Co.*, 453 U.S. at 482-83.

concurrent jurisdiction, relying on the presumption that state courts enjoy concurrent jurisdiction over federal claims.[84] As Gonell noted, "state courts are presumed to have jurisdiction over federal actions by virtue of their status as courts of general jurisdiction of sovereign states in our federal system."[85] Due to this presumption, the "mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction."[86] Gonell then made an analogy to these cases in concluding that "federal courts have jurisdiction over federally created causes of action . . . unless Congress clearly repeals that statute in whole or in part."[87] However, there is no symmetry between state and federal jurisdictions in this regard, and thus the analogy is inappropriate.

The Supreme Court has held that it will affirm the existence of state court jurisdiction over statutes providing for permissive federal court jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case."[88] This presumption is based almost entirely on state courts' status as courts of general jurisdiction. As Justice Frankfurter noted:

> [State courts may enforce federally created rights] for the same reason that rights created by the British Parliament or by the Legislature of Vermont could be enforced in the New York courts. Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the [general] jurisdiction conferred upon them by the only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the State of New York—enables them to enforce rights no matter what the legislative source of the right may be.[89]

The concept driving the presumption of state court jurisdiction over federal claims is embodied in the last sentence of the excerpt above. Because only state legislatures have the power to confer jurisdiction upon their state courts, and these courts have been granted general jurisdiction by their state legislatures, the federal courts *must* presume that state courts are competent to hear federal cases unless Congress has specifically decreed otherwise in individual statutes.

However, the same cannot be presumed of federal courts. Federal courts are not courts of general jurisdiction, but instead are courts of

84. *See Yellow Freight Sys., Inc.*, 494 U.S. at 823; *Tafflin*, 493 U.S. at 462; *Gulf Offshore Co.*, 453 U.S. at 478.

85. Gonell, *supra* note 68, at 1908.

86. *Id.* at 1906 (quoting *Gulf Offshore Co.*, 453 U.S. at 479).

87. *Id.* at 1932-33.

88. Claflin v. Houseman, 93 U.S. 130, 136 (1876).

89. Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

limited jurisdiction.[90] This means that federal courts may not exercise jurisdiction over a claim unless Congress has specifically authorized them to do so.[91] As a result, the premise that supports the presumption of state court jurisdiction over federal claims—that state courts are courts of general jurisdiction—cannot be used to support a presumption of federal district court jurisdiction over federal claims. This fundamental difference in the nature of state and federal question jurisdiction accounts for the asymmetry in the presumptions of state and federal question jurisdiction exercised by these courts over federal claims.

Proponents of the analogy contend that section 1331 already gives federal district courts jurisdiction over all claims brought to enforce rights created by federal statute, thus effectively giving federal courts general jurisdiction over suits brought to enforce federal law.[92] However, the general federal question jurisdiction over cases arising under federal law is not the same general jurisdiction enjoyed by state courts. To appreciate the differences between the two, one need look no further than the language the Supreme Court has employed to describe the process of determining whether federal question jurisdiction exists:

> We have consistently emphasized that, in exploring the outer reaches of [section] 1331, determinations about federal jurisdiction require *sensitive judgments* about congressional intent, judicial power, and the federal system. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of *self-sufficient words*. . . . The Act of 1875 is broadly phrased, but it has been continuously *construed* and *limited* in the light of the history that produced it, the demands of *reason* and *coherence*, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation."[93]

This language suggests that the determination of the existence of federal district court jurisdiction is a delicate process. The prudence required in this process is very different from the nearly robotic application of the sweeping grant of general jurisdiction enjoyed by state courts, which one treatise describes as a "comprehensive residual subject matter jurisdiction to hear all cases not exclusively allocated to courts of limited

90. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

91. *See id.*

92. *See* ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 521 & n.2 (Alito, J., dissenting) ("This observation [of the differences between state and federal courts with respect to jurisdiction], while entirely accurate, is irrelevant to the issue before us. . . . [D]istrict courts have possessed general federal question jurisdiction since 1875.").

93. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 810 (1986) (emphasis added) (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959)).

jurisdiction."[94] For these reasons, any attempt to discern federal jurisdiction over private TCPA claims by making an analogy to the presumption of state court jurisdiction over federal claims is ill advised.

The second premise of the critics' approach—that Congress must effectively repeal section 1331 in specific statutes if the district courts are to be divested of jurisdiction[95]—is also flawed. First, the Court's language above implicitly rejects the repeal approach to section 1331. The rigid requirements[96] for effectively repealing section 1331 to divest the district courts of jurisdiction require that section 1331 be treated "as a wooden set of self-sufficient words," which the Court in *Romero v. International Terminal Operating Co.*[97] abhors. The basis for an implied repeal must ordinarily be evident from the language or operation of the statutes,[98] as opposed to relying on the legislative history of the statute for help in discerning the purpose and policy underlying the statute. In this way, the repeal approach to section 1331 is contrary to *Romero* because it requires treating section 1331 as self-sufficient.

The repeal structure is also contrary to the approach taken by three circuit courts that have addressed the issue. These courts read section 1331 as granting federal district courts jurisdiction over cases arising under federal law unless district court jurisdiction is "precluded"[99] or "preempted"[100] by another statute or doctrine of judicial administration. As will be discussed in depth in Part V, this language suggests a much different conception of the role of section 1331 in the federal jurisdiction scheme. If section 1331 need only be preempted for a court other than the district courts to have jurisdiction, then Congress need only show an intent to assign jurisdiction elsewhere.[101]

In contrast, the repeal standard is much more exacting than the preemption standard. Under the repeal standard, the statute (or other indicia of congressional intent) may contain evidence of an intent contrary to section 1331, but if the statutes can be reasonably construed not to conflict, they must be left to coexist.[102] The repeal standard stands in stark contrast

94. GENE R. SHREVE & PETER RAVEN-HANSEN, *supra* note 32, § 23, at 101.

95. *See* Gonell, *supra* note 68, at 1908-09.

96. For a list of the requirements that a statute purporting to divest district courts of jurisdiction under section 1331 must meet, see *id.* at 1909-10.

97. 358 U.S. 354 (1959).

98. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 470 (1982).

99. *See* First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 694 (3d Cir. 1979).

100. *See* Connors v. Amax Coal Co., 858 F.2d 1226, 1229 (7th Cir. 1988); Public Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622, 627 (9th Cir. 1985).

101. *See* discussion *infra* Part V.

102. *See* Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984).

to the approach taken by three courts of appeals and undermines the validity of the repeal structure in section 1331 analysis.

In sum, the two premises that the critics' approach to section 1331 rely upon are invalid. Because state and federal courts differ in the nature of the jurisdiction they enjoy, the analogy the critics make to the presumption of state court jurisdiction is inappropriate. In addition, the critics' repeal framework flies in the face of existing circuit court precedent, raising serious doubts as to its validity. In short, because two indispensable premises of the critics' argument are flawed, the rest of the approach languishes in a shadow of doubt.

V. THE PREEMPTION FRAMEWORK EXPLAINED AND APPLIED

The results reached by the federal courts of appeals regarding federal jurisdiction over private actions brought to enforce the TCPA are correct: the federal district courts do not have jurisdiction over these cases.[103] The criticisms leveled at the five circuit courts' opinions focus in part on the courts' interpretations of the legislative history of the TCPA as a basis for concluding that the TCPA divests the district courts of jurisdiction under section 1331.[104] These criticisms are legitimate because the courts' discussions of the legislative history are insufficiently developed. However, the public policy expressed by Senator Hollings, the bill's sponsor, coupled with a consideration of the possibility of and incentives for defendant-initiated removal of private TCPA cases to federal courts leads one to the inescapable conclusion that Congress did not grant federal district courts jurisdiction over TCPA claims. In addition, the direct link between the policy expressed in the legislative history and the unique language of the statute supports that conclusion.

A. The Preemption Framework Is the Correct Approach

Gonell overstated the burden that the opinions of the circuit courts must carry in order to show that the TCPA cases do not belong in federal court. Gonell claimed that Congress, via express language or other indicia of legislative intent, must effectively repeal section 1331 for every statute that Congress does not want enforced in a federal district court.[105] Because

103. *See* Foxhall Realty Law Offices, Inc., v. Telecommunications Premium Serv., Ltd., 156 F.3d 432 (2d Cir. 1998); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir. 1998); International Science & Tech. Inst., Inc. v. Inacom Comm., Inc., 106 F.3d 1146 (4th Cir. 1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997).

104. *See ErieNet, Inc.*, 156 F.3d at 522 (Alito, J., dissenting); *see generally* Gonell, *supra* note 68.

105. *See* Gonell, *supra* note 68, at 1934.

repeals by implication are disfavored, Gonell concluded that "[n]one of the circuit courts interpreting the TCPA analyzed the legislative history with the rigor required to find an intent to repeal [section] 1331 by implication."[106]

The above approach misstates the relationship between section 1331 and the language of any statute conferring jurisdiction to courts other than federal district courts. Three circuit courts have taken the position that section 1331 should not be looked upon as being *repealed* by individual statutes, but as being *precluded*[107] or *preempted*[108] by another statute. The differences between the words "repealed" and "precluded" or "preempted" are not mere wordplay, but instead reveal different conceptions of the role that section 1331 plays in conferring federal jurisdiction. The word "repealed" suggests that the language of the statute or the legislative history must show an "unmistakable"[109] intent on the part of Congress to *eliminate* that which is *already in existence*, while the word "precluded" suggests that the legislative history need only reveal a *different* intent of the part of Congress sufficient to prevent federal jurisdiction from being conferred. Because the circuit courts' opinions specifically concern federal jurisdiction and have not been borrowed from general principles of statutory precedence, the approach of those courts should control here. As a result, the legislative history need only reveal a contrary intent on the part of Congress to conclude that the TCPA divests federal courts of jurisdiction over private TCPA claims.

B. The Role of the TCPA's Legislative History in the Preemption Framework

To determine congressional intent with respect to federal jurisdiction, courts first look to the language of the statute.[110] As previously noted, the TCPA does not mention federal jurisdiction. Instead, the TCPA only provides that state courts may have jurisdiction.[111] The significance of this omission is that the statutory language itself is of no immediate help in determining whether Congress intended to give federal courts jurisdiction over claims arising under the TCPA. If the statute expressly grants or prohibits federal jurisdiction over these claims, then the provision disposes

106. *Id.* at 1925.

107. *See* First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 694 (3d Cir. 1979).

108. *See* Connors v. Amax Coal Co., 858 F.2d 1226, 1229 (7th Cir. 1988); Public Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622, 627 (9th Cir. 1985).

109. Tafflin v. Levitt, 493 U.S. 455, 460 (1990); *see also* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

110. *See, e.g.*, ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998).

111. *See* 47 U.S.C. § 227(b)(3) (1994).

of the issue. Otherwise, the statute's omission of federal jurisdiction brings section 1331 into play. This requires the examination of other indicia of congressional intent to determine if the TCPA divests federal courts of jurisdiction over private TCPA claims.

The legislative history reveals Congress's intent to make the enforcement of the TCPA by private right of action relatively inexpensive and simple. The legislative history expressly demonstrates that Congress contemplated and even desired that these actions brought under the TCPA be brought in state courts, particularly small claims court.[112] However, this history contains no mention of an intent to grant or prohibit the federal district courts' jurisdiction over TCPA claims. At first glance, it may appear that this consideration of the legislative history is of no help in determining what exactly Congress intended. After all, it was the silence of the statute itself concerning federal jurisdiction that made it necessary to look other places to determine Congress's intent. How can a legislative history that is equally silent on the issue of federal jurisdiction be of any help?

The answer to the previous question lies in the reasons why Congress wanted state courts to have jurisdiction over TCPA cases: the relative ease with which these cases can be brought in state courts, as opposed to federal courts. Recognizing that litigation in federal court is expensive and time-consuming, Congress viewed state courts, particularly small claims courts, as more hospitable venues for plaintiffs to bring actions to enforce the TCPA.[113] In short, Congress wanted to make the enforcement of the TCPA by private action cheap and easy for plaintiffs and viewed state courts as the primary vehicle for enforcement.

VI. THE POSSIBILITY OF REMOVAL TO FEDERAL COURTS CONSIDERED

If Congress's goal of cheap and easy litigation of TCPA claims is to be realized, federal courts must be eliminated as a possible choice of venue. The necessity of eliminating federal question jurisdiction over TCPA claims becomes obvious once the possibility of defendants removing these cases from state courts to federal courts is considered. The removal of cases from state courts to federal courts is governed by federal statute.[114] Essentially, "a defendant may remove a case from [state court to federal court] only if the claim could have been brought in federal court"

112. *See* 137 CONG. REC. S30,821 (1991) (statement by Sen. Hollings).

113. *See id.*

114. *See* 28 U.S.C. § 1441 (1994).

originally.[115] In other words, defendants may unilaterally remove cases brought to enforce federal statutes to federal courts if the statutes upon which the cases are founded provide for concurrent jurisdiction.

When removal is a possibility, defendants with substantially more assets in their litigation "war chests" than their plaintiff counterparts have every incentive to remove the cases to federal courts. The prospect of litigating in federal courts, accompanied by the costs of hiring attorneys and possibly traveling to distant federal courthouses, may be enough to frighten less-sophisticated plaintiffs into settling early or dropping the action altogether. As a result, if Congress wishes to make the enforcement of a statute cheap and easy, it must eliminate federal courts as a possible venue for the action—not simply because it is expensive to commence litigating in federal court, but because wealthy defendants have great incentives to remove cases to federal court.

For these reasons, it is unlikely that Congress intended to confer jurisdiction over cases brought under the TCPA to federal district courts. The legislative history makes clear that Congress envisioned that the TCPA could and would be enforced by plaintiffs of limited means against defendants who are in the business of marketing products via telecommunicative processes. These defendants, in turn, are likely to have the means and the incentive to remove these cases to federal court. Few plaintiff's attorneys will be willing to prepare a case for federal court when the likely recovery for the client will be $500 per violation,[116] as Senator Hollings, the sponsor of the bill, recognized.[117] As a result, if courts are to remain true to their charge that they consider the provisions of the whole law, its object, and its policy,[118] then courts must interpret section 227(b)(3) to confer exclusive jurisdiction of private TCPA cases to state courts.

Finally, the unique language of section 227(b)(3), coupled with the unusual public policy expressed in the legislative history, suggests that Congress intended to limit jurisdiction to state courts. As the cases recognize,[119] the language providing for jurisdiction over private TCPA claims is unique. The sentiments expressed by the sponsor of the bill go hand-in-hand with the interpretation that Congress intended to limit jurisdiction to state courts. A lay person would likely look at the express

115. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

116. *See* 47 U.S.C. § 227(b)(3)(B) (1994).

117. *See* 137 CONG. REC. S30,821-22 (1991) (statement of Sen. Hollings).

118. *See* United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)).

119. *See, e.g.*, ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 514 (3d Cir. 1998).

language of the statute (coupled with the thoughts of the Senator Hollings) and conclude that Congress intended for state courts to be the only venues for private TCPA actions. Those with legal training should reach a similar conclusion.

VII. CONCLUSION

The statutory language providing for state court jurisdiction over private TCPA claims, absent any mention of federal jurisdiction, is unique. The novelty of this language has caused the federal courts to scramble in search for existing law to support their conclusions that the TCPA divests federal district courts of jurisdiction over private TCPA claims.

The federal circuit courts' conclusions are correct. They base their conclusions, in large part, on a more limited view of the role that section 1331 plays in conferring federal jurisdiction. Under this view, section 1331 grants jurisdiction to federal district courts unless another statute or doctrine confers jurisdiction elsewhere. These courts read the express mention of state courts (and only state courts) in section 227(b)(3) as preempting section 1331 by conferring jurisdiction elsewhere. These courts also rely on the express mention of federal courts elsewhere in the TCPA and the Communications Act to conclude that Congress mentioned the federal courts only in those instances where Congress intended to grant jurisdiction to the federal courts. Also, these courts read the legislative history to express a policy preference in favor of exclusive state court jurisdiction.

The critics of the federal circuit courts' approach contend that the circuit courts misapply section 1331 doctrine. The critics contend that section 1331 grants federal courts the power to hear all cases arising under federal law, unless the specific statute repeals section 1331 as it applies to cases brought to enforce that statute. This complaint is undermined by its conflicts with existing case law suggesting that the repeal structure does not apply to section 1331 analysis. Also, the critics' application of section 1331 to the TCPA requires that there be symmetry between the presumptions of state court jurisdiction and federal court jurisdiction that simply has no basis in law or reason.

Finally, while the federal circuit courts reached the correct result, these courts overlooked an important justification for that result. Given the policy preference demonstrated in the legislative history of the TCPA for the cheap and easy enforcement of the TCPA by private action, state courts must be the only venues available for private TCPA claims. Even if plaintiffs commence their actions in state court, defendants will have every incentive to remove the cases to federal court due to the increased burden

that federal court litigation will impose on plaintiffs. As a result, federal courts must be stripped of jurisdiction over private TCPA claims if Congress is to realize its goal of making the enforcement of the TCPA cheap and easy. This provides another justification for the federal circuit courts' conclusions that federal district courts do not have jurisdiction over private TCPA claims.