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DEFEATING CLASS CERTIFICATION IN TELEPHONE CONSUMER PROTECTION ACT CASES

The principal grounds for denying class certification in TCPA cases have been: predominance of individualized issues; lack of adequacy and typicality of proposed class representatives; ascertainability of the class; and, in a few cases, findings that a class action would not be superior to alternative methods of adjudication. After an overview of the TCPA and the requirements for a class action, the authors discuss the cases dealing with these issues.

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In 1991, Congress enacted the Telephone Consumer Protection Act (“TCPA”) to ban certain types of unsolicited phone calls, text messages, and faxes. The law provides a private right of action for statutory damages of \$500 per violation, or as much as \$1,500 per violation if the conduct was “willful.” Despite the legislative history suggesting that the statute was intended to permit consumers to seek a modest remedy on an individual basis, the plaintiff’s bar has seized on the TCPA as a mechanism for aggregating the claims of large numbers of people with potentially enormous claims for statutory damages. As a result of the potentially crushing liability exposure these actions can impose, some TCPA class actions have settled for tens

of millions of dollars.¹ And the pace of TCPA class action filings is only increasing. Between 2010 and 2016, the number of filings increased by more than 1,200%; and from 2015 to 2016, the filings jumped by almost a third, going from nearly 3,700 filings in 2015 to over 4,800 the next year.²

¹ See, e.g., *In re Capital One Telephone Consumer Protection Act*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (\$75.5 million settlement); *Rose v. Bank of America Corp.*, 2015 WL 1969094, at *1 (N.D. Cal. May 1, 2015) (\$32 million settlement); *Arthur v. Sallie Mae, Inc.*, 2012 WL 90101, at *3 (W.D. Wash. Jan. 10, 2012) (\$24 million settlement), *settlement approved*, 2012 WL 4075238 (W.D. Wash. Sept. 17, 2012).

² WebRecon. 2017. 2016 Year in Review: FDCPA Down, FCRA & TCPA Up. January 24, 2017.

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For companies facing TCPA class actions, however, hope is not lost. In addition to the powerful strategies that are available for obtaining dismissal on the pleadings or negotiating early settlements (which are beyond the scope of this article), companies have an arsenal of strategies they can deploy to successfully defend — and defeat — class certification in these types of cases. Most frequently, defendants have defeated class certification by establishing that individualized issues predominate over common issues, including issues regarding consent, standing, ascertainability, and manageability. Defendants have also defeated certification by demonstrating that the plaintiff is atypical or inadequate, or that a class action would not be superior based on disproportionate damages.

First, we begin with an overview of the TCPA and class certification requirements in federal court.

OVERVIEW OF TCPA AND CLASS CERTIFICATION REQUIREMENTS

The TCPA generally makes it unlawful for any person to (1) use an “automatic telephone dialing system” to call a cell phone number without the prior express consent of the called party; (2) call a cell phone or residential phone line using an artificial or prerecorded voice without the prior express consent of the called party; or (3) send an “unsolicited advertisement” to a fax machine in the absence of an established business relationship.³ Courts have also adopted the Federal Communications Commission’s interpretation that a text message is a “call” within the meaning of the TCPA.⁴

To certify a class in federal court, a plaintiff must satisfy four prerequisites under Federal Rule of Civil Procedure 23(a): the proposed class must be sufficiently numerous; common questions of fact or law must exist; the proposed class representative must have claims or defenses that are typical of the proposed class; and the proposed representative must be adequate to represent the class. Most courts also recognize an independent requirement of “ascertainability,” which requires, at a

minimum, that the proposed class be defined with reference to objective and definite criteria.⁵ In a class action seeking damages, the plaintiff must additionally satisfy the requirements of Rule 23(b)(3): first, that common issues *predominate* over individualized issues, and second, that a class action is superior to other methods for adjudicating the matter. Only if the plaintiff can satisfy each of these requirements can a class be certified.

PREDOMINANCE OF INDIVIDUALIZED ISSUES

Many defendants have successfully defeated class certification in TCPA cases by arguing that a key element of liability — that the class members did not *consent* to receive the calls, text messages, or faxes at issue — cannot be adjudicated on a classwide basis, but instead depends upon individualized proof.

In *Newhart v. Quicken Loans Inc.*, for example, the court concluded that a class could not be certified because determining whether each class member provided the requisite consent would “depend upon multiple layers of individualized evidence about each call and the circumstances that preceded it.”⁶ That is because, in addition to the threshold inquiry of whether each class member consented to the call, the factfinder would *also* need to determine whether each challenged call was made for a telemarketing purpose: if so, the prior consent must have been provided in writing, but if not, then a writing is not required. The court rejected the plaintiff’s argument that it could simply conclude that every call was for telemarketing purposes. Critically, the defendant demonstrated that the purpose of the calls varied — e.g., some were made in direct response to requests from borrowers, and other calls were simply transactional in nature and not intended to encourage the purchase of any goods or service.

In *Ung v. Universal Acceptance Corp.*, the court similarly concluded that individualized consent issues predominated over common issues and thus denied

³ 47 U.S.C. § 227(b).

⁴ See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

⁵ Courts have split as to whether a plaintiff must also demonstrate an administratively feasible means for identifying class members as a prerequisite to class certification.

⁶ 2016 WL 7118998, at *2 (S.D. Fla. Oct. 12, 2016).

certification of a class.⁷ The defendant showed that at least some class members had consented to being called and that the circumstances of consent would vary from class member to class member. For example, liability would hinge on whether each class member voluntarily provided his or her cell phone number, whether he or she consented to be called when contacted by Universal, and whether he or she orally consented to being called at the time of an in-person purchase transaction.

Some courts have reached a similar conclusion based on the lack of standing of class members who consented to receive calls. For example, in *Legg v. PTZ Insurance Agency, Ltd.*, the court held that under the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, if a call recipient expressly agreed and expected to receive calls from the defendant, that person had not suffered a concrete injury.⁸ In the court's view, a plaintiff who consented to the call would lack standing even if the defendant technically violated the statute's written consent requirements. Based on the defendant's showing that a substantial number of putative class members agreed to receive calls from the defendant, the court held that "there is simply no way to establish a lack of consent with generalized evidence."

On the flip side, several courts have granted class certification where the defendant failed to prove that any portion of the proposed class actually provided express consent. One judge wrote, for example, that "courts should ignore a defendant's argument that proving consent necessitates individualized inquiries in the absence of any evidence that express consent was actually given."⁹ In another case, the court held that the defendant, having produced no evidence that any individual consented to receive the text messages, was "unable to realistically argue that individual issues regarding consent outweigh the commonality."¹⁰

In *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, the Sixth Circuit Court of Appeals affirmed the district court's refusal to certify a class of fax recipients on two grounds.¹¹ First, the court held that

the consent issue was individualized because the defendant proved that several thousand individuals on the list of intended fax recipients were current or former customers, many of whom had previously provided their fax numbers. Second, whether analyzed under the rubric of predominance, ascertainability, or superiority, the court held that the likely difficulties of determining class identity precluded class certification. The problem was that the defendant intended the fax to be sent to 53,000 individuals whose information the defendant purchased from a third party, but only 40,000 people actually received the fax. The 25% who did not receive the fax would not be class members, and, critically, there was no log that identified who received the fax and who did not.

Other courts have reached similar conclusions where, as in *Sandusky*, the plaintiff failed to provide a sufficiently reliable method for identifying the proposed class.¹²

As these and other cases demonstrate, defendants have strong defenses to class certification where they can show (1) that a substantial portion of the proposed class actually consented to the allegedly unauthorized communications; (2) that the purpose and nature of each individual communication varied from person to person; or (3) that identifying who provided consent and who did not would be impractical or even impossible because, for example, adequate records do not exist or are unavailable.

LACK OF ADEQUACY AND TYPICALITY

Defendants in TCPA class actions have also had success in defeating certification by demonstrating that the proposed representative was inadequate or atypical — especially where the circumstances surrounding their consent distinguish them from other class members or subject them to unique defenses.

For example, in *Cholly v. Uptain Group, Inc.*, the court held that the plaintiff, who had initially consented to the calls and then later revoked her consent, was atypical of class members who had never consented in the first place.¹³ The court further denied the plaintiff's request to represent a "revocation subclass" because, while the plaintiff may be typical of others who similarly gave and then revoked their consent, determining

⁷ 319 F.R.D. 537 (D. Minn. 2017).

⁸ *Legg*, 2017 WL 3531564 (N.D. Ill. Aug. 15, 2017) (discussing *Spokeo*, 136 S. Ct. 1540 (2016)).

⁹ *Kristensen v. Credit Payment Servs.* 12 F. Supp. 3d 1292, 1307 (D. Nev. 2014).

¹⁰ *Silbaugh v. Viking Magazine Servs.*, 278 F.R.D. 389, 393 (N.D. Ohio 2012).

¹¹ 863 F.3d 460 (6th Cir. 2017).

¹² See, e.g., *Leyse v. Lifetime Entertainment Servs., LLC*, 679 Fed. Appx. 44, 47 (2d Cir. Feb. 15, 2017) (affirming district court's denial of certification because identifying the proposed class would require conducting "mini-hearings").

¹³ 2017 WL 449176 (N.D. Ill. Feb. 1, 2017).

whether each class member revoked consent is an individualized issue that would violate the predominance requirement. The court thus struck the proposed class allegations.

In *Banarji v. Wilshire Consumer Capital, LLC*, the court granted the defendant's motion to deny certification where the plaintiff's father provided the plaintiff's phone number to the defendant, indicating that it was his own.¹⁴ Further complicating the issue, the plaintiff's father might have been a non-subscriber customary user of the plaintiff's phone line, which would give him authority to consent to receiving calls on that line. Under these circumstances, the court held that the unique issues surrounding the plaintiff's father's authority to consent to the calls defeated the typicality requirement and precluded class certification.

Courts have also rejected class certification where the plaintiff was atypical or inadequate for other reasons. In *Nghiem v. Dick's Sporting Goods, Inc.*, for example, the proposed class representative was an attorney who had filed numerous TCPA class actions.¹⁵ The court held that the adequacy and typicality requirements were not satisfied because the proposed representative and his counsel would "have to devote most of their time and resources trying to refute Defendants' attacks on his character, and his motivations for filing and litigating this lawsuit."¹⁶ And in *Del Valle v. Global Exchange Vacation Club*, the court held that the plaintiff lacked adequacy and typicality because she could not prove she was a member of the class she sought to represent.¹⁷ While the plaintiff could establish that she had received calls from a third party that made calls on behalf of several timeshare companies including the defendant, she could not show that the calls she received were actually made on behalf of the defendant and not some other timeshare company.

SUPERIORITY

Many courts have expressed concern that TCPA class actions can expose companies to enormous liability out of any proportion to the actual harm caused by the conduct. Some courts have gone so far as to deny class certification on this basis, reasoning that a class action

would not be "superior" to alternative methods of adjudication, such as filing individual actions.¹⁸

However, the majority of courts have rejected this argument, stating that this is a legislative policy judgment for Congress and should not be considered by courts in evaluating the Rule 23 requirements.¹⁹ The Ninth Circuit's decision in *Bateman v. American Multi-Cinema, Inc.* has been especially influential in this regard.²⁰ Putting an end to a growing trend among district courts in the Ninth Circuit, the court of appeals held that district courts cannot consider the amount of potential damages exposure or the proportionality of such exposure to the actual harm caused in evaluating the propriety of class certification.

Notably, at least one court has staked out a middle position, holding, in granting certification in a TCPA class action, that while the impact on the defendant of a classwide damages award was immaterial for purposes of class certification, it could be considered in determining the final damages award in the event plaintiffs obtained a judgment.²¹

CONCLUSION

Companies facing TCPA class actions should rest assured that the failure to obtain a dismissal on the pleadings or an early resolution is not game over. Many defendants have succeeded in defeating class

¹⁴ 2016 WL 595323 (S.D. Cal. Feb. 12, 2016).

¹⁵ 318 F.R.D. 375 (C.D. Cal. 2016).

¹⁶ *Id.* at 383.

¹⁷ 320 F.R.D. 50 (C.D. Cal. 2017).

¹⁸ See, e.g., *Kim v. Sussman*, 2004 WL 3135348, at *3 (Ill. Cir. Ct. Oct. 19, 2004) ("[C]ertifying a class threatens to impose on defendant a virtually automatic liability to thousands of individuals in a sum that dwarfs the magnitude of the harm involved. Congress clearly did not intend to cripple individuals and entities using broadcast facsimile transmissions to solicit business."); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 405 (E.D. Pa. 1995) (certifying class "would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements").

¹⁹ See, e.g., *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at *9 (S.D. Fla. Dec. 24, 2014) ("a court cannot use [the superiority requirement] as an excuse to save a defendant from [disproportionate] liability simply because there are questions as to Congress's judgment").

²⁰ 623 F.3d 708 (9th Cir. 2010).

²¹ *Am. Copper & Brass, Inc. v. Lake City Indus. Prod., Inc.*, 2012 WL 3027953, at *5-6 (W.D. Mich. July 24, 2012), *aff'd*, 757 F.3d 540 (6th Cir. 2014).

certification by demonstrating that (1) individualized issues predominated over common issues, particularly with regard to consent and ascertainability; (2) the proposed class representative was atypical or inadequate; or (3) a class action was not superior. Companies

defending against TCPA class actions should partner with experienced counsel to develop a tailored strategy to defend and successfully defeat class certification based on the unique facts and circumstances of their case. ■