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Defeating Class Certification in TCPA CASES

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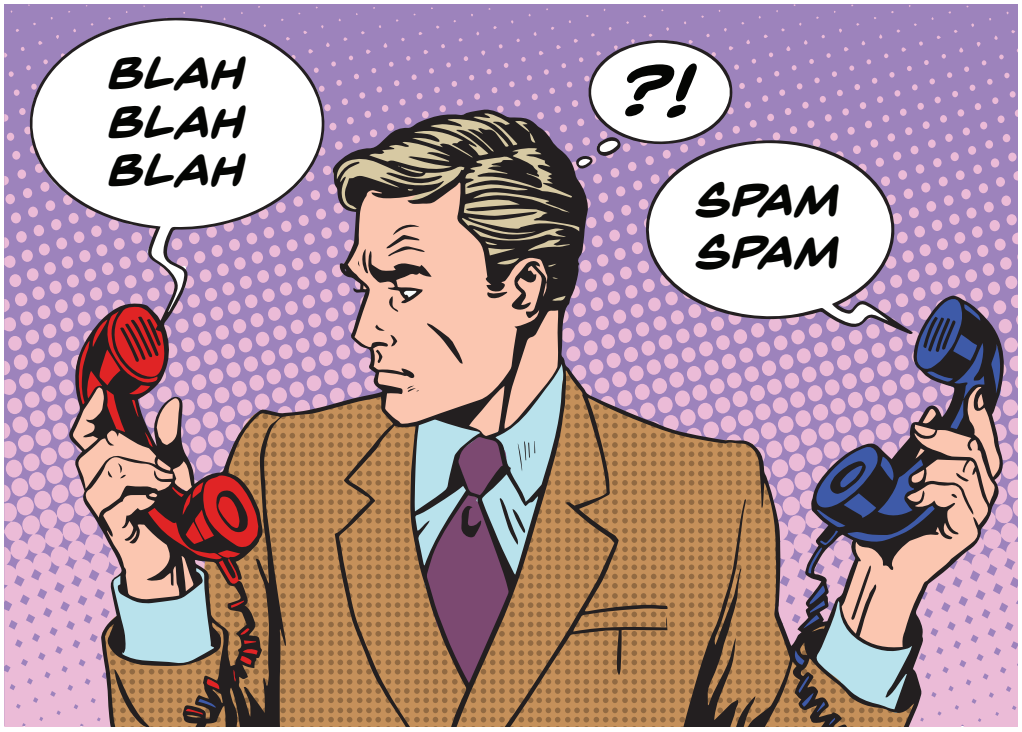

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In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to ban certain types of unsolicited phone calls, text messages, and faxes. The law provides for statutory damages of $500 *per violation*, or as much as $1,500 per "willful" violation. Recently, the plaintiff's bar has seized on the TCPA to file putative class actions seeking massive statutory damages. As a result, many TCPA class actions have settled for tens of millions of dollars. See, e.g., *In re Capital One Telephone Consumer Protection Act*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) ($75.5 million). 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 percent. New York, in particular, has seen an uptick in TCPA class actions since the Second Circuit affirmatively held that New York Civil Practice Law and Rules §901(b) does not bar TCPA class actions in New York federal courts. *Bank v. Independent Energy Grp.*, 736 F.3d 660, 661 (2d Cir. 2013).

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 defeat class certification. 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

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superior based on disproportionate damages.

Overview of TCPA and Class Certification Requirements

The TCPA makes it unlawful for any person to (1) use an "automatic telephone dialing system" to call or text 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. 47 U.S.C. §227(b).

To certify a class, a plaintiff must satisfy four prerequisites: the proposed class must be sufficiently numerous; common questions of fact or law must exist; the proposed class representative must be typical of the proposed class; and the proposed representative must adequately represent the class. Fed. R. Civ. Proc. 23(a). Most courts also recognize an independent requirement of "ascertainability," which requires that the proposed class be defined with reference to objective and definite criteria. *Ault v. J.M. Smucker Co.,* 310 F.R.D. 59, 64 (S.D.N.Y. 2015). When seeking damages, the plaintiff must also demonstrate that common issues *predominate* over individualized issues and that class action proceedings are superior to individual actions. Fed. R. Civ. Proc. 23(b)(3).

Predominance of Individualized Issues

Many defendants have successfully defeated putative TCPA class actions by arguing that a key element of liability—that the class members did not *consent* to receive the communications—cannot be adjudicated on a classwide basis.

For example, in *Newhart v. Quicken Loans*, the court denied class certification 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." 2016 WL 7118998, at *2 (S.D. Fla. 2016). That is because, in addition to the threshold inquiry of whether each class member consented to the call, the fact-finder would *also* need to determine whether each challenged call was made for a telemarketing purpose. The court rejected the 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 others calls were simply transactional in nature and did not encourage the purchase of any goods or service. See also *Ung v. Universal Acceptance*, 319 F.R.D. 537 (D. Minn. 2017) (individualized consent issues predominated where at least some class members had consented to being called and the circumstances of consent varied).

Other courts have reached a similar conclusion based on the lack of standing. For example, in *Legg v. PTZ Insurance Agency*, the court held that a call recipient who expressly consented to receive calls has not suffered a "concrete injury" under the Supreme Court's decision in *Spokeo v. Robins*. 2017 WL 3531564 (N.D. Ill. 2017). 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, the court held that "there is simply no way to establish a lack of consent with generalized evidence."

In contrast, several courts have granted class certification where the defendant failed to prove that any portion of the proposed class actually provided express consent. In one such case, the court held 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." *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1307 (D. Nev. 2014). In another, 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." *Silbaugh v. Viking Magazine Servs.*, 278 F.R.D. 389, 393 (N.D. Ohio 2012).

In sum, defendants have strong defenses to class certification where they can show that: (1) a substantial portion of the proposed class consented to the communications; (2) the purpose and nature of each communication varied from person to person; or (3) identifying who provided consent and who did not would be impractical or impossible.

Lack of Adequacy and Typicality

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

For example, in *Cholly v. Uptain Group*, the court held that the plaintiff, who had initially consented to the calls, but later revoked her consent, was atypical of class members who had never consented in the first place. 2017 WL 449176 (N.D. Ill. 2017). In *Nghiem v. Dick's Sporting Goods*, for example, the proposed class representative was an attorney who had filed numerous TCPA class actions. 318 F.R.D. 375 (C.D. Cal. 2016). 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." Id. at 383. 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. 320 F.R.D. 50 (C.D. Cal. 2017).

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. Some courts have gone so far as to deny class certification on this basis, reasoning that a class action would not be "superior" to the filing of individual actions. See, e.g., *Kim v. Sussman*, 2004 WL 3135348, at *3 (Ill. Cir. Ct. 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.").

However, most courts have rejected this argument and held that potential exposure should not be considered. See, e.g., *Physicians Healthsource v. Doctor Diabetic Supply*, 2014 WL 7366255, at *9 (S.D. Fla. 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").

Notably, at least one court has staked out a middle position, holding 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. *Am. Copper & Brass v. Lake City Indus. Prod.*, 2012 WL 3027953, at *5-6 (W.D. Mich. July 24, 2012).

Conclusion

Companies facing TCPA class actions should rest assured that the failure to obtain a dismissal on the pleadings is not game over. Many defendants have successfully defeated class 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.