

Tactics for Defeating Class Certification of TCPA Claims

By Kali Backer – March 2, 2015

Lawsuits asserting violations of the Telephone Consumer Protection Act (TCPA) continue to surge, as 2014 paved the way for some of the largest settlements to date under the TCPA. Capital One settled its TCPA case for \$75.5 million, and Bank of America settled for \$32 million, for example. *In re Capital One, Case No. 12 C 10064 (N.D. Ill. Feb. 12, 2015)*; *Rose v. Bank of America Corp., Case No. 5:11-CV-02390-EJD (N.D. Cal. Aug. 29, 2014)*. The driving force behind these multi-million-dollar settlements is the class-action mechanism. The TCPA only authorizes \$500 to \$1,500 per statutory violation; however, that dollar figure quickly multiplies when considering thousands of calls or faxes. 47 U.S.C. § 227(b)(3). Class certification has become a critical stage in TCPA litigation because it gives defendants the opportunity to convert a multi-million-dollar case into a case worth as little as five hundred dollars.

To prevail on a TCPA claim, a plaintiff need only prove that (1) the defendant called or faxed the plaintiff using an automatic dialing system; and (2) the plaintiff did not consent to the call or fax. 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(c). However, to certify a class, a plaintiff must satisfy Rule 23's requirements of numerosity, commonality, typicality, and adequate representation. Additionally, plaintiffs must prove that the class is ascertainable by objective measures and, for classes under Rule 23(b)(3), that common issues of law and fact predominate over individualized inquiries.

The Supreme Court's decision in *Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)* requires courts to apply "rigorous analysis" to class-certification issues. In the wake of that decision, lower courts have subjected TCPA classes to a heightened level of scrutiny, resulting in more class-certification denials. Below are various angles of attack that have successfully resulted in denials of class certification.

Determining the Recipient of a Fax Is Not Administratively Feasible

Tracing fax numbers to the person who actually received the fax can make class management a logistical nightmare that makes courts reluctant to certify a class. As the District of Minnesota recently put it, "the fax number is just the starting point of the analysis." *Sandusky Wellness Center LLC v. Medtox Scientific, Inc., Case No. 12-2066 (D. Minn. Aug. 5, 2014)*. This is because both the recipient of the fax and the subscriber to the fax number have standing under the TCPA. After a list of relevant fax numbers is compiled, the parties still need to identify who owned and who actually used the fax machine associated with the fax number at the time the fax was sent. Accordingly, courts have declined to certify these classes on ascertainability grounds because individualized inquiries are required to identify who is included in the class.

Individualized Issues of Consent

Identifying class members who may have consented is one of the most common and effective ways to attack a motion for class certification. The key to this method is setting forth specific evidence that establishes that a significant number of potential class members consented to the calls or faxes. The TCPA does not define what it means to provide consent, and courts have allowed defendants to prove "consent" in a variety of ways. Agreeing to particular provisions in customer contracts, enrolling in rewards programs, filling out credit applications, and speaking with customer-service representatives are all ways potential class members can consent to calls or faxes. *Connolly v. Hilton Grand Vacations Co., LLC, 2013 WL 5835414 (S.D. Cal. Oct. 29, 2013)*. See also *Jamison v. First Credit Services, Inc., 290 F.R.D. 92 (N.D. Ill. 2013)*. In light of this, defendants should point out all the ways in which class members provided the defendant with the applicable fax or telephone number. The more ways potential class

Consumer Litigation

members could have consented, the more individualized the issue of consent becomes, thereby precluding certification.

Fail-Safe Classes

A fail-safe class is a class definition that essentially parrots the elements of liability under the statute. Fail-safe class definitions within the TCPA context usually involve all people who received phone calls, faxes, or text messages without the recipient's "prior express consent". Some courts refuse to certify fail-safe classes on ascertainability grounds because class members can only be identified through individualized fact-finding regarding the issue of consent. However, circuits are split as to whether to allow fail-safe classes—the Sixth and Seventh Circuits will not certify fail-safe classes, but the Fifth Circuit will allow those classes to proceed. [*Zarichny v. Complete Payment Recovery Services, Inc.*, Case No. 14-3197 \(E.D. Penn. Jan. 21, 2015\)](#).

Non-Customers Are Not Typical Due to Contracts with Customers

Contractual relationships with customers can alter a company's duties and create different theories of liability for customers as opposed to non-customers under the TCPA. In [*Labou v. Cellco Partnership*, 2014 WL 824225 \(E.D. Cal. 2014\)](#), a non-customer failed to satisfy the typicality requirement because class encompassed both customers and non-customers. The customer contracts contained applicable arbitration provisions and consent for automated calls. Because the plaintiff was not subject to those provisions, her claims were not typical of the class, and class certification was denied. Class definitions are often drafted as broadly as possible, and contracts with potential class members can create individualized issues that bar class certification.

Expert Evidence Is Flawed

Increasingly, plaintiffs rely on expert opinions to identify class members. However, flaws in an expert's methodology can prevent class certification. The Western District of Washington addressed this issue, finding that the plaintiff's expert failed to account for whether individuals later consented to be called and whether there was an existing business relationship, among other factors. [*Southwell v. Mortgage Investors Corp. of Ohio, Inc.*, 2014 WL 3956699 \(W.D. Wash. 2014\)](#). As a result, the court found that the plaintiffs could not establish numerosity because the expert's analysis could not prove the number of TCPA violations at issue.

Conclusion

Obtaining a denial of class certification is a powerful tool that can significantly impact settlement negotiations. Defense counsel should consider arguments that may be used to oppose class certification at an early stage in the litigation, as discovery and expert reports may be critical to obtaining a denial of a class.

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