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Telemarketing

Junk Fax Class Certification Exposes Federal Consent Disparity

A recent federal court class certification highlights the struggle companies may go through to defend Telephone Consumer Protection Act (TCPA) claims that they didn't get consent before sending faxes, class action attorneys told Bloomberg BNA.

The U.S. District Court for the Southern District of Illinois certified a class of consumers who allegedly received unsolicited fax messages from a consulting company without prior consent in violation of the TCPA, 47 U.S.C. § 227 (*Dr. Robert L. Meinders D.C., Ltd. v. Emery Wilson Corp.*, 2016 BL 198888, S.D. Ill., No. 14-CV-596-SMY-SCW, 6/21/2016).

Judge Staci M. Yandle certified June 21 a class of consumers who were in ''defendant's 'central file' or 'dead file' databases'' and were sent a fax.

The ''defendants are learning a tough lesson the hard way that written TCPA and telemarketing sales rule policies and formal documentation of consent are both critical,'' Richard Gottlieb, a financial services class action partner at Manatt, Phelps & Phillips LLP in Chicago, said June 23.

According to the class complaint, filed in Illinois state court and removed to federal court, the defendant sent fax advertisements to the plaintiffs without consent and without a proper opt-out provisions.

Question of Consent. David Almeida, class action partner at Sheppard, Mullin, Richter & Hampton LLP in Chicago, said June 22 that the decision wasn't surprising.

''The single biggest defense to TCPA liability is consent, which defendants generally argue predominates over any common questions at the class certification stage,'' he said.

However, courts have begun to ''force defendants to put forth evidence of consent to establish that individual questions predominate,'' he said. This trend ''inverts the burden at the class certification stage,'' and makes it easier for plaintiffs to get TCPA class certification, Almeida said.

Companies that may advertise through fax messages and use a database to store consumer information ''must retain evidence—even in shortform—of consent,'' he said. ''Even a modicum of proof of consent will go a very long way.''

Troy Lieberman, litigation attorney at Nixon Peabody LLP in Boston, said June 23 that this decision ''is a bad sign for TCPA defendants that make the argument that class certification isn't appropriate because of the many differing ways consent can be and is obtained.'' The Southern District of Illinois wasn't ''swayed by this very real concern, that a lot of these consent issues are individualized,'' he said.

Circuit Split Over Ascertainability. The case highlights a discrepancy in ascertainability standards between circuit courts, although attorneys disagree on the degree to which this disparity exists.

Ascertainability, an implied prerequisite to class certification, requires that the class be defined by objective characteristics that allow for class members to be readily identified.

The Third Circuit required that sales records—or other reliable evidence of product purchases identifying class members—be available for a class to be found ascertainable in *Carrera v. Bayer Corp*. The Seventh Circuit roundly rejected the Third Circuit's Carrera strict standard for identifying class members in its July 2015 ruling in *Mullins v. Direct Digital LLC*. The Seventh Circuit held that as long as the class definition is spelled out clearly and objectively, ascertainability is met.

Martin Jaszczuk, a partner at Locke Lord LLP and head of the firm's TCPA class action litigation section in Chicago, said June 23 that although ''there is a difference between the Seventh Circuit's and Third Circuit's articulation of the ascertainability standard, one could make the argument that the difference isn't the chasm that some commentators have made it out to be.''

When a defendant provides ''concrete examples of consent for numerous potential class members that would overwhelm a class trial, certification is likely to be denied by courts in either jurisdiction,'' he said.

However, Almeida takes a different approach on the issue.

''The Seventh Circuit's approach is very lenient, while in contrast the court notes the Third Circuit applies a heightened ascertainability requirement, which, in effect, requires that plaintiffs establish an administratively feasible way of identifying class members,'' Almeida said. In this case, the defendant ''correctly points out that the plaintiff failed to put forth any evidence that it could possibly identify the recipients of unsolicited advertisements,'' he said.

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Gottlieb said that ''there is nothing surprising about the ruling with respect to the split.'' The court in this case ''was bound to follow the Seventh Circuit.''

However, there were some surprising aspects to the decision, Gottlieb said. ''The ease in which the court accepted the faulty premise that the class was the least bit ascertainable under the facts,'' was surprising, he said. The argument that ''you can identify a universe of potential class members doesn't negate the common sense conclusion that there is no way the true subset of class members may prove up their claims without minitrials,'' he said.

Next Stop Supreme Court? With the disparity between the two circuit courts on ascertainability, the Supreme Court may be the ultimate destination for the issue.

''It is truly bizarre that this class was certified in the Seventh Circuit, where the same class wouldn't have been certified in the Third Circuit,'' Almeida said. ''Frankly, this is an issue the Supreme Court will need to address in the near term.''

The court appointed Dr. Robert L. Meinders DC Ltd. as class representative. Phillip Bock, Christopher Tourek, James Smith, Jonathan Piper and the law firm Bock & Hatch LLC were named class counsel. Blank Rome LLP, DLA Piper LLP and Cray, Huber, Horstman, Heil & VanAusdal LLC represent the defendant.

By Daniel R. Stoller

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Full text of the opinion is available at http://www.bloomberglaw.com/public/document/Dr_Robert_L_Meinders_DC_Ltd_v_Emery_Wilson_Corp_No_14CV596S

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