

Exposing Individual Issues Regarding Consent Can Help Defeat Class Certification

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Recent decisions suggest it may be tougher for plaintiffs to obtain class certification in Telephone Consumer Protection Act (TCPA) matters where individual issues regarding consent predominate. The TCPA imposes \$500 statutory damages per call (including text messages) where the recipient did not provide the requisite consent to the communication, and up to \$1,500 per knowing and willful violation. Because the risks associated with protracted class action litigation are compounded by the TCPA's generous damages scheme, the best chance for minimizing exposure in such matters is at the certification stage. One strategy for defending against certification is to exploit individualized issues related to consent. Recently, a California federal district court ruled that predominance was not demonstrated under Rule 23(b) where issues of consent could not be established with class-wide proof. In *Fields v. Mobile Messengers Am., Inc.*, the consumer plaintiffs claimed to be victims of "cramming," a purported scam that results in the placement of "unauthorized, misleading, or deceptive charges on a consumer's cell phone bill." The plaintiffs complained of receiving monthly charges for the periodic receipt of unsolicited text messages containing trivia or horoscope information. The defendants produced evidence indicating that consent was obtained from more than 1.5 million potential class members when they entered their information into one of the defendants' websites, which detailed available text message subscription plans. The plaintiffs' contradictory evidence showed that at least some of the putative class members had not responded to the defendants' confirmation text messages, and that it may have been possible for the defendants to manipulate the data regarding subscription confirmations. Because there was insufficient class-wide evidence regarding consent, the court denied certification. Exploiting individualized consent issues may not work where other factors supersede those related to consent. For example, in *C-Mart, Inc. v. Metro. Life Ins. Co.*, a Florida federal district court determined that, because a defendant's fax solicitations failed to include necessary opt-out language, the communications would have violated the TCPA even if valid consent was obtained. Still, companies

should focus on individualized issues including those related to consent where appropriate, as doing so could help defeat certification.

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