

## WSGR ALERT

APRIL 2010

## SUPREME COURT DECISION MAY OPEN DOOR TO MORE CLASS LITIGATION OVER FAX MARKETING IN FEDERAL COURTS

On Monday, April 19, 2010, the United States Supreme Court vacated the Second Circuit's decision in *Holster v. Gatco, Inc.*, which had dismissed the unsolicited fax class action, and remanded for further consideration in light of the Supreme Court's recent holding in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* If the Second Circuit concludes that *Shady Grove* requires reinstatement of Holster's class action claim, we will likely see an increase in unsolicited fax class actions, which can be crippling to companies that utilize faxes as a means of marketing their products.

**Background**

Holster accused Gatco of violating the Telephone Consumer Protection Act (TCPA), which generally prohibits the sending of unsolicited facsimile advertisements and marketing materials. The statute provides for damages in a fixed amount of \$500 per facsimile, and for treble damages where the defendant acted "willfully or knowingly." Although a federal statute, Congress did not provide for federal jurisdiction over TCPA claims, so most must proceed in state court because the amount at issue is below the amount required to proceed in federal court. Holster was only able to bring his claim in federal court because he asserted his claims on behalf of

a class of all persons who had received unsolicited faxes from Gatco, thereby increasing the amount in controversy to greater than \$5 million. Holster could not have brought the same suit in New York state court on a class basis, because a New York statute—N.Y. Civ. Prac. Law Ann. § 901(b)—bars class actions that seek statutory damages.

The Second Circuit dismissed the action, concluding that New York's Section 901(b) applied to the federal court action, and precluded the claim from being brought on a class basis. It relied entirely upon another decision handed down the same day, in *Bonime v. Avaya Inc.* (successfully handled by Wilson Sonsini Goodrich & Rosati). In *Bonime*, the court reasoned that the action could not proceed on a class basis both because under the *Erie* doctrine Section 901(b) should be applied as a "substantive" state law, and because the TCPA permits claims only "if otherwise permitted by the laws or rules of the court of a State," and New York—by way of Section 901(b)—does not permit TCPA class actions.

In *Shady Grove*, the Supreme Court rejected the Second Circuit's ruling that the plaintiff was barred from filing a class action against Allstate Insurance Co. in New York federal court for violations of a New York insurance statute that provided for

statutory interest on unpaid benefits. The Supreme Court determined that Rule 23 of the Federal Rules of Civil Procedure, and not Section 901(b), controls whether a class action may be filed in a New York federal court.

The Second Circuit now will need to decide whether the Supreme Court's decision in *Shady Grove* requires a different outcome in *Holster*. In a concurring opinion in *Holster*, Justice Scalia stated his position that *Shady Grove* requires a different result in *Holster*. In a dissent, Justice Ginsburg stated her position that *Shady Grove* did not require a different result in *Holster*.

**Implications**

Many companies advertise and market their products through so-called "fax blasts." *Gatco* calls into question *Bonime* and other cases that have prohibited unsolicited fax class actions from proceeding in federal court based upon state-law restrictions. As Justice Ginsburg observed in her *Shady Grove* dissent, reversal of *Holster* would enable plaintiffs who would otherwise face the prospect of a minimal recovery in state court to "transform a \$500 case into a \$5 million award." Companies therefore should be very cautious about faxing advertising and marketing materials. The TCPA and its implementing regulations

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have strict requirements governing to whom a fax may legally be sent, and the mandated opt-out language and procedures, as well as record-keeping requirements. Accordingly, before sending advertising or marketing materials by fax, businesses should ensure that they are in compliance with the TCPA and its regulations.

For more information or any questions regarding consumer class action litigation, please contact Keith Eggleton, Tonia Klausner, or another member of Wilson Sonsini Goodrich & Rosati's litigation department.



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