Wednesday, November 30, 2011

Class Action Smackdown

Class action plaintiff lawyers have been known to do some pretty sleazy things. Don't just take our word for it. Check out the ALI's recently adopted Principles of the Law of Aggregate Litigation §§1.05, 3.08 (2010), and especially the cases and articles cited in the Reporter's Notes. Class action plaintiff lawyers also have to satisfy the "adequacy of representation" prong of Rule 23(a) in order to get a class certified. When can the former preclude the latter?

That was the question in the recent decision by the Seventh Circuit in Creative Montessori Learning Centers v. Ashford Gear LLC, No. 11-8020, slip op. (7th Cir. Nov. 22, 2011). Creative Montesori isn't a drug/device case – far from it – but it's a useful reminder about another way to defend against class actions. Moreover, we recommend that defense counsel read it with an eye towards the type of discovery that would be appropriate to prove the sorts of representation issues that the Seventh Circuit has declared relevant (and potentially dispositive) to class certification.

You've probably heard of "patent trolls" – entities that produce nothing of value, only litigation over questionable patents. Well, Creative Montessori involves what could be called "fax trolls" – a law firm that specializes in bringing suits under a federal statute (the so-called "Telephone Consumer Protection Act") that imposes "draconian" penalties for sending unsolicited faxes. Slip op. at 2. The firm apparently scraped the bottom of the barrel rather thoroughly to dig up the purported plaintiffs for the suit in question, engaging in two types of conduct that the appellate court took issue with:

- First, they "obtain[ed] material from [a fax broadcaster's] files on the basis of a promise of confidentiality that concealed the purpose of obtaining the material, a purpose inconsistent with maintaining confidentiality and likely to destroy [the broadcaster's] business." Creative Montessori, slip op. at 6. This case was not the only such breach of confidence. According to the opinion, the same firm brought "more than 50 similar class action suits based on information" from the same source. Id. at 6.
- Second, once the firm identified the fax recipients, it solicited their participation in the class action suit by "implying in the letter to [the would-be plaintiff] that there already

> was a certified class to which the [plaintiff] belonged." This "would constitute misconduct . . . because the communication was misleading." Id. at 6-7.

The district court ignored these incidents in deciding to certify the class, holding that the alleged misconduct was properly the province of "bar authorities." Creative Montessori, slip op. at 7. The lower court went on to hold that "only the most egregious misconduct" by would-be class counsel "could ever arguably justify denial of class status." Id. at 2. The Seventh Circuit, in a unanimous decision by Judge Posner, vehemently disagreed. Any serious allegation of misconduct by class counsel undercuts the adequacy of their representation:

> "Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification. . . . A serious or, equivalently, a "major" ethical violation, should place on class counsel a heavy burden of showing that they are adequate representatives of the class."

Id. at 10-11 (citations omitted). A lesser standard, without the burden being on class counsel to justify their adequacy in such circumstances, is merely an invitation to class action lawyers to profit from their own ethical misdeeds:

> "To rule that only the most egregious misconduct "could **ever arguably** justify denial of class status," as the court went on to hold, would if taken literally condone, and by condoning invite, unethical conduct."

Id. at 10 (emphasis original).

The court therefore vacated class certification and remanded – with the explicit instruction to "re-evaluate the gravity of class counsel's misconduct and its implications for the likelihood that class counsel will adequately represent the class." Creative Montessori, slip op. at 11.

There's even more to Creative Montessori than we've discussed (such as that the would-be class representative probably never even received a fax), so it's worth a read by anyone defending class actions of any sort. The opinion is a ringing reiteration of the principle that "actions have consequences," something that lawyers, as well as children, should bear in mind. Moreover, by expressly linking ethical lapses – not limited in any way to the solicitation of clients – the opinion underscores the need for properly targeted discovery, at the class certification stage, into potential misconduct by class counsel.