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April 4 **2014**

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7th Circuit: Impact of Defendant's Exposure on Rule 23(f) Class Cert Appeal & Novel Issues of the TCPA

After two weeks off, we return with what our regular readers will recognize is my favorite topic to discuss on the Hoosier Litigation Blog: a Seventh Circuit class action decision authored by Judge Richard Posner. Today's discussion probes an issue that we have not previously delved into. It also touches upon a few topics that we have previously discussed. Without further ado, let us jump into this week's case: *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities*.

The case stems from alleged violations of the Telephone Consumer Protection Act (TCPA). We have previously discussed a handful of TCPA class action cases out of the Seventh Circuit in discussing the boundaries of the Class Action Fairness Act (CAFA) and in addressing whether class counsel's questionable actions could result in decertification of a class. As you can probably tell, the TCPA has provided a strong statutory basis for many class actions, particularly because it permits a successful litigant to recover the greater of his actual harm or $500. Because the TCPA applies to things such as "junk faxes" – i.e., unsolicited faxes – it is almost universally the case that the $500 statutory damage surpasses the actual damages. The TCPA also permits a trebling of that amount if the violation is willful.

The trial court decided to certify the case as a class action. The defendants sought an interlocutory appeal to the Seventh Circuit under Rule 23(f). Those who have read *7th Cir. (Posner) Examines Interlocutory Appeals of Class Certification Decisions Under 23(f)* will recall that Rule 23(f) does not permit an absolute right to appeal a class certification decision, rather it invests discretionary authority in the appellate court to, if it so desires, accept an interlocutory appeal.

The first issue on appeal – our novel issue for the day – is the impact of the magnitude of a defendant's exposure – i.e., how much money is on the line – on the court's granting of interlocutory appeal under Rule 23(f). The threat of putting a defendant out of business by an extremely large judgment, at least in the Seventh Circuit, is not a concern that impacts the class certification decision. This was made clear by Judge Frank Easterbrook in *Murray v. GMAC Mortgage Corp.*: "An award that would be unconstitutionally excessive may be reduced but constitutional limits are best applied after a class has been certified." But, the size of exposure relative to the size of the company is a legitimate consideration in determining whether to grant Rule 23(f) review of the certification decision. Specifically, as Judge Posner found in today's case: "If the expected damages are so great in relation to the defendants' assets that if the class certification order stands, the defendants may well be forced—even if they have a strong case on the merits—to settle, in order to avoid the risk of a catastrophic judgment, we would give careful consideration to the request for leave to appeal the order."

In this case, the potential exposure was in the neighborhood of $15 million. However, the exposure was not sufficient to entice the Seventh Circuit to exercise Rule 23(f). The reason: the defendants did not identify "what their assets are" in seeking appeal. They only said that "the corporate defendant is 'a small family owned business.'" As Judge Posner added, in a fashion that well signifies the writing style we have come to know (and some of us love) him for, "It is no doubt small in relation to such family-owned businesses as Koch Industries and Walmart, but maybe not so small that a contingent liability of $15 million would force it to settle; it hasn't settled yet, and this suit will be celebrating its fifth birthday later this year."

But, as I noted above, the relative exposure and its likelihood to compel settlement does not actually impact the class certification decision. It only bolsters the argument for accepting an interlocutory appeal of the class certification decision. As Judge Posner said:

> Even if the defendants could prove that they'll be forced to settle unless we reverse the class certification order, they would have to

> demonstrate a significant probability that the order was erroneous. "However dramatic the effect of the grant or denial of class status in ... inducing the defendant to capitulate, if the ruling is impervious to revision there's no point to an interlocutory appeal."

Thus, that portion of the defendants' argument failed to carry the day.

The next argument – "the defendants' principal argument" – addressed the issue of standing under the TCPA. Defendants argued "that only owners of fax machines have standing to sue. . . . The plaintiffs have not presented evidence concerning the ownership of the fax machines of the class members." The court rejected this argument by recognizing that the TCPA makes no mention of ownership: "the Act prohibits is faxing unsolicited fax advertisements 'to a telephone facsimile machine.'" This may seem like a silly distinction, but it really isn't. Of course it is not the fax machine itself that gets to sue. The issue is in this argument is really to determine who the proper plaintiff is when the fax machine is leased. In such a situation is it the actual owner who is leasing the machine or the person in possession of the machine, using it every day.

The defendants relied on a 2013 federal district court – i.e., trial court – decision out of Michigan: *Compressor Engineering Corp. v. Manufacturers Financial Corp*. In that case, the judge "read an ownership requirement into the" TCPA. Judge Posner rejected the decision as "erroneous on its own terms, because the lessee of a fax machine pays for the paper and often the ink." This makes sense, as the likely party to be actually harmed is the lessee. However, Judge Posner takes it a step further. Relying on a 2013 Seventh Circuit case – *Holtzman v. Turza* – Judge Posner recognized that the TCPA does not require any monetary loss to support a claim. Thus, it doesn't even matter if the lessee actually pays for ink or paper. "Whether or not the user of the fax machine is an owner, he may be annoyed, distracted, or otherwise inconvenienced if his use of the machine is interrupted by unsolicited faxes to it, or if the machine wears out prematurely because of overuse attributable to junk faxes."

Interestingly, even though it may seem that the decision is saying that as between the true owner and the lessee in a lease relationship, the lessee is the proper plaintiff. It goes on to say, "At most the defendants' argument would support adding to the class the owners, if different from the users, of the fax machines that received the unauthorized fax advertisements." While it is true in the Seventh Circuit that the determination whether a particular class member actually has a claim is not something to be determined at class certification, this is a surprising statement. If read broadly, and perhaps in the only reasonable manner possible,

this statement would mean that there could be two plaintiffs for a single fax machine. Meaning, that by virtue of a lease on the fax, a defendant's exposure for sending a single fax can go from $500 (trebled to $1.5k) to $1k (trebled to $3k). It's an interesting, though not fleshed out, proposition.

The court also added another insight into the TCPA. One of the formerly named plaintiffs (he was dropped as a class rep by class counsel) was a federal prisoner when the junk fax was sent to his fax machine. Defendants tried to argue that he could not be a class member because he was not able to use his machine at the time. Judge Posner noted, "His wife received the defendants' fax while he was imprisoned." I don't think whether his wife actually received the fax or not matters; at least not based upon the judge's earlier discussion. If the owner of a leased fax could be added to the class, then why does it matter if an imprisoned person had a wife to receive the fax? Merely having ownership of the fax should be enough.

To add the coup de grâce to defendants' argument on ownership, the judge adds that the numerosity requirement of class certification is met so long as the size is sufficiently large to make joinder impracticable even if the exact size and composition isn't known. He also adds, as I recognized above, that the validity of a class member's claim is to be determined after certification. Thus, he finds, "[This] goes to show that the defendants' argument about ownership is not really addressed to the appropriateness of class certification, and so doesn't belong in this appeal." Essentially, the argument was simply that there were persons in the class who shouldn't be. "If the argument had merit (it doesn't), it would merely encourage the district judge to create subclasses, one of which (the owner subclass) could win while the lessee subclass lost."

The defendants had another interesting argument. Under the TCPA a fax is only a violation if it is unsolicited. In a prior case also authored by Judge Posner, the defendants argued that one of the named plaintiffs had solicited the fax by "post[ing]its fax number on its website and next to it the phrase 'Contact Us.'" The same plaintiff had also authorized publication of its fax number in a business directory and the yellow pages. The business directory authorization "states that 'by supplying [the directory] with your fax and e-mail address, you agree to have [the directory] and users of [its] services communicate with you via fax or e-mail.'" However, in this case, though the same business directory was at issue, the named plaintiff had not signed the authorization. Thus, the named plaintiff was not rendered an inadequate class representative.

Lastly, defendants argued that the class counsel should have been disqualified for sending a class action notice to the defendants. The court agreed

that such an action would certainly "have been unethical conduct if the purpose of the notice had been to enlist the defendants in a class action suit as members of the plaintiff class. For that would puth them on both sides of the case–thus suing themselves!" However, that is not at all what happened! The notice that was sent to defendants was for a different junk-fax case.

After chastising the trial court and the parties for dragging this case out for five years, the court concluded by denying to exercise Rule 23(f) to permit appeal of the class certification decision.

Join us again next time for further discussion of developments in the law.

Sources

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- *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006).
- *Compressor Engineering Corp. v. Manufacturers Financial Corp.*, 292 F.R.D. 433, 448 (E.D. Mich. 2013) (Cox, J.).
- *Holtzman v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (Easterbrook, C.J.).
- *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721 (7th Cir. 2011) (Posner, J.).
- Telephone Consumer Protection Act (TCPA) – codified at 47 U.S.C. § 227.
- Federal Rule of Civil Procedure 23(f).
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