

Question of Consent Turns Putative TCPA Fax Class Action Into Junk

Article By:

Brooke Patterson

A recent decision by a Connecticut district court reiterates that the issue of consent may foreclose class certification in Telephone Consumer Protection Act (TCPA) junk fax cases. The action was one of several putative class actions brought by Gorss Motels Inc. against suppliers to Wyndham hotels and its various franchisees. Gorss was a former corporate owner of a Wyndham franchise hotel. Defendant Otis Elevator Co. had a contract with a subsidiary of Wyndham as an approved supplier. The contract provided that the subsidiary would share information about Otis with Wyndham franchisees. Gorss filed the action after a third-party vendor sent a “fax blast” regarding Otis to Wyndham franchisees. The fax blast contained an opt-out disclaimer and was allegedly transmitted to 2,936 fax numbers.

Gorss argued that the fax was a junk fax in violation of the TCPA. To have a viable TCPA claim, the fax must have been sent without prior express permission of the Wyndham franchisees, in other words, without their consent. While the parties agreed there were several questions of law and fact common to the putative class, Otis argued that the question of consent required an individualized inquiry and body of proof, which would preclude a finding of predominance under Rule 23.

The court noted that several other courts had identified the issue of consent in TCPA cases as presenting individualized questions of proof sufficient to defeat a claim of predominance. The court found that Otis’ preexisting relationships with many putative class members (Wyndham franchisees) was probative of the issue of consent and would require individualized inquiry into prior communications between Otis and the putative class members, making the action unsuitable for class certification.

[*Gorss Motels, Inc. v. Otis Elevator Co.*](#), No. 3:16-cv-1781-KAD, 2019 WL 1490102 (D. Conn. Apr. 4, 2019)

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