

“Unethical and in Bad Faith”: TCPA Defendant and its Counsel Hammered By Federal Judge for “Coercive” Ex Parte Contacts With Class Members

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The line between zealous advocacy and unethical coercion is sometimes finer than it ought to be. But, as one recent case demonstrates, when it comes to making unilateral contact with class members post-certification Defendants (and their counsel) need to tread very very carefully.

In a remarkable order, the Honorable Cynthia Bashant of the S.D. Cal. recently determined that a TCPA defendant acted in a “coersive,” “unethical” and “bad faith” manner in [contacting class members post-certification in the big *McCurley* TCPA case](#). The Court also determined that the Defendant’s lawyers—Greenspoon Marder—had violated the ethical rules forbidding contact with a represented party, but were not required to withdraw from the case. The ruling is *McCurley v. Royal Sea Cruises, Inc.*, Case No. 17-cv-00986-BAS, Doc. No. 190 (S.D. Cal. Jul. 31, 2020) at it is available here: [Order Finding Unethical Conduct](#)

The story is pretty incredible.

Here’s what happened, according to the Order. Apparently, Defendant waited until *after* the case was certified to attempt to contact class members in an effort to gather evidence of consent designed, apparently, to de-certify the case. When they did reach out, however, the Defendant did not advise the class members about the case and explain what they were up to. Instead Defendant acted as if it was conducting a marketing survey and offered incentives to class members that agreed they had previously visited websites containing TCPA consent disclosures.

Hmmmm.

Setting aside why evidence of consumer consent was not marshaled *before* certification, ex parte contact with consumers within a certified class potentially conflict with the ethical rules prohibiting contact with a represented party—many courts have determined that class members are represented starting the moment a class is certified. And while other courts (and the ABA) view representation arising only after class notice has been given and class members have been afforded an opportunity to opt out, most every court to weigh in on the situation agrees that defendants and their lawyers must act fairly and non-coercively when engaging in unilateral communications with potential class members, represented or otherwise.

The *McCurley* court found that the ethical rules triggered the moment the class was certified, however. That being the case, most any unilateral communication with the class members would have been forbidden. (Tough for Defendant or its counsel to have known that ahead of time, but if you get too close to the line you can't complain if the court finds you crossed it I guess.) But the Court found Defendant and its counsel did went beyond just contacting class members—they did so in a “coercive” and “unethical” way.

Specifically, the Defendant's use of scripts designed to encourage class members to remember visiting a website containing consent disclosures, without any explanation of why Defendant was asking for this information, was determined to be unethical and in bad faith. Here is the critical language from the opinion:

*Contrary to the accusation made by Defendant that Plaintiffs are not searching for the truth in this action, it is Defendant's actions that suggest an attempt to obfuscate the truth. If Defendant was seeking truth, it could have asked neutral questions, not suggesting the answer it was seeking. If it was seeking truth, it could have worked with Plaintiffs to conduct discovery of class members. And, if Defendant had been seeking truth, it would not have omitted any information about the fact that a class action existed, that this individual was a member of the class, and that the class member was represented by class counsel if he or she so desired. That Defendant was intentionally leaving out this information is made clear by the fact that Defendant refers to the affidavits it seeks to obtain from class members, as “surveys.” **Clearly, Defendant was seeking to mislead the class members it contacted.** (Emphasis Added).*

Wow. That is a brutal finding. But the ruling continues:

*Defendant's conduct is particularly egregious because the answer it is suggestively encouraging the class member to give is contrary to the class members' interest. Unlike many of the cases cited by defense counsel, Defendant was not seeking to settle with the class member; **it was seeking to strip the class member of any rights, without explaining the importance of the question it was asking.** (Emphasis Added).*

That's going to get you into trouble every time folks. To be sure, there may be times when contacting class members—even post certification—is just fine. But as *McCurley* demonstrates, the rules here are tricky and you'd better be extra careful about how you go about approaching consumers within the class. Engaging in conduct that is designed to strip class members of rights—or undermine their case—without explaining what your doing or why is a pretty big no no.

And the Court squarely determined the Defendant's counsel also acted unethically in furthering the Defendant's “bad faith” efforts:

Defense counsel thus violated an ethical rule when they encouraged their client to contact an individual the lawyer knew to be represented by counsel, regarding the subject of the representation, without counsel's consent. Furthermore, the communications were misleading, omitted material facts about the existence of the class action, and were coercive in that they used suggestive, leading questions, offered incentives for giving the “right” answers, and suggested the answers were not important except for marketing purposes.

That's a bad day at the office.

There is a lesson here for all of us, of course. No matter how tempting it might be to skirt the lines to

get that extra piece of evidence—especially when you think you’re right on the merits—it just isn’t worth a potential finding that you’ve engaged in unethical conduct. If there is any doubt, there is no doubt. Stay away.

In the end the Court refused to allow Defendant to make any use of the evidence gathered from its survey efforts—including any deposition testimony from the class members—and sanctioned Defendant for the cost and expense incurred by Plaintiff in pursuing its motion for sanctions. The Court did not, however, order Defendant’s counsel to withdraw. Although the Court found the lawyers violated the applicable ethical rules, the Court determined that the harm from the violation had been cured and withdrawal was not required.

Perhaps the most lasting damage from this ordeal, however, is that Defendant must continue to litigate before a Court that has found it acted “unethically and in bad faith” respecting class members. One can assume there will be much second guessing and scrutiny as the case proceeds.

And, perhaps unsurprisingly, the Defendant’s effort to de-certify the case was denied today with the Court finding: “Notably, the only new evidence presented by Defendant in the Motion for Reconsideration are the declarations already rejected by the Court in its Order granting sanctions against the Defendant.”

We’ll keep an eye on this one.

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