Defaulted TCPA Defendant Avoids Certification on Ascertainability Grounds–For Now

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Ascertainability is such an interesting little concept. While the Eleventh Circuit recently did away with it (sort of) the requirement that class members be identifiable via administratively feasible means before a case can be certified is still alive and well in some circuits.

Take the Fourth Circuit, for instance.

In *Katz v. Capital Med. Educ.,* Civil Action No.: 3:20-cv-02524-JMC, 2021 U.S. Dist. LEXIS 147830 (D. S.C. August 6, 2021) the Court refused to certify a JUNK FAX case against a DEFAULTED defendant because the Plaintiff had failed to demonstrate ascertainability.

As we've reported in the past, defaulting is generally a pretty bad idea in a TCPA class action. But here the strategy of "playing dead" seems to be working. For now at least.

The issue in *Katz* was Plaintiff's failure to demonstrate who actually received the faxes at issue. While it should be emphasized that a Plaintiff does not need to identify class members at the pleadings stage–and, as such, CLASS DATA SHOULD NEVER BE REQUIRED PRE-CERTIFICATION–the Plaintiff does need to demonstrate a method for identifying class members post-certification as a condition of certification.

In *Katz* the Plaintiff didn't do that: "[Plaintiff] did not suggest any method for the court to determine the identity of the recipients of [Defendant's] fax." So the Court denied certification although all of the other Rule 23 factors were met.

Takeaways: TCPA class action litigators should always be mindful of the "implied" ascertanability rules. They can prove a considerable hurdle, even in a case involving a defaulted defendant.

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