Published on *The National Law Review* https://natlawreview.com

DEFENSE WIN TO STRIKE CLASS: Class Allegations Facially and Inherently Deficient Due to Unique EBR Defense

Article By:

Jenniffer Cabrera

Happy Wednesday TCPA World!! Our founders, Eric and Puja, are at Lead Generation World speaking TCPA, REACH and Compliance with our Dame, who is also celebrating her birthday this week. If you are there, please be sure to say Hello!

There's a new defense win that I wanted to share and the Court was not persuaded or impressed by Plaintiff. The case is *Sorsby v. Trugreen Limited Partnership* which has been ongoing for several years (2020) and the court has made previous rulings including dismissing other defendants.

Here's some relevant background to set the stage:

Plaintiff has two remaining claims against TruGreen LP, alleging that it violated (1) violated 47 U.S.C. § 227(c)(5) by calling her and others with their phone numbers on the National Do-Not-Call Registry and (2) violated 47 C.F.R. § 64.1200(d)(3) by calling her and others with their phone numbers on Defendant's internal Do-Not-Call list. In accordance with those claims, she seeks to represent two classes.

Defendant filed its first motion to strike class allegations contending that Plaintiff could not satisfy the Rule 23 requirements for a class action. In response, Plaintiff requested class-wide discovery to demonstrate that her proposed classes would meet Rule 23 requirements. The Court denied complete class wide discovery and ordered limited discovery "proportional to the needs of the case" to give the parties sufficient information to respond to Defendant's motion. Thereafter, TruGreen renewed its motion to strike class allegations.

The Court held that Plaintiff's class allegations are "facially and inherently deficient" because Plaintiff is an atypical and inadequate class representative. NICE WIN!!!

The Court's analysis is good.

First, in order to represent a class, plaintiff must first meet the four Rule 23(a) requirements for class certification: numerosity, commonality, typicality, and adequacy. FED. R. CIV. P. 23(a). After satisfying Rule 23(a), then plaintiff must satisfy one of the conditions in Rule 23(b). For classes seeking to be certified under Rule 23(b)(2), the plaintiff must additionally demonstrate predominance

and superiority. FED. R. CIV. P. 23(b)(2) The Court analyzed these arguments in pairs.

- Typicality and Adequacy

First, Plaintiff argued that Defendant's objections on adequacy and typicality grounds are premature and more suited to a motion for class certification. The Court disagreed and added that this Court flagged its concerns regarding the typicality and adequacy requirements in its July 23, 2021 order. Plaintiff had an opportunity to request the necessary discovery to resolve these issues and signaled that she has the necessary facts to do so. On the only issues before the Court, the parties have developed a record sufficient for the Court to rule on the motion to strike class allegations.

Next, the parties agreed that Plaintiff and a small subset within both her proposed Nationwide DNC Registry and Internal DNC List Classes would likely be subject to the established business relationship defense. Again, as the Court observed in its July 23, 2021 order—and Plaintiff failed to rebut in her briefing—Plaintiff's conversation with Defendant highlights the ambiguity of determining whether class members successfully revoked their business relationship with Defendant.

- Predominance and Commonality

Here, the Court addressed unresolved issues from its July 23, 2021 order that the parties addressed in briefing. In its order, the Court asked the parties to address whether the Court should follow *Cholly v. Uptain Grp., Inc.*, and *Wolfkiel v. Intersections Ins. Servs. Inc.*, or *Chicago Car Care Inc. v. A.R.R. Enterprises, Inc.* Specifically, the Court advised Plaintiff to address *Cholly* and *Wolfkiel* to demonstrate "that there are efficient and appropriate ways to identify a plausible class." In response, Plaintiff highlights *Chicago Care Care* as instructive because it held that "[o]n the face of the pleadings * * * there is no reason to conclude that complex individualized inquiries are needed." (what? the court ordered limited discovery for this motion)

The Court finds Plaintiff's argument unpersuasive. Plaintiff specifically requested discovery to properly brief this motion. Only after Plaintiff agreed that she had sufficient discovery to complete her brief did the Court hear this motion. (so now plaintiff wants to look at the pleadings only? NO.)

The Court noted that "even with the benefit of initial discovery, Plaintiff cannot advance a theory of generalized proof that could establish proper revocation of EBR for all applicable class members."

Plaintiff's next argument that Defendant's internal Do-Not-Contact forms can be the decisive date on which a consumer terminated her EBR highlights the difficult process that the Court would necessarily wade into to determine EBR termination dates. Further, the records before the Court leave unclear *why* consumers have cancelled service. Once again, the Court would need to dive into the factual circumstances of each customer cancellation, which makes this question individual, rather than common.

Because there is no single source of information that would demonstrate whether all class members had successfully terminated their business relationship with Defendant, Plaintiff's proposed revocation determinations would require individualized inquiries and thus are not suitable for class wide treatment in this case.

Take away:

1. Pay attention to Court Orders. Literally, it is the Court speaking to you.

2. A class representative may be inadequate and atypical if she is subject to an established business relationship unique to her.

3. Determining revocation of established business relationship would require individualized inquires.

National Law Review, Volume XIII, Number 11