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

Strong Move: Court Modifies a TCPA DNC Class Definition At the Pleadings Stage And it is Beautiful To See

Article By:

Eric J. Troutman

Nothing irks me more than an uncertifiable class definition surviving the pleadings stage. Then the Plaintiff gets to take enormously broad discovery while hiding their true class definition from the Defendant until they actually move to certify the case months or years later. It is absolutely not supposed to work that way.

First the Plaintiff must plead a viable definition. Then and only then the Plaintiff may conduct discovery specific to the definition. When it doesn't work that way the Plaintiff can obtain data sets that are massively over broad and uneeded to the case, causing havoc for defendants and consumers (whose personal information is needlessly disclosed) alike.

As I have been saying for years, then, the proper first step to assure limited discovery is to strike improper class definitions at the pleadings stage. But courts are reluctant to do that for some reason–which is just dumb. A court should NEVER allow an uncertifiable class definition past the pleadings stage, as just explained.

Well in *Klassen v. Solid Quote,* 2023 WL 7544185 (D. Colo Nov. 14, 2023) the Court took an interesting in between position, which I really like.

The Plaitiff's DNC class included everybody whose number is on the DNC list. The Defendant argued–correctly–that only those who personally subscribed to the DNC list can be included in the class. They oved to strike

the class as overly broad on that basis–the correct move.

Rather than strike the class completely, however, the Court simply used its discretion to modify the class definition to include only persons that personally subscribed to the DNC list–a brilliant move:

SolidQuote's concern is that the proposed "class definition asks this Court to improperly expand this case beyond the statutory scope" (D. 26 at 14) as a statutory violation requires a residential subscriber "[to have] registered his or her number on the national do-not-call registry," 47 C.F.R. § 64.1200(c)(2). In contrast, Plaintiff's proposed class would include any person whose number "was registered," without regard to who did the registering (D. 8 at 9). This issue is easily remedied. The Court modifies subdivision (1) of the proposed class definition to instead state "the person's telephone number was registered by the person on the National Do-Not-Call Registry 30 or more days." Rather than strike the offending pleading and require amendment, I exercise my discretion to slightly amend the proposed definition—which is far more efficient and in keeping with the spirit of Federal Rule of Procedure 1 than another round of briefing on this issue (which would ultimately result in the same slight amendment). To be clear, this alteration will not prohibit dissemination of the proposed class information to all such qualifying numbers registered on the do-not-call list, but will require opt-in plaintiffs to certify they registered their own number(s).

Really good stuff.

The last two lines of this block are interesting though.

First, the Court correctly says notice can go to everyone regardless of whether or not they personally subscribed to the DNC list or not, and I agree with that. But this line about "opt in" is odd–Rule 23 classes are opt out and not opt in classes. So not sure what the Court meant there–perhaps only that to succeed at trial the class member will need to show evidence of personal subscription?

Regardless, this is a great little ruling.

National Law Review, Volume XIII, Number 319