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

# $35MM GODADDY TCPA SETTLEMENT EXPLODES (PART 1): Appellate Court Finds Probable “Collusion” Between Class Counsel and GoDaddy Lawyers in TCPA Class Settlement–Deems Class Counsel “Inadequate” To Represent the Class

Article By:

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Oh, the wonderous TCPAWorld.

Every day something new and novel and fun.

People wonder why I never get bored of TCPA litigation. Those people aren’t paying attention. ?

There is simply no better place to reside for a law nerd. A fan of esoteric legal doctrine. Fans of practicing complex litigation at the highest level. Fans of using the courts as a giant atom smasher to detect new legal particles and theories that have never existed before.

No, there is simply nothing like TCPAWorld as a vehicle for DEVLOPING LAW. And that, after all, is what I am most interested in–the philosophy (metaphysics if you will) of the law. What drives it. Changes it. Bends it. I always want to be right on the cutting edge.

And in TCPAWorld I always am.

And so are you…

The latest MASSIVE ruling is So full of nuance and intrigue it bests any great piece of film noir.

The case is *Drazen v. GoDaddy.com* 2024 WL 2122466, No. 21-10199 (11th Cir. May 13, 2024) and it is over 120 pages long! Indeed, there are so many pieces to the decision I am going to do several blogs on it to break it down properly.

First, some quick background.

GoDaddy allegedly used an autodialer to illegally make marketing calls to over a million people without consent. A couple of people sued under the Telephone Consumer Protection Act (TCPA)

hoping to represent everyone who received these calls in one consolidated case (known as a class action.) While GoDaddy theoretically faced exposure of over $1BB it eventually settled the case for a “mere” $35MM. Yet even that number was not what it appeared and the true out-of-pocket cost to GoDaddy was going to be around $10MM, with the bulk of that amount going to the Plaintiff’s attorneys fees.

While the district court approved of the settlement–a required step in a class action-the Eleventh Circuit Court of Appeals found the deal problematic in numerous respects and nuked it, blasting Class Counsel along the way.

The decision may redefine how class actions resolve in TCPA (and other) class cases and is a decision every class litigator in the country should read. But the decision is one that is mostly focused on courts–charging them with heightened responsibilities in reviewing settlements for reasonableness.

Indeed, the decision instructs courts to take a microscope to the terms of class settlements–inspecting notice provisions, release terms and claims process details–even as they are to also keep in mind macro-factors, such as potential changes in law and pending appellate decisions across the country.

But, as I said, let’s go piece by piece here.

Piece one: **basics on a court’s responsibility in reviewing a class settlement and its role in detecting “collusion” between Class Counsel and defense counsel.**

At the highest level, *Drazen* is a stern reminder to courts of their obligation to carefully review class settlements to search for EVIDENCE OF COLUSION between class counsel and the defense.

Now this is a weird concept for most folks because defendants and plaintiffs are adversaries–so why would they collude? Short answer: because Plaintiffs’ lawyers want money and dont really care about the class. So a defendant can “pick off” a case by paying off the lawyers and giving very little to class.

That’s the cynical view, of course. But also the one that animates the Court’s responsibility to keep an eye on class settlements. We can’t have cases where a Plaintiff’s law firm makes millions and the class gets very little.

In the case of the GoDaddy settlement, for instance, the class had an eye popping headline of being worth$35MM. But under the surface things were quite different.

Class members only received money if they made a claim–very normal–but all class members gave up their rights against GoDaddy regardless of whether or not a claim was made. And more importantly, class counsel sought over $7MM in fees–an amount that makes sense if ALL class members made claims, but an amount that makes a lot less sense if only a small number of class members made claims.

In Drazen, for instance, only 2 percent of class members made claims. This meant that the amount of attorneys fees was going to be a multiple of the sum paid to ALL CLASS MEMBERS COMBINED. Eesh.

This, the appellate court found, was a big red flag. Why would class counsel agree to a settlement that gave them so much and the class so little?

But there were other issues here as well.

GoDaddy was going to receive a vast release of claims from *everybody* in the class that did not opt out. Not just those who made a claim. But in order to opt out the class member had to send a letter *under penalty of perjury* stating their intention to opt out. The appellate court found this provision was calculated to keep opt outs to a minimum–and that helped GoDaddy and potentially damaged the class.

Problematic too was the "overly broad" class release. The district court had noted the release was too broad–releasing far more claims than those raised in the complaint–and tried to re-write the release for the parties in approving the settlement. This was error per the appellate court–instead the Court's only remedy was to DENY the settlement and attorneys fee motion. Very harsh.

But the real emphasis of the appellate court ruling was its concern **that 98.1% of class members but they would receive absolutely nothing in exchange for giving GoDaddy overbroad releases, while Class Counsel would receive $7 million in attorney's fees.**

The appellate court was exceptionally cynical of Class Counsel in this analysis and really laid into the conflict of interest apparent between counsel and their "clients" the class:

*Class Counsel, in seeking $10.5 million in fees, were representing themselves. They were the absent Class Members' adversaries. At the same time, Class Counsel were in effect representing GoDaddy in obtaining overbroad releases of GoDaddy and scores of "affiliates" from claims yet to materialize. A class of 1.26 million members had to be bound by those releases. Class Counsel had agreed to the release provisions GoDaddy wanted. Their hope for attorney's fees depended on their agreement.*

My goodness. That is strongly worded.

But the next section–the final I will discuss in this blog– is the scariest for would-be class counsel:

***The District Court erred in finding that Class Counsel's representation of the absent Class Members was adequate because it* failed to "adopt the role of a skeptical client and critically examine … the proposed settlement terms."** *See Manual for Complex Litigation § 21.61. Likewise, it did not "exercise 'careful scrutiny' in order to 'guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members.' " See In re Equifax Inc., 999 F.3d at 1265 (quoting Holmes, 706 F.2d at 1147). Finally, it didn't see the conflict the lawyers had vis-à-vis the class members.*

The court erred in finding Class Counsel adequate?

HOLY SMOKES. That is some dynamite.

In order for class counsel to represent a class, they must be deemed "Adequate" counsel. A finding of inadequacy is rare and potentially devastating to a plaintiff's lawyers "Career" as class counsel–once one federal judge says you're not good enough, good luck convincing another judge that you are.

But the *Drazen* court found class counsel inadequate as a matter of law–and for the basic reason that they sought a fee award.

This is weird to me. Class counsel is *always* going to seek a fee award in a TCPA class action. Perhaps the tension between the money available in the common fund was the issue here, but I don't see it. Class members were entitled to their money regardless of whether or not class counsel got paid. So I don't see the conflict in the isolated fact that they sought a fee award.

Now there is certainly an inference of collusion to be drawn from: i) the small amount paid to class members on a claims made basis; ii) the big fee award class counsel took for itself despite the small amount paid to class members; iii) the overly broad release; and iv) the stern terms seemingly limiting opt outs. These points I agree with. But to hold class counsel inadequate *merely because they sought a fee award?* That's… weird.

As mentioned there is a lot more to chew on in this case, and this is just step one of the analysis.



National Law Review, Volume XIV, Number 135