

District Court Denies Class Cert in TCPA Suit on Ascertainability Grounds

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In a win for Defendant IQVIA, Inc., accused of allegedly sending faxes in violation of the Telephone Consumer Protection Act (TCPA), the United States District Court for the Eastern District of Pennsylvania denied Plaintiff Brian J. Lyngaas D.D.S.'s (Lyngaas) motion for class certification, agreeing with IQVIA that the class did not cross the Third Circuit's threshold ascertainability requirement.^[1]

Lyngaas, who owns a dental practice in Michigan, alleged that IQVIA administered a research study called the National Healthcare Census (the NHC) and engaged a third party to send faxes in connection with the NHC to healthcare professionals.^{[2][3]} Lyngaas claimed that in 2017, he received unsolicited faxes from IQVIA regarding its NHC study, which formed the basis of Lyngaas's TCPA suit.^[4] Having brought the case as a class action, Lyngaas moved to certify the following class pursuant to Rule 23(b)(3):^[5]

All persons: (1) who were sent one or more facsimiles between September 29, 2016 and August 28, 2018, inviting them to participate in [the] "National Healthcare Census" in exchange for monetary payment; (2) who did not participate in and had never participated in the "National Healthcare Census" survey; and (3) as to whom Defendant has not produced evidence showing SK&A verified the person's fax number.^[6]

As the Court explained, the Third Circuit has held that class ascertainability is "an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3)."^[7] Accordingly, the Court focused on the threshold ascertainability issue. The inquiry, explained the Court, "is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."^[8] Neither requirement of the second prong was satisfied, concluded the Court, resulting in the denial of the plaintiff's class certification bid without having to delve into the remainder of Rule 23's certification requirements.

First, the plaintiff's methodology for ascertaining class membership was unreliable, explained the Court. Lyngaas argued that the proposed class was ascertainable because, based on his expert's review of faxing reports, an "S" code in the reports indicated that faxes were successfully sent to over 130,000 fax numbers.^[9] The Court disagreed, determining that the expert's "opinions lack[ed] persuasion and credibility."^[10]

Among other issues, the fax reports did not define what "S" actually meant and did not establish that all phases of a fax transmission had actually been successfully completed.^[11] The Court noted that the plaintiff's expert testified to the possibility that false positive reporting could have occurred and also pointed out that the defendant's expert concluded that it was not possible – "with **any reasonable certainty**" – to determinate if any of the fax transmissions in the fax reports were in fact transmitted.^[12]

Second, the plaintiff's methodology for ascertaining class membership was not administratively feasible.^[13] Even if Lyngaas could ascertain some class members, he could not ascertain the class without individualized inquiries because several thousand unique fax numbers did not have complete names associated with them (necessitating contacting each alleged recipient to determine their identities).^[14] Nor was there "a feasible mechanism to identify those recipients who did not consent to receive the faxes" given that the underlying facts indicated many fax numbers were potentially obtained with consent.^[15]

Key Takeaways:

Although it is yet to be seen whether Lyngaas will appeal the decision, or how he will approach the remainder of the case, this was clearly a victory for the defendant. The decision highlights the advantages of litigating in a circuit that recognizes an ascertainability requirement for Rule 23. The case is also a reminder of the potential importance of an expert's role at class certification when rebutting evidence that does not conclusively support certification requirements.

FOOTNOTES

[1] [Brian J. Lyngaas, D.D.S., P.L.L.C. v. IQVIA, Inc.](#), No. 20-2370, 2024 U.S. Dist. LEXIS 119796, at *2 (E.D. Pa. July 9, 2024).

[2] [Id.](#) at *4-5.

[3] [Id.](#) at *5.

[4] [Id.](#) at *5-6.

[5] [Id.](#) at *7.

[6] [Id.](#) at *6. According to the plaintiff's allegations, "SK&A" was the originator of the data used to send the faxes and may have obtained consent when compiling that data. [Id.](#) at *3-4.

[7] [Id.](#) at *8 (quoting [Marcus v. BMW of N. Am.](#), 687 F.3d 583, 592-593 (3d Cir. 2012)).

[8] [Id.](#) at *9.

[9] [Id.](#) at *10.

[10] Id. at *10.

[11] Id. at *11-12.

[12] Id. at *12, *14-15.

[13] Id. at *17.

[14] Id. at *17-18.

[15] Id. at *19-20.

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