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Northern District of Ohio Finds Putative Fax Blast Class Action Fails to Meet Commonality Requirement

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A district court in the **Northern District of Ohio** recently denied a plaintiff's motion for class certification in a TCPA blast fax case, finding that the proposed class failed to meet the commonality requirement under Federal Rule of Civil Procedure 23(a)(2). Specifically, the court noted that "the proposed class includes entities that requested the facsimiles and/or had prior business relations" with the defendants and that the faxes sent to those entities did not violate the TCPA. A copy of the opinion in ***Sandusky Wellness Center, LLC v. Wagner Wellness, Inc., et al*.,** No. 3:12 CV 2257, 2014 WL 1224418 (N.D. Ohio Mar. 24, 2014), is available **here**.

Plaintiff Sandusky Wellness Center ("Sandusky Wellness") had alleged that defendants Wagner Wellness, Inc., and its owner, Robert Wagner (collectively "Wagner"), had violated Section 227 of the TCPA by purchasing a list of fax numbers from a company called infoUSA and sending unsolicited advertisements via fax to market a wellness and weight loss program. *See* 47 U.S.C. § 227(b)(1)(C) (making it unlawful "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" unless certain exceptions apply).

During Robert Wagner's deposition, however, he testified that Wagner did not purchase all of the fax numbers from infoUSA. As the court pointed out, "Mr. Wagner's testimony establishes that his company had other sources for obtaining the facsimile numbers used, including obtaining contacts at medical conferences." Opinion at *5.

Sandusky Wellness moved for class certification and defined the proposed class as follows: "All persons who (1) on or after September 5, 2008, (2) were sent telephone facsimile messages inviting attendance at a Physicians Wellness and Weight Loss Program, and (3) which did not display a proper opt-out notice." *Id*. at *2.

In determining whether the proposed class met the requirements for certification, the court focused on the commonality requirement of Rule 23(a)(2). As the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*, a plaintiff's "claims must depend upon a common contention — . . . [which is] of such a nature that it is capable of classwide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. at *4 (quoting *Dukes*, 131 S. Ct. 2451, 2551 (2011)). The Supreme Court emphasized that district

courts must employ a “rigorous analysis” of the plaintiff’s claim and that the central inquiry is “the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Dukes*, 131 S. Ct. at 2551 (emphasis in original).

In considering Sandusky Wellness’s proposed class, the court pointed out that the TCPA does not prohibit all faxing of advertisements. “Rather, it only prohibits the sending of an ‘unsolicited advertisement’ unless certain conditions apply, such as ‘the unsolicited advertisement is from a sender with an established business relationship with the recipient.” Opinion at 4 (quoting 47 U.S.C. § 227(b)(1)(C)(i)).

Because Mr. Wagner’s testimony established that the proposed class included entities that either requested the faxes or had prior business relationships with Wagner, the proposed class did not meet the commonality requirement of Rule 23(a)(2).

The *Sandusky Wellness* opinion demonstrates the importance of the Supreme Court’s recent jurisprudence on class certification with respect to putative TCPA class actions. If plaintiffs do not propose classes in which all members have claims that generate common answers under the TCPA, defendants will be able to argue that the commonality requirement is not met and that the proposed class should not be certified.

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