

Ohio Federal Court Denies Certification In Significant TCPA Case Based on Lack of Ascertainability of the Class and Commonality Issues Because Evaluating Consent Would Require Mini-Trials for Each Individual

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Since our [December 8, 2015](#) blog post regarding the scope of vicarious liability, courts have continued to wrestle with the scope of vicarious liability under the TCPA and its ramifications with respect to class certification. A recent decision denying class certification based on lack of ascertainability of the class and commonality issues from the Southern District of Ohio in [Barrett v. ADT Corp., No. 15-cv-1348, 2016 U.S. Dist. LEXIS 28767 \(S.D. Ohio March 7, 2016\)](#), illustrates why class certification is an uphill battle in this context for plaintiffs in TCPA litigation.

In *Barrett*, the Court evaluated class certification in a case stemming from alleged prerecorded telemarketing calls placed by one of ADT's licensed dealers, Security Solutions, Inc. ("SSI"). 2016 U.S. Dist. LEXIS 28767, at *1-3.

Plaintiff allegedly received a prerecorded call on his cell phone and attempted to identify himself, but was cut off by a prerecorded voice identifying itself as "Katie" from Home Protection. *Id.* at *3. During the call, Plaintiff allegedly stated that he was not interested in the products and terminated the call. *Id.* Plaintiff further alleged that the call was placed from a call center in the Philippines using automated technology developed by a company called Perfect Pitch that allows operators to use keystrokes to play prerecorded messages in response to individualized inquiries from parties on the other end of the line. *Id.* Plaintiff alleged that the call centers used the technology to connect calls to more than 5 million people between June and December 2013 and that there were thousands of class members who could be identified by reviewing call logs. *Id.* at *4.

Plaintiff argued that prior TCPA lawsuits brought against ADT put—or should have put—ADT on notice that SSI was using illegal telemarketing tactics to promote ADT products and services, such that ADT should be held vicariously liable for SSI's actions. *Id.* at *5-6.

In a well-reasoned opinion, the Court ultimately denied class certification because the Court found that the members of Plaintiff's proposed class were unascertainable without individualized fact-finding and that Plaintiff had failed to meet Rule 23(b)(3)'s commonality requirements. With respect to ascertainability of the class, the Court assumed *arguendo* that: 1) "ADT—through its authorized

dealers—did in fact violate the TCPA for some portion of the 13.8 million calls it allegedly placed during the proposed class period; and 2) ADT can be held vicariously liable for those violations.” *Id.* at *22-23. Despite these assumptions, the Court held that there was no way for the parties or the Court to ascertain which calls were actionable under the TCPA without undergoing extensive, individualized fact-finding, thus rendering the case inappropriate for class treatment under Sixth Circuit law. The Court held that ascertainability was not feasible—even though there were common issues with respect to the technology used and whether ADT could be held vicariously liable—because the individualized questions as to prior consent overwhelmed the common issues. *Id.* at *23. As a result, the commonality requirements of Rule 23(b)(3) were not met. In reaching this conclusion, the Court found that because consent could be obtained from one of ADT’s marketing partners or one of its 300 independent dealers, “it is possible – if not likely – that ADT does not possess any record of such consent, but that does not mean that consent has not been given.” *Id.* at *27. “The only way to locate a call recipient’s possible consent is to conduct a ‘mini-trial’ for each individual.” *Id.* Consequently, the court ruled that class certification was inappropriate.

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