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Courts Continue To Require That TCPA Classes Be Presently and Readily Ascertainable By Reference To Objective Criteria

Article By:

Katie L. Bailey Garayoa

Michael P. Daly

In a decision that many saw as lowering the bar for class certification, the Eighth Circuit recently reversed a trial court's decision that a putative class was not readily ascertainable by reference to objective criteria. *Sandusky Wellness Center LLC v. Medtox Scientific Inc.*, No. 15-1317, 2016 WL 1743037 (May 3, 2016). The Eighth Circuit held that classes must be readily ascertainable, which it had yet to squarely do, but found that this particular class was ascertainable, as it included individuals who "were sent" the fax at issue and "fax logs show[ed] the numbers that received faxes." In doing so, it rejected the argument that fax logs do not necessarily identify the "recipient" of a fax who would have standing under 47 U.S.C. § 227(b)(1). The defendant had noted that the "recipient" could be not "the subscriber to the fax number" but rather "the owner of the fax machine," "a lessee of the fax machine," and indeed "any user disrupted by the fax." The Eight Circuit acknowledged that "the subscriber to the fax number may not be the recipient of the fax." But it reversed all the same, seemingly satisfied by the production of some "objective indicator," even one that didn't necessarily "indicate" who actually had standing to assert a claim arising from a particular fax. It then remanded for further proceedings, after which the case was reassigned to Judge Patrick J. Schiltz of the District of Minnesota.

As we have previously discussed, although courts have not hesitated to deny certification if there is no list of numbers to which calls, texts, or faxes were sent, they have struggled with whether such a list is enough in and of itself to establish that class members are ascertainable. But a number of recent decisions show that such a list may not be:

- In *Gannon v. Network Tel. Servs., Inc.*, 628 F. App'x 551 (9th Cir. 2016), the trial court denied certification of a class of consumers who had received allegedly "unauthorized" text messages from a phone sex operator. The trial court found that class members were not ascertainable because consent varied from consumer to consumer. The Ninth Circuit affirmed and explained that the putative class included at least three groups for whom consent was inherently individualized: (1) those who (like the plaintiff) claimed to have called the service by mistake and terminated the call before hearing a "mid-amble" that gave callers notice about the defendant's intent to send texts; (2) those who heard the mid-amble and chose not to follow its instructions for opting out of text messages; and (3) those who called in response to

an advertisement that gave promised future texts. “Given the significance of those uncommon questions,” the Ninth Circuit held, the district court had not abused its discretion by finding that the class was not readily ascertainable, as it would be “extremely difficult” to determine from objective criteria who had and had not consented to receive the texts.

- In *Barrett v. ADT Corp.*, No. 15-1348, 2016 WL 865672 (S.D. Ohio Mar. 7, 2016), the Southern District of Ohio denied certification of claims arising from millions of allegedly automated calls. Although there were common questions of law and fact, and although there was a log of the numbers that had been called, there were no records from which the court could conclude on a classwide basis who had and had not consented to being called. *Id* at *23. The court explained that, because there was evidence that consent could have been obtained from one of ADT’s marketing partners or one of its 300 independent dealers, the fact that “ADT does not possess any record of such consent … does not mean that consent has not been given.” *Id.* at *27. In other words, it rejected the notion that an absence of consent can be inferred from an absence if evidence, and instead required that that the plaintiff prove that the absence of consent is capable of adjudication on a classwide basis. *Id.* Our prior discussion of *Barrett* is available here.

- In *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, No. 13-2085, 2016 WL 75535 (N.D. Ohio Jan. 7, 2016), the Northern District of Ohio denied certification of a claim arising from the receipt of an allegedly unsolicited fax about a prescription drug. The defendant conceded numerosity and typicality but contested ascertainability, commonality, and manageability. The court found that class members were not readily ascertainable by reference to objective criteria because, before the plaintiff had filed suit, the defendant and its vendors had disposed of the fax logs that would have shown the numbers to which faxes had and had not been successfully sent. Although the court “acknowledge[d] Sandusky’s argument that [the defendant] should not escape responsibility for its potential wrongdoing because of its lack of records,” it nonetheless found that “the absence of the fax logs does not alleviate Sandusky’s burden of demonstrating that the proposed class meets the Rule 23 requirements.” (citing *City Select Auto Sales, Inc. v. BMW Bank of N. Am. Inc.*, 2015 WL 5769951, at *8 (D.N.J. 2015); *Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, 2015 WL 1538497, at *4 (N.D. Ill. 2015); *Brey Corp. v. LQ Mgmt. LLC*, 2014 WL 943445, at *1 (D. Md. 2014)).

- And in *Simon Healthways, Inc., et al.*, No. 14-08022, 2015 WL 10015953 (C.D. Cal. Dec. 17, 2015), the Central District of California denied certification of claims arising from the alleged transmission of faxes that did not have opt-out notices. The court noted that the defendants had successfully petitioned the FCC for a retroactive waiver of the opt-out notice requirement for the faxes at issue, provided that the defendants had received prior express consent from the recipient. As a result, the court concluded that individualized questions of consent would predominate over any common questions of law or fact, as consumers had provided their consent in a variety of ways, for example when they: (1) joined the networks and provided their fax numbers; (2) orally provided their fax numbers and requested that they receive faxes; or (3) registered online. The court found that this was not a theoretical argument, as the defendants had produced evidence—specifically an internal customer service log with notes about customer’s fax preferences—that showed that consent was in fact individualized. The court also rejected the argument that the FCC did not have the statutory authority to grant the

retroactive waiver in the first place. *Id.* (citing 47 U.S.C. § 227(b)(2); 47 C.F.R. § 1.2, 1.3; *NCTA v. Brand X*, 545 U.S. 967, 980 (2005)).

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