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Shining a Spotlight on Adequacy of Class Counsel

By Jeremy Gilman – December 28, 2011

Class certification challenges frequently focus on what might be called the group dynamic elements of Rule 23: commonality, typicality, and predominance. Now, with the Seventh Circuit Court of Appeals' decision in *Creative Montessori Learning Centers v. Ashford Gear, LLC* [PDF], No. 11-8020 (7th Cir. Nov. 22, 2011), parties opposing class certification—at least within the Seventh Circuit—might shift their gaze to another possible basis for challenging class certification: the adequacy of class counsel.

The district court certified a plaintiff class in an action brought under the Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Prevention Act of 2005. The defendant sought leave to appeal under Fed. R. Civ. P. 23(f), the Seventh Circuit assumed jurisdiction, and, in a unanimous opinion, it vacated the certification order and remanded with instructions.

Let's look at the facts as conveyed in the opinion. A school named Creative Montessori Learning Center sued Ashford Gear, a "tiny" California home furnishings wholesaler with three employees and half a million dollars in annual sales, alleging that it had received two unsolicited one-page faxes. The school moved for class certification, and the district court granted that motion and certified a plaintiff class consisting of "14,574 persons, who are alleged to have received a total of 22,222 unsolicited faxed advertisements from the defendant."

When the defendant opposed the plaintiff's class-certification motion, it argued that the plaintiff's counsel's "misconduct showed that [it] would not adequately represent the class." The district court agreed that the plaintiff's counsel had engaged in misconduct, depicted by the Seventh Circuit as follows:

Class counsel . . . specialize in bringing class action suits under the Act. . . . The lawyers learned about these faxes not from a recipient, but from a fax broadcaster (Caroline Abraham, who conducts her business under the name B2B)—a company that faxes advertisements as an agent of the advertiser. The lawyers asked her for transmission reports of faxes that she had sent and information on how to communicate with the intended recipients, but promised not to disclose any of this material to a third party. On the basis of this assurance of confidentiality she turned over material that evidenced (or so it is alleged) faxes of advertisements that Ashford Gear had sent to the 14,574 persons constituting the class. One of the recipients was the Creative Montessori Learning Center, a private school. . . . The lawyers notified Creative Montessori that “during our investigation, we have determined that you are likely to be a member of the class. You might not remember receiving the junk faxes, but if the lawsuit is successful, you would receive compensation (up to \$1,500) for each junk fax sent. We would like to discuss this issue with you. Please call me [telephone number].” Which it seems Creative Montessori did—though actually it seems that the junk faxes supposedly sent to Creative Montessori were images from Abraham’s computer of advertisements that never had been sent. Nevertheless Creative Montessori became the named plaintiff and (therefore) class representative.

From these facts, the district court identified two displays of misconduct: The plaintiff’s counsel obtained material from Abraham’s files “on the basis of a promise of confidentiality that concealed the purpose of obtaining the material” and implied to the plaintiff that a class had already been certified and that plaintiff was a member.

But that misconduct did not, for the district court, warrant denial of the plaintiff’s class-certification motion on the grounds that plaintiff’s counsel could not adequately represent the class. The district court reasoned that “only the most egregious misconduct” by class counsel required denial of a class-certification motion on inadequacy grounds—a quantum of misconduct the district court found lacking in this case. Instead, the district court posited that bar-sponsored discipline was the appropriate vehicle for addressing this misconduct.

The district court found support for the “most egregious” standard in a 1972 Seventh Circuit opinion. But those words, the Seventh Circuit now noted, derived from “a throwaway line” in an opinion rendered in “an era before concerns with the adequacy of representation by class counsel had become acute.” The correct standard for this era, the appeals court noted, was that expressed in *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002), which stated, “Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification.” *Culver*’s “serious doubt” standard is rooted in the rationale that “[c]lass counsel owe a fiduciary obligation of particular significance to their clients when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf.” By contrast, the “most egregious misconduct” standard employed by the district court was, in the Seventh Circuit’s words, “unattainable.”

The Seventh Circuit vacated the district court’s class-certification order and remanded “with directions that the district court, applying the *Culver* standard rather than the ‘egregious misconduct’ standard, re-evaluate the gravity of class counsel’s misconduct and its implications for the likelihood that class counsel will adequately represent the class.”

This decision is likely to sharpen the focus on the adequacy-of-counsel requirement in consumer class actions—at least within the Seventh Circuit. “Serious doubt” is a decidedly different, and seemingly more encompassing, standard than “egregious misconduct,” and it invites greater scrutiny of those seeking appointment as class counsel in consumer cases.

Keywords: litigation, commercial, business, Seventh Circuit, adequacy of class counsel

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