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Blog Entry: Sixth Circuit Reverses Defendant's TCPA Class Action Win

DECEMBER 19, 2016

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This case is more than merely an appellate adjudication of a TCPA case. It's an announcement of class certification law by the Sixth Circuit Court of Appeals.

Here's the court's summary:

Plaintiffs … allege that defendant … violated the TCPA when it hired [a fax broadcasting company] to send unsolicited fax advertisements to plaintiffs and a class of similarly situated persons and businesses. The district court denied plaintiffs' motion for class certification and dismissed their complaints as moot after the plaintiffs chose not to accept offers of individual judgment. … We reverse.

Defendant was a Michigan-based residential mortgage company. A fax broadcasting company named B2B - whose operator another court referred to as a modern-day "typhoid mary" - allegedly sent fax ads for defendant to more than 4,000 fax numbers using a list acquired from non-party InfoUSA. Plaintiffs were among the recipients. They claimed that the faxes were unsolicited and that they did not have an established business relationships with defendant. They sued in federal court in Detroit and sought certification of a class consisting of "[a]ll persons sent one or more faxes in March 2006 from 'Top Flite Financial' offering '0 Down, 0 Closing Costs" for Mortgages' on 'Purchases/ReFinancing, and identifying (718) 360-0971 as a 'Remove Hotline' telephone number."

The district court denied class certification. Why? Here's how the Sixth Circuit described it:

[T]he [district] court "ma[de] no determinations as to the satisfaction of the requirements in Rule 23(a)," and instead focused its analysis exclusively on "application of Rule 23(b)(3)" and the issue of predominance. The district court expressed concern that individual class members *might* have solicited or consented to receiving the challenged faxes, and held that determining if class members had so consented "would require investigation of the factual circumstances of each person or business that received a facsimile transmission[.]" The court explained that it was "not persuaded" that the issue of consent was "subject to generalized proof," and, consequently, would "exercise its discretion to deny [the] request for class certification" on the ground that plaintiffs had not shown that common questions of law or fact predominate over questions concerning individual class members. (Emphasis added.)

Plaintiffs sought interlocutory appellate review under to Rule 23(f) but that was denied. Defendant then extended Rule 68 offers of judgment to plaintiffs but they lapsed without acceptance. Defendant then moved to dismiss, claiming that "because the district court had denied class certification and plaintiffs had failed to accept offers of judgment that encompassed all of the

individual relief sought in their complaints, both complaints were now moot and the district court should dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)."

Motion granted. Case dismissed. Defendant won.

But the Sixth Circuit reversed. Its rationale is best expressed by the court itself:

We have recognized repeatedly that "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." Here, [plaintiffs] presented evidence suggesting a class-wide absence of consent - evidence that B2B failed to contact anyone on the list it purchased from InfoUSA to verify consent prior to faxing them advertisements. In response, [defendant] merely alleged that class members *might* have given consent in some other way. The district court adopted this idea, opining that B2B's failure to obtain consent "does not foreclose the possibility that some of those [class] members gave consent to [defendant] and or InfoUSA[,]" even though [defendant] did not offer any information or evidence to support that theory. (Emphasis in original.)

We are unwilling to allow such "speculation and surmise to tip the decisional scales in a class certification ruling[,]" particularly under the circumstances present here. Our precedent is clear that a possible defense, standing alone, does not automatically defeat predominance. Even where defendants point to some evidence that a defense will indeed apply to some class members, which is more than [defendant] did here, courts routinely grant certification because "Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class." As the First Circuit has recognized, moreover, if evidence later shows that a "defense is likely to bar claims against at least some class members, then a court has available adequate procedural mechanisms. For example, it can place class members with potentially barred claims in a separate subclass, or exclude them from the class altogether."

And then, this pronouncement:

We hold that the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3). Holding otherwise and allowing such speculation to dictate the outcome of a class-certification decision would afford litigants in future cases "wide latitude to inject frivolous issues to bolster or undermine a finding of predominance." In light of the foregoing, particularly the class-wide evidence [plaintiffs] presented showing an absence of consent, *we hold that speculation alone regarding individualized consent was insufficient to defeat plaintiffs' showing of predominance under Rule 23(b)(3).* The district court abused its discretion in holding otherwise in this case. (Emphasis added.)

The effects of these words will be hashed out case-by-case by district courts within the Sixth Circuit, and we'll be reporting on those cases as they unfold.

As for the district court's dismissal of the action for lack of subject matter jurisdiction because of defendant's lapsed offers of judgment, the Sixth Circuit reversed that, too, in light of the Supreme Court's intervening decision in *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663 (2016) ("An unaccepted settlement offer - like any unaccepted contract offer - is a legal nullity, with no operative effect").

The case is *Bridging Communities Inc. v. Top Flite Financial Incorporated,* Sixth Circuit Court of Appeals, case no. No. 15-1572, and the decision can be found here: http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0290p-06.pdf