Dispute Over Whether TCPA Litigator Invited Calls Make Her "Inadequate" to Represent Class

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In the realm of TCPA class actions, the Central District of California's decision in Wiley v. Am. Fin. Network, Inc. serves as a noteworthy (and positive) development. And it offers a blueprint for corporate defendants finding themselves defending (allegedly scam or setup) TCPA class action claims.

American Financial Network, Inc., the defendant in this case, is a mortgage banker that uses telemarketing to offer consumers its lending services. The company purchases consumer leads from companies various third parties, and then uses a "single power dialer" to pitch its services.

The plaintiff, Mona Wiley, alleged that the defendant called her numerous times without her consent, even though her phone number was registered on the National Do Not Call Registry (NDNCR), and sought to represent a nationwide class of individuals for alleged violations of the Telephone Consumer Protection Act (TCPA). However, the defendant presented evidence suggesting that the plaintiff had invited the defendant to communicate with her, and specifically that the plaintiff had expressed interest in the defendant's services and had requested a return call.

Based on the conflicting evidence as to whether the plaintiff invited the calls, the court denied class certification. The court found that the plaintiff was not a typical or adequate representative of the class, as her interests did not align with the class's interests. The court noted that the typical member of the class would have hoped and expected that his or her privacy would be respected and not invaded by unwanted phone calls from the defendant.

The court concluded that class certification was not appropriate in this case, as the plaintiff had not carried her burden to show that she was a typical or adequate representative of the class. The court reasoned that the defendant would likely spend substantial time at trial arguing that the plaintiff had invited the defendant to contact her, which could potentially be to the class's detriment. This outcome makes sense-even if there were individuals in the putative class that had bona fide claims, because Mona sought to represent all of them as a class, they ran the risk of "losing" as a whole if a jury were to find that Mona had invited the specific calls to her.

This is an important and noteworthy decision for businesses defending against TCPA class actions. Far too often-and particularly in cases involving serial litigants (who know how to game the system, in the author's opinion)-plaintiffs will express interest, have mysteriously "dropped" calls after expressing interest (thus prompting a call back), or engage in other types of conduct that invite a call back even if they don't use the magic words of "I consent to solicitation calls." The court's decision in *Wiley* serves as a blueprint for a potent defense for far too many TCPA claims that reek of a set up. To be sure, the court in *Wiley*

is not the first to deny class certification on similar grounds. But it adds another quiver of what appears to be a positive trend of courts being willing to take a harder look at the merits of individuals' claim relative to the inevitably broader class they seek to represent.

Regardless, *Wiley* serves as a stark reminder of the legal complexities surrounding telemarketing activities. Businesses should review their telemarketing practices to ensure they are in compliance with the TCPA and other applicable laws. They should also consider seeking legal advice to understand the potential risks and liabilities associated with their telemarketing activities. As the legal landscape continues to evolve, staying informed and proactive is the best defense.

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