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TCPA class actions – unpublished Third Circuit decision illustrates use of consent defense to defeat predominance requirement for class certification

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Takeaway: Congress passed the Telephone Consumer Protection Act (TCPA) in 1991 to address an increase in abusive and unwanted telemarketing practices. For the first few decades of the TCPA's existence, courts construed the unusual jurisdictional language of the federal statute ***not*** to provide federal question jurisdiction, with the result that many TCPA actions proceeded in state court. But in 2012, the U.S. Supreme Court unanimously ruled that TCPA cases presented a federal question. *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368 (2012). Since that time, federal courts have been flooded with TCPA class actions, as well as individual claims seeking relatively limited individual damages. As a recent unpublished Third Circuit decision illustrates, the predominance requirement remains a potent tool to prevent certification of "spam fax" TCPA claims, even if a named plaintiff may be able to establish a valid—but low-dollar—individual claim. *See Steven A. Conner, DPM, P.C. v. Fox Rehabilitation Servs., P.C.*, Nos. 23-1550 & 23-1684, 2025 WL 289230 (3d Cir. Jan. 24, 2025).

In *Conner*, the named plaintiff claimed it has received a series of "unsolicited advertisements" via facsimile transmission from Fox, a provider of in-home physical, occupational, and speech therapy services. 2025 WL 289230, at *1. After "nearly one year of precertification discovery," Conner moved to certify a class of all persons or business entities that had been "sent" facsimiles on the same dates that he received facsimiles from Fox. *Id.* at *2. Fox opposed class certification, offering "declarations from thirty-two putative class members who claimed they had voluntarily provided their fax numbers to Fox at some unspecified point during their business relationship." *Id.* The district court denied certification on ascertainability and predominance grounds. *Id.* & n.12 (citing *Steven A. Conner DPM, P.C. v. Fox Rehabilitation Servs., P.C.*, No. 2:21-cv-1580-MMB, 2022 WL 4080761, at *4-6 (E.D. Pa. Sept. 6, 2022)). The Third Circuit denied Conner's request for an interlocutory appeal. *Id.* & n.13.

As part of the same order denying class certification, the district court also denied Fox's motion for summary judgment. *Id.* Conner continued to litigate his individual claim and the district court ultimately held a three-day bench trial. *Id.* Conner ultimately prevailed on his individual claims and recovered a $4,000.00 individual damages award. *Id.* at *3 (citing *Steven A. Conner DPM, P.C. v. Fox Rehabilitation Servs., P.C.*, No. 2:21-cv-1580-MMB, 2023 WL 2226781, at *6-8 (E.D. Pa. Feb. 24, 2023)); *see also Steven A. Conner DPM, P.C. v. Fox Rehabilitation Servs., P.C.*, No. 2:21-cv-1580-MMB, Doc. No. 160 (E.D. Pa. Feb. 4, 2023) (Final Judgment Order).

On appeal, the Third Circuit first addressed at length, but ultimately rejected, Fox's cross-appeal challenging the $4,000.00 individual judgment received by Conner. *See* 2025 WL 289230, at *3-11. This portion of the decision garnered a dissent from Judge Batey. *See id.* at *14 (Matey, J., dissenting).

Regarding Conner's appeal of the class certification ruling, the Court of Appeals gave short shrift to a challenge to the district court's refusal to compel certain certification-related discovery. *Id.* at *11. But it agreed with Conner the district court had erred in finding the proposed class "neither administratively feasible nor reliable." *Id.* at *12. While Fox claimed the class definition required proof the faxes had been "successfully transmitted," the Third Circuit found that class membership turned on whether "the individual's fax number was ' *sent* one or more facsimiles . . . *identified as successful transmissions* on the fax transmission detail reports." *Id.* Because class membership could be determined by reviewing the "transmission logs and identifying which faxes were identified as successfully transmitted," Conner had satisfied the ascertainability requirement. *Id.*

The Third Circuit affirmed the denial of class certification, however, based on Conner's failure to satisfy the predominance requirement. "We require actual, not presumed, conformance with the predominance requirement. A party's assurance to the court that it intends or plans to meet the requirement is insufficient." *Id.* at *13 & nn.135-136 (cleaned up). Thus, "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.* & n.139 (cleaned up).

To show an "unsolicited advertisement" under the TCPA, the plaintiff must show, *inter alia*, that the facsimile was "unsolicited, meaning without the person's prior express invitation or permission, in writing or otherwise." *Id.* & n.142 (cleaned up). The Court of Appeals agreed with the district court that the putative class "would require thousands of mini trials on the individualized issue of whether the faxes had been unsolicited." *Id.* at *14 & n.145.

Based on the class member declarations provided by Fox, the determination found that the issue of individual class member consent to receiving the fax would require "individualized review." *Id.* & nn.146-147. The individual factual questions included: "(1) Whether Fox sought permission to send these faxes; (2) What, if anything, Fox informed each class member about these faxes; (3) How each class member provided their consent; (4) Whether the specific fax or faxes each class member received fit within the contours of any consent that member may have provided; and (5) Whether a class member invited the faxes in some other way than through a request from Fox to receive them." *Id.* & n.148. Because the declarations showed that Fox had obtained prior express consent "through highly individualized methods of communication," the district court properly denied class certification on predominance grounds. *Id.*

While Conner claimed that Fox's communications with the putative class members to secure the declarations violated ethical rules limiting a defendants' communications with class members, the Third Circuit rejected this contention in a footnote, holding "Fox did not need to obtain consent from Conner's counsel before engaging in precertification communications with putative class members." *Id.* n. 146 (citing David F. Herr, *Annotated Manual for Complex Litigation* § 21.12 (4th ed.)).

Thus, *Conner* provides a reliable roadmap for defending TCPA claims based on alleged spam faxes in cases where the defendant can develop evidence from class members showing consent.