JULY 31, 2019

TCPA: district court strikes class allegations due to individualized issues of consent and revocation

by Jeffrey H. Fisher

Takeaway: More class actions are filed under the Telephone Consumer Protection Act (TCPA) than any other statute, and TCPA claims often present common issues capable of class certification. But courts will not certify a TCPA class action that raises unique defenses, especially involving consent and revocation. In *Tillman v. Hertz Corp*., 16 C 4242, 2019 WL 3231377 (N.D. Ill. July 18, 2019), the district court went a step further by granting Hertz's motion to strike class allegations. The Tillman court found the allegations of the amended complaint submitted by the TCPA plaintiff raised "unique defenses peculiar to the plaintiff's case, thus making him an atypical and inadequate class representative," further ruling that the allegations raised individual issues that predominated over common ones. 2019 WL 3231377, at *2.

In *Tillman*, Rico Tillman filed a TCPA class action alleging that he received multiple "robocalls" from The Hertz Corporation after his mother failed to return a rental car on time. Tillman alleged that the calls continued even after he directed Hertz to stop calling him.

In August 2018, the district court denied Hertz's motion for summary judgment, finding that there were issues of material fact concerning (a) whether Tillman's mother consented to receiving calls by putting her number (regarding a cellphone used primarily by her son) on the rental agreement and (b) if she did consent, whether Tillman effectively revoked that consent by directing Hertz to stop calling him. *Tillman v. Hertz Corp*., 16 C 4242, 2018 WL 4144674, at *3 (N.D. Ill. Aug. 29, 2018). In denying summary judgment, however, the court observed that its ruling "demonstrates the highly unlikely certification of any plaintiff class . . . due to the obvious predominance of individual facts." *Id*.

Tillman later submitted an amended complaint that included a revised class definition consisting only of class members who received a robocall from Hertz "after a request to stop calling that phone number." Hertz moved to strike the class allegations.

On July 18, 2019, the court granted Hertz's motion to strike, concluding that Tillman failed to satisfy the Rule 23 requirements of adequacy, typicality, and predominance. 2019 WL 3231377, at *2. The court explained that Tillman's case turned on unique factual disputes about the type of contract Tillman's mother signed (whether it constituted consent), the type of calls Tillman received (whether they were live or recorded), and whether Tillman properly "revoked" consent. *Id.*

Under Tillman's amended class definition, the court would have to conduct mini-trials to determine whether each class member made a valid "request to stop calling" the phone number. The court concluded that these mini-trials "destroy any notion that a class action is superior to other available methods for efficiently resolving the controversy." *Id*.

Although *Tillman* involves unusually individualized facts, it demonstrates the value of developing consent

and revocation issues in defeating class certification. The district court noted that the plaintiff had cited no cases certifying a "revocation class" or denying a motion to strike a revocation class. Defendants in future TCPA class actions likely will endeavor to keep this streak alive in any case involving revocation issues.