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Predominance? Class Defendant Must Introduce Evidence that Individualized Issues Predominate

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Takeaway: To prevail on the predominance issue, an evidentiary showing is required. Defense counsel should prove – either through declaration or deposition testimony – that a particular defense (such as consent under the TCPA) applies to individual class members. Simply arguing that a defense ***might*** apply is insufficient to defeat a class plaintiffs' showing that common issues predominate.

The Sixth Circuit addressed this issue in a "junk fax" case filed under the Telephone Consumer Protection Act (TCPA). *Bridging Communities, Inc. v. Top-Flite Financial Inc.*, 843 F.3d 1119 (6th Cir. 2016). There, the TCPA plaintiffs alleged that a "fax blasting" company hired by the defendant (a residential mortgage firm) "blasted" more than 4,000 unsolicited fax ads to the plaintiffs and others across the United States, in violation of the TCPA. On the issue of consent under the TCPA, both plaintiffs asserted that the faxes they received were unsolicited and also that they did not have "established business relationships" with the defendant (an unsolicited fax ad does not run afoul of the TCPA where the sender and recipient have an "established business relationship," the recipient voluntarily made its fax number available to the sender, and the unsolicited fax contains a notice satisfying various requirements under the TCPA and its corresponding regulations).

The district court denied class certification. Focusing its analysis exclusively on predominance under Federal Rule of Civil Procedure 23(b)(3), the district court "expressed concern that individual class members ***might*** have solicited or consented to receiving the challenged faxes," which would require a class member-by-class member investigation. The district court further stated it was "not persuaded" the issue of TCPA consent could be established by common proof. The district court refused to certify a class, ruling that the TCPA plaintiffs had not carried their burden of showing that common questions predominated over individual ones.

The TCPA plaintiffs successfully petitioned for an interlocutory appeal under Federal Rule of Civil Procedure 23(f). The Sixth Circuit then reversed the district court's denial of class certification, finding that the district court had abused its discretion.

The Sixth Circuit observed that the TCPA plaintiffs had submitted evidence showing that the consent issue was subject to "generalized proof," including that the faxes were sent to numbers obtained from a single list of fax numbers purchased by the fax blasting company, and also that the fax blasting company failed to contact anyone on the list to verify consent. In response, the defendant did not submit

any evidence but “merely raised the possibility of consent.”

The Sixth Circuit held: “[T]here the mere mention of a defense is not enough to defeat the predominance requirement,” further holding “that speculation alone regarding individualized consent was insufficient to defeat plaintiffs’ showing of predominance under Rule 23(b)(3).”