California Federal Judge Rejects TCPA Class Certification Before Discovery

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Discovery is expensive, and defense lawyers often are looking for ways to help clients achieve early dismissal of cases to avoid that expense. An encouraging trend is emerging of judges rejecting class allegations pre-discovery, and the latest example is *Labou v. Cellco Partnership*, 2014 WL 824225 (E.D. Cal. March 3, 2014).

In *Labou*, a single plaintiff filed a putative class action against Verizon Wireless, alleging violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. *Id*. at *1. The plaintiff claimed that Verizon Wireless had violated the automated telephone dialing system ("ATDS") provision of the TCPA by calling her cell phone to collect wireless telephone bills owed by her former brother-in-law. *Id*. The plaintiff claimed that she had not consented to these calls. *Id.* She purported to represent a class of "all persons within the United States who received any telephone calls from Defendant . . . made through the use of any automatic telephone dialing system" in the past four years, when that person "had not previously not provided [sic] their cellular telephone number to Defendant." *Id.* Verizon Wireless moved to deny class certification before discovery, and the court granted the motion. *Id.* at *6.

The plaintiff argued that a motion to deny class certification before discovery was premature. *Id.* at *3. The court rejected that argument, reasoning that "'[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim. . . .'" *Id*. (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)).

The court found that the plaintiff could satisfy neither the typicality nor the adequacy requirements of Rule 23. *Id*. at *3-6. Notably, in so doing, the court actually considered testimony unilaterally submitted by Verizon Wireless that it did not charge customers for calls placed by Verizon. *Id.* at *4, n.6. Rejecting the plaintiff's objection to consideration of this evidence, the court found it was relevant to typicality, adequacy, and commonality under Rule 23 and thus could be considered even before discovery had commenced. *Id.*

As to typicality, the court reasoned that because the plaintiff was not a Verizon Wireless customer, her claims would be different from those of customers. "As the TCPA permits collection calls so long as the recipient is not being charged, Plaintiff's circumstance of being a non-customer with a non-Verizon issued

phone is atypical from the class of Version Customers." *Id.* at *4. For instance, Verizon customers had written contracts with provisions for both automated calls with prior written consent and for arbitration. *Id.* *4. Those contracts would present issues atypical to those related to the plaintiff. *Id*. Notably, this is an issue that would arise in any context in which the class representative did not contract with the defendant but others within the class did and thus have unique factual and legal issues.

As to adequacy, the court found that because Verizon Wireless contended that the brother-in-law provided the plaintiff's cell phone number to Verizon Wireless, that unique factual issue and the unique legal issues springing from it rendered the plaintiff an inadequate representative. *Id.* at *5. Although the plaintiff argued these issues warranted discovery, the court disagreed, finding that the plaintiff bore the burden to present a *prima facie* showing of adequacy in the face of Verizon Wireless's challenge and she had failed to do so. *Id.* "Verizon need not provide evidence to prove that Plaintiff's claim is inadequate. To the contrary, even under a motion to deny class certification, it is Plaintiff who bears the burden of showing she is an adequate class representative. Plaintiff's contention that she is an adequate class representative simply because she pled she is an adequate class representative falls short of that burden." *Id.* (citation omitted).

And while typically the rubber meets the road in class actions at the predominance inquiry, the court found that the typicality and adequacy issues were so clear — pre-discovery — that the court did not even need to address predominance. *Id.* at *6.

This is a fantastic opinion for the TCPA defense bar and reflects an emerging trend of federal judges applying heightened scrutiny to these cases, as well as class actions generally, even before discovery.

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