New Jersey Appellate Court Rules TCPA Claims Ill-Suited for Class Actions

July 27, 2011

In its recent decision in *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*, 2011 WL 2793214 (N.J. Super. July 19, 2011), the Appellate Division of the Superior Court of New Jersey affirmed the decision of the trial court that the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.A. § 227, is ill-suited for class action lawsuits. The court concluded that TCPA plaintiffs cannot meet the predominance and superiority criteria necessary to certify a class in New Jersey.

What Happened

In *Local Baking Products*, the plaintiff alleged it received an unsolicited one-page fax on its fax machine from defendant Kosher Bagel Munch, Inc., touting the services of the defendant, a local restaurant. Allegedly, the defendant hired an entity known as Business to Business Solutions to transmit a "blast fax," advertising the defendant's food services, to approximately 4,649 fax machines. In response, the plaintiff filed a complaint under the TCPA on its behalf and on behalf of: "All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant, (3) with respect to whom Defendant did not have prior express permission or invitation for the sending of such faxes, and (4) with whom Defendant did not have an established business relationship." The trial judge ruled that a class action could not be maintained under the TCPA and dismissed the class allegations. The Appellate Court affirmed the trial court's decision.

The broad issue presented in *Local Baking Products* is whether a plaintiff may maintain a class action to enforce a private cause of action under the TCPA in New Jersey. More narrowly, the issues in the case were whether the proposed class raised questions of law or fact common to the members of the class that predominated over any questions affecting only individual members, and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Notably, the Court cited the United States Supreme Court's recently announced decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), to support its assertion that predominance and superiority are "more demanding criteria" than commonality and typicality in determining whether to certify a class. The Court noted that the issue of TCPA class actions throughout the nation reveals a lack of uniformity as to approach and result, and provides an

extensive summary of the differing approaches taken both in state and federal courts. The Appellate Court determined that New Jersey had superior means to handle individual TCPA claims than through class action lawsuits. Specifically, the Court noted that New Jersey small claims court provided a cheaper and more efficient venue for which individuals could, and should, pursue their claims. This allowed them to conclude that both the predominance and superiority demands of class certification could not be met.

What It Means

The Court's decision in *Local Baking Products* has two clear consequences: (1) it will be significantly harder for private actors or entities to successfully bring a class action lawsuit in New Jersey under the TCPA, and (2) the Supreme Court's recent decision in *Wal-Mart* may be shifting the balance in class certification heavily in favor of the question of whether predominance and superiority are present (rather than looking at all class certification factors evenly).

What You Should Do

If you have any questions about how the *Local Baking Products* decision might impact your company or if you have any other questions about TCPA defense or compliance, contact your Lathrop Gage attorney, or one of the attorneys listed on this alert.