

TCPA Defendants Rejoice!

November 21, 2013

San Francisco Federal Judge Alsup Denies Class Certification in Mobile Phone Cramming Case Based Largely on Individualized Issue of Consent

In a decision likely to be cited across the country by TCPA defense lawyers, U.S. Northern District of California Judge Alsup on November 18 denied class certification in a mobile-phone cramming case against mobile aggregators. See *Fields, et al. v. Mobile Messengers America, Inc., et al.*, No. C 12-05160, U.S. Northern District of California, Docket Entry No. 229. The decision is particularly significant because it represents the rare scenario in which TCPA defendants litigated to a class certification decision as opposed to settling under the weight of defense fees and burdens of discovery.

The plaintiffs claimed that three aggregators (Mobile Messenger Americas, mBlox, and Motricity) had been complicit with Wise Media in sending unauthorized text messages and cramming mobile-phone bills with unauthorized charges for flirting tips, horoscope updates, celebrity gossip, and weight-loss advice. The plaintiffs asserted two classes and one subclass under Fed. R. Civ. P. 23(b)(3). The putative class with the most relevance to TCPA lawyers nationwide was a nationwide automatic telephone dialing system ("ATDS") class under 47 U.S.C. § 227(b)(1).

After discovery and oral argument, Judge Alsup concluded that "[i]t is unnecessary to reach a number of the issues under Rule 23 because individualized issues of consent preclude certification of a nationwide text-message class." Docket Entry No. 229 at p. 4. Although Judge Alsup rejected reliance on the Fifth Circuit's well-known TCPA class certification denial in *Gene & Gene v. BioPay*, 541 F.3d 318, 327-329 (5th Cir. 2008) in light of the Ninth Circuit's more recent TCPA class certification affirmation in *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. 2012), he distinguished the *Meyer* decision in noting that it involved absolutely no evidence of consent to any text message whereas the defendants in the *Fields* case had submitted such evidence. Docket Entry No. 229 at pp. 4, 7. Reasoning that consent is an element of the plaintiffs' *prima facie* burden under a TCPA claim, Judge Alsup concluded that Rule 23's predominance requirement could not be satisfied.

This defense victory demonstrates that these cases can indeed be won if litigated to the class certification stage and should embolden TCPA defendants to fight back against these lawsuits as opposed to yielding to the plaintiffs' lawyers' demands. The issue of predominance continues to be a powerful weapon in the TCPA



defense lawyer's arsenal.

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