

ALERTS AND UPDATES

N.J. Appellate Division Refuses to Certify Class Action Under Telephone Consumer Protection Act; Finds Class Certification Is Not a Superior Method of Proceeding

August 10, 2011

In a case of first impression, the New Jersey Appellate Division recently held that a single plaintiff could not prosecute a class action to enforce the provisions of the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 (2011). Although the decision concerns that specific statute only, its reasoning may impact other putative class actions based on similarly structured statutes.

In *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*,¹ Local Baking Products ("Plaintiff") received an unsolicited facsimile from Kosher Bagel Munch ("Defendant") advertising its restaurant in Passaic, N.J. The fax actually came from a third party, Business to Business Solutions, which sent the same fax to 4,649 other fax machines in an advertising technique known as "blast faxing." In response, Plaintiff filed a complaint against Defendant for violation of the TCPA. Among other things, the TCPA prohibits the use of any device to send "to a telephone facsimile machine, an unsolicited advertisement" 47 U.S.C. § 227(b)(1)(C). The TCPA provides for, among other remedies, a "[p]rivate right of action" and assigns damages for each violation at \$500 or actual damages, whichever is greater. *Id.* § 227(b)(3). The complaint asserted a TCPA cause of action on behalf of all recipients of unsolicited faxes from Defendant within the previous four years.

At the trial court level, Defendant moved to dismiss for failure to state a claim, contending that a class action could not be maintained to enforce what was intended to be a private cause of action. The trial court agreed and dismissed the class action component of Plaintiff's lawsuit, but did award Plaintiff \$500 in statutory damages. Plaintiff then brought the appeal.

The Appellate Division began its analysis by summarizing the issue on appeal as follows: Whether the proposed class raises "questions of law or fact common to the members of the class [that] predominate over any questions affecting only individual members . . . and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." N.J. Rule of Civ. Prac. 4:32-1(b)(3). The Appellate Division also noted the wide divergence of opinion on whether the TCPA could be the basis of a class action. Courts in Arizona, California, Florida, Indiana, Missouri, North Carolina and Oklahoma have allowed such class actions to proceed, while Colorado, Connecticut, New York, Ohio and Texas courts have denied them. In addition, various courts in Georgia and Louisiana have reached conflicting results on this issue.

The Appellate Division ultimately concluded that "a class action is not a superior means of adjudicating a TCPA suit." Specifically, it found that the purpose of class actions is to provide a means of adjudicating the claims of plaintiffs whose common claims, in isolation, are too small to be redressed in an economically feasible manner. According to the Appellate Division, the TCPA addresses this problem by awarding damages for each violation, *i.e.*, each unsolicited fax, at \$500 or actual damages—whichever is greater. Thus, any successful plaintiff would be automatically entitled to a minimum of \$500. The Appellate Division reasoned that New Jersey small claims court is an appropriate and superior venue for the adjudication of TCPA claims because plaintiffs may appear *pro se*, filing fees are minimal, few procedural obstacles exist and an appearance before a judge will generally take place within 30 to 45 days. Thus, the cost of litigating an individual claim is likely less than the ultimate recovery and the rationale for proceeding via a class action would be obviated.

Although this decision is limited to the TCPA, the court's reasoning applies to other causes of action in New Jersey where the amount of the recovery is likely to be higher than the cost of litigating a single action. The ruling also adds to the body of decisions which have held that class certification is not appropriate under the TCPA, and may provide support to parties opposing class certification claims where the damages of the putative class are based on limited statutory damages.

For Further Information

If you have any questions about this *Alert*, please contact any [member](#) of the [Trial Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *Local Baking Prods. v. Kosher Bagel Munch, Inc.*, 2011 N.J. Super. LEXIS 143 (App.Div. July 19, 2011).

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