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Questionable Actions of Class Counsel Did Not Merit Decertification in Class Action

While many courts across the country were relatively quiet this week, the Seventh Circuit Court of Appeals provided a very valuable decision in helping to understand the mechanism of class actions. The basic issue that arose in *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.* was whether the conduct of class counsel in a certified class action case could provide a basis to decertify the class. The court held that while it is possible for the actions of class counsel, in very rare circumstances, to provide such a basis, decertification was not warranted in this case.

Just so we are all on the same page. A class action case is filed as a normal case that has language whereby the person who files the claim purports to represent a class of similarly situated people. However, the case is not a class action until a court determines that it meets the requirements of a class action case, discussed briefly below, and "certifies" a class. At this stage, the case becomes a class action and the people within the class have become parties to the case.

The issue in the case arose from circumstances surrounding four earlier cases. One of those earlier case was *G.M. Sign, Inc. v. Finish Thompson, Inc.*, which,

like the other three, involved a class action filed pursuant to the Telephone Consumer Protection Act as amended by the Junk Fax Prevention Act of 2005. "The Act authorizes $500 in statutory damages for faxing an unsolicited advertisement. This award triples upon a showing of willfulness, and each transmission is a separate violation." It is a very powerful statute in the class action realm. Due to the power of this statute, two law firms in Chicago have made a name for themselves in prosecuting junk fax cases.

One of these Chicago firms stumbled upon a golden repository of information in breaking open junk fax cases. The only problem was that the information was located on a hard drive that was subject to a confidentiality agreement. The firm acquired the information in the course of the four prior cases and agreed to not disclose the information. However, the firm took the information and sent solicitations to businesses that had been sent junk faxes in violation of the Act. From these solicitations, the firm was able to launch a series of other class action cases, including *CE Design Ltd. v. Cy's Crabhouse North, Inc.*, *Creative Montessori Learning Ctr. v. Ashford Gear*, and *McKnight Sales Co.* In each case, the basis for the suit stemmed from the misconduct in acquiring the information from the confidential material.

In all three of these cases, classes were certified to move forward in the case. However, defendants challenged certification of these classes arguing that the law firm's misconduct prevented certification. The argument was that the misconduct prevented the law firm from being "adequate counsel." In order for this argument to make sense, you must first understand the basic requirements for class certification. Class actions in federal courts are governed by Federal Rule of Civil Procedure 23. In order to get a class certified a putative class representative must meet the requirements of Rule 23(a) and the requirements of Rule 23(b)(1), (b)(2), or (b)(3). The Rule 23(a) requirements are typically stated as Numerosity, Commonality, Typicality, and Adequacy of Representation.

So what the defendants argued was that the last requirement, "adequacy of representation" could not be met because of the misconduct of the class' lawyers. The issue of whether the misconduct of a lawyer will require denial of class certification has been rarely addressed by prior cases. Due to this rarity, there was some confusion by the trial court in the *Ashford Gear* case as to what the precise standard was to deny certification for lawyer misconduct. The trial judge looked to a 1972 decision from the 7th Circuit and concluded that, "only the most egregious misconduct by the law firm representing the class could ever arguably justify denial of class status."

On appeal, the 7th Circuit held that a 2002 decision, *Culver v. City of*

Milwaukee, provided the proper standard. That is, "misconduct by class counsel that creates a **serious doubt** that counsel will represent the class loyally requires denial of class certification." With that standard established, *McKnight Sales Co.*, provided the court with its first opportunity to fully apply that standard to this series of cases predicated upon the law firms misconduct.

The court noted that "an attorney's misconduct or ethical breach is pertinent" due to the risk of class counsel subverting the class' interest for its own. "When class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class." Nevertheless, it still takes a "serious doubt" on behalf of the court to deny class certification. But, the ethical violation does not itself have to be prejudicial to the class. The court concluded "that unethical conduct, not necessarily prejudicial to the class, nevertheless raises a 'serious doubt' about the adequacy of class counsel when the misconduct jeopardizes the court's ability to reach a just and proper outcome in the case."

The court made sure to add clarification. "That does not mean, however, that an ethical violation always requires denial of certification . . . . A 'slight' or 'harmless' breach of ethics will not impugn the adequacy of class counsel." The court was also particularly mindful of the Illinois and Wisconsin professional conduct rules that advise: "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Thus, the court decided that such matters are best handled by state bar authorities and ought not to, typically, be utilized as a weapon against recovery for class members injured by the actions of others.

The decision is ultimately an extremely valuable and necessary victory for persons who have been wronged by others. The conduct of the law firm in this case was certainly unprofessional and apparently in violation of a clear confidentiality agreement. Nevertheless, the actions of the lawyers are wholly separate from the reality that the class members suffered the injury of receiving junk faxes. I cannot and will not endorse or support the misconduct of another lawyer. That said, just because the law firm acted in an untoward manner has no bearing upon the injury to the class members or the illegality of the actions taken by defendants. For that reason, I strongly support decisions that do not rob injured persons from their rights to seek redress just because their lawyers have acted with misconduct.

Join us again next time for further discussion of developments in the law.

Sources

- *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489 (7th Cir. 2013).
- *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 1:07-cv-05953 (N.D. Ill Dec. 9, 2008).
- *CE Design Ltd. v. Cy's Crabhouse North, Inc.*, No. 07 C 5456 (N.D. Ill. Aug. 23, 2010).
- *Creative Montessori Learning Ctr. v. Ashford Gear*, No. 09 C 3963 (N.D. Ill. July 27, 2011).
- *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972).
- *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002).
- Telephone Consumer Protection Act – 47 U.S.C. § 227(b)(1)(C), (b)(3).
- Federal Rule of Civil Procedure 23.