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TCPA Opinion Highlights Strategies For Avoiding Class Claims

By **Eric Macey** (August 12, 2019, 12:20 PM EDT)


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An inordinate number of class actions are filed under the Telephone Consumer Protection Act, 47 U.S.C. §227(b). Principal issues in these cases revolve around whether the plaintiff (who received the call) consented to the call or revoked consent by advising the caller to stop calling, but then subsequently received a call.

On their face, consent and revocation appear to be fact-intensive inquiries particular to the circumstances of each case. For that reason, motions for summary judgment to avoid TCPA liability often fail because courts hold that consent and/or revocation raise disputed fact issues. But recently, the U.S. District Court for the Northern District of Illinois, while denying summary judgment on these grounds, used the same analysis to grant a motion to strike the class allegations.

In Tillman v. Hertz Corp.,[1] U.S. District Judge Robert Gettleman granted the defendant's motion to strike the class allegations in the amended complaint after having denied the defendant's motion for summary judgment. The plaintiff sued The Hertz Corporation under the TCPA, claiming Hertz violated the statute by making automated unsolicited calls to a cell phone he used. The plaintiff brought the case as a putative class action.

Hertz had moved for summary judgment, but the court denied the motion.[2] Among other things, the court found that there were disputed issues of fact regarding (a) whether the car rental form permitted Hertz to make calls to numbers listed by the renter on the form, and (b) whether the plaintiff directed Hertz to stop calling his cell number and to remove it from Hertz's database. The court's opinion on summary judgment, however, issued a warning: "This opinion demonstrates the highly unlikely certification of any plaintiff class under Fed. R. Civ. P.23, due to the obvious predominance of individual facts concerning consent and revocation thereof."[3]

In an apparent effort to cure the class certification problem raised by Judge Gettleman in his summary judgment opinion, the plaintiff filed an amended complaint with a revised class definition — but to no avail. The defendants filed a motion to strike class allegations, which was analyzed no differently than whether a class should be certified under Rule 27, "and the burden [was] on plaintiff to demonstrate that class certification [was] appropriate."[4]

The plaintiff sought to certify a class under Rule23(b), but the court found that the allegations of the amended complaint raised unique facts that precluded satisfaction of the "typicality" and "adequacy" preconditions of Rule23(a). In addition, the court found that these same facts precluded finding both (a) a predominance of common questions of fact, and (b) that a class action was superior to other available methods of fairly and efficiently resolving the dispute, thus failing to satisfy the requirements for a Rule23(b) class.

Specifically, Judge Gettleman held that the same disputed issues of fact that caused him to deny summary judgment remained — the type of car rental agreement signed, whether the calls made were live or automated, and whether and how the plaintiff revoked any consent. Because resolution of these fact questions were unique to the plaintiff's case, they made him "an atypical and

inadequate class representative."[5]

Moreover, the plaintiff's proposed class included all noncustomers that Hertz called after a request to stop calling that person's number was made. Yet that meant the case required proof by each class member of whether a request to stop calling was made (and, obviously, what exactly was said in each call). Consequently, common facts would not predominate over any questions affecting just putative class members, and the need for mini-trials demonstrated that the proposed class action was not superior to other ways to effectively resolve the dispute.

In denying the initial motion for summary judgment, but granting the motion to strike the class allegations, the decision in Tillman demonstrates how the very fact disputes in a TCPA class action involving consent and/or revocation can be used to prevent class certification. Arguably, Tillman involved particular individualized facts that drove the court's decision to strike the class allegations. But it is a good lesson for practitioners to be sure in precertification discovery to develop consent and revocation issues that may warrant denial of certification.

It is also a reminder to review all underlying documents in a commercial transaction to examine the extent and nature of any possible consent arguments based on language in the transaction documents. Finally, in light of Tillman, perhaps defense counsel in similar fact situations should forego the expense and time of filing summary judgment and attack the class claim allegations head on.

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[1] Tillman v. Hertz Corp. , Case No.16 C 4242 (N.D. Ill. July 18, 2019).

[2] See Tillman v. Hertz Corp. , Case No.16 C 4242, 2018 WL 4144674 (N.D. Ill. Aug. 29, 2018).

[3] Id. at*3 n.5.

[4] 2019 WL 3231377 at*2.

[5] Id. at*3.
