

Too Close for Comfort: Plaintiff's Ties to Class Counsel Leads to Denial of TCPA Class Action Certification

Thursday, February 14, 2019

Certification in a TCPA class action almost always turns on whether the issue of consent can be determined by common proof. But every once in a while, a class representative is found to be inadequate based on their close ties with the putative class counsel.

Recently, the court in *Gordon v. Caribbean Cruise Line, Inc.*, 2019 U.S. Dist. LEXIS 20604 (N.D. Ill. Feb. 8, 2019), denied Plaintiff's motion for class certification on the basis that Plaintiff could not be an adequate class representative because of his significant business and personal ties to class counsel. But it also found that even if Plaintiff was adequate, he could not satisfy the Rule 23(b)(3) predominance requirement because Defendant provided specific evidence showing that a significant percentage of the class consented to receiving text messages.

Factual Background

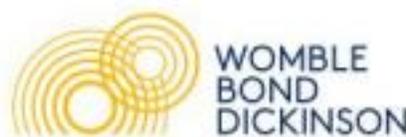
To provide some background, Caribbean Cruise Line, Inc. ("CCL") is a marketer of cruise vacation packages. CCL hired Adsource to generate sales leads of persons interested in purchasing such packages. In order to generate sales, Adsource placed advertisements on various websites offering vacation deals. If a person clicked on the advertisement, he or she would be directed to Adsource's website. Once on the website, the person had the option of submitting his or her phone number, which served as consent to receive a subsequent automated telephone call or text message about the offer.

Plaintiff asserts that he never visited Adsource's website, provided his phone number, or consented to receive text messages. Nonetheless, he alleges he received an automated text message on his cell phone, in violation of the TCPA, stating, "You've been sent a pair of zero cost tickets to the Bahamas! Call 813.5151805." On the basis of these allegations, Plaintiff sought to certify the following class:

All individuals in the United States that: (1) had a text message sent to their cellular telephone number by, on behalf of, or for the benefit of CCL; (2) using an automated telephone dialing system; (3) between February 1, 2014 and April 1, 2015 (the "Class Period"); (4) whose cellular number appears in CCL's records (the "Class").

Lack of Adequate Representation

After finding the Plaintiff had satisfied the numerosity, commonality, and typicality requirements of Rule 23, the Court turned its attention to the issue of adequacy. First, CCL argued that Plaintiff was not an adequate representative because he is a TCPA class action attorney. The court held that Plaintiff's position as a class action attorney, in and of itself, did not call into question his adequacy as a class representative.



Article By [Artin Betpera](#)
[Susan Nikdel](#)
[Womble Bond Dickinson \(US\) LLP](#)
[TCPA Defense Force](#)
[Communications, Media & Internet](#)
[Litigation / Trial Practice](#)
[Illinois](#)

Next, CCL argued that Plaintiff's close ties with class counsel rendered him inadequate. In support of this argument, CCL indicated that Plaintiff and class counsel had jointly represented class action plaintiffs in five different matters, three of which were pending. They also share an office suite, receptionist, and fax machine. Moreover, the office space that class counsel's firm rents is owned by a partnership involving Plaintiff's cousin and Plaintiff had even applied to work at class counsel's firm. Plaintiff is also currently serving as co-class counsel with another attorney from class counsel's firm. On top of all that, Plaintiff lives near class counsel, their families socialize, and their daughters go to the same school. Two peas in a pod.

The Court found that these connections—including significant business ties, and close personal ties to class counsel—"cast significant doubt upon his ability to put the interests of absent class members above that of class counsel." As such, the court held that Plaintiff failed to satisfy the Rule 23 adequacy requirement.

Predominance of Individualized Inquires of Consent

The Court also held that, even without these serious adequacy shortcomings, the class was still not certifiable because individualized issues of consent predominated over common questions of law or fact.

Specifically, the Court found that "when the defendant provides specific evidence showing that a significant percentage of the putative class consented to receiving calls, issues of individualized consent predominate." Here, CCL provided specific evidence in the form of a declaration, verifying that Adsource sent text messages only to those who entered their names and phone numbers on Adsource's landing page and checked the box indicating their consent to receive text messages via an auto-dialer. CCL also provided Adsource's Lead Lists which identified over 300,000 individuals, as evidence of class members who provided consent to receive text messages, along with their names, phone numbers, and IP addresses.

In response, Plaintiff presented evidence in the form of declarations from Plaintiff and two other individuals who attested they never entered their information on their website and other evidence that another 50 people appearing on Adsource's lead list who "were not associated with their corresponding phone numbers as of 2017." However, the Court correctly found that all this evidence did was prove CCL's point that individualized inquiries of consent predominated because "individualized factual inquiries will be necessary whether the individuals on the Lead Lists did, in fact, consent, and those issues will predominate the litigation."

Notably, it's not uncommon for class action firms to pursue similar claims based on online lead generation. But what the *Gordon* case helps show is that—when it comes to online lead generation—appropriate clickwrap web flows, sound TPCA consent disclosures and accurate data will go a long way in helping defeat certification in a potential no-consent class action. As the Court aptly noted, it would take a fact-intensive, individualized inquiry into each lead to try to ferret out every instance where a putative class member didn't actually visit the website in question or provide their consent to be called.

Copyright © 2019 Womble Bond Dickinson (US) LLP All Rights Reserved.

Source URL: <https://www.natlawreview.com/article/too-close-comfort-plaintiff-s-ties-to-class-counsel-leads-to-denial-tpca-class>