

Lose the Battle; Win the War - After Denying Summary Judgment, Court Grants Motion to Strike Class Allegations



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Sometimes losing summary judgment comes with a silver lining. Last August, the court in *Tillman v. Hertz Corp.*, 2018 U.S. Dist. LEXIS 147945 (N.D. Ill. Aug. 29, 2018) denied defendant's motion for summary judgment, but in doing so, the court noted that it was **"highly unlikely" that a class could be certified because of the predominance of individual issues of fact concerning consent and revocation.** Notwithstanding plaintiff's efforts to amend her complaint and revise her class definition, this past week, the court granted defendant's motion to strike the class allegations, finding that plaintiff had not rectified the individual issues of fact previously identified by the court as precluding class certification.

This case involved calls made by the defendant rental car company when plaintiff's mother failed to timely return the car. Plaintiff claimed, among other things, that the defendant continued to call her after she had revoked consent. Defendant moved for summary judgment, which the court denied finding that taking plaintiff's version of the facts as true at the summary judgment stage, plaintiff's revocation was reasonable. However, the court was skeptical about whether a class could be certified because of the individual issues of fact regarding consent and revocation. In response to the court's skepticism, plaintiff amended her complaint and class

definition to include only noncustomers who received calls from defendant *after* a request to stop calling was made by the noncustomer. Defendant then moved to strike the class allegations.

The court granted defendant's motion. First, the court found that "[n]umerous contested facts peculiar to this case destroy any notion of adequacy and typicality," including the type of agreement executed in connection with the rental, the type of calls made, and whether and how plaintiff revoked the consent given by her mother. In addition, the court found a lack of predominance of common questions of fact. "Whether a 'request to stop calling' was made is a question of fact that will need to be litigated with respect to each class member in the class." Further, the court found that the prospect of conducting mini-trials for each class member destroyed any notion that a class action is superior.

As those of us here at TCPAWorld know all too well, issues of consent and revocation often create disputed issues of fact that preclude summary judgment. But it is those same disputed issues of fact that help defeat class certification. Thus, in those cases, you sometimes lose the summary judgment battle, only to win the class certification war.

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