Anytime I am contemplating raising a substantive defense pre-certification in a putative TCPA class action I always ask myself—is it worth it?

If you raise a substantive issue pre-certification—especially one that impacts the entire class—you absorb two huge risks: i) that the Court will obliterate your defense pre-certification resulting in a waiver of the one-way intervention protections; and ii) that the Court will view the issue as a critical common issue that justifies certification.
Sometimes the potential benefits to the Defendant justify those risks—especially where the substantive issue is unique to the named Plaintiff—and sometimes they do not.

One place where a Defendant will virtually NEVER want to raise a class-wide substantive merits issue, however, is at the pleadings stage. Doing so risks the Court ruling on a critical issue that impacts the entire class, pre-certification, and without a complete factual foundation. Its generally just a terrible idea. Yet TCPA defendants keep falling into this trap over and over again.

In the latest edition of “why not give it a shot,” the Defendant elected to raise a critical merits defense—apparently the lynchpin argument by which they claim to have had an “established business relationship” with the class members—at the pleadings stage, even though the underlying facts establishing the defense were not pleaded in the complaint. This meant the Defendant had about a zero percent chance of winning the argument even if the court bought it—pleadings stage challenges are limited to the alleged facts—and a 100 percent chance of losing their entire defense if the Court did not buy it.

Guess which one happened?

In Johansen Bluegreen v. Vacations Unlimited, CASE NO. 20-81076-CIV-SMITH, 2021 U.S. Dist. LEXIS 151333 (S.D. Fl. July 14, 2021) the Defendant argued, at the pleadings stage, that it was allowed to call the Plaintiff ten years after its last business dealings with him—the general EBR rule ends after 18 months—because he had purchased a vacation package and never redeemed it.

Now the Court was a bit suspicious of this claim—and the facts establishing it were not alleged—but had the court simply rejected the argument at the pleadings stage it would have been no big deal. Sure the defendant wasted the Court’s time—and its own money—raising an issue prematurely, but no real harm no real foul.

But the Court went much farther than saying—as some courts will—“bring it up to me later.” Instead the Court in Johansen completely rejected the underlying premise that if the guy had a vacation package from ten years ago the Defendant could still make calls. Rather it found that vacation phone calls are NOT like mortgage or insurance calls made to individuals that have an ongoing financial relationship with a broker/lender—in those instances a business is free to continue calling after 18 months. But just because someone bought your product 10 years ago and never cashed in on it does not give you the right to keep calling in violation of the DNC rules.

Since that issue is presumably not unique to the named Plaintiff—it appears Defendant called others on the mistaken belief that it could continue to reach folks who had never cashed in on their purchased vacation packages—the Court just ruled in favor of the class on a critical (and common) substantive defense at the pleadings stage.

That’s a really really bad thing for the defendant. Like really bad.

Worse yet, it was a self-inflicted wound. Had they kept this bullet in the chamber
until the MSJ phase and better-developed the defense factually they might have stood a fighting chance.

I preach not to throw anyone under the bus here- I preach so that others may learn. Do NOT prematurely raise critical substantive defenses in class litigation folks. There is no upside and tremendous downside. Call me if you have questions.

Takeaways: i) what I just said; ii) some courts will narrowly read the EBR exception to apply solely to ongoing relationships that involve financial transactions–if you are in a business that maintains regular contact with former customers who are not currently in any sort of financing relationship with you keep this in mind!

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