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TCPA Class Certification Denials Continue to Pile Up, This Time in Florida

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Yet another court has found that consent in a TCPA case is an inherently individualized issue that precludes class certification. In *Newhart v. Quicken Loans, Inc.*, 2016 U.S. Dist. LEXIS 168721 (S.D. Fla. Oct. 13, 2016), the plaintiff moved to certify a class of individuals who had received calls from defendant on their cellular telephones, allegedly in violation of the TCPA. The court denied class certification, finding that "resolving the consent issue will depend upon multiple layers of individualized evidence about each call and the circumstances that preceded it. Therefore, predominance is lacking." *Id.* at *6. Importantly, the court did not need to decide "whether any class member actually consented." *Id.*

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The court held that the consent analysis had two parts. First, the trier of fact must determine "whether each challenged call was made for a telemarketing purpose." *Id.* If so, prior express ***written*** consent would be required. If not, the consent need not be in writing. *Id.* Second, the trier of fact must determine whether the defendant "possessed the requisite consent before making each call." *Id.* at *6–7. The court's decision that an individualized analysis was necessary turned largely on its finding that the trier of fact must look at each individual call, not the "purpose of the overall campaign. *Id.* at *7–8. Analogizing to the TCPA fax provision, the court noted that, "[t]he FCC has expressly recognized, in the unsolicited fax context, that even when some aspect of a series of communications might meet the telemarketing rule, others might not, and so it is necessary to examine the communications separately." *Id.* at *8. Because evidence showed that the challenged calls in the case were not uniform in purpose, the telemarketing issue could not be resolved on a class-wide basis. *Id.* at *10.

The *Newhart* case is hardly unique in finding that the element of consent can doom a TCPA class action under the right facts and circumstances, but it is a well-reasoned opinion that defense lawyers should consider as another arrow in the quiver when attacking class certification.

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