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Class Actions under the Federal Telephone Consumer Protection Act of 1991

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I.
Introduction

Class action cases brought under the "Telephone Consumer Protection Act of 1991" ("TCPA") can be potentially hazardous for defendants. This article provides a brief overview of the basic aspects of the TCPA, describes many of the pitfalls for defense counsel in TCPA class action cases, and provides helpful suggestions to assist defense counsel in defeating TCPA class action claims. Part II of this article provides a brief overview of the TCPA and what communications are prohibited by the Act, and Part III discusses the jurisdictional obstacles in bringing a TCPA claim. Part IV provides strategic tactics for defendants in TCPA class action cases, including suggestions on early motion practice. Part V analyzes issues of predominance and superiority under Federal Rule of Civil Procedure 23(b)(3), and it identifies issues that a defense counsel should consider at the early stages of any TCPA case. Finally, Part VI takes a look at cases in which courts have certified TCPA class actions, and Part VII provides examples of cases in which class certification has been denied.

II.
The Telephone Consumer Protection Act of 1991

The TCPA[1] is a federal statute enacted in 1991 that prohibits unsolicited advertising by facsimile, automated recorded telephone messages, advertising calls to cellular telephones or other devices where the customer must pay to receive the call, and solicitation after

[1] 47 U.S.C.A. § 227 (West 2001 & Supp. 2010).

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consumers have included their names on the no-call list.[2] Recent court decisions have also included unsolicited text messaging advertisements in the category of communications prohibited under the TCPA.[3] There have been only isolated reported opinions asserting that a plaintiff was the target of an unsolicited recorded message.[4] Computer spam messages are not covered by the act, but instead by the Can-Spam Act.[5]

The TCPA was enacted by Congress to effectively function as a state law, permitting a private cause of action under the statute if permitted by state law. Specifically, the statute provides that "a person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State . . . an action to recover for actual mon-

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[2] The TCPA was amended in 2005 by the Junk Fax Prevention Act of 2005 ("JFPA"), which provided a statutory basis for a narrow existing business relationship exemption. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). See Deborah F. Buckman, *Propriety of Class Actions Under Telephone Consumer Protection Act*, 30 ALR FED. 2D 537 (2010), for cases discussing class actions under the TCPA.

[3] *See, e.g.*, Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009).

[4] *See, e.g.*, Margulis v. Resort Rental, L.L.C., No. 08-1719, 2008 WL 2775494 (D.N.J. July 14, 2008); Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392 (3d Cir. 2004).

[5] 15 U.S.C.A. § 7701-7713 (West 2009).

etary loss from such violation, or to receive $500 in damages for each violation, whichever is greater."[6] Section 227(b)(3) authorizes a recovery of three times the statutory damages for knowing or willful violations, and section 227(b)(3)(A) permits injunctive relief.[7] Significantly, the TCPA does not authorize the award of attorney's fees, so to recover fees, a plaintiff's counsel must assert a state statute that permits attorney's fees or seek fees from a "common fund" theory in a class action.[8]

To include many different forms of unsolicited communications, the TCPA defines "unsolicited advertisement" broadly to include "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior expressed invitation or permission, in writing or otherwise."[9] The statute expressly prohibits any unsolicited advertising calls using "an artificial or prerecorded voice to deliver a message without the prior expressed consent of the called party."[10] Telephone solicitations to cell phones or other telephone services where the called party is billed for the service are also prohibited.[11]

Although many forms of communication are prohibited under the Act, the vast majority of reported court decisions regarding TCPA claims pertain to unsolicited facsimile advertising, where a "fax broadcast" has been sent to thousands of potential customers. Some of the cases have led to very large awards, including a $11,889,000 judgment against Hooters of Augusta, Inc. in 2003.[12] Broadcast faxes by telephone, facsimile, or computer are prohibited unless (1) the sender has established a business relationship with the recipient; (2) the sender has consented through a voluntary communication of the number; or (3) the number was obtained through a directory, advertisement, or site on the Internet to which the recipient agreed to make available its fax number for public distribution.[13] If the defendant attempts to rely on the prior business relationship exemption, the consolidated advertisement must

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[6] § 227(b)(3). Theoretically, the consumer could have damages greater than the $500 statutory minimum, but it is difficult to envision such a situation. Indeed, the $500 award applies even if the actual injury is only pennies.

[7] § 227(b)(3)(A).

[8] *See, e.g.*, Fla. Stat. § 501.203(3)(c) (2009) (providing that certain consumer statute violations also constitute Little FTC Act or FUDPTA violations); Fla. Stat. § 501.2105 (2009) (providing for attorneys' fees on a discretionary basis for violations of state FDUTPA); Fla. Stat. § 501.059(9)(c) (2009) (Florida Consumer Telephone Solicitation Act providing for prevailing party fee awards).

[9] Tit. 15, § 227(a)(5).

[10] § 227(b)(1)(B).

[11] § 227(b)(1)(A)(iii).

[12] Hooters of Augusta, Inc. v. Am. Global Ins., Co., 272 F. Supp. 2d 1365 (S.D. Ga. 2003), *aff'd* 157 Fed. Appx. 201 (11th Cir. 2005).

[13] § 227(b)(1)(C).

contain a notice that allows the recipient to opt out of future communications.[14] Moreover, some courts have refused to apply the prior business relationship exemption to fax broadcasts.[15] In addition to these exceptions, numerous additional exceptions apply to non-profit organizations and emergency circumstances.[16]

III.
FEDERAL JURISDICTION UNDER THE TCPA

The TCPA authorizes a private cause of action if permitted by state law.[17] However, circuits are split as to whether federal or state courts have jurisdiction over TCPA claims.

A series of federal court opinions limited original jurisdiction for TCPA claims to state courts.[18] Currently, a majority of the circuits hold that federal courts lack federal question jurisdiction over private claims brought under the TCPA.[19] For example, in *Murphy v. Lanier*,[20] the Ninth Circuit held that state courts have original jurisdiction over TCPA claims, noting that the TCPA "contemplates that private actions may be brought in state court 'if the state consents.'"[21] Similarly, in *American Cooper & Brass, Inc. v. Lake City Industrial Products, Inc.*,[22] the court held that federal courts lack federal question jurisdiction over TCPA claims. The plaintiff in that case brought a claim under the TCPA in response to an unauthorized fax advertisement sent to 11,000 individuals. The court held that although federal courts do not have federal question jurisdiction under the TPCA, the plaintiff could

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[14] § 227(b)(1)(D).

[15] *See, e.g.,* Karen S. Little, L.L.C. v. Drury Inns, Inc., 306 S.W.3d 577 (Mo. Ct. App. 2010) (holding that express consent is the only defense to fax broadcasts). The JFPA, however, clearly establishes a limited defense for pre-existing business relationships. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

[16] § 227(b)(1)(A)(B); § 227(b)(2)(B); § 227(a)(4)(C).

[17] § 227(b)(3).

[18] *See* Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd., 156 F.3d 432, 435 (2d Cir. 1998) (holding that although no federal question jurisdiction is authorized, federal courts have diversity jurisdiction over TCPA claims); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998) (holding the TCPA grants exclusive state jurisdiction); Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns., Inc., 106 F.3d 1146 (4th Cir. 1997) (holding that state courts have exclusive jurisdiction over TCPA claims); Chair King, Inc. v. Hous. Cellular Corp., 131 F.3d 507 (5th Cir. 1997) (holding that the TCPA grants exclusive jurisdiction to state courts); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir. 1998) (holding that the TCPA grants exclusive subject matter jurisdiction to state courts).

[19] American Cooper & Brass, Inc. v. Lake City Indus. Prod., Inc., No. 1:09-CV-1162, 2010 WL 2998472, at *1 (W.D. Mich. July 28, 2010).

[20] Murphy v. Lanier, 204 F. 3d 911, 915 (9th Cir. 2000).

[21] *Id.* at 914.

[22] No. 1:09-CV-1162, 2010 WL 2998472, at *1 (W.D. Mich. July 28, 2010).

proceed with his claim in federal court under diversity jurisdiction because the amount in controversy requirement was satisfied.[23] Likewise, in *Bridging Communities, Inc. v. Top Flite Financial, Inc.*,[24] the court considered the plaintiff's claim that the defendant sent an unsolicited fax advertisement in violation of the TCPA. The court held that federal courts lack federal question jurisdiction over private TCPA claims.[25]

Conversely, in *Brill v. Countrywide Home Loans, Inc.*,[26] the Seventh Circuit expressly held that federal courts have original jurisdiction over TPCA claims. Originally, the TCPA class action claim in *Brill* was brought in state court, alleging illegally broadcast faxes. The defendants removed the case under the Class Action Fairness Act of 2005 ("CAFA") asserting that the court had diversity jurisdiction and that the aggregate number of facsimiles exceeded 3,800 transmissions. The Seventh Circuit permitted the removal, reasoning that if there was a finding of intentional misconduct, the $1,500 enhanced damage amount per transaction would reach the aggregate jurisdictional requirements of $5 million, and the jurisdictional limit could be met.[27] When determining whether it had jurisdiction over the TCPA claim, the Seventh Circuit sought to ascertain whether Congress had mandated exclusive state court jurisdiction. The Seventh Circuit reasoned that if state court jurisdiction really is exclusive under the TCPA, then it eliminates federal question and diversity jurisdiction as well.[28] The Seventh Circuit noted that no language in section 227(b)(3) purports to provide the states with exclusive jurisdiction.[29] Further, the court highlighted that section 227(f)(2) authorizes actions by a state attorney general to enforce the statute, but provides that the federal courts would have exclusive jurisdiction in such cases.[30] The Seventh Circuit concluded that removal of a TCPA claim to federal court was authorized under section 1441, as a separate and independent claim or cause of action, as well as under the CAFA.[31] To date, the Seventh Circuit is alone in finding that section 227(b)(3) does not grant exclusive jurisdiction to the state courts.[32]

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[23] *Id. See also* Imhoff Inv., L.L.C. v. Alfoccino of Auburn Hills, Inc., No. 10-CV-10221, 2010 WL 2772495 (E.D. Mich. July 13, 2010) (holding that the TCPA does not provide for federal question jurisdiction).

[24] No. 09-14971, 2010 WL 1790357 (E.D. Mich. May 3, 2010).

[25] *Id.* at *3.

[26] 427 F. 3d 446 (7th Cir. 2005).

[27] *Id.* at 447-48. Interestingly, the court suggested that the plaintiff could have prevented removal under the CAFA, if it had "represented that the class would neither seek nor accept more that $5 million in aggregate." *Id.* at 449.

[28] *Id.* at 450.

[29] *Id.* at 450.

[30] *Id.* at 451.

[31] *Id. See also* Hamilton v. United Health Group, No. 3:08-CV-279, 2008 WL 4425958, at *2-3 (S.D. Ohio Sept. 22, 2008) (holding that TCPA cases are removable to federal court).

[32] *Bridging Cmtys., Inc.*, 2010 WL 1790357, at *2.

Because circuits are split as to whether the TCPA grants federal or state jurisdiction over private claims, jurisdiction issues for class action claims under the TCPA should be carefully examined in every case.

IV.
THRESHOLD STRATEGIC ISSUES FOR TCPA CLAIMS

Conventional trial wisdom holds that a defendant should subordinate all issues to defeat or minimize the chances of class certification. This philosophy is particularly important in defending TCPA claims, since the actual damages are usually nominal and an individual claimant's recovery should be limited to $500, or $1,500 if trebled. The maximum amount in damages available to a plaintiff is $1,500 if only a TCPA claim is asserted.

In addition to a TCPA claim, plaintiffs are very likely to assert state law telephone consumer protection act claims, commonly referred to as "Little FTC Act" claims, in order to have a statutory basis for attorneys' fees. Additionally, to increase damage awards, a savvy plaintiff's counsel will carefully research the relevant law on insurance coverage and try to include a claim such as false advertising, property damage, or invasion of privacy, which would have a reasonable chance of triggering coverage under a commercial or other insurance policy.[33] Some of the claims, such as invasion of privacy, are not well-suited for class treatment. However, regardless of what claim a plaintiff asserts, he must assert a claim that permits a fee recovery or rely on a "common fund" fee payment from a class action. The Little FTC Act in many states will provide for attorneys' fees and define a violation of a federal consumer act as a violation of the state act.

When plaintiff's counsel includes multiple claims in addition to a TCPA claim, such as state Little FTC Act and common law claims, class certification may become less likely. Many times the additional claims are not well pled and may be subject to attack on motion, which will eventually lead to a dismissal of that claim. The more rigorous pleading requirements required by *Bell Atlantic Corp. v. Twombly*[34] and *Ashcroft v. Iqbal*,[35] provide some reason to believe that such motion practice can be used to narrow the complaint.

Narrowing the complaint is not necessarily in the defendant's best interests. The more complex the plaintiff's complaint and the more fact-driven the class action allegations are, the greater the chance that the defendant will prevail on the crucial predominance and superiority issues. It is not unusual for a plaintiff to over-plead issues and obscure claims that might be

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[33] For cases discussing insurance coverage issues regarding TCPA claims, see R. Johan Conrod, *Insurance Coverage Claims of Violations of the Telephone Consumer Protection Act*, 3 A.L.R. 6TH 625 (2005).

[34] 550 U.S. 544 (2007).

[35] 129 S. Ct. 1937, 1949-50 (2009).

more susceptible to proper class treatment.[36] Because plaintiffs' lawyers are sometimes so anxious to cover all of their bases or to prove how pernicious the defendant's conduct was, they will include complex individualized fact patterns not central or even relevant to their primary class claims.

A defendant's counsel should consider early motion practice to defeat the plaintiff's claims. For example, threshold issues of personal jurisdiction, especially relating to individual defendants, may be appropriate for a motion to dismiss. In *Strojnik v. Signallife, Inc.*,[37] the plaintiff sued a defendant corporation, its owner, and the chief executive officer and his wife for violations of the TCPA. The pleadings were vague and referred indiscriminately to the actions of the "defendants," and the complaint asserted that a Pennsylvania defendant continuously and systematically sent unsolicited faxes to the state of Arizona.[38] The plaintiff relied on one fax referred to in the complaint and nine more, which were sent over a three-month period. On the defendants' motion, the court rejected the claim of personal jurisdiction as to all of the defendants and refused to authorize additional time for discovery.[39]

Because a plaintiff's claim may be defeated on a motion to dismiss, the facts relating to the class representative must be examined with great care. Threshold standing issues should also be considered as a possible basis to defeat pre-class certification. Last, although damage class actions are controlled by Federal Rule of Civil Procedure 23(b)(3),[40] local rules regarding special pleading requirements should also be carefully reviewed.[41] Under local laws, a defendant's counsel may be able to restrict all initial discovery to facts directly related to the class issue and avoid expensive merits discovery.

In response to a plaintiff's complaint alleging multiple causes of action in addition to a TCPA claim, a defendant's counsel should proceed carefully to maximize chances for success. Early motion practice should be considered as a way to swiftly defeat multiple claims.

V.
Critical Rule 23(b)(3) Factors for Damage Class Actions

The typical TCPA class action claim relates to the receipt of a broadcast advertising fax. In preparing to defeat the class certification, defense counsel must carefully analyze not only the elements of each claim, but the potential affirmative defenses. Generally, the

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[36] *See, e.g.*, Rollins, Inc. v. Butland, 951 So. 2d 860, 874-76 (Fla. Dist. Ct. App. 2006) (denying class certification based on lack of common theory of proof beyond impermissible "pattern and practice" evidence).

[37] No. CV-08-1116-PHX-FJM, 2009 WL 605411 (D. Ariz. Mar. 9, 2009).

[38] *Id.* at *1.

[39] *Id.* at *3-4. The court in *Strojnik* may also have been influenced by the fact the plaintiffs and their lawyers were one and the same.

[40] Fed. R. Civ. P. 23(b)(3).

[41] *See, e.g.*, S.D. Fla. Local R. 23.1.

plaintiff must prove three elements in a "fax blast" TCPA claim: "(1) [that the defendant] used a telephone facsimile machine, computer or other device to send a facsimile; (2) [that] the facsimile was unsolicited; and (3) [that] the facsimile constituted an advertisement."[42]

In response to the plaintiff's claim, a defendant may rely on one of the TCPA's exceptions to the general prohibition against unsolicited fax advertisements. The defendant may try to establish that he had an established business relationship with the plaintiff and that he sent the advertisement to a fax number obtained through the "established business relationship, or from 'a directory, advertisement, or site on the Internet to which the recipient voluntarily'" offered the fax number for public distribution.[43] The defendant should use these exceptions to establish that a brief trial is necessary to resolve central issues. The defendant must insist upon his right to present evidence on issues surrounding the TCPA exceptions in every case to maximize the likelihood for success.

Moreover, the defendant should pay particular attention to predominance and superiority issues arising under Federal Rule of Civil Procedure 23(b)(3).[44] In order to maintain a class action, a court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[45] Practically speaking, to maintain a class action, a court must find "not only that common questions exist, but that those common questions predominate over individual questions."[46] Additionally, in order for a court to find that the class action is superior to other proceedings, it must "envision how a class action trial would proceed."[47] In envisioning the trial, a "court must determine whether the purported class representatives can prove their individual cases and, by so doing, necessarily prove the cases for each one of the thousands of other members of the class."[48]

To determine whether the class should be certified, a court will necessarily analyze the evidence offered to prove each of the causes of action. It is crucial for a defendant to carefully scrutinize the evidence to locate weaknesses and thus opportunities to argue that

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[42] Holtzman v. Turza, No. 08 C 2014, 2010 WL 4177150 at *2 (N.D. Ill. Oct. 19, 2010).

[43] *Id.* at *2 n.2 (quoting 47 U.S.C. § 227(b)(1)(C) (2006)).

[44] FED. R. CIV. P. 23(b)(3). Under Rule 23(b)(3), a class action may be maintained if, among other things, the court finds common questions of law or fact and that a class action is superior to other methods of adjudication. The matters pertinent to those findings by the court include: the desirability of control of the litigation by individual class members; the extent and nature of the litigation concerning the controversy; the desirability of concentrating the litigation in one forum; and the difficulties of managing the class. *Id.*

[45] *Id.*

[46] Humana, Inc. v. Castillo, 728 So. 2d 261, 266 (Fla. Dist. Ct. App. 1999).

[47] *Id.*

[48] *Id.*

common issues do not predominate or that a class action is not the superior method of adjudicating the controversy. In its argument against class certification, a defendant should argue that it has a due process right to cross-examine witnesses and present evidence on individual issues. In arguing that a class action is not the superior method of adjudication, the defendant's theme should be that the class mechanism will require the court to resort to thousands of unmanageable mini-trials to resolve key factual issues that the defendant has a due process right to litigate.[49]

To defeat a class action, a defendant must carefully scrutinize each of the following issues that are typically present in a TCPA class action claim:

1) The plaintiff must be able to prove that the defendant actually sent the broadcast faxes, so the defendant should consider whether the fax logs or billing records are sufficient to tie the faxes to the defendant.

2) The plaintiff will likely be able to prove that the faxes were sent from the defendant's logs. However, the defendant should bear in mind the distinction between attempted and successful fax transmissions and determine whether a computer expert should be used to determine legitimacy issues.

3) The most critical issue for a defendant to address is whether a prior business relationship or express consent existed. The defendant must have confirmation of the opt-out compliance in the advertisement to rely on this defense. Potential sources of consent include customer lists, different lead sources, and current or former employees who may have obtained consent.

4) A defendant must keep in mind that the less accurate the defendant's business records are regarding customer information, the less appropriate the case is for class certification. If the defendant makes any statement that it can easily identify its former customers or examples of consent, the statements will be used as admissions to certify the class on the theory that prior customers or examples of consent can be easily obtained from the defendant.

5) If the defendant used a marketing company to generate leads in the past, the defendant should attempt to determine the procedures used by the marketing company to ensure that the leads were legitimate, consenting entities. Additionally, the defendant must explore any issues surrounding its duty to take reasonable steps to confirm the potential recipients' consent.

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[49] *Rollins, Inc.*, 951 So. 2d at 872-74 (rejecting pattern and practice evidence as an insufficient theory of common proof).

6) A defendant must always consider whether the fax transmission was truly an unsolicited advertisement. Section 227(a)(5) defines an unsolicited advertisement as one that is transmitted without "prior express invitation or permission, in writing or otherwise."[50] The defendant should carefully consider whether there is evidence to suggest permission in any form.

7) If the fax numbers were compiled on behalf of the defendant, it is presumed that the fax numbers were "voluntarily made available for public distribution so long as they [were] obtained from the intended recipient's own directory, advertisement or Internet site."[51] In light of this presumption, the defendant should carefully scrutinize the methods used to obtain the fax numbers used for the distribution so that it may rely on the presumption.

8) The defendant must also develop arguments surrounding the disproportionate economic impact on the defendant of a potential class action, as it relates to both the superiority issue and as a potential challenge to damages on constitutional grounds.

VI.
CERTIFYING TCPA CLASSES – *KAVU, INC. V. OMNIPAK*

Approximately fifty courts have certified TPCA class actions.[52] In *Kavu, Inc. v. Omnipak Corp.*,[53] the court granted the class certification motion for a TCPA claim, and the case is typical of those cases in which a court certifies a class.[54] In *Kavu*, defendant Omnipak sent a broadcast fax advertisement to 3,000 entities in four western states. The defendant

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[50] § 227(a)(5).

[51] F.C.C. Order No. 08-239, 6 (Oct. 8, 2008).

[52] *See,* Karen S. Little, L.L.C. v. Drury Inns, Inc., 306 S.W.3d 577, 584 n. 5 (Mo. Ct. App. 2010).

[53] 246 F.R.D. 642 (W.D. Wash. 2007).

[54] *Id.* The following cases provide additional examples of grants of class certification in TCPA cases: CE Design Ltd. v. Cy's Crabhouse N., Inc., 259 F.R.D. 135 (N.D. Ill. 2009); Holtzman v. Turza, No. 08 C 2014, 2010 WL 4177150 (N.D. Ill. Oct. 19, 2010); G.M. Sign, Inc. v. Finish Thompson, Inc., No. 07 C 5953, 2009 WL 2581324 (N.D. Ill. Aug. 20, 2009); Am. Home Servs. Inc. v. A Fast Sign Co., Inc., No. A07A0986, 2007 WL 2265578 (Ga. Ct. App. Aug. 9, 2007); Transp. Inst. v. Seattle PC-Magic, Inc., No. 04-2-37247-0 SEA, 2005 WL 5267529 (Super. Ct. Wash. June 8, 2005); Whitting Corp. v. Sungard Corbel, Inc., No. 03 CH 21135, 2005 WL 5569575 (C.C. Ill. Nov. 9, 2005); Dubsky v. Advanced Cellular Commc'ns., Inc., No. 2003 CV 00652, 2004 WL 503757 (Ohio Com. P. Feb. 24, 2004); Penser v. MSI Mktg., Inc., No. 01-30868 CA 32, 2003 WL 25548019 (C.C. Fla. Apr. 2, 2003).

obtained the recipients' fax numbers from a company that compiled customer data for sale to third-parties. The broadcast fax that the defendant sent in that case was the only fax the defendant had ever used to advertise its product.[55] The plaintiff claimed damages as to the loss of paper and toner, the temporary loss of use of the fax machine, and the potential loss of business while the machine was in use.

The defendant in *Kavu* was not able to rely on the TCPA exceptions, as the court noted that the plaintiff "had never done business with Omnipak and did not request the facsimile."[56] The court in *Kavu* noted that an unsolicited advertisement is permitted if it contains "a notice that meets certain requirements, *and* the sender either has an established business relationship with the recipient or the sender obtained the facsimile machine number through 'a directory . . . to which the recipient voluntarily agreed to make available its facsimile number for public distribution.'"[57]

The plaintiff in *Kavu* sought to represent a nationwide class of all persons who received the unsolicited fax advertisement during the time period defined by the statute of limitations.[58] A party seeking to certify a class must meet the minimum requirements of Federal Rule of Civil Procedure 23(a), which include the following:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[59]

The first requirement under Rule 23(a), that joinder of all parties is impracticable, was met in *Kavu* because the defendant sent the fax to approximately 3,000 entities in multiple states.[60] The second requirement under Rule 23(a), commonality, proves to be a relatively low hurdle for a plaintiff because the existence of common factual issues is almost always

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[55] *Kavu*, 246 F.R.D. at 645.

[56] *Id.* at 645.

[57] *Id.* at 645 (quoting 47 U.S.C. § 227(b)(1)(c)(ii)(II)) (emphasis in original).

[58] *Id.* at 645.

[59] Fed. R. Civ. P. 23(a). In addition to the four requirements of Rule 23(a), some courts also require a class to be sufficiently ascertainable. For example, in *G.M. Sign, Inc. v. Group C Communications, Inc.*, the court held that "membership of a class must be determinable through application of objective criteria." In that case, the court held that the class was ascertainable because the plaintiff identified two fax-number databases used by the defendant. In addition, the court held that the defendant's "unsupported speculation that some of the proposed class members may have consented does not warrant denial of class certification." No. 08-cv-4521, 2010 WL 744262, at *2-3 (N.D. Ill. Feb. 25, 2010).

[60] *Kavu*, 246 F.R.D. at 645.

present.[61] However, the requirement for commonality under Rule 23(a) must be distinguished from the critical 23(b)(3) issue of whether common or individual issues predominate.[62] In *Kavu*, the key common issue was whether the fax was unsolicited, since all of the recipients' information was received from a common source. The plaintiff in *Kavu* relied on authority providing that if the defendant obtains the fax numbers from a third party, the defendant must take reasonable steps to verify that the recipient consented to communications. Further, the *Kavu* court found that other common issues included whether technical rules under the TCPA were violated and whether the defendant's common course of conduct concerning the single fax list constituted willful behavior.[63]

The third requirement under Rule 23(a), typicality, was met in *Kavu* because Kavu allegedly suffered the same unlawful conduct that was directed at the class sought to be represented.[64] Evidence suggesting typicality was particularly strong in that case because of the single event and the same source of the leads.[65] The court rejected the defendant's arguments that typicality was not present because certain unique defenses applied and because the plaintiff's claims were dominated by individual issues.[66]

Last, although the fourth requirement of adequacy was not discussed at length in *Kavu*, the court briefly noted that the class representative was always a member of the class and agreed to take his responsibilities to the class seriously. The *Kavu* court concluded that the plaintiff met the class certification requirements of Rule 23(a) and certified the class.[67]

The *Kavu* case is a typical example of classes that obtain certification in TCPA cases. The facts in *Kavu* were particularly strong for obtaining class certification since only one fax broadcast was sent on a single day, and the defendant obtained all of its leads from a single source. The main question in that case was whether the defendant employed proper due diligence to ascertain whether the recipients consented to the communication.

Although the case is typical of class certifications, the *Kavu* court's analysis ignored the critical issue of whether the people whose names were listed by the third-party vendor consented to communication. Did any customers in that case explicitly consent? The real issue for a court in a TCPA case should be whether each person on the lead list consented

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[61] *Id.* at 647.

[62] *See supra* Part V, for a discussion of Rule 23(b) issues in TCPA claims.

[63] *Kavu*, 246 F.R.D. at 647. Since *Kavu*, the F.C.C. has suggested that the duty to confirm consent is limited. In some instances proof that the fax number was obtained from the recipient's own directory, advertisement, or website will create a presumption that permission to send facsimiles was provided. F.C.C. Order No. 08-239, 6 (Oct. 8, 2008).

[64] *Kavu*, 246 F.R.D. at 648.

[65] *Id.*

[66] *Id.* at 648.

[67] *Id.* at 650.

to communication. The *Kavu* order did not address this critical issue of consent, but instead avoided it by using the class definition to exclude class members who had consented. Certainly, a class should be maintained if the leads list was simply a scam; however, the undefined duty to confirm the accuracy of the list is a critical issue. Must the sender call each recipient?[68] Can the sender rely upon the representations of the lead company? The *Kavu* court's analysis makes it impractical to rely upon any marketing lists, despite the clear Congressional intent to permit such lead lists to be used as a basis for consent. The explicit language of the TCPA provides that a communication is not an unsolicited advertisement if the sender obtained the number through "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution."[69]

The *Kavu* court also rejected the defendant's argument that the court should decline to certify the class because of the draconian effect the minimum penalty may have on the defendant, and it stated that "the class size is a direct result of defendant's large number of violations, for which it should not be rewarded."[70] However, the court concluded that it would reserve judgment on constitutional issues and would address those issues if liability was established and "in the context of determining the appropriate amount of damages."[71] Since the statutory minimum award under the TCPA is $500 per recipient, the trial court understood the potentially catastrophic results of the facsimile blasts sent by small businesses. The court incorrectly suggested that it could limit the damage award, which it could not do unless it was prepared to apply a due process punitive damage analysis.

Courts often implicitly consider the draconian effect of a class action destroying a business. Some courts conclude that a class is superior in order avoid thousands of individual suits,[72] but these holdings ignore the fact that the vast majority of individual claimants have not been materially harmed. Private individual actions, injunctive relief in a single case, and regulatory actions can protect the public interest.[73] Superiority is not established when the class action mechanism is used to destroy a business or extort a settlement beyond any real damages. The purpose of the $500 minimum recovery is to provide an incentive to vindicate consumer interests independent of the class action procedure.

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[68] *See* F.C.C. Order No. 08-239 (Oct. 8, 2008) (directly calling or emailing the recipient is not necessarily required).

[69] § 227(b)(1)(C)(ii)(II).

[70] *Kavu*, 246 F.R.D. at 650.

[71] *Id.* at 651.

[72] *See, e.g.,* Roper v. Consurve, Inc., 578 F.2d 1106, 1114 (5th Cir. 1978).

[73] *See, e.g.,* London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 ("defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff"); Forman v. Data Transfer, Inc. 164 F.R.D. 400, 404-05 (E.D. Pa. 1995).

VII.
REJECTING CLASS CERTIFICATION UNDER THE TCPA

Although class certification has been granted in approximately fifty TCPA cases, many TCPA class certifications are denied. For example, in *Gene & Gene, L.L.C. v. BioPay L.L.C.*,[74] the Fifth Circuit reversed the trial court's class certification order on two separate occasions, on the grounds that consent could not be determined on a class-wide basis. The plaintiff asserted that the defendant sent unsolicited advertisements to 4,000 potential customers in Louisiana, and the class definition excluded "any recipients from whom the Defendant has received the prior express invitation or permission to receive the telefacsimile advertisements."[75] As in most consumer class actions, the plaintiff argued that the defendant engaged in a common course of conduct and that the defendant had the burden of proof to show consent. However, the defendant presented evidence that it obtained leads from many different sources, including trade shows, websites, and from lists of companies with which the defendant or its affiliates had established business relationships. The Fifth Circuit held that the primary issue in the case was differentiating between consenting and non-consenting recipients.[76] The court stated that it was most concerned that the lower court "failed to address the broader consideration of the predominance requirement: The district court did not explain how the common course of conduct it described would affect a trial on the merits."[77] Therefore, the Fifth Circuit held that the evidence did not support the conclusion that the "case would not degenerate into a series of individual trials."[78]

In *Gene & Gene*, the Fifth Circuit did not adopt a per se rule that the issue of consent precluded a TCPA class, but instead held that the plaintiff failed to "advance any viable theory employing generalized proof concerning the lack of consent with respect to the class involved in" that case.[79] Thus, in a TCPA case, the plaintiff must prove the absence of consent and have a class-wide theory of proof, which resolves whether each member of the class consented. The Fifth Circuit noted that in *Kavu* the plaintiff was able to determine class-wide lack of consent by proving that the sole vendor obtained fax numbers without obtaining permission from the recipients.[80]

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[74] 541 F.3d 318 (5th Cir. 2008). On the second appeal to the Fifth Circuit, the court held that additional discovery did not produce any evidence that proved individual consent and again reversed the lower court's grant of class certification. Gene & Gene, L.L.C. v. BioPay, L.L.C., No. 09-31191, 2010 U.S. App. LEXIS 22381 (5th Cir. Oct. 22, 2010).

[75] *Gene & Gene, L.L.C.*, 541 F.3d at 323.

[76] *Id.* at 323.

[77] *Id.* at 326.

[78] *Id.* at 326.

[79] *Id.* at 329.

[80] *Id.* at 327-28.

Similar to the Fifth Circuit in *Gene & Gene*, the court in *Sadowski v. Med1 Online, L.L.C.*,[81] refused to certify a TCPA claim based on the grounds that the class definition included persons who did not expressly consent or have an established business relationship with the defendant. The court in that case held that the plaintiff's definition of the class "would require the court to investigate—and the Defendants to provide evidence regarding—the relationship between each potential class member and the Defendants."[82] Thus, the court found that the court would be required to conduct myriad mini evidentiary trials, which would defeat the purposes of the class action.[83] Although the *Sadowski* court held that the plaintiff failed to define a sufficiently identifiable class, it noted that other courts have addressed the issue as a failure to meet either the commonality or typicality requirements.[84]

Thus, a defendant should analyze the cases in which certification has been denied to TCPA classes to help produce successful arguments designed to question whether the plaintiff consented to communication in order to prevent class certification.

VIII.
Conclusion

Class action cases under the TPCA are fraught with risk for defendants. A defendant must carefully analyze questions of jurisdiction to determine whether the case may be removed to federal court. Additionally, defense counsel should take every opportunity to argue that the plaintiff consented to communication or that the defendant had a prior business relationship with the plaintiff. Defendants should vigorously attack class definitions that require substantive proof of the violation as to each putative class member, as those cases are often not proper for class certification and defeat the benefits of class actions.

Finally, the defendant should emphasize the injustice in permitting class treatment for TCPA claims with minimum damages and no actual injury under the superiority requirement. Regulatory and injunctive remedies in individual cases may be valid alternatives to granting class certification that protect the public interests without leaving the defendant bankrupt.

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[81] No. 07 C 2973, 2008 WL 489360 (N.D. Ill. Feb. 20, 2008).

[82] *Id.* at *3.

[83] *Id.* at *3.

[84] *Id.* at *3 n.1.