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JUDGES IN A FUNK OVER JUNK FAXES

NEW JERSEY COURTS SPLIT ON WHETHER THE TELEPHONE CONSUMER PROTECTION ACT ALLOWS  
CLASS-ACTION SUITS

Mary P. Gallagher

No group would seem to be more similarly situated or innumerable than junk-fax recipients, but New Jersey judges are at odds over whether those besieged by unwanted paper may sue as a class.

On Aug. 2, Hudson County Superior Court Judge Lourdes Santiago certified as a class those who received unsolicited faxed advertisements for the New York-based Spanish Yellow Pages and related entities in the past six years. Not only were the faxes unwelcome but the senders failed to include identifying information, as required by the Telephone Consumer Protection Act of 1991, allege the plaintiffs in *Palace Drug Stores v. Hispanic Media Group USA*.

But on July 1, Somerset County Superior Court Judge Harriet Derman ruled the other way in *Law Offices of Michael A. Freedman v. Advanced Wireless Cellular Communications*, reversing her grant of class certification last year, striking the complaint's class-action allegations with prejudice and vacating a \$23 million default judgment -- including attorneys' fees -- as 'manifestly unjust.'

Derman reasoned that the TCPA's setting of damages at \$500 to \$1,500 per fax gives sufficient incentive to pursue private redress without the need to aggregate claims. An unwanted fax is a 'trivial annoyance' that most people just 'toss,' she wrote.

Since the TCPA, a federal law that created a right of action in the state courts, makes no mention of class actions, the issue is being decided on a state-by-state basis. Derman noted cases from other jurisdictions that rejected class actions, including Colorado, Texas and Indiana.

There is a dearth of New Jersey case law on the subject. Derman cited only one case: an unpublished 2001 ruling, *Levine v. 9 Net Avenue Inc.*, that affirmed a denial of class certification by a Hudson County judge. The Appellate Division expressed doubts about the need for class actions under the TCPA, though New Jersey courts tend to liberally allow class suits in consumer matters. However, the Levine court did not impose a bright-line prohibition on class-action junk fax suits, and so the case law is still evolving.

Paul Drobbin and David Phillips of Newark's St. John & Wayne, lawyers for

defendant Advanced Wireless in the Somerset case, say Derman's ruling is a move toward a 'blanket prohibition' on junk fax class actions in New Jersey. (Plaintiffs' lawyer Lee Squitieri, of Squitieri & Fearon in New York, is seeking an interlocutory appeal.)

David Warshaw, who represents the plaintiffs in the Palace Drug Stores case just certified in Hudson County, says the need for class actions is underscored by the fact that the defendants kept violating the law even after paying money to settle other junk fax lawsuits. Many entities just chalk up the \$500 damages to the cost of doing business, says Warshaw, of Goldman & Warshaw in Pine Brook.

Warshaw says that his client originally brought an individual action in Special Civil Part but the unwanted faxes kept pouring in. Since filing the class suit in the Law Division, however, only one or two have arrived.

Lawrence Kalish, an attorney with Kanengiser & Kalish in Lake Hiawatha who represents the Spanish Yellow Pages, did not return a call seeking comment. He had not moved for reconsideration or an appeal as of last week, according to Warshaw's co-counsel, Dover solo Glen Chulsky.

Kurt Anderson, who represented the plaintiff in Levine, sees a need for a class vehicle because junk faxes are easily sent across state lines. Damages of \$500 will not make it worth one's while to sue a sender who might be located on the other side of the country, says Anderson, of Middletown's Giordano, Halleran & Ciesla.

Drobbin and Phillips, the lawyers for Advance Wireless in Freedman, say Derman was right the second time because the minimum \$500 recovery does not fit the basic concept behind class actions, which is to combine a large number of very small individual claims that would not otherwise be brought. The statutory damages far exceed any actual damages incurred, they add. They also say the fact that the TCPA does not provide attorneys' fees supports the view that the actions were meant to be filed in small claims court where parties usually don't have lawyers.

Robert Blau, of Blau & Blau in Springfield, who has brought 253 junk fax cases since the fall of 2003, says he has never filed one as a class action, though he has filed 'mass actions' with as many as 30 plaintiffs.

At least one other New Jersey court has certified a class in a junk-fax case. Camden County Superior Court Judge Theodore Davis did so in 2003, for injunctive relief purposes only, in Spectracom v. Cell Direct Corp. The case settled for \$23,000 in legal fees and the defendants' agreement not to send any more unsolicited faxes to New Jersey machines.

#### STATE COURTS BLAZING THE TRAIL

Other aspects of junk-fax litigation law continue to play out in state courts.

One issue is the limitations period for filing suit since the TCPA does not provide one. A New Jersey appeals court held last Monday in Zelma v. Konikow [digested in this issue at page 62] that the four-year 'catchall' period of 28 U.S.C. 1658(a) for federal actions applies.

The appeals court reversed Bergen County Superior Court Judge Bruce Gaeta's

dismissal of the case as time-barred, based on an analogous two-year limitations statute that covers penal forfeitures, N.J.S.A. 2A:14-10.

Another issue is whether junk fax claims are covered by insurance. The Seventh U.S. Circuit Court of Appeals became the first federal appellate court to decide the issue, ruling last December in American States Insurance Co. v. Capital Associates, 392 F.3d 939, that there is no coverage under a policy's 'advertising injury' clause, based on Illinois law.

Pending in federal court in Maryland is a case filed by American Motorists Insurance Co., the insurer for Advanced Wireless, seeking a declaration that it does not have to defend or indemnify in the Freedman case. The carrier brought the action, American Motorists Insurance Co. v. Advanced Wireless Cellular Communications, before Judge Derman vacated the default judgment.

Issues are also raised by an amendment to the TCPA that took effect on July 9. The Junk Fax Prevention Act of 2005 created an 'established business relationship' exception to the ban on unsolicited faxes. Though defendants have been arguing for such an exception all along, it was often rejected by judges.

Who will bear the burden of proof on the issue is unclear. The exception might also make it more difficult to certify a plaintiffs' class by introducing individual 'relationship' issues that militate against commonality, one of the requisites for a class action.

Some of the same questions surrounding litigation under the federal law are also likely to come up when a New Jersey junk fax ban, A-669, signed on June 29, takes effect at the end of the year. It allows recovery of up to \$1,000 per unwelcome fax, plus attorneys' fees, and makes junk faxing a violation of the Consumer Fraud Act. It makes no mention of class actions or a limitations period, but does contain its own existing business relationship exception.

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