



A federal district court in California denies class certification to a nationwide putative TCPA class of consumers against a debt collector who allegedly made more than 500 million prohibited calls

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The United States District Court for the Southern District of California recently issued an order denying class certification to a nationwide putative class of consumers against The CBE Group, Inc. ("CBE"), which alleged that CBE made over 500 million calls^[1] to these consumers' cell phones without their prior express consent in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA"). *Blair, et al. v. The CBE Group, Inc.*, No. 3:13-cv-00134-MMA-WVG (S.D. Cal. August 26, 2015).

CBE provides first-party debt collections and third-party debt recovery services to various industries, including utilities, satellite communications providers, cable television providers and student loans. Plaintiffs allege they are consumers who received unsolicited calls on their cell phones from CBE and that CBE used an automatic telephone dialing system ("ATDS") or prerecorded voice to place the calls. Plaintiffs also allege the calls were not for emergency purposes, they did not provide prior express consent to receive the calls, and that the calls continued even after the recipients asked that they stop. CBE maintains that it is not liable for TCPA violations because the three phone systems it uses^[2] do not meet the statutory definition of an ATDS, and it obtains prior express consent, including from all three named plaintiffs, prior to making calls.

Plaintiffs filed a putative class action on behalf of a nationwide class of individuals who received unsolicited calls from CBE or its agents in violation of the TCPA. Plaintiffs' moved to certify three classes pursuant to Rules 23(a) and 23(b)(3): an autodialer class, a prerecorded voice class and a skip trace class. Plaintiffs' alleged that CBE made in excess of 500 million calls to consumers nationwide during the putative class period. In deciding the motion, the district court noted that it must engage in a rigorous analysis of each Rule 23 factor and that such an analysis will entail some overlap with the merits of the underlying claims.

As is often the case, the district court found that Rule 23(b)(3)'s predominance inquiry was dispositive. As practitioners know, Rule 23(b)(3) requires that the questions of law or fact common to class members predominate over any questions affecting only individual members. In answering this question, the district court focused on the elements of the underlying cause of action. To establish liability under the TCPA, the Plaintiffs must prove that (i) CBE called a cellular phone number; (ii) using an ATDS or prerecorded voice; and (iii) CBE did so without the recipient's prior express consent. The district court focused on the second element: prior express consent. That court explained that it "should not simply accept a party's argument that consent requires individualized inquiries without evidence demonstrating consent is, in fact, an individualized issue."

Plaintiffs argued that CBE could not present any evidence that it received consent directly from any of the three named Plaintiffs, despite CBE's internal procedure of document such consent it receives during calls with a debtor. Plaintiffs argued that CBE's failure to do so permits a finding that consent is a common issue with a common, classwide answer which predominates over any individual issues.

The district court was not persuaded. First, it noted that by FCC rule, express consent can also be established by showing a debtor, such as the named Plaintiffs, provided his or her cell phone number to the original creditor on an application for services resulting in the debt owed.^[3] Also by a subsequent FCC Rule, this consent not only applies

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to an original creditor, but also for calls made by a third party collector acting on behalf of that creditor, such as CBE.

[4] With respect to the named Plaintiffs, CBE did present colorable evidence of consent. For example, CBE presented evidence that one of the named plaintiffs provided her cell phone number “as her primary point of contact” during a phone call she initiated with DirecTV, the original creditor, during a call to reinstate her service. CBE argued this was evidence of prior express consent to call Plaintiff on that cell phone number. Likewise, CBE presented evidence that another named Plaintiff provided her cell phone number to Verizon, the original creditor, on the date she placed her order for service, indicating she “can be reached at that number.” Similarly, the third named Plaintiff provided her cell phone number on a loan application when she took out a student loan through her original creditor. Each of these cell phone numbers were contained in the transfer files submitted to CBE for collection by the named Plaintiffs’ original creditors after Plaintiffs became delinquent on their respective accounts.

In reviewing the evidence of consent, the district court explained that at the certification stage, it need not decide the ultimate merits of whether consent with respect to each named Plaintiff was valid. Instead, the court must determine whether the issue of consent is a common issue with a common answer. The district court explained that the evidence before it “underscores” the need for individualized inquiry, because the underlying debts arose in varying contexts and with different underlying creditors. Also, the specific interactions between the named Plaintiffs and their respective creditors and the circumstances in which they may or may not have provided consent varies significantly. The district court ultimately concluded that determining whether a particular class member provided his or her wireless phone number to an underlying creditor requires an individualized inquiry into the circumstances in which the debt arose, precluding class certification.

[1] The TCPA provides for statutory damages of \$500 (\$1,500 if willful) per call found to be a violation of the statute.

[2] The telephone systems used by CBE are Manual Clicker Application, Noble and Live Vox.

[3] See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*. 23 F.C.C.R. 559, 564-565 (2008).

[4] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 15-72 (July 10, 2015)(footnotes and citations omitted).