

PUBLICATION

Hilton Avoids Class Certification Over Timeshare Telemarketing

May 1, 2014

Hilton Grand Vacation, a subsidiary of Hilton Worldwide, Inc., recently avoided a class action certification in the Southern District of California concerning its telemarketing efforts involving automated calls to cell phone numbers allegedly in violation of the Telephone Consumer Protection Act (TCPA). The statutory damages sought were between \$500 and \$1,500 per unlawful call and could have totaled between \$18 and \$54 billion.

According to the plaintiffs, Hilton Grand Vacation made approximately 37 million calls to over six million cell phones during a four-year period covered by the TCPA. In order to establish a claim under the TCPA, plaintiffs must show that (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent. Most cases turn on the issue of "express consent."

In the motion papers concerning class certification, the parties differed about the importance of the means by which consent was provided to Hilton Grand Vacation or its parent Hilton. On one hand, Hilton Grand Vacation stressed that the means of consent for the persons on its call list was varied and, therefore, not suitable for class action treatment. They indicated that consent had been provided by persons who signed up for Hilton's HHonors loyalty program over the phone, online or by filling out a paper application. Consent was also provided by Hilton guests who reserved rooms online, over the phone, at the front desk or through third parties and/or travel agencies. Thus, Hilton Grand Vacation argued that the factually different scenarios involving consent would make a class-wide trial on the merits unworkable.

On the other hand, the plaintiffs argued that such trivial details do not defeat the commonality required under Rule 23 of the Federal Rules of Civil Procedure. They tried to frame the issue as whether a guest who provides a cell phone number during reservation or check-in or when enrolling in the loyalty program automatically consents to future telemarketing.

Ultimately, District Judge Janis Sammartino found that the context of class members' interactions with Hilton was "sufficiently varied to provide dissimilar opportunities for the expression of consent." For example, some class members may have provided consent over the telephone while discussing a non-scripted reservation request, while others may have indicated consent as part of a scripted experience. In either instance, the amount of information the individual received about how their cell phone number might be used for future telemarketing efforts could be varied and would need to be evaluated under the TCPA individually. Under Rule 23, class action claims must be "cohesive" and subject to relief to the class as a whole.

The court also found that because the circumstances of consent might be varied, so too the claims for individualized damages could not be efficiently handled on a class action basis.

The plaintiffs appealed this ruling and now the matter will be taken up by the Ninth Circuit Court of Appeals. The plaintiffs' brief is due on June 26, 2014, and Hilton's brief will be due on July 28, 2014, with oral argument to follow sometime later in the summer.