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Class & Collective Action Group Newsletter

Supreme Court

Denial of Certiorari in *DISH Network L.L.C. v. Krakauer*

Key Issue

Whether the placement of a phone call in violation of the Telephone Consumer Protection Act (the "TCPA") is, without further allegation or showing of injury, sufficient to show an Article III concrete injury under *Spokeo, Inc. v. Robins*.[1]

Background

Plaintiff Thomas Krakauer filed a putative class action suit against DISH Network in 2011, seeking statutory damages for phone calls allegedly placed to him and approximately 18,000 others in violation of the TCPA. Krakauer sought to certify a class of all those whose numbers were listed on the Do-Not-Call Registry, and who received telemarketing calls from Satellite Systems Network promoting DISH satellite services between May 1, 2010 and August 1, 2011.

DISH contested certification on several grounds, including a lack of standing under Article III and *Spokeo*. DISH argued that the plaintiff class was defined on the basis of a "bare statutory violation," and that the class had been certified without showing that any class members had personally received or heard the violative phone calls. DISH asserted that under *Spokeo*, a bare statutory violation is not always enough to establish standing, and that in this case plaintiffs relied exclusively on a statutory violation for standing.

Both the district court and the Fourth Circuit disagreed with DISH.[2] The Fourth Circuit held that every class member certified by the district court had Article III standing because the class definition "hewed tightly to the language of the TCPA's cause of action, and that statute itself recognizes a cognizable constitutional injury."[3] The Fourth Circuit found that a violation of the TCPA could constitute a concrete injury under *Spokeo* because the Act protects an individual's particular and concrete privacy interest against receiving multiple unwanted calls to their residential phone number. The court then analogized the TCPA to the protections against invasion of personal privacy recognized in tort law. Further, the court disagreed with DISH's argument that an injury had to rise to a level that would support a common law cause of action in order to meet *Spokeo*'s "concrete injury" requirement, stating that this sort of "judicial grafting" was not what *Spokeo* intended. Quoting

[1] 136 S. Ct. 1540 (2016).

[2] Petition for a Writ of Certiorari, *DISH Network L.L.C. v. Krakauer,* No. 19-496, 7-12 (U.S. Oct. 15, 2019).

[3] *Krakauer v. DISH Network, L.L.C.*, 925 F.3d 643, 652 (4th Cir. 2019), *cert denied*, — S.Ct. —, 2019 WL 6833425 (U.S. Dec. 16, 2019).

Spokeo, the court stated, "Congress is empowered to 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" which is what the court found Congress had done in the TCPA.[4]

DISH sought certiorari solely on the question of whether a bare violation of the TCPA is sufficiently concrete to establish an injury-in-fact. In its petition, DISH requested that the Supreme Court address the "radically conflicting approaches" in the lower courts to interpreting *Spokeo*.[5] The Supreme Court, however, declined to review the Fourth Circuit's decision.

Thoughts & Takeaways

The Supreme Court's denial of certiorari leaves in place a circuit split on the proper interpretation of the TCPA, as well as more broadly on the issue of what constitutes a sufficient injury for standing. While the Eleventh Circuit has held that a TCPA violation is not by itself sufficient for concrete injury, the Second, Third, Ninth, and now Fourth Circuits have all found that it is. This question also affects a broader set of issues, including the kind and degree of evidence that is required to show injury.

This split is of particular importance to class actions because it affects various aspects of class certification under Rule 23(b), and affects the burden of proof that will be imposed on plaintiffs attempting to bring class actions based on statutory injuries. In this case, for example, the issue of standing was closely tied to the question of certification for Krakauer's putative class and particularly the Rule 23(b) issues of whether the class was ascertainable and whether common questions predominated over individual issues. DISH challenged the sufficiency of plaintiff's evidence showing that the class was ascertainable, arguing that the plaintiff needed to show which class members actually received the violative phone calls. The circuit court, however, declined to require such specific evidence based on its definition of an injury under the TCPA, and its finding that a statutory TCPA violation was sufficient injury to support standing.

Read the petition for certiorari here.

[4] *Id*. at 654 (citation omitted).

[5] Petition for a Writ of Certiorari, *supra* note 2, at 12-13.

Federal Appellate Courts

Decision in *Faber v. Ciox Health, LLC* (Sixth Circuit)

Key Issue

Whether a summary judgment decision in favor of defendants—granted after class certification but before notice of certification was sent to the class—can bind the absent class members, if those absent class members are provided with post-judgment notice.[6]

Background

Two plaintiffs brought a class action suit in the Western District of Tennessee against Ciox, a medical-records provider, alleging that they had been charged excessive fees for the retrieval of their medical records, in violation of the Health Insurance Portability and Accountability Act ("HIPAA") and the Tennessee Medical Records Act. In February 2018, plaintiffs moved to certify the class, and in April 2018, plaintiffs and defendant each crossmoved for summary judgment. On July 10, the district court granted plaintiffs' motion for class certification—but only two weeks later on July 24, the court granted Ciox's motion for summary judgment, holding that the relevant statutes did not provide plaintiffs with a private right of action against Ciox. No opt-out notice had been issued to the certified class in the interim.

On appeal, plaintiffs argued that, even if the order granting summary judgment were affirmed, it could only bind the two named plaintiffs. Because the absent class members had never received notice of the certified class, and never received the opportunity to opt out, their due process rights would be violated if the judgment were asserted against them as res judicata.[7]

Defendant Ciox agreed that the district court's judgment, without more, was insufficient to bind the absent class members, admitting that the "recommended practice" was to issue opt-out notices shortly after class certification and before any judgment on the merits.[8] However, Ciox argued that the Sixth Circuit could remedy this deficiency by remanding the case back to the district court with instructions to issue post-judgment notice to the absent class members. Absent class members would then have the opportunity to opt out of the class post hoc so that they would not be bound by the summary judgment decision.

Decision

On December 5, 2019, the Sixth Circuit affirmed the district court's summary judgment decision on the merits, but unanimously rejected Ciox's argument that opt-out notice provided after summary judgment would comport with Rule 23 or due process. The Sixth Circuit stressed that notice is a mandatory feature of the Rule 23 mechanism. Certification notice has to be given "before class members can be legally bound," and certification under Rule 23(b)(3) is not binding unless the absent class members are "provid[ed] adequate notice as required by the Due Process clause."[9]

Defective notice, the Sixth Circuit stated, does not satisfy due process any more than the failure to give notice at all. Post-judgment notice like that proposed

[6] *Faber v. Ciox Health, LLC*, 944 F.3d 593, 596 (6th Cir. 2019).

[7] Brief of Appellants at 35-36, *Faber*, No. 18-5896 (6th Cir. Oct. 22, 2018), ECF No. 20.

[8] Brief of Defendant-Appellee Ciox Health, LLC at 45, *Faber*, No. 18-5896 (6th Cir. Dec. 20, 2018), ECF No. 23.

[9] *Faber*, 944 F.3d at 603.

by Ciox would merely apprise class members that a class had been certified. It would not afford them a meaningful opportunity to litigate the issues at stake, and consequently it would be defective.

As a result, the Sixth Circuit held that the procedural anomalies in the case operated to nullify the earlier grant of class certification. Although class certification had been valid when it was issued, the effect of the district court's premature summary judgment order was to render "the class members who could receive fair notice at this stage . . . an empty set."[10] Since there were no absent class members who could receive fair notice of class certification, there were no individuals who would be bound by a classwide judgment. The earlier certification now "carri[ed] no effect" and was "therefore a nullity."[11]

Thoughts & Takeaways

Addressing an "issue of first impression in [the] circuit," the Sixth Circuit adopted "the general rule" that "[w]hen a defendant moves for and obtains summary judgment before the class has been properly notified, the defendant waives the right to have notice sent to the class, and the decision binds only the named plaintiffs."[12]

This rule—which the court characterized generally as "movant beware"—represents a fairly straightforward application of the text and logic of Rule 23, and serves as a warning to defendants of the potential risks of moving for summary judgment before the court has the chance to resolve class certification. However, it is hard to accuse Ciox of jumping the gun: the defendant submitted its motion for summary judgment on "the final day for submitting dispositive motions" as provided in the district court's scheduling order.[13] In light of *Faber*, defendants faced with looming dispositive motion deadlines before class certification has been decided may find it advisable to seek a modification of the scheduling order. If they simply trust that the district court will provide full notice to any certified class before turning to motions for summary judgment, defendants may receive a pyrrhic victory that binds only the named plaintiffs.

Read the decision here.

Decision in *Dancel v. Groupon, Inc.* (Seventh Circuit)

Key Issue

Whether the district court abused its discretion in denying class certification on the basis that common questions would not predominate over individual ones as required by Rule 23(b)(3).[14]

Background

Between April 2015 and February 2016, Groupon used an "Instagram Widget" software it had developed to collect and display photographs posted to Instagram that were taken at particular locations where Groupon offered deals. The Instagram Widget allowed visitors to certain "Deal Pages" on Groupon's website to see photographs taken at those businesses. If the Groupon visitor hovered her cursor over a displayed photograph, the username of the Instagram user who posted the photograph and the photograph's caption, if any, would be displayed.

Plaintiff Christine Dancel posted a photograph taken at an Illinois restaurant to Instagram, and this photograph was displayed on the Groupon Deal Page for that restaurant using the Instagram Widget. She brought a putative class action alleging

[10] *Id.* at 604.

[11] *Id.*

[12] *Id.* at 602.

[13] Brief for Defendant-Appellee Ciox Health, LLC, *supra* note 8, at 12-13.

[14] Opinion, *Dancel v. Groupon, Inc.*, No. 19-1831 (7th Cir. Dec. 18, 2019), ECF No. 36.

violations of the Illinois Right to Publicity Act ("IRPA"). The IRPA prohibits the use of a person's identity—defined as "any attribute of an individual that serves to identify that individual to an ordinary reasonable viewer or listener"—for commercial purposes without consent.[15]

Dancel sought to certify a class of Instagram users whose photographs were acquired and used on a Groupon webpage for an Illinois business. The district court denied class certification on predominance grounds, concluding that whether an Instagram username establishes identity under the IRPA "is inherently a question of fact that cannot be answered with the same evidence across the putative class."[16] The district court rejected Dancel's argument that the common question was whether Instagram usernames "categorically serve to identify that individual to an ordinary, reasonable viewer" of Groupon's website, and concluded that while there exists a common question as to whether *any* username identifies an individual, that argument "ignores the individual inquiry that is the essence of determining 'identity' under the IRPA."[17]

On appeal, Dancel argued that the district court improperly rejected her theory of class liability on the merits at the class-certification stage, "rather than assessing whether her theory is supported by common evidence."[18] She further argued that, even if the district court could have addressed the merits, it erroneously interpreted the IRPA, asserting that "the *content* of each class member's username is not important to either Ms. Dancel's legal theory or the required inquiry under the IRPA; the fact that each username *uniquely identifies* an Instagram user is."[19]

Decision

On December 18, 2019, the Seventh Circuit affirmed the district court's order denying class certification, concluding that the district court did not abuse its discretion.

The Seventh Circuit first rejected Dancel's argument that the district court improperly addressed the merits of her IRPA claim, noting that "the court must satisfy itself with a 'rigorous analysis' that the prerequisites of certification are met, even if that analysis has 'some overlap with the merits of the plaintiff's underlying claim.'"[20] The Seventh Circuit stated that unlike the cases cited by Dancel where the court granted class certification even where there was a risk it might later need to decertify the class, Dancel's theory "presents a question that is common only if she is right," and elaborated that:

> If the answer to that question is yes, then one significant aspect of the case can be resolved in the class's favor (if, as a factual matter, Groupon used the usernames within the meaning of the IRPA). But if usernames are not categorically an identity under the IRPA, and the court decertified the class, then the same element would remain entirely subject to dispute for each plaintiff.[21]

The court further stated that the district court "was right to identify the starting point as 'the substantive elements of plaintiffs' cause of action and . . . *the proof necessary for the various elements*," and that because "the present dispute is precisely what evidence is needed to make a prima facie case for the identity element under the IRPA," the district court properly addressed this at the class-certification stage.[22]

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[15] 765 Ill. Comp. Stat. 1075/5, 1075/30 (1999).

[16] *Dancel v. Groupon, Inc.*, No. 18 C 2027, 2019 WL 1013562, at *3 (N.D. Ill. Mar. 4, 2019).

[17] *Id.* (internal quotation marks and citation omitted).

[18] Plaintiff-Appellant's Opening Brief at 22, *Dancel*, No. 19-1831 (7th Cir. June 10, 2019), ECF No. 10.

[19] *Id.* at 35-36.

[20] Opinion, *supra* note 14, at 8 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)).

[21] *Id.* at 10-11.

[22] *Id.* at 13-14 (quoting *Simer v. Rios*, 661 F.2d 655, 674 (7th Cir. 1981)).

The Seventh Circuit next turned to the interpretation of "identity" under the IRPA, rejecting Dancel's argument that all Instagram usernames are identities within the meaning of the statute. The court stated that the relevant inquiry under the IRPA turns on a username's content, and that "[c]ategorically, Instagram usernames identify only Instagram accounts," but the IRPA requires that an attribute serve to identify the particular individual whose identity is being appropriated.[23] The court concluded that Dancel could not answer the question of whether an Instagram username identifies a particular person "for herself or for any putative class member with only her proposed common evidence, and so she cannot develop, for each class member, a common prima facie case under the identity element of an IRPA claim."[24]

Thoughts & Takeaways

In rejecting Dancel's argument that the district court improperly addressed the merits at the class-certification stage, the Seventh Circuit highlighted that "Rule 23 is more than 'a mere pleading standard.'"[25] Thus, while the court should only look to the merits to the extent necessary to determine whether the requirements of Rule 23 are satisfied, a plaintiff seeking to certify a class must do more than simply assert that there exists a common question.

Additionally, the Seventh Circuit noted that neither it nor the district court had decided the merits of any putative class member's claim. The decision acknowledged that certain Instagram usernames might satisfy the IRPA's definition of identity, and does not preclude putative class members from individually pursuing IRPA claims on this basis.

Read the opinion here.

[23] *Id*. at 15-16.

[24] *Id*. at 16.

[25] *Id*. at 8 (quoting *Dukes*, 564 U.S. at 350-51).

Federal District Courts

Decision in *Marotto v. Kellogg Co.* (S.D.N.Y.)

Key Issue

Whether individual issues predominate in a class composed of all purchasers of a product over a given time period, when only some of the labels used by the product during the time period contained allegedly fraudulent statements.[26]

Background

Plaintiff Matthew Marotto, a professional chef, alleged he had been a lifetime consumer of Pringles and was particularly partial to the "Salt & Vinegar" flavor; however, at the same time, he rigorously insisted on purchasing food with "only natural, high-quality ingredients."[27] In 2018, Marotto alleged he was dismayed to learn that Salt & Vinegar Pringles contained at least two artificial flavorings, despite a label on the can promising "No Artificial Flavors." He brought suit on behalf of a putative class of Pringles purchasers, asserting claims under state consumer protection statutes as well as under several common-law theories.

After discovery, Marotto moved to certify a class in the Southern District of New York of all consumers who had purchased Salt & Vinegar Pringles from April 2012 to the present.

Decision

The district court denied Marotto's motion for class certification. As an initial matter, the court raised questions about Marotto's suitability as a class representative. The court noted that Marotto was "a professional pastry chef" who had received "years of training in molecular gastronomy at an elite culinary school," and that Marotto had testified that consuming food with natural ingredients was so important to him that "price is of no concern" so long as he obtained the right kind of food.[28] The court suggested that this combination of professional expertise and culinary "zealous[ness]" likely made him an atypical Pringles purchaser and a poor representative for a class of them.[29]

The court also looked askance at the source of Marotto's knowledge about Pringles. After a lifetime of consuming Pringles, Marotto had learned about the snack's artificial ingredients from his wife, who happened to be a lawyer at one of the firms seeking to represent the putative class. The court noted that this fact raised serious questions about whether the suit was brought for the benefit of the plaintiff or for the benefit of class counsel.

Notwithstanding these issues, the court denied class certification on predominance grounds. *First*, the court noted that the "No Artificial Flavors" language had only appeared on four of the twenty labels used by Salt & Vinegar Pringles over the course of the class period. Because plaintiffs' claims depended on actually having seen the allegedly fraudulent label, the court would have to exclude those would-be class members who had purchased Pringles on which the offending language did not appear. This exercise would require the court to make individualized determinations about the class membership of thousands of consumers, and meant that individual issues would predominate.

[26] *Marotto v. Kellogg Co.*, — F. Supp. 3d —, No. 18 Civ. 3545 (AKH), 2019 WL 6798290 (S.D.N.Y. Dec. 5, 2019).

[27] *Id.* at *2.

[28] *Id.* at *3.

[29] *Id.*

Second, the court pointed out that the calculation of class members' injuries also would be individualized. Consumers who did "not care whether Pringles contain artificial flavors and instead [are] only interested in, *e.g.*, taste, cannot make out a claim for fraud, misrepresentation, or breach of express warranty."[30] There would be no way to separate these consumers from others who did care whether Pringles contained artificial flavors without conducting highly individualized inquiries into their preferences. Even if it could do so, the court would also need to determine exactly how much value a class member did place on the "No Artificial Flavors" language. The proposed class would thus be overwhelmed by individualized questions.

Thoughts & Takeaways

The opinion highlights some of the difficulties in certifying classes based on arguably amorphous product descriptions like "naturalness." Even when a plaintiff can successfully argue that class members relied on the same representations, it may be difficult to demonstrate that the same class members put value, much less consistent value, on those product features. When plaintiffs bring claims about such misrepresentations, an effective strategy for defeating class certification can be to emphasize the myriad reasons a given consumer might be willing to pay for a particular product.

In addition, although the court ultimately did not base its decision on the typicality of the named plaintiff, the court's skepticism about his typicality is a reminder that a class representative who is too zealous about the product features giving rise to the suit may be deemed atypical of a proposed class of consumers. This is because typical consumers likely balance several factors when deciding what to buy and how much to pay.

Read the decision here.

Decision in *In re FCA US LLC Monostable Elec. Gearshift Litig.* (E.D. Mich.)

Key Issue

Whether consumers seeking monetary and injunctive relief due to an alleged design defect could be certified as a nationwide class under Rule 23(b)(2) and as 16 elemental sub-classes under Rule 23(b)(3) or in the alternative, 23 state-by-state sub-classes.[31]

Background

Plaintiffs brought a consumer class action in 2016 after FCA US LLC (Chrysler) announced it was recalling approximately 1.1 million vehicles after discovering an issue with the gear shift that could cause these vehicles to roll away after the driver had exited because the park function would not engage as expected. Plaintiffs sought to certify a nationwide class in the Eastern District of Michigan under Rule 23(b)(2) to require defendant to take corrective action to fix the vehicles. They also sought to certify 16 subclasses under Rule 23(b)(3) that they proposed to organize by commonality of certain elements of their causes of action under various state laws. In the alternative, they asked for certification of classes state-by-state in only 23 states. Plaintiffs sought damages on the theory that they suffered economic losses due to overpaying for new vehicles at the point of sale, which they believed were safe and fit, but later found were difficult and dangerous to drive.

Decision

The court denied class certification, but permitted plaintiffs across 21 states to collectively pursue their warranty and product liability claims through an issue-based class under Rule 23(c)(4).

[30] *Id.* at *4 (citation omitted).

[31] *In re FCA US LLC Monostable Elec. Gearshift Litig.*, — F.R.D.—, 2019 WL 6696110 (E.D. Mich. Dec. 9, 2019).

First, the court denied nationwide certification under Rule 23(b)(2), holding that because the main thrust of plaintiffs' complaint was the recovery of damages for the loss of the value of cars they purchased, they were prevented under the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* from seeking class certification when each class member would be entitled to an individualized award of monetary damages. Although *Dukes* kept open the possibility that Rule 23(b)(2) certification might be appropriate when monetary relief was "incidental" to injunctive relief, the monetary damages in this case were not incidental, but rather the main relief sought.

Second, the court held that plaintiffs failed to meet their burden of demonstrating compliance with Rule 23(b)(3) because their request for sub-classing based on common elements across various state laws was unsupported by any legal authority and they did nothing to suggest how the elements on which plaintiffs focused predominated over other issues raised by the various causes of action. The court found that plaintiffs' proposed state-by-state structure of subclasses similarly did not do the "heavy lifting of analyzing state by state and claim by claim why the purported common issues predominate over any individual questions, or what common proofs would be used to sustain each claim."[32]

Third, although plaintiffs had not adequately demonstrated that any of their causes of action was appropriate for class treatment, the court held that there were discrete issues apparent from the record that were suitable subjects for classwide adjudication under Rule 23(c)(4). Plaintiffs did not address the option of issue class certification in their briefing, instead stating only at oral argument that they would be amenable to it; nonetheless, the court stated that Rule 23(c)(4) was appropriate, especially given the Sixth Circuit's "broad view" of Rule 23(c)(4) that instructed courts to analyze predominance after identifying common issues for class treatment. In the Sixth Circuit, this broad view allows courts to use Rule 23(c)(4) even where predominance has not been satisfied for the cause of action as a whole.[33] The court stated that at least three common questions satisfied these requirements: whether the gear shift had a design defect that rendered vehicles unsuitable for ordinary use; whether defendants knew about the alleged safety defect in the gear shift design and concealed its knowledge; and whether this information would be material to a consumer. Accordingly, the court conditionally certified a class where the vehicle was purchased in one of 21 states for determination of these three discrete issues.

Thoughts & Takeaways

The opinion demonstrates that courts take seriously the requirement to engage in a "rigorous analysis" of whether common issues predominate over individual issues under Rule 23(b)(3). The court stated that although "plaintiffs need not show that every element of every claim can be sustained by common proofs," they "must at least identify the elements of their claims so that the Court can weigh the common and individualized issues to determine which predominate."[34] Plaintiffs' second request for a Rule 23(b)(2) class also brought to light the often-raised question of when a request for money damages will be considered "incidental" to injunctive or declaratory relief such as to allow certification of Rule 23(b)(2) and 23(b)(3) classes at the same time. Finally, plaintiffs' alternative proposal of state-by-state subclasses did not help their argument, but rather made "evident" the "unmanageability of the plaintiffs' proposed schemes of certification" because plaintiffs had conceded that they were not seeking class certification for consumer protection claims of plaintiffs in seven states in the statebystate structure and it was "unclear whether counsel intend[ed] to proceed with

[32] *Id.* at *8.

[33] *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 411 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

[34] *FCA US*, 2019 WL 6696110, at *10.

individual litigation of those claims, or, more likely, mean[t] to simply abandon the plaintiffs to their own devices" under that structure.[35] As a result, when plaintiffs present various or alternative certification proposals in consumer class actions, defendants should carefully analyze the claims and plaintiffs across these proposals to uncover inconsistencies that may doom plaintiffs' certification request.

Read the decision here.

Decision in *San Pedro-Salcedo v. Häagen-Dazs Shoppe Co.* (N.D. Cal.)

Key Issue

Whether evidence of a general corporate policy inconsistent with a plaintiff's individual experience is sufficient to show that the plaintiff's experience was atypical for Rule 23 purposes.[36]

Background

Plaintiff Melanie San Pedro-Salcedo was invited to join Häagen-Dazs's rewards program while patronizing one of the company's stores. The cashier asked for San Pedro-Salcedo's phone number, after which Häagen-Dazs sent her a text message thanking her for joining the program and inviting her to download the rewards program's mobile app. The plaintiff alleged that she had not been notified about nor consented to receive the text message and that it thus violated the Telephone Consumer Protection Act ("TCPA"). She subsequently moved in the Northern District of California to certify a class of individuals who received text messages from Häagen-Dazs or its agents in connection with the rewards program.

Decision

The court denied class certification, holding that the plaintiff failed to establish typicality or adequacy. In opposition to the motion, Häagen-Dazs had submitted evidence of its corporate policy governing invitations to join the rewards program. The policy instructed cashiers asking for customers' phone numbers to inform them that they would receive a text message inviting them to download the Häagen-Dazs mobile app.

The plaintiff argued that the cashier had not notified her that she would receive a text message. However, she had not presented evidence that her experience was typical of other participants in the rewards program. In the absence of this evidence, the court was satisfied that Häagen-Dazs's evidence about its corporate policy and the training it gave to its cashiers was sufficient to suggest that most customers were verbally notified about text messages when they signed up for the rewards program.

The plaintiff also argued that under the TCPA, Häagen-Dazs was permitted only to send text messages with the customer's *written* consent. She argued that, as a result, her experience was typical of all text message recipients in that, even if interactions with cashiers followed official policy, no customer gave her written consent to receive the messages. The court responded that there were regulations and case law suggesting that one-off messages sent with a consumer's verbal consent were not inconsistent with the TCPA. The fact that Häagen-Dazs could raise that defense against many class members, but not the named plaintiff, made her claims atypical of the class.

[35] *Id.* at *9.

[36] Order Denying Motion for Class Certification; Denying Motion to Strike at 1, S*an Pedro-Salcedo v. Häagen-Dazs Shoppe Co.*, No. 5:17-cv-03504-EJD (N.D. Cal. Dec. 3, 2019), ECF No. 141.

Thoughts & Takeaways

This case suggests that official corporate policies can serve as an effective shield against attempts to turn isolated incidents into class litigation. The court rejected the plaintiff's argument that Häagen-Dazs should have provided affidavits from class members showing that they had actually been notified that they would receive text messages. In the absence of evidence of systemic failures to adhere to official policy, the court was willing to accept evidence of that policy as sufficient proof that plaintiff's experiences were not typical of the class.

Read the decision here.

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