LEGAL UPDATES

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Eleventh Circuit Eviscerates TCPA Class Action Settlement

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COLLEEN FOX
WASHINGTON:
202.378.2300
COLLEEN.FOX@
HUSCHBLACKWELL.COM

SCOTT J. HELFAND
CHICAGO:
312.341.9876
SCOTT.HELFAND@
HUSCHBLACKWELL.COM

On May 13, 2024, in *Drazen v. GoDaddy.com, LLC*, the United States Court of Appeals for the Eleventh Circuit issued a scathing, 123-page decision reversing a district court's approval of a class-action settlement in consolidated cases brought under the Telephone Consumer Protection Act (TCPA). The decision is a good reminder that—in negotiating class settlements—defendants and their counsel must keep in mind both the latest legal developments in the constantly changing TCPA landscape **and** the need to structure any class settlement in a way that obtains peace **and** withstands searching court review.

The background: plaintiffs race for a payday before the Supreme Court trims the TCPA

Drazen involved three consolidated cases alleging that the defendant violated the TCPA by placing calls and texts using an Automatic Telephone Dialing System (ATDS). As the cases progressed through the court system, the Supreme Court granted certiorari in *Facebook v. Duguid*. In that case, as we have previously written about, the Supreme Court narrowed the type of equipment that qualifies as an ATDS under the TCPA. In so doing, the Supreme Court put the brakes on a scourge of litigation that had long plagued legitimate businesses simply trying to efficiently communicate with consumers. As the former chairman of the Federal Communications Commission once put it, "the TCPA has strayed far from its original purpose" (i.e., reining in rogue telemarketers harassing random and unsuspecting citizens), and has "become the poster child for lawsuit abuse" (i.e., serving as a vehicle for plaintiffs' class-action lawyers to target with potentially crippling liability legitimate businesses just trying to communicate important information to their customers).

Unfortunately, as predicted, *Facebook* did not end the abuse. Plaintiffs simply refocused their efforts on other TCPA prohibitions (such as making calls

without consent using prerecorded or artificial voices and making solicitation calls to phone numbers on the Do Not Call Registry).

Back to *Drazen*. The plaintiffs there saw the writing on the wall when the Supreme Court granted certiorari in *Facebook*. They knew that—at least to a large degree—the ATDS jig would soon be up. So they raced to push their settlement through.

The decision: the race was not to the swift

In *Drazen*, the plaintiffs succeeded in pushing the settlement through before the Supreme Court issued *Facebook*: the district court approved the class action settlement and awarded the plaintiffs' counsel $7 million in attorneys' fees. The victory did not last, however. In a biting decision spanning over 100 pages, the Eleventh Circuit reversed the district court's decision approving the class settlement. In so doing, the Eleventh Circuit hammered the district court and the parties for their roles in the case.

There are many highlights and lowlights in the Eleventh Circuit's decision. For present purposes, though, we note three key reminders the decision offers.

First, Rule 23 and due process require that, in finalizing a class settlement, the parties and the court must give absent class members a meaningful opportunity to opt-out or challenge the class settlement. In *Drazen*, although the district court approved a notice of settlement that indicated that the plaintiffs would file a motion to approve an award of attorneys' fees in December 2020, the plaintiffs' actually filed that motion months earlier. In response, the district approved an award of millions in attorneys' fees before absent class members likely knew the fee petition was on file. The Eleventh Circuit pilloried plaintiffs' counsel and the district court for proceeding in this manner.

Second, courts will scrutinize the "real" relief to the class as compared to the money going to plaintiffs' counsel. In *Drazen*, the parties' settlement agreement identified a class fund including $35 million in relief to the class. Based on this, plaintiffs' counsel sought an award of $10.5 million in attorneys' fees (or a little under a third of the alleged fund). As noted, the district court reduced the award to $7 million. But that didn't solve the problem.

Although labeled a "common fund," the settlement really involved a "claims made" structure. Under that structure, class counsel can recover the full amount of the attorneys' fees sought; the class members, however, recover only if they submit claims. And those claims rates are usually low (often well under 10%). As that scenario played out in *Drazen*, the $7 million fee award wasn't a little under a third of the value given to the class; the $7 million fee award was over four times that value.

Third, as the saying goes, bad facts make bad law. Unlike other Federal Courts of Appeals, the Eleventh Circuit had not previously taken a stand against the claims-made structure for class

settlements. Faced with the facts of *Drazen*, the Eleventh Circuit did so with a vengeance. In the process, however, the Eleventh Circuit issued an opinion that includes troubling language for defendants who seek to obtain peace through a class settlement that provides reasonable relief in light of the potential value of individual consumer claims (including when considered in light of the potential defenses against such claims on the merits or in opposition to class certification).

Consider one example. The Eleventh Circuit criticized as "overbroad" the release in the settlement agreement. In particular, the Eleventh Circuit found problematic inclusion in the release of "defendant and its past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, attorneys, board members, assigns, partners, contractors, joint venturers, or third-party agents with which it has or had contracts, and/or their affiliates." But such broad release language—at least to the extent it covers related companies—is entirely standard in settlement agreements entered every day in class and individual cases across the country. Thus, we are hopeful that, when the dust settles, courts inside and outside the Eleventh Circuit will recognize that such release language in and of itself is not problematic. Rather, the problem arises only where a broad release is included alongside problematic settlement **procedures** and attorneys' fees awards.

As we have written and spoken about many times, the TCPA is an extremely dangerous statute. Even where the substantive claims are weak or there are strong defenses to class certification, companies must be able to balance the risk and cost of defending TCPA class actions against the certainty of obtaining peace through settlement. *Drazen* is a good reminder that, in making that calculus, companies and their counsel must take into account the scrutiny and cost involved in the settlement-approval process itself. *Drazen* is also a good reminder of the need for constant vigilance when it comes to TCPA compliance.

Contact us

Husch Blackwell regularly defends clients in class actions under the TCPA and other so-called "consumer protection" statutes. In addition, Husch Blackwell regularly advises clients on compliance with these laws. Please contact Colleen Fox, Scott Helfand, or your Husch Blackwell attorney for more information.