



A New Tool for Defendants to Combat Serial Class Action Plaintiffs

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On September 30, U.S. District Court Judge Rodney Smith denied class certification in a Telephone Consumer Protection Act (TCPA) class action in which the named plaintiff “deceptively” prolonged calls to bolster his claims for damages. Order Denying Plaintiff’s Motion for Class Certification, *Johansen v. Bluegreen Vacations Unlimited, Inc.*, No. 20-81076, at *10–11 (S.D. Fla. Sept. 30, 2021). This decision gives defendants a new tool, in TCPA matters and beyond, to potentially help defeat class certification.

The TCPA allows consumers to bring lawsuits in several situations, including cases where they allegedly receive more than one unwanted telemarketing call within 12 months from the same entity. 47 U.S.C.A. § 227 *et seq.* Plaintiffs can seek between \$500 and \$1,500 in statutory damages for each alleged violation of the law. *Id.* § 227(b)(3).

In *Johansen*, the named plaintiff, Kenneth Johansen, testified during his deposition that he had been a plaintiff in about 60 previous TCPA class actions and has made roughly \$60,000 a year in TCPA lawsuits since 2014. *Id.* at *1–2. The Court found that Johansen would “pose[] as a customer of the entity responsible for initiating the telemarketing call and induce[] the representative into believing that he [was], in fact, an established customer and genuinely interested in the product or service offer, thereby prolonging the purported injury that Plaintiff claims to have suffered and increasing the potential damages that he could, in theory, recover.” *Id.* at *10. Johansen “readily admit[ted] that his conduct . . . was deceptive,” but argued “deception is appropriate behavior for a class representative.” *Id.* at *3.

The Court denied class certification because it found Johansen’s claims were not typical of the putative class. The Court held the claims were not typical because “Plaintiff’s claim is inherently different than those of the putative class members who presumably did not use similarly deceitful methods.” *Id.* at 8. Specifically, the Court found that Johansen’s deceit would “necessitate[]” a further inquiry into Plaintiff Article III standing, given it was not clear his injury was fairly traceable to defendant’s conduct. *Id.* The Court further found that Johansen was “an inadequate class representative.” *Id.* at 11. The Court held that Johansen was not an adequate representative because “the Court has serious concerns about the Plaintiff’s credibility, honesty, trustworthiness, and motives in bringing forth [the] putative class action.” *Id.*

It is not uncommon for class action defendants to be across the table from professional plaintiffs—even outside the TCPA context. *Johansen* gives defendants opposing class certification a new tool to argue that certain serial

plaintiffs should not be permitted to represent a putative class where it can be shown that the named plaintiff engaged in deceptive and dishonest tactics in order to craft a claim.

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