

Hilton Fends Off Class Cert. In \$54B Robocall Suit

By **Gavin Broady**

Law360, New York (October 30, 2013, 1:12 PM EDT) -- A California judge on Tuesday rejected class certification efforts in a potential \$54 billion lawsuit claiming a Hilton Worldwide Inc. unit spammed 6 million consumers with telemarketing robocalls, saying those consumers provided their numbers to Hilton in nonuniform ways.

U.S. District Court Judge Janis L. Sammartino said Hilton Grand Vacations Co. LLC's claim that consumers voluntarily provided their cellphone numbers directly to the hotel chain under a host of factually different circumstances creates questions of predominance regarding consent issues that would require extensive individual analysis and make class treatment too unwieldy.

Named plaintiffs Brian Connelly, Mary Sikes and Keith Merritt alleged that Hilton placed about 37 million auto-dialed marketing calls over a four-year stretch. Judge Sammartino noted that the \$1,500-per-violation maximum penalty available under the Telephone Consumer Protection Act means the proposed class could claim up to \$54 billion in damages, according to the order.

"The context of class members' interactions with Hilton is sufficiently varied to provide dissimilar opportunities for the expression of consent," Judge Sammartino said. "This diversity suggests that the issue of consent should be evaluated individually, rather than on a classwide basis."

Hilton argues that it never cold-called any consumers, but rather solicited those who voluntarily provided their phone numbers upon reserving or checking into a room or signing up for the company's loyalty rewards program, according to the order.

Judge Sammartino said consumers who gave their cell numbers while placing reservations with Hilton over the phone likely had unscripted and nonuniform conversations with sales representatives and therefore received varied information about how their numbers might be used, according to the report.

Because there is "at least a nontrivial possibility" that some consumers may have expressed consent under these circumstances, a class treatment of the claims would run the risk of devolving into judicially inefficient individualized trials concerning those interactions, Judge Sammartino said.

She also rejected the plaintiffs' efforts to pursue a statutory alternative that would allow for certification absent a showing of predominance where declaratory relief is sought, saying that exception is unavailable while the plaintiffs are also seeking monetary damages under the TCPA, according to the order.

The plaintiffs sued Hilton in March 2012, surviving an early dismissal bid after Judge Sammartino found in June that they had presented enough of a case to state a claim under TCPA and subsequently filing for certification this May.

Hilton sought to stymie the certification bid on a number of grounds, claiming the plaintiffs had not defined a clearly ascertainable class and could not meet requirements for typicality, commonality, superiority and predominance, according to the order.

The plaintiffs shot back that Hilton was “vastly overstating” the different ways in which it acquired their cellphone numbers, and argued that those differences amounted to “minute variances” that did not affect the central question of whether providing a cellphone number is tantamount to providing express consent for telemarketing, according to the order.

Judge Sammartino said she did not need to rule on any issue raised by Hilton but predominance, noting that the plaintiffs’ arguments relied on prior cases in which the defendants got ahold of phone numbers under uniform circumstances and therefore do not apply here, according to the order.

“HGV notes that the different ways in which it obtained phone numbers from the class members suggest that its ‘call list is not a list of homogeneously unconsenting recipients,’ and that express consent should be evaluated on an individualized basis,” Judge Sammartino said. “Thus, the individualized issues in this suit are at least as important as the common issues and the predominance requirement is not satisfied.”

Representatives for the parties were not immediately available Wednesday for comment.

The plaintiffs are represented by Charles T. Mathews, George S. Azadian and Zackey I. Domb of The Mathews Law Group.

Hilton is represented by Angela C. Agrusa, Randall J. Sunshine and Sterling L. Cluff of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP.

The case is Connelly et al v. Hilton Grand Vacations Company, LLC, case number 3:12-cv-00599 in the U.S. District Court for the Southern District of California.

--Editing by Richard McVay.