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TCPA class actions and the question of adequacy — for counsel and plaintiff

A divided panel of the 1st District recently set forth two divergent views of the "adequacy" requirement that a putative class representative must satisfy if his or her claim is to proceed as a class action.

According to the dissent in *Byer Clinic and Chiropractic Ltd. v. Kapraun*, 2016 IL App (1st) 143733, the majority's decision decertifying the class erected "a higher barrier for attaining class certification than has previously been recognized in Illinois." Id. at ¶ 35.

According to the majority, the dissent's more lenient view would "erode public confidence in class actions and undermine the integrity of the entire framework that governs class actions." Id. at ¶ 24.

The claim in *Byer* was for violation of a statute that has provided fertile ground for class-action practice in Illinois state and federal courts in recent years, the Telephone Consumer Protection Act, 47 U.S.C. Section 227. Among other things, the TCPA creates a private right of action for recipients of unsolicited fax advertisements against the sender of the fax. See Section 227(b)(1)(C).

Statutory damages of $500 per violative fax, which can be trebled if the court finds that the violation was willful or knowing, Sections 227(b)(1)(C), (b)(3), make for high financial stakes when proceeding collectively and alleging that the faxes were sent multiple times to thousands of recipients.

To proceed as a class action under Illinois law, the trial judge must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." 735 ILCS 5/2-801. The Illinois class certification statute largely tracks the federal statutory scheme, Byer, at ¶ 11, and the federal counterpart to the adequacy requirement is found at Federal Rule of Civil Procedure 23(a)(4).

In *Byer*, the putative class representative's deposition testimony revealed him to be strikingly uninformed about the litigation. The court highlighted several excerpts of the testimony, including the following:

- When asked whether he was pursuing the case individually or on behalf of a group: "I believe individually."
- When asked whether he had any duties or responsibilities to members of the class: "No."
- When asked if he knew the current status of the case: "Not at all."

Id. at ¶ 5.

The majority found that the putative class representative's testimony depicted him as "uninformed, lackadaisical and inattentive about the facts, the litigation and his role as the class representative." Id. at ¶ 19.

This was too much for Justice Michael B. Hyman, who wondered rhetorically, "Why even bother to appoint a class representative who unveils himself or herself as a tool of class counsel?" Id. at ¶ 20.

While recognizing that the adequacy threshold for a class representative is "low," the majority insisted that that did not mean the inquiry should be "trivialized or treated as having no consequence." Id. at ¶ 25.

The court reversed and remanded the trial court's certification of the class.

The dissent argued for a far more pragmatic analysis. "The purpose of the adequate representation requirement is merely to ensure that all class members will receive proper and efficient protection of their interests in the proceedings." Id. at ¶ 42.

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The class representative "does not need to understand the legal theories upon which his case is based" to be adequate. Id. at ¶ 43.

To the contrary, argued the dissent, "It is well-known that the role of the class representative is nominal." Id. Most striking, the dissent asserted, "Realistically, such cases are managed entirely by class counsel, with the class-action attorneys being the real principals and the class representative being their agent." Id. (emphasis added).

The dissent was pragmatic in its analysis, not only of the adequacy requirement in the abstract, but also as it applied to *Byer* in particular. "Especially in a case where the need for the plaintiff's testimony is so minor, I fail to see how plaintiff could not represent this class." Id. at ¶ 51.

In the dissent's view, the majority sought to "ignore the simple realities of *this case* and create the illusion of inadequacy despite being unable to show at any level how plaintiff's knowledge could logically impact its ability to prosecute the action." Id. (emphasis in original).

Finally, the dissent took a pragmatic view of the likely result of the court's ruling on remand. "Perhaps on remand class counsel could find a representative slightly more prepared or adept at giving a deposition, but I cannot conceive of it having any impact on the case at all. The additional delay in resolving this case is not justified by whatever negligible impact a different representative might have." Id. at ¶ 50.

Nobody doubts that the interests of the class need to be protected, but the *Byer* dissent implicitly shifts that responsibility away from the named plaintiff and on to class counsel. As noted above, the dissent understood class counsel to be the "real principals." Interestingly, the 7th U.S. Circuit Court of Appeals expressed particularly strident views on the adequacy requirement as applied to class counsel several years ago in another TCPA case.

In *Creative Montessori Learning Centers v. Ashford Gear LLC*, No. 09 C 3963, 2011 WL 3273078, at *5 (N.D. Ill., July 27, 2011), the U.S. District Court had found that some of class counsel's conduct in initiating the lawsuit had been "unseemly." The court ordered further inquiry into the possibility that class counsel had violated the Rules of Professional Conduct, but on the question of class certification, the court concluded that disciplinary action against the attorneys, if necessary, was the preferred remedy over "denying class status to claimants who have alleged actionable claims." Id. at *6-7.

Finding that the district court reviewed class counsel's adequacy under too lenient a standard, the 7th Circuit vacated class certification and remanded the case, asserting that "[w]hen class counsel have demonstrated a lack of integrity, a court can have *no confidence* that they will act as conscientious fiduciaries of the class." *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) (emphasis added).

The court noted, "Class counsel owe a fiduciary obligation of particular significance to their client when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters

that would motivate and enable them to monitor the efforts of class counsel on their behalf." Id. at 917.

The *Byer* court certainly picked up on a "motivation" problem in that class representative.

Looking forward, the *Byer* majority's derision is so stark, and the class representative's performance so woeful, that it is hard to imagine we will see those mistakes repeated in future cases. Class counsel in Illinois is on notice, and they will surely prepare their clients to better the *Byer* plaintiff's example.

But, of course, the tough cases are always on the margins, and there is quite a gap between the *Byer* plaintiff's performance and that of the gold standard class representative. Time will tell if the class-action process suffers more from what may now be "muddied waters" as to what constitutes an adequate class representative. See *Byer*, at ¶ 35.

And what of the dissent's contention that the "negligible impact a different representative might have" did not justify the additional delay in resolving the case? It bears noting that, in the context of the adequacy of class counsel, at least seven courts following *Creative Montessori* had occasion to apply the stringent standard articulated by the 7th Circuit in that case to the very same attorneys and the very same "unseemly" conduct, including the district court in *Creative Montessori* on remand. See *Reliable Money Order Inc. v. McKnight Sales Co. Inc.*, 704 F.3d 489, 496-97 (7th Cir. 2013). Even under the more severe standard, all seven found that the conduct did not render the attorneys inadequate and did not merit denying class certification.

Perhaps potential attorney discipline, as recognized by the *Creative Montessori* district court in the first instance, would have been the more prudent course after all. And perhaps recognizing "the simple realities" of some cases, as urged by the *Byer* dissent, can properly inform a court's review of the adequacy of the proposed class representative.

There can be no doubt that a class is poorly served by inadequate class counsel and an inadequate lead plaintiff. But a class is poorly served by lengthy and needless delay as well. And it is an odd thing to deny or decertify a class in the name of protecting it, particularly when the defendant is the loudest voice in support of the proposition.