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Attorneys

Recent Seventh Circuit Decisions May Signal Heightened Scrutiny Under Adequacy Prong

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The adequacy prong of Fed. R. Civ. P. 23 may become more of a hurdle for class certification in the wake of two U.S. Court of Appeals for the Seventh Circuit decisions, attorneys told BNA.

In the recently decided *Creative Montessori Learning Centers v. Ashford Gear LLC*, No. 11-8020 (7th Cir. Nov. 22, 2011) (12 CLASS 1067, 11/25/11), the Seventh Circuit held the district court applied the wrong standard when it said only ''egregious'' attorney misconduct would require denial of class certification under Rule 23(a)(4), which requires that the representative parties fairly and adequately protect the interests of the class.

In an opinion written by Circuit Judge Richard A. Posner, the Seventh Circuit vacated the class certification order in this junk fax class action and said that a ''rigorous analysis'' of the certification requirements was not conducted, as required under *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (12 CLASS 519, 6/24/11) (quoting *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982)).

Posner said the district court should deny class certification where alleged misconduct ''creates a serious doubt that counsel will represent the class loyally.''

Earlier this year in another junk fax class action brought under the Telephone Consumer Protection Act, *CE Design Ltd. v. King Architectural Metals Inc.*, 637 F.3d 721 (7th Cir. 2011) (12 CLASS 225, 3/25/11), the Seventh Circuit clarified the adequacy requirement as it applies to the named plaintiffs.

There, in another opinion by Posner, the Seventh Circuit vacated class certification, with directions for the district court to consider whether the lead plaintiff adequately represented the class. The appeals court suggested the plaintiff's deposition testimony raised doubts about his truthfulness and raised the specter of a potential defense unique to him.

More Adequacy Challenges? These cases may provide a roadmap for defendants to challenge certification based on the adequacy of a class's representatives.

''Historically, defense counsel has infrequently challenged certification motions based on the adequacy requirement,'' Eric Samore, a founding partner of Smith-Amundsen LLC in Chicago who represented defendant Ashford Gear in the *Creative Montessori* case, told BNA. ''This practice may change, because the Seventh Circuit has raised the bar that a plaintiff and its counsel must clear in order to satisfy the adequacy prong.''

King Architectural holds that where the plaintiff's testimony has been impeached as to a material point, to the detriment of the absent class members' claims, the plaintiff may not serve as class representative, he said. *Creative Montessori* holds that because class counsel are fiduciaries of the class, any serious doubts about their ability to loyally represent the interests of the class necessitates a denial of class certification, Samore continued.

''*Creative Montessori* and *King Architectural* underscore the importance of a rigorous analysis of the adequacy requirement . . . to protect the interests of the class,'' Samore said.

Tightening Certification Standards. Bruce Braverman, counsel in the Chicago office of Sidley Austin LLP, who represents insurance and financial services industry clients in class actions, told BNA that the Seventh Circuit's decision in *Creative Montessori* reflects the ''increased vigilance'' that federal courts of appeals are applying in reviewing the adequacy of representation requirement.

Braverman published an article earlier this year called, ''The 'Adequate Representative' Requirement Gains Some Teeth'' (12 CLASS 945, 10/14/11).

Braverman said that the Seventh Circuit's reworking of the standard applicable to class counsel is an example of the general shift towards increased scrutiny of class action requirements over the years.

''Comparing federal rulings on class certification from the 1970s and 1980s with rulings over the past fifteen years generally reflects a marked tightening of the class certification standards and an increase in the scrutiny courts apply in analyzing whether plaintiffs have in fact established the Rule 23 requirements,'' he said.

The addition of Fed. R. Civ. P. 23(g) in 2003, which requires that class counsel fairly and adequately represent the class, is consistent with this trend, Braverman added.

Junk Fax Cases Targeted? Braverman said that it appears that the Seventh Circuit found these two TCPA junk fax cases to be ideal candidates to send the message that district courts must apply the more rigorous analysis required by the U.S. Supreme Court for deter-

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mining whether class certification requirements—including the two adequacy of representation requirements—have been met.

''It is understandable that the Seventh Circuit would address adequacy of representation issues in these junk fax cases in light of the fact that the statute provides for statutory damages of $500 per fax, and that few, if any, of the recipients suffer any actual damages,'' Braverman said. ''As the Seventh Circuit suggested in *Creative Montessori*, the cases can often be 'lawyer driven,' '' he said.

But Phillip A. Bock, partner at Bock & Hatch LLC in Chicago who represented the plaintiff in the *Creative Montessori* case, disagreed that this pair of decisions means that the appeals court frowns on TCPA cases.

''They rule on the case in front of them. If they see things they don't like, they say they see things they don't like. They are just doing their job,'' he said.

Bock Defends His Firm, Points Finger Elsewhere. Bock told BNA that because the Seventh Circuit ruled on the petition for permission to appeal, the merits issues had not been briefed before the appeals court.

Bock also sought to set the record straight about the alleged misconduct. Although the Seventh Circuit's decision appears to implicate the Bock & Hatch firm in the alleged questionable conduct at issue, the district court's class certification opinion points to the firm of Anderson & Wanca, co-counsel in the case (12 CLASS 695, 8/12/11).

The district court said that Ashford Gear alleged that class counsel at Anderson & Wanca broke a promise of confidentiality to their source of information about class members, and improperly implied in their first contact with the lead plaintiff that a class was already certified in the matter.

Bock said, ''The record isn't complete . . . We will go back to the district court on a full record and the district judge will decide what happened and apply the law. There was no misconduct by anyone at my firm, nor has there been any alleged,'' he said.

Even if the district court finds misconduct, the class may remain certified. In the certification decision, the district court said that, if necessary, the court could consider disqualifying the attorneys at Anderson & Wanca without decertifying the class.

An attorney from Anderson & Wanca did not respond to a request for comment before publication.

The Creative Montessori *opinion is at http://op.bna.com/class.nsf/r?Open=jkas-8nuqt4.*

The district court's July 27, 2011, class certification opinion in Creative Montessori *is at http://op.bna.com/class.nsf/r?Open=jkas-8p4m9h.*

The King Architectural *opinion is at http://op.bna.com/class.nsf/r?Open=jkas-8f6rb9.*

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