

Consumer Litigation

American Bar Association Litigation Section

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Can a Serial TCPA Plaintiff Represent a Class?

The TCPA has long been a breeding ground for innovative and aggressive plaintiffs and the attorneys who represent them.

By Mark E. Rooney

A recent federal district court decision highlights an important limitation on claims under the Telephone Consumer Protection Act (TCPA).

In *Johansen v. Bluegreen Vacations Unlimited, Inc.*, No. 20-81076-CIV, 2021 WL 4973593 (S.D. Fla. Sept. 30, 2021), a district court considered and denied the TCPA plaintiff's motion for class certification given his long history of deceptively conjuring up TCPA claims.

The plaintiff filed 60 previous TCPA lawsuits and made about \$60,000 a year doing it. He was on record describing his "typical practice" of lying to telemarketing callers, posing as an interested consumer, prolonging calls, and verifying false contact information.

In light of this background, the court found that the plaintiff failed to meet both the typicality and adequacy requirements for class representation. His experience was not typical of a class member because his "deceptive and dishonest tactics" were "inherently different than those of the putative class members who presumably did not use similarly deceitful methods." The plaintiff's conduct rendered him an inadequate class representative because it seriously undermined his credibility and trustworthiness.

Because the TCPA is a strict-liability statute, and provides for statutory damages of \$500 to \$1,500 per illegal call or text, it has long been a breeding ground for innovative and aggressive plaintiffs and the attorneys who represent them.

TCPA practitioners will recall the infamous case of Melody Stoops, who admitted to keeping about 40 cell phones for what she described as her "business" of filing TCPA claims. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798 (W.D. Pa. 2016). She lost that case when the court concluded that she lacked the invasion-of-privacy injury required to support a TCPA claim, and therefore lacked standing.

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Together, the *Stoops* and *Johansen* decisions show that courts are willing and able to differentiate between legitimate TCPA claims involving unwanted robocalls and texts, and those manufactured by serial plaintiffs as part of a money-making plan.

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