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## CORDOBA V. DIRECTV, LLC: WHEN CLASS-MEMBER STANDING MATTERS FOR CLASS CERTIFICATION

by Frank Cruz-Alvarez and Melissa Madsen

In a recent decision vacating a class certification in an action against DIRECTV, the Eleventh Circuit explained that the issue of class-member standing may, in some instances, “be exceedingly relevant to the class certification analysis required by Federal Rule of Civil Procedure 23.” *Cordoba v. DIRECTV, LLC*, No. 18-12077 (Nov. 15, 2019 11th Cir. Ct.). In *Cordoba*, the Eleventh Circuit concluded that the District Court for the Northern District of Georgia abused its discretion when it certified a class under Rule 23(b)(3) without first considering “the standing problem that arguably affected the bulk of the unnamed members of the class it had drawn.” The Eleventh Circuit remanded the case back to the district court to determine whether “common issues predominate” under Rule 23(b)(3), when it appears that a large portion of the class does not have standing.

Sebastian Cordoba sued DIRECTV and the company it used for telemarketing services, Telecel Marketing Solutions, Inc., for violating the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227—a federal statute that limits telemarketing calls and “grants individuals who unlawfully receive calls permission to sue.” Among other consumer protection measures, the TCPA authorizes the Federal Communications Commission to promulgate regulations creating a national “do-not-call list” and requiring individual telemarketers to maintain their own “do-not-call lists” based on consumer requests not to receive telemarketing calls. Cordoba alleged that despite his repeated demands that he not be contacted, DIRECTV and Telecel failed to maintain their internal do-not-call lists and continued to call him.

The U.S. District Court for the Northern District of Georgia certified two classes that Cordoba sought to represent: The first class was defined as “all individuals who received more than one telemarketing call from Telecel on behalf of DIRECTV on or after October 27, 2011.” The second class included “all individuals whose telephone numbers were on the National Do Not Call Registry” but still received the marketing calls.

After the District Court certified both classes, DIRECTV sought an interlocutory appeal, challenging only the first class certification. The sole question addressed by the Eleventh Circuit was whether a recipient of a telemarketing call who did *not* request to be placed on the caller’s internal do-not-call (DNC) list “has standing under Article III to maintain a claim that the caller failed to institute appropriate internal DNC list procedures.” Recall that in order to have Article III standing, a plaintiff must allege an “injury in fact” that is “concrete and particularized” and “actual or imminent,” that must be “fairly traceable to the challenged action of the defendant” and must likely “be redressed by a favorable decision.” The Eleventh Circuit concluded that this category of

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call recipient *did not*, in fact, have standing.

First, the Eleventh Circuit held that Cordoba and all of the absent class members who received more than one unwanted call from Telecel sufficiently satisfy the “injury in fact” prong of Article III standing. After all, the court noted, “a phone call intrudes upon the seclusion of the home, fully occupies the recipient’s device for a period of time, and demands the recipient’s immediate attention.”

Notwithstanding that analysis, the court held that this category of absent class members—recipients who did *not* request to be placed on a telemarketer’s internal DNC list—cannot meet the traceability requirement of Article III standing. These call recipients cannot show a *causal connection* between their injury and the challenged action of DIRECTV and Telecel. As the court explained, “if an individual not on the National Do Not Call Registry was called by Telecel and never asked Telecel not to call them again, it doesn’t make any difference that Telecel hadn’t maintained an internal do-not-call list.” Because even if Telecel had carefully followed the regulations, it would have continued to call these individuals. Since “there’s no remotely plausible causal chain linking the failure to maintain an internal do-not-call list to the phone calls received by class members who never said to Telecel they didn’t want to be called again,” those plaintiffs lack Article III standing to sue.

The Eleventh Circuit then went on to explain that for a class action to be justiciable under Article III of the U.S. Constitution, all that is required is that a named plaintiff have standing. Cordoba, the named plaintiff in this action, meets that minimum requirement for a justiciable claim. Federal Rule of Civil Procedure 23(b)(3), however, requires the court in certifying the class to find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.” Here, the Eleventh Circuit concluded, the unnamed class members’ standing “poses a powerful problem under Rule 23(b)(3)’s predominance factor.”

The Eleventh Circuit concluded that the district court failed to consider an individualized issue that may predominate over common issues: namely, that “at some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief.” Because each individual plaintiff will have to show his or her injury is traceable to Telecel’s violation of the law, he or she *will have to show that they communicated to Telecel that they did not wish to be called*. The Eleventh Circuit pointed out that the district court would be in a better position to determine (1) how many class members actually asked Telecel not to contact them and (2) how the class members intend to prove that they made such a request. If few class members actually made these requests, or if it would be difficult to identify those who did, “*then the class would be overbroad and these individualized determinations might overwhelm issues common to the class.*”

The Eleventh Circuit’s decision does *not* require plaintiffs in a class action to now prove that every member of a proposed class has standing prior to certification. But it does expressly highlight that “there is a meaningful difference between a class with a few members who might not have suffered an injury traceable to the defendants and a class with potentially many more, even a majority, who do not have Article III standing.”

Accordingly, going forward, targets of proposed class actions, will want to take a close look at the “standing” of proposed class members during the certification stage to determine if there is a viable argument to defeat certification based on the lack of standing of large portions of the proposed class. In the end, this decision is another tool for counsel defending against proposed class actions—but one that can have significant ramifications.