The following constitutes the order of the Court.

Signed April 11, 2005.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
MSI MARKETING, INC.,	§	CASE NO. 03-35822-SAF-11
	§	
D E B T O R (S).	§	

MEMORANDUM OPINION AND ORDER

On June 6, 2003, MSI Marketing, Inc., the debtor, filed a petition for relief under Chapter 7 of the Bankruptcy Code. On July 1, 2003, the court converted the case to a case under Chapter 11. On November 3, 2003, Debra Hicks, now known as Debra D. Colabrese, filed a proof of claim on behalf of herself and all others similarly situated for damages for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, relating to the sending of unauthorized facsimile communications. On December 2, 2004, MSI objected to the proof of claim. On February 7, 2005, the court held an evidentiary hearing on the

allowance of the claim.

The allowance of a claim against a bankruptcy estate raises a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(B) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that "a party correctly filing a proof of claim is deemed to have established a prima facie case against the debtor's assets." In re Fidelity Holding Co., Ltd., 837 F.2d 696, 698 (5th Cir. 1988). The claimant will prevail unless a party who objects to the proof of claim produces evidence to rebut the claim. Id. Upon production of this rebuttal evidence, the burden shifts to the claimant to prove its claim by a preponderance of the evidence. Id. Accordingly, Hicks' proof of claim as a secured claim is prima facie valid, unless MSI produces evidence to rebut the presumption.

Hicks Claim

On July 15, 2000, and July 22, 2000, Hicks received two facsimile communications she asserts had been sent or caused to be sent by MSI. One fax solicited people to operate a medical billing business for an entity known as American Billing Services, and offered a free seminar. The other fax headlined a success story in the medical billing business, solicited

participation, and provided a pass for the seminar. Hicks did not give permission to MSI nor to any other entity to send the facsimile communications.

The Telephone Consumer Protection Act prohibits the use of a facsimile machine or computer to send "an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). A person may bring an action in state court for a violation of the statute, and may request injunctive relief and damages of $500 for each violation. If the court finds that the defendant willfully or knowingly violated the statute, the court may treble the damages. 47 U.S.C. § 227(b)(3).

The facsimile communications received by Hicks violated the Telephone Consumer Protection Act. Hicks, a resident of Allegheny County, Pennsylvania, filed a class action in the Court of Common Pleas of Allegheny County, Pennsylvania, against American Billing Services, Inc., doing business as "ABS, Inc.;" MSI, doing business as "Y2Marketing;" and Fax Source, Inc., doing business as "Fax Source." The state court certified the class as to ABS and Fax Source. The MSI bankruptcy petition stayed the

action against MSI.

In its objection to the proof of claim, MSI contends that it was not responsible for sending the facsimile communications to Hicks and that Hicks had failed to provide original documentation to support the claim. At the hearing, Phillip Settles, MSI's chief operating officer, testified that MSI did not send the faxes to Hicks and did not send facsimile communications in Pennsylvania. He conceded that MSI had sent facsimile communications in Texas. He testified that MSI prepared advertising for ABS, and arranged the services of Fax Source to send the facsimile communications for ABS. This testimony rebuts the prima facie validity of the proof of claim. Hicks must establish her claim by a preponderance of the evidence.

At the hearing, Hicks produced the documentation of the receipt of the two facsimile communications. In addition, Hicks established that ABS identified MSI as the source of the faxes. MSI invoiced ABS for facsimile communications in July 2000. An invoice dated July 17, 2000, charges ABS with 21,505 facsimile communications in the Pittsburgh, Pennsylvania, area on July 15, 2000, the date of the first fax to Hicks. Another invoice dated July 24, 2000, charges ABS with 21,182 facsimile communications in Pittsburgh on "July 15, 2000." Hicks received the second fax on July 20, 2000. Considering the date of the first fax and subsequent invoice and the second fax and subsequent invoice, the

court infers that the July 24, 2000, invoice meant to identify the July 20, 2000, facsimile communications, ABS having already been invoiced for the July 15, 2000, facsimile communications. Settles had no personal knowledge of the July 2000 MSI activities. He did not know whether ABS paid the invoices.

MSI had also invoiced ABS on February 22, 2000, for 4,369 facsimile communications sent to Harrisburg, Pennsylvania, on February 18, 2000, and on February 29, 2000, for 6,507 facsimile communications sent to Harrisburg on February 25, 2000. MSI requested that Fax Source send those faxes.

MSI had been a marketing service agency. Doing business as Y2Marketing, in 1999 MSI advertised that it could broadcast by computer-generated faxing documents to many destinations virtually simultaneously. On its web page, Y2Marketing addressed who should fax broadcast and why. Y2Marketing represented that it had a "giant database of over 6.2 million fax number[s]" in 230 of the biggest markets.

These representations notwithstanding, Settles testified that MSI only sent facsimile communications in Texas. Elsewhere, MSI prepared the communications, obtained numbers from third persons, and arranged for the transmissions by third persons.

Fax Source executed an affidavit claiming that it did not send the facsimile communications to Hicks. MSI produced no records that showed that Fax Source sent the communications.

Hicks has established by a preponderance of the evidence that MSI used or caused to be used a facsimile machine or computer to send unsolicited advertisements to Hicks in violation of 47 U.S.C. § 227(b)(1). MSI is liable whether it physically transmitted the communications or caused another to do so. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, ¶ 54 (F.C.C., Oct. 16, 1992)(No. F.C.C. 92-443, C.C. 92-90).

MSI did not acknowledge its role in the transmission of the facsimile communications despite its own invoices, lack of documentation of any role by Fax Source, the February 2000 communications, and MSI's own web-based advertising. The court concludes that MSI acted willfully and knowingly. The court therefore allows Hicks an unsecured claim of $3,000.00. The court calculates that claim as follows: two facsimile communications in violation of the Telephone Consumer Protection Act at $500 per violation equals $1,000, trebled to $3,000.

Class Action

Hicks seeks to prosecute a class action claim on behalf of persons similarly situated to her. The state court certified a class action against ABS and Fax Source. At the hearing on the objection to the claim, MSI objected to a class claim, arguing that a class action would not be superior to the claims processes actually used in the bankruptcy case. Hicks observed that MSI

did not lodge the class objection in the written objection to the Hicks' claim. By order entered February 17, 2005, the court established a briefing schedule on the class claim issue. The parties have submitted their respective briefs. No further evidentiary hearing is needed on the issue.

Hicks established by a preponderance of the evidence that MSI faxed or caused to be faxed 21,505 communications in the Pittsburgh, Pennsylvania, area on July 15, 2000, and 21,182 on July 22, 2000. She further established that MSI faxed or caused to be faxed 4,369 communications in the Harrisburg, Pennsylvania, area on February 18, 2000, and 4,278 on February 25, 2000.

Hicks asserts that joinder of all the persons who received those facsimile communications would be impracticable. She argues that she has raised in her claim common questions that affect the entire class, that her claim is typical of the claims of the class members, and that the class action would be superior to other available methods to determine claims.

Class Certification

The unique facts of each case will generally be the determining factor governing certification of a class. Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 316 (5th Cir. 1978). A court must "conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class." O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 738 (5th Cir. 2003).

The party seeking certification bears the burden of establishing that the requirements of Rule 23 have been met. O'Sullivan, 319 F.3d at 737-738.

Under Rule 23(a), a plaintiff seeking to certify a class must satisfy four threshold requirements: "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical ... of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 301 (5th Cir. 2003). Beyond these four prerequisites of Rule 23(a), Rule 23(b)(3) demands of a party seeking class certification yet two further requirements, namely the burden of demonstrating both (1) that questions common to the class members predominate over questions affecting only individual members, and (2) that class resolution is superior to alternative methods for adjudication of the controversy. Id. The standard for certification imposed by Rule 23(b)(3) is also more demanding than the commonality requirement of Rule 23(a), and as such, mandates caution." Id. at 301-2. The question that necessarily follows is whether alternative methods superior to Hicks' proposed class resolution exist to adjudicate the controversy.

Class Proofs of Claim

The court may assume that Hicks has raised claims typical of the other recipients of the facsimile communications in Pennsylvania, with common questions for adjudication. However, MSI has established that the other recipients could have conveniently and practically filed proofs of claims in the bankruptcy case, and that the bankruptcy claims allowance process under the federal bankruptcy rules provided a fair and efficient opportunity to adjudicate those claims.

Settles testified that the court appointed a representative for claimants to assist the court in developing a procedure for the filing of claims. With the input of the representative, the court established a process to easily access claims forms. At the court's direction, MSI placed claims notices in national newspapers, on various web sites and at other locations. Settles further testified that the process has resulted in numerous claims filed in the case. On average, MSI has settled the claims for $250 per facsimile communication, if the claimant documents the communication.

The court takes judicial notice of the details of the claims process. Because of the large number of pending law suits alleging violations of the Telephone Consumer Protection Act, on August 29, 2003, the court entered an order granting the debtor's motion to publish notice of the claims bar date for unknown

creditors. At a hearing on August 29, 2003, the court directed publication of the notice in the Dallas Morning News, Wall Street Journal National Edition, and USA Today. MSI thereafter filed an amended plan of reorganization and disclosure statement. By order entered October 20, 2003, the court approved the amended disclosure statement.

However, on October 29, 2003, Walter Oney, a Boston attorney and a claimant, filed a motion to enlarge the time to file proofs of claims and to require additional disclosures. On November 24, 2003, the court granted an extension of time to file claims. On November 25, 2003, Oney filed an objection to the MSI plan, asserting the basis for Telephone Consumer Protection Act violations, especially focusing on Massachusetts. In detail, he explored the operations of Y2Marketing.

The court conducted the plan confirmation hearing on December 1, 2003. The court indicated it would confirm a plan for MSI only with an injunction pursuant to the Telephone Consumer Protection Act and with an amended claims process. The court held it would set a new claims bar date. The court named Oney as a representative of claimants to work with MSI in developing a claims process designed to provide fair notice and a fair opportunity for the filing of claims. The court provided that Oney would be compensated by the estate. Following a continued confirmation hearing, the court confirmed an amended

plan by order entered December 31, 2003. The amended plan extended the claims bar date for persons claiming a violation of the Telephone Consumer Protection Act. The plan included a specific notice to be issued by MSI, with a web link to the court's bankruptcy claims form. The plan directed the posting of the notice on the Y2Marketing web page and at another web page. On January 28, 2004, the court entered an injunction, essentially providing the type of relief sought by Hicks in the class action. By motion filed January 28, 2004, Oney raised issues regarding the web-based claims notices. The court held a hearing on that motion on February 26, 2004, found that MSI complied with the plan, and relieved Oney of his obligations to the bankruptcy estate.

The court recognizes that the time of violations discussed by Oney differs from those raised by Hicks. But the common questions of notice and process are the same. Considering the national publication notice of the initial bar date, this process has afforded persons with a full and fair opportunity to file claims against MSI based on alleged violations of the Telephone Consumer Protection Act. A class action is not a superior method to determine claims against the bankruptcy estate.

Hicks invokes Pennsylvania law to support class certification. Hicks' claim is based on federal law and her claim is allowed. Class certification presents a different

question, which this court resolves under the federal rules as applied by the Fifth Circuit.

The court also notes that the handling of a large number of claims is not impractical for this court. The number of potential claims based on the number of communications contained in the MSI invoices to ABS pales in comparison to the claims that have been filed in other cases in this court. The court therefore denies the class claim.

Order

Based on the foregoing,

IT IS ORDERED that Debra D. Hicks, now known as Debra D. Colabrese, shall have an allowed unsecured claim of $3,000.

IT IS FURTHER ORDERED that the request for a class action is **DENIED** and any class claim is **DISALLOWED**.

###END OF ORDER###