Superior Court of New Jersey, Appellate Division.
John R. LEVINE, individually and as representative of plaintiff's class, Plaintiff-Appellant,
v.
9 NET AVENUE, INC., Concentric Network Corporation, Sakon, LLC and Graphnet, Inc.
No. A-1107-00T1.

June 7, 2001.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, L-7965-99.

Timothy D. Lyons and Kurt E. Anderson, for Appellant.
Joseph A. Boyle, for respondent, 9 Net Avenue, Inc.
David E. Kramer, Wilson, Sonsini, Goodrich & Rosati, for respondent, Concentric Network Corporation.
John J. Farmer, Jr., for amicus curiae.

Before Judges CONLEY, WECKER and LANDAU.
PER CURIAM
***1** In 1991, Congress passed the Telephone Consumer Protection Act, 47 *U.S.C.A.* § 227 (TCPA), providing, *inter alia*, federally recognized relief from unwanted commercial advertising solicitations by means of telephone facsimile (fax) machines. Section 227b(1)(C) makes it unlawful for any person within the United States "... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." The term "telephone facsimile machine" is defined as:
[E]quipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.
[47 *U.S.C.A.* § 227(a)(2).]

An unsolicited advertisement is defined as:
any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission.
[47 *U.S.C.A.* § 227(a)(4).]

The TCPA provides three avenues for enforcement:

(1) Regulatory and court action by the Federal Communications Commission (FCC) for violation of regulations promulgated under the Act ;

FN1. 47 *U.S.C.A.* § 227(f)(7); 47 *U.S.C.A.* § 503(b)(1), (5).

(2) Civil action by the Attorney General of a state, or an official or agency designated by a state, on behalf of its residents, to recover for the greater of actual monetary loss or $500 for each violation, trebled in the court's discretion for willful or knowing violations. 47 *U.S.C.A.* § 227(f)(1). Investigatory powers of state Attorneys General are recognized. 47 *U.S.C.A.* § 227(f)(5). The FCC is given leave to intervene. 47 *U.S.C.A.* § 227(f)(3).

Court actions brought under Section 227(f) are committed to the exclusive jurisdiction of the federal courts by subparagraph (2) of that subsection; and mandatory injunctive relief by federal district courts is also authorized. 47 *U.S.C.A.* § 227(f)(2).

(3) Section 227(b)(3) authorizes a private person or entity to bring an action, not in federal court but if "otherwise permitted by the laws or rules of court of a state," in an "appropriate court of that State" for injunctive relief and for recovery of the greater of actual monetary loss or $500 in damages for each violation.

The private action remedy was provided in a late amendment to Senate Bill S. 1462, with the purpose of rendering it possible, in states willing to allow such actions, for a consumer to appear without an attorney in a small claims or similar court of a state to recover not merely actual damages but a minimum of $500 for each violation. *See International Sci. & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152-53 (4th Cir.1997). The drafters recognized that damages from a single violation would ordinarily amount only to a few pennies worth of ink and paper usage, and so believed that the $500

minimum damage award would be sufficient to motivate private redress of a consumer's grievance through a relatively simple small claims court proceeding, without an attorney. *See* 137 Cong.Rec. S16204-01, at S16205-S16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings.)

Plaintiff John R. Levine, proprietor of a business known as I.E.C.C., allegedly received a one-page unsolicited fax transmission on his telephone facsimile machine sent at the instance of defendant 9 Net Avenue, Inc. (9 Net), advertising 9 Net's web hosting service. A similar fax was sent to possibly as many as 100,000 web site owners throughout the United States and abroad.

***2** On November 1, 1999, Levine filed a Law Division action under Section 227(b)(3) of the TCPA, asserting that he represented a class of similarly situated plaintiffs. The complaint seeks damages under the TCPA, trebled for willful violation because Levine's web site domain listings indicated "Fax-NO FAX ADS $500 PENALTY[.]" Joined as defendants are 9 Net, a New Jersey Corporation; Concentric Network Corporation, a corporation that acquired the principal assets of 9 Net after the transmission and has continued its web hosting business ; Sakon, LLC, a New Jersey Corporation; and Graph Net, Inc., a New Jersey Corporation. The latter corporations were joined as entities because they were engaged to make the transmissions on behalf of the advertiser, 9 Net.

> FN2. The question of applicability of successor liability in a TCPA action remains open. *See* *Ramirez v. Amsted Indus., Inc.*, 86 *N.J.* 332, 431 A.2d 811 (1981).

Rule 4:32-2(a) requires that the court determine by order, as soon as practicable after its commencement, whether an action may be maintained as a class action. The record discloses that after substantial discovery and during other motion proceedings the judge requested that plaintiff initiate a proceeding for class certification.

When plaintiff had failed to do so, almost nine months after commencement of the action, defendant Concentric moved for an order striking the class allegations or declaring that a class may not be certified in the cause. Plaintiff opposed the motion. Following oral argument, the motion judge rendered a written opinion that granted Concentric's motion. On September 15, 2000, the motion judge entered an order striking the class allegations and declaring that a class may not be certified. We granted Levine's motion for leave to appeal, but now affirm substantially for the reasons set forth in Judge D'Italia's opinion dated September 15, 2000, which we find does not constitute a mistaken exercise of discretion, nor present any errors of law requiring our intervention.

> FN3. Existence of an abuse of discretion by the trial court is the appropriate standard of review in appeals respecting class action certifications. *In re:* *Cadillac V8-6-4 Class Action*, 93 *N.J.* 412, 436, 461 A.2d 736, (1983). The federal standard is the same. *Dionne v. Bouley*, 757 F.2d 1344, 1355 (1st Cir.1985).

A highly fact sensitive judicial determination is required by *Rule* 4:32-1(a) and (b). While the judge appropriately focused most of his attention upon the predominance and superiority factors set forth in *Rule* 4:32-1(b)(3), we also recognize and approve his evident assessment that there was no reasonable basis for concluding that the elements of either *Rule* 4:32-1(b)(1) or (2) were satisfied. In our view, the judge's assessment might have also included a finding, on the record presented, that the typicality prerequisite of *Rule* 4:32-1(a)(3) was insufficiently established to order class certification, particularly as to the claim of willful conduct. We note that Levine's web sites each display an express warning against fax advertisements. While perhaps not unique, there is no reason to assume that this would have been typical of the proposed class of web site owners.

Although the motion judge's opinion is sufficient to support our conclusion that the order under review does not constitute a mistaken exercise of discretion, it is appropriate that we address concerns set forth in the amicus brief filed by the Attorney General of New Jersey. We will also comment briefly on several additional considerations supportive of the discretionary declaration against class certification in this case. Additionally, we shall respond to Levine's contention that the court committed reversible error by foreclosing an opportunity to argue the applicability of *Rule* 4:32-1(b)(1) or (2).

I

***3** The Attorney General has expressed concern that the opinion and order under review may evidence a

policy of judicial restriction of private rights of action under consumer-based statutes such as the TCPA or even the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -20. We are urged to ensure "that the mere existence of an investigation by the Attorney General of a defendant in a private-party lawsuit does not serve to automatically extinguish private rights of action in consumer based litigations." The Attorney General also requests that we order broadly that "[a]ny time the actions of the Attorney General are a substantive factor in a court's decision, the Attorney General must be given notice and the opportunity to be heard."

We have reviewed carefully Judge D'Italia's decision, and do not interpret it to constitute a generalized judicial restriction of the exercise of private rights under the TCPA or any other consumer oriented statute. The only question the court was to decide was whether a class action should be certified in this case, which arises out of a fax transmission generated by 9 Net. We understand the portion of the opinion that concerns the Attorney General to address, in the circumstances before the court, the issue of superiority of a class action over other available methods for fair and efficient adjudication of the controversy. Under *Rule* 4:32-1(b)(3) this necessarily included the motion's judge consideration of the private TCPA action still available to Levine and to others who might deem themselves sufficiently aggrieved by defendants' actions to take advantage of the $500 small claims court provision. Additionally, the judge was required to consider the extent and nature of any other pending proceedings concerning the same controversy. It was Judge D'Italia's obligation not to ignore the existence of an Attorney General investigation into 9 Net's fax transmission when he learned that such an investigation was being conducted, apparently under the broad enforcement and investigatory powers delegated under the TCPA. We think it neither error nor a mistaken exercise of discretion to weigh the existence of such an ongoing investigation, *together with all other relevant factors*, as part of the court's *Rule* 4:32-1(b)(3) determination respecting class certification.

> FN4. The parties have informed us that a settlement of the 9 Net matter has since been reached in the Attorney General's proceeding.

We emphasize that we do not endorse the proposition that an Attorney General investigation, or the mere statutory authorization for such alternative relief, should automatically preclude private consumer actions. However, the Levine action, like any other class certification proceeding, had to be considered in light of its own unique foundational circumstances. Taken as a whole, that is what we read Judge D'Italia's opinion to have done.

As to the Attorney General's request for notification and hearing rights, these requests recall the statutory requirements of notice and intervention afforded in Consumer Fraud cases by *N.J.S.A.* 56:8-20, and perhaps invoke the spirit of *Rule* 4:5-1; 4:28-1; 4:28-4; 4:29-1; and the entire controversy doctrine. Without action by the Legislature and consideration by the Civil Practice Committee, however, we decline to supplement these provisions by judicial fiat as requested by the Attorney General. We rely instead on the discretion of each trial judge to determine, on a case-by-case basis, whether notice to the Attorney General is required in the public interest and to avoid double exposure to prosecutions and penalties.

II

***4** In affirming the exercise of discretion in this case, we have not ignored, nor did the motion judge ignore, the thrust of New Jersey cases which recognize that class actions are liberally allowed in consumer actions where there is a common grievance. *See, e.g. In Re Cadillac, supra*, 93 *N.J.* at 435; *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 332 *N.J.Super.* 31, 44-45, 752 A.2d 807 (App.Div.2000). We note, however, that the endorsement of private class actions in those cases was based on the rationale of inadequacy of alternative consumer relief. In *In Re Cadillac, supra*, 93 *N.J.* at 435, the Court paraphrased the language in *Riley v. New Rapids Carpet Center*, 61 *N.J.* 218, 225 (1972), which expressed a preference for class actions where "individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief." Similarly in *Varacallo, supra*, we recognized that liberal allowance of class actions in consumer matters was indicated when a common grievance exists "under circumstances that would make individual actions uneconomical to pursue." *Varacallo, supra*, 332 *N.J.Super.* at 45. A reasonable jurist could recognize, as did the judge here, that the private action language in the TCPA was added to the original draft of that Act in order to provide sufficient incentive through the $500 minimum damage provision, to bring a small claims court action without an attorney, and merely prove receipt of a

commercial fax that the litigant did not solicit. While the record submitted by plaintiff shows that such actions were sometimes met in the earlier years of the TCPA by constitutional and obstructional defenses, the record also shows that private litigants can readily succeed. We deem this to be particularly true today, as those ostensible defenses to the TCPA have been consistently struck down by state and federal courts.

Rule 1:4-8(a) and (b) provide a substantial disincentive to defendants who attempt to impose costly and harassing defenses against private litigants in the Special Civil Part. This rule can be invoked *sua sponta* by the court, should frivolous defenses emerge.

III

***5** Contrary to plaintiff's arguments on appeal, our review of the motion papers satisfies us that defendants' motion was not limited to plaintiff's failure to meet the superiority and predominance standards of *Rule* 4:32-1(b)(3) but was broadly stated in terms of plaintiff's failure to meet the certification requirements of *Rule* 4:32. The court did not err in pointing out that plaintiff had not argued that the action might be maintained under sub-section (b)(1) or (b)(2) of the Rule.

Levine contends that his burden under defendant's motion was limited to responding to the *Rule* 4:32-1(b)(3) issues, because the matter pending before the judge was not his motion to certify the class. Not so. The burden of satisfying the requirements of *Rule* 4:32 remains upon the party seeking class certification. It does not shift merely because that party has failed to move for certification. *See* *Parker v. Time Warner Entertainment Co.*, 198 *F.R.D.* 374, 376-77 (E.D.N.Y.2001) (so holding with respect to Fed.R.Civ.P. 23, which is analogous to *R.* 4:32.). This principle is particularly apt where, as here, despite requests by the court, the plaintiff failed to move for class certification, precipitating defendants' motion. Moreover, we have held that *Rule* 4:32-1(b)(1)(A) is designed to protect only the interests of the party opposing the class. *Saldana v. City of Camden*, 252 *N.J.Super.* 188, 194, 599 A.2d 582 (App.Div.1991). As to *Rule* 4:32-1(b)(1)(B), it applies only if individual adjudications would as a practical matter dispose of the interest of other members not parties to the adjudication or impede their ability to protect their interest. Nothing in the record before us suggests such interference would be likely if there is no class certification. *See*, *Saladana*, *supra*, 252 *N.J.Super.*, at 195-96, 599 A.2d 582. We take notice that New Jersey Superior Court records do not indicate other pending actions against either 9 Net or Concentric, which is consistent with the defendants' *Rule* 4:5-1 certifications.

IV

Several factors uncovered by our review of the record further support the reasonableness of denying class certification in this case. First, we note counsel's argument in the court below that current technology has progressed during the ten years since the TCPA was enacted, so that it is now common for faxes to be received, not by fax machines, but by e-mail. Persons who receive transmissions in that fashion only print them out on a fax machine if they so elect. Such an elective printing would constitute consent. Under 47 *U.S.C.A.* Sec. 227(b)(1)(C), the unsolicited advertisement must be received upon a “telephone facsimile machine,” rendering transmissions received by other means outside the TCPA.

A second factor affecting the propriety of a class action is the uncertainty as to those states in which a private action under the TCPA may or may not be authorized. We doubt that Congress intended to permit an end run around the option clearly afforded to each of the respective states under Section 227(b)(3) to determine whether it wishes to add private enforcement rights to the enforcement avenues delegated to the Federal Communications Commission and to State Attorneys General. *See* *Foxhall Realty Law Offices v. Telecom. Prem. Servs. Ltd.*, 156 *F.*3d 432, 438 (2nd Cir.1998). In addition to their relevance on the *Rule* 4:32-1(b) issues, the commonality required by *Rule* 4:32-1(a) is brought into question by the two factors just enumerated.

We are also uncertain about the effect of the TCPA mandate for a $500 minimum damage award in private actions. Given this expression of congressional intent, there is at least a serious question whether a state class action or a state court's rules can supersede that federally fixed minimum by a settlement which provides members of a class in a private action with a lesser amount. *See* *Ratner v. Chemical Bank New York Trust Co.*, 54 *F.R.D.* 412, 416 n. 7 (S.D.N.Y.1972) (rejecting class certification in part because seeking less than the minimum $100 per violation mandated by the Truth In Lending Act was not allowed). A New Jersey TCPA class action might therefore have to run its full course by trial, rather than settlement.

***6** Since Judge D'Italia granted the motion under review, a Federal District Court decided *Parker v. Time Warner Entertainment Co., supra*, 198 *F.R.D.* 374. *Parker* recognizes, as did the motion judge, not only the principle of avoidance of punishment through class action in which the award sought is grossly disproportionate to the harm suffered by the plaintiffs, *id.* at 383-84, but that the superiority prong of a class action is undermined where there is a readily available individual remedy. *Id.* at 381-383. *Accord Wilson v. American Cablevision of Kansas City, Inc.*, 133 *F.R.D.* 573 (W.D.Mo.1990). Under the TCPA private action provision, the proofs are simple, the costs low, the injury small, and the $500 damage award is attractively disproportionate to the extent of the actual injury. Thus, *Parker* supports our view that it was a reasonable exercise of discretion for the motion judge to conclude that a class action certification is not warranted in this case.

The order under review is affirmed. We remand to the Law Division for completion of proceedings in this cause.

N.J.Super.A.D.,2001.
Levine v. 9 Net Ave., Inc.
Not Reported in A.2d, 2001 WL 34013297 (N.J.Super.A.D.)

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