Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Urged To Certify Class In $54B Hilton Robocall Suit

By **Daniel Siegal**

Law360, Los Angeles (May 5, 2016, 10:46 PM ET) -- Hilton customers urged the Ninth Circuit on Thursday to grant class certification in their $54 billion suit alleging Hilton's time-share unit spammed 6.5 million consumers with telemarketing robocalls, arguing no evidence backs the "hypothetical" individual issues that led a trial court to deny certification.

During oral arguments in Pasadena, California, John M. Bickford of R. Rex Parris Law Firm, representing named plaintiffs Brian Connelly and Keith Merritt, urged a three-judge panel to reverse U.S. District Judge Janis L. Sammartino's ruling denying class certification in the suit alleging Hilton Grand Vacations Co. LLC racked up tens of millions of violations of the federal Telephone Consumer Protection Act.

Bickford argued that all 6.5 million of the putative class members handed their cellphone information to Hilton in one of two ways covered by a pair of subclasses proposed by the plaintiffs: either in signing up for the hotel chain's "HHonors" rewards program, or in the process of reserving or checking in to a room at a Hilton-affiliated hotel.

Bickford said that class certification was appropriate because for each subclass, there was just one common question to determine if consumers consented: for HHonors members, it was if that program's terms and conditions obtained consent, and for hotel guests, it was if their reservation or check-in forms obtained consent.

Bickford said the trial court erred in accepting Hilton's argument that the various consumers might have granted consent in different ways when handing over their numbers. This was a mistake, Bickford argued, because Hilton had failed to produce any evidence of any time a customer signing up for HHonors rewards or checking into a room actually was informed about the telemarketing calls and consented to receive them.

"An individual issue can't predominate over the common question when there's no evidence it actually occurred," he said. "That's the real thorn in this case, is they claim these individual issues exist, but there's not a single example."

Connelly, Merritt and another plaintiff, Mary Sikes, filed suit in March 2012, alleging that Hilton placed about 37 million auto-dialed marketing calls over a four-year stretch.

In October 2013, Judge Sammartino **denied class certification**, ruling that because consumers voluntarily provided their cellphone numbers directly to the hotel chain under a host of factually

different circumstances, questions of predominance were created regarding consent issues that would require extensive individual analysis and make class treatment too unwieldy.

Judge Sammartino noted that the $1,500-per-violation maximum penalty available under the TCPA meant the proposed class could claim up to $54 billion in damages, according to the order.

Judge Sammartino said consumers who gave their cellphone numbers while placing reservations with Hilton over the phone likely had unscripted and nonuniform conversations with sales representatives and therefore received varied information about how their numbers might be used, according to the ruling.

On Thursday, Angela Agrusa of Liner LLP, representing Hilton, urged the appellate panel to uphold that ruling, arguing that when looking at the actual facts, including those surrounding the named plaintiffs, it was clear class members made reservations in many different ways — either online, on the phone or through another person — and that determining when a potential class member consented to be called was not at all possible in one fell swoop.

The panel took the matter under submission.

Circuit Judges Alex Kozinski, William A. Fletcher and Ronald M. Gould sat on the panel that heard Thursday's arguments.

The plaintiffs are represented by R. Rex Parris, Alexander R. Wheeler and John M. Bickford of R. Rex Parris Law Firm and Charles T. Mathews, George S. Azadian and Zack I. Domb of The Mathews Law Group.

Hilton is represented by Angela C. Agrusa and David B. Farkas of Liner LLP.

The case is Brian Connelly et al. v. Hilton Grand Vacations Company LLC, case number 14-55431, in the U.S. Court of Appeal for the Ninth Circuit.

--Editing by Philip Shea.