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Class Attys In Uber Text Message Spat Get \$6.3M In Fees

By **Shayna Posses**

Law360 (March 1, 2018, 6:20 PM EST) -- The attorneys representing individuals who allegedly received unwanted text messages from Uber scored most of the fees they sought Wednesday after securing a \$20 million settlement, with an Illinois federal judge awarding them roughly \$6.31 million for working on a matter he said involved "real and significant risk" for counsel.

In an order dated Monday and entered on the docket Wednesday, U.S. District Judge Thomas M. Durkin knocked a little more than \$37,000 off the \$6.35 million **class counsel sought** for their work on Telephone Consumer Protection Act litigation accusing Uber Technologies Inc. of sending unwanted texts to consumers encouraging them to sign up, and to individuals who started, but didn't complete, the driver application process.

The judge disagreed slightly with class counsel's application of the sliding-scale percentage approach to attorneys' fees — the circuit's preferred method for these sorts of TCPA settlements — which divides the settlement into amount-based tiers, with class counsel receiving a percentage of each tier that decreases as the size of the fund increases.

Where class counsel and Judge Durkin differ is in the application of the upward adjustment to the percentages that are added in high-risk cases like this one, he explained. The attorneys asked the court to apply the same 6 percent bump to the two tiers here, but he declined, saying case law — specifically an April 2017 Illinois federal court decision in a matter called *Aranda v. Caribbean Cruise Line Inc.* — calls for the risk premium to be decreased for each tier.

Judge Durkin said, "As the *Aranda* court explained, plaintiffs' counsel's incentives change as the risk of non-recovery decreases. Plaintiffs' counsel articulated no reason — and the court sees no reason — to distinguish the risk assessment in this case from that in *Aranda*, where the court applied a lower, five-point premium to the second band."

As a result, the judge applied a six-point premium to the first tier, awarding class counsel 36 percent of \$10 million tier and 30 percent of the second tier, which comes out to a little more than \$9 million after subtracting costs and incentive awards, bringing the total award to about \$6.31 million.

Judge Durkin also overruled the sole objection to **the settlement**, filed by Kerry Ann Sweeney, who argued that the requested attorneys' fees were excessive and didn't appropriately follow the sliding-scale approach laid out in *Aranda*.

While the judge stopped short of striking the objection — relief the plaintiffs had requested — he nonetheless wasn't swayed by Sweeney's argument, noting that the individuals

leading the suit did apply the sliding-scale approach. There was just one problem with their application, which Judge Durkin said he identified and addressed independently of Sweeney's objection.

Sweeney told Law360 in a Thursday email that she is disappointed that the court didn't limit the attorneys' fees in the amount she requested.

She said, "I will consider all of my options going forward."

The dispute dates back to late 2014 when Jonathan Grindell and James Lathrop sued Uber in California federal court, alleging that they had considered becoming drivers for the company and had provided it some information, but ultimately decided not to follow through. Yet Uber continued texting them, asking them to complete their applications even after they asked that the messages stop, they said.

Other plaintiffs joined the action in early 2015, and later that year, Maria Vergara filed suit in Illinois federal court, alleging that she received a slew of unsolicited texts from Uber over several weeks despite never expressing any interest in being a driver or rider, according to court filings.

Both actions survived multiple attempts by Uber to escape the allegations, and after the U.S. Judicial Panel on Multidistrict Litigation denied efforts to have the many TCPA suits against the ride-hailing giant transferred to Illinois for consolidated proceedings in 2016, class counsel managed to negotiate a nationwide settlement.

The deal, which won the judge's preliminary approval in August, is expected to provide more than \$120 for each claimant and requires Uber to implement changes to reduce or eliminate the sorts of unauthorized text messages challenged in the litigation, according to court filings.

The settlement involves three classes: One includes everyone texted about the company's Refer-a-Friend program, another is comprised of potential drivers who partly completed Uber's application process and received texts after asking the company to stop sending them, and a third is made up of others who received unwanted messages.

In making their fee request in November, the plaintiffs' attorneys asserted that those class members could have received nothing had the lawyers not fought for them in the face of Uber's substantial resources, strong legal defenses and willingness to litigate. Indeed, class counsel noted, similar suits against Uber have been unsuccessful.

Representatives for Uber and the other plaintiffs didn't immediately return requests for comment Thursday.

The plaintiffs are represented by Myles McGuire, Evan M. Meyers and Paul T. Geske of McGuire Law PC, and Hassan A. Zavareei, Andrea R. Gold and Andrew J. Silver of Tycko & Zavareei LLP.

Uber is represented by Austin V. Schwing of Gibson Dunn & Crutcher LLP, David J. Fioccola and Adam J. Hunt of Morrison & Foerster LLP, and John C. Ellis of Ellis Legal PC.

The case is Vergara et al. v. Uber Technologies Inc., case number 1:15-cv-06942, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Rachel Graf. Editing by Adam LoBelia.

Update: This story has been updated to include a comment from the settlement objector.