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7th Circ. Appeal Of Uber TCPA Deal In 'Bad Faith,' Attys Say

By Ben Kochman

Law360 (July 26, 2018, 9:07 PM EDT) -- Counsel for a proposed class of drivers and riders who settled a suit against Uber Technologies Inc. over unsolicited texts for \$20 million urged the Seventh Circuit on Wednesday to reject an objection to the deal, arguing that the challenge to roughly \$6.31 million in attorneys' fees awarded as part of the agreement had been made in "bad faith."

The attorneys, who in March **were awarded** the fees by an Illinois federal judge who said the suit alleging Uber breached the Telephone Consumer Protection Act involved "real and significant risk," claimed objector Kerry Sweeney improperly raised concerns over what she called the "unprincipled" risk premiums tacked onto the base rates of the "sliding scale" that courts in the circuit prefer to use to resolve TCPA cases. The system 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.

Sweeney raised her objection to the premiums for the first time to the Seventh Circuit earlier this month, having not mentioned it while the case was at the lower court, lawyers for the proposed class of Uber users wrote.

"Sweeney had multiple opportunities to challenge plaintiffs' fee request or the district court's findings if she thought this litigation was not risky enough to warrant upward adjustments to the sliding-scale formula's base percentages," the lawyers said. "She failed to properly do so and has thus waived this argument."

They added that Sweeney's argument that the risk premiums were too high is "frivolous" because the circuit recently signed off on "nearly identical" risk premiums as part of attorneys' fees awarded in April in *Birchmeier v. Caribbean Cruise Line Inc.*, another TCPA class action. In that case, an Illinois federal judge in April awarded two Chicago-based plaintiffs firms at least \$14 million in fees for their work on a class action over millions of unwanted phone calls soliciting Caribbean cruises, telling them they can apply for more based on the class' recovery.

They also accused Sweeney of acting in "bad faith" and urged the appeals court to dismiss the case.

The dispute stems from litigation accusing Uber of sending unwanted texts to consumers encouraging them to sign up, and to individuals who started, but didn't complete, the driver application process. In March, 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 the case, disagreeing slightly with class counsel's application of risk premiums.

The attorneys had asked the court to apply the same 6 percent bump to the two tiers here, but the judge declined, saying case law — specifically an April 2017 Illinois federal court decision in *Aranda v. Caribbean Cruise Line Inc.* — calls for the risk premium to be decreased for each tier.

Counsel for both sides did not immediately respond to requests for comment on 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.

Sweeney is represented by Robert W. Clore of Bandas Law Firm.

The case is Maria Vergara et al. v. Kerry Sweeney, case number 18-1659, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Shayna Posses. Editing by Breda Lund.