

Stryker Says Junk-Fax Class Action Would Hurt Doctors

By **Andrew Scurria**

Law360, New York (August 20, 2013, 5:10 PM ET) -- Stryker Corp. on Monday slammed a Telephone Consumer Protection Act case over faxes touting orthopedics seminars, calling the suit a money grab that will harm the primary care practices it purports to represent.

The medical device maker urged U.S. District Judge Robert J. Jonker to refuse a class certification bid from Physicians Healthsource Inc., a litigious Cincinnati medical practice accusing Stryker of sending illegal fax blasts promoting orthopedic technology seminars to more than 8,000 numbers stored by the American Medical Association.

Stryker told the judge that the class couldn't be certified because Physicians Healthsource's interests in pursuing the litigation run counter to primary care physicians' interests in being apprised of continuing education opportunities.

"That a plaintiff may pursue relief on a classwide basis does not mean that class members' interests are aligned with those of class representatives or are served by class litigation," its brief said. "Here, [Physicians Healthsource] has usurped the professional interests of PCPs in receiving notice of medical education seminars provided through the AMA's Physician Masterfile, to advance its personal goal of profit."

Stryker also attacked Physicians Healthsource's adequacy as a class representative and leveled harsh criticism at its delay in filing suit until three years after it allegedly received the first junk fax. According to the brief, its decision to defer the litigation allowed more class claims to accrue and maximized the potential windfall in attorneys' fees, but also doomed as untimely claims from potential class members who received faxes before July 2008.

"Accepting as true [Physicians Healthsource's] allegations that these facsimiles were unwelcome, these actions smack of gamesmanship, not fiduciary obligation or the 'vigorous pursuit' of class interests," Stryker said.

The suit, lodged in July 2012, argues that Stryker's faxes ran afoul of a 2006 Federal Communications Commission rule-making that updated the TCPA to clarify that even faxes sent to businesses with an existing business relationship with the sender must contain contact information for recipients who want to opt out of future messages.

The company allegedly sent out more than 15,000 messages during the class period, none of which contained the required opt-out notice.

Stryker moved unsuccessfully to toss the complaint, with Judge Jonker ordering an inquiry into whether the faxes were advertisements for Stryker products that fell within the ambit of the TCPA, as opposed to merely informational messages.

The judge also denied Physicians Healthsource's nascent bid for class certification, prompting it to mount an amended motion in July.

Stryker hit back on Monday with arguments that Physicians Healthsource's interests are antagonistic to the rest of the proposed class, leaning on a survey purportedly indicating that the majority of physicians value orthopedics education and have no objection to receiving fax transmissions regarding such seminars.

"[Physicians Healthsource], by contrast, wants to put an end to these transmissions and impose liability on each one," the brief said. "The interests of [Physicians Healthsource] and the putative class could not be more diametrically opposed."

The faxes went to machines that were used by multiple doctors and practices at the same time, including Physicians Healthsource, according to the brief. This would require an individualized inquiry for each transmission, as the owner of the fax machine is the only entity with standing to pursue a TCPA claim, Stryker said.

"If [Physicians Healthsource] is truly 'typical' of primary care practices, this court faces the daunting prospect of over 15,000 separate determinations of who owned the fax machine when multiple parties could have a claim of ownership," the brief said.

In addition, the determination of whether the faxes constitute "advertisements" under the TCPA is necessarily individualized and would depend on how the message's content related to each recipient's medical offerings, according to the company.

Stryker also took a personal shot at the plaintiffs' attorneys, saying they should have disclosed when applying to practice in Michigan that they had been admonished by the Seventh Circuit for allegedly using trial discovery to seek out new clients in a separate TCPA case.

Counsel for the plaintiffs were not immediately available for comment Tuesday.

Stryker is represented by David S. Almeida of Sheppard Mullin Richter & Hampton LLP and Anthony J. Anscombe of Sedgwick LLP.

The plaintiffs are represented by Brian J. Wanca and Ryan M. Kelly of Anderson & Wanca.

The case is Physicians Healthsource Inc. v. Stryker Sales Corp., case number 1:12-cv-00729, in the U.S. District Court for the Western District of Michigan.

--Editing by Elizabeth Bowen.