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Discover Makes Final Push For \$8.7M Robocalling Settlement

By **Andrew Scurria**

Law360, New York (January 13, 2014, 1:53 PM ET) -- Discover Financial Services has struck an \$8.7 million settlement of claims that it failed to obtain proper consent from up to 9 million credit card holders before contacting their cellphones with automated calls and prerecorded messages, according to papers filed Friday in California federal court.

A putative class of customers of DFS subsidiary Discover Bank asked U.S. District Judge Jeffrey S. White to grant final approval to the deal, which resolves a pair of lawsuits and won the judge's preliminary nod in August.

In the suits, plaintiffs Andrew Steinfeld and Walter Bradley alleged that the financial giant placed harassing, nonemergency calls using an automatic telephone dialing system and an artificial or prerecorded voice without their prior express consent.

The settlement establishes a nonreversionary fund and averts a bid by the company to send the claims to individual arbitration under a purportedly binding provision in its cardholder agreements.

"The relief the settlement provides is a very good result, particularly in view of the risks and delays involved in continued litigation, including the very substantial risk that the court would find that class members' claims were subject to mandatory, individual arbitration," the plaintiffs said Friday.

Class counsel will receive one-quarter of the settlement sum in fees, totaling \$2.2 million, according to the agreement.

The deal covers a six-year period stretching back to 2007. During that time, Discover allegedly began contacting its cardholders at all hours of the day, with call recipients unable to stop the calls because they used only automated messaging with no apparent opt-out mechanism, according to the complaints. The plaintiffs alleged that the calls violated the Telephone Consumer Protection Act and demanded treble damages of \$1,500 for each purposeful violation.

This all came after the Federal Communications Commission issued a citation to DFS in 2007 for TCPA violations that determined the company had "made prerecorded telephone calls to consumers who 'had not expressly invited or authorized the call(s),'"

 according to the suits.

The suits pointed to a 2008 FCC ruling that confirmed creditors cannot place an autodialed or prerecorded call to a cellphone if they do not have the user's prior express consent.

As the plaintiffs argued, in order to give prior express consent to a creditor, a consumer must provide the creditor with his or her phone number at the time the credit relationship is originated, while they did not list numbers on any documents related to credit applications.

Discover maintained that under FCC rules, prior express consent could be given at any point in time during the credit relationship, saying that the FCC did not intend that prior consent come at the time of origination in the context of credit and mortgage relationships that last for many years.

The company also mounted a bid to compel arbitration and asserted that under its cardholder contracts any disputes from the credit relationship must be arbitrated on a nonclass, nonconsolidated and nonrepresentative basis.

Discover's cardholder agreements contain waivers prohibiting classwide claims. Such provisions were declared unconscionable and invalid by the California Supreme Court in 2005, but in 2011 the U.S. Supreme Court abrogated the so-called Discover Bank Rule established by that decision.

The arbitration question was put on hold in the instant suit while the parties explored a settlement.

"Plaintiffs recognized the risk that the court would rule in Discover's favor, particularly given recent court decisions broadly interpreting agreements to arbitrate and the lack of complete clarity as to whether TCPA claims are arbitrable," they said on Friday.

Since settlement talks began, the risk that Discover would prevail in compelling arbitration had only increased due to intervening defendant-friendly rulings in California in TCPA class actions against **Kroger Co.**, **Citi Holdings Inc.** and **DirectTV LLC**, according to their motion.

A hearing on final approval was scheduled for Feb. 14.

Representatives for the parties were not immediately available for comment on Monday.

The plaintiffs are represented by Jonathan D. Selbin, Daniel M. Hutchinson and Nicole D. Reynolds of Lieff Cabraser Heimann & Bernstein LLP, by Mark Ankcorn of Casey Gerry Blatt & Penfield LLP, by Beth E. Terrell of Terrell Marshall Daudt & Willie PLLC and by Matthew R. Wilson of Meyer Wilson Co. LPA.

Discover is represented by Julia B. Strickland, Lisa M. Simonetti and Shannon E. Ponek of Stroock & Stroock & Lavan LLP.

The case is Steinfeld v. Discover Financial Services et al., case number 3:12-cv-01118, in the U.S. District Court for the Northern District of California.

--Editing by John Quinn.