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Second Circuit Decision Underscores Risk Of Aggressive Settlement Class Notice Programs

Although defendants settle class actions to "buy peace" through class-wide releases, it is well-established that class releases will not be enforced in certain situations, such as when notice to the settlement class was constitutionally inadequate. In *Hecht v. United Collection Bureau*, 2012 U.S. App. LEXIS 17374 (2d Cir. Aug. 17, 2012), the Second Circuit recently highlighted that risk, finding that a class settlement did not bar a claim under the federal Fair Debt Collection Practices Act ("FDCPA") because notice of the settlement solely through a single advertisement in *USA Today* was insufficient. While the general principle reiterated in *Hecht* is not new, the Second Circuit's analysis of how much notice was required to satisfy due process in that case likely will discourage parties from settling class actions at least in some circumstances.

Case Background

Chana Hecht brought an individual FDCPA action against United Collection Bureau ("UCB") based on allegations that UCB called her without disclosing its identity or stating that it was attempting to collect a debt. UCB successfully moved to dismiss the action as *res judicata* based on a prior class action settlement in *Gravina v. United Collection Bureau* ("*Gravina*"). There was no dispute that Hecht was a member of the *Gravina* class and did not opt out, or that the claims in Hecht's individual case were identical to those released in *Gravina*.

The *Gravina* class was certified for settlement purposes under Federal Rule of Civil Procedure 12(b)(2). The settlement gave each named class representative $1,000, the maximum recovery for class representatives under the FDCPA, plus a $1,500 incentive award. The class was awarded $13,254, which the court found to be 1% of UCB's net worth and therefore the maximum possible class recovery, distributed to charity as a *cy pres* payment. Class counsel received $90,000 in fees, and UCB was enjoined to "use its best efforts" to identify itself in and disclose the purpose of future debt collection calls. There were no objections to the settlement.

In opposing dismissal of her individual claim, Hecht argued that she was not bound by the class release in *Gravina* because a single advertisement in *USA Today* did not satisfy due process. The district court rejected this argument, finding that additional notice was not reasonably practicable given that there were more than two million class members and the settlement amount was too small to justify a more expensive notice program.

The Second Circuit's Decision

After noting that judgments in class actions do not bind absent class members "where to do so would violate due process," the Second Circuit began its analysis by examining whether Hecht had any right to notice of the *Gravina* settlement. Citing the United States Supreme Court's decisions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558-59 (2011), the court found that notice and an opportunity to opt out of a settlement are required not only in cases brought "predominantly" for money damages, but also when a claim for money damages is more than "incidental." In *Gravina*, the court held, the claim for monetary relief clearly did not predominate

because the class was defined "as victims of a completed harm with no reference to ongoing injury or risk of future injury." Indeed, the Gravina complaint did not even request injunctive relief, and only the damages remedy was available to the entire class. Notice therefore was constitutionally required.

The court then went on to consider whether the one-advertisement notice program was sufficient. It reiterated that notice must be "the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" -- not just a "mere gesture," but rather a real, albeit reasonable, attempt to actually reach class members. Based on prior Second Circuit cases, the court opined that, while publication may be sufficient when class members cannot be identified through reasonable diligence, a single advertisement in one publication is unlikely to be sufficient if no other notice is given. Rather, multiple ads in multiple publications generally are required.

Most significantly, the Second Circuit rejected UCB's argument "that the negligible amount of money to be awarded per person under the *Gravina* settlement justified lesser notice." Noting the contrast between the $1000 in statutory damages available in an individual FDCPA action and the $500,000/1%-of-net-worth limitation on FDCPA class damages, the court expressed the view that "it was all the more important that Hecht receive adequate notice before being deprived of her individual right to sue."

What *Hecht* Means

The notice program is a key deal point in every class action settlement, as each dollar spent on notice as a practical matter reduces the funds available for distribution to the class. *Hecht* should remind class action defendants that it rarely is in their interest to accept a weak notice program, as they are not really buying peace if their class-wide release is subject to collateral attack. While most class settlements include significantly more notice than a single *USA Today* ad, there are cases like *Hecht* in which a class settlement simply may not be possible without a very inexpensive notice program. In those cases, the limited dollars available must be used wisely, or the settlement may not be buying peace.

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