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Consumer and Class Action Defense

Second Circuit Holds No Prior Express Consent Under TCPA After Plaintiff Disclosed His Cell Phone Number to Creditor

Nigro v. Mercantile Adjustment Bureau, 13-1362 (2nd Cir. Oct. 16, 2014)

In *Nigro v. Mercantile Adjustment Bureau*, plaintiff called a power company requesting to discontinue electric service to his mother-in-law's apartment because she had passed away. During the call, the power company told him that in order to cancel the service his phone number was required. Plaintiff provided the number, but was not aware that there was then a $68 balance on the account. The power company later engaged Mercantile Adjustment Bureau (MAB) to collect, and 72 automated telephone calls were placed to plaintiff's cell phone. Plaintiff had not received any bills regarding the balance.

Plaintiff sued MAB, alleging, among other claims, violations of the TCPA. The district court ruled in MAB's favor on summary judgment, holding that plaintiff had provided prior express consent to receive the calls.

The U.S. Court of Appeals for the Second Circuit reversed, holding that plaintiff did not provide prior express consent to receive the calls. In arriving at that decision, the court first appeared to hold that prior express consent can only be obtained during the transaction that gave rise to the debt based on the court's interpretation of a 2008 Federal Communications Commission (FCC) ruling. The court reasoned that plaintiff did provide his cell phone number long after the debt was incurred, was unaware that a balance remained and was not

responsible for the debt.

This, of course, begs the question as to what happens when a debtor discloses a cell phone number after the debt is incurred. Importantly, in a footnote at the end of the opinion, the Second Circuit qualified its holding by excluding from the scope of its decision the "after acquired cell phone number from the debtor" situation, as well as where an official representative of an estate who would be responsible for the deceased's debts would disclose his cell phone number. Specifically, the court stated:

We do not decide what the outcome would be if a consumer were to open an account with a creditor and initially provide only his home phone number, but later in the course of the relationship provide a wireless number. Whether a subsequently given phone number is given as part of a continuing "transaction," or a transaction separate from the initial one that "resulted in the debt owed," is a question for future courts. Here, Nigro sought to close the account, not service it. In no sense was he incurring a debt. Since Nigro was not an official representative of Thomas's estate, we also need not decide whether the outcome of this case would change if he had been.

Thus, the Second Circuit's holding in this case appears to be limited as follows: a person who is not responsible for the debt, but has nonetheless disclosed his cell number after the debt was incurred, does not give prior express consent under the TCPA. Whether the fact that the person had no knowledge of an outstanding balance when disclosing the cell phone number would ultimately be a material consideration is uncertain. It appears that the Second Circuit did take that into consideration when plaintiff was told that he needed to provide a number solely for the purposes of cancelling service.

Curiously, the Second Circuit referenced the "established business relationship" exception in the FCC's 1992 ruling; however, that exception has only been applied in the context of telemarketing calls to residential landlines. This decision underscores the importance for collection agencies to scrub accounts to exclude calls to cell phone numbers and to verify consent before making automated calls.

Individual and Putative Class Action Claims Not Mooted Despite Failure to Accept Rule 68 Settlement Offer

Gomez v. Campbell-Ewald Co., 13-55486, 2014 WL 4654478 (9th Cir. Sept. 19, 2014)

In *Gomez v. Campbell-Ewald Co*., the U.S. Court of Appeals for the Ninth Circuit held that: (1) a putative class action plaintiff's rejection of a complete settlement offer did not moot personal or class claims; (2) the Telephone Consumer Protection Act (TCPA) restriction on sending text messages is not unconstitutional; and (3) a party may be held vicariously liable for violation of the TCPA.

Plaintiff brought a personal and putative class action claim under the TCPA, alleging that defendant instructed or allowed a third-party vendor to send unsolicited text messages on behalf of the U.S. Navy, with which defendant had a marketing contract. Defendant attempted to settle the matter, offering plaintiff $1,503 per violation, plus reasonable costs. The offer was not accepted. Defendant moved to dismiss, arguing that rejection of the offer mooted all claims. The motion was denied, and defendant then moved for summary judgment based upon the doctrine of derivative sovereign immunity, which motion was granted.

Plaintiff appealed, and defendant moved to dismiss the appeal for lack of jurisdiction, again arguing that all claims were moot. The court rejected this argument on its merits, looking to the recent case of *Diaz v. First Am. Home Buyers Prot. Corp*., 732 F.3d 948 (9th Cir. 2013), where the court had expressly held that "[a]n unaccepted [Fed. R. Civ. P.] 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." Thus, the unaccepted offer, by itself, was insufficient to moot plaintiff's claim. Likewise, the Ninth Circuit has already held, in *Pitts v. Terrible Herbst, Inc*., 653 F.3d 1081, 1091-92 (9th Cir. 2011), that "an unaccepted Rule 68 offer of judgment — for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification — does not moot a class action." The court did not deviate from this prior holding. Of note, defendant acknowledged these rulings but argued that the court should depart from precedent due to the U.S. Supreme Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), where the high court held that plaintiff's rejection of a settlement offer of complete relief mooted the claim. However, *Symczyk* involved a Fair Labor Standards Act claim, not a class action. Therefore the Ninth Circuit found that it remained bound to the precedent set by *Diaz* and *Pitts*.

The court also rejected defendant's constitutional challenge, finding that a restriction on unsolicited text messaging does not violate the First Amendment. Finally, the court held that despite the undisputed fact that defendant did not itself send the text messages, it could be held vicariously liable for the party that did. While the statute is silent as to vicarious liability, the court incorporated ordinary tort-related vicarious liability rules, such that vicarious liability can be found where an agency relationship (as defined by federal law) is established with the third-party caller.

Seventh Circuit Assesses Reasonableness of Fee Awards in Class Settlements

Redman v. RadioShack Corp., 14-1470, 2014 WL 4654477 (7th Cir. Sept. 19, 2014)

In *Redman v. RadioShack*, the U.S. Court of Appeals for the Seventh Circuit clarified how district courts must determine the reasonableness of fee awards in proposed class settlements and offered guidance on what settlements are subject to the "coupon settlement" provisions of the Class Action Fairness Act (CAFA). In a separate case that had been consolidated with the *Redman* appeal, the court decided whether a merchant may be held liable for statutory damages under the Fair and Accurate Credit Transactions Act (FACTA) for printing the month of a credit card's expiration date on a paper receipt.

The first appeal in *Redman* arose from a class action alleging that RadioShack violated FACTA's truncation requirements, 15 U.S.C. 1681c(g), by printing receipts that showed the expiration dates of customers' credit and debit cards. Over the objection of two groups of class members, the district court approved a class settlement in which RadioShack paid class counsel approximately $1 million in attorneys' fees and administrative costs of approximately $2.28 million, and provided class members with about $830,000 worth of vouchers that could be used to purchase goods from RadioShack.

In an opinion written by Judge Richard A. Posner, the Seventh Circuit reiterated that when a trial court is called upon to review the fairness of a class settlement, the law requires more than a judicial rubber stamp because there is a "built-in conflict of interest in class action suits." The defendant only cares about the total cost of the settlement, while class counsel, as "'economic man,' . . . presumably is interested primarily in the size of the attorneys' fees provided for." Due to this conflict of interest, the court found the magistrate judge's expression of confidence that the settlement was fair because it was arrived at through arm's-length negotiations between experienced counsel "naïve."

While the magistrate judge had concluded that attorneys' fees under the settlement accounted for only about one-quarter of the total settlement amount ($1 million/$4.1 million), the administrative costs of the settlement should not have been included in the calculation because they benefited class counsel and class members equally. The correct ratio for determining the reasonableness of a fee award is the ratio of the fee award to the fee award, plus what the class members receive. Because the class members received at most $830,000 (they actually received less because the actual value of the coupons was less than face value), the ratio of the fee award to the settlement amount was 1 to 1.83, which equated to a contingent fee of 55 percent, not 25 percent as the magistrate judge had found.

The magistrate judge also erred by failing to determine the actual — as opposed to face — value of the coupons. The actual value was well under face value because the coupons expired in six months, a maximum of three coupons could be stacked for one purchase, and part of a coupon's value would be lost on any purchase for less than the total face value of the coupons used. Moreover, the cost of redeeming the coupons to RadioShack was less than their face value because RadioShack pays wholesale prices for its inventory and the coupons would induce some class members to make additional purchases. The parties and the magistrate judge should have attempted to determine the actual value of the coupons, perhaps through expert testimony under Fed. R. Evid. 706.

Although class counsel argued that the fee award was reasonable because their hourly rates multiplied by the hours they worked totaled nearly $1 million, the central consideration governing the reasonableness of the fee award was "what it buys" the class members, not how much time and effort class counsel invest in the case. In determining the appropriateness of a fee award, the court may begin by examining the time spent by class counsel. But ultimately the amount must be reasonable compared to the value received by the class. The fee award here, at 55 percent of the settlement, was plainly excessive.

The parties argued that the Class Action Fairness Act's (CAFA) coupon provisions, 28 U.S.C. § 1712(a)-(b), did not apply because the settlement provided for vouchers that could be used for the full price of RadioShack products, while coupons under CAFA were limited to discounts off of full prices. The court disagreed. A coupon includes both discounts off full prices and vouchers covering the entire price of a product. Thus, the magistrate judge erred by failing to ensure, as required by CAFA Section 1712(a), that the fee award was proportional to the "value to class members of the coupons that are redeemed." While CAFA does not impose a rigid rule requiring the redemption value of coupons to be determined after they expire (which would mean postponing payment of the fee award until then), lower courts may not, before the redemption period expires, attempt to determine what the ultimate value of coupons will prove to be without an estimate by a qualified expert. (Slip. op. at 17-22).

The court noted four other defects in the settlement. First, the value of the coupons to the class members was uncertain and unproved, while class counsel received a guaranteed $1 million cash. Second, the settlement contained a "clear-sailing clause" providing that RadioShack would not contest class counsel's request for fees. Such a provision is not *per se* unlawful, but the lower court should have subjected it to "intense critical scrutiny." Third, the lower court violated Fed. R. Civ. P. 23(h) by allowing class counsel to file their attorneys' fees motion after the deadline for class members to object to the settlement had expired. Fourth, the named plaintiff was employed by the law firm for which principal class counsel once worked. Lower courts must ensure that there is a genuine arm's-length relationship between class counsel and the named plaintiffs because the latter are fiduciaries of the class.

The court remanded the case to the district court with instructions to reassess "the division of the spoils between class counsel and class members." (Slip op. 27-28). The total amount of the settlement, $4.1 million, was appropriate, and $830,000 in coupons afforded to the class members was adequate given the RadioShack's parlous financial state. (Slip. op. at 15-16, 27). But the share of the settlement going to class members should be increased and the share going to class counsel reduced.

In a separate FACTA action that had been consolidated with the *Redman* appeal, plaintiff alleged that a retailer, Shoe Carnival, willfully violated FACTA's truncation requirements by printing the month of expiration dates of credit cards on its receipts. The court found that the statute was ambiguous as to whether printing only the month on a receipt violated FACTA because the statute prohibited printing the "expiration date," but it did not define that term or explicitly require merchants to omit both the month and year of an expiration date. Because printing the month alone on a receipt was permissible under a reasonable reading of the ambiguous text of FACTA, Shoe Carnival's alleged violation was not willful, and accordingly plaintiff could not maintain suit for statutory damages under FACTA.

Providing Cellular Telephone Number to Medical Intermediaries Constitutes Consent Under the TCPA

Mais v. Gulf Coast Collection Bureau, Inc., 13-14008, 2014 WL 4802457 (11th Cir. Sept. 29, 2014)

The U.S. Court of Appeals for the Eleventh Circuit in *Mais v. Gulf Coast Collection Bureau, Inc.* held that the district court was wrong to not follow the Federal Communications Commission's (FCC's) previous orders on the interpretation of Telephone Consumer Protection Act (TCPA) consent, determining that medical debt is essentially like every other debtor-creditor relationship.

The court also held that TCPA consent was obtained when the wife of the plaintiff/patient gave his cell phone number on hospital admission forms. The court discussed that TCPA consent was established through the provision of the telephone number in situations where the medical provider has provided the specific Health Insurance Portability and Accountability Act (HIPAA) disclosures, which disclose that information would be provided to other medical providers for purposes including payment:

Ultimately, by granting the Hospital permission to pass his health information to Florida United for billing, Mais' wife provided his cell phone number to the creditor, consistent with the meaning of prior express consent announced by the FCC in its 2008 Ruling.

Unanswered Phone Calls Do Not Constitute "Communications" for Purposes of Establishing Liability Under Massachusetts Debt Collection Regulations

Barbara Camacho v. Northland Group, Inc. et al., 1:13-cv-107730-RWZ (D. Mass Sept. 17, 2014)

In *Barbara Camacho v. Northland Group, Inc.*,the U.S. District Court for the District of Massachusetts held that unanswered telephone calls without a voicemail message do not constitute "communications" as defined by the Fair Debt Collection Practices Act (FDCPA). Plaintiff asserted FDCPA claims against defendant arising out of defendant's attempt to collect a debt incurred by her husband. Plaintiff alleged that defendant engaged in harassing phone calls with both her and her husband, and threatened her with legal action if she refused to pay the debt. Plaintiff only offered her unsubstantiated deposition testimony in support of her claim for harassment. However, defendant offered certified copies of all phone calls by and between plaintiff and defendant's representatives, along with its account notes and call records reflecting that the recorded calls were the only communications that took place. The court held that in the face of such extensive and undisputed documentary evidence, plaintiff's own self-serving testimony was insufficient to avoid the entry of summary judgment. Furthermore, plaintiff was unable to pursue a claim of harassment on behalf of her husband.

Plaintiff also asserted that defendant communicated with plaintiff more than two times in a seven-day period in violation of Massachusetts debt collection regulations prohibiting such conduct. The record evidence demonstrated that although more than two calls were made in a seven-day period to plaintiff, all such calls went unanswered and no message was left for plaintiff. The court held that "unanswered phone calls with no message convey no information and so cannot be deemed 'communication' under the plain meaning of the statutes." Because there was no evidence of two instances of actual communication with plaintiff in a seven-day period, there was no violation of the Massachusetts' regulations. This was an issue of first impression in Massachusetts. Importantly, the court abstained from addressing defendant's argument that plaintiff lacked standing to sue under the regulations because she did not incur the debt on which defendant sought collection. Hinshaw was counsel for defendant.

New Rules for New York State Debt Collection Lawsuits

On September 15, 2014, the Administrative Board of the New York Court System adopted new rules specifically addressing debt collection lawsuits. The new rules are effective October 1, 2014 for all debt collection lawsuits, except for a short exemption for debt purchasers that expires on July 15, 2015. After July 15, 2015, the new rules will apply to all collection lawsuits without exception. The official administrative order is identified as AO-185-14.

The new rules explicitly state that "The County Clerk or clerk of the court shall refuse to accept for filing a default judgment application that does not comply with the requirements of this section" and require that specific affidavits be included with consumer debt collection lawsuits. Depending upon the classification of the party filing the suit, there are specific form affidavits that require different types of supporting documentation as exhibits. Those exhibits can include: a copy of the credit agreement as defined by the new rules, the bill of sale or written assignment of the account where applicable, and relevant business records of the original creditor that set forth the name of the defendant; the last four digits of the account number; the date and amount of the charge-off balance; the date and amount of the last payment, if any; the amounts of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf the defendant; and the balance due at the time of sale.

All consumer debt collection lawsuits must now also contain an "affirmation of non-expiration of statute of limitations" executed by counsel for the party seeking payment on the debt.

Please note that at the time this article was published, all of the approved affidavit forms were not yet available on the New York court system's website; however, the proposed affidavit forms are available.

The new court rules are identified as follows:

- Section 202.27-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the Supreme Court and the County Court)
- Section 202.27-b Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the Supreme Court and the County Court)
- Section 208.6(h) Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the New York City Civil Court)

- Section 208.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the New York City Civil Court)
- Section 210.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the City Courts Outside the City of New York)
- Section 210.14-b Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the City Courts Outside the City of New York)
- Section 212.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the District Courts)
- Section 212.14-b Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the District Courts)
- Section 202.6 Request for judicial intervention (Uniform Civil Rules for the Supreme Court and the County Court)