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Newsletters

Consumer & Class Action Litigation Newsletter - November 2014

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Second Circuit Certifies to N.Y. Court of Appeals Questions Regarding Whether N.Y.C. Local Law 15, Which Regulates Debt Collection Agencies, Impermissibly Regulates Attorney Conduct

Eric M. Berman, P.C. v. City of New York, No. 13-598, 2014 WL 5463299 (2d Cir. Oct. 29, 2014) *certified question accepted*, No. 233, 2014 WL 6473627 (N.Y. Nov. 20, 2014) and *certified question accepted*, 2014 WL 6475840 (N.Y. Nov. 20, 2014)

In *Berman v. City of New York*, the U.S. Court of Appeals for the Second Circuit certified to the New York Court of Appeals questions regarding whether New York City Local Law 15 impermissibly regulates the practice of law. Previously, New York City required debt collection agencies to obtain a license prior to engaging in debt activities. Local Law 15 amended, among other things, the definition of a debt collection agency and includes attorneys in certain instances.

Local Law 15 does not, on its face, appear to regulate an attorney who is collecting a debt in her representative capacity as a licensed attorney, in the name of a client, and through activities that only a licensed attorney can perform. However, its definition of a debt collection agency includes "any attorney-at-law or law firm or part thereof who regularly engages in activities

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traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt or other activities as determined by rule of the commissioner." 2014 WL 5463299, at *1 (emphasis removed). "This portion of the definition of a debt collection agency appears to cover attorney conduct, such as calling a debtor on the telephone, when it is not performed in the name of a client and in a manner reserved solely for licensed attorneys." *Id.* at *4.

The Second Circuit concluded that it could not "predict how the New York Court of Appeals would answer the question of whether New York City may permissibly regulate the conduct of an attorney who is functioning as a traditional debt collector and not in a manner reserved exclusively for attorneys." *Id.* at *6. In making that determination, it considered prior New York state cases that touched upon conduct of attorneys, noting a type of spectrum ranging from the regulation of the practice of law to subjecting an attorney who runs a fruit stand to regulations governing fruit stands. Ultimately, the Second Circuit found that the issues presented by Local Law 15 were too different from any of the cases it considered to allow the court to make such a prediction.

Plaintiffs, law firms that attempt to collect debts, also contended that the New York City Charter impermissibly gives the New York City Department of Consumer Affairs the authority to grant and withhold licenses to practice law, which is a power vested solely with the state.

Accordingly, the Second Circuit certified to the New York Court of Appeals the following two questions:

1. Does Local Law 15, insofar as it regulates attorney conduct, constitute an unlawful encroachment on the State's authority to regulate attorneys, and is there a conflict between Local Law 15 and Sections 53 and 90 of the New York Judiciary Law?
2. If Local Law 15's regulation of attorney conduct is not preempted, does Local Law 15, as applied to attorneys, violate Section 2203(c) of the New York City Charter?

Lawyers and law firms that act in the consumer and debt collection space are closely watching this case. We will continue to closely monitor whether the New York Court of Appeals accepts the case and the results that follow.

Seventh Circuit Rules That If the Plaintiff Asks for the Moon, Only Offering the Moon Extinguishes the Controversy

Smith v. Greystone Alliance, LLC, No. 14-1758, 2014 WL 5861338 (7th Cir. Nov. 13, 2014)

In this Fair Debt Collection Practices Act (FDCPA) case, the U.S. Court of Appeals for the Seventh Circuit held that extinguishing the controversy by making an offer of judgment does not diminish the court's jurisdiction. Here, defendant served plaintiff with an offer of judgment of $1,500 plus her costs and reasonable attorney's fees. Plaintiff did not accept the offer. After discovery had closed, defendant filed a Fed. R. Civ. P. 12(b)(1) motion to dismiss, arguing that it had offered more than what plaintiff could recover in the case because (1) FDCPA statutory damages are capped at $1,000 per plaintiff, per suit; and (2) plaintiff had no evidence supporting any viable claim for actual damages.

The district court agreed with defendant and dismissed the case, calling the suit "moot" based on the offer having exceeded any potential recovery and having extinguished any pending controversy. The Seventh Circuit reversed, holding that the district court's ability to decide any part of the merits is only possible if there is jurisdiction. Thus, a court cannot first decide the merits and then dismiss for lack of jurisdiction.

Citing *Gates v. Towery*, 430 F.3d 429 (7th Cir. 2005), the Seventh Circuit stated that a jurisdictional dismissal is proper only if the defendant offers more than the plaintiff's demand, and that "[i]f the plaintiff asks for the moon, only offering the moon extinguishes the controversy." It also warned that "[a]n excessive demand may lead to sanctions for frivolous litigation" but it does not diminish the court's jurisdiction. Therefore, the Seventh Circuit reversed the district court's dismissal and remanded the case for a decision on the merits.

Class Attorneys' Fees Must Relate to the Value the Class Members Receive, Not the Whole Settlement Amount

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Pearson v. NBTY, Inc., Nos. 14–1198, 14–1227, 12–1245, 14–1389, 2014 WL 6466128 (7th Cir. Nov. 19, 2014)

The U.S. Court of Appeals for the Seventh Circuit reversed and remanded a class action settlement deemed excessive compensation for class counsel and determining the *cy pres* was invalid. The proposed settlement sought $4.5 million in attorneys' fees. The district court cut down the proposal to $1.9 million before approval. The Seventh Circuit found the $1.9 million in fees to be excessive and held that the attorneys' fees should not exceed one-third, or at most one-half, of the total amount of money going to class members, not the entire settlement amount. The *cy pres* was not appropriate because the parties failed to demonstrate that it was infeasible to provide compensation to the class members. Rather, the court found that it would be feasible to compensate the 4.72 million class members who were known to have bought the product by mailing them each a check, and thus the *cy pres* was not valid.

Multiple class action suits were filed and a nationwide settlement was negotiated wherein defendants were charged with violating several states' consumer protection laws by making false claims for the efficacy of glucosamine. The district judge approved the settlement with some modifications. The settlement requires Rexall to pay approximately $5.63 million. This figure includes $1.93 million in fees to class counsel, plus $179,676 in attorney expenses, $1.5 million in notice and administration costs, $1.13 million to Orthopedic Research and Education Foundation as a *cy pres* award, $865,284 to the 30,245 class members who submitted claims, and $5,000 to each of the six named plaintiffs.

The Seventh Circuit reversed and remanded the district court's approval of the settlement because of its excessive compensation for class counsel and its low benefit to class members evidenced by the $865,284 split amongst 30,245 class members (approximately $28.61 per member) and the 30-month injunction. The attorneys' fees represented 69 percent of the aggregate value of the monetary settlement award. The court took issue with class counsel not taking action to prevent defendants from structuring a claims process that discourages the filing of claims by consumers. The court also took issue with the *cy pres* award because there was a feasible means of providing the consumers with the value of their claims. The court further reasoned that this award could have been eliminated if the claims process was simplified or if a $3 check was mailed to all 4.72 million consumers who were known to have bought at least one bottle of Rexall's pills. The court noted its disapproval with the conflicts of interests that are present in class action suits. The court stated that it "remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers."

California District Court Rejects FCC's Definition of ATDS in Putative TCPA Class Action

Marks v. Crunch San Diego, LLC, No. 14-cv-00348-BAS-BLM (S.D. Cal. Oct. 23, 2014)

In *Marks v. Crunch San Diego, LLC*, the U.S. District Court for the Southern District of California followed a small but growing number of cases holding that courts have their own ability to interpret the statutory definition of "automated telephone dialing system" (ATDS) and need not follow the Federal Communication Commission's interpretation of that term.

The *Marks* putative class action complainant alleged that Crunch, which operates gyms in California and other states, sent him numerous unwanted, promotional text messages advertising special pricing or personal training rates, from November 2012 to October 2013 in violation of the Telephone Consumer Protection Act (TCPA).

Crunch moved for summary judgment, claiming that it did not use an ATDS to transmit the text messages. Crunch further argued that it used a third-party web-based platform to send promotional text messages, but that phone numbers were inputted by human hand into the platform. Thus, Crunch argued the platform lacked "the capacity to store or produce telephone numbers . . . using a random or sequential number generator," as was by definition not an ATDS under the TCPA. The court agreed noting that because the platform Crunch used required "human curation and intervention" for number entry, it could not reasonably be considered a random or sequential number generator within the purview of the TCPA. The court entered judgement in favor Crunch.

Class Certification Denied in Student Loan Case Because Individual Questions Predominated

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Breitman v. Xerox Education Services, LLC, Docket No. 12 Civ. 6583 (PAC) (S.D.N.Y. Oct. 22, 2014)

In a recent ruling in a case involving student loan debts, the U.S. District Court for the Southern District of New York denied plaintiff's motion for class certification pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3). Specifically, the court held that because individual questions predominated in connection with how prepayments were to be applied and how damages were to be calculated, class certification was improper.

Plaintiff alleged that defendant, a student loan servicer, misapplied prepayments towards her federal student loans and failed to apply certain benefits to which she was entitled. Plaintiff filed a class action lawsuit claiming breach of contract and violations of the N.Y. Gen. Bus. Law § 349. Plaintiff sought to certify a class consisting of those individuals whose prepayments were allegedly misapplied and another class of individuals who were allegedly denied certain borrower benefits.

The court found that with respect to the benefits class, "the threshold question of eligibility for the relevant benefits requires individualized inquiries." As to the proposed class involving alleged misapplied payments, "individualized inquiries would be necessary to determine which class members provided instructions regarding prepayments which class members sought to advance their next due date, and which set of contract terms applied to each member." The court also determined that with respect to damages putative class members do not share plaintiff's intention for additional payments and "[s]uch differences implicate class members' entitlement to damages, and would necessitate individualized inquiries into each members' intentions." Finally, the court held that because plaintiff had "not shown that the monetary relief sought is incidental to the requested injunctive or declaratory relief," certification under Fed. R. Civ. P. 23(b)(2) would be improper.

FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements

In an order entered on October 30, 2014, the Federal Communications Commission (FCC) confirmed that opt-out notices are required on all fax ads, and such notices must conform to the rules adopted by the FCC in its 2006 Junk Fax Order. The FCC recognized that a number of parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether the requirement for an opt-out notice applied to such faxes. Accordingly, the FCC granted retroactive waivers of the opt-out requirement to certain advertisement fax senders to provide them with temporary relief from any past obligation to provide opt-out notices to fax recipients as required by FCC rules. In addition, the FCC provided a six-month window from October 30, 2014 for these waiver recipients to come into full compliance.

The FCC noted that similarly situated parties may seek waiver requests and emphasized that such parties should make every effort to file such requests prior to April 30, 2015. Absent a waiver, however, full compliance is currently expected, and any past or future failure to comply could subject entities to enforcement sanctions, including potential fines and forfeitures.

Even if the fax sender places an opt-out notice on its fax ad, it will not comply with the law unless the notice satisfies each requirement contained in the rules. Section 64.1200(a)(4)(iii) specifies that the opt-out notice contained in fax ads must:

1. be clear and conspicuous and on the first page of the ad;
2. state that the recipient may make a request to the sender not to send any future ads and that failure to comply, within 30 days, with such a request is unlawful; and
3. contain a domestic contact telephone number and fax number for the recipient to transmit an opt-out request.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. October 30, 2014) (Fax Order).

Massachusetts Appeals Court Rejects Condominium Association's Argument to Seek Multiple Priority Liens Ahead of First Mortgagee

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Drummer Boy Homes Association, Inc. v. Carolyn Britton, No. 12-P-1761, 2014 WL 5782494 (Mass. App. Ct. Nov. 7, 2014)

In *Drummer Boy Homes Association, Inc. v. Carolyn Britton*, the condominium association appealed from a decision of the Appellate Division affirming the district court that the association's statutory lien for unpaid condominium fees and expenses was prior to the first mortgagee only to the extent of the amounts due for the six months preceding the institution of the first of the association's lawsuits. The appeals court rejected the association's argument that by filing multiple lawsuits against the unit owner and the first mortgagee, the association would have multiple priority liens ahead of the mortgage. Recognizing that Mass. Gen. Laws ch. 183A § 6(c) limits the association's super-priority lien ahead of the mortgagee only to the extent of the six months immediately preceding the first litigation, the appeals court declined to interpret the legislative intent of the statute to allow the association a super-priority lien in an amount equal to 18 months of assessments and fees through the filing of three successive lawsuits.

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