

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRED J. TENUTO, Administrator : CIVIL ACTION  
of the Estate of Anthony Tenuto, :  
deceased, on behalf of himself :  
and all others similarly :  
situated :  
: :  
v. :  
: :  
TRANSWORLD SYSTEMS, INC. : NO. 99-4228

MEMORANDUM ORDER

Presently before the court is plaintiff's unopposed Motion for Preliminary Approval of Settlement and Notice to Class. A class was certified pursuant to Fed. R. Civ. P. 23(a) and (b)(3) by Memorandum and Order of September 29, 2000. Following mediation and completion of discovery, the parties entered into a settlement agreement on May 9, 2001.<sup>1</sup>

The essence of the claim asserted by the representative plaintiff is that defendant violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., by sending virtually identical deceptive debt collection letters to the class members. The class consists of all persons with Pennsylvania addresses to whom defendant sent letters containing a statement that post-judgment remedies may include wage or bank account garnishment, in an attempt to collect a debt incurred

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<sup>1</sup>Shortly after executing the agreement, the initial class representative died. In the interim, an administrator of his estate was appointed and later substituted as representative plaintiff. He has now executed an amendment ratifying the settlement agreement.

primarily for personal, family or household purposes, which were not returned as undelivered during the one-year FDCPA limitation period preceding the commencement of this action.<sup>2</sup>

The touchstone for approval of a class action settlement is a determination that it is fair, adequate and reasonable. See Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d Cir. 1995); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). In evaluating a settlement for preliminary approval, the court determines whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval. See In re

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<sup>2</sup>Plaintiff also sought and secured certification of a tandem class of such persons who received this letter within four years of the initiation of suit for purposes of relief under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 et seq. Plaintiff now seeks to abandon this class for three reasons. One is the unavailability of names and addresses of recipients prior to 1998. As to such persons, however, notice could be made by publication. Another reason is that their inclusion would dilute recovery given the \$500,000 cap on class action damages. The referenced cap, however, applies to FDCPA claims and not UTPCPL claims. Insofar as plaintiff is actually suggesting that defendant will not increase the pool of settlement funds and they should be dedicated to the FDCPA claims, he is effectively seeking to maximize recovery for some prospective claimants by eliminating others whom he initially undertook to represent. Plaintiff's other reason, however, is substantial and justifies his request to proceed only on behalf of the FDCPA class. Recovery under the UTPCPL is limited to actual damages and attorney fees. The thrust of plaintiff's effort is the recovery of statutory damages. He has been unable to establish actual damages. The UTPCPL class thus appears to be an illusory or phantom class.

Prudential Securities Incorporated Limited Partnerships Litigation, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (citing Manual for Complex Litigation § 30.41 at 237 (3d ed. 1995)).

The settlement agreement is a product of lengthy arms-length negotiations, concluded after completion of discovery. The settlement funds available to claimants constitute 44% of the maximum recovery under the FDPCA. The agreement also provides for a permanent injunction to ensure that defendant does not again use the challenged letter in Pennsylvania. Defendant has a potentially viable defense and resolution by trial would not be risk free to the class. The proposed attorney fees are 30% of the total fund.<sup>3</sup> The proposed incentive bonus for the class representative is modest and reasonable. There is no preferential treatment of the class representative or any segment of the class.

The agreement provides for actual notice by mail. The proposed notice sets forth all pertinent information in understandable language. Any unclaimed funds would not revert to defendant which thus has no incentive to limit its cooperation in

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<sup>3</sup>The proposed fees represent 40% of the portion of the fund dedicated to payment of claims and fees. Even this is not per se excessive. See In re Smithkline Beckman Corp. Sec. Lit., 751 F. Supp. 525, 544 (E.D. Pa. 1990) (noting general range of attorney fees in common fund cases is 19% to 45%). Of course, the circumstances of each case should be examined in assessing fee requests and this is one function of the final fairness hearing.

effecting notice. The proposed claim form is concise and comprehensible.

The proposed settlement discloses no grounds on its face to doubt its fairness or other obvious deficiencies. It is clearly within the range of possible approval.

**ACCORDINGLY**, this                    day of October, 2001, upon consideration of plaintiff's Motion for Preliminary Approval of Settlement and Notice to Class (Doc. #59), the proposed settlement agreement and other supporting submissions, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and an appropriate order implementing such approval will be entered herewith.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**

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O R D E R

AND NOW, this                    day of October, 2001,  
consistent with the court's memorandum and order of this date  
preliminarily approving the parties' settlement, **IT IS HEREBY**  
**ORDERED** that:

1. This action shall proceed as to the class  
certified by the court's memorandum and order of September 29,  
2000 comprising all persons with addresses in the Commonwealth of  
Pennsylvania to whom one or more letters were sent on or after  
August 20, 1998 by Transworld Systems, Inc. containing a  
statement regarding post-judgment remedies substantially as  
follows:

If [the creditor] were to opt to proceed  
judicially, the costs necessary to obtain a  
judgment are most often added to the  
delinquent debt, thereby significantly  
increasing the amount of the original debt.  
Post-judgment remedies themselves **can also be**

**costly in a variety of ways, which may include wage or bank account garnishment or execution on other assets.** (emphasis supplied),

which letters were not returned as undelivered by the post office ("Tenuto Class Certification Letter").

2. The court will hold a hearing ("Final Approval Hearing") on January 25, 2002 at 3:30 p.m. in Courtroom 9-B, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania to determine whether the proposed settlement is fair, reasonable and adequate and should be finally approved, and to consider an award of reasonable attorneys' fees and expenses payable from the Settlement Fund (as defined in the Agreement of Settlement), and an incentive award to the class representative. The Final Approval Hearing may, from time to time and without further notice to members of the class, be continued or adjourned by order of the court.

3. Notice of the proposed settlement and of the Final Approval Hearing shall be given within 30 days of the date of this order by the class action settlement administrator approved by the parties by third-class mailing of the Notice of Class Action and of Proposed Settlement (the "Notice") in the form submitted with the Motion for Preliminary Approval and Notice to Class, except that numbers for facsimile transmission shall be provided with the names and address in section VII, which mailing shall be individually addressed to each person meeting the class

definition at the last known address for each person in the Transworld Systems, Inc. computer stored database.

4. A member of the class may opt out of the class at any time until thirty (30) days before the Final Approval Hearing. To opt out of the class, a class member must complete and return a request for exclusion to the administrator, as described in the Class Notice, which request for exclusion shall be post-marked no later than December 26, 2001 (the "Opt-Out Date"). Any member of the class who opts out shall not be subject to the Agreement of Settlement or any final judgment in this case.

5. No member of the class, or any other person, shall be heard at the Final Approval Hearing in opposition to class certification, the Agreement of Settlement, plaintiff's counsel's request for attorney's fees and expenses, or the proposed incentive payment to the class representative unless not later than 5:00 p.m. on January 4, 2002, three weeks prior to the Final Approval Hearing, such person files with the Clerk of Court and serves upon plaintiff's counsel and counsel for Transworld Systems, Inc. the following: (i) a statement of each objection being made; (ii) a description of the facts underlying each objection; (iii) a list of any witnesses the objector may call; and, (iv) a list of any exhibits which the objector may offer during the Final Approval Hearing, together with true copies of any such exhibits.

6. Class members, and any other person objecting, shall file notice of objections with the Clerk of Court and serve such notice of objections upon plaintiff's counsel and counsel for Transworld Systems, Inc. no later than January 4, 2002. Any class member or other person who fails properly or timely to file a notice of objection with the court, or fails timely to serve any such notice and objection on plaintiff's counsel and counsel for Transworld Systems, Inc. shall not be heard during the Final Approval Hearing and his or her objections will not be entertained, however, any class member is entitled to opt out of the class through the Opt-Out Date without filing an objection.

7. Any notice required by this order to be served on plaintiff's counsel and counsel for Transworld Systems, Inc. shall be served by mail, hand-delivery or facsimile transmission to the addresses and numbers provided in the Notice.

8. The court has made no finding and Transworld Systems, Inc. has made no admission of any liability, fault or wrongdoing by Transworld or the entitlement, apart from the Agreement of Settlement, of any person to any measure of damages and Transworld has not conceded the appropriateness of class certification for any purpose other than settlement. If the Agreement of Settlement is terminated pursuant to its terms, or if the Settlement is not approved or consummated for any reason, the Agreement of Settlement and all proceedings had in connection

therewith shall be without prejudice to the status quo ante  
rights of the parties to this action.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**