

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

M E M O R A N D U M

WALDMAN, J.

January 31, 2002

This is a consumer class action. Defendant is a debt collection agency. The essence of plaintiff's allegations is that in an effort to collect debts, defendant sent a form letter to Pennsylvania residents deceptively suggesting that the recipient's wages could be garnished if the debt were not satisfied and the creditor elected to proceed with judicial action.

Plaintiff asserted a claim for violation of the federal Fair Debt Collection Practices Act ("FDCPA") which prohibits the use of any false representation or deceptive means in an attempt to collect a debt. See 15 U.S.C. § 1692e(10). Plaintiff also asserted a claim for violation of the Pennsylvania Unfair Trade Practices & Consumer Protection Law ("UTPCPL") under which a false representation that failure to pay a debt will result in garnishment is prohibited. See 72 P.S. §§ 201-3.1 & 201-9.2; 37 Pa. Code § 303.3(11). With certain limited exceptions, the wages

of a judgment debtor may not be garnished under Pennsylvania law. See 42 Pa. C.S.A. § 8127.

The proposed class consisted of persons in Pennsylvania to whom defendant sent the offending letter in an attempt to collect a consumer debt.

One subclass included persons to whom the letters were sent during the one-year period prior to the filing of the complaint which corresponds with the FDCPA limitations period. Another subclass included those to whom letters were sent up to four years prior to the filing of the complaint which encompasses the six-year UTPCPL limitations period.¹ There was no allegation of actual damages. Plaintiff sought only statutory damages pursuant to 15 U.S.C. § 1692k(a) and 73 P.S. § 201-9.2. Plaintiff also sought to enjoin defendant from using its form letter with the reference to garnishment in Pennsylvania in the future.

The court granted plaintiff's motion for class certification pursuant to Fed. R. Civ. P. 23(a) & 23(b)(3). After considerable motion practice, discovery and mediation, the parties reached an agreement to settle the FDCPA claim. The UTPCPL claim was dropped when plaintiff was unable to establish any actual damages. Following initiation of this action and

¹See Keller v. Volkswagen of America, Inc., 7333 A.2d 642, 646 n.9 (Pa. Super. 1999).

class certification, the Pennsylvania Supreme Court definitively held that statutory damages are unavailable under the UTPCPL in the absence of an ascertainable loss of money or property proximately caused by the defendant's prohibited conduct. See Weinberg v. Sun Company, Inc., 777 A.2d 442, 446 (Pa. 2001). The court granted plaintiff's motion for preliminary approval of the settlement agreement and notice to the class.

Presently before the court are plaintiff's motion for final approval of the settlement and request for attorney fees and costs. There is also a request for an incentive award to the representative plaintiff's estate.

The court held a hearing on final approval, and has considered the submissions of the parties presented in connection with that hearing. The court has also considered the objections presented by two of the class members.²

Adequacy of Notice

Notice was provided by mail from a class action administrator to all class members from defendant's records. The record shows that ultimately 56,332 of 65,544 class members were reached by mail. It is conceivable that some of the others might have received notice through advertising in mass media throughout

²A third class member also filed objections but formally withdrew them and opted out of the class prior to the hearing. One of the other two objectors withdrew two of his four objections at the time of the hearing.

the Commonwealth, but only at a substantial expense and use of funds otherwise available for settlement. Moreover, it is far from certain that those who are no longer at their most current Pennsylvania addresses still reside in the Commonwealth or follow Pennsylvania based media.

The notice contained the pertinent details about the action necessary to allow class members to make an informed decision, including the information contemplated by Fed. R. Civ. P. 23(c)(2). The notice was mailed 35 days prior to the opt-out date and 45 days prior to the deadline for filing objections.

The court concludes that class members were provided with the best notice practicable under the circumstances and the notice provided, as to mode and content, satisfied Rule 23(c)(2) and due process. See, e.g., Lake v. First Nationwide Bank, 156 F.R.D. 615, 628 (E.D. Pa. 1994); Carlough v. Amchem Prod., 158 F.R.D. 314, 325 (E.D. Pa. 1993); Sanders v. Robinson Humphre/American Express, Inc., 1990 WL 105894, *3 (N.D. Ga. May 23, 1990).

Settlement Approval

The touchstone for approval of a class action settlement is whether it is fair, adequate and reasonable under the circumstances. Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d Cir. 1995). This determination is guided by several pertinent

considerations - the so-called Girsh factors. See Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975).

The court first considers the complexity, expense and duration of any litigation. The litigation of this action to conclusion would entail significant additional time, effort and expense including the utilization of expert testimony. The issues involved are moderately, although not unduly, complex.

The court next considers the reaction of the class. Of the thousands of class members, only twelve have opted out and only two have pressed objections. Claim forms have been submitted by 4,849 individuals.

Ronald Mindek stated he does not believe the amount of the settlement is sufficient to compensate him for the distress he felt upon reading the Transworld letter. He states that a recovery of \$5,000 would fairly compensate him. He suggests that he be awarded \$5,000 and the balance of the settlement fund then be apportioned pro rata among the other claimants, or alternatively that \$5,000 earmarked for him simply be added to the settlement fund. Mr. Mindek's objection is not addressed to the propriety of the settlement but only to his perception of the value of his claim as an individual. The appropriate course for Mr. Mindek was to opt out.

John J. Pentz, Jr. pressed two objections through his son, an attorney with The Objectors Group in Massachusetts. He

states that notice of the settlement should have been provided to those who would have been in the four-year subclass had the UTPCPL claim not been withdrawn. There is no suggestion of collusion and no prejudice to any person whose claim would be predicated on the initial prayer for relief under the UTPCPL. These persons never received notice of the pendency of this action and it has received no publicity. See Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 813 (5th Cir. 1982) (no notice required to those in initially certified class action with gender and race discrimination claims who had no notice of action when race discrimination claim was deleted); Seligson v. The Plum Tree, Inc., 61 F.R.D. 343, 346 (E.D. Pa. 1973) (notice of dissolution of certified class not required to those to whom no notice of action was ever given). As plaintiff's request to delete the UTPCPL claim was approved on October 31, 2001, prior to the entry of any judgment, there is no res judicata effect.³

Moreover, as the court noted in approving the requested amendment, any subclass of persons seeking relief in this action under the UTPCPL would be illusory. There was no allegation that

³To avoid any possible future doubt, the court will supplement its memorandum order of October 31, 2001 approving plaintiff's request to drop the UTPCPL claim, inter alia, with a discrete order making it categorically clear that the request to amend to the withdraw that claim was effective when approved on October 31, 2001 and is without prejudice to the right of any person not within the settlement class to assert in good faith any claim he or she may wish.

anyone sustained an ascertainable loss of money or property as a result of the offending letter and counsel was never able to establish any such loss.⁴ In the particular circumstances presented, any notice would have been directed to persons without viable claims at substantial expense and detriment to those with viable claims.⁵ This would have been a fruitless but expensive gesture. After arguing that each recipient of this form letter would be entitled to statutory damages of at least \$100 under the UTPCPL, counsel for Mr. Pentz acknowledged that he had been unaware of the Pennsylvania Supreme Court holding precluding any recovery absent proof of actual economic loss.

Mr. Pentz also objected to the size of the settlement. In so doing, he incorrectly argued that it represents only 44% of the statutory maximum of \$500,000. In fact, it exceeds 1% of defendant's actual net worth and thus represents or exceeds a 100% recovery.

The court next considers the extent of discovery and the stage of the proceedings. The settlement agreement was reached after substantial discovery, resolution of dispositive

⁴Had defendant moved for summary judgment on the UTPCPL claim at the close of discovery on this basis, the motion would have been granted.

⁵Names and addresses of those to whom the form letter was sent prior to 1998 were unavailable. Thus, any notice would have to be through mass media advertising with funds otherwise available for distribution to recipients with viable claims who could be identified.

motions, mediation and considerable arms-length settlement discussions. The settlement agreement was thus reached at a mature stage of the litigation and was informed by adequate legal and factual knowledge.

The court next considers the risk of establishing liability. Applying the least sophisticated consumer standard, a jury could quite reasonably find that a suggestion garnishment could occur in circumstances where it could not constitute a violation of § 1692e(10). Even where garnishment is generally available subject to exceptions, a categorical reference to garnishment in a debt collection letter may be viewed as misleading. See Cacace v. Lucas, 775 F. Supp. 502, 506 (D. Conn. 1990). A determination of liability, however, was not assured. The form letter suggested that garnishment "may" and not will be an available remedy to enforce any judgment. While use of the word "may" is not dispositive, it is a factor a jury could consider in assessing the overall tone and impact of the letter. See Irwin v. Mascott, 2000 WL 1280455, *8 (N.D. Ill. Aug. 31, 2000).

The court also considers the risk of establishing damages. Upon a determination of liability, an award of some statutory damages is virtually assured. In assessing such damages, however, the egregiousness of the violation is a key factor. See Crossley v. Lieberman, 868 F.2d 566, 572 (3d Cir.

1989); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 982 (N.D. Ill. 1979). Statutory damages of far less than the maximum \$1,000 have been awarded in cases involving comparable or more egregious violations than alleged herein. See, e.g., Weiner v. Bloomfield, 901 F. Supp. 771, 778 (S.D.N.Y. 1995); Strange v. Wexler, 796 F. Supp. 1117, 1120 (N.D. Ill. 1992); Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 875-76 (D.N.D. 1981).

There is no appreciable risk that the case could not be maintained as a class action through trial.

The court finally considers the reasonableness of the settlement in view of the best recovery and in view of the attendant risks. The settlement fund is \$255,000.⁶ This exceeds the best recovery possible through trial given defendant's net worth. See 15 U.S.C. § 1692k(a)(2)(B).⁷ Even if a determination of liability were assured, the settlement is excellent and well within the range of reasonableness.

⁶This amount includes unexpended sums dedicated to administrative costs. As part of the agreement, \$120,000 was provided to effectuate notice and administer the settlement. Whether due to the efficiency of the class action administrator or to an inaccurate estimate, \$35,000 of this amount is unexpended. The court believes that this should be added to the fund available for distribution to the claimants and counsel have agreed.

⁷Of course, defendant nevertheless derives economic benefit from capping class counsel fees and limiting its own fees and costs.

The court concludes that the settlement is fair, adequate and reasonable under all of the circumstances. It will be approved.

Fees and Costs

The costs claimed are \$9,152. An attorney who has created a common fund for the benefit of a class is entitled to recover reasonable litigation costs from the fund. See Lachance v. Harrington, 965 F. Supp. 630, 651 (E.D. Pa. 1997). The costs have been documented, appear reasonable and have not been challenged by anyone.

It is typical and appropriate in common fund cases to award percentage fees, cross-checked against the lodestar method. See In re Prudential Ins. Co. of America Sales Practices Lit., 148 F.3d 283, 333 (3d Cir. 1998); Lachance, 965 F.2d at 647. The requested fee of \$140,950 represents thirty-five percent of the total settlement fund minus administrative costs. Given the result, the experience of class counsel and percentage fees typically awarded in other class actions, the fee request is reasonable. See In re Pacific Enterprises Sec. Lit., 47 F.3d 373, 379 (9th Cir. 1995) (benchmark in common fund cases is twenty-five percent adjustable upward or downward depending upon circumstances); In re SmithKline Beckman Corp. Sec. Lit., 751 F. Supp. 525, 533 (E.D. Pa. 1990) (noting fee awards have generally ranged from nineteen to forty-five per cent of settlement fund).

Class counsel have documented the lodestar at \$146,518. This does not include time expended in connection with the fairness hearing. The documented hours expended and the corresponding rates normally charged appear reasonable. Even if the hourly rate was discounted to that suggested on the CLS schedule for consumer litigation by attorneys with comparable experience, the lodestar figure would be over \$131,000. This would effectively result in a multiplier of .10 to reach the percentage amount requested. Substantially greater multipliers are within the range typical in comparable class actions. See In re Prudential, 148 F.3d at 341.

The court will approve the recovery of the costs and an award of attorney fees to class counsel in the amounts requested.

With their request, class counsel also seek permission to distribute a \$2,000 incentive award to plaintiff's estate. Mr. Tenuto actively assisted counsel in the prosecution of this litigation to the benefit of the class. In such circumstances, an incentive award is appropriate and the amount requested is reasonable. See In re SmithKline, 751 F. Supp. at 535.

Conclusion

Consistent with the foregoing, plaintiff's Motion for Final Approval of Class Settlement and for Counsel Fees and Costs will be granted, and a \$2,000 incentive payment will be awarded.

Appropriate orders will be entered.

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TRANSWORLD SYSTEMS, INC. : NO. 99-4228

O R D E R

AND NOW, this day of January, 2002, upon
consideration of plaintiff's request for Attorney Fees and Costs,
consistent with the court's memorandum herein of this date, **IT IS**
HEREBY ORDERED that said request is **GRANTED** in that class counsel
are awarded attorney fees of \$140,950 and litigation costs of
\$9,152.

BY THE COURT:

JAY C. WALDMAN, J.

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ORDER AND JUDGMENT

AND NOW, this day of January, 2002, upon
consideration of plaintiff's Motion for Final Approval of
Settlement and after a hearing thereon, consistent with the
findings set forth in the accompanying memorandum, **IT IS HEREBY
ORDERED** that said Motion is **GRANTED** and accordingly:

- a. the parties' Settlement Agreement is approved;
- b. defendant is permanently enjoined from sending to
any consumer with an address in the Commonwealth of Pennsylvania
the form of collection letter which is the subject of this
litigation, but may use the revised letter in the form of Exhibit
"F" of the Agreement of Settlement;
- c. defendant shall pay to Fred J. Tenuto, as
administrator of the estate of Anthony Tenuto, \$1,000.00 in
statutory damages and an incentive award of \$2,000.00;
- d. the unexpended funds dedicated to administrative
costs shall be added to the settlement fund for distribution to
class claimants and defendant shall pay \$255,000.00 to be

distributed equally among all class members who submitted claim forms before the date of the fairness hearing;

e. defendant shall pay the remaining costs of administration including distribution of payment checks to class members;

f. the claims of all members of the class as of this date, except those twelve who timely excluded themselves as set forth in the affidavit of Michael Caines filed as document number 68 herein on January 29, 2002, are dismissed with prejudice; and,

g. this action is **DISMISSED** and **CLOSED**.

BY THE COURT:

JAY C. WALDMAN, J.

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O R D E R

AND NOW, this day of January, 2002,
consistent with the court's memorandum order of October 31, 2001
herein, **IT IS HEREBY ORDERED** that approval of the amendment
dismissing plaintiff's Pennsylvania Unfair Trade Practices &
Consumer Protection Law claim was without prejudice to any person
not within the final settlement class to assert in good faith any
claim he or she may wish to pursue.

BY THE COURT:

JAY C. WALDMAN, J.