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Western District Case Notes

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Conditional Class Certification

In *Augustyniak v. Lowe's Home Center, LLC*, No. 14-CV-00488-JJM (Feb. 8, 2016), plaintiff brought an action against her employer seeking recovery on behalf of herself and others similarly situated, alleging that she was misclassified as a salaried employee for the purpose of avoiding the overtime provisions of the Fair Labor Standards Act.

Plaintiff later filed a motion for conditional certification of a nationwide class, which the Court denied. Before the motion was filed, however, more than 50 individuals from several states filed consents to "opt-in" to the action. Defendants argued that the Court's denial of conditional certification required dismissal of the opt-in plaintiffs' claims without prejudice, but the Court rejected that argument, holding that the sole consequence of denying conditional certification was that notice would not be sent to potential class members.

It did not, however, automatically require dismissal of those plaintiffs who opted-in without receiving such notice. Nonetheless, the Court held that the opt-in plaintiffs could only join the action if they were similarly situated to the individual plaintiff who brought the suit, and that it was plaintiff's burden to make that showing. Although the plaintiff "will face an uphill battle in demonstrating that the opt-in plaintiffs are similarly situated to her," the Court granted her the opportunity to make that showing.



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Stay of Proceedings

In *Zink v. First Niagara Bank, N.A.*, No. 13-CV-01076-RJA-JJM (Mar. 1, 2016), a putative class action in which plaintiff seeks to recover statutory damages for defendant's alleged "systematic failure" to timely file mortgage satisfactions, plaintiff filed a second "uncontested" motion requesting preliminary approval of the parties' settlement following the denial of his initial uncontested motion.

In support of the second uncontested motion, *defendant* argued that the settlement should be approved now because the Supreme Court is currently considering a case concerning Article III standing that "could affect the viability of [plaintiff's] claims." In that case (*Spokeo v. Robins*), the Supreme Court is expected to decide whether Congress can confer Article III standing upon a plaintiff who suffers no concrete harm by authorizing a private right of action based on a bare violation of a federal statute.

Although both parties urged the Court not to stay the action pending the Supreme Court's decision in *Spokeo*, and the defendant "decided not to press the question of standing at this time," the Court determined that it could not ignore the issue because it has an obligation to

assure itself that Article III jurisdiction exists. Ultimately, the Court questioned whether the belated filing of plaintiff's satisfaction of mortgage amounts to a "palpable deprivation" sufficient for Article III standing and concluded that a stay of limited duration was appropriate.

Fair Debt Collection Practices Act

In *Andino v. Mercantile Adjustment Bureau, LLC*, No. 14-CV-59-JTC (Feb. 18, 2016), plaintiff brought an action to recover actual and statutory damages under the Fair Debt Collection Practices Act ("FDCPA") based on defendant's alleged conduct in attempting to collect a debt incurred by plaintiff's mother. Upon completion of discovery, defendant moved for summary judgment, contending that plaintiff failed to come forward with evidence rebutting its records showing that it called plaintiff's telephone number on only two occasions over a 10-day period, a volume and pattern that defendant claimed was insufficient as a matter of law to constitute a violation of the FDCPA.

Observing that "courts have not hesitated to grant defendants summary judgment where the evidence demonstrates an intent to contact debtors rather than an intent to annoy, abuse, or harass them," the Court found that defendant met its burden on the motion. Turning to whether plaintiff had come forward with specific facts showing a genuine issue for trial, the Court held that plaintiff's "unresponsive" deposition testimony and "self-serving statements in his unsworn declaration" failed to suggest "anything other than a legitimate effort to collect a debt." As a result, plaintiff's complaint was dismissed.

Automatic Stay

In *FTC v. Unified Global Group, LLC*, No. 15-CV-422W(F) (Feb. 9, 2016), the FTC brought suit under the Federal Trade Commission Act to enforce the Fair Debt Collection Practices Act, and sought to enjoin defendants' allegedly deceptive, abusive and unfair debt collection practices, which the FTC claimed had caused consumers to pay millions of dollars to the defendants, resulting in unjust enrichment.

After defendants' assets were frozen and a receiver was appointed for the corporate defendants, one of the individual defendants filed for bankruptcy under Chapter 11 of the Bankruptcy Code and sought to stay the FTC lawsuit pursuant to the automatic stay provision in 11 U.S.C. §362(a)(1). The Court declined to stay the lawsuit under the "governmental unit" or "police powers" exception to the automatic stay, which applies when a governmental unit is suing a debtor to prevent or stop a violation of anti-fraud, consumer protection, or similar police or regulatory laws, such as the FTC was doing in this case.

Interpleader and Attorneys' Fees

In *Metropolitan Life Insurance Co. v. DeSabio, et al.*, No. 15-CV-691EAW (Feb. 1, 2016), plaintiff filed a complaint in interpleader seeking to deposit the proceeds of a life insurance policy with the Court and discharge plaintiff from further liability pending a determination of the policy's proper beneficiaries.

After granting plaintiff's motion seeking that relief, the Court denied plaintiff's request for an award of attorneys' fees to be paid from the life insurance proceeds. The Court acknowledged that it possessed equitable discretion to award costs and fees to a disinterested stakeholder who deposits a disputed res into the Court, but noted that, in matters involving the payment of insurance proceeds, an award of attorneys' fees to an insurer is appropriate only when the incurred expense exceeds the ordinary

cost of doing business, which the Court found plaintiff had failed to establish in this case. The Court also was troubled that the requested fees and costs totaled nearly 7% of the amount of life insurance proceeds at stake.

Discovery

In *Bausch & Lomb, Inc., et al. v. Vitamin Health, Inc.*, No. 13-CV-6498JWF (Feb. 9, 2016), a patent infringement action, the Court previously issued a discovery order directing plaintiff to supplement a response to an interrogatory prior to depositions being taken, but defendant deposed three witnesses before the supplemental response was served, and then moved to preclude plaintiff's infringement claim. The Court agreed that plaintiff had violated the discovery order, but refused to preclude the infringement claim as a sanction, finding that preclusion would be disproportionate to the relative harm sustained by defendant as a result of plaintiff's discovery violation. Rather, the Court ordered that, at plaintiff's expense, defendant could re-depose the witnesses with regard to those facts disclosed in plaintiff's supplemental interrogatory response.

Pleading

In *United States ex rel. Takemoto v. The Hartford Financial Services Group, Inc., et al.*, No. 11-CV-613S (Jan. 20, 2016), plaintiff commenced a *qui tam* action on behalf of the United States, who elected not to intervene, pursuant to the False Claims Act ("FCA"), seeking to recover damages from defendants for their alleged failure to reimburse the Government for payments made to Medicare beneficiaries. Defendants moved to dismiss under both Rule 8(a)(2) and Rule 9(b).

After first granting plaintiff's request for leave to drop a "knowingly concealed" allegation and proceed solely with a claim that defendants "knowingly and improperly avoided or decreased an

obligation to pay money to the government" under Section 3729(a)(1)(G) of the FCA, the Court granted the motion to dismiss, finding that plaintiff failed to allege facts sufficient to allow *each* defendant to understand the basis of plaintiff's claims against it.

The Court found that the amended complaint grouped related corporations together without differentiating as to the involvement of each, in violation of Rule 8(a), and that a plaintiff was not permitted to rely on discovery to determine whether or not, and against whom, a cause of action might lie. Moreover, the Court found that the amended complaint failed to identify any particular payment obligation which defendants had avoided, knowingly or otherwise.

The Court proceeded to dismiss the amended complaint with prejudice, and without leave to replead, noting that plaintiff had made only a bare-bones request for leave to replead without explaining how any new pleading would cure the deficiencies identified by the Court. The Court also concluded that plaintiff lacked a good faith basis for certain allegations in the complaint, a factor the Court could consider when deciding whether to allow plaintiff to replead.

Finally, having concluded the amended complaint failed to satisfy the more relaxed pleading standard under Rule 8(a), the Court concluded it did not need to decide whether plaintiff's "knowing and improper avoidance" claim under the TCA were subject to the heightened pleading standard under Rule 9(b).

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