

CLIENT UPDATE

SECOND CIRCUIT: CLASS ACTION NOTICE MUST BE PUBLISHED MORE WIDELY THAN JUST IN *USA TODAY*

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The U.S. Court of Appeals for the Second Circuit held last week in *Hecht v. United Collection Bureau, Inc.*, 2012 WL 3538269, that members of a settlement class who were notified of the settlement only by a single publication of notice in the *USA Today* newspaper cannot be bound by the settlement and may sue over the same claims. The decision has the potential to affect other defendants who settled class actions and published notice only in a single periodical.

Because class members have a due process right to opt out of proposed settlements, Federal Rule of Civil Procedure 23(e)(1) says courts must direct notice of proposed class action settlements “in a reasonable manner to all class members who would be bound by the proposal.”

The Supreme Court held in 1985 that “when notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”

The Second Circuit held that a single publication in *USA Today* does not suffice, saying that “[r]easonableness is admittedly a flexible standard, . . . but it is difficult to imagine a manner of providing notice more akin to the ‘mere gesture’ deprecated [by the Supreme Court] or less ‘reasonably calculated to apprise interested parties of the pendency of the action.’”

The Second Circuit's decision means that the defendant, a collection agency, will not receive the *res judicata* benefits of a class settlement to which it agreed in 2010. Members of the settlement class will be able to pursue claims the defendant had thought released.

Other defendants who settled class actions with *USA Today* notice only – and there have been many such cases – may face collateral attacks in the wake of the Second Circuit's decision. Indeed, the Second Circuit suggested that one-time notice in *any* "single publication" may not suffice, and that class action defendants instead should pursue "notices that either [run] more than once or appear[] in more than one publication."

Importantly, the Court also said that the "reasonableness" standard for publication may be easier to meet when some class members are notified directly (by mail or email), rather than by publication. The Court also said that if class members responded to a notice program by filing a substantial number of claims or objections, collateral attacks on a notice program may not succeed.

Defendants that recently settled class actions with *USA Today* notice only, may wish to consult with counsel about the potential impact of this new decision if class members' claims have not yet been barred by the statute of limitations.

Please do not hesitate to contact us with any questions.

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