

11-1327

United States Court of Appeals
For the Second Circuit

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CHANA HECHT,

Plaintiff-Appellant,

v.

UNITED COLLECTION BUREAU, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF PLAINTIFF-APPELLANT
CHANA HECHT

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REPLY BRIEF OF PLAINTIFF-APPELLANT CHANA HECHT

Introduction

In key ways, the brief filed by appellee United Collection is more important not for what it says but for what it tacitly concedes. United does not deny that an absent class member must be provided certain due process protections before a class action judgment can have binding effect. Nor does United disagree that, under *Phillips Petroleum Co. v. Shutts*, these protections include constitutionally adequate notice, a right to opt out, and, at all times, adequate representation by the named plaintiff. 472 U.S. 797, 811-12 (1985). Nor does United dispute that a class action judgment that lacks binding effect because it was entered without due process is subject to collateral attack — that is, a class judgment entered in violation of due process does not have res judicata effect on an absentee, who is therefore free to pursue her own suit. Indeed, one of the cases cited by United (Br. 13), *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 170-72 (2d Cir. 2006), stands for that proposition.

Rather than contest any of these basic propositions, United argues that the one-time fine-print notice in *USA Today* provided Hecht constitutionally sufficient notice of the *Gravina* settlement. On Hecht's claim of inadequate representation, United first says that this Court is powerless to review the claim because it was not

pressed below. It then argues alternatively that the *Gravina* settlement was a product of adequate representation, though it does not contest that the settlement provided the class members no monetary recovery and that the charitable missions of the *Gravina* cy pres recipients have no relationship to the purposes of the suit.

As we now show, United's arguments should be rejected.

A. The *Gravina* Settlement and Judgment Did Not Provide Chana Hecht Adequate Notice or a Meaningful Opportunity to Opt Out, and They Therefore Do Not Bind Her.

For the *Gravina* judgment to bind Chana Hecht, notice to the class must have been “the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Shutts*, 472 U.S. at 812 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). United ignores this standard, failing even to cite the Supreme Court's landmark decision in *Shutts*, and makes two arguments, both meritless.

First, United says that because the *Gravina* class was certified under Federal Rule of Civil Procedure 23(b)(2), which requires only that the class receive “appropriate notice,” *see* Fed. R. Civ. P. 23(c)(2)(A), individual notice of the action and the right to opt out were unnecessary. United Br. 10-11. United confuses the Constitution with the Rule. The question in this appeal is whether the means of

notice employed in *Gravina* — whether or not consistent with the notice required in a Rule 23(b)(2) class action — comported with due process.

Just as in *Mullane* it would have been nonsensical to rely on the existence and use of the New York statutory notice provisions under attack to justify their constitutionality, *see* 339 U.S. at 309-10 (quoting relevant notice provision of New York Banking Law), United may not tautologically rely on the existence of Rule 23(b)(2)'s relatively lax notice requirements — and that the *Gravina* court used them — in defending the constitutionality of notice to the *Gravina* class.

In this regard, United misunderstands our discussion of *Gravina*'s erroneous Rule 23(b)(2) certification — which United does not even attempt to defend — and our citations to *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). We understand that Hecht is entitled to relief only if her constitutional rights were violated and that an erroneous certification does not necessarily violate the constitutional rights of absentees. We appreciate as well that *Wal-Mart* and *Eisen* were, strictly speaking, interpretations of the Rule, not the Due Process Clause.

But those two Supreme Court cases are hardly irrelevant. They interpreted Rule 23 to require individual notice and opt-out rights in cases in which monetary relief is sought in significant part because the Constitution demands that those

rights be honored. *Wal-Mart* went so far as to suggest that notice and opt-out rights are constitutionally required in *any* case where *any* monetary relief is sought, 131 S. Ct. at 2559, and *Eisen* took pains to note that Rule 23(b)(3)'s insistence on individualized notice has its origin in the demands of the Due Process Clause. 417 U.S. at 173-75.

Here, no one disputes that the *Gravina* class sought only monetary relief, *see* JA47-48, and that only monetary relief may be sought in an FDCPA action such as *Gravina*. *See* Hecht Opening Br. 14 (citing unanimous case law). Thus, the *Gravina* court's erroneous Rule 23(b)(2) certification is important because it highlights the due process violation.

Second, United suggests that this Court has held that publication notice of the kind that occurred in *Gravina* "is sufficient to satisfy due process." United Br. 13 (citing *Wolfert*, 439 F.3d at 169 n.4). To put it charitably, that is not true. First of all, the *Wolfert* footnote cited by United is not a holding (or even a dictum) of this Court, but rather part of a recitation of the district court's findings in the case. Moreover, although the footnote says that the district court "also noted" that notice had been published on four consecutive weeks in *USA Today*, it had done so only after it had found that the class members had been sent personal notice by first-class mail and that the objecting absentee had actually received the notice, but

“failed to opt out.” *See id.* at 169-70 & 169 n.4.

Indeed, *Wolfert* strongly supports Hecht’s position here. In *Wolfert*, as noted at the beginning of this brief, this Court explained that an absent class member may collaterally attack a class judgment entered in violation of due process. *Id.* at 170-72. Moreover, the notice-based challenge in *Wolfert* was rejected because, as indicated, notice and opt-out rights were provided each class member by first-class mail. Although *Wolfert* did not confront a situation, as here, in which notice by publication was the sole means of informing the class members that their rights were at stake, it is impossible to read *Wolfert* and believe that this Court would have found a one-time notice in *USA Today* constitutionally adequate to bind members of a class seeking monetary relief.

It bears noting that United does not dispute that it had (or could have obtained) the class members’ addresses and thus could have provided them personal notice. Nor does it claim that the *Gravina* notice was “reasonably calculated” to alert the *Gravina* class members of the suit and their rights to opt out of it. Instead, United claims, without citation, that “Hecht’s only argument . . . is that she did not personally see or receive a copy of the notice.” United Br. 9. That statement is both false and irrelevant.

Due process does not require that every class member actually receive and

read the class notice before the class judgment may bind the absentees. Rather, the “best notice practicable” standard demanded by due process, and incorporated into Rule 23(b)(3), asks whether notice was accomplished by means that “one desirous of actually informing the absentee might reasonably adopt to accomplish it.”

Mullane, 339 U.S. at 315. As shown in our opening brief (at 10-13), it was not. The means employed here was the “mere gesture” at notice condemned by the Supreme Court over sixty years ago. *Id.* For that reason, the *Gravina* judgment does not bind Chana Hecht.

B. Chana Hecht Was Not Provided Adequate Representation in *Gravina*, and, Therefore, the *Gravina* Judgment Does Not Bind Her.

1. United argues that this Court should not reach Hecht’s claim of inadequate representation because she did not press that specific failing below when she argued that the *Gravina* judgment lacks binding effect under the Due Process Clause. *See* United Br. 14-15. United’s position should be rejected.

The “general” rule that appellate courts will not review issues not raised below is discretionary and flexible. *See, e.g., Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 418-19, 419 n.4 (2d Cir. 2001); *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). In *Readco, Inc. v. Marine Midland Bank*, this Court recognized two situations in which it may review issues not raised in the trial court: (1) where

review “is necessary to avoid manifest injustice,” or (2) where “the issue is purely legal and there is no need for additional fact-finding.” 81 F.3d 295, 302 (2d Cir. 1996). Both of these conditions apply to Hecht’s inadequate-representation claim. The issue is a pure question of law that can be determined by reviewing the undisputed record in *Gravina*. And saddling someone who would, if she prevails, prosecute claims worth up to \$1,000 or more with a zero-value settlement constitutes manifest injustice.

Perhaps even more important, the district court itself raised the inadequate representation issue *and* ruled on it, *see* JA147, underscoring the issue’s ripeness for appellate review. *See Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 648 (2d Cir. 1998) (indicating that full briefing of an issue on appeal, combined with a lower court ruling on it, is important factor in exercising discretion to review an issue not raised below). That the district court actually decided the inadequacy issue is of particular resonance here. Given that the inadequate-representation issue is purely legal, the only potential problem is that United did not have a chance to air its arguments below. But that concern is irrelevant here. United’s position on adequacy — that Hecht’s *individual* FDCPA rights were appropriately disregarded because of the FDCPA’s limits on *class* recovery — is exactly the position embraced by the district court. *Compare* United Br. 15-16 *with* JA147. The

confluence of the district court's ruling with United's position in this Court show both that the adversary process in the district court was not shortchanged and that United will not be prejudiced if the Court considers Hecht's inadequate-representation claim.

2. Turning to the merits of the inadequate-representation argument, United advances two arguments, neither of which is persuasive.

First, United blithely proclaims that "each member of the *Gravina* class was awarded injunctive relief," United Br. 15, in an apparent effort to turn a zero-relief settlement into something a bit more palatable. There are two problems with this argument.

First of all, it is not true. *No* member, not "each member," of the *Gravina* class obtained injunctive relief. The *Gravina* class is composed solely of people who were contacted by United *in the past*. See JA100 (defining settlement class). The class members could not (and did not) claim ongoing injury, and they sought no injunctive relief. On the other hand, the "injunction," assuming it would benefit anyone, could only benefit people who would be contacted by United *in the future*. As a legal matter, that future group includes *no one* in the *Gravina* class (which, as noted, claimed only past injury). And, as a factual matter, the future group is unlikely to include more than a handful (if any) *Gravina* class members.

Moreover, under the settlement terms, United is only required to use its “best efforts” to identify itself to people whom it calls and to tell them that it is a debt collector seeking to collect a debt. JA59. But the FDCPA renders debt collectors strictly liable for failing to do those things, 15 U.S.C. §§ 1692d(6), 1692e(11), and so the injunction appears to authorize United to engage in conduct prohibited by federal law — hardly a signpost of adequate representation.

Second, and with more conviction, United asserts that Hecht was provided adequate representation in *Gravina* because “[t]he measuring stick [for adequate representation] is not what Hecht would have received as an individual plaintiff. The measuring stick is what she would have received as a member of a class.” United Br. 15. That is wrong, as suggested by United’s failure to adorn its assertion with any authority.

In fact, all relevant authority points in the other direction. Once again, United’s assertion is belied by this Court’s ruling in *Wolfert*. There, in considering a collateral attack on a California class action settlement, this Court reviewed at length the challenger’s claim that her *individual* rights under New York law had been rendered worthless by the settlement and rejected the claim only because it determined that the challenger’s view of New York law was incorrect. *See Wolfert*, 439 F.3d at 172-75.

Wolfert's understanding of the proper adequate-representation analysis follows from the Supreme Court's decision in *Shutts*, which gave the right to notice *and* opt out constitutional protection so that absentees could control their own litigation destiny and decide for themselves whether their rights would best be protected through individual rather than class adjudication. 472 U.S. at 813; *accord Wal-Mart*, 131 S. Ct. at 2558; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999). Indeed, the constitutional pedigree of the right to opt out must explain why the settling parties in *Gravina* gave lip service to that right by including it in the notice, JA105 — though lip service it was, given that the right to opt out was buried in a notice that the class members would never see. In sum, given the right to opt out, it makes no sense to assess Hecht's right to adequate representation solely on the basis of a class action that she deems unfair and from which she wants to extricate herself so that she can pursue her own litigation.

It bears emphasis that unlike in *Wolfert* where the comparison between what the class action provided and what the challenger gave up required close analysis, the comparison here is easy. While the *Gravina* class members got nothing, Hecht held a valuable individual claim worth up to \$1,000 in statutory damages and any actual damages, plus costs and attorney's fees. 15 U.S.C. § 1692k(a)(1), (a)(2)(A), (a)(3). United does not deny this. In fact, it trumpets the importance of the

absentees' individual interests by explaining that the *USA Today* notice "indicated that any class member could opt out, bring an individual action under the FDCPA, and recover up to \$1,000 plus actual damages." United Br. 9.

The unfairness of Hecht's fate is underscored by how the money in *Gravina* was split up: The absentees went away empty handed, but the two class representatives received \$2,500 and \$3,500, respectively, including \$1,000 each specifically designated as "statutory damages" under the FDCPA, JA58, two charities received about \$13,200 each, and the class lawyers received \$90,000, or more than triple the "class relief" (which is what the settlement agreement calls the charitable distributions). JA58-59. Put another way, it is hard to take seriously United's accusation that Hecht is seeking to "essentially decertify" the *Gravina* class and "expos[e] it to double liability," United Br. 4, 7, given that the *Gravina* absentees received nothing, and the class lawyers took most of the money.

United defends the *Gravina* distribution on the ground that cy pres awards are proper where "distributing settlement proceeds would be impossible." United Br. 16. Taken from the Norman French expression "cy pres comme possible" ("as near as possible"), cy pres is a charitable trust law doctrine under which a court directs that trust property be used for a purpose that carries out the settlor's intention after a distribution specified in the trust becomes impossible or unlawful.

See Restatement (Second) of Trusts § 399 (1959).

Whatever one thinks as a general matter of the use of the cy pres doctrine in class actions, *see S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 412-16 (S.D.N.Y. 2009), it can only be justified when it serves as the next-best option for advancing the class members' interests. *See generally* Stewart R. Shepherd, "Damage Distribution in Class Actions: The Cy Pres Remedy," 39 U. Chi. L. Rev. 448 (1972). Therefore, if the doctrine is invoked at all, the money must go to charities whose missions have a tight nexus with the class members' claims and the purposes sought to be advanced by the class action. *See Principles of the Law of Aggregate Litigation* § 3.07(c), at 217 (Am. Law Inst. 2010); *see id.* § 3.07, at 220 (illustration 2) (in a suit claiming racial discrimination in employment, if money is leftover and a follow-up direct distribution is infeasible, "the donation of the balance to an entity that indirectly benefits class members and other victims of race discrimination ... would be appropriate.").

In *Gravina*, the plaintiffs' lawyers proposed two cy pres recipients, the Western Center on Law and Poverty and the National Consumer Law Center. *See* Doc. 34, at 2-3, in *Gravina v. United Collection Bureau, Inc.*, No. 2:09-cv-04816-LDW-AKT (E.D.N.Y. filed Nov. 10, 2010), available at <http://ia700503.us.archive.org/25/items/gov.uscourts.nyed.297830/gov.uscourts.ny>

ed.297830.34.0.pdf. United agreed to the Western Center on Law and Poverty, but opposed the National Consumer Law Center, suggesting instead the United Way or Habitat for Humanity. *See* Doc. 35 at 1, in *Gravina v. United Collection Bureau, Inc.*, No. 2:09-cv-04816-LDW-AKT (E.D.N.Y. filed Nov. 24, 2010), available at <https://ecf.nyed.uscourts.gov/doc1/12316151549>. The district judge approved an award to the Western Center on Law and Poverty, but rejected the parties' other recommendations and chose a charity on his own that none of the lawyers had mentioned, the Make-a-Wish Foundation of Suffolk County, New York. *See* Minute Entry, in *Gravina v. United Collection Bureau, Inc.*, No. 2:09-cv-04816-LDW-AKT (E.D.N.Y. Nov. 29, 2010); *see also* JA 108.

Although the charities chosen in *Gravina* are worthwhile organizations, it should go without saying that class-member property arising from nationwide violations of a statute meant to curb collection agency abuse should not be appropriated to fund charities that grant the wishes of seriously ill children in Suffolk County and fight poverty in the California courts. Put a bit more bluntly, a doctrine meant to serve as a surrogate for the class members' interests may not be used as a means to fund the settling parties' pet projects or the court's favorite charity. *See Bear, Stearns*, 626 F. Supp. 2d at 415-16 (citing articles referring to cy pres awards made to counsel's and judges' favorite charities, including alma

maters, and noting that “while courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety”); Sam Yospe, “Cy Pres Distributions in Class Action Settlements,” 2009 Colum. Bus. L. Rev. 1014, 1019-21, 1027 (2009) (describing case in which funds were directed to lead counsel’s law school alma mater) (discussing *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 2007 U.S. Dist. Lexis 49406 (D.D.C. 2007)). In sum, taking Chana Hecht’s constitutionally protected property interest and converting it into benefits for charities that have nothing to do with that interest underscores, not undermines, the conclusion that she was not adequately represented in *Gravina*.

CONCLUSION

For the reasons stated above and in our opening brief, the decision of the district court should be reversed, with directions that the district court consider Chana Hecht’s complaint on its merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3213 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14-point times new roman font.

/s/Brian Wolfman

Brian Wolfman

October 6, 2011