claim under an alleged "willful violation" quickly become staggering.[4]

To properly allege a violation, the statute requires that:

1. There must be a "person;"
2. That person must accept credit or debit cards for the transaction of business;
3. That person must "[electronically] print" more than the last 5 digits of the card number or the expiration date;
4. The last 5 digits of the card number or the expiration date must be electronically printed on the "receipt";
5. That electronically printed receipt must be printed off of a "cash register or other machine or device that electronically prints receipts for credit or debit card transactions"; and
6. That "printed" "receipt" must be provided to the cardholder at "the point of sale or transaction."[5]

With the potential for very large statutory damages, plaintiffs' lawyers quickly took note, and shortly after December 4, 2006, hundreds of class actions lawsuits were filed against traditional retailers and restaurants. Thereafter, plaintiffs leveled their sights on internet retail transactions. But with those suits came unique issues.

Internet Transactions

In a traditional brick and mortar retail store or restaurant, the credit or debit transaction is done face-to-face at the checkout counter or table. The receipt is printed by the cash register or credit/debit card PCI terminal and is typically handed to the customer. The customer signs the receipt, returns the "merchant" copy, and keeps the "customer" copy. All too often, however, the customer wads up his copy and tosses it in the nearest trash receptacle. There was concern that those customers, by throwing away their printed receipts, were opening themselves up to identity theft. The commonly articulated fear was that an unscrupulous "dumpster diver" might retrieve the receipt and use the customer's credit card number to make unauthorized purchases.[6]

Compare and contrast the typical brick and mortar transaction with an online retail transaction. With an online transaction, the customer could be anywhere in the world (as long as the retailer ships to that location), likely sitting at a computer, at home or at work. The

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Silberblatt v. Morgan Stanley: Class Action Court Protects Unnamed Class Members

by Jack Park

When a federal district court is called on to approve the settlement of a class action, it rarely, if ever, receives much input from any party that does not have a significant interest in the outcome. The class representative and class counsel want the deal approved so that they can receive its benefits, and, assuming he has not agreed to remain silent, the defendant, too, wants the deal to go forward to bind as many potential claimants as possible. The court, likewise, has a strong institutional interest in disposing of such a case. Only a limited number of unnamed class members are likely to object, and only some of those objections, however strongly felt and expressed, are likely to be helpful to the court when it determines whether the settlement is fair, reasonable, and adequate.

In *Silberblatt v. Morgan Stanley, et al.*, the court was confronted by all of these obstacles, and overcame them, slashing a requested fee award and freeing up a greater amount of the cash consideration for the class members to share.[1] The court did all this without any apparent hiccup from the defendants and without any objection by an unnamed class member. It did so independently, taking seriously its duty "to make a considered and detailed assessment of the reasonableness of the proposed settlement."[2]

The plaintiff class representative in *Silberblatt* alleged that the Morgan Stanley defendants misled him about their handling of precious metal bars or units which the plaintiff had purchased and left in their custody. The plaintiff claimed that the plaintiff class was "misled into believing that specific bars or units of precious metals were allocated to them and, therefore, not subject to claims of creditors of defendants."[3] In addition, the plaintiff alleged that the defendants charged excessive storage fees. These contentions, which the defendants denied, were packaged in a complaint that sought money damages on claims of breach of contract, breach of fiduciary duty, unjust enrichment, negligent misrepresentation, and violations of state law; but the plaintiffs did not seek declaratory or injunctive relief.

The complaint also sought certification of a plaintiff class composed of all persons who entered into contracts for the purchase of precious metals from or through the defendants from February 19, 1986, through August 26, 2005. While the court granted the motion to certify the class, that class suffered from two major deficiencies. First, given that the statute of limitations was six years, many of the class members had stale claims. Second, while there were some 23,000 class members, when the case was settled only some 500 had active accounts; the other 22,500 accounts had been closed. The court considered both of these facts in evaluating the fairness of the proposed settlement.

After the parties conducted discovery, including a number of depositions, and engaged in mediation, they reached a settlement. That settlement, which the court described as a "potpourri," included both monetary and non-monetary consideration.[4] The defendants agreed to pay $1.5 million in cash and to revise their sales brochures, third-party agreements, and forward pricing policies. Valuing the combination of monetary and non-monetary relief at $4,335,000, class counsel asked the court to approve an attorneys' fee of $783,900, plus expenses.

The court explained that, while notice of the settlement was mailed to more than 24,317 individuals and published in the *Wall Street Journal*, only twenty-seven class members opted out, and no one objected to the settlement or the fee application. In addition, only counsel for the parties spoke at the hearing, and no witnesses were called.[5] In other words, as frequently happens, the court had little help from the parties or unnamed class members in evaluating the settlement.

Nonetheless, the court found flaws in its terms with respect to both the cash and non-cash relief. As to the cash total of $1.5 million, the court found that amount to be fair, reasonable, and adequate to the class members, pointing out that it was 37.5 % of the full amount of all customer payments. It noted that the contractual claims would have been difficult to prove, explaining:

> It is fair to observe that defendants' statements did not drive home the point that no specific metals were segregated for the particular purchaser. Yet, no single document indisputably excluded the possibility of unallocated holdings. For example, a silver purchaser was not given the number of a specific bar owned by him, which would have pointed toward an allocated purchase.[6]

In addition, none of the class members had actually suffered a loss from the seizure of his unallocated holding by a creditor of the defendants. Finally, the planned allocation of 80% of the cash to those class members who incurred storage fees after January 1, 2000, and 20% to those who incurred fees before that date, was not unfair given the statute of limitations (six years) and the difficulty of proving older claims.

With respect to the non-monetary consideration, the court found the proposed valuation of that relief to be unproven. The plaintiff class' expert valued that non-monetary consideration at more than $1 million. He did so by valuing the changes in customer disclosure, on the website, and to the customer brochure equally, with each being worth $339,502.39 to some unknown number of class members. The court observed, "A well-crafted letter on fancy, embossed stationery sent by overnight courier to each of the 500 holders could have conveyed the same information with much the same effectiveness at a fraction of the combined value exceeding $1 million."[7] In addition, the defendants reserved the right to change the terms of their agreements, making the valuation of the changes "inherently uncertain."[8] Third, the expert treated accounts inconsistently and invariably in a way that maximized their putative value. The court concluded that while the non-monetary relief had some value, that value

> has not been proven. The methodology offered by the plaintiff's expert is so flawed as to be entitled to little weight. It assumes continued holdings for valuing one item but assumes the opposite in valuing another. It places a value on disclosures without knowing to how many investors the disclosures would be made.[9]

The inclusion of a reduction in the cap on storage fees as part of the non-monetary relief prompted the court to consider the Class Action Fairness Act of 2005 (CAFA). In particular, the court noted, but did not resolve, the question of whether the reduction in storage fees constituted a "coupon." Under CAFA, the court must consider the "actual value" of any coupons that are part of the compensation that goes to the class members and take the redemption rate of those coupons into account when assessing the attorneys' fee to be paid to class counsel.[10] The court observed that the reduction in storage fees looked like a coupon to the extent that it could be viewed as "a discount on a future purchase."[11] The similarity was not complete, however, because the discount was neither transferable nor limited to class members. Ultimately, there was no evidence of the reduction's value. Even so, the court explained, "That an item of non-monetary consideration may not fall within the statute's use of the term 'coupon' does not make it any less worthy of close judicial scrutiny."[12]

The uncertain valuation of the non-monetary consideration led the court to reduce the fee request. As the court noted, if the request for fees and expenses were granted in full, counsel would get 63% of the cash consideration of $1.5 million. Such a recovery would be "an unfair result."[13] Instead, the court concluded that an award of 20% of the cash consideration, or $300,000, plus expenses of $150,016.44, would be reasonable under the circumstance. The court explained that, with a lodestar figure of $1,310,853, the award was a negative multiplier of 4.4.[14] A negative multiplier was necessary in this case because, if the fee application were not reduced, it would have consumed a large part of the common fund. That said, in cases with much larger common funds, positive multipliers, including positive multipliers of 4.4 or more, have been approved.[15]

As the court recognized in *Silberblatt*, when a court is called on to approve a fee application in a class action, it "act[s] as a fiduciary who must serve as the guardian of the rights of absent class members."[16] That is, a fiduciary for unnamed class members, not class counsel, class representatives, or defendants. In order to do that, the *Silberblatt* court had to overcome inertia and other obstacles. The unnamed class members should be grateful that it did.

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Endnotes

1 524 F. Supp. 2d 425 (S. D. N.Y. 2007).

2 524 F. Supp. 2d at 428 (quoting Weinberger v. Kendrick, 698 F. 2d 61, 82 (2d Cir. 1982)).

3 *Id.*, at 429.

4 *Id.*, at 427.

5 *Id.*, at 428.

6 *Id.*, at 429.

7 *Id.*, at 430.

8 *Id.*, at 431.

9 *Id.*

10 *See* 28 U.S.C. § § 1712(a), (c), and (d).

11 524 F. Supp. 2d at 432.

12 *Id.*

13 *Id.*, at 427.

14 *Id.*, at 434.

15 *See, e.g., In re* Xcel Energy, Inc., 364 F. Supp. 2d 980 (D. Minn. 2005) (approving a multiplier of 4.7 to justify an award of some $20 million from a common fund of $80 million in a securities class action).

16 524 F. Supp. 2d at 433 (quoting Central States Southeast and Southwest Areas, Health and Welfare Funds v. Merck-Medco Managed Care, L.L.C., 504 F. 3d 249-50 (2d Cir. 2007).

"Reverse Bifurcation" Approach to Punitive Damages Trials in West Virginia

by Mark A. Behrens & Christopher E. Appel

Defendants in West Virginia trial courts are increasingly being forced to confront a novel "reverse bifurcation" approach to decide punitive damages in mass tort cases. The approach calls for a determination of a defendant's liability for punitive damages before basic issues of compensatory liability and damages have been decided. Defendants are challenging the procedure, arguing that putting the "cart before the horse" violates procedural due process guarantees found in the U.S. Constitution.

At time of press, a petition for writ of certiorari was pending before the U.S. Supreme Court in one such challenge. That appeal, *Chemtall, Inc. v. Stern*, involves a medical monitoring class action brought by coal preparation plant workers against manufacturers and sellers of an industrial water cleaner in the Circuit Court for Marshall County, West Virginia.[1] The trial plan, proposed by plaintiffs and approved wholesale by the trial court, will have the jury determine the liability of defendants for punitive damages and set a punitive damages "multiplier" prior to class certification, before a full determination of the defendants' liability for medical monitoring, and before any medical monitoring damages have been determined. The West Virginia Supreme Court of Appeals refused defendants' request to intervene, concluding that appellate review of the trial plan would be premature before "complete development of all the facts and testimony and after a trial of all the issues."[2] One justice dissented, stating that "the appropriateness of punitive damages cannot, and should not, be determined prior to a finding of underlying liability."[3]

The U.S. Supreme Court recently declined to hear another appeal raising similar issues, *Philip Morris USA v. Accord*.[4] That action involves a three-stage trial plan that consolidated more than 700 separate personal-injury actions brought by individual smokers against several tobacco companies in the Circuit Court for Ohio County, West Virginia. In Phases I and I(A) of the upcoming trial, the jury will be asked to determine whether each defendant's conduct merits punitive damages and will set