When Single Publication Notice Is Sufficient – and When It's Not

In Mueller v. Nugent, the U.S. Supreme Court famously said that the act of filing for bankruptcy, in and of itself, is a "caveat to all the world" of the creation of a bankruptcy estate, and that a debtor's creditors were required to operate with appropriate care in light of same. Despite that decision, bankruptcy lawyers know that they can't simply rely upon headlines in The Wall Street Journal to ensure that creditors are being properly advised of what's happening in a debtor's bankruptcy case. Indeed, the U.S. Supreme Court in Mullane v. Central Hanover, later cautioned that due process requires actual notice to known creditors and constructive notice that is properly tailored to ensure the best form of notice to unknown creditors possible under the circumstances. Historically, notice to unknown creditors has taken the form of publication notice. As digital forms of notice, such as the web and email, have become increasingly reliable, though, they are being used to supplement (or even replace) print notice. Given the various methods and forms of notice, however, what actually constitutes adequate notice as a matter of constitutional due process in any individual case turns on the particular facts of that case. This tenet is highlighted by two decisions recently published in the Second Circuit, In re BGI, Inc. f/k/a Borders Group, Inc. and Hecht v. United Collection Bureau.

In BGI, more than eight months after confirmation of the debtors' chapter 11 plan of liquidation and almost a month after it went effective, individuals who claimed that they held Borders gift cards asked the bankruptcy court to permit them to file late proofs of claim and to certify a class on behalf of similarly situated creditors. They argued that they should not be held to the terms of the bar date order because (i) they should have received actual notice of the bar date as their personal information was contained in one or more of the debtors' various customer-information databases, and (ii) the debtors' single publication notice in The New York Times was an inadequate form of constructive notice.

The bankruptcy court was not persuaded. First, it held that the individuals were not entitled to actual notice of the bar date because they were not "known" creditors of the debtors. The debtors submitted persuasive evidence that, even if they had combed through the four different databases of customer information (each of which was administered or maintained by a different third party), the debtors would not have known that the individuals, in addition to being Borders customers, also held unused gift cards. Second, the bankruptcy court found that the Borders debtors had sent numerous targeted communications to customers during their chapter 11 cases by way of email and had posted information about their cases on their general website. These communications, coupled with the single published notice, constituted adequate constructive notice of the bar date to their unknown gift card holders. The bankruptcy court further held that,

in light of the individuals' failure to act in a timely manner and the substantial prejudice to the debtors' estates and their other creditors if the movants were permitted to file their claims and also file a proof of claim on behalf of a purported class, the motion had to be denied.

Only three days after BGI was issued, the Second Circuit Court of Appeals, in Hecht, addressed the constitutional adequacy of publication notice in the context of a class action settlement. The Second Circuit found that a plaintiff's action was not barred by a prior judgment in a previous class action because she had a due process right to notice of the settlement reached in that litigation, which was not satisfied by the single notice of class action and settlement published in USA Today. In reaching its decision, the Second Circuit stated that it was not aware of any case in its circuit holding that "a single publication" satisfied constitutional due process. The Second Circuit further found that not only was such a single publication void of meaning, it was, at best, a "mere gesture" of notice, particularly given that it failed to yield a single response from any member of the putative class. In dicta, however, the court cited with favor the plaintiff's argument that, had the notice been coupled with a "more extensive notification campaign – including electronic media, local publications, and the like," it may have been adequate. Absent such additional forms of notice, however, the Second Circuit found that the settlement was not binding on the plaintiff.

At first blush, the decisions appear contrary – in BGI, a single notice published only once in one newspaper was deemed adequate; in Hecht, such notice was deemed deficient. But the decisions are easily reconcilable, as both recognize that whether notice is adequate as a matter of constitutional due process ultimately turns on whether the procedures utilized, taken as a whole, provided affected parties with meaningful notice and an opportunity to participate (or opt out) of the action or case. Thus, the decisions reiterate the principle that it is not so much the method of notice that matters for purposes of due process, but rather quality that counts.

184 U.S. 1 (1902)

339 U.S. 306 (1950)