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THE PIB REPORT

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Second Circuit Affirms District Court's Granting of Summary Judgment in TILA Putative Class Action

On November 23, 2016, the Second Circuit Court of Appeals affirmed the dismissal of a putative class action complaint filed by the holder of a store-branded credit card against the bank that issued the card.

Plaintiff Abigail Strubel filed a putative class action complaint against defendant Comenity Bank ("Comenity"), alleging that Plaintiff's credit card agreement contained defects in the disclosure of certain consumer rights, in violation of the Truth in Lending Act ("TILA"). Specifically, Plaintiff alleged that Comenity had failed to disclose the following:

• Cardholders that wanted to stop payment on an automatic payment plan were required to first satisfy certain obligations;

• Comenity was obliged to acknowledge billing error claims within 30 days of receipt, as well as any corrections made during that time;

• While the disclosures identified certain rights pertaining to disputed credit card purchases for which full payment had not yet been made, the disclosures did not apply to cash advances or checks that accessed credit card accounts; and

• If a consumer was not satisfied with a credit card purchase, the consumer was required to contact Comenity in writing or electronically.

Comenity moved for summary judgment upon the completion of discovery, and Plaintiff cross-moved for class certification. The Southern District of New York granted Comenity's motion, on the grounds that the claims failed as a matter of law, and denied Plaintiff's motion as moot. Plaintiff then appealed.

The Second Circuit considered Comenity's argument that Plaintiff lacked constitutional standing. It applied the three-part test to determine if Plaintiff satisfied the "irreducible constitutional minimum" of Article III standing: (1) was there an injury in fact; (2) was there a causal connection between the injury and the conduct of which Plaintiff complains; and (3) is there a likelihood the injury will be redressed by a favorable decision. Injury in fact, in turn, requires a plaintiff to show invasion of a legally protected interest that is "concrete and particularized," and that is "actual or imminent, not conjectural or hypothetical."

The Second Court held that only two of Plaintiff's four TILA challenges met the standard for concrete and particularized injury: (1) certain identified consumer rights pertain only to disputed credit card purchases not yet paid in full, and (2) a consumer dissatisfied with a credit card purchase must contact the creditor in writing or electronically. The Second Circuit rejected Plaintiff's argument that Comenity's alleged failure to disclose a consumer's obligation to provide a creditor with timely notice to stop automatic payment of a disputed charge risked concrete in-

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jury – Comenity did not offer an automatic payment plan at the time Plaintiff held the credit card at issue. Further, the court rejected Plaintiff's challenge to Comenity's 30-day response obligations to reported billing errors, finding that the "bare procedural violation" alleged by Plaintiff did not present a sufficient risk of harm that would satisfy the concrete injury requirement, especially where Plaintiff failed to show that the challenged notice changed her credit behavior had she received proper notice, and failed to show that, upon the reported error, the bank did not honor its statutory response obligations to consumers.

While the Second Circuit found that Plaintiff did have a statutory remedy, it found that Plaintiff's challenge to Comenity's disclosure of "purchase" and "outstanding balance" limitations on consumer rights to dispute unsatisfactory credit card purchases failed as a matter of law, on the grounds that the disclosure was substantially similar to the relevant part of Model Form G–3(A) prescribed in Regulation Z. The Second Circuit also found that Comenity did not violate TILA by failing to advise her that a consumer must report an unsatisfactory purchase to a creditor in writing, on the grounds that inclusion of this language was specifically optional under Regulation Z. For these reasons, the Second Circuit dismissed Plaintiff's appeal, affirmed the district court's granting of summary judgment, and affirmed the termination of Plaintiff's motion for class certification. ■

For more information, contact Sanjay Ibrahim at sanjay.ibrahim@piblaw.com.

Celgene Seeks Rehearing of PTAB Decision Invalidating Patent Claims on Cancer Drugs

On November 25, 2016, the Celgene Corporation requested rehearing before the Patent Trial and Appeal Board (PTAB), pursuant to 37 C.F.R. §42.71(d), regarding the PTAB decisions invalidating claims of U.S. Patent Nos. 6,045,501 (the '501 patent) and 6,315,720 (the '720 patent) as obvious over the prior art, in response to a petition filed by the Coalition for Affordable Drugs VI LLC. The '501 patent is directed to "Methods for Delivering a Drug to a Patient While Preventing the Exposure of a Foetus or other Contraindicated Individual to the Drug." The '720 patent is directed to "Methods for Delivering a Drug to a Patient While avoiding the Occurrence of an adverse Side Effect Known or Suspected of Being Caused by the Drug."

The subject patent claims are directed to computerized methods of delivering teratogenic drug to patients to keep them from being used by pregnant women. Claim 10 of the '501 patent adds the limitation "providing to said patients . . . a contraceptive device or formulation," and the request for rehearing challenges the obviousness finding based on an expert's reliance on prior art directed to counseling patients about getting contraception, rather than providing contraception. Claim 10 of the '720 patent adds the limitation that the computerized system includes a "set of information" from the patient comprising genetic testing. The request for rehearing pertaining to the '720 patent challenges the obviousness finding based on an expert's reliance on prior art disclosing other types of testing, but not genetic testing.

The '501 and '720 patents are among the patents listed in the FDA's "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly known as the Orange Book, that support exclusivity for Celgene's Thalomid®, Revlimid® and Pomalyst® products. These are cancer drugs indicated for multiple myeloma, as well as other conditions.

This case is reflective of the growing trend toward challenging patents at the PTAB as an alternative to, or in conjunction with, challenging patents in the federal district courts. ■

For more information, contact Scott Parker at scott.parker@piblaw.com