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BUSINESS LITIGATION ALERT

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Proceed Without Counsel At Your Own Risk: Settlement Agreement Held Valid Despite Execution By Unrepresented Party

More often than not, it can be less expensive to hire an attorney to review a negotiated contract or settlement agreement than to comply with a poorly drafted contract. The recent matter of *Colburn Family Foundation v. Chabad's Children of Chernobyl*, venued in the United States District Court for the Southern District of New York, provides a perfect example.

In October, 2004, Colburn Family, a not-for-profit organization, loaned $500,000 to Chabad's Children of Chernobyl ("CCOC") as consideration for a promissory note to be repaid in December 2004. After CCOC failed to remit payment that December, Colburn Family agreed to extend the maturity date to September 2005. When CCOC again failed to remit payment in September 2005, Colburn Family filed a lawsuit seeking $500,000 plus interest, costs and fees pursuant to the Note. CCOC, without hiring counsel, negotiated and entered into a Settlement Agreement with Colburn Family. The Settlement Agreement provided that $500,000 plus $20,050 in costs and fees be paid pursuant to a schedule. The Settlement Agreement also contained a default provision permitting Colburn Family to recover all attorneys fees and costs incurred in enforcing the terms of the Agreement.

After making several payments pursuant to the Agreement's schedule, CCOC ceased all payments. Colburn Family filed for a default judgment seeking the remaining amount owed pursuant to the Settlement Agreement and an additional $10,719 in fees and costs incurred in enforcing the terms of the Agreement. In defense, CCOC argued that it unwillingly entered into an adverse Settlement Agreement, that its principal did not speak English and therefore did not know what he was signing, that CCOC was unaware of its rights, and that it was pressured into executing the Agreement because CCOC was not represented by counsel, whereas Colburn Family had retained counsel.

The Court agreed that unequal bargaining power existed between the parties and that the Settlement Agreement may have contained unfavorable terms to CCOC, but nevertheless held the Settlement Agreement to be a valid contract. The Court noted that CCOC could have retained counsel at any time, but voluntarily chose to proceed on its own. Consequently, CCOC was bound by the Settlement Agreement it executed.

Colburn Family is a reminder that attorney review is a very important part of drafting any contract or settlement agreement. A party is not likely to be excused from contract obligations because it was unrepresented by counsel at the time. ■

On The Strength Of "A Bottle Of Broken Promises:" The New Jersey Supreme Court Has Reversed The Denial Of Class Certification To Plaintiffs Who Purchased Relacore, A Weight Loss Supplement

On September 30, 2010, the New Jersey Supreme Court issued the Opinion in *Lee v. Carter-Reed Co., LLC* **reversing the appellate court's denial of class certification in a case for violation of the New Jersey Consumer Fraud Act.** The Court held that in reviewing the case in the light most favorable to Plaintiff Melissa Lee, common issues arising out of her allegations predominated over individual class member issues, where, as in this case, Plaintiff alleged her ascertainable loss was the "purchase price of a bottle of broken promises [a weight loss supplement]." The Court ruled that the class action device was a superior vehicle for this type of consumer litigation and was not unmanageable.

Plaintiff, individually and as the class representative, stated that she purchased three bottles of Relacore, totaling $120, based upon Carter-Reed's advertising and marketing campaigns. She claimed that Carter-Reed represented that Relacore would "shrink belly fat, improve users' mood, and combat the medical condition known as metabolic syndrome." Despite her use of all three bottles of the product for a three-month period, she actually gained weight. She never returned the bottles or unused product to Carter-Reed for a refund.

Rather, Plaintiff proceeded with a putative class action alleging, *inter alia*, that Carter-Reed's advertising and marketing campaign violated the New Jersey Consumer Fraud Act and that she had sustained an ascertainable loss in the amount she paid to purchase the Relacore. Carter-Reed responded that Plaintiff could not meet the class action elements of predominance, superiority, and manageability because the company had offered a refund program and because the Plaintiff could not demonstrate that the representations it made about Relacore were untrue. The trial and appellate courts had agreed with Carter-Reed and had denied certification of the class. ■

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