A House Divided: U.S. District Court Splits on Whether Class Has a Private Right of Action Against "Money Transmitters"

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Two class action lawsuits, *Hucke v. Kubra Data Transfer LTD., Corp.*, No. 2-15-cv-14232-RLR, and *Pincus v. Speedpay, Inc.* Case No. 9:15-cv-80164-KAM, [1] in the U.S. District Court for the Southern District of Florida, seek the determination of whether two credit card processors violated the following Florida statues:

- Fla. Stat. § 501.0117, which prohibits a seller from imposing a surcharge on a buyer for "electing to use a credit card in lieu of" other payment means (the "Surcharge Statute"); and
- Fla. Stat. § 560.204, which states that money transmitters[2] must obtain a license from the State of Florida (the "Money Transmitter Statute").

Hucke involves Kubra Data Transfer ("Kubra"), which provides credit card processing to Duke Energy customers. Residential customers that choose to pay their energy bill with a credit card are charged $2.40 by Kubra. Commercial customers are charged $9.95. *Pincus* involves Speedpay, Inc. ("Speedpay"), which provides credit card processing for customers of Florida Power & Light Company for a similar fee.

The complaints in both *Hucke* and *Pincus* allege that the payment processor violated the Surcharge Statute and the Money Transmitter Statute. However, neither plaintiff seeks relief directly under those statutes, as the statutes do not provide a private right of action. In other words, only the State of Florida, not an individual citizen, has the authority to bring a lawsuit to enforce the statutes.

Instead, the plaintiffs seek relief indirectly through (a) the common law theories of unjust enrichment and "money had and received," and (b) Florida's Deceptive and Unfair Trade Practice Act, Fla. Stat. § 501.204 (FDUTPA).

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Both Kubra and Speedpay moved to dismiss the complaint, challenging an individual's ability to use the Surcharge Statute and the Money Transmitter Statute in this way.

U.S. District Judge Kenneth A. Marra, the presiding judge in *Pincus*, ruled on the issues first in an Order dated October 6, 2015. Judge Marra held that "even though the statutes in question do not create private rights of action, Plaintiff [in *Pincus*] may proceed with common law or other statutory causes of action that exist if the elements of those claims are properly stated."

Two days later, Chief United States Magistrate Judge Frank J. Lynch reached the opposite conclusion in *Hucke*. Magistrate Judge Lynch held that there is no "possibility of seeking private relief [under the Surcharge Statute and the Money Transmitter Statute]. It appears instead that Florida intends these violations not to be redressable through private causes of action. . . ."

On November 4, 2015, after Magistrate Judge Lynch issued his Report and Recommendation, the Eleventh Circuit issued its opinion in *Dana's Railroad Supply v. Attorney General, Florida*, No. 14-14426, 2015 WL 6725138 (11th Cir. Nov. 4, 2015), which found that the Surcharge Statute is an unconstitutional abridgment of free speech.

Five days later, on November 9, 2015, U.S. District Judge Robin Rosenberg, presiding over *Hucke*, entered an Order adopting Magistrate Judge Lynch's findings and dismissing the claims.

Judge Rosenberg first held the Eleventh Circuit's opinion in *Dana's Railroad Supply* provided immediate grounds for dismissing the Plaintiff's claims as they relate to the Surcharge Statute.

Judge Rosenberg's Order next held that the plaintiff may not bring common law claims based on the Money Transmitter Statute. In support, Judge Rosenberg distinguished Judge Marra's opinion in *Pincus*, and held "the Money Transmitter Statute cannot serve as the basis for a common law claim . . . as this would essentially allow an end-run around the Legislature's decision not to provide a statutory cause of action."

Finally, Judge Rosenberg concluded that the Money Transmitter Statute may not serve as a FDUTPA predicate. There are only two

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ways that a statute may serve as a predicate for a FDUTPA claim: (a) if the text of the statute expressly states that it is a may serve as a FDUTPA predicate; or (b) a court may find that the statute proscribes unfair and deceptive trade practices. Judge Rosenberg concluded that the Money Transmitter Statute fails to meet either of those two criteria.

Both Judge Rosenberg and Magistrate Judge Lynch, assumed, for the sake of discussion, that Kubra is a "money transmitter" and should be licensed under the Money Transmitter Statute. Kubra argued that it is not a money transmitter in its Motion to Dismiss:

> [A] "money transmitter" under Florida's MSB Code is an entity "which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, including . . . through bill payment services . . . ." Fla. Stat. § 560.103(23). Yet credit cards are ***specifically excluded*** from the definition of "payment instruments." Fla. Stat. § 560.103(29) (the term "[p]ayment instrument . . . does not include . . . a credit card voucher . . . ."). The exclusion makes sense when analyzing what actually happens when a credit card payment is processed. When an entity such as Kubra processes a credit card payment (or when a customer similarly "swipes" their credit card when making a purchase), ***no money changes hands*** between the holder of the credit card (in this case, Plaintiff) and any other party to the transaction. *See Payment Card Litig.*, 986 F. Supp. 2d at 214. By its very nature it is a ***credit*** transaction, an indication of ***a promise of future payment***—and one in which the credit card holder has very limited risk of loss. Moreover, the very idea of a "credit card" is that the bank issuing the credit card—not third parties—is liable for the initial payment of charges made using a credit card. There would simply be no reason to require the processer of that payment to comply with the bonding, record-keeping, employee background check and other onerous licensing requirements of the Money Transmitter Statute. To hold otherwise would transform every merchant in Florida who accepts credit cards directly, and every online merchant, into a "money transmitter." *Cf., e.g., Payment Card Litig.*, 986 F. Supp. 2d at 214 (describing steps and parties in a credit card

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transaction).

The Court did not need to make a determination as to whether Kubra is a money transmitter under Florida law. Because it held that an individual citizen is unable to bring a lawsuit under the Money Transmitter Statute, it did not matter whether Kubra was a money transmitter under Florida law.

The outcomes of *Hucke* and *Pincus* should provide electronic payments to businesses with an idea of whether they are exposed to individual lawsuits from customers in Florida. The Surcharge Statute has now been stricken as unconstitutional. The Money Transmitter Statute is part of Florida's regulatory administrative scheme, which allows for various forms of administrative or regulatory relief for violations. Whether a claimant may bring a common law claim for violation of the Money Transmitter Statute may be determined by the Eleventh Circuit Court of Appeals, given the split in the law created by *Hucke* and *Pincus*.

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[1] Both cases were brought by plaintiffs' attorneys Scott Owens and Bret Lusskin, Jr.

[2] A money transmitter is defined under Florida law as business that "receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or other businesses that facilitate such transfer within this country, or to or from this country." Fla. Stat. 560.103.

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