NO SHORTCUTS TO CLASS NOTICE: THIRD CIRCUIT ORDERS SPRINT TO SPEND MORE TIME AND MONEY IDENTIFYING MORE POTENTIAL CLASS MEMBERS

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To Our Clients and Friends:

The Third Circuit Court of Appeals on Friday rejected a proposed class action settlement, essentially holding that the defendant should spend an estimated five months and $100,000 to identify a much larger subset of class members. Federal Rule of Civil Procedure 23(c)(2)(B) requires "individual notice to all [class] members who can be identified through reasonable effort." The new case is notable for the appellate court's willingness to wade into the particulars of the costs of notice, and emerge with the conclusion that particular incremental expenditures may be needed to meet the standard of reasonableness.

On review here was the parties' second proposal on class notice. The *Larson* plaintiffs alleged that certain mobile phone providers' flat-rate early termination fees were unlawful penalties. Sprint Nextel Corp. proposed to settle for consideration totaling $17.5 million. Objectors argued that the parties had not provided adequate notice to settlement class members, and the District Court initially agreed. The District Court did not require Sprint to identify *all* class members—a process which Sprint contended would take 12 months and cost $1 million—but it did instruct Sprint to identify *subsets* of class members who could be identified at a more reasonable cost.

The parties then submitted a new notice plan that, despite the judge's prior order, did not propose to identify any new subsets of former Sprint customers. Sprint affirmed that identifying former customers who paid a flat-rate ETF between April and July 2009 would take two months and cost $20,000, while identifying customers who paid the fee between April 2007 and April 2009 would take up to five months and cost $80,000. (The proposed class covers customers since 1999, but data from periods before 2007 were even less accessible.) The District Court agreed that, even though these steps could have identified millions of class members, neither the $20,000 nor the $80,000 cost was justified. The same objectors appeared again, but this time the District Court approved the deal.

Last week the Third Circuit reversed and remanded, instructing the district judge either to order Sprint to conduct the $100,000, five-month search or else provide a much more detailed explanation as to why the district judge would not do so. Assuming the search would yield two

million class members' contact information, the panel noted that the cost of search would be $0.05 per class member and the combined cost of search plus notice would be $0.43. The panel noted that the U.S. Supreme Court had approved higher search costs (adjusted for inflation) in its own leading cases, *Eisen v. Carlisle & Jacquelin* and *Oppenheimer Fund, Inc. v. Sanders*. Analogizing the situation to cases involving electronic discovery cost-shifting, the Third Circuit suggested that the district judge could order sampling of the media containing class members' information, to better determine—beyond the "millions" guesstimate—how many class members would be identified in a full search. The court noted its tradition of "stringent" enforcement of the individual notice requirement, particularly where as here there was a reasonable potential for identifying large numbers of additional class members.

Sprint's settlement costs will rise considerably if it must pay up to $0.43 per person to identify and mail settlement notices to several million more class members. Unlike Sprint's notices to current customers, which can be provided as inserts to bills already being sent, notices to former customers require separate mailings. It is not clear how the potential incremental cost of additional notice compares to the cost of defending the settlement through two district court fairness hearings and an appeal.

The *Larson* holding does not mean that class action defendants must identify every putative class member regardless of cost. For what seems to be the first time, however, *Larson* has attached a specific dollar threshold to "reasonable," saying that incremental costs of $0.43 per person to identify and notify at least two million class members "are not troublingly high sums."

Class action defendants should keep this decision in mind when proposing notice programs where large numbers of class members are known to them or can be identified through moderately costly efforts.

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