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GUEST COLUMN

Overturning settlement, 9th Circuit calls for 'something more' than mailed notice

By Jordan Elias

The 9th U.S. Circuit Court of Appeals' vigorous policing of class action settlements continued on Dec. 11 with a decision vacating a settlement between exotic dancers and a San Francisco strip club management company.

Roes 1-2 v. SFBSC Management, LLC, 2019 DJDAR 11502, is the latest in a series of 9th Circuit cases reflecting a concern that the self-interest of class counsel and representative plaintiffs may "seep its way into" settlement talks, resulting in an agreement that is unfair to the broader class of plaintiffs. But where *SFBSC* mostly breaks new ground is in the area of class notice. In fact, this might be the case that turns online publication notice into a standard practice.

The dancers in *SFBSC* claimed they were misclassified as independent contractors and sought unpaid wages and other penalties. After defeating the management company's arbitration motion, they reached a deal with the company and several of its clubs that would provide $2 million in cash — $950,000 of which would be allocated to their attorneys' fees — and up to another $1 million if the initial $2 million was exhausted. The settlement also would have required the clubs to offer dancers the option to work as an employee, instead of an independent contractor, and allowed current dancers to keep customer payments for lap dances on specified nights for two years instead of taking an immediate payout.

The trial court approved the settlement, but the 9th Circuit reversed. Applying de novo review because notice implicates due process, the court deemed the notice procedure in *SFBSC* "lackluster" and constitutionally infirm.

Notices were sent by U.S. mail to dancers for whom the clubs had addresses and were also posted in the clubs' dressing rooms. But even though class members stood to gain hundreds of dollars in backpay, less than one in five class members filed a claim.

At oral argument, U.S. District Judge Lawrence L. Piersol, sitting by designation, expressed the panel's collective sense that the notice plan "seemed kind of old world. You know, all kinds of people figured out how to get to people politically through the internet. It seemed like you didn't explore that at all. It seemed like it's old school you followed."

The panel rejected the defendants' explanation that it didn't have email addresses for the dancers, commenting that the parties still could have posted the notice on Stripper.web, an online forum for adult entertainers, or run targeted Facebook ads. Even without email, "technological developments are making it even easier to target communications to specific persons or groups and to contact individuals electronically at little cost."

SFBSC should add fuel to the practice of using web banner ads and other forms of online notice. This trend also dovetails with the 2018 amendments to Federal Rule of Civil Procedure 23, which state that notice may be given through "electronic means."

As for the posters in the clubs' dressing rooms, those were likely only seen by dancers still working at the clubs whose current addresses the defendants had. The posters were not likely seen by *former* dancers whose current addresses the defendants did *not* have. Even after skip-tracing, 560 of the 4,681 mailed notices were returned as undeliverable.

Although direct notice need not be sent to each class member, Rule 23 requires "the best notice that is practicable under the cir-

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cumstances, including individual notice to all members who can be identified with reasonable effort." This provision was violated in *SFBSC* by the failure to implement a notice plan for former dancers and to make any attempt to reach class members who didn't receive notice by mail. The court reiterated that, regardless of specific platforms or methods, class counsel must make a targeted effort to *try* to reach all members of the class, holding that "something more" than U.S. mail was needed to bring the *SFBSC* program up to par.

The Supreme Court, too, has prioritized the role of the class notice in ensuring that valuable claims are not unknowingly compromised or released. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the court rejected an argument that notice could be dispensed with because of its high cost: "The short answer ... is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23."

Lawyers who appear at preliminary approval hearings typically expect the judge to train attention on the proposed notice. *SFBSC* will reinforce that judicial instinct and may intensify scrutiny of the methods and reach, as distinct from the content, of class action settlement notices. ■

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