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Research on class action notification costs

Introduction

Our Client is the Plaintiff in a civil case that was certified as a class action with a 100,000-member class. Client would like to argue that the Court should require Defendant, rather than Plaintiff, to bear the costs of notifying the class members, even though liability and damages have not been determined.

Question Presented

Under what circumstances will the Courts require Defendant, rather than Plaintiff, to bear the costs of notifying the class members, even though liability and damages have not yet been determined?

Short Answer

Generally it is the burden of the Plaintiff to bear the cost of notifying the class members. There are some exceptional circumstances when the burden to bear the cost shifts to the Defendant, such as apparent merit or lack of merit in the claim, the presence or absence of genuine issues of fact and law, or the strength of Defendants' desire for *res judicata* effect.

Discussion

Fed R. Civ. P. 23 sets out the standards for a class action. Rule 23(c) requires the Court to direct appropriate notice to the class, using the best notice practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort. However, the provision does not stipulate whether the Plaintiff or the Defendant must bear the burden of notice costs. The historical rule in the United States is that individual litigants are responsible for their own legal costs, regardless of which party prevails. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (U.S. 1975). In the context of class actions, this rule implies that a small number of nominal Plaintiffs -- or their attorneys -- must assume the costs of an entire class while bearing the risk of losing the case or being denied costs in an otherwise favorable settlement. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

In *Eisen*, the Court set out the general rule that plaintiffs bear the cost of class notification. *Eisen* involved a class action on behalf of about 6,000,000 individuals and entities, of which the names and addresses of 2,250,000 were "easily ascertainable" *Id.* at 175. After proceedings dating back to 1966 and appellate decisions known as *Eisen I* (*Eisen v. Carlisle & Jacquelin*, 370 F.2d 119*)*, and *Eisen II* (*Eisen v. Carlisle & Jacquelin*, 391 F.2d 555), the district Court eventually ruled Fed R. Civ. P. 23(c)(2) would be satisfied if Plaintiff were to give individual notice to but a fraction of the 2,200,000 identifiable class members, provided he supplemented the notice by publication in certain widely read papers. The defense was ordered to bear 90 percent of the cost of such notice, or about $ 19,500. The Supreme Court reversed the order. The Court held that the requirement of Rule 23 that class members be given the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," meant precisely what it said: 2.25 million individual notices, regardless of cost or circumstances of the particular case.

The Court observed that there is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular Plaintiffs. *Eisen*, 417 U.S. at 177. The Court further held that Rule 23 does not permit dispensing with notice before trial, *Id*. at 176-177, or conducting a preliminary or "mini" hearing on the probable or apparent merits of the suit for the purpose of determining whether to shift all or part of the cost of giving notice from the Plaintiff to the Defendant. *Id.* at 177-178. The Court observed:

> The usual rule is that a Plaintiff must initially bear the cost of notice to the class. The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the Plaintiff and Defendant, as in a shareholder derivative suit. Where, as here, the relationship between the parties is truly adversary, the Plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.

Id. at 178-179.

In appropriate circumstances, however, a court is empowered to require a defendant to bear some of the expense entailed in identifying and notifying absent class members. *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (U.S. 1978). For example, in, *Cartt v. Superior Court*, 50 Cal. App. 3d 960 (Cal. Ct. App. 1975), Petitioner credit card purchaser filed a class action against an oil company, alleging that the company falsely advertised that certain gasoline would produce a significant reduction of exhaust emissions and air pollution, and that petitioner and the members of her class relied on such advertising in purchasing at least 300,000,000 gallons of the gasoline at an estimated increase of five cents per gallon over the market price. The trial court certified petitioner's case as a class action and ordered her to mail notices to each of the 700,000 oil company credit card holders residing in Southern California. The Appellate Court vacated these orders, finding that the lower court failed to balance the issues of adequate

notice and maintenance of the class action. The Court observed that the mailing list was both too short, in that it did not contain class members who were no longer cardholders or members who left the area, and too long, in that it contained many individuals who were not class members. *Id.* at 965. The Court also set down the standards for shifting the cost of notification to defendants, taking into consideration the myriad possibilities of abuse of the process, such as the improbability that anyone else who is only minimally damaged will undertake and underwrite new litigation, the statute of limitations, the doctrine of *res judicata* and, above all, the impact of *stare decisis*. *Id.* at 969 The Court ruled that there are no rigid rules of allocation of expenses, and each case must be decided based on individual circumstances. *Id.* at 974. Relevant factors include the apparent merit or lack of merit in the claim, the Defendant's desire to take advantage of the broader res judicata effect of a class action, the number of named Plaintiffs and their financial responsibility, the value and percentage of their holdings as compared with those of the entire class, the ability of the Plaintiffs to make the initial outlay required, and, of course, the cost of notice. *Id.* The Court noted:

> Where the claim appears to be a meritorious one and Defendants desire it be prosecuted through a class action, it does not seem unreasonable to require the corporate Defendant to share the cost of notice, particularly in a case where Plaintiffs may be able to reimburse the corporation if the claim is dismissed. On the other hand, where the claim's merit is doubtful, the cost of notice is high, the Defendants have no particular desire to gain the advantages of class *res judicata*, and Plaintiffs would be unable in the event of dismissal to reimburse the corporation, Plaintiffs should be required to pay out the initial expense rather than obtain a 'free ride' at the corporation's expense."

Id. at 974.

The burden of class notification may also be shifted to defendants in cases where there exists a fiduciary relationship between the parties. For example, in *White v.*

Laborers' Int'l Union, 90 F.R.D. 368 (D. Alaska 1981), Plaintiff union members challenged a vote conducted to remedy a violation of the Labor-Management Reporting and Disclosure Act, claiming that a multiple question ballot had resulted in the deprivation of voting rights and that an assessment imposed to recoup expenditures had deprived the union members of a remedy. *Id.* The Court held that the costs of class notification be born by the Defendants, rather than the Plaintiffs, due to the fiduciary duty owed to Plaintiffs:

> The administrative burden and cost of such notice shall be on the Defendants. While the duty of providing notice is generally that of Plaintiffs in a *Fed.R.Civ.P. 23(b)(3)* class action, *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974),* the Supreme Court has recognized an exception "where a fiduciary duty pre-existed between the Plaintiff and Defendant, as in a shareholder derivative suit." *417 U.S. at 178, 94 S. Ct. at 2152.* Such a relationship exists between a union member and his union officials. *29 U.S.C. § 501*(a); *Kerr, 466 F.2d at 1271.* In fact, a suit under § 501(a) of the LMRDA has been viewed as the functional equivalent of a shareholder derivative suit. *Phillips v. Osborne, 403 F.2d 826, 831 (9th Cir. 1968* The Court need not base this decision on Eisen, however, as notice is ordered here pursuant to *Fed.R.Civ.P. 23(d)(2),* not 23(b)(3).

[*Id*. at 374. See also, *Thomas v. Baca*, 2005 U.S. Dist. LEXIS 39956, 39967 (D. Cal. 2005)(Departure from the rule that the Plaintiff should bear the notice costs allowed under “exceptional circumstances”).]

Courts from other circuits have also dealt with this issue regarding burden of notice costs. In *Lamb v. United Sec. Life Co.,* 59 F.R.D. 25 (D. Iowa 1972), the District Court for the Southern District of Iowa, observed that many Courts have imposed the burdens and costs of notifying the class in the first instance upon the Plaintiffs, but other Courts have noted the desirability of apportioning costs of notice between the parties in the sound discretion of the Court. In some cases, the Courts went to the extent of requiring

Defendants to pay all costs of notice, though perhaps with Plaintiffs being required to post a bond for reimbursement should they lose on the merits, as in *Eisen* II*;* See *Dolgow v. Anderson*, 43 F.R.D. 472 (D.N.Y. 1968). These Courts have noted that a rigid rule that Plaintiff always pays would, in cases where there is a large class, heavy notice expense, and prospective recovery of only small individual amounts, effectively require dismissal of possibly meritorious claims, frustrating the public policy behind both the liberally interpreted class action rule and the federal securities laws that there should be no profit from illegal acts merely because small frauds have been perpetrated on many. A rigid rule might also preclude class Plaintiffs who have relied on the pendency of the class action to the point where they become time-barred. *Id*. at 39.

The Court summarized the rationale behind the practice as follows:

> Apportionment, or requiring Defendant to bear the cost of notice, on the other hand, may be desirable since in many actions the Defendant stands in a fiduciary relation with those allegedly defrauded, *Cady, Roberts & Co., 40 S.E.C. 907 (1961)*, since Defendants have an interest in seeing all members of the class bound by *res judicata* (especially if they prevail on the merits or settle), and since Defendants are benefited by the preclusion of 'one-way' intervention or collateral estoppel if liability is established against them. Furthermore, corporate Defendants may already have the mechanics at hand for contacting the members of the class, and thus may achieve considerable savings in cost.

Id. at 39.

The Iowa Court also left a word of caution and stressed the need for strict monitoring of apportionment or shifting the cost of notice to a corporate Defendant as any mistake will result in a spate of frivolous suits, imposing unfair burdens upon Defendants for which they could only rarely obtain reimbursement. The Court was not in favor of a mechanical rule that Defendants pay or contribute whenever a breach of

fiduciary duty is alleged and further observed that the ultimate goal in each case, in deciding who is going to bear the costs of notice, is to facilitate the valid claim, yet to frustrate, as much as possible, the frivolous or vexatious. The Court held:

> whether or not the cost of notice should be apportioned or shifted to the Defendants *in toto* depends on a multitude of relevant factors, including the apparent merit or lack of merit in the claim, the presence or absence of genuine issues of fact and law, the strength of Defendants' desire for *res judicata* effect, the number of class representatives, their financial responsibility, the value and percentage of their holdings when compared to the class as a whole, the anticipated type and approximate cost of notice, Plaintiffs' ability to make the initial outlay, the ratio of the cost of notice to total anticipated recovery, the public policies underlying the type of action being prosecuted, and whether such types of action have traditionally been allowed to proceed as class actions.

Id. at 40.

Conclusion

In general, Plaintiffs must bear the cost of notice to the members of the class. However, federal Courts have recognized factual situations in which the burden can be shifted to the Defendants. Relevant factors include the apparent merit or lack of merit in the claim, the presence or absence of genuine issues of fact and law, and the strength of Defendants' desire for *res judicata* effect.