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Sprint Class-Action Settlement Upended by U.S. Appeals Court

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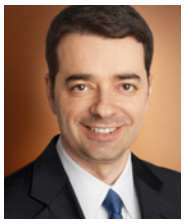

A federal appeals court has vacated a $17.5 million settlement, including nearly $5.8 million in attorney fees, in a class suit against Sprint Nextel over illegal service contract termination fees.

The trial judge prematurely determined that giving notice to unidentified class members would be too burdensome a process, the U.S. Court of Appeals for the Third Circuit said June 29 in *Larson v. Sprint Nextel Corp.*, 10-1285/1477/1486/1587.

"Given Sprint's concession that a billing records search could result in identifying millions of class members who were charged a [fee] — individuals who are in the sweet spot of the proposed class — we are not sure how it can be said that it is unreasonable for Sprint to search any of its billing records," Judge Kent Jordan wrote for the panel.

The court remanded for collection of more evidence about the efforts such a search would require.

District Judge Jose Linares based his ruling — that identification measures would exceed the "reasonable effort" demanded by Rule 26(c)(2)(B) — solely on a declaration submitted by a company official, who estimated it would take $100,000 and five months to pick out Sprint clients charged with the fee in a two-year period.

That evidence by itself was insufficient basis for the ruling, the court said, adding that reasonability does not hinge primarily on cost.

"Even if the costs had been higher ... that would not automatically mean they were unreasonable," said Jordan, joined by Chief Judge Theodore McKee and Judge Julio Fuentes.

The panel cited a line of cases dating back to the early 1970s, including *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which "stands for the proposition that individual notice must be delivered to class members who can be reasonably identified, and that the costs required to actually deliver notice should not easily cause a court to permit the less satisfactory substitute of notice by publication."

The settlement resolved a suit by cellular customers who were charged Sprint's flat-rate fee of $150-$200 to terminate their contracts. The plaintiffs claimed Sprint violated the Federal Communications Act and state consumer-protection statutes in collecting the fees.

The parties entered mediation with retired District Judge Nicholas Politan and reached a deal that required Sprint to pay $14 million in cash to a common fund and grant another $3.5 million in activation fee waivers for class members. All customers were entitled to some sort of recovery, regardless of whether they paid the fee.

The company also was enjoined from charging termination fees for two years beginning on Jan. 1, 2009, though Sprint continued to refrain from the practice even after the Dec. 31, 2010, end date, according to the opinion.

The deal ended *Larson*, as well as 10 other actions in various state courts.

Linares preliminarily approved the deal in December 2008 and certified a class of customers charged the fee from 1999 through that year, but objectors challenged Sprint's notification efforts and other aspects of the settlement.

In April 2009, Linares denied final approval, and ordered the parties to craft a new notice plan and attempt to identify subclasses, particularly because those who paid the fee were entitled to more relief than those who didn't.

They submitted a new plan but contended it would be unreasonable to search Sprint's billing records. The company's vice president of customer billing services, Scott Rice, submitted a declaration estimating the price tag at $100,000.

Linares signed off on the plan, noting that he was satisfied that the time, cost and effort of the records search would be unreasonable.

The objectors claimed Sprint failed to individually notify millions of easily identifiable class members. But in January 2010, Linares overruled the objections, granted final approval of the settlement and awarded fees.

At the time, other class suits over early-termination fees had settled for $13.5 million and $21 million.

The objectors appealed and, on June 29, the Third Circuit panel reversed, pointing to Rule 26(c)(2)(B), which requires "individual notice to all members who can be identified through reasonable effort."

Linares, the panel said, "did something of an about face" when he demanded a new notice plan but then relied completely on Rice's declaration to excuse the records search. The judge "did not provide any support for [his] new and very different determination," Jordan wrote.

The panel noted that Sprint could use statistical sampling, contemplated in electronic discovery rules, to provide a better picture of the cost-benefit analysis of doing a full records search.

The panel did not rule on the objectors' additional claims — that the class representatives, who weren't current Sprint customers at the time of settlement, don't adequately represent those class members who were — but urged Linares to consider the issue on remand.

Scott Bursor of Bursor & Fisher in New York, who argued on behalf of the objectors, says the parties "settled this case too cheaply."

"If they searched the records ... they would've found tens of millions of class members," Bursor says. "The failure to do the search ... was designed to disguise just how bad this deal was."

Bursor points to a California state court matter he handled, *Ayyad v. Sprint*, RG03-121510, where the class won a $73.8 million cash award plus another $225 million in fee cancellations.

Class counsel, James Cecchi of Carella, Byrne, Cecchi, Olstein, Brody & Agnello in Roseland, did not return a call.

Joseph Boyle of Kelley, Drye & Warren in Parsippany, argued for Sprint. He did not return a call. A Sprint spokeswoman, Stephanie Vinge, says the company is reviewing the opinion to consider appropriate next steps. ■

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