3/22/83

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	No. 72-100C(4)
	)	
THE BOARD OF EDUCTION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,	)	
	)	
Defendants	)	

SUGGESTIONS FOR RULE 23(e) COMPLIANCE

I. INTRODUCTION

On February 22, 1983, this Court entered Order H(2142)83, in which it ordered the parties to file a detailed settlement proposal in this interdistrict school desegregation case by March 24, 1983, and also to file suggestions for compliance with Rule 23(e) of the Federal Rules of Civil Procedure. This memorandum is filed pursuant to that order to present suggestions for compliance with Rule 23(e).

This case is currently pending as a class action involving two plaintiff classes. On October 3, 1973, the district court entered a Memorandum and Order in the intradistrict case by which it allowed the action filed by the Liddell plaintiffs "to be maintained as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2)." Memorandum and Order, dated October 3, 1973. It defined the Liddell class as "black students who attend or are eligible to attend the St. Louis Public Schools and their parents."

Subsequently, the Caldwell plaintiffs and the City Board were granted leave to file amended pleadings alleging interdistrict claims. Order H(337)81, dated August 24, 1981. In response, a motion for class action determination was filed by the defendants

in the interdistrict action, and the matter was referred to the United States Magistrate for his review and recommendation. Order H(1407)82, dated September 27, 1982.

After a hearing on the motion for class action determination, the Magistrate filed his Report and Recommendation in which he recommended that "the Liddell class, as originally certified, may continue to prosecute this litigation." Report and Recommendation of United States Magistrate, H(1985)83, dated January 25, 1983, at 33. He further recommended that the interdistrict claims of Caldwell "are properly maintained as a class action under Rule 23(a) and 23 (b)(2)," and that "[t]he District Court should certify the Caldwell class as comprising all students, and their parents, now attending or who will attend Missouri public primary and secondary schools located in the metropolitan St. Louis, Missouri, area." Id. at 33-34. The Magistrate limited, for purposes of his Report and Recommendation, the "St. Louis Metropolitan area" to "the geographic area encompassed by the boundaries of St. Louis City and St. Louis County," in light of stays the district court entered against the counties of St. Charles and Jefferson and defendants therein. Id. at 9 n. 5. This Court thereafter entered its Order sustaining, adopting, and incorporating the Magistrate's Report and Recommendation. Order H(2085)83, dated February 9, 1983.

The foregoing summary indicates the parameters of the classes certified in this case. The following discussion will rely upon the classes defined, as well as other factors present in this case, to suggest what procedures are necessary under Rule 23(e) for this Court's approval of the proposed settlement.

II. DISCUSSION

Rule 23(e) provides that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The text of the Rule gives little guidance as to what procedures a district court should follow in approving a settlement of a class action, other than that notice of the proposed

settlement "shall be given to all members of the class in such manner as the court directs." Because the Rule requires some sort of notice to class members and approval by the district court of a proposed class action settlement, the safest course for this Court to follow in approving the proposed settlement is to give notice and hold hearings prior to determining whether to approve the settlement the parties have proposed. Therefore, this discussion will focus upon the notice expressly required by Rule 23(e), as well as the hearing implicitly required by its provision for court approval.

A. NOTICE

1. Notice to Class Members

As discussed above, Rule 23(e) expressly requires notice of a proposed class action settlement "shall be given to all members of the class in such manner as the court directs." Notice requirements in class actions "are of constitutional significance and must be viewed in due process terms." 3B Moore's Federal Practice ¶23.80[3], at 23-514 (2d ed. 1982) (footnote omitted). However,"[t]here are no controlling decisions under the Constitution regarding the type of notice that must be given under Rule 23." Manual for Complex Litigation, Part I, §1.45, at 51 (5th ed. 1982) (footnote omitted) (hereinafter "Manual"). The Manual for Complex Litigation recommends notice of a settlement be given if practicable, and that even though it may not be necessary to do so in a Rule 23(b)(2) action, it may be advisable. Id. at 52.

The manner in which notice is to be given is left, by Rule 23(e), to the discretion of the district court, "subject only to the broad 'reasonableness' standards imposed by due process." **Grunin vs. International House of Pancakes**, 513 F2d 114, 121 (8th Cir.), cert. denied, 423 U.S. 864 (1975). In addition, the content of the notice is also left to the discretion of the district court, subject to the same due process standards of reasonableness. **Mendoza vs. United States**, 623 F2d 1338, 1350-51 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

To comply with due process requirements as to the form and content of Rule 23(e) notice, "the notice given must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" **Mendoza vs. United States**, supra, 623 F2d at 1351 (quoting **Mullane vs. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 314 (1950)). In terms of the manner of giving notice, due process requires that it give interested parties sufficient time to prepare and present their positions, although it does not require that all parties actually receive notice. See **Grunin vs. International House of Pancakes**, supra. In terms of the content of the notice, due process requires that the notice enable "class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known, and if they choose to become actively involved, to have sufficient opportunity to prepare their position." **Reynolds vs. National Football League,**, 584 F2d 280, 285 (8th Cir. 1978).

Subject to the foregoing due process requirements, Rule 23(e) gives the district court broad discretion in determining the manner in which notice of the proposed settlement is to be given, as well as the content thereof. However, the courts have applied Rule 23(e) to require that the notice given not systematically deprive an identifiable group of notice of the settlement. E.g. **Mendoza vs. United States**, supra. Therefore, so long as the notice given affords interested parties an adequate opportunity to be heard, and a sufficient basis for deciding whether to present a particular position at the hearing, without depriving an identifiable group of such an opportunity, it would appear that the notice given satisfies both due process and the requirements of Rule 23(e).

Based upon the foregoing guidelines, it would appear that the manner in which this Court should give notice of the proposed settlement to the Liddell and Caldwell class members would be by publication in newspapers serving the St. Louis Metropolitan area (as defined in the Magistrate's Report and Recommendation), perhaps augmented by notices furnished to community groups, stores,public schools, and churches serving

the area. Notice given in a very similar manner has been held to comply with due process standards and the requirements of Rule 23(e) in a class action school desegregation case, especially in light of the large amount of publicity surrounding proceedings in such cases. **Mendoza vs. United States**, supra. Although individualized notice may be the best notice practicable in a class action, **Grunin vs. International House of Pancakes**, supra, in a case of this magnitude, involving two classes comprising hundreds of thousands of members throughout the City and County of St. Louis, the best notice practicable is very likely the type of notice the Ninth Circuit approved in **Mendoza**

This Court should also consider giving notice in a manner which affords interested parties sufficient time to prepare and present their views on the proposed settlement. However, the time granted for preparation need not be overly long, in that the hearing on the proposed settlement is not to be conducted as a full trial on the merits, 6 Federal Procedure, Lawyers Edition §12:239, at 721 (1982), and the amount of publicity already generated concerning the proposed settlement should assure that a significant number of class members are already aware of the terms of the agreement in principle. This Court also should consider giving sufficient time for interested parties to conduct such discovery on the fairness of the proposed settlement as will be necessary to enable them to present their views thereon, so that the Court can be assured it will be presented with sufficient information to evaluate the fairness of the settlement. See **Mendoza vs. United States**, supra, 623 F2d at 1348-49. The amount of discovery allowed may be limited by the scope of the hearings and the issues to be addressed, as discussed in Part II. B.

The content of the notice should adequately describe the proposed settlement in scrupulously neutral terms, advise class members of the time and place of the hearing on the settlement proposal, and probably should also provide for receiving written

comments on the settlement[1] from class members unable to attend the hearing. Manual, supra, Part I, §1.46 at 55[2] and 55 n. 133. The Eighth Circuit has approved a Rule 23(e) notice similar to those appearing in the sample materials contained in Part II of the Manual. See **Grunin vs. International House of Pancakes**, supra, 513 F2d at 122. Additionally, the notice should probably identify the class members to which it is directed, summarize the background of the case, identify the other parties, indicate where a copy of the settlement proposal may be obtained, and indicate provisions made concerning attorneys' fees. See **Mendoza vs. United States**, supra, 623 F2d at 1351-52.

2. Notice to Persons Other than Class Members

Rule 23(e) requires that notice of a proposed class action settlement be given to all members of the class. By its terms, it does not require notice to persons who are not class members. In most cases, compliance with Rule 23(e) should be sufficient to protect all persons whose interests might be affected by the settlement of a class action. However, as this Court has often observed, this case is not like most cases. Furthermore, certain provisions of the proposed settlement might affect the interests of persons and entities who are not members of the certified classes. In fact, this Court has already entered an order allowing the public to comment upon the agreement in principle. Order H(2159(83, dated March 2, 1983. It may well be that there are persons or entities whose interests might be affected by the final settlement proposalwho will wish to be heard thereon.

Although it may not be required to notify such persons or entitiesunder Rule 23(e), the interests of judicial economy will be served better by insuring that they are

---

1. A provision in the notice similar to the order recently entered by this Court pertaining to written comments on the agreement in principle should suffice. See Order H(2159)83, dated March 2, 1983.

2. The Manual for Complex Litigation also provides that the notice "should include the best available information concerning fees and expenses that may be deducted from the gross amount [of the settlement]." Manual for Complex Litigation, Part I, §1.46, at 55. This requirement does not appear applicable to the case at bar, in that the settlement concerns injunctive relief rather than damages.

notified of the settlement, in that their views can then be heard at the hearing on the settlement, rather than in later, collateral attacks on the plan implementing the settlement. The notice procedure outlined above should provide those persons with sufficient notice; in fact, such notice is more likely to afford them an opportunity to present their views than would individualized notice to class members.

B. Hearing

The Manual for Complex Litigation recommends a two-step procedure for approval of class action settlements. The first step is a preliminary hearing to determine whether notice of the proposed settlement and a hearing thereon should be undertaken. The second step is the "fairness" hearing, after notice , at which the district court receives evidence supporting and opposing the settlement proposal, so that it may decide if the settlement is fair, reasonable, and adequate. Manual, supra, Part I, §1.46, at 52-53. Suggestions as to the scope and nature of these hearings follow.

1. Preliminary Hearing

The preliminary hearing is to determine if "the proposed settlement is within the range of possible approval," so that the district court may decide whether it is worthwhile to issue notice and hold a "fairness" hearing. Manual, supra, at 53. The hearing is not " a definitive proceeding on the fairness of the proposed settlement," but is rather for the purpose of informing the court about pertinent facts and circumstances surrounding the settlement. Id. at 53-54. The Manual for Complex Litigation suggests several "pertinent inquires" the court should make to be investigated at the preliminary hearing, and further suggests that discovery might be conducted prior to this hearing "on the issue of whether the proposed settlement is within the range of being fair, reasonable, and adequate." Id. at 54 (footnote omitted). Due to the limited scope of the preliminary hearing, it would appear that this Court would have the authority to restrict both the proceeding and any discovery it might allow to the issue of whether the porposed settlement is within the range of possible approval. See id. at 54-55.

Notice to the class of the preliminary hearing is probably not required. This is because the hearing and any order which may be entered thereafter is interlocutory. See **Mungin vs. Florida East Coast Railway Co.**, 318 F. Supp. 720, 732-33 (M.D. Fla. 1970), aff'd, 441 F2d 728 (5th Cir.) (per curiam), cert. denied, 404 U.S. 897 (1971). In addition, the Manual for Complex Litigation does not suggest giving notice of such a hearing, apparently because of its provisional nature. See Manual, supra, at 52-55.

That the preliminary hearing is interlocutory and not a final judgment on the metits of the issue of the fairness of the proposed settlement does not mean that Court should dispense lightly with holding such a hearing. In fact, the Seventh Circuit recently reaffirmed its position that although the failure to hold a preliminary hearing is not inevitable reversible error, the better practice is to hold such a hearing as recommended in the Manual for Complex Litigation. **Armstrong vs. Board of School Directors**, 616 F2d 305, 314 n. 13 (7th Cir. 1980).

The scope of the preliminary hearing need not be overly broad. As suggested above, the district court appears to have the authority to limit the hearing so that it simply resolves the issue of whether the proposed settlement is within the range of possible approval. This may require merely that the court allow counsel for the parties to state their reasons for supporting the proposed settlement at the preliminary hearing, so that it can consider those statements, along with the settlement document itself, in arriving at its decision. See **Armstrong vs. Board of School Directors**, 471 F. Supp. 800, 805-05 (E.D. Wis. 1979), aff'd, 616 F2d 305 (7th Cir. 1980). The Manual for Complex Litigation appears to approve such a limited preliminary hearing, although it suggests that the parties and counsel who took part in negotiations, as well as those who did not, should be heard. Manual, supra, at 53. Because no parties were directly involved in negotiations of the proposed settlement in this case, it should suffice that this Court simply arrange to hear from counsel, both negotiators and non-negotiators,

who wish to be heard on the issue of whether the proposed settlement is within the range of possible approval.

2. "Fairness" Hearing

After notice is given to all class members, the district court must determine whether to approve or reject the proposed settlement. Rule 23(e). In order to approve the settlement, the court must find that it is fair, reasonable, and adequate. **Armstrong vs. Board of School Directors**, supra, 616 F2d at 314; **Grunin vs. International House of Pancakes**, supra, 513 F2d at 123; Manual, supra, at 56. Unless the proponents of the settlement establish that it is fair, reasonable, and adequate, the court cannot accept it, and the burden is on the proponents to show that the settlement meets these standards. **Grunin vs. International House of Pancakes**, supra.

Rule 23(e) does not expressly require that a district court hold a hearing on the fairness of a proposed class action settlement, but holding such a "fairness" hearing is clearly the best course to follow prior to deciding whether to approve the settlement.[3] The Manual for Complex Litigation stresses the importance of the "fairness" hearing as a means by which the court may become fully informed of the views of interested parties, so that it can rule intelligently on the fairness of the settlement. Manual, supra, at 57. It lists the following four considerations as relevant to determining whether the settlement is fair, reasonable, and adequate: (1) the strength of plaintiff's case on the merits, balanced against what is offered in settlement; (2) defendant's

---

3. There is authority that an evidentiary hearing prior to approval of a class action settlement is not required if the district court already has sufficient facts to rule on the fairness of the proposal, or objections thereto are frivolous. See, e.g., **Mandujano vs. Basic Vegetable Products, Inc.**, 541 F2d 832, 836 (9th Cir. 1976) (no hearing required for frivolous objections, but district court should make record on why it considers objections frivolous); **Patterson vs. Stovall**, 528 F2d 108, 112-14 (7th Cir. 1976) (no hearing required if district court has sufficient facts before it to make informed judgment on proposed class action settlement). The proposed settlement of this case, however, involves the interests not only of hundreds of thousands of class members and numerous other parties, but also the interests of others that may be affected by this Court's decision on the settlement proposal. Such a situation compels the conclusion that a "fairness" hearing should be held to obtain all the facts.

ability to pay[4]; (3) the complexity, length and expense of further litigation; and (4) the amount of opposition to the proposed settlement. Id., at 56. Additional considerations include: (1) the presence of collusion in reaching the settlement; (2) the reaction of class members to the settlement; (3) the opinion of competent counsel; and (4) the stage of the proceedings and the amount of discovery completed. 3B Moore's Federal Practice ¶23.80[4], at 23-521. It would appear that the foregoing factors can be presented to the court most effectively in a hearing at which interested parties have the opportunity to present evidence thereon.

The factor which is uniformly considered the most important in determining the fairness of a proposed class action settlement is the strength of plaintiff's case, balanced against what is offered in settlement. E.g., **Armstrong vs. Board of School Directors**, supra, 616 F2d at 314; **Grunin vs. International House of Pancakes**, supra, 513 F2d at 124; 6 Federal Procedure, Lawyers Edition §12:242. Because this factor necessarily requires the district court to engage in balancing the merits of the class claims against what is offered in settlement, the it will have to address issues of both liability and proposed remedy in the fairness hearing. Manual, supra, at 57. However, the court should not try the case on the merits at the "fairness" hearing; in approving the settlement it has neither the right nor the duty to reach ultimate conclusions of fact and law on the merits. **Grunin vs. International House of Pancakes**, supra, 513 F2d at 123-24. Additionally, the court "must not forget that it is reviewing a settlement proposal rather than ordering a remedy in a litigated case." **Armstrong vs. Board of School Directors**, supra, 616 F2d at 314-15. As with all settlements, what the court will review will be a bargained-for compromise between the parties. Its role in reviewing that compromise is limited to the minimum required to protect the interests of the class and public, and

---

4. The defendant's ability to pay is not relevant to a school desegregation case. **Armstrong vs. Board of School Directors**, 471 F. Supp. 800, 805 (E.D. Wis 1979), aff'd, 616 F2d 305 (7th Cir. 1980).

it should refrain from substituting its own judgment of the terms for that of the parties and their counsel. Id at 315.

In addition, to the principles stated in this text, it is also well settled that the district court is not empowered to rewrite the settlement the parties have agreed upon and proposed to the court. Although it may suggest to the parties certain modifications of the proposed settlement, the district court may not delete, add, or modify terms of the settlement. It can only approve or reject the whole settlement as proposed by the parties. E.g., **Officers for Justice vs. Civil Service Commission of the City and County of San Francisco**, 688 F2d 615,630 (9th Cir. 1982). See also, **Cotton vs. Hinton**, 559 F2d 1326, 1331-32 (5th Cir.. 1977).

Aside from the factors the district court should consider at the "fairness" hearing, there are additional issues that need to be addressed concerning the scope and nature of the hearing. As stated above, it is not a trial on the merits. However, in order to insure that this Court is fully informed on the fairness of the proposed settlement, it should make every effort to allow interested parties to be heard.

"Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." **Grunin vs. International House of Pancakes**, supra, 513 F2d at 123. This fiduciary duty alone requires that the district court obtain sufficient information to determine that the proposed settlement is fair, reasonable, and adequate. In addition, those class members objecting to the settlement must be granted leave to be heard. **Cotton vs. Hinton**, supra, 559 F2d at 1331. Furthermore, as suggested above in Part II.A.2., it may be in the interests of judicial economy to allow persons and entities other than class members to participate in the "fairness" hearing, if it appears that their interests may be affected by approval of the proposed settlement.

Allowing objecting class members and interested non-class members to participate in the "fairness" hearing does not mean that the hearing must be necessarily lengthy.

The district court has the authority to limit the scope of the hearing even as to objecting class members. **Cotton vs. Hinton**, supra. The court need not "open to question and debate every provision of the proposed compromise"; rather, it "may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." Id. The guiding consideration should be that the Court acquire sufficient information relevant to the fairness of the proposed settlement so that it can decide whether to approve the proposal.

It is also important that the district court hold a "fairness" hearing so that it has an adequate record on which to enter findings of fact and conclusions of law supporting its decision. If there is an appeal from this Court's decision on the fairness of the proposed settlement, findings of fact and conclusion of law will be necessary for the Eighth Circuit to determine whether this Court properly exercised its discretion in reaching its decision. **Cotton vs. Hinton**, supra, 559 F2d at 1330 and 1331.

In light of the foregoing, it may be helpful for this Court to request post-hearing findings of fact and conclusions of law, together with legal memoranda, from the participants at the "fairness" hearing. To avoid duplication of such filings, it is suggested that this Court impose the following limitations: (1) one set of consolidated filings from all parties supporting the proposed settlement; (2) one set from all parties objecting thereto; and (3) if practicable, one set from all non-class members objecting to the settlement.

III. CONCLUSION

The foregoing discussion presents ~~these~~ procedures ~~the authorities recommend~~ recommended for compliance with Rule 23(e) in the settlement of a class action. The undersigned parties respectfully urge this Court to follow the procedures outlined above.

Respectfully submitted,