COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO: 03-CI-181
JUDGE: JOHN POTTER

JOHN DOE, et al., PLAINTIFFS

vs.

ROMAN CATHOLIC DIOCESE OF COVINGTON, et al., DEFENDANTS

PLAINTIFFS' MEMORANDUM OPPOSING A REQUIREMENT THAT CLASS MEMBERS FILE A PROOF OF CLAIM PRIOR TO THE TRIAL OF THE COMMON ISSUES PHASE OF THIS CASE

The Court has required the parties to address this issue: 1) "whether it is permissible and whether it would be advisable for the Court to require each class member, as a condition of participating in any recovery by settlement or trial, to file a proof of claim prior to the trial date." October 8, 2004 Order, p. 2.

The Court has ordered trial in two phases: 1) a common issues liability and punitive damages trial, and 2) a trial on the individual damages issues of each class member. Plaintiffs have no objection to the Court requiring each class member, as a condition to participating in the second phase trial on individual damages, to file a proof of claim prior to the date of the second phase trial. Plaintiffs strongly object to such a requirement prior to the first phase trial, because it is contrary to the class action rules and procedures, because the federal appellate courts construing the issue have held it would improperly convert an opt out class into an opt in class, and because it is economically wasteful at this time.

I. IT IS NOT PERMISSIBLE TO REQUIRE CLASS MEMBERS TO FILE A PROOF OF CLAIM AS A CONDITION TO PARTICPATING IN A LIABILITY PHASE TRIAL

Kentucky courts do not appear to have addressed this issue. Kentucky, however, follows federal law with respect to class action adjudications[1] and Kentucky class action rules are substantially identical to Fed. R. Civ. P. 23. The federal courts of appeals that have addressed this issue have determined it is error for a trial court to require individuals take some affirmative action in order to be included as class members in a Rule 23 class action proceeding. *See Kern v. Siemens Corp.*, 2004 WL 2926005 (December 20, 2004); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986); *Kyriazi v. Western Electric Co.*, 647 F.2d 388 (3rd Cir. 1981); *Robinson v. Union Carbide Corp.*, 544 F.2d 1258 (5th Cir. 1977); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974).

"[A] *court may generally not require class members to file a proof of claim form before a liability determination, because courts have generally found the use of such a form to be an improper opt-in requirement in violation of Rule 23(c)(2), at least as a prerequisite to trial."* 2-14A James Wm. Moore, et al, *Moore's Manual -- Federal Practice and Procedure* states in § 14A.23[5[b] (2004). (Emphasis added). *See also* 7 B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1787, at 216 (2d ed. 1986).

Requiring class members to file a proof of claim prior to the phase one trial date in order to participate in any recovery is the equivalent of an opt in requirement. "Not only is an 'opt in' provision not required, but substantial legal

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1 *Pyro Mining Co. v. Kentucky Com'n on Human Rights*, 678 SW 2d 393, 396 (1984).

authority supports the view that by adding the 'opt out' requirement to Rule 23 in the 1966 amendments, Congress *prohibited* 'opt in' provisions by implication." *Kern*, 2004 WL 2926005 at *3. The Advisory Committee on Civil Rules rejected the suggestion that the judgment in a Rule 23(b)(3)[2] class action should embrace only those individuals who in response to notice affirmatively signify their desire to be included. Id., citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 397 (1967).

The reason for rejecting a requirement that individuals affirmatively request inclusion in the lawsuit is that it would "result in freezing out the claims of people -- especially small claims held by small people -- who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class. Otherwise, the (b)(3) type would become a class action which was not that type at all -- a prime point of discontent with [the pre-1966 version of Rule 23]" 81 Harv. L. Rev. at 397-98.[3]

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[2] Fed. R. Civ. P. 23(b)(3) is the equivalent of CR 23.02(c), under which the class in this case was certified and is commonly known as the opt out provision of Rule 23.

[3] Kentucky CR 23.02 was amended on July 1, 1969 to incorporate the changes in Federal Rule 23.

The above reasoning is particularly applicable in the instant case, where victims of sexual abuse by religious officials are extremely reluctant to come forward. *See* affidavits of Dr. James Hawkins and Dr. Rena Kay, attached hereto. Many of these individuals may decline to come forward where liability has not yet been determined and may only be persuaded to risk identifying themselves when they have more certainty about recovery. "Although there may be some . . . actions in which unnamed plaintiffs will have to come forward to establish their entitlement to portions of the recovery, ***such requirement should not be imposed upon them until necessary for adjudication*** . . . ***Opting in was not necessary before the adjudication of liability.***" *Robinson*, 544 F.2d at 1260. (Emphasis added).

In reversing a district court's requirement that class members take affirmative action by consenting to be bound by the judgment (a lesser requirement than submitting a detailed proof of claim, which is at issue in this case), the Second Circuit held that:

> the District Court ignored the critical difference between, on the one hand, requiring an individual to take affirmative action to join a class for liability determination purposes and, on the other hand, requiring a class member to take action (such as filing a claim form) in order to obtain ultimate relief. . . The former is an "opt in" provision and the latter is not, since a class member who fails to obtain ultimate relief because she did not fill out a claim form is still nonetheless a class member.

Kern, 2004 WL 2926005, *4. ' "The consensus among courts and commentators is that such an inquiry *after a judgment establishing liability* is not prejudicial and can serve as an essential aid in the efficient control of a complex class action suit." ' Id. at FN7, quoting *Kyriazi*, 647 F.2d at 392 (Emphasis in original).

The long-standing federal opt in class action rules for cases under the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act demonstrate that Rule 23 was intended to exclude opt in classes. The provisions of 29 U.S.C. 216(b), which apply to the aforementioned Acts, require class members to consent to joining the class action (to opt in) in order to be included. The reasons for the opt in requirement lie in the history of the FLSA, which was enacted in 1938 to govern the maintenance of standard wage and hour practices. The legislation prompted thousands of "portal to portal" lawsuits.[4] Between July 1946 and January 1947, employees around the country filed thousands of such FLSA class actions,[5] based on the Supreme Court's expansion of the scope of compensable work time in *Anderson v. Mount Clemens Pottery Co*., 328 U.S. 680 (1946).[6] Congress then sought to limit the jurisdiction of the courts through the Portal-to-Portal Act, Pub. L. No. 80-49, ch. 52, § 1(b)(3), 61 Stat. 85 (1947). The Portal-to-Portal Act allowed one or more employees to maintain an action "on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b). This changed participation in an FLSA class from opt out to opt in; thus plaintiffs could not certify a class under Rule 23 even though federal subject matter jurisdiction existed. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3rd Cir. 2003). FLSA class members must specifically consent to join the class and must do so within the limitations period for their claim. See *Prickett v. Dekalb County*, 349 F.3d 1294, 1296-98

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4 "Portal to portal" represents an employee's work day from starting time to quitting time. *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161, 188 (1945) (Jackson, J., dissenting).

5 93 Cong. Rec. 2,082 (1947).

6 See 93 Cong. Rec. 2,089 (1947).

(11th Cir. 2003); *Perella v. Colonial Transit, Inc*., 148 F.R.D. 147, 149 (W.D. Pa. 1991). Of course, pursuant to due process concepts, those who do not opt in are free to file individual lawsuits. Id. When Rule 23 was amended in 1966 to set forth an opt out requirement, the authors were well aware of the federal opt in procedure and chose not to adopt it under Rule 23.

Requiring class members to submit a proof of claim form prior to the common issues phase one trial also runs afoul of the rule that discovery of absent class members "is rarely permitted due to the fact that they are not 'parties' to the action, and that it would defeat the purpose of class actions which is to prevent massive joinder of small claims." *McCarthy v. Paine Webber Group, Inc.*, 164 F.R.D. 309, 312 (D. Conn. 1995) (citations omitted). Requiring absent class members to complete a questionnaire or proof of claim has the effect of requiring them to opt into the class and is contrary to the opt out policy of Rule 23. Id. The Supreme Court has determined that absent class members are passive and free from the duties generally associated with litigation, including discovery. Generally speaking, "an absent class-action plaintiff is not required to do anything." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 & n.2 (1985).

Requiring an opt in provision primarily serves the interests of class action defendants, who seek arbitrarily to limit class participation.

> [I]t is hardly surprising that the defense bar continues to advocate the substitution of an opt-in procedure. One commentator has observed:
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> > ***[T]he opt-in procedure is ... a very effective means of diminishing the size of a class, because an affirmative act by an individual is always less likely than mere inaction and hence presents certain dangers.*** Requiring class members to insert themselves into the suit will result inevitably in smaller classes, unrelated to the magnitude of the harm done or the merits of the case. ***In addition to its unfairness, unnecessary reduction of class size negates the perceived benefits of class actions as efficient and economic means of litigation, since those who fail to opt in could bring their own suits, thereby multiplying cases where one would do.*** Note, Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal, 16 Harv.J.Legis. 543, 571-72 (1979) (footnotes omitted). (Emphasis added)

Kleiner v. The First National Bank of Atlanta, 751 F.2d 1193, 1202 n. 19 (11th Cir. 1985). Thus, requiring class members to file a proof of claim prior to the phase one trial in order to participate in recovery would destroy one of the primary benefits of Rule 23: the res judicata effect of the judgment in this case on all individuals who fit the class definition and did not opt out. Those not filing a proof of claim could not be bound by the judgment in this case. This would not only be a detriment to Plaintiffs, but it would prevent a result where a class action judgment in favor of Defendants would bind all class members.

II. WHILE PERMISSIBLE, IT IS NOT APPROPRIATE TO CONDUCT A CLASS CENSUS AT THIS TIME

As pointed out by Class Counsel earlier in the case, a census can be done at any time, so long as it is not conditioned on a class member's right to recovery. At the time the opt out notice was issued in this case, Class Counsel argued that neither an opt out form nor an opt in form is the appropriate method for completing a census. (Oct. 16, 2003 hearing). That is still Plaintiffs' position. Because the judgment in this case will have a res judicata effect on all class members, the only time is would be proper to require them to submit proofs of claim as a condition to recovery is after liability has been established. A census undertaken at this time will not aid in structuring the litigation, because the framework for a phase one common issues trial is already in place. It will involve common issues evidence of the Diocese's pattern of illegal conduct from 1956 to the present. Plaintiffs have recommended that it also include several "bellwether" cases of Class Representatives. The many other class members in this case, known and unknown, will simply not be involved in the phase one trial. If class liability is established, then it may become appropriate to issue a notice and require absent class members to identify themselves and submit proofs of claim in order to participate in individual damages recoveries. Any census notice issued at this time will have to inform the recipients that no determination has been made in this case as to whether they have a right to recover anything from Defendants. That will severely limit the number of

responses that otherwise would be made. Any census notice requiring responses to be filed with the Court will also severely limit the number of responses that otherwise would be made.

If the Court feels it is beneficial to conduct a census, it can do so, so long as a class member's participation in recovery is not conditioned on his/her response to the census, as set forth in the authorities cited in Part I of this brief, taking into account that it is very difficult for sexual abuse victims to provide such embarrassing information without having developed a relationship of trust with the party to whom they are providing the information. Since a census undertaken at this time could only benefit the Defendants and cannot limit absent class members' rights to participate in recovery, Defendants should bear the very substantial cost of any census.[7]

Respectfully submitted,

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[7] An adequate census notice would at least duplicate the cost of the opt out notice publication in this case, which exceeded $200,000. See Plaintiffs' Response To Motion To Intervene By John Does II Through VIII, Exhibit E.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served by facsimile on January 14, 2005 to: Mark D. Guilfoyle, Esq., Deters, Benzinger & LaVelle, P.S.C., 2701 Turkeyfoot Road, Crestview Hills, KY 41017, and Carrie K. Huff, Esq., Mayer, Brown, Rowe & Maw, LLP, 190 South LaSalle Street, Chicago, IL 60603.

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