No. 05-1450

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SYNFUEL TECHNOLOGIES,

Plaintiff-Appellee,

vs.

AIRBORNE EXPRESS,

Defendant-Appellee,

APPEAL OF: JOEL SHAPIRO

BRIEF OF APPELLANT JOEL SHAPIRO

On Appeal From the United States District Court
For the Southern District of Illinois
David R. Herndon, Judge

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FED. R. APP. P. 26.1 AND CIR. R. 26.1 DISCLOSURE STATEMENT

Appellant Joel Shapiro states that he is an individual and not a corporation, and therefore is not covered by Fed. R. App. P. 26.1. Appellant Shapiro states that the following attorneys have entered appearances on his behalf in this case:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

page

Jurisdictional Statement

1. **District Court's Jurisdiction.** There is no federal jurisdiction over this case. The Second Amended Complaint alleged that jurisdiction was founded on 28 U.S.C. § 1331, and alleged only one count, for violation of "federal common law." There is no federal common law that governs contracts between businesses and customers, and therefore no federal jurisdiction exists because this action does not arise under the Constitution, laws or treaties of the United States.

2. **Appellate Jurisdiction.** If the district court had had jurisdiction, this Court would have jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered a Final Order and Judgment approving a class action settlement on January 27, 2005. On February 18, 2005, the district court entered an order clarifying that despite an amendment to the January 27, 2005 Order, the effective date of finality and appealability was January 27, 2005. Appellant's Notice of Appeal was filed on February 21, 2005.

Statement of Issues Presented for Review

1. Did the district court improperly entertain this case despite a lack of federal jurisdiction?
2. Did the improper designation of the claims filing deadline in the notice sent to class members violate the class members' due process rights?

Statement of the Case

The class action filed in the district court is based upon the default rate Airborne charged its customers who sent a "Letter Express" package without indicating the package's weight or type. S.A. at 1.[1] A customer's failure to indicate a package's weight and type resulted in a default rate equivalent to the cost of sending a five pound package. S.A. at 2. Airborne's smaller "Letter Express" packages hold no more than eight ounces of paper. Id.

Plaintiff filed suit against Airborne on behalf of itself and all similarly situated customers in the United States District Court for the Southern District of Illinois on April 11, 2002, complaining that Airborne's default rate constituted a penalty in violation of federal common law. Docket, Doc. #1 and App. 1-5. The parties reached a settlement which the district court preliminarily approved on October 31, 2003. App. 8-26. The court certified

a settlement class of all Airborne customers who were charged a five pound default weight rate charge between April 11, 1992 and November 30, 2003. S.A. at 3.

After notice of the settlement was mailed to approximately 250,000 class members, and publication notice was placed in newspapers, App. at 53, the court held a fairness hearing on July 6, 2004. S.A. at 5. On January 27, 2005, the court approved the settlement. S.A. at 1-18.

Statement of Facts

The settlement that was approved by the district court provides that class members may submit valid proofs of claim within 60 days from Final Approval to receive either "Letter Express" packages or cash for past default charges paid. S.A. at 3-4. Class members may receive up to 4 "Letter Express" packages or $1.50 - $2.50 per default charge, depending upon the number of default charges claimed, up to a maximum of $30. As part of the settlement, Airborne has also agreed to institute changes in its business practices, including more frequent weighing of packages and additional disclosures of what information is required in order to avoid default charges. App. at 15-16.

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[1] "S.A." will be used in this Brief to refer to the Short Appendix of the decisions on appeal that appears at the end of this Brief. "App." shall be used to refer to the separate Appellant's Appendix.

As of July 23, 2004, 7,426 class members had filed claims for packages or cash, giving the settlement a value of between $18,565 and $445,560. App. at 48-49 n.2. The deadline for filing claims has not yet arrived, and will arrive no earlier than 90 days after the resolution of this appeal.[2] App. at 13-14.

Claim forms were mailed to approximately 250,000 class members with the Notice of Proposed Class Action Settlement and Release of Claims. App. at 52-53. Each claim form stated prominently in the upper left hand corner: "Must be Postmarked No Later Than July 23, 2004." App.at 40. The publication notice did not inform class members of how to claim benefits or the deadline for filing a claim form, but instead directed class members to the settlement website for further information. App. at 6-7. At that website, class members could download the same claim form that was mailed to the 250,000 known class members, which stated prominently in the upper left hand corner: "Must be Postmarked No Later Than July 23, 2004." App. at 40. Halfway down the form, even more confusion was

[2] "Final Approval" is defined in the Settlement Agreement to occur when "approval of this Settlement Agreement and Final Judgment have been affirmed in their entirety, and without material change, by the Court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review." The losing party will have 30 days to petition for review of this Court's decision to the United States Supreme Court, and therefore the claim filing deadline will not occur until 60 days after that date.

created by the language "Your Proof of Claim Must be Received at the address listed above no later than July 23, 2004." Id. Class members were thus informed by the claim form that it must be postmarked, or received, by July 23, 2004.

Elsewhere on the website, this same erroneous information was repeated. On the Frequently Asked Questions page of the website, class members were told that the claim form must be postmarked by ***September 24, 2004***. App. at 41. Of course, by the time of the July 6, 2004 fairness hearing, claim forms were due no sooner than October 6, 2004, and then only if the court had approved the settlement and entered a Final Order from the bench that day.

Joel Shapiro filed a timely objection to the settlement that pointed out the erroneous information on the claim form and on the website, and asked the court to order the parties "to amend the claim form posted on the website each month from now to Final Approval to reflect the new deadline that applies at each stage of this litigation." App. at 27-33. The court declined to do this.

The court took almost seven months from the date of the fairness hearing to approve the settlement. By that time, the information on the claim form and website was nine months out of date, and had likely deterred hundreds of class members from filing claims that, according to Airborne,

were still being accepted. App. at 52. After the court approved the settlement, Objector Shapiro once again brought the defective notice issue to the court's attention. App. at 34-45. Soon thereafter, Airborne amended the website to delete any reference to a July 23, 2004 or September 24, 2004 deadlines for filing claims. App. at 53.

Objector Shapiro asked the court to order curative notice to the class informing them of the correct claim filing deadline. App. at 36. The court denied this motion. S.A. at 19-22.

Summary of Argument

A fundamental and primary issue in every case is the court's power to adjudicate. Where that power is lacking, a court must dismiss the case. This applies at every stage of the case, including appeal, and the issue of jurisdiction may not be waived. Because the district court was without jurisdiction to hear this case, the court's Order and Final Judgment must be vacated, and the case dismissed.

Adequate notice is a requirement of due process that is necessary in order to bind absent class members to a court's judgment in a class action. One of the benefits that class counsel negotiated on behalf of the class in the proposed settlement is the right to file a claim for a period of up to several years. Presumably, something of value was traded for this extended claims filing right. Because class members did not receive adequate notice of their

rights under the settlement, the court's Order approving the settlement must be reversed, and the case remanded to the district court for curative notice to the class.

Argument

I. The District Court Lacked Jurisdiction Over This Case.

There was no federal jurisdiction over this case, as there is no such thing as "federal common law" that governs general contract disputes. Moreover, challenges to federal jurisdiction can never be waived. See Del Vecchio v. Conseco, Inc., 230 F.3d 974, 980 (7th Cir. 2000)("While we are not unsympathetic to the waste of effort represented by a case that has been fully litigated in the wrong court, both the Supreme Court and we ourselves have noted time and again that subject matter jurisdiction is a fundamental limitation on the power of a federal court to act.").

This case involves allegations of breach of contract – namely, that the amount of liquidated damages applied by Airborne for the failure to fill in the weight of a package constitutes a penalty because it exceeds Airborne's reasonable costs caused by the breach. There is no federal regulation of these charges, and no federal interest that is implicated. Therefore, this case does not present an issue for which the promulgation of federal common law has been authorized. Cf. Teamsters Natl. Auto. Transp. Indus. Neg. Cttee. v. Troha, 328 F.3d 325, 329 (7th Cir. 2003)(holding that the Supreme Court had

authorized creation of federal common law to govern enforcement of collective bargaining agreements).

The existence of federal question jurisdiction must be determined from the face of the complaint. Turner/Ozanne v. Hyman/Power, 111 F.3d 1312, 1316 (7th Cir. 1997). The only Seventh Circuit case cited in the Complaint to establish jurisdiction is United Order of Am. Bricklayers and Stone Masons Union No. 21 v. Thorlief Larsen and Son, Inc., 519 F.2d 331 (7th Cir. 1975), which was brought under §301 of the Labor Management Relations Act of 1974, not federal common law. Moreover, rather than establishing any special "federal common law" regarding liquidated damages clauses, the Seventh Circuit in United Order relied on the Restatement Second of Contracts, Williston on Contracts and Corbin on Contracts in reaching its decision.

Because Plaintiff's complaint points to no possible basis of federal jurisdiction over a routine breach of contract claim, the district court was without jurisdiction over this controversy, and should have dismissed this case. This Court should remand with an order to dismiss.

II. The Notice Given To The Class Violated Their Due Process Rights.

In addition to the right to opt out and the right to object to a class action settlement, class action notice pursuant to Fed. R. Civ. P. 23(e) is intended to apprise class members of their right to claim benefits under the settlement. The notice provided to class members in this case violated both Fed. R. Civ. P. 23(e) and the class' Constitutional right to due process.

Under the settlement approved by the district court, class members have the right to file a claim for cash or pre-paid packages until 90 days after this appeal is concluded, which will probably not occur until 2006. The notice provided to class members, however, instructed them that the claim forms had to be received by July 23, 2004. Clearly, class members were deterred from filing claims by the inaccurate July 23, 2004 deadline that appeared in the claim form and on the website. While Airborne contends that it continued to accept claim forms that were filed after July 23, 2004, as it is required to do under the Settlement Agreement, it failed to provide any evidence to the court that any class members did file claims after the published deadline, or, if so, how many.

It is difficult to imagine why a class member would take the time and energy to perform an apparently futile act, such as filing a claim for benefits after the published deadline (that appeared right on the claim form).

Certainly, most class members who picked up their claim forms, or visited the settlement website, after July 23, 2004 were deterred from filing a claim by the apparent futility of doing so after the published deadline.

Airborne offers two arguments against this certainty. One, class members who downloaded and read the entire Settlement Agreement could have discovered the true claim filing deadline, and, two, class members had seven months in which to file claims, which is sufficient.

The first argument ignores human nature, and borders on farcical. Most class members are interested only in claiming their benefits under the settlement, not in becoming experts in the settlement's details. Therefore, they would not be inclined to read through the entire settlement agreement. Furthermore, given that the claim filing deadline was prominently displayed at the top of the claim form, what would possibly lead a class member to suspect that this printed deadline was in fact erroneous, and send the class member digging into the case file for the correct date?

The argument that four months is enough time to file a claim disregards the clearly bargained-for value of a deferred claim deadline. The amount of time for filing claims is a negotiated item. Generally, a longer time period for filing claims favors the class members, a shorter time period favors the defendant. Class counsel here negotiated a claim filing period that may extend for several years. This was one of the settlement's benefits,

and presumably something of value to the class was traded in order to obtain it. The incorrect deadline printed on the claim form deprived the class of one of the settlement's benefits negotiated on their behalf. The Defendant may not "recapture" this benefit without giving the class something of value in consideration for it.

Curative notice is required to correct the false impression that was created by the first erroneous notice. The notice must be sent to all class members who have not submitted a claim. See In re Bankamerica Corp., 227 F. Supp.2d 1103, 1108 (E.D. MO 2002)(supplemental notice must be sent to all class members whose rights are materially affected). Every class member who did not file a claim has the continuing right to file a claim for at least a $14 mailer. A curative notice would alert class members to the fact that claims may still be filed, and could be expected to prompt the filing of hundreds or perhaps thousands of additional claims. After all, over 240,000 class members who received mailed notice have yet to file their claims. Nothing short of curative notice will accomplish this.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's approval of the settlement and remand with an order to dismiss this case for lack of federal subject matter jurisdiction. If the Court finds that federal jurisdiction exists, it should remand to the district court with instructions to order the mailing and publication of curative notice informing class members of the correct deadline for filing a claim.

Dated: May 10, 2005

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SHORT APPENDIX

Circuit Rule 30(b) Statement

As required by Circuit Rule 30(d), undersigned counsel certifies that all materials required under Circuit Rule 30(a) and (b) are in the appendix bound with the brief.

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John J. Pentz

CERTIFICATE OF SERVICE

I, John J. Pentz, hereby certify that on May 2005 I caused two copies of the foregoing brief to be served on the following counsel via first class mail:

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