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COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 03-CI- 00181

ENTERED BOONE CIRCUIT/DISTRICT COURT	
APR 30 2004	
BY: <u>PAT GUTZEIT</u>	CLERK DC

JOHN DOE et al.

PLAINTIFFS

VS.

ROMAN CATHOLIC DIOCESE OF COVINGTON, et al.

DEFENDANTS

**Order Ruling
On
Motion of Doe II-Doe VIII
To opt-out
And
For Protective Order**

This is an action against the Diocese brought by several individuals who allege that they were sexually abused by priests when they were minors. On October 21, 2003 it was certified as a class action. Absent class members were given notice of their inclusion in the class by publication. The notice informed potential class members that they had the right to be excluded from the class ("to opt out") but to exercise that right they had to return a completed form expressing their choice by January 31, 2004. The notice specifically stated, "Requests for exclusion sent to any other address or postmarked after January 31, 2004 will be deemed invalid and will not result in your exclusion from the Class."

Class counsel has included as absent class members seven individuals who believe they have, in fact, opted-out or should be allowed to now opt out.

On March 19, 2004 these seven individuals, identified as Doe II – VIII, filed a motion to intervene, for leave to opt-out and to be protected from certain acts. The Plaintiffs filed a Response on March 30, 2004, which was supplemented on March 31, 2004. On April 5, 2004 the Movants filed a motion to strike the Plaintiffs' Response. At the Pretrial on April 6, 2004 the Court allowed the Movants to intervene, denied the motion to strike Plaintiffs' Response and took the rest of the Motion under submission.

Based upon sketchy affidavits¹, the seven Does divide themselves into three categories:

1. Two (Doe II and III) knew of the class action prior to the deadline, contacted class counsel prior to the deadline, but were not specifically informed of their right to opt out by class counsel. They did not opt out in a timely manner because they didn't fully understand their right to opt out.
2. Four (Doe IV through VII) did not become aware of their right to opt-out until after the deadline had passed and now wish to opt out.
3. One (Doe VIII) signed and returned the opt-out form in a timely manner but did not supply all of the requested information in a legible manner.

The Plaintiffs dispute this characterization of the facts, and the documentary evidence would by in large support their position. However the Court finds it unnecessary to resolve these discrepancies.

Turning to Doe VIII, the individual who submitted a timely but illegible or incomplete form, the court finds that good cause has been shown for the form to be given effect. However, it is necessary that he complete a legible form so that class counsel can know who is in the class. Otherwise Doe VIII could wait events to determine whether he wanted to participate in any settlement.

As for the remaining Does, the Court finds that, absent one fact peculiar to this case, there would be no grounds for allowing them to circumvent the normal opt-out procedures. The notice was determined by the Court to be adequate, and they did not comply with its terms. It is not sufficient that they have changed their mind, that they subjectively never wanted to be part of the class, or that they did not know of the class action or its opt out provisions until after the deadline had passed. The notice was sufficient to meet the requirements of due process, and as such absent class members can lose certain rights. The Court has no doubt that there will be absent class members who never know about this action, much less the opt-out provisions, and as

¹ While litigation is always stressful the Plaintiffs arguments and common sense make it clear that in this particular case the potential class members are suffering under very strong and unusual psychological stresses. The court interprets the discrepancies between the affidavits of the individual Movants and the documents to be the unintentional result of these stresses rather than any calculated effort to deceive the Court.

a result forfeit their claims against the Dioceses. *Reppert v. Marvin Lumber and Cedar Co., Inc.* 359 F.3d 53 (1st Cir. 2004). Similarly, should there be a court approved settlement; class members could be bound even though they might object to its terms. *TBK Partners, Ltd. V. Western Union Corp.* 675 F.2d 456 (2nd Cir. 1982).

However, there is one fact that prevents this straight forward approach. A transcript of the hearing of October 20, 2004 reveals the following (12:40:52 et. seq.):

Guilfoyle: And Judge, in talking with Mr. Steinberg [unrelated interruption omitted] we have an understanding, a loose understanding with him, and I'd just like to put this on the record for the Court's information. What are we going to do if we get an opt-out form postmarked [after the deadline]? ... Bob has indicated that if someone really wants to opt out they're in all likelihood not going to object to that but...

Judge Bamberger [observation on why the Defendants would not object to late opt outs]

Guilfoyle: ... We're putting a dead line in [the notice] and I guess what we're suggesting, that we are hoping, that it's not a hard and fast... We can say it's hard and fast but...

Judge Bamberger: It won't be. I can't imagine. I can't imagine compelling somebody to be member of a class if they don't want to be. You know, for control purposes I think it helps to have them in here, but to say "Sorry, you're locked in here," that's hard to imagine.

Steinberg: I've told them we agree with that. If somebody's a little bit late we don't have a problem. But this gives you an idea, at time cutoff, how many opt-outs there are.

Judge Bamberger: Anything else? I mean judicially can you imagine compelling someone to be in a class?

Guilfoyle: No...No.

Judge Bamberger: ...I understand the problem, but I think it helps to give them deadlines.

Along the same lines the Court remembers that at the February 5, 2004 pretrial conference Plaintiffs' counsel casually stated that the class membership was not "cast in stone."

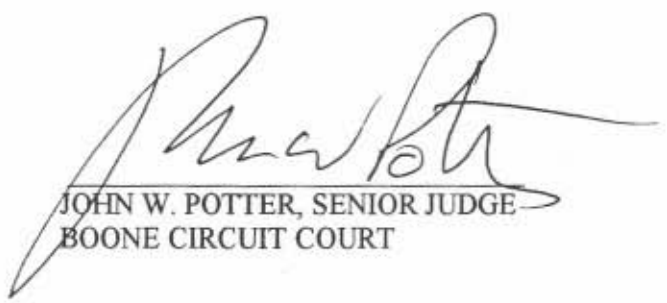
In light of these representations made to the Court, the Court will grant the motions of Doe II through VII to opt out provided they file an opt out form within 20 days.

It should be noted that the Court believes that sufficient time has passed so that the statements of Plaintiffs' counsel quoted above would no longer serve as a basis for allowing other absent class members to now opt out.

In the title of their motion Does II-VIII have also moved for a protective order limiting further contact with them by Plaintiffs' counsel, but they do not address the issue directly in their brief. In light of the above ruling it is unlikely that Does II-VIII will have significant future contact with Plaintiffs' counsel. For this reason the motion for a protective order will be denied as moot.

For the above reason IT IS HEREBY ORDERED:

1. Does II-VIII shall be excluded from the class if they deliver to Plaintiffs' counsel a completed opt out form within 20 days of the date of this order.
2. The Motion for a protective order is denied as moot.



JOHN W. POTTER, SENIOR JUDGE
BOONE CIRCUIT COURT

Cc:

Robert Steinberg, Esq.
Stan Chesley, Esq.

Mark Guilfoyle, Esq.
Carrie Huff, Esq.

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Barbara Bonar, Esq.
Benita Fields Land, Esq.

Ann Oldfather, Esq.

Angela Ford, Esq.

Judge John Potter

CERTIFICATE

I, PAT GUTZEIT, Clerk of the Boone District/Circuit Court, hereby certify that I have mailed a copy of the foregoing order and notice to all parties hereto at their last known addresses or their counsel of record this 30 day of April, 2004.

PAT GUTZEIT
BOONE DISTRICT/CIRCUIT COURT

PG D.C.