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PERSPECTIVE

Passive review and the proposed Facebook settlement

By Robert C. Fellmeth

Federal courts are passive officials sitting before contending parties. We assume that the proper precedent or ruling will come from the range of advocacy the parties provide.

Enter *Fraley v. Facebook*, a case brought by a class of Facebook users, including millions of children age 13 to 18. The class seeks damages for alleged improper use of names and photos for "sponsored stories" — Facebook's practice of publishing to one's "friends" a commercial endorsement of some sort without consent. Under the final proposed settlement, this practice would yield under the following financial terms: (a) a rather token system of less than $10 to each "claimant"; (b) possible awards to multiple consumer and privacy groups who might otherwise oppose it — as cy pres financial grants; and (c) *$7.5 million to the firm for the class* (what's worse — if the plaintiffs do not settle and do not prevail at trial, there are fee-shifting provisions at play that could expose them to millions in fee award damages).

So what would Facebook's future practice be under an order approving the settlement? Facebook would remove the reference to "prior consent" contained in the prior version of its terms and conditions. New terms would provide a blanket advance waiver of any compensation granting permission for any expropriation of any posting or photo on Facebook. The terms would include a caveat that Facebook will respect limitations imposed by members. But these limitations will not be readily apparent — a major problem considering the default limitation setting will be "public." Rather, these "limitations" will be illusory. This arrangement will take the form of a little missive in the middle of the adhesive terms and conditions we all sign off on — unread by 99 percent of all new users and 100 percent of all current users.

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Kids will have their postings sent in some unknown format and purpose to — *who knows*? Regrettably, kids are not always completely mature in their postings and suffer heightened emotional turmoil when they are embarrassed. It is not an accident that California law requires children to get parental permission for a tattoo. But under the proposed settlement, parents will have no ability to monitor and limit their child's online tattoos.

Far from being "fair, reasonable and adequate" (required of class action settlements), this is an illusory remedy, worse than the posture of the class (particularly the subclass of children) prior to this suit. Indeed, we have a federal court being asked to approve future violations of the very type that brought the case before it.

Children cannot agree to a "contract" of this sort. Facebook has stipulated that California law applies to its practices and this settlement — and California has perhaps the clearest statutes requiring parental consent before any such privacy incursion can occur. The issue is addressed in Civil Code Section 3344 and in various sections of the Family Code. In fact, the Family Code specifically addresses the illegality of the "delegation" to someone other than a parent or guardian of the use of a child's information or likeness.

Yet Facebook argues that the federal Children's Online Privacy Protection Act (COPPA) preempts all state law pertaining to child Internet use and privacy. COPPA applies only to children age 0 to 13, and it prohibits Facebook from even allowing a child in that range to use Facebook without prior parental permission. This high floor of protection directed only those children, Facebook argues, means that all laws and protections for children 13 to 18 are extinguished.

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The tendency of most courts is to not appreciate the actual economic dynamics at play. It is tempting to get lost in the interstitial complexity of "how much should the class attorneys get?" Or, "should the class representatives get $2,000 each in incentive payments or $5,000 each?" Or, "is the notice adequate?" Or, "what if Facebook changes 'sponsored stories' and calls it something else?" (An irrelevant concern since the proposed final order allows it to go way beyond any "sponsored story" configuration.) But these questions dominated the hearing for final approval of the settlement.

There is a simple change to fix all of this: have Facebook copy and paste what it intends to send out, add a description of the recipients, and send it to parents with an "I consent" button. If no parent has been identified or is available, do not send anything. If the button is clicked by someone claiming in good faith to be a parent, send it. The court seems to view such an alternative as "interfering" with the parties and their arrangements — but there are all sorts of alternatives possible that might create some bona fide prior consent.

This is a case where those critically affected are not really before the court. Often, objectors are looked upon as intruders, and they do sometimes have their own agendas. But, on the other hand, the class action mechanism has a flaw that only the courts can police — one manifested here in spades. You do not intervene on behalf of the state, and enter a court order sanctioning the violation of the common law, numerous statutes, privacy rights, child rights, parental rights — many of them with constitutional dimension. You best not do so with the rationalization that you are just mediating between two contending parties and what they propose is not only presumptively, but dispositively, "fair, reasonable and adequate."

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