Attorney Sanctioned for 'Objector Extortion' in Class Action Settlement

by Thomas E.L. Dewey

When named plaintiffs and defendants in a class action agree to a settlement, they must obtain the court's preliminary approval of the proposed class action settlement. Thereafter, class members are notified of the proposed settlement and given an opportunity to file objections, which the court will consider before determining whether finally to approve the proposed settlement. The Second Circuit has stated that class members who object to a proposed settlement serve an important role in "preventing collusive or otherwise unfavorable settlements." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974).

Nevertheless, in recent years, certain class action objectors have sought to file frivolous objections and appeals concerning proposed settlements to obtain personal payments in exchange for voluntarily dismissing their objections. The Seventh Circuit has recently described this practice, which delays the resolution of class actions and depletes settlement resources, as "objector blackmail." *Pearson v. Target*, 893 F.3d 980, 982 (7th Cir. 2018).

Earlier this year, the district court (Rakoff, J.) overseeing the class action against Petroleo Brasileiro S.A. (Petrobras), which concerns the defendants' alleged violation of federal securities laws by concealing a multi-year, multi-billion dollar bribery and kickback scheme, issued its final approval of a $3 billion class action settlement. In so doing, the court rejected objections filed by class member Spencer Bueno, who was represented by attorney Joseph R. Furman, and which the named plaintiffs had alleged were made solely to extort payments.

After entry of the court's final judgment, Bueno, still represented by Furman, filed a notice of appeal, and the named plaintiffs moved for sanctions against Furman and other class members. In a decision issued on Sept. 21, 2018, the district court concluded that Furman's objections and appeal on behalf of Bueno had "lack[ed] any colorable basis," and that Furman had filed them in bad faith. The court therefore granted the named plaintiffs' motion for sanctions against him, ordering Furman to pay $10,000, without prejudice to subsequent motions for further sanctions.

This decision is significant because it shows that, while courts recognize the important role that class action objectors can play in safeguarding class interests, when an objector or his counsel acts in bad faith to extort a personal payment, sanctions may be imposed.

Background

On June 22, 2018, the court issued a decision finding that the proposed settlement agreement and plan of allocation in the Petrobras securities class action was fair and reasonable and complied with all applicable legal standards. Thus, the court granted the named plaintiffs' motion for final approval of the settlement agreement and plan of allocation and instructed the clerk to enter final judgment. See In *re Petrobras Sec. Litig*., 317 F. Supp. 3d 858, 879 (S.D.N.Y. 2018).

In its June 22, 2018 decision, the court rejected numerous objections raised by class members and their counsel. For example, it considered a "kitchen-sink brief" filed by Furman on behalf of Bueno, but it rejected his arguments because they were meritless, with some lacking factual support or any legal basis, including an objection to the proposed cy pres recipient (i.e., an entity that would receive any leftover settlement funds), which the court deemed not "ripe for consideration."

In addition, the court considered objections filed by Richard and Emelina Gielata, which were drafted by Joseph Gielata, alleging an interclass conflict between domestic claimants and non-domestic claimants whose purchases of Petrobras securities were connected to the United States solely because their transactions were cleared through the Depository Trust Company in New York. The court rejected this objection because, among other reasons, the defendants had waived any domesticity challenges for settlement purposes.

Although the court directed entry of a final judgment in accordance with its June 22, 2018 decision, it retained jurisdiction over disputes arising in connection with the settlement, including the named plaintiffs' allegations that certain objectors, including Bueno and Richard and Emelina Gielata, had sought to file frivolous appeals to extort personal payments. The court also expressly retained jurisdiction for purposes of any objections to the entity designated to receive cy pres distributions, if and when the issue were to become ripe for a decision.

Thereafter, Bueno and Richard, Emelina, and Joseph Gielata filed notices of appeal of the court's final judgment. Subsequently, the named plaintiffs filed a motion for sanctions against Furman and Richard and Joseph Gielata (collectively, the Gielatas), arguing that they had filed their appeals as part of an "extortionist agenda" and that sanctions were warranted pursuant to Federal Rule of Civil Procedure 11, 28 U.S.C. §1927, and/or the court's inherent authority. In addition, the named plaintiffs argued that the court should order Bueno and the Gielatas to post an appeal bond. Furman, Bueno, and the Gielatas opposed those motions and filed cross-motions for sanctions against the named plaintiffs.

Motion for Sanctions

In a decision issued on Sept. 21, 2018, the district court granted the named plaintiffs' motion for sanction against Furman. See *In re Petrobras Sec. Litig*., No. 14-cv-9662 (JSR), 2018 WL 4521211 (S.D.N.Y. Sept. 21, 2018). It began its analysis by explaining that a federal district court has broad inherent power to protect the administration of justice through sanctions, including by disciplining attorneys who appear before it. The court noted that sanctions are warranted pursuant to its inherent authority upon a specific finding of bad faith and clear evidence that the conduct under review is "entirely without color" and "motivated by improper purposes." In addition, §1927 authorizes the court to impose sanctions against "any attorney … who so multiplies the proceedings in any case unreasonably and vexatiously" in the form of "excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §1927.

Applying these standards to Furman's objections, the court held that his objections had no colorable basis. For example, the court found that there was no factual support for his contention that the plan of allocation was not provided on the notice website, while his argument that the plan was an improper claimant fund-sharing scheme was premised on inapposite legal authority. The court also rejected Furman's objection that the settlement failed adequately to address cy pres distributions, because it did not name a specific cy pres recipient, instead providing for the subsequent designation of a Brazilian entity "selected by the Petrobras [d]efendants and approved by [c]lass [c]ounsel, whose mission is to fight corruption and improve corporate governance in Brazil," noting this objection had no legal support whatsoever.

Similarly, the court found that Furman's appeal, which was limited to his cy pres objection, was "totally frivolous," because "there is no case law in the Second Circuit requiring the court to identify a specific cy pres recipient prior to approving a settlement." Moreover, Furman's citation to *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012) to support an argument that the court must designate a cy pres recipient to "avoid a circuit split," rested on a "blatant mischaracterization," because, in Dennis, the Ninth Circuit had found objections to the cy pres distribution to be ripe where—unlike the Petrobras case—funds were available for cy pres distribution and a determination had been made as to the amount of those funds.

Next, the court analyzed whether Furman had acted in bad faith. Given Furman's "repeated misrepresentation of both the facts and law," the court held that "[t]he only likely motive for this misconduct is Furman's attempt to extort a payment from the [c]lass plaintiffs in order that they may avoid costly delay." As further evidence of his bad faith, the court examined Furman's history of filing appeals on behalf of objectors and voluntarily dismissing them in exchange for payments. In addition, it noted that Furman had refused to sign a stipulation, which was entered by the court, clarifying that before any cy pres distribution would be made, the named plaintiffs and defendants would file a motion designating a proposed recipient, which any settlement class member could oppose, and no distribution would be made until the court ruled on that motion and all appeals were exhausted. The court found that Furman's refusal to accept this stipulation, which addressed all of his purported concerns, evinced his bad faith.

Consequently, the court awarded sanctions against Furman. While the named plaintiffs suggested an award of $23,000, which would have reflected the time spent by their counsel responding to his objections, the court found that this figure was based on time spent responding to all of the objectors'

In light of the "palpable lack of merit of Furman's filings," the court held that relatively little time was needed to respond to his particular objections, so a sanctions award of $10,000 was appropriate. The court also held that its award against Furman was without prejudice to subsequent sanctions motions.

Other Motions

As to the motion for sanctions against the Gielatas, the court held that sanctions were not warranted. While the court stated that it was "deeply troubled by some of the Gielatas' conduct," which included an unrelated prior guilty plea by Joseph Gielata for arranging sham transactions, and his attempts to effectively act as counsel to Richard and Emelina Gielata in the Petrobras class action (despite not requesting pro hac vice admission), their argument regarding an alleged interclass conflict was "not frivolous". Instead, it was in line with the types of argument that the court would expect from a "serious objector motivated by concerns for class welfare." Thus, the court denied the motion for sanctions against the Gielatas.

With respect to the objectors' arguments that the named plaintiffs should be sanctioned for "filing a frivolous Rule 11 motion" to bully them into not filing an appeal, the court held that while Rule 11 may not have provided a basis for the named plaintiffs' sanctions motion, they raised "legitimate concerns under §1927 and under the inherent power of the [c]ourt". Accordingly, the court did not award sanctions against the named plaintiffs.

Finally, as to the named plaintiffs' motion for appellate bonds, the court ordered the Gielatas to post an appeal bond of $50,000 and for Bueno to post an appeal bond of $5,000, with the former amount representing an estimate of the named plaintiffs' taxable costs of their appeal, and the latter being a smaller figure due to Bueno's comparatively lesser resources.

Conclusions

The court's decision in In re Petrobras illustrates that courts take seriously their responsibility to strike a balance between hearing legitimate objections to proposed class action settlements and protecting class members from objector extortion. Where an objector or his counsel raises frivolous objections in an effort to obtain personal payments in exchange for voluntarily dismissing his objections, the court may impose sanctions.

More broadly, this decision tracks a rising awareness in the legal profession of the harm caused by class action objectors who engage in objector extortion. For this reason, an amendment to Rule 23 of the Federal Rules of Civil Procedure that would require judicial approval of any monetary settlements to objectors is scheduled to take effect on Dec. 1, 2018, unless it is vetoed by Congress.

Going forward, even objectors with legitimate concerns about proposed class action settlements can expect more scrutiny over their objections. They and their counsel should therefore take care to ensure that any objections they raise are made in good faith and are supported by applicable facts and law.

This article first appeared in the *New York Law Journal* on October 26, 2018. Anders W. Pauley, an associate at the firm, assisted with the preparation of this article.