THE AMERICAN LAWYER

How a Nagging Flaw Could (and Should) Un-Do the Trump U Settlement

Jenna Greene, The AmLaw Litigation Daily
June 21, 2017

"A classic Catch-22." "A Hobson's choice." "Deeply problematic." That's how a dozen top law school professors describe the Trump University fraud settlement in an amicus brief filed Monday.

Fellow amici from the National Association of Consumer Advocates and a trio of plain-language experts agree, blasting the settlement in their brief, also filed Monday, as "fundamentally unfair."

It's not that they object to the $25 million payout to the class members (though they don't think much of the recovery). It's that the deal barred class members from opting out at the time of settlement.

It's a strong argument—and it may be enough to persuade the U.S. Court of Appeals for the Ninth Circuit to reverse U.S. District Judge Gonzalo Curiel's March 31 approval of the settlement. The deal resolved three lawsuits alleging that Trump University made fraudulent claims about its real estate seminars.

In many ways, the settlement is good deal for the class members, who will get more than half of their money back.

While the payout falls short of a full refund—much less treble damages for the RICO claim—Curiel in approving the settlement on March 31 pointed out the plaintiffs faced some big challenges. Among them: winning a unanimous jury verdict on liability against the man who was just elected president of the United States, spending years fighting over individual damages and then prevailing on appeal, "with the corresponding risk that class members would receive no recovery."

Sweetening the pot, plaintiffs counsel from Robbins Geller Rudman & Dowd and Zeldes Haeggquist & Eck agreed to work pro bono, foregoing all legal fees and costs.

So yes, there were lots of reasons for the plaintiffs to fall in line and accept the settlement.

But there were also reasons not to. Donald Trump—being Donald Trump—crowed in a tweet that the settlement was only "a small fraction of the potential award." (Indeed, Lit Daily recognized his lead lawyer, Daniel Petrocelli of O'Melveny & Myers, as litigator of the week for brokering the deal.) Nor did he acknowledge wrongdoing. ("The ONLY bad thing about winning the Presidency is that I did not have the time to go through a long but winning trial on Trump U. Too bad!")

Moreover, these weren't piddling claims, where it would be stupid to pursue independent litigation over $5 in damages. These plaintiffs spent real money—up to $35,000—on Trump U programs. That could make it worthwhile to ditch the class and go it alone.

Objector Sherri Simpson shelled out $19,000 on a three-day Trump U seminar and a year-long "Gold Elite Mentorship" before concluding "it was all a scam," wrote her lawyers Deepak Gupta of Gupta Wessler; and Gary B. Friedman, Edward Zusman and Kevin Eng of Markun Zusman Freniere & Compton in their Ninth Circuit opening brief filed last week.

At first, Simpson planned to sue Trump on her own. But then, she heard about the class action in San Diego federal court. "The class notice specifically reassured Simpson and her fellow class members that they would be notified of how to 'ask to be excluded from any settlement.' Simpson understood this to mean that, if she stayed in the class, she would be notified of any future settlement and be able to decide whether to opt out," her lawyers wrote.

She figured her claim with treble damages was worth up to $66,310, but under the settlement, she'd recover at most $9,500. She wanted out of the class.

The settlement notice set a deadline of March 6, 2017 both for filing a claim form and for making any objection to the settlement. Simpson did both. "She sought to object as well as to preserve her rights in the event that her objection ultimately proved unsuccessful," her lawyers wrote.

Curiel in denying her request said that she had the chance to opt out when she received the class notice in 2015, before anyone had any idea what the settlement might be. "She chose not to do so, and cannot now belatedly argue that due process compels a further opt-out opportunity," he found.

Much of the fight now comes down to the language in that class notice, which stated, "If you stay in, and the Plaintiffs obtain money or benefits, either as a result of the trial or a settlement, you will be notified about how to obtain a share (or how to ask to be excluded from any settlement)."

That's where the amicus brief from plain-language experts is especially helpful. The class notice language is copied verbatim from a Federal Judicial Center model—which was written by amici Todd B. Hilsee and Terri LeClercq, based on research performed by amicus Lawrence Solan.

The trio are very clear on what it is supposed to mean. The key language "has only one reasonable interpretation—at the time of settlement, class members would be given the chance to opt out. Any reasonable class member would have read the notice that way."

As far as Curiel was concerned, though, he was not compelled to do anything—allowing an opt-out was at his discretion. The language in the notice "does not objectively give rise to the conclusion that Simpson had an unequivocal right to opt out of the settlement," he found. "There is no blanket rule that due process requires a settlement-stage opt-out opportunity."

The amici respond, "Although worded (out of respect for the district court) as a request, the language does not suggest that the request might be denied. When a class has been notified that it has the right to opt out, courts do not ordinarily consider whether to grant or deny opt-out requests; those who ask to opt out are simply deemed opted out." The amicus brief (a great read, befitting experts in plain language) continues, "To give a comparable example, it would be misleading for Trump University to promise that it would 'explain how dissatisfied students can get their money back at the end of the course,' and then after the course was over to say 'Here's how to get your money back: You can't.' The district court's reading renders the class notice just as misleading."

The amicus brief was written by Gregory Beck, a public interest lawyer in Washington, D.C., and Christopher Peterson, a professor at the University of Utah S.J. Quinney College of Law. It was signed by eight other scholars in consumer-protection.

On Monday, Curiel denied a request by the plaintiffs lawyers to force Simpson to post a $147,388 bond to ensure payment of their costs on appeal. "The court finds it likely that Simpson will lose the appeal and be subject to costs," he found, but also said the plaintiffs failed to identify applicable fee-shifting statutes. He set the bond at $500 instead, to cover basic court costs.

The second amicus brief, by law professors from Berkeley, Stanford, Columbia and other top schools, is also fiercely critical of Curiel and class counsel for denying plaintiffs the ability to opt out.

They laid out the "Catch-22" dilemma. Claims against the fund and objections to the settlement were to be submitted on the same day—but if you submitted a claim, that meant you waived any rights to pursue separate litigation.

"As scholars in the field of civil procedure and complex litigation, we are unaware of any case that similarly attempted to burden the right of class members to file objections seeking a time-of-settlement opportunity to opt out," wrote Jay Tidmarsh of Notre Dame Law School and Elizabeth Brannen and Peter Stris of Stris & Maher.

They continued, “The only legitimate way to resolve this Kafkaesque dilemma while allowing the objection process to do its vital work is to recognize that filing a claim does not and cannot deprive a class member of the ability to object to the settlement.”