United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 28, 2000 Decided March 31, 2000

No. 99-5222

Timothy C. Pigford, et al.,
Appellees

Leonard C. Cooper,
Appellant

v.

Dan Glickman, Secretary,
The United States Department of Agriculture,
Appellee

Consolidated with
No. 99-5223

Appeals from the United States District Court
for the District of Columbia
(No. 97cv01978)
(No. 98cv01693)

David M. Schnorrenberg argued the cause for appellant. With him on the briefs were Richard T. Seymour, Teresa A. Ferrante, Stephon J. Bowens, Marcus Jimison, J. Michael Klise and Matthew C. Hans. Julie Nepveu and Julie L. Gantz entered appearances.

Alexander J. Pires, Jr. argued the cause for appellees Freddie Jones, et al. With him on the brief was Phillip L. Fraas.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellee Dan Glickman, Secretary, The United States Department of Agriculture. With him on the brief were David W. Ogden, Acting Assistant Attorney General, Marleigh Dover, Special Counsel, and Wilma A. Lewis, U.S. Attorney.

Before: Sentelle, Rogers and Tatel, Circuit Judges.

Opinion for the Court filed by Circuit Judge Rogers.

Rogers, Circuit Judge: Leonard C. Cooper appeals the district court's order approving a consent decree settling lawsuits brought by a class of approximately 20,000 African-American farmers, of which Mr. Cooper is a member, against the United States Department of Agriculture ("USDA").1 See Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999). Under the decree, the United States is likely to provide an estimated $2 billion in debt relief and monetary payments in consideration for the dismissal of the class' complaint alleging that USDA systematically discriminated against them on the basis of their race. See id. at 111. Making no claim that the

farmers' individual claims cannot be fairly and justly resolved under the decree, Mr. Cooper contends instead that the benefits of the consent decree are illusory because USDA has

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1 Mr. Cooper is the only member of the class to appeal although in noting his appeal he purported to file on behalf of himself individually and as a representative of a class of African-American farmers, sending copies to nine named persons. None of those persons is a named appellant, however. The class representatives, the named plaintiffs in the district court, and the Secretary of Agriculture are appellees.

reserved the right in paragraphs 19 and 21 to undo the decree by regulatory fiat, depriving the farmers of any judicial relief and, thus, the district court abused its discretion in approving the decree as fair, adequate, and reasonable under Rule 23(e) of the Federal Rules of Civil Procedure. As clarified by stipulations in the briefing and oral argument on appeal, no basis exists to conclude that USDA would promulgate such a regulation under laws in effect when the decree was approved by the district court. While paragraph 19 leaves the class exposed to potential congressional enactments nullifying or modifying the consent decree, the class would bear that risk in any event, at least so long as the decree remains executory. Additionally, Mr. Cooper's contention concerning the limitation of the district court's authority by paragraph 21 is inconsistent with the plain language of that provision. Accordingly, because Mr. Cooper's contentions are unpersuasive on their own terms, and, in light of the benefits conferred on the class by the decree taken as a whole, we find no abuse of discretion by the district court, and we affirm.

I.

The consent decree settling the class action was the product of lengthy and, at times, contentious negotiations. The background is set forth in Judge Friedman's comprehensive opinion, Pigford, 185 F.R.D. at 89-92, familiarity with which is assumed, and we repeat only the details necessary for this opinion.2

USDA indirectly administers programs that provide credit and other benefits to farmers. The USDA's credit and benefit programs are federally funded, but the decisions to approve or deny applications for credit or benefits are made at the county level by a committee of three to five members elected by local farmers and ranchers. In addition to acting on credit and benefit applications, the county committee appoints a county executive to assist farmers in completing

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2 The district court's opinion appears as an appendix to this opinion.

their applications and to recommend to the county committee which applications should be approved. Id. at 86. USDA has promulgated a number of regulations governing how these officials are to administer the credit and benefit programs, but the evidence before the district court shows that USDA has exercised little oversight regarding how applications historically have been processed at the county level. Id. at 86-88. For years, African-American farmers, who have been significantly underrepresented on the county committees, see

id. at 87, have complained that county officials have exercised their power in a racially discriminatory manner, resulting in delayed processing or denial of applications for credit and benefits by African-American farmers not experienced by white farmers who are similarly situated. Id. at 87-88. Such discriminatory treatment is prohibited by statute and by regulation. See 15 U.S.C. s 1691(a) (1994); 7 C.F.R. ss 15.51, 15.52 (1999). In December 1996, the Secretary of Agriculture appointed a Civil Rights Action Team to investigate allegations of racial discrimination in the administration of USDA credit and benefit programs, and, in February 1997, the USDA Inspector General reported that USDA had a backlog of discrimination complaints in need of immediate attention. The President and the Secretary thereafter sought appropriations to carry out the recommendations to improve USDA's civil rights efforts. Pigford, 185 F.R.D. at 111.

On August 28, 1997, three African-American farmers filed suit on behalf of a putative class of similarly situated African-American farmers alleging racial discrimination in the administration of USDA programs and further harm from the allegedly surreptitious dismantling of USDA's Office of Civil Rights in 1983, which together were alleged to violate the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. s 551 et seq.; Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d; and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. s 1691, prohibiting discrimination in consumer credit. Following amendments to the complaint, the district court granted class certification in October 1998. See Pigford, 185 F.R.D. at 90. At that time, most of the

farmers' ECOA claims were arguably barred by a two-year statute of limitations. See 15 U.S.C. s 1691e(f). Responding to petitions from class members, Congress enacted, and the President signed in November 1998, an amendment to retroactively extend the limitations period for persons who had filed administrative complaints between January 1, 1981, and July 1, 1997, for acts of discrimination occurring between January 1, 1981, and December 31, 1996.3 A second class action, Brewington v. Glickman, Civ. No. 98-1693, filed in July 1998 and making similar allegations covering a different time period, was consolidated with Pigford for purposes of settlement, and a new class was certified. See Pigford, 185 F.R.D. at 90.

As the February 1999 trial date drew near, the parties' negotiations shifted from individual claims to a global settlement, id., and with the assistance of a court-appointed mediator, the parties developed and agreed to a consent decree that contemplated a two-track dispute resolution mechanism to determine whether individual class members had been the victims of discrimination and, if so, the amount of monetary relief to which they were entitled. If a class member opts for resolution under Track A, "class members with little or no documentary evidence [will receive] a virtually automatic cash payment of $50,000 and forgiveness of any debt owed to USDA," id. at 95; whereas, class members opting for Track B resolution have the opportunity to prove their claims in a one-day mini-trial before an arbitrator and, if successful, the amount of monetary damages is not capped. Id. Class members dissatisfied with the opportunity for resolution of their claims under either Track A or Track B could opt out of the class within 120 days of entry of the consent decree, and

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3 See Pub. L. No. 105-277, s 741, 112 Stat. 2681 (codified at 7 U.S.C. s 2297, notes); see also Statement By President William J. Clinton Upon Signing H.R. 4328, 34 Weekly Comp. Pres. Doc. 2108 (Nov. 2, 1998) ("This bill will also address the long-standing discrimination claims of many minority farmers by adopting my request to waive the statute of limitations on USDA discrimination complaints that date back to the early 1980s."), reprinted in 1998 U.S.C.C.A.N. 582.

file individual lawsuits. Id. The district court is to appoint a monitor from a list of names provided by the parties "to track and report on USDA's compliance with the terms of the Consent Decree." Id. at 109.

By law, the proposed consent decree could not take effect until the district court had approved it, see Fed. R. Civ. P. 23(e), and the district court's approval could not be granted until notice had been given to the class of the proposed settlement and a fairness hearing had been held to determine whether the "settlement is fair, adequate, and reasonable and is not the product of collusion between the parties." Pigford, 185 F.R.D. at 98 (quoting Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir. 1998)). The district court held a day-long hearing in which representatives of eight organizations and sixteen individuals, including Mr. Cooper, voiced their objections to the terms of the proposed consent decree. Many, including Mr. Cooper, objected to the absence of certain forms of prospective structural relief, notwithstanding the fact that the complaint, as amended, did not seek such injunctive relief. Id. at 110. While USDA was likely to face billion-dollar monetary liability under the decree, no changes to the county committee system were mandated, and objectors feared that no improvements would be made to the way in which the farm credit and non-credit programs are administered. See Transcript of Fairness Hearing ("Tr."), Mar. 2, 1999 at Joint Appendix (JA) 388 (Mr. Bowens); 493 (Mr. Cooper). They also maintained that insufficient information had been exchanged during the discovery period leading up to the settlement. However, at the fairness hearing, neither Mr. Cooper nor his counsel voiced the objections raised now on appeal to paragraphs 19 and 21 of the decree. Instead the National Council of Community Based Organizations in Agriculture ("NCCBOA") argued to the district court that paragraph 19 "contemplates that a future statute or regulation may interfere with the relief that is provided by the decree." Tr. at JA 410. Without specifically mentioning paragraph 21, NCCBOA objected to that provision on the grounds that the class members "are remitted to contract law claims against the Government, but the contract here expressly provides

that they can't have their claims reinstated and the Government has got a defense because of its new regulation to the relief that's provided by the Consent Decree." Tr. at JA 411.

Following the hearing, the district court suggested fourteen changes to the proposed consent decree, including modifying paragraph 19 to require USDA to use its best efforts to comply with laws prohibiting discrimination and modifying paragraph 21 to make clear that the district court retained jurisdiction to enforce the consent decree with its contempt power. The class and USDA rejected the first suggestion and adopted the second. The district court then allowed another round of written objections to be filed to the revised consent decree.4 After considering all of the objections and

the entire record, the district court approved the proposed consent decree as fair under Rule 23 and ordered that the decree be entered. Mr. Cooper noted an appeal from the order, but he did not seek a stay of proceedings under the consent decree pending appeal.5

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4 Objections made directly by Mr. Cooper questioned whether class counsel truly represented the interests of the class members and suggested that the decree contain a provision rendering it void if either USDA or class counsel took steps to obstruct the district court's jurisdiction to enforce the proposed decree. Mr. Cooper's counsel, on behalf of Mr. Cooper, filed eight pages of objections, which also questioned the capacity of class counsel to represent the class, but made no mention of either paragraphs 19 nor 21 nor of the enforceability of the decree as a general matter. In addition, the North Carolina Association of Black Lawyers Land Loss Prevention Project at North Carolina Central University Law School filed a set of objections jointly with three other organizations, including NCCBOA, which stressed, among other things, the view that in light of paragraphs 19 and 21, the district court's contempt power was inadequate to enforce the decree.

5 Although the figures differ, USDA and class counsel represented in their respective briefs that more than 20,000 persons have filed claims under the decree. See Appellee USDA's Br. at 15; Appellee Plaintiff Class' Br. at 12. At oral argument, class counsel represented that as of February 25, 2000, decisions in 9,573 Track A cases had been rendered of which 5,746 claims were granted and

II.

The law is well settled that the decision to approve a consent decree is committed to the sound discretion of the district court. See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 299 (3d Cir. 1998). The district court's role in reviewing the decree is to protect the interests of absent class members, and that is done primarily by evaluating the terms of the settlement in relation to the strength of their case. See Thomas, 139 F.3d at 231. The appellate court is not to substitute its views of fairness for those of the district court and the parties to the agreement, see Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992), but is only to determine whether the district court's reasons for approving the decree evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23. See Thomas, 139 F.3d at 231; see also Kickapoo Tribes v. Babbitt, 43 F.2d 1491, 1495 (D.C. Cir. 1995). Mr. Cooper bears the burden on appeal of making a "clear showing" that an abuse of discretion has occurred. See Moore v. National Ass'n of Sec. Dealers, 762 F.2d 1093, 1107 (D.C. Cir. 1985). He has not done so; on the contrary, the district court fulfilled the requirements of Rule 23 in exemplary fashion.

On appeal Mr. Cooper has abandoned the objections he raised in the district court regarding the lack of prospective structural relief and confines his challenge to the consent decree to paragraphs 19 and 21, which he contends give USDA, in effect, the right to unilaterally withdraw from the consent decree leaving class members with no judicial remedy. Mr. Cooper thus contends that the district court erred by failing to notify class members specifically of the terms of

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paid in an amount totaling $359,125,000. Of the 3,827 Track A claims that were denied in whole or in part, one third have been appealed under the terms of the consent decree. In addition, approximately 146 class members have opted for resolution under Track B. Four cases have been completed, and eighty others are in discovery.

the two paragraphs and by approving the decree without requiring alteration or deletion of the two paragraphs.6

In his opening brief, Mr. Cooper contended that USDA can use paragraph 19 to renege on its agreement in the consent decree in one of three ways: (1) Congress could pass new legislation that USDA could interpret to preclude some or all of the relief provided by the decree; (2) USDA could promulgate new regulations to the same effect without new legislation; or (3) USDA could interpret existing law to bar the relief provided in the decree without promulgating a rule. In subsequent briefing by appellees class counsel and USDA,

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6 The paragraphs under attack provide:

19. Defendant's Duty Consistent With Law and Regulations

Nothing contained in this Consent Decree or in the Final Judgment shall impose on the defendant any duty, obligation or requirement, the performance of which would be inconsistent with federal statutes or federal regulations in effect at the time of such performance.

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21. No Effect if Default

Subject to the terms of p 17, above, [conditioning the decree's obligations on a final judgment dismissing the complaint] and following entry by the Court of Final Judgment, no default by any person or party to this consent Decree in the performance of any of the covenants or obligations under this Consent Decree, or any judgment or order entered in connection therewith, shall affect the dismissal of the complaint, the preclusion of prosecution of actions, the discharge and release of the defendant, or the judgment entered approving these provisions. Nothing in the preceding sentence shall be construed to affect the Court's jurisdiction to enforce the Consent Decree on a motion for contempt filed in accordance with p 13 [requiring parties to conciliate before filing contempt motion].

The last sentence of paragraph 21 was added after the fairness hearing.

and at oral argument, it has been clarified that there was no intent that paragraph 19 include the second and third possibilities; rather, USDA stipulates, and class counsel concurs, in their respective briefs that paragraph 19 "simply recognizes the legal reality that Congress makes the laws, and that it is the obligation of the government to perform prospectively in conformance with the then binding laws enacted by Congress." See Appellee USDA's Br. at 25; Appellee Plaintiff Class' Br. at 11.

With that clarification, USDA's promise to perform under the consent decree is not illusory because USDA has not reserved a unilateral right to withdraw, cf. Gray v. American

Express Co., 743 F.2d 10, 19 (D.C. Cir. 1984) (interpreting New York law), rather it would take action by Congress to enable USDA to withdraw from the consent decree. Consequently, under elementary principles of contract law, USDA's promise to perform was backed by consideration at the time it was made and the parties have assigned to the plaintiff class the marginal risk that Congress might nullify the agreement in some respect by future legislation. Although the evidence before the district court establishes the basis for class members' mistrust of USDA and concern that the risk may be more than hypothetical, see Pigford, 185 F.R.D. at 110, the fact that Congress and the President acted quickly to remove a limitations bar to the plaintiffs' recovery indicates that as of October 1998 all three branches of the federal government had taken steps to aid in the final resolution of the farmers' claims on the merits. The district court noted the priority commitment of the President and the Secretary of Agriculture, spurred by the efforts of the African-American farmers, to obtain funding to carry out recommendations improving USDA's civil rights efforts, as well as Congress' "unprecedented action of tolling the statute of limitations." Id. at 111. And Mr. Cooper acknowledged through counsel on appeal that he has no evidence that this three-branch commitment has waned. The district court could therefore reasonably conclude when approving the decree that the risk of a radical about-face in current federal policy was remote.

More fundamentally, even in the absence of paragraph 19, the class would bear the risk of such hypothetical legislation, at least so long as the decree remains executory. See Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (1855); BellSouth Corp. v. FCC, 162 F.3d 678, 692-93 (D.C. Cir. 1998); see also Landgraf v. USI Film Products, 511 U.S. 244, 273-274 (1994); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).7 Thus, we need not pass upon Mr. Cooper's' contentions concerning possible constitutional limitations on Congress' power to enact such legislation, see Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), nor address the ramifications of such legislation under the reasoning of United States v. Winstar Corp., 518 U.S. 839 (1996), to conclude that the district court did not abuse its discretion by approving the proposed consent decree, as amended, which assigns a risk to the plaintiff class that it would have borne in any event.

As to Mr. Cooper's contention that paragraph 21 deprives the farmers of the right to ask the district court to modify the decree or reinstate their lawsuit in the unlikely event that Congress passes legislation nullifying the decree, it too relies on a misplaced concern. Paragraph 21 provides that if the government defaults on its obligations under the decree, the plaintiff class can enforce the decree only by motion for civil contempt. Mr. Cooper reads this provision to also "strip[ ] the district court of its authority to reopen the final judgment" if Congress enacts legislation allowing for the decree to be nullified in whole or in part. However, the very basis for Mr. Cooper's contention concerning paragraph 19 is, and USDA agrees, that USDA would not be in default under the agreement if Congress passed new legislation nullifying, or directing the Secretary to nullify by regulation, the consent decree. Because that action would not qualify as a default, the provisions of paragraph 21 would not apply. Thus, Mr.

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7 It is to be noted that the relief Mr. Cooper seeks, an order

vacating the decree and remanding for trial, could require that plaintiffs' cases be tried over a number of years, see Pigford, 185 F.R.D. at 104, and thus could expose class members to this risk for a far longer period.

Cooper's contention that the consent decree is unfair because the class would not be able to seek relief under Rule 60(b) of the Federal Rules of Civil Procedure is mistaken. On its face, paragraph 21 does not foreclose that avenue of relief when USDA has not defaulted, and thus were Congress to enact the hypothesized legislation, paragraph 21 would not bar the class from seeking modification of the decree, subject to its ability to "establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." Rufo, 502 U.S. at 393.

Moreover, not only do Mr. Cooper's contentions collapse under their own weight, but even were they to retain some persuasive force, the court must evaluate the district court's decision to approve the consent decree, with whatever shortcomings paragraphs 19 and 21 might present, in light of the agreement as a whole. See Thomas, 139 F.3d at 231. In that context, there is no doubt that the district court exercised its discretion well within the boundaries of the law. The serious concerns and objections to the proposed consent decree were carefully considered by the district court and balanced against the likely alternatives in a manner reflecting a considered and compassionate conclusion. See, e.g., Pigford, 185 F.R.D. at 101-04, 109-111. Neither Mr. Cooper nor, to our knowledge, any other class member contends at this point that the provisions of the consent decree providing monetary payments and loan forgiveness are unfair or unreasonable, and we have no occasion to consider whether these provisions are otherwise unfair or unreasonable. As a result, Mr. Cooper has failed to meet his burden to show that the enforcement provisions of the decree are so infirm as to render the entire agreement unfair or unreasonable. Furthermore, our reasons for finding Mr. Cooper's substantive contentions unpersuasive also lead us to reject his procedural contentions that the district court did not address the objections to paragraphs 19 and 21 with sufficient specificity and that notice to the class was inadequate because it did not specifically describe paragraphs 19 and 21.

The ultimate question before the court is whether the district court abused its discretion by approving a consent decree, the principal provisions of which are an indisputably fair and reasonable resolution of the class complaint, containing one paragraph that assigns to the class a risk it would have borne in any event and another paragraph that limits the mode of enforcing the decree in the event of default. To ask the question is to answer it. Because it is clear that no abuse of discretion occurred we do not reach the government's alternative argument concerning whether it would be equitable for this court to vacate the decree in light of the number of claims that have been resolved in reliance on the decree.

Accordingly, we affirm the order of approval of the district court.

APPENDIX

(Pages 14 through 79 of slip opinion not available electronically)