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Litigator of the Week: A Giant of the Plaintiffs Bar—and a Giant Settlement

By Cogan Schneier
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Cohen Milstein Sellers & Toll partner Joseph Sellers just won approval of a major settlement in a decades-old discrimination class action, for what he hopes is the last time.

Sellers represents a class of Native American farmers and ranchers who faced discrimination in loan processing by the U.S. Department of Agriculture. The case involved thorny discovery, the testing of new legal theories, and complex settlement negotiations with the Justice Department. For Sellers, it was about returning what was owed to some of the country's most marginalized citizens.

"They were our nation's first farmers and ranchers, which is part of the spirit behind this case," he said.

The first settlement was approved in 2011 for $680 million. But after the claims process, more than half the money was left over in the fund. Another battle ensued over what to do with the extra money.

Just this week, the U.S. Court of Appeals for the D.C. Circuit upheld a new settlement, which both allows members of the class to collect an additional $18,500 apiece and creates a massive $265 million trust to allocate money to nonprofits serving the needs Native American farmers. It will be "the largest philanthropic institution to serve Native Americans in the history of U.S.," Sellers said.

But this all started in 1999, when the case was filed. Sellers and his team needed to prove that the USDA had discriminated against Native Americans when issuing loans. Sellers, traditionally a civil rights attorney, borrowed legal theories used under the Civil Rights Act and applied them to this case, filed under the Equal Credit Opportunity Act.

Joseph Sellers of Cohen Milstein Sellers & Toll.
Photo: Diego M. Radzinschi/ALM

Jenner & Block and Squire Patton Boggs were co-lead counsel.

The USDA, however, kept no records of rejected loan applications. There was no way to show who got a loan and who didn't. Sellers' team had to get creative, pulling together individual accounts and personal records from those affected. The key, he said, was getting his witnesses to trust his team and the system.

"There's a great deal of mistrust of a case like this, because the belief was [that] there was no good that could come from participating in a lawsuit in the court of the U.S., against the U.S.," Sellers said. "Many people thought the system was rigged and they would once again be disappointed."

They trusted Sellers and the team anyway. More than 1,000 Native Americans were interviewed. There were more than 100 depositions taken, and tens of thousands of documents reviewed. Questions of discovery went up to the D.C. Circuit and back twice, and the legal wrangling went on for 10 years.

Then, following the election of President Barack Obama, the new administration signaled a greater willingness to settle. Negotiations began in 2010. The next year, the settlement was approved.

"In 2011, when this settled, there wasn't a dry eye in the courtroom--I must say, I might even count the judge -- over the recognition that we'd come together to acknowledge that the U.S. court could provide a forum in which this kind of justice could be achieved," Sellers said.

But, of course, it wasn't over. There were 3,605 successful claimants—and $380 million leftover in the settlement fund after the claims process.

The court listed potential reasons for the mis-match in 2015. Some in the class were dead by the time the claims process began, heirs lacked sufficient information to file claims, and there was general distrust of the government, so some wouldn't participate in the process.

A "cy pres" provision in the agreement mandated that the remaining money be distributed to nonprofits. Sellers wanted the class members to get the best possible deal, and set about negotiating the settlement, though the USDA wouldn't relinquish all the money to the claimants.

They had to compromise. After one failed attempt in 2015, a new deal was finally reached and approved by the district court in April last year. But two class members were still unsatisfied. They still thought the remaining funds should be distributed to the claimants, so they appealed. Sellers understood their plight, but said it was upsetting to see the class members butt heads.

"It is frustrating when it happens because you think you've come so far together, and we have, and suddenly there's a split," he said.

Undeterred, Sellers saw the case through to the D.C. Circuit's decision this week. Now, the only thing that can keep the case alive is a petition to rehear the case, or a writ to the Supreme Court. Those are both on the table, lawyers for the appellant plaintiffs said this week.

Sellers said he'd be "disappointed" if the case continues. He's ready for the funds to go to work.

"My hope remains that people will put whatever feelings they had before behind them and we can start to put this money to good use," he said.

He concluded: "I feel very good, notwithstanding the criticism that this settlement has received from some. I think it was a really strong settlement. It made some strong changes to the responsibilities of the farm program. It's the first time in decades that anything has changed and it resulted in the payment of a lot of money, some to distributed claimants and the rest … will be used to serve the broader community."

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