

Class Representatives, PEX Piping Maker Oppose Objector's Challenge Of Settlement

Share us on:

Mealey's (March 24, 2022, 8:23 AM EDT) -- NEW ORLEANS — In separate appellee briefs filed in the Fifth Circuit U.S. Court of Appeals on March 17, class representatives and the maker of polyethylene (PEX) piping dispute an objector's claims that a \$7.65 million class settlement in a lawsuit alleging that the piping was faulty suffered from inadequate representation or that the settlement is poorly funded.

(Jose Garcia v. David Matson, et al., No. 21-51151, 5th Cir.)

(Class representatives' appellee brief and attachments available. Document #43-220401-002B. NIBCO's appellee brief available. Document #43-220401-003B.)

The class representatives, in their brief opposing claims made by appellant Jose Garcia concerning the settlement reached with PEX piping maker NIBCO Inc., write that there was no abuse of discretion shown.

First, Garcia, whose counsel includes an attorney who filed a lawsuit against NIBCO parallel to the one that settled, waived any claim regarding the District Court's conclusion that Garcia lacked standing to object to the adequacy as he did not raise any such arguments in his brief, David Matson and the other class representatives write.

Further, Garcia's objections regarding the adequacy fail as he does not hold a justiciable interest in that issue, the class representatives argue. "Garcia's objection was based upon his assertion that Class Members who may suffer future leaks were not adequately represented by the Matsons and Garrett Plaintiffs because each had already experienced multiple leaks. But Garcia's own objection demonstrated he too had suffered numerous leaks from NIBCO's PEX plumbing products and thus would not benefit from whatever change he seeks to the Settlement," they write.

The class representatives add that even if there was no issue with Garcia's standing, "his argument wholly lacks merit because there is no intra-class conflict between the Matsons or Garrett on the one hand, and Settlement Class Members with potential future leak claims on the other."

NIBCO's Arguments

NIBCO writes in its brief that "Garcia's brief largely ignores the district court's thorough and well-reasoned opinion, instead repeating the arguments he made below without actually addressing the district court's analysis or attempting to satisfy the applicable abuse of discretion standard of review."

Like the class representatives, NIBCO writes that Garcia failed to address the District Court's determination regarding his standing "and he therefore cannot contest this individual ground for affirmance."

Further, NIBCO calls Garcia's objections to the fairness of the settlement "baseless."

"[T]o the extent he is arguing that the parties needed to provide the district court with additional information regarding the specific materials they reviewed in reaching the mediated settlement, Garcia ignores that: (i) much of the information (rulings, motions practice, expert reports) was included in publicly-available filings in prior PEX litigation; (ii) the briefing in opposition to and the record on Garcia's objections included relevant competing expert opinions and a discussion of the relevant principles of law underlying NIBCO defenses; and (iii) the district court's obligation to evaluate the adequacy of a settlement does not require it to actually adjudicate the competing evidence on the merits in a settlement hearing," NIBCO writes, adding that the District Court found no evidence that "the settlement was the product of uneducated guesswork . . . and Garcia identifies no error in this finding."

2 Cases

The settled case was filed against NIBCO in June 2019 in the U.S. District Court for the Western District of Texas by Matson and others. The plaintiffs claimed that the company's PEX piping installed in their homes prematurely burst, resulting in water damage. The plaintiffs alleged that the piping is defective and that the manufacturer breached the express warranty for the product.

In January 2020, Janice Williams and others, represented by George Fleming and his firm, filed their nearly identical competing complaint (Janice Williams, et al. v. NIBCO Inc., No. 20-48, W.D. Texas).

In December 2020, the Matson plaintiffs informed the District Court that they reached a class settlement and moved for preliminary approval. A week later, without leave of court, Fleming filed a notice of appearance in the Matson case and then filed an objection to the settlement alleging that his clients' rights would be affected by the court's adjudication of the proposed settlement.

In January 2021, Fleming sent putative class members a letter marked as advertisement urging them to opt out of the Matson settlement, stating that it wasn't providing sufficient compensation. The letter provided a form and postage-paid, self-addressed envelope for opting out.

After learning of the letter, the Matson plaintiffs sought to amend their proposed court-approved notice to address inaccuracies in Fleming's letter.

The District Court granted preliminary approval of the Matson settlement on Feb. 23 and struck Fleming's objection for lack of standing and as premature.

Opt-Out Forms

On March 10, 2021, Fleming submitted to the class administrator in the Matson case 228 requests for exclusion. The requests were all on the form Fleming sent with his January letter.

On March 18, the court denied NIBCO's previously filed motion to dismiss in the Williams case but extended a previously issued stay. The court noted that the court, parties and counsel should not interfere with the Matson case.

One day later, Fleming sent a second letter to the provisionally certified Matson class. Like the first, the letter was marked as an advertisement and encouraged the recipients to opt out of the Matson settlement.

The court-approved notice in Matson was issued March 25.

Five days later, NIBCO moved for curative action and sanctions in both cases, alleging that Fleming's second letter was misleading and coercive and unfairly resulted in hundreds of opt-outs by class members who made their decisions without all the pertinent information.

The Matson plaintiffs joined NIBCO's requests. On May 7, Fleming submitted an additional 183 requests for exclusion. Most were filed on the form attached to Fleming's letters.

The District Court held a consolidated hearing in both cases to address the merits of NIBCO's motion.

Requests Struck

In June, Magistrate Judge Farrer issued two orders. In the first order in the Matson case, the magistrate judge struck the 411 requests for exclusion that were submitted by Fleming's firm or on one of the letters' forms and restored those class members to the settlement class, opining that Fleming's letters "were inherently misleading."

Next, the magistrate judge ruled that although the March 25 notice addressed some of the inaccuracies in the first letter, the second letter plus the large number of opt-outs showed that further curative action was necessary. As a result, the magistrate judge ordered the sending of curative notice and the reopening of the

opt-out period for the affected class members for a period of 30 days after the notice is sent.

In his second order issued in the Williams case, the magistrate judge partially dismissed and partially denied NIBCO's motion as "[t]he Court has already granted curative action in the Matson case."

Fleming's Filings

Later that month, Fleming and his firm filed objections to the final curative notice. The next month, Fleming moved for leave to communicate by letter with the 411 plaintiffs whose exclusions were stricken after they received copies of the final curative notice regarding what he believes are the shortcomings of the proposed settlement. Fleming's motion was later denied.

On Aug. 30, the homeowners and NIBCO moved for final approval of the class settlement.

Objections Overruled

The magistrate judge granted final approval of the settlement on Oct. 20, finding no merit to objections by Garcia, whose counsel includes Fleming.

Garcia's objections included that the plaintiffs were inadequate representatives for class members whose homes had not yet leaked, that the settlement fund was "grossly inadequate" and that the requested class counsel fees were not supported by billing data.

Garcia appealed. A request to expedite the appeal filed by the class members and NIBCO was denied by Judge Jerry E. Smith on Jan. 3. However, the judge stated "that no extension of time will be granted for the filing of any brief."

Garcia's Arguments

Garcia filed his appellant brief on Feb. 15, arguing that the District Court erred in approving the settlement.

He argues that the inadequate representation in the settled case is because there are two sets of class members. The first, Garcia writes, comprises the class representatives and other homeowners who have experienced leaks in the past caused by the NIBCO PEX piping. Those homeowners, he argues, make up a minority of the class.

The majority of the class are those homeowners who have not yet experienced leaks, Garcia continues. "The problem under the undisputed facts of this case is the probability that the latter group will not be compensated for leakage damages," he writes.

Further, the funding for the settlement is inadequate due to the \$7.65 million cap, Garcia continues. "That sum must take into account 8,100 homes, only a minority of which have suffered PEX plumbing leaks. That is in contrast to the majority of homes that have not leaked," the appellant writes, adding that those homes that don't have leaks by the 2025 deadline will receive no compensation.

Counsel

Garcia is represented by George M. Fleming, Gregory D. Brown and Sylvia Davidow of Fleming, Nolen & Jez LLP in Houston and Ross Sears of Sears Crawford LLP in Houston.

The class is represented by Robert E. Linkin and J. David Rowe of Munck Wilson Mandala LLP in Austin, Texas, Austin Tighe of Nix Patterson LLP in Austin and Kirby D. Farris of Farris, Riley & Pitt LLP in Birmingham, Ala.

NIBCO is represented by William R. Peterson in Houston and J. Gordon Cooney Jr. and Franco Corrado in Philadelphia, all of Morgan, Lewis & Bockius LLP.

(Additional documents available: Garcia's appellant brief. Document #43-220218-037B. District Court

final settlement approval order. Document #43-211105-005R. District Court order approving attorney fees and costs. Document #43-211105-006R.)