No. 20-1080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSEPH DUNN, HELEN IEHL, ALBERT PIETERSON, JOHN HASTINGS, WINDIE BISHOP, LISA BARNES, ANGELA GARR, and MYESHA PRATHER, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

ADAM HOIPKEMIER,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 1:17-cv-00481
Hon. Manish Shah, United States District Judge

APPELLANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE

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I. Introduction

This is not one of those exceptional appeals where summary affirmance is warranted. The appeal presents legitimate appellate issues related to the District Court's approval of a class settlement engineered by Wells Fargo with "disarmed" counsel that were not in any position to certify the broad claims they agreed to release at mediation for pennies on the dollar.

Class counsel are on record with pointed criticism of the settlement as a "reverse auction" – before they were cut in on the fee – and admit the settlement was struck when the case was relatively "in its nascency." Six of the seven Wells Fargo business lines included in the settlement were not pled, litigated, or vetted in discovery before mediation. Class counsel did not adequately represent absent class members by settling claims for business lines that they had not worked up, and therefore were not in position to certify or evaluate the risks or benefits of settlement. And yet, the District Court approved the settlement without investigating these circumstances. Reversal is required by *Reynolds v. Ben. Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002) and *Smith v. Sprint Communs. Co., L.P.*, 387 F.3d 612 (7th Cir. 2004).

As for standing, Appellate established class membership with testimony that he received auto-dial calls from Wells Fargo on his (404) cell phone number while not a customer of the bank. Doc. 113-1 at ¶ 6. Every other class member attested to the same facts in the Claim Form – no more. Doc. 80-1 at 61. Yet, the District Court found Appellant lacked standing by applying a uniquely stringent test for class membership that disregarded Appellant's testimony because he did not offer evidence of the *nature* of the auto-dial calls. Doc. 7-1, Ex. E, Tr. 7:7-23 ("He doesn't offer any testimony about what the call was in connection with…His own testimony is, in my view, insufficient to establish that he is a member of the class."). That was reversible error.

Relevant to the motion, the decision that Appellant's lacked standing because his own testimony was "insufficient" presents a substantial appellate issue for the merits panel. Standing is a mixed question of law and fact. Therefore, this Court reviews standing *de novo*, rather than for clear error. *United States v. Burnside*, 588 F.3d 511, 517 (7th Cir. 2009) ("Mixed questions of law and fact are reviewed *de novo*.").

Finally, the Court ordered Appellant to "specifically address[] the movant's request for summary affirmance." Plaintiffs-Appellees suggest summary affirmance is warranted because District Court's ruling on standing is "clearly correct as a matter of law." Motion, Doc. 7-1 at 8. Not true. Unlike the *Chrans* case, no binding precedent controls the outcome adversely to Appellant. Since the District Court's ruling that Appellant's testimony was insufficient to confer standing is at the very least debatable, this appeal does not present the "limited circumstances" where summary affirmance is appropriate. *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006). Appellant is entitled to panel review of the District Court's ruling that his testimony is insufficient to confer standing based on the complete record and full briefing, such that the motion should be denied in its entirety. *Cf.* Fed. R. App. P. 27(c) ("A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding.").

II. Background

a. Appellant is a "Class Member" with standing to object to the settlement

i. The Class Definition

The Settlement defines "Class" or "Class Member" as follows:

> All persons within the United States who used or subscribed to a wireless or cellular phone number to which Wells Fargo made or initiated any Call during the Class Period (a) in connection with the collection or servicing of a mortgage or home equity loan, credit card account, retail installment sale contract for an automobile, automobile loan, overdraft on a deposit account, student loan, or in

> connection with a fraud alert on a credit card or deposit account, using any automated dialing technology or artificial or prerecorded voice technology, and (b) who were not customers of Wells Fargo at the time of the Call.

Doc. 81 at 7. The District Court's order preliminarily approving the settlement required that objections to the settlement include "the telephone number(s) at which he or she received an unauthorized call or text message from Defendant." Doc. 84 at 7. Likewise, the Claim Form requires class members to attest that he or she received calls or text messages from Wells Fargo while not a bank customer:

> By submitting a claim, you are attesting that you received one or more phone call(s) or text messages from Wells Fargo but were not a Wells Fargo customer at the time you received the call or text message.

Doc. 80-1 at 61. Nothing in the settlement documents or the Court's prior orders required Appellant or other class members to provide evidence of the nature or timing of the auto-dial calls.

ii. Appellant's Declaration

Appellant established that he received auto-dial calls from Wells Fargo on his cell phone while not a customer of the bank in a declaration submitted with his objection to the settlement. Doc. 113-1 at ¶ 6. Appellant testified as follows:

> I recall receiving Calls from Wells Fargo on my cell phone number ending in 9535 while I was not a customer of Wells Fargo. I cannot recall the dates of the Calls from Wells Fargo to my cell phone number ending in 9535. I have been unable to verify the dates of the Calls from documents in my possession or control, as set forth herein.

Id. Appellant detailed his unsuccessful efforts to independently verify the dates of the Calls. *Id.*, ¶¶ 7-10. Appellant affirmed the number at which he received "Calls" from Wells Fargo in his objection, as required by the preliminary approval order. Doc. 113 at 1.

On November 4, 2019, Appellant served notice of service of a subpoena to Wells Fargo

for records relating to his credit card account and calls on the account; the District Court quashed the subpoena because Appellant had not yet intervened. Doc. 111. The District Court ultimately denied Appellant's motion to intervene because the District Court found he had not offered evidence of the nature of the auto-dial calls which he testified to receiving. Doc. 128; Doc. 7-1, Ex. E (12/10/19 Hearing Tr.), 7:7-23.

iii. The Abraham Declaration

Ravi Abraham is responsible for "overseeing Wells Fargo's dialer systems and equipment for contacting customers regarding delinquent accounts." Doc. 114 at ¶ 1[1] Mr. Abraham confirmed that Appellant closed his credit card account with Wells Fargo on June 8, 2015. *Id.*, ¶ 3. Mr. Abraham also confirmed that the (404) number on which Appellant testified to receiving auto-dial calls ("Calls") from Wells Fargo was associated with Appellant's credit card account. *Id.*
Mr. Abraham's declaration contains a single sentence regarding his "investigation" of auto-dial calls to Appellant's (404) cell phone number:

> I reviewed documents and consulted with personnel with knowledge of Wells Fargo's records regarding any calls or texts ('calls') to these numbers during the time periods that Mr. Hoipkemier states he was associated with the numbers.

Id., ¶ 4. Mr. Abraham offered the following conclusion from his document review:

> Based on my review of Wells Fargo's records, Wells Fargo did not make any calls to (404) xxx-9535 using the technologies describe [sic] above during this time frame.

Id., ¶ 9. Mr. Abraham did not attach the documents he reviewed to his declaration or testify to any independent personal knowledge of calls to Appellant. Mr. Abraham did not describe the nature of the documents or testify to their completeness. *See generally id.* In any event, Mr. Abraham's testimony that some unidentified documents did not reflect a call to Appellant does not contradict

[1] There is no evidence that Appellant's credit card account with Wells Fargo was ever delinquent.

Appellant's direct evidence that he received an auto-dial call while not a Wells Fargo customer.

Counsel for Appellant requested copies of the documents referenced by Mr. Abraham, Doc. 115-2; Wells Fargo refused to produce them. Doc. 115-3. Appellant then moved to strike Mr. Abraham's declaration pursuant to the best evidence rule, Fed. R. Evid. 1002. Doc. 126.

iv. The District Court's rulings on standing and Appellant's motion to strike the Abraham Declaration

At the final approval hearing, the District Court took up Appellant's motion to strike the Abraham declaration and Appellant's status as an objector. The District Court ruled as follows:

> The motion to strike is denied. I am satisfied that Mr. Abraham has a sufficient foundation to competently declare by affidavit the absence of information in records.

Id. at 6:15. The District Court could not know the documents Mr. Abraham reviewed. Nevertheless, the District Court ruled that Appellant's testimony that he received "Calls" from Wells Fargo while not a bank customer was "insufficient" to establish class membership:

> The defense has come forward with evidence that, as I've just ruled, indicates no such call or text message being sent to Mr. Hoipkemier. His own testimony is, in my view, insufficient to establish that he is a member of the class. So my conclusion is that he is not a member of the class.

Doc. 7-1, Ex. E (12/10/19 Hearing Tr.) at 7:7-25. That ruling is a subject of Appellant's appeal.

b. The Circumstances of the Settlement

Since Plaintiffs-Appellees characterize this as a "frivolous appeal," Appellant will briefly address the merits. On January 20, 2017, Counsel from McGuire Law, P.C. filed a TCPA class action on behalf of Plaintiff Prather alleging a class of customers that received "Fraud Alert Calls" related to Wells Fargo deposit accounts. Doc. 1. Only two substantive motions were filed. McGuire Law only served one set of interrogatories and one set of document requests. Doc. 39-1; Doc. 39-2. There was no class or merits discovery outside of the deposit account line of business.

On December 20, 2018, Plaintiff Prather and Wells Fargo attended mediation. The mediation resulted in global settlement across *all* Wells Fargo business lines. *E.g.* Doc. 113-3 at 45 ("The mediation with Judge Holderman resulted in a settlement."); *id.* at 57 ("[The December 20, 2018] mediation resulted in a settlement and a term sheet has been executed by the parties.")

At the time of the settlement, Wells Fargo was facing four other TCPA class actions in California. The plaintiffs in the California litigations were represented by counsel from Lieff Cabraser Heimann & Berstein LLP and Girard Sharp LLP ("California counsel"). California counsel strongly opposed the concept of a global settlement. California counsel made multiple motions in the California district court attempting to put a stop to the settlement, including the following representations:

- "The facts here align with those in cases where courts have determined that a 'reverse auction' may have occurred." Doc. 113-3 at 22.
- "Given that the *Prather* settlement bears indicia of a reverse auction, [final approval] is very much in doubt: such settlements are disfavored, particularly in the Seventh Circuit." *Id.* at 60.
- "The fact that Wells Fargo apparently agreed to a global settlement across business lines is strong indicia that the settlement primarily benefits Wells Fargo rather than class members." *Id.* at 64.
- "[Wells Fargo] wouldn't have settled and created this drama if it weren't for economic reasons, and so the settlement that they still insist on keeping secret from us will reflect the fact that the Plaintiffs in [*Prather*] were in no position to obtain class certification. That's just pure economics." *Id.* at 144.
- "We think it's wrong for them to game the system by going to another case that's less advanced to settle out from under us." *Id.* at 99.

Those objections persisted until the California court stayed the California litigations pending a decision on approval of the *Prather* settlement. After that, California counsel sat down with counsel in *Prather* at BAY Mediation's office in Chicago, resolved their differences, and eventually agreed to split any resulting fee. Class counsel omitted this history in its preliminary approval papers and described the outcome of mediation very differently to the District Court:

> After a full day of negotiations, the Parties made extensive progress towards reaching a resolution. The Parties thereafter continued their settlement negotiations with Wells Fargo, and in an effort to reach a global resolution worked with counsel in the concurrently pending [California] actions.

Dkt. 80-3 at ¶ 5. This paragraph contains three material misrepresentations of fact: (1) use of the defined term "Parties" to describe the mediation participants;[2] (2) the characterization that Plaintiff Prather and Wells Fargo only made "extensive progress" at mediation; and (3) the implication that the mediated settlement agreement was not global. *E.g.* Doc. 113-3 at 64, *id.* at 39.

Given class counsel's shifting representations to the California district court and the District Court, the indicia of a reverse auction, and California counsel's change of heart regarding their view of a fairness of a global settlement, Appellant moved for leave to intervene to conduct limited discovery into the circumstances of the settlement. Doc. 104. The District Court deferred denied the motion to intervene, on the grounds that it had authority to require additional disclosures regarding the circumstances of the settlement negotiations. Doc. 7-1, Ex. E (12/10/19 Hearing Tr.), 8:15-22. But the District Court declined to exercise that authority. *E.g. id.*, Tr. 13:14-15.

III. Standard of Review

At issue in the motion is whether the District Court's ruling on standing is so plainly correct

[2] "Parties" is defined to mean "the Wells Fargo Plaintiffs." Dkt. 80 at 7 fn. 1; Dkt. 80-1 at 6. Class counsel know how to correctly use capitalized and uncapitalized versions of "Parties" and did so in the preceding paragraph. Dkt. 80 at 7 ("On September 13, 2018, the parties in the *Pieterson-Hastings* matter participated in a mediation with mediator Hunter Hughes.").

that dismissal of the appeal or summary affirmance is warranted. More specifically, the question is if the District Court erred by finding that Appellant's "own testimony" was "insufficient" to confer standing. That legal ruling was based on a declaration without resolving any disputed facts.

Standing presents a mixed question of fact and law. *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 n.3 (2d Cir. 2013) ("Because standing presents a mixed question of law and fact, we review the District Court's finding *de novo*."); *Fisher Island Ltd. v. Fisher Island Invs., Inc.*, 518 F. App'x 663, 665 (11th Cir. 2013) ("Standing is a mixed question of law and fact, and we therefore review the district court's determination on standing *de novo*."). Accordingly, this Court's review of the standing issue is *de novo*. *United States v. Burnside*, 588 F.3d 511, 517 (7th Cir. 2009) ("Mixed questions of law and fact are reviewed *de novo*.").

IV. Legal Standard

"Summary proceedings are, of course, an exception to our normal course of considering an appeal and, in any situation, ought to be employed only when the appropriateness of such a course is clear and only with great solicitude for the substantial rights of the parties." *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1994). This is a stringent test.

Accordingly, summary affirmance is properly "confined to certain limited circumstances." *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006). Those circumstances are (1) when there is an "emergency" that cannot await full briefing, (2) the arguments in the brief are "incomprehensible or completely insubstantial," or (3) a recent appellate decision resolves the appeal. *Id.* Plaintiffs-Appellees argue that summary affirmance is appropriate because the "threshold determination that Mr. Hoipkemier is a non-class member is plainly correct and cannot be deemed clear error." Doc. 7-1 at 9. Plaintiffs-Appellees are incorrect. The District Court

committed legal error by ruling that Appellant's "own testimony" was insufficient to establish he was a member in the class by imposing a unique, additional showing for class membership.

V. Legal Argument

a. Appellant is entitled to panel review of the District Court's ruling on standing.

The District Court's ruling that Appellant lacks standing presents a legitimate and unsettled issue for panel review.[3] The settlement agreement defines "Class Member" as persons that received auto-dial or text messages from Wells Fargo while they were not a bank customer during the class periods. Likewise, the Claim Form requires an attestation to receipt of a call or text message from Wells Fargo while not a bank customer. The Claim Form does not require class members to describe the nature or timing of the calls or text messages. *Id.*

Appellant submitted a declaration attesting that he recalls receiving "Calls"[4] from Wells Fargo while he was not a bank customer. This uncontradicted testimony established Appellant met the criteria for class membership. Nevertheless, the District Court ruled that Appellant's "own testimony is, in my view, insufficient to establish that he is a member of the class." Doc. 7-1, Ex. E (12/10/19 Hearing Tr.), 7:7-23. Based on the District Court's statements preceding that ruling, the apparent basis was that Appellant did not provide testimony describing the nature or timing of the calls. *Id.* Simply put, that additional showing is not a prerequisite for class membership. No other class member was required to make such a showing. And, the District Court did not order Appellant to make an additional showing of class membership or otherwise give Appellant

[3] There are multiple merits issues that warrant review, as outlined in Appellant's objection to the settlement, which is incorporated herein by reference. Doc. 113. Appellant confines the discussion to the District Court's ruling on standing, since that is the basis for Plaintiffs-Appelless' motion.
[4] "Calls" is defined by the settlement agreement to mean "voice calls and SMS/text messages made or sent using equipment that constitutes or may constitute an automatic telephone dialing system, as well as artificial or prerecorded voice." Doc. 80-1 at 7.

advance notice that a further showing of class membership beyond receipt of an auto-dial call or text message while not a Wells Fargo customer would be required. Appellant is entitled to panel review of his position that it was reversible error to find Appellant lacked standing on that ground.

b. Appellant is entitled to panel review of the District Court's evidentiary rulings involving Mr. Abraham's testimony.

Appellant moved to strike Mr. Abraham's testimony purporting to establish that Wells Fargo did not make any auto-dial calls to Appellant's (404) cell phone number, pursuant to Fed. R. Evid. 1002. Rule 1002 provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Appellant challenged the following testimony from Mr. Abraham:

> Based on my review of Wells Fargo's records, Wells Fargo did not make any calls to (404) xxx-9535 using the technologies describe [sic] above during this time frame. That is, at no time did Wells Fargo make a dialer or prerecorded or artificial voice call or send a text message to the (404) xxx-9535 number.

Doc. 114-3 at ¶ 9. The objection is to the attempt to positively establish the absence of auto-dial calls to Appellant's cell phone by relying on the contents of unidentified documents. The District Court denied Appellant's motion to strike, finding that Mr. Abraham "has a sufficient foundation to competently declare by affidavit the absence of information in records."

But Mr. Abraham did not identify the documents or records he reviewed, or even the generally describe the type of documents or records. He did not testify that he reviewed all available sources of auto-dial records or that Wells Fargo even has records of all auto-dial calls during the relevant time period. It was error to allow Mr. Abraham's testimony regarding the documents without requiring him to produce them. Appellant is entitled to panel review of the District Court's consideration of the Abraham declaration and any corresponding factual findings related to standing.

Conclusion

For the foregoing reasons, the Court should deny Plaintiffs-Appellees' motion.

Dated: February 3, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this date, I caused the foregoing document to be filed with the CM/ECF system for the United States Court of Appeals for the Seventh Circuit which will deliver electronic service of process to counsel of record.

Dated: February 3, 2020.

Respectfully submitted,

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