No. 07-10547-DD

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: PROGRESSIVE CORP. INS. UNDERWRITING
AND RATING PRACTICES LITIGATION,

APPEAL OF: THOMAS AND MARILYN BELL

BRIEF OF APPELLANTS

On Appeal From the United States District Court
For the Northern District of Florida
Maurice M. Paul, Judge

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FED. R. APP. P. 26.1 AND CIR. R. 26.1 CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I certify that the following is a list of all persons, corporations, attorneys and law firms that have an interest in the outcome of this appeal:

Progressive Express Insurance Company

Progressive American Insurance Company

Progressive Consumers Insurance Company

Progressive Southeast Insurance Company

Progressive Casualty Insurance Company

Sharele Dikeman

Richard Lulow

Ruby Johnson

Anna Barbosa

Thomas S. Bell

Marilyn Bell

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STATEMENT REGARDING ORAL ARGUMENT

Appellants hereby request oral argument. This case involves difficult issues regarding how a district court determines whether a proposed class action settlement is sufficient consideration for the release of the class' claims, and whether the district court made factual findings sufficient to support its ultimate conclusion that the settlement is adequate. Oral argument is expected to shed further light on these issues and aid the Court in resolving the issues on appeal.

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STATEMENT OF JURISDICTION

1. **District Court's Jurisdiction.** The District Court had jurisdiction over this case because the Complaint alleged claims arising under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*..

2. **Appellate Jurisdiction.** This Court's jurisdiction exists pursuant to 28 U.S.C. § 1291. The District Court entered Final Judgment and Order Approving and Adopting Amended Settlement, Dismissing Consolidated Cases With Prejudice and Directing Entry of Final Judgment on January 3, 2007. Appellants' Notice of Appeal was timely filed on February 1.

Appellants are class members who filed timely objections to the proposed settlement in the District Court, and who are bound by the District Court's Final Judgment.

STATEMENT OF ISSUES

1. Did the district court abuse its discretion in approving a settlement virtually identical to one it had rejected in 2005?
2. Did the district court abuse its discretion in failing to assign a likely value to the settlement?
3. Did the district court abuse its discretion in determining that the case has less than a one percent chance of success?
4. Did the district court fail to comply with Fed. R. Civ. P. 23(h)(3) in making an award of attorney's fees to class counsel?

STATEMENT OF THE CASE

Beginning in 2000, several putative class action lawsuits were filed against the Progressive Defendants in courts around the country, seeking to recover damages under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*., for Progressive's failure to send adequate adverse action notices to policyholders who were charged a higher premium or had their insurance cancelled as a result of information contained in their credit reports. The Judicial Panel on Multidistrict Litigation ordered that all pending federal cases against Progressive be consolidated in the Northern District of Florida for pretrial proceedings on April 16, 2003.

After both parties filed motions for summary judgment, a settlement was reached in July 2004. The 2004 settlement essentially provided that

each class member would receive a free copy of his or her credit report in exchange for the release of all claims. After notice was mailed to class members, several class members, including Appellants Thomas and Marilyn Bell, filed objections to the proposed settlement and appeared at the October 29, 2004 fairness hearing in opposition to the settlement.

The District Court rejected the proposed settlement on February 23, 2005, based in part on the Court's finding that the value of a free credit report is worth less than the $9.00 market price charged by the credit reporting agencies. 2005 Order (Docket # 83) at p. 17. The Court also found that the case had litigation value due to the presence of statutory damages claims. *Id*. at p. 13.

Rather than returning to litigation, the parties quickly filed an Amended Settlement Agreement on June 20, 2005 (Docket # 96) that offered a free credit report plus a credit score to each class member, and a Class Payment Process that offered certain class members whose current credit reports contain errors the opportunity to seek a cash payment up to $225. The case was then delayed for approximately nine months by an ultimately unsuccessful motion to be appointed class counsel filed by one of the other objectors' counsel (Docket # 106).

On June 6, 2006, the District Court preliminarily approved the amended settlement and set a fairness hearing for August 23, 2006. More

objections were filed to the amended settlement than were filed to the original settlement in 2004. The fairness hearing lasted two days, and involved live testimony from witnesses for both the parties and the objectors.

Objectors' witness Lawrence Kenny, a professor of economics at the University of Florida, testified at the hearing that the value of a free credit report and credit score to class members, based upon actual rates of credit report usage by consumers, is between $0.45 and $1.05. Transcript (Docket # 346) at p. 184. The parties contended that the market price of a credit report and credit score, if purchased from Experian on the open market, is $15.00. However, as explained by Dr. Kenny, because only 2% of consumers actually purchase credit reports and scores at the market prices, only 2% of the class would realize the full value of the market price. *Id*. at p. 181. The rest would realize far less, verging on zero, and, on average, each class member would receive something having a value of between $0.45 and $1.05. *Id*. at p. 184.

At the fairness hearing, the parties disclosed that approximately 900,000 class members have submitted claims for a free credit report and score. *Id*. at p.7.

The District Court approved the amended settlement on January 3, 2007 in an Order that failed to make any factual findings regarding the

settlement's value, the likelihood of success at trial, the potential recovery, or the point below which the settlement would not be fair, reasonable or adequate. In its 9-page decision, the District Court found only that "'willfulness' on the part of Progressive is seriously debatable and the … settlement reflects that uncertainty." Docket # 359 at p. 5. That is the entirety of the Court's findings regarding the settlement's fairness.

With regard to attorney's fees, the Court stated that "considering the years Plaintiff's counsel has spent working on the case, the Court further finds that an award of attorneys' fees and costs in the amount of $3,000,000 is fair and reasonable." *Id*. at p. 7.

The Court's findings are reviewed under an abuse of discretion standard.

SUMMARY OF ARGUMENT

The district court abused its discretion in failing to place a value on the proposed settlement and to compare that value to the potential recovery discounted by the likelihood of success. The court also abused its discretion in failing to distinguish the amended settlement from the original settlement that it had rejected as inadequate.

In approving a settlement that has a value to the average class member of no more than $1.00, the court implicitly held that the case filed by class counsel has no more than a 1% chance of success. This means that the court rewarded class counsel for filing an extremely weak and possibly frivolous case, rather than sanctioning them or forcing class counsel to take its case to trial and risk suffering a loss.

The court failed to comply with Fed. R. Civ. P. 23(h)(3) in making an award of attorney's fees to class counsel. The court did not find any facts or state any conclusions of law that would support an award of attorney's fees in the amount of $3 million.

ARGUMENT

I. The District Court Abused Its Discretion In Failing to Place A Value on the Settlement and the Likely Recovery.

To be sure, a district court's approval of a class action settlement is reviewed for an abuse of discretion. *Bennett v. Behring Corp.,* 737 F.2d 982, 986 (11th Cir. 1984). That discretion is not unbounded, however. A district court must compare the settlement terms "with the likely rewards the class would have received following a successful trial of the case." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). "A 'mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law' will not suffice." *Id*. (*quoting Protective Committee v. Anderson*, 390 U.S. 414, 434 (1968)).

The district court's opinion is the epitome of a boiler-plate approval lacking in analysis. First and foremost, the court failed to place any value on the settlement's benefits, despite having focused on the lack of value of the same benefits in its 2005 Order (Docket # 83) denying approval to the 2004 settlement. At that time, the court held that "[t]he value to the Class [of free credit reports] is considerably less than $90,000,000." 2005 Order at p. 19.

In its Order Approving And Adopting Amended Settlement, Dismissing Consolidated Cases With Prejudice And Directing Entry of Final Judgment (Docket # 359)("Approval Order"), the court does not even

mention the value of the settlement benefits, even though considerable testimony was presented at the August 2006 fairness hearing regarding the value of free credit reports and scores. Multiplying the number of timely claims submitted, 900,000, by the high-end of the value range for a free credit report and score as determined by Dr. Kenney, $1.05, yields a total settlement value of $945,000. While the Approval Order offers no clue as to what valuation, if any, Judge Paul might have place on the settlement had he bothered to make that finding, it is highly likely that, based upon his 2005 Order, he would have been closer to $945,000 than the wildly inflated figure urged by class counsel.

In *Reynolds v. Beneficial Natl. Bk.*, 288 F.3d 277 (7th Cir. 2002), the Seventh Circuit set forth the procedure to follow for a court that is considering whether to approve a proposed settlement of a class action lawsuit. A judge must "quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate. Determining that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range…" *Id*. at 284-85.

> Some arbitrary figures will indicate the nature of the analysis that we are envisaging. Suppose a high recovery were estimated at $5 billion, medium at $200 million, low at $10 million. Suppose the midpoint of the percentage estimates for the probability of victory at trial was .5 percent for the high, 20

> percent for the medium, and 30 percent for the low (and thus 49.5 percent for zero). Then the net expected value of the litigation, before discounting, would be $68 million… [O]ur point is only that the judge made no effort to translate his intuitions about the strength of the plaintiffs' case, the range of possible damages, and the likely duration of the litigation if it was not settled now into numbers that would permit a responsible evaluation of the reasonableness of the settlement.

Id. at 285.

A judge should "insist[] that the parties present evidence that would enable [] possible outcomes to be estimated…" *Id*. Recently, the Seventh Circuit applied its *Reynolds* holding to reverse a district court's approval of a class action settlement:

> In considering the fairness of the settlement, the court did not attempt to quantify the value of the plaintiffs' case or even the overall value of the settlement offer to class members. Nor did it estimate how many class members' claims would be barred by the statute of limitations or the voluntary payment doctrine. In fact, the only effort to value the litigation that appears in the record is the [] objectors' estimate Airborne overcharged class members by $75 million during the relevant period…

Synfuel Tech., Inc. v. DHL Express, Inc., 463 F.3d 646, 654 (7th Cir. 2006).

While Judge Paul alluded to some potential values of continued litigation in footnote 3 of the Approval Order, he failed to identify which valuation he used for purposes of his Rule 23(e) analysis:

> [A]n award of only ten dollars per class member would amount to one hundred million dollars; an award of one hundred dollars per class member would amount to one billion dollars…

Approval Order at p. 5 fn. 3. Since the minimum statutory damages for a violation of FCRA is $100, these two figures bracket a range from 10% to 100% of minimum statutory damages, which would correspond to either a 10% likelihood of success at the low end or a 100% likelihood of success at the other. Based upon the rest of the Approval Order, it is safe to assume that Judge Paul placed the likelihood of prevailing on the statutory damages claim far closer to 10% than he did to 100%.

That does not end the inquiry, however. If the case has a 10% likelihood of success, then a fair settlement value would be 10% of the class-wide minimum statutory damages, or $100 million. Judge Paul approved a settlement having a value of less than $1 million. From this, can it be concluded that Judge Paul determined that the case's likelihood of success, should it continue to be litigated, is less than one-tenth of one percent? Only if the case actually has such a low probability of success would the approved settlement be fair.

But what of a case that has only one-tenth of one percent chance of success? Should it even be filed, let alone settled? As Judge Easterbrook asked rhetorically in reviewing a similar FCRA class action settlement in *Murray v. GMAC Mtg. Corp.*, 434 F.3d 948 (7th Cir. 2006):

> We don't mean by this that all class members must receive $100; risk that the class will lose should the suit go to a judgment on the merits justifies a compromise that affords a

> lower award with certainty. But if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could [lead plaintiff] personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1%, as the proposed [incentive award] implies, then the failure to afford effectual relief to any other class member makes the deal look like a sellout.

Id. at 952. The same analysis is appropriate here: if this case has less than *one-tenth* of 1% chance of success on the merits on the issue of willfulness, and if no evidence exists to prove actual damages, shouldn't this case be dismissed as frivolous, and Progressive be awarded costs and fees for having to defend it for so long? If it has greater than a one-tenth of 1% chance of success, as Appellants Dikeman and Lulow, as well as the Bells, argue, shouldn't class members be receiving more than .001 of the minimum statutory damages?

II. The District Court Abused Its Discretion In Approving A Settlement That Represents No More Than a 1% Recovery of Minimum Statutory Damages.

Appellants hereby adopt that section of the Brief of Appellants Dikeman and Lulow regarding the potential value of the class' claims and the likelihood of success on the merits with regard to willfulness. *See Reynolds, supra*, 288 F.3d at 283 (objectors' statement of total amount potentially recoverable in competing action must be credited where case was proceeding and could not be dismissed as frivolous).

In evaluating a proposed settlement, courts are to compare the maximum possible damages recoverable through litigation, discounted by the likelihood of success, with the projected value of the proposed settlement. Only if the value of the settlement exceeds the expected recovery through litigation may the settlement be approved. *Reynolds, supra,* 288 F.3d at 284-85 ("the judge should have made a greater effort … to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate").

The Eleventh Circuit, through the factors set forth in *Bennett, supra*, requires the same analysis as the Seventh Circuit. The relevant factors the court should consider in determining whether a settlement is fair, adequate and reasonable are:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate or reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

Bennett, supra, 737 F.2d at 986. The first three of these factors, taken together, require a comparison of the likely value of continued litigation with the expected yield from a proposed settlement.

The district court did not set forth any findings with regard to the "point on or below the range of possibly recovery at which a settlement is fair, adequate or reasonable." The court failed to indicate what chance of success he gave to Plaintiffs' claims, and did not identify that point below which a settlement would be unfair.

By starting with the court's findings and working backwards, however, it can be inferred that the court determined that Plaintiff's claims had no more than one-tenth of 1% chance of overcoming Progressive's defenses and prevailing at trial, because the projected settlement value of $945,000 is less than one-tenth of 1% of $1 billion, the aggregate minimum statutory damages. If the court had concluded that the litigation had a greater likelihood of success, a $945,000 recovery would have been *per se* inadequate, as the Seventh Circuit held in *Reynolds, supra*.

For all of the reasons set forth in the Brief of Appellants Dikeman and Lulow, the court's determination that this case has no more than a one-tenth of one percent chance of success through litigation is a clear abuse of discretion.

III. The District Court Failed to Find Facts and State Conclusions of Law as Required by Fed. R. Civ. P. 23(h)(3).

Fed. R. Civ. P. 23(h) governs the award of attorney's fees to class counsel in class actions. Rule 23(h)(1) provides that claims for attorney's fees must be made by motion and directed to all class members in a reasonable manner. Rule 23(h)(2) provides that a class member may object to the motion for fees. Rule 23(h)(3) provides that the court "must find the facts and state its conclusions of law on the motion under Rule 52(a)."

The district court devoted only one sentence of its Approval Order to class counsel's fee request: "Considering the years Plaintiffs' counsel has spent working on this case, the Court further finds that an award of attorneys' fees and costs in the amount of $3,000,000.00 is fair and reasonable." This terse finding fails to satisfy Fed. R. Civ. P. 23(h)(3).

Fee awards in this Circuit are governed by *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). In *Camden I*, this Court expressed a preference for the percentage methodology of setting a reasonable fee in a common fund case. *Id*. at 774. In adopting this method

of awarding fees, this Circuit reminded district courts to articulate specific factors and reasons underlying their fee decisions.

> [T]he district court should articulate specific reasons for selecting the percentage upon which the attorneys' fee award is based. The district court's reasoning should identify all factors upon which it relied and explain how each factor affected its selection of the percentage of the fund awarded as fees.

Id. at 775. The *Camden I* Court recommended continued reference to the twelve factors set forth in *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), when making fee awards, even when those awards are based on a percentage of a common fund. *Camden I* at 775. Those twelve factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions involved;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client;
(12) awards in similar cases.

Johnson, 488 F.2d at 717-19.

In making his fee award, Judge Paul did not follow the guidelines set forth in *Camden I*. First, he apparently eschewed the 11th Circuit's

preference for the percentage methodology expressed in *Camden I*. This may have been due to the fact that the settlement did not create a common fund. Clearly, the court's failure to place a value on the settlement benefits precludes an award of attorney's fees on a percentage basis. In order to award a percentage fee, one first needs a denominator.

In another recently settled FCRA class action in which class members were eligible to claim two free credit reports and credit scores, the court declined to award attorney's fees on a percentage basis due to the same valuation difficulties presented here. *See Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 120 (E.D. Pa. 2005):

> Class counsel urges this Court to apply the percentage-of-recovery method … Even assuming this case could be termed as a common fund case, the Court rejects this request and instead will apply the lodestar method…. [T]his Court simply cannot ignore some important distinctions that demand application of the lodestar method to the fee request. Perhaps the most obvious difference is that Plaintiffs have not recovered a fund of money from which individual class members will be awarded damages. Rather, each class member will have to fill out a claim form to secure the right to receive two free credit reports and two free credit scores…. Additionally, any attorneys' fees paid to class counsel will not come from any pool of funds created (as none exists), but rather will be paid separately by Fleet.
> Furthermore, the benefits to the class simply do not lend themselves to any precise measurement. While Plaintiffs' expert, Even Hendricks, estimates the value of two free credit reports and two free credit scores to be $2,797,500.60, he also recognizes that "the Court could determine that various factors dictate that for purposes of class valuation, the two credit reports only retain a portion of their market value." One such

> factor is the recently enacted amendments to the FCRA, which by September 1, 2005 will entitle all Americans to one free copy of their credit report from each of the three major credit reporting agencies.

The district court faced the same valuation difficulties identified in *Perry*. Given the court's comments regarding the value of a free credit report in its 2005 Order rejecting the 2004 settlement, it is likely that the court was unable to place any reliable valuation on the free credit report and score offered here. Indeed, if the court accepted Dr. Kenney's valuation of $945,000, a common-fund fee analysis would support attorney's fees of no more than $300,000, or about one-third of the fund created.

Second, the court did not articulate specific reasons for making the fee award it did, or even identify the method by which fees were calculated in this case. Presumably, given the court's reference to "the years spent working on this case," the fee award was based upon the lodestar methodology typically used in fee-shifting cases. The FCRA statute contains a fee-shifting provision, and, therefore, a lodestar fee award could be permissible if it meets the standards set forth in fee-shifting cases such as *City of Burlington v. Dague*, 505 U.S. 557 (1992)(contingency enhancements in fee-shifting cases no longer permitted).

There are several reasons why the court's fee award, if made under the lodestar methodology, is an unreasonable abuse of discretion. First, given

the court's discussion of the weaknesses of Plaintiff's case for statutory damages, it is debatable whether the Plaintiff could be termed a prevailing or substantially prevailing party. Especially in light of the fact that the settlement relief is something available for free from other sources, a strong argument could be made that the settlement is more like surrender than victory.

Second, class counsel claimed a lodestar of approximately $1.8 million at the time of the fairness hearing. Thus, the court's $3 million fee award represents a 1.66 multiplier of the amount that is the presumptively reasonable fee. *See Dague, supra*, 505 U.S. at 562 (strong presumption that lodestar represents reasonable fee, and burden on applicant to show that enhancement is necessary to make fee reasonable). Because the court did not cite any factors that would justify an enhancement of the lodestar in a fee-shifting case, or that would make class counsel's lodestar an unreasonable fee, the award of $3 million is a clear abuse of discretion and reversible error if the fee is evaluated on a lodestar basis.

Finally, the court failed to consider any of the twelve *Johnson* factors. While the court's reference to "the years spent working on this case" could be construed as a reference to factor number one, the court never even quantified the number of hours or lodestar required to adequately prosecute this case. Therefore, there is an inadequate basis on which to review the

court's fee award, or to affirm that the court's fee award was reasonable and not an abuse of discretion. This case should be remanded for the district court to make further findings of fact and conclusions of law, consistent with its duty pursuant to *Camden I* and Fed. R. Civ. P. 23(h)(3), in support of its fee award.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's approval of the settlement and fee award, and remand to the district court for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief to be served on counsel for the parties by depositing one copy of the same in the United States mail in Maynard, Massachusetts, with first class postage affixed, on May , 2007 addressed to the counsel listed below:

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