BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE WELLS FARGO PAYCHECK . MDL Number 2954
PROTECTION PROGRAM LITIGATION . July 30, 2020
- - - - - - - - - - - - - - - 4:27 p.m.

TRANSCRIPT OF ORAL ARGUMENT

BEFORE: HONORABLE KAREN K. CALDWELL, CHAIR
United States District Court
Eastern District of Kentucky

HONORABLE ELLEN SEGAL HUVELLE
United States District Court
District of Columbia

HONORABLE R. DAVID PROCTOR
United States District Court
Northern District of Alabama

HONORABLE CATHERINE D. PERRY
United States District Court
Eastern District of Missouri

HONORABLE NATHANIEL M. GORTON (Recused)
United States District Court
District of Massachusetts

HONORABLE DAVID C. NORTON (Recused)
United States District Court
District of South Carolina

HONORABLE MATTHEW F. KENNELLY
United States District Court
Northern District of Illinois

Official Court Reporter: SARA A. WICK, RPR, CRR
U.S. Courthouse, Room 4704-B
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Washington, D.C. 20001
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P R O C E E D I N G S

(All participants present via video conference.)

JUDGE CALDWELL: We will now proceed to hear the final case of the day, MDL 2954, In Re Wells Fargo Paycheck Protection Program Litigation.

Mr. Kennard, you're back.

MR. KENNARD: It's an honor to be back, Judge. Thank you so much.

You've already heard my arguments on each bank needing to have its own bucket. So I won't reiterate that here. And you have heard my arguments now on the notion that there are damages incurred regardless of whether or not they were ultimately funded in the first round and regardless of whether or not there are funds that remain available.

I would advocate for the Southern District of Texas. Here, we've got a highly capable judge in Judge Bennett, who would not have now an exorbitant amount of MDL cases, but I will defer to my colleagues on whether the Southern District of Texas is not as acceptable to them. We just first and foremost believe that this would require MDL certification.

As to Wells Fargo specifically and their policies and procedures, they have failed wholly to follow the model dictated by the Act, which is first come first served is the way to go, and many have suffered as a result of that.

And I will now yield for any questions since a bulk of my arguments have already been made in the last six minutes.

JUDGE CALDWELL: Questions? Judge Huvelle.

JUDGE HUVELLE: Yes. How many cases against Wells Fargo are now still pending? It seemed that we heard from the other two banks that the number of cases has shrunk since the beginning, and I was wondering when the last one was filed.

MR. KENNARD: I think the last one was filed several months ago, Judge. I haven't seen a whole bunch of new ones coming in right now. But as I sit here right now, I am not in a position to give an exact number as to how many Wells Fargo cases remain, but as I understand, they are -- it's closer to the original number filed than the alternative.

JUDGE HUVELLE: Which might have been five or six, I guess. Okay. I will ask someone else, then. Thank you.

JUDGE CALDWELL: Anyone else have questions for Mr. Kennard?

Thank you, Mr. Kennard. You've reserved a minute for rebuttal.

MR. KENNARD: Thank you.

JUDGE CALDWELL: We will now hear from Kathleen Herkenhoff.

MS. HERKENHOFF: Good afternoon. Can you hear me?

JUDGE CALDWELL: We can hear you, but we cannot see you. It appears that maybe your screen is being blocked.

MS. HERKENHOFF: Can you see me now?

JUDGE CALDWELL: No. We are happy to hear from you. We would like to see you, but we will hear from you. Okay, we can see you.

MS. HERKENHOFF: Again, good afternoon. My name is Kathleen Herkenhoff. I work at Haeggquist & Eck out of San Diego, California, and I represent Karen's Custom Grooming in one of the Wells Fargo cases.

Before starting, I guess to briefly answer the question raised with the last counsel, by my count, I believe there's about seven cases. We've lost item numbers 2 and 3 on the schedule of actions. That was the Scherer action. They were both dismissed, whether voluntarily or otherwise, and that's in ECF 44. An additional case which Wells Fargo noticed had been filed in ECF 49. That's the Borisov individual case in the Central District. So we lost a Central District but we gained a Central District.

And so to go to the primary focus of my argument, it's correct that I opposed centralization as it was originally proposed, which would have included the securities class action, not that they could not have been included, but for procedural reasons, they are set up under a different statutory scheme. They have a discovery stay. It didn't seem appropriate to centralize with them. They apparently agree, because they have not only made that position but left.

So now in Northern District, we only have the one case, Marselian, filed by a different firm and which I have noted in my papers is filed by a firm that is located here in San Diego for a client here in San Diego. So in addition to my case which is San Diego-centric, you have the Marselian case filed in Northern District but by counsel and a client in San Diego. You now have an additional Central District case.

So when we talk about where these cases are related or directed, not only is it California, but it's Southern California. And I think my issue with the centralization proposal for Southern District of Texas originally, their claims are much more narrow as styled in their complaint. Out here in California between Marselian and myself, we have nationwide-proposed classes. We have state of California classes. And as between the two, I think even Wells Fargo's briefs indicated my claims are broader.

So the broader claims are in California. The banks have principal places of business in California. Their lawyers, while McGuire Woods and Sullivan & Cromwell are in different areas, they also have Los Angeles bases.

I see my time is up, but I think our pitch is centralization of the what I call consumer cases, but certainly, they should be in the Southern District of California.

JUDGE CALDWELL: Any questions for Ms. Herkenhoff? Thank you very much.

MS. HERKENHOFF: Thank you.

JUDGE CALDWELL: We will hear from Mr. Viapiano.

MR. VIAPIANO: Good afternoon again, Your Honors. Christopher Viapiano of Sullivan & Cromwell in Washington, D.C., again representing Wells Fargo & Company and Wells Fargo Bank N.A. Wells Fargo opposes centralization of these cases but, if they are to be centralized, supports centralization in the District of Colorado.

In very stark contrast to the agent fee cases that we discussed just a little while ago, movant here seeks to centralize just a handful of actions brought only against Wells Fargo. And this panel has repeatedly held that where there are few actions to be centralized, the proponent of centralization bears the heavier burden.

The panel has also considered whether litigation is growing in determining whether centralization is appropriate. There's reason to believe that we are much closer to the end of these prioritization cases being filed than to the beginning.

Plaintiffs in these cases claim that Wells Fargo did not process PPP loan applications in the correct order and that they did not receive a loan from Wells Fargo, resulting in injury. As counsel for some of the other lenders have said already today, nearly $130 billion in funding remains available. Lenders continue to accept applications. So any small business that wants a loan and is eligible under applicable SBA regulations can get one, even today.

Movant doesn't come close to satisfying its heightened burden for centralization. In seeking centralization, movant focuses on how Wells Fargo processed PPP loan applications. While that undoubtedly is important, it masks significant factual differences among these few cases, differences that movant does not address. Some plaintiffs got PPP loans from lenders other than Wells Fargo. Some withdrew their applications, while others were offered a loan by Wells Fargo but never followed up to provide the necessary information.

These factual differences make or break these cases. And contrary to what Mr. Kennard said, they go to such threshold issues as to whether plaintiffs actually were injured and have standing to bring these cases.

Indeed, the very first of this type of case filed against Wells Fargo was voluntarily dismissed after we contacted the plaintiffs' counsel to inform them that both of the named plaintiffs received PPP loans from Wells Fargo. If the remaining cases survive motions to dismiss, plaintiffs would have significant difficulty being appointed class representatives. These factual issues about plaintiffs, not how Wells Fargo processed applications, predominate and define these cases.

The cases to be centralized here are few in number, not growing, and lack a common factual core, all unlike the agent fee cases we discussed earlier. To the extent necessary, discovery can be coordinated across these cases because Wells Fargo is represented by the same counsel.

Thank you, Your Honors.

JUDGE CALDWELL: Questions for Mr. Viapiano? Judge Huvelle.

JUDGE HUVELLE: Yes. I'm just trying to get a handle on what has happened to the securities case in front of Judge Seeborg. Is that a part of this motion or not a part of this motion? I was confused by what counsel said a moment ago.

MR. VIAPIANO: Sorry for talking over you, Your Honor. It is not. The movant and the plaintiff in the securities case stipulated that it would not be a part of this motion.

JUDGE HUVELLE: Okay. So that leaves us with one from Texas, one from Northern -- one from Southern California, one from Northern, and one from Colorado, or am I missing one? That's four.

MR. VIAPIANO: Your Honor, we have those four as a part of the original motion. We noticed a tag-along action that was filed in the District of Minnesota. That gives us five class actions. There is the individual action also filed in California that we noticed as a tag-along. And then late last night in an action that we have not even been served with, there was one class action filed in the Northern District of California.

Before that action -- and this is to my point that these cases do not appear to be growing -- the last case, the last class action was filed in mid-June and, before that, the last case in May.

JUDGE HUVELLE: But you just filed one yesterday in the Northern District of California, or not?

MR. VIAPIANO: We did late last night, Your Honor.

JUDGE HUVELLE: So it's a little more recent. And where is the other tag-along? One is in Minnesota, Northern District of California, and the third one?

MR. VIAPIANO: That was the individual action pro se, Your Honor. That's in the Central District of California.

JUDGE HUVELLE: And do you know whether under California practice they have the ability in California to consolidate cases that are in the Northern, Central, and Southern District, or are they limited by the district?

MR. VIAPIANO: I think by the district, though certainly 1404 is available.

JUDGE CALDWELL: Anything else? Thank you, all. Now we will hear a minute rebuttal from Mr. Kennard.

MR. KENNARD: Thank you, Judge.

I think speaking to the last point, clearly the fact that one was filed last night in and of itself is evidence that it is growing. It may not be 100 that have been filed, but one, in essence, is growing. So we've had one filed as recently as last night.

Admittedly, there is one claimant in Texas, and the majority are in Southern California. So we would ask in the alternative, if the Southern District of Texas is not ideal, that the MDL be set up in Southern California.

It wouldn't make sense to go to Colorado where you only have one claimant, just the same way it wouldn't make sense, if I acquiesced to the notion, there is only one in Texas where I filed our collective action. We have still brought a nationwide collective action in Texas and would be happy to deal with this in Southern California where the bulk reside. Again, we have folks from Minnesota and all over, so it makes sense where the majority of the claimants are, and in fact, Wells Fargo is headquartered in California. I will concede to that point that Southern California would be the best place, but Colorado just makes no sense.

I see I am out of time. Thank you, Judge.

JUDGE CALDWELL: Thank you.

Any questions for Mr. Kennard? All right. Thank you.

JUDGE HUVELLE: One final question.

JUDGE CALDWELL: Yes, Judge Huvelle.

JUDGE HUVELLE: I see two in the Northern District, based on what the defense counsel just said. So to the extent we are looking, why Southern District of California? There's one that's Karen's Custom Grooming. Are there others in Southern California?

MR. KENNARD: Judge, as far as I know, that would then equalize the amount in Northern California or Southern California. We would be fine in either one, but we have asked for Texas, and my colleague has asked for Southern California. So I would say California is the place to be, Judge, northern or southern.

JUDGE HUVELLE: Okay. Thank you.

JUDGE CALDWELL: Anyone else?

All right. I would like to thank all counsel who have argued today. That concludes the hearing on MDL 2954. The matter will stand submitted.

(Proceedings in MDL 2954 concluded at 4:43 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Please Note: This hearing occurred during the COVID-19 pandemic and is, therefore, subject to the technological limitations of court reporting remotely.

/s/ Sara A. Wick                    August 9, 2020

SIGNATURE OF COURT REPORTER          DATE