No. 15-5325

IN THE UNITED STATESCOURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs-Appellees,

v.

FHTM, Inc. et al., Defendants,

YVONNE DAY et al., Appellants.

On Appeal From An Order Of The United States District Court
For the Eastern District of Kentucky
Hon. Gregory F. Van Tatenhove
Case No. 5:13-cv-123

BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTIONAL STATEMENT

As set forth in Argument I below, the Court lacks jurisdiction over this

STATEMENT OF THE CASE

A. The Underlying FTC Enforcement Case

Fortune Hi-Tech Marketing, Inc. purported to be a legitimate multilevel marketing company that offered consumers the opportunity to earn money by selling the services of various companies to other consumers and by enrolling others to become salespeople. Compl., D.Ct. Dkt. No. 4, at 6-7. Extensive investigation by the Federal Trade Commission and several states showed that Fortune in fact was an illegal pyramid scheme.[2] The FTC and the states sued Fortune, four related corporate entities, and two individuals. See D.Ct. Dkt. No. 4. At the same time,

ultimately stipulated to the entry of a preliminary injunction. D.Ct. Dkt. Nos. 20, 23, 134.

In April 2014, the parties agreed to settle the case pursuant to a Stipulated Order that permanently enjoins Fortune and the individual defendants from running multilevel marketing programs, prohibits them from making false earnings claims, requires them to pay more than $13 million in equitable monetary relief to victims, and obligates them to disgorge the proceeds from the sale of certain properties. See D.Ct. Dkt. Nos. 198, 202.

B. Appellants' Putative Class Action

Appellants are not parties to this case, they were not parties to the settlement of this case, and they do not appeal any aspect of the settlement agreement between the government plaintiffs and the Fortune defendants.

Rather, appellants are plaintiffs in a different case, Day v. Fortune Hi-Tech Marketing, Inc., No. 5:10-cv-302 (E.D. Ky.). Day is one of two putative class actions brought on behalf of participants in Fortune's pyramid scheme (the other is Wallace v. Fortune Hi-Tech Marketing, Inc., No. 5:11-cv-127 (E.D. Ky.)). Day was brought against 38 defendants, only two of which (Fortune Hi-Tech Marketing, Inc. and two individuals) overlap with the defendants in this case. Day also was premised on different legal theories than this case. See Appellant's Br. 3.

Appellants (and the Wallace plaintiffs) filed suit in late 2010. In the three years that followed, the only issue litigated in both cases was the enforceability of arbitration clauses contained in Fortune's contracts with participants in the pyramid scheme. This Court eventually determined that the clauses were not enforceable, see Day v. Fortune Hi-Tech Marketing, Inc., No. 12-6304 (6th Cir. Sept. 12, 2013), but the cases barely advanced after that. By the time the FTC filed the Stipulated Order settling this case, a few motions to dismiss were being briefed in Day, but none of the defendants had answered the complaint and discovery had not begun. The appellants had not (and st

The parties briefly contemplated a "global" settlement that would have included both the FTC case and the purported class actions. See D.Ct. Dkt. Nos. 179, 183 (status reports filed with the district court). But as the parties told the court a short while later, discussions of a global settlement "complicated the process." D.Ct. Dkt. No. 183. In particular, the discussions were premised on the understanding that any global settlement would provide monetary and injunctive relief to consumers beyond what the government plaintiffs had already negotiated with the defendants. Instead, it became clear that resolving the class claims (and the attorney's fee demands) would result in a reduction in the funds available to redress harm to consumers—without any countervailing benefit to consumers. Accordingly, the FTC made no further effort toward a global settlement, but completed its settlement negotiations with the defendants without further involvement of the Day plaintiffs or their attorneys, resulting in the Stipulated Order in this case. See D.Ct. Dkt. Nos. 198, 202.

After the settlement of the case below, appellants and the Wallace plaintiffs apparently settled with six individual defendants in their cases, two of whom who were also defendants in this case,[3] but they did not settle with the main defendant, Fortune Hi-Tech Marketing, Inc. See D.Ct. Dkt. No. 214 Ex. B. The settlement applies only to the named plaintiffs Day and Wallace (each of whom receives

[3] Thomas A. Mills and the estate of defendant Paul C. Orberson, who died while this case was pending.

$5,000). Id. at 7. The FTC did not participate in the negotiations that led to that limited settlement. The Day/Wallace settlement does not resolve (and therefore effectively jettisons) the class allegations against the settling defendants and provides no compensation to any class members. In addition to the payments to the named plaintiffs, the settling Day/Wallace defendants agreed to pay $45,000 in attorney's fees.

Appellants' brief (at 4-5) suggests that the settlement of the FTC case and the Day/Wallace cases were negotiated together as part of a single package. That is incorrect. The FTC's Stipulated Order (and its benefits to consumers) resulted from the FTC's negotiation with the defendants below and does not depend on whether or how the class action allegations would be resolved. The Stipulated Order acknowledged the existence of the Day/Wallace cases and the possibility that the Day and Wallace lawyers could attempt to get fees from the FTC judgment, but it reserved the FTC's right to "oppose any request for payment of any attorney's fees or payments to class representatives associated with the [Day/Wallace] Lawsuits." D.Ct. Dkt. 198 at 15. The Day/Wallace settlement was negotiated separately, without the government's participation or agreement, and after the parties to this case had filed the Stipulated Order.[4] The language

[4] See D.Ct. Dkt. No. 257 (April 14, 2015). The agreement was completed before the district court entered the Stipulated Order but not before it had been submitted

appellants cite (at 5-6) regarding a supposed "right to petition the Court for reasonable attorney's fees" comes from their settlement and not the FTC's Stipulated Order.

D. Appellants' Attempt To Collect Attorney's Fees From The FTC's Settlement

Appellants and the Wallaceplaintiffs filed motions seeking leave to file attorney's-fee petitions to be paid from the consumer redress fund created by the FTC's Stipulated Order. Together, they sought more than $1 million in fees and costs.[5] See D.Ct. Dkt. Nos. 214, 215.

Appellants did not seek to intervene in the FTC's case before filing their motion. Instead, they argued that this Court's decision in Exact Software v. DeMoisey, 718 F.3d 535 (6th Cir. 2013), gave them the right to seek attorney's fees without intervening. The district court—deciding only that threshold question—denied the motions. D.Ct. Dkt. No. 252. The court held there were "very important distinctions between the case at-hand and Exact Software." Id. at 5. In particular, the court noted that unlike the attorney in Exact Software, here "the attorneys seeking leave to file have never been attorneys in this case." Id.

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to the court. Appellants' suggestion (at 5) that the private settlement predated the FTC settlement is thus incorrect.

[5] In a separate motion, appellant Yvonne Day sought to receive an incentive award from the monetary relief ordered in this case. D.Ct. Dkt. No. 235. That motion remains pending.

Moreover, the "language consistently used in Exact Software makes it clear that the court was considering the situation where an attorney was attempting to collect from his own client." Id. (emphasis in original). The court observed that other cases relied on by the Day and Wallace plaintiffs likewise involved lawyers seeking fees against their own clients, and noted that "[n]either the Day nor Wallace attorneys have identified a case where non-party lawyers were granted similar permission to seek fees absent formal intervention." Id. at 6. The court did not address whether a fee award would be appropriate. Id. at 3.

After the district court denied their motion, the attorneys for the appellants filed a motion to intervene on their own behalf (and on behalf of Day, to pursue her request for an incentive award). D.Ct. Dkt. No. 253. That motion is still pending. The next day, appellants filed their notice of appeal. D.Ct. Dkt. No. 254.

SUMMARY OF THE ARGUMENT

Appellants are strangers to this case and contributed nothing to create the consumer redress fund from which they now seek payment. The district court properly rejected their attempt to raid that fund without first even seeking leave to intervene. Their appeal from that ruling is nonjusticiable and would lack merit even if it were justiciable.

First, the order on review is not final and is thus not appealable under 28 U.S.C. § 1291. Whether appellants' attorneys may receive fees from the

settlement below remains to be determined by the district

STANDARD OF REVIEW

The district court's conclusions of law are reviewed de novo. Its determinations of fact are reviewed for clear error. See Foster v. Nationwide Mut. Ins. Co, 710 F.3d 640, 643-44 (6th Cir. 2013).

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS CASE.

The Court lacks jurisdiction both because the order on appeal is not a final order and, separately, because appellants lack standing to challenge it.

A. The Order On Appeal Is Not A Final Order.

Congress has granted the federal courts of appeals jurisdiction to review only "final decisions" of the district courts. 28 U.S.C. § 1291. A decision is "final" for purposes of Section 1291 "when it terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined." O'Donovan v. Hayden, Stone, Inc., 434 F.2d 619, 620 (6th Cir. 1970). The finality requirement must be met by the time the notice of appeal is filed. See Haskell v. Washington Twp., 891 F.2d 132, 133 (6th Cir. 1989).

The order on review is not final. Before appellants even filed their notice of appeal, their attorneys sought to rectify their procedural miscue by filing a motion to intervene on their own behalf. That motion remains pending before the district court. If the district court were to grant the motion, it would moot the sole issue

appellants present in this appeal (whether a stranger to a case may seek attorney's fees without obtaining leave to intervene), and the court would then consider the merits of the fee petition itself. If instead the district court denies the motion to intervene, that order would be final for appealability purposes, and appellants' attorneys would be free to raise the arguments they present here as a basis to reverse or vacate the denial. Either way, this appeal is premature.

Appellants' only counterargument is that the order appealed from "was a post-judgment order" and "most post-judgment orders are final and appealable." Appellant's Br. 1. But that is so only because in most cases "there is . . . little prospect that further proceedings will occur to make them final." United States v. One 1985 Chevrolet Corvette, 914 F.2d 804, 807 (6th Cir. 1990). Here, in contrast, the district court has before it a motion to intervene that appellants concede may moot this appeal—and the resolution of which would itself be an appealable order. See Opp'n to Mot. to Dismiss 2; Marino v. Ortiz, 484 U.S. 301, 304 (1988) (orders denying intervention are appealable). In a similar posture, the Tenth Circuit rejected non-parties' attempt to appeal before the district court had ruled on their motion to intervene. Southern Utah Wilderness Alliance v. Kempthorne, 525 F.3d 966, 968 (10th Cir. 2008).

B. Appellants Lack Standing.

Separately, appellants also lack standing. Article III requires a litigant to show (1) an injury in fact that (2) was caused by the conduct complained of and (3) will be redressed by the requested judicial relief. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "To have appellate standing, 'a party must be aggrieved by the judicial action from which it appeals.'"

Wise, 643 F.2d 319, 320 (5th Cir. 1981), and the "real part[y] in interest." Gonter, 510 F.3d at 616, quoting Price v. Pelka, 690 F.2d 98, 102 n.3 (6th Cir. 1982). The cases relied on by appellants (at 1) are to the contrary. Neither case addresses standing; both are ordinary fee-shifting cases where fees are awarded to a client who is already before the court.

Appellants themselves thus have no stake whether their attorneys recover fees. They are not parties to the underlying settlement, and their motion sought fees only for their attorneys and not themselves. The attorneys therefore are not simply "the real parties in interest"; they are the only parties in interest. The appellants' "net recovery" in their own case will "not be affected" by any fee award in this case. Lipscomb, 643 F.2d at 320. Even if their attorneys could be "aggrieved in fact," appellants are not. For the same reason, no such injury to appellants can be redressed by an award of fees.

II. APPELLANTS MAY NOT SEEK ATTORNEY'S FEES WITHOUT FIRST SEEKING TO INTERVENE.

Quite apart from these threshold obstacles to this appeal, the district court was independently correct to deny appellants' attempt to seek attorney's fees on the ground that they must first show that they should be permitted to intervene. The Federal Rules of Civil Procedure treat intervention the "procedure by which an outsider with an interest in a suit" may assert that interest. See 7C Wright, Miller, and Kane, Federal Practice & Procedure § 1901 at 257 (2007). Rule 24

specifies who may intervene as of right and who may do so only with the district court's permission. See generally Fed. R. Civ. P. 24(a) & (b). The intervention rules "strike a balance between varying interests," including those of the parties already in the case, those on the outside who believe that a decision may have an effect on them," and the "public interest in the efficient resolution of controversies." 7C Wright, Miller, and Kane § 1901 at 258-59; see also Sherman L. Cohn, The New Rules of Civil Procedure, 54 Geo. L. J. 1204, 1232 (1966). Non-parties who do not intervene ordinarily may not participate in a case by filing motions or otherwise expecting to be heard.

Here, the appellants are not parties to the case below, and they did not seek to intervene before filing a motion to have money paid to their attorneys from the proceeds of the settlement. The district court concluded that fact precludes any award of attorney's fees. In similar circumstances, the Seventh Circuit rejected a lawyer's attempt to collect fees paid to his former law firm where he did not intervene, was not a lawyer for any party, and therefore was "a stranger to [the] litigation." Cooper v. IBM Personal Pension Plan, 240 Fed. Appx. 133, 135 (7th Cir. 2007). If it reaches the issue, this Court should rule likewise.

Appellants contend, however, that this Court's decision in Exact Software excused them from any need to intervene in the FTC's case before they try to tap

an attorney need not intervene before seeking to recover fees from his own client in the very case before the court. In contrast, appellants here seek fees from the FTC's judgment in a different case, to which they are strangers.

In Exact Software, the client fired its lawyer just before the $4 million settlement of the underlying dispute. 718 F.3d at 537. Seeking fees for his work up to his termination, the lawyer notified the district court of an equitable lien on the settlement proceeds. The court held a portion of those proceeds in escrow and ultimately awarded the lawyer $1.4 million in fees. Id. On appeal, this Court addressed whether the district court had diversity jurisdiction over the fee dispute where the lawyer and his client were from the same state. That question ultimately

days of the republic, federal courts have resolved fee disputes between lawyers and their clients when those disputes arise out of the underlying case." Exact Software at 542; see id. at 545 (district courts "for generations have resolved fee disputes between lawyers and clients that grow out of the underlying dispute"). Such disputes are "part of the same case or controversy" as the original lawsuit," and district courts have authority to resolve them because attorney's fees are "part of the overall costs of the underlying litigation." Id. at 542. Indeed, resolving such issues is often necessary "to provide a full and fair resolution of the litigation." Id. at 542-43, quoting Kalyawongsa v. Moffett, 105 F.3d 283, 287-88 (6th Cir. 1997). Jurisdiction thus arises not from a specific congressional grant but from "the traditional authority of district courts over the parties and lawyers before it." Id. at 544-45.[7]

The Court's rationale makes clear that its decision applies only to fee disputes that have two specific features: (1) the attorney and client are parties and lawyers in a case before the court; and (2) the dispute arises from the lawyer's

[7] The Court went on to discuss "another way of looking at this dispute" that was "not joined by the parties." 718 F.3d at 544. Supplemental jurisdiction, the Court explained, rests on the idea that a new "claim" is being added to a case. But a district court's "traditional authority to ensure that . . . clients do not leave their lawyers in the lurch (by failing to pay them) does not turn on new claims filed by lawyers against clients." Thus, when a lawyer is seeking fees from his own client in the course of a case already before the district court, the Court concluded, "there is no reason to intervene, to file a new claim or even to become a 'party' to the case." Id.

representation of the client in that case. First, the decision turned on the "traditional authority of district courts over the lawyers in front of them," 718 F.3d at 543 (emphasis added), and the court's "authority over parties and lawyers before it," id. at 544 (emphasis added). Second, the opinion addresses "fee dis-

lawyers seek fees not from amount to be paid to the Day

Finally, appellants are wrong to insinuate that they helped settle the case and that the FTC acknowledged their right to seek fees from the FTC's stipulated judgment. Appellant's Br. 4-5, 10. The contention is both factually baseless and legally irrelevant. It is wrong because appellants played no role in the FTC's Stipulated Order resolving its case. As discussed above, the parties briefly considered a settlement that would have included the class action cases, but the idea was abandoned. As the district court found, "the attorneys seeking leave to file have never been attorneys in this case." D.Ct. Dkt. 252 at 5.[10] In any event, even if appellants' attorneys had contributed to the FTC's Stipulated Order, and even if the FTC had recognized as much, that would not change the legally proper route for appellants' attorneys to seek fees: by seeking to intervene on their own behalf and filing a proper motion as a party (a route that appellants' attorneys have now embarked upon and the outcome of which remains pending before the district court). Nothing in the FTC's Stipulated Order could change appellants' status as strangers to the case.

[10] The FTC's Stipulated Order refers to funds paid to consumers "after any payments allowed by Court." But that contingency provision does not somehow suggest that such a request would be proper—indeed, the Stipulated Order sets forth the FTC's right to oppose a fee request. D.Ct. Dkt. 198 at 15. Instead, the provision prudently accounted only for the possibility that appellants' attorneys would seek (and the district court would award) fees.

CONCLUSION

The Court should dismiss this case for lack of jurisdiction. Should the Court find the matter justiciable, the district court's order should be affirmed.

Respectfully submitted,

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September 14, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that it contains 4,621 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: Sept. 14, 2015

/s/ Theodore (Jack) Metzler

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ADDENDUM

APPELLEES' DESIGNATION OF RELEVANT DOCUMENTS

Appellees, pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), hereby designate the following filings in the district court's record as relevant documents:

Federal Trade Commission v. Fortune Hi-Tech Marketing, Inc. et al
Case No: 5:13-cv-00123

Date Filed	RE#	Page ID#	Docket Text
1/24/2013	4	7	Complaint
1/24/2013	23	2673	Ex Parte Temporary Restraining Order
5/28/2013	134	5351	Stipulated Preliminary Injunction
9/26/2013	164	5517	ORDER: matter REFERRED to Magistrate Judge Robert E. Wier for a settlement conference.
11/13/2013	177	5909	Joint Status Report
11/27/2013	179	5914	Joint Status Report
12/16/2013	183	5922	Joint Status Report
4/18/2014	198	5992	Settlement Agreement
5/9/2014	202	6285	Stipulated Order for Permanent Injunction and Monetary Judgment
7/22/2014	214	7079	Motion of Yvonne Day, Leonard Haslag, James McCormick, and John W. Turner For Leave To File Motion For Attorneys' Fees From Common Fund Created By The Stipulated Order
2/23/2015	252	8046	Order: The 214 Motion for Leave and 215 Motion for Leave to File are DENIED.
3/24/2015	253	8052	Motion to Intervene by Yvonne Day, Leonard Haslag, James McCormick, John W. Turne
3/25/2015	254	8160	Notice of Appeal

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I filed and served the foregoing with the Court's appellate CM