No. 03-60339

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CLAUDIA SMITH; WILBERT WALKER; NORRIS CLASS PLAINTIFFS; MULLINS CLASS PLAINTIFFS; ANDERSON CLASS PLAINTIFFS; CHRISTINE BROOKS

Plaintiffs - Appellees

v.

REBECCA CRYSTIAN; MARTHA SHAFFER; WHITE CLASS PLAINTIFFS; MARTIN CLASS PLAINTIFFS

Plaintiffs - Appellants

v.

HYNUM CLASS PLAINTIFFS

Plaintiff - Appellant

v.

TOWER LOAN OF MISSISSIPPI INC; AMERICAN FEDERATED INSURANCE COMPANY; AMERICAN FEDERATED LIFE INSURANCE COMPANY; FIRST TOWER LOAN INC

Defendants - Appellees

v.

CLIFTON GRAY; LARRY PICKENS; 693 MOVANT - OBJECTORS

Appellants

On Appeal From the United States District Court
for the Southern District of Mississippi

REPLY BRIEF OF APPELLANTS REBECCA CRYSTIAN AND MARTHA SHAFFER

Brian Wolfman
Alan B. Morrison
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Robert B. McDuff
767 North Congress St.
Jackson, MS 39202
(601) 969-0802

Counsel for Appellants Rebecca Crystian and Martha Shaffer

November 24, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE RULE 23(b)(2) CERTIFICATION WAS IMPROPER. 5

II. THE RULE 23(b)(1)(A) CERTIFICATION WAS IMPROPER. . . 16

III. DUE PROCESS REQUIRES THAT THE CLASS MEMBERS BE PROVIDED THE RIGHT TO OPT OUT. 21

CONCLUSION 23

CERTIFICATE OF SERVICE . . . .

CERTIFICATE OF COMPLIANCE . . . .

TABLE OF AUTHORITIES

CASES

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 1, 3, 6, 13, 19

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 8

Bell Atlantic Corp. v. AT&T Corp.,
339 F.3d 294 (5th Cir. 2003) 16

Board of Educ. of Oklahoma City Public Schools v. Dowell,
498 U.S. 237 (1991) 10

Bolin v. Sears, Roebuck & Co.,
231 F.3d 970 (5th Cir. 2000) 4, 14

Bowling v. Pfizer, Inc.,
143 F.R.D. 141 (S.D. Ohio 1992) 17

Bryant Jones v. Tower Loan, et al.,
No. 2:96cv63PG (S.D. Miss. Feb. 5, 1998) 20

Castillo v. Barnhart,
325 F.3d 550 (5th Cir. 2003) 22

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 8

In re General Motors Corp. Engine Interchange Litigation,
594 F.2d 1106 (7th Cir. 1979) 12

In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig., 846 F. Supp. 330 (E.D. Pa. 1993), *rev'd on other grounds*,
55 F.3d 768 (3d Cir. 1995) 18

Hancock Bank v. Travis,
580 So. 2d 727 (Miss. 1991) 7

Lowery v. Guaranty Bank and Trust Co.,
592 So. 2d 79 (Miss. 1992) 7, 8

McKinnon v. Batte,
485 So. 2d 295 (Miss. 1986) 7

McManus v. Fleetwood Enterprises, Inc.,
320 F.3d 545 (5th Cir. 2003) 11

Monumental Life Insurance Co.,
343 F.3d 331 (5th Cir. 2003) 2, 3, 11, 22

Oritz v. Fibreboard Corp.,
527 U.S. 815 (1999) 9, 12, 21, 23

Phillips Petroleum v. Shutts,
472 U.S. 797 (1985) 21, 23

In re Real Estate Title & Settlement Services Antitrust Litigation,
869 F.2d 760 (3d Cir. 1989) 22-23

National Super Spuds v. N.Y. Mercantile Exchange,
660 F.2d 9 (2d Cir. 1981) 12

RULES

Fed. R. Civ. P. 23(b)(1)(A) 17

39 F.R.D. 69 (1966) (Rule 23 Advisory Committee Note) 19

INTRODUCTION AND SUMMARY OF ARGUMENT

The briefs of the settling parties are suffused with an air of unreality. All agree that, at the very least, claims for injunctive relief must "predominate" before a mandatory, non-opt-out class may be certified under Rule 23. And defendants concede that, in conducting the predominance analysis, a court must focus on the claims held by the class, not on the relief in the settlement. Tower Loan ("TL") Br. 40. Yet, the settling parties still maintain that the class members' damages claims here are "incidental" to their claims for injunctive relief under this Court's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The settling parties' position does not withstand scrutiny.[1]

Tower Loan does not actually analyze the class complaint. *See* TL Br. 40. If it did, it would see that each cause of action, which the complaint describes in great detail, R. 480-508, is one for money damages, and it is the boilerplate claim for an injunction that is "incidental." R. 509-10. *See* Opening Br. 7-8. Every comparable suit against Tower Loan, or similar lenders, principally sought money

[1]Class counsel do not seriously engage appellants' arguments regarding the mandatory class certification and assert only that, because the settlement does not release claims regarding failures to pay insurance benefits, non-opt-out class certification is proper. Appellee's Reply to Principal Briefs of Appellants ("Class Counsel Br.") 10. Thus, except where specifically indicated, this reply is limited to the arguments advanced by Tower Loan.

damages. *See, e.g.,* R. 1451-64. All such cases that have settled have done so *exclusively* for money damages. R. 1748-52, 1800-01, RE 161-67; R. 1095, RE 156; R. 2008, RE 169; R. 2262, docket entry 222 (under seal). All of the settling parties' complaints about the supposedly improper conduct of objectors' counsel in filing damages suits in allegedly "plaintiff-friendly" fora, *e.g.*, Class Counsel Br. 21; TL Br. 19, and class counsel's lament that, in the absence of this mandatory class settlement, 1000 to 1500 class members could recover significant money damages, R. vol XI 37-38, are, in reality, further concessions that the claims released by the settlement are principally claims for money damages.

Tower Loan either ignores these points entirely or claims that our analysis of the plaintiffs' complaint relies impermissibly on the "subjective intentions of the class representatives and their counsel in bringing suit." TL Br. 41 (quoting *Monumental Life Ins. Co.*, 343 F.3d 331 (5th Cir. 2003)). Not so. The plain words of the class complaint, the pursuit by various plaintiffs of state court damages suits against Tower Loan, the settlement history in similar cases, the class action release, and the settling parties' in-court concessions about the nature of the objectors' cases are *cold, hard facts about which there are no disputes* — inconvenient facts from the settling parties' perspective, but facts nonetheless. Thus, however difficult the certification decisions may have been in the once-controversial, but

now settled rulings in *Allison* and *Bolin* — cases in which the class claims plausibly could be characterized as primarily injunctive — this case is easy because the claims here almost entirely for money damages.

Moreover, this case differs from *Allison* and *Bolin*, and from the Court's recent decision in *Monumental Life,* in a way that renders the denial of opt-out rights far more troubling here than it would have been in those cases. Those cases involved requests for pre-litigation, pre-settlement certification. The Court held either that *no* claims could go forward on a class basis under Rule 23(b)(2) or (b)(3), *see Allison*, 151 F.3d 402, or that mandatory certification might be appropriate because, as this Court said in the first line of its *Monumental Life* opinion, the case "was the ultimate negative value class action lawsuit," 343 F.3d at 335 — therefore, mandatory certification could be justified because few, if any, class members had anything to gain from opting out, and class treatment was the only practicable way to litigate the case. *See id.* at 335 n.1. Thus, in those cases, meaningful opt-out rights were not, as a practical matter, in serious danger.[2]

---

[2]Moreover, in *Monumental Life*, the class representatives had requested that notice and opt-out rights be accorded the class even though certification was under Rule 23(b)(2), 343 F.3d at 336, recognizing class members' potential interest in litigating their monetary claims on their own. This Court noted that due process requires opt-out rights "where a rule 23(b)(2) class seeks monetary damages," and directed the district court to consider opt-out rights on remand if it were to certify (continued...)

The practical realities of this case are poles apart from those in *Allison*, *Bolin*, and *Monumental Life*. Here, unlike those cases, the defendants are not trying to defeat class certification, which would leave the class members free to sue on their own. Rather, the defendants are, as *Bolin* warned, "attempting to purchase res judicata." 231 F.3d at 976. Now that the mandatory settlement has been approved, there is no chance, as there was in *Monumental Life,* that the district court will allow class members to opt out of the (b)(2) class. The whole point here is to prevent opt outs.

Nor is this case, like *Monumental Life*, a "negative value case," in which the real choice was class action certification or no litigation at all. Here, 1200 class members — some with existing litigation and some yet to file suit — have attempted to vote with their feet. They want out. And why shouldn't they? For at least half the class, the settlement's prospective relief provides no benefit. The only relief for them is the settlement's paltry damages fund. Although their state-court actions may fail — defense counsel testified below that one state-court action

---

[2](...continued)
the class. *Id.* at 340-41 (citing *Allison*); *see also Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) ("*Allison* reflects our concern that plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections" and that "[d]efendants attempting to purchase res judicata may prefer certification under (b)(2) over (b)(3).").

had survived summary judgment and another had not, Parker Testimony, R. vol. XI 172-73 — the class members have decided that state-court damages actions, no matter how risky, are worth pursuing when weighed against a settlement that may provide them under $50 and in no case more than $86.75.

To be sure, those objecting class members who borrow again from Tower Loan during the five-year settlement period would lose the prospective relief if the settlement were not approved (although nothing prevents the settling parties from re-submitting this settlement, in opt-out form, to the district court). But they, too, have decided that pursuing their damages actions is well worth that price. Nothing in the settling parties' briefs undermines the bedrock principle — enshrined in cases such as *Allison* and *Phillips Petroleum v. Shutts* and in the text of Rule 23 itself — that the decision whether to be included in a class action or to file one's own damages action is not class counsel's, and it is certainly not the defendants' — it is the class members' to make.

ARGUMENT

I. THE RULE 23(b)(2) CERTIFICATION WAS IMPROPER.

If you ask the wrong questions, or ignore the proper ones, you tend to get the wrong answers. The settling parties never seriously ask and answer the following three questions that determine whether the damages sought here are "incidental" to

injunctive relief. *Allison* requires each question to be answered "yes" before a court may approve a (b)(2) certification involving monetary relief.

! **Does the monetary relief "flow directly from liability to the class *as a whole* on the claims forming the basis for the injunctive or declaratory relief" and thus "by definition," is it "more in the nature of a group remedy?" *Allison*, 151 F.3d at 415.**

No. Our opening brief (at 3-4, 10, 13-14, 26-28, 31-33) describes the myriad individual issues — the terms of the contracts, the type of insurance purchased, what Tower Loan agents told individual class members, etc. — and shows that monetary relief would not flow from a group-wide injunction on each (or any) of the plaintiffs' claims. We need not repeat that discussion.

However, review of just one of the plaintiffs' causes of action serves to rebut Tower Loan's contention that this case involves a "group remedy" from which all damages flow automatically. The plaintiffs claim that defendants breached a fiduciary duty that they owed to them because Tower Loan was procuring (worthless or overpriced) insurance contracts from borrowers on behalf of an undisclosed entity — American Federated — without disclosing the corporate relationship between the two entities and American Federated's kickbacks to Tower Loan. Under Mississippi law, "[t]he determination of what constitutes a

confidential or fiduciary relationship *is a question of fact*." *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79, 85 (Miss. 1992) (emphasis added). Someone who procures insurance for another may become the insured's agent, *Hancock Bank v. Travis*, 580 So.2d 727, 731-32 (Miss. 1991), and be charged with a duty of good faith and reasonable care. *McKinnon v. Batte*, 485 So.2d 295, 297 (Miss. 1986). Whether such a fiduciary relationship was created with Tower Loan customers will depend on the number and quality of interactions by Tower Loan agents with individual customers. *Lowery*, 592 So.2d at 83-84 (whether such relationship exists depends on assessment of past dealings between parties). These are obviously fact-specific, individualized inquiries.[3]

Moreover, although Tower Loan says individual reliance would not be an issue, TL Br. 43 (quoting district court opinion), that is legally — and logically — wrong. For instance, if a plaintiff alleges that she was fraudulently told that insurance was a mandatory component of the loan, then, for her to recover, that statement would have to be the reason she made her purchase, *i.e.,* to show actual

[3]As will be recalled, in some instances, a plaintiff's damages would be measured by the premiums used to insure personal property that was virtually valueless and thus not worth insuring, *see* Opening Br. 3, which would require an individual inquiry into the value of each plaintiff's insured personalty. Our point here is not to establish the merit of these claims, but simply to show that damages cannot possibly flow from a "group remedy."

damages, she would have to prove that she would not have bought the insurance if she believed it to be optional. *See Lowery*, 592 So.2d at 83 (in assessing fiduciary-duty claim, key question of fact is whether plaintiff justifiably *relied* on lender based on past interactions).

As noted above, Tower Loan does not analyze these claims in any serious way. Its principal response is to attack the merits of the objectors' state-law claims and to complain repeatedly that the objectors did not "put on any proof of any individualized claim" before the district court. TL Br. 42; TL Br. 44-45 (complaining that objectors did not put on case about what they were told by Tower Loan agents). With all respect, this argument is frivolous.

The merits are irrelevant to the question whether a class should be certified. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). For that reason, no one — not the settling parties, not the court, not the objectors — has suggested that the *settling parties* had to come forward with proof about their case (or its defense) to show that certification was proper. In any event, the burden of justifying the settlement and certification is on its proponents, *see generally Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and the objectors need not make a record on the certification question.

Tower Loan's position is particularly bizarre in the light of the

circumstances here. Since 1998, shortly after the Crystian Objectors filed suit in state court, all suits against Tower Loan have been enjoined. There has been *no* discovery and little fact development of any kind beyond the initial filings.

Tower Loan cites no authority — because there is none — requiring objectors to make an evidentiary showing about their cases before being allowed to opt out. Indeed, the practice is just the opposite. In *Allison*, the Court did not indicate that the opt-out right could be denied if the absent class members had failed to show that their claims for compensatory damages had merit under the Civil Rights Restoration Act of 1991. Nor did *Monumental Life* inquire into whether the absentees had valid monetary claims before considering whether non-opt-out certification was permissible; rather, it based its holding on the plaintiffs' pleadings. And the Supreme Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), did not remotely suggest that the mandatory certification rejected there might have been acceptable if the absentees were unable to show that they had evidence for their claims against the defendant.

The foregoing rebuttal shows that the class members' compensatory damages would not flow from a "group remedy." In addition, two other points advanced by Tower Loan further undermine its position. First, Tower Loan proclaims that the settlement's five-year expiration date is irrelevant because

"*Allison* does not require the settlement of a properly certified (b)(2) action to impose permanent injunctive relief." TL Br. 45. That truism — that the *Allison* court did not address an issue not before it — does not respond to the real issue: How can the absent class members' damages relief flow from an "injunction" that is really not an injunction? The settlement's prospective relief will simply disappear without any court having said it is no longer needed, which is what a court must do to lift a genuine injunction. *See, e.g., Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 246-47 (1991). Put in *Allison*'s terms, after five years, when Tower Loan is free to return to its old ways, the class members' monetary relief would no longer be "incidental" to anything. This reveals the settlement's principal legal gimmick: It has created an illusory "injunction" — whether it provides true benefit is debatable and irrelevant — in the hope that the class members' damages will be seen as an "incidental" appendage that may serve as a basis for destroying the class members' opt-out rights.[4]

Second, Tower Loan claims it is irrelevant that a large proportion of the

---

[4]In light of the settlement's sunset provision, it is difficult to take seriously the opening line of class counsel's brief that "the injunctive relief ... will literally change the way Tower Loan does business." Class Counsel Br. 1. That may or may not be "literally" true . . . for five years.

class will not benefit from the settlement's "injunctive" relief. *Bolin* does not, as Tower Loan would have it, stand for the proposition that (b)(2) certification is inappropriate only "where most, if not virtually all, of the [class members] face[] no further harm from" the defendant. TL Br. 45. Rather, *Bolin* stands for the proposition that it is nonsensical to say that the damages claims for class members who will not benefit from injunctive relief claims "flow from" or are "incidental" to that (non-existent) injunctive relief. Tower Loan decries our reliance on *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545 (5th Cir. 2003), because it says that, in that case, there was "no prospect of future defendant conduct affecting any class member." TL Br. 47 n.16. That may be so. But that means only that the class members in *McManus* were situated identically to at least half the class here.[5]

Tower Loan relies on *Monumental Life* for the proposition that the "full benefit to every class member of injunctive relief is not a prerequisite to class certification." TL Br. 47 (citing *Monumental Life*, 343 F.3d at 339-40). That may

---

[5]Tower Loan cites the district court's statement that 75% of the class members will borrow over the next five years and thus might benefit from the settlement's prospective relief. TL Br. 46. That fully 25% of the class gets no "injunctive" relief does not, under *Allison* and *Bolin*, permit mandatory certification. In any event, the district court's statement is incorrect. The settlement itself, relying on defendants' records, indicates that 44% of the class members have *not* been repeat borrowers during the 8½-year class period. R. 959, 980 n.4; Opening Br. 29-30.

be true, particularly in a "classic negative value case," like *Monumental Life*, where the district court was required to consider opt-out rights. *See supra* at 3 & n.2. But that statement has no application here, where half the class members are forced to relinquish their *valuable* damages claims because of what the *other half* of the class is getting. It should go without saying that, in class litigation, the class representative (or, more precisely put, class counsel) cannot trade off the claim of one class member for that of another. *See National Super Spuds v. N.Y. Mercantile Exchange*, 660 F.2d 9, 17 (2d Cir. 1981) (Friendly, J.); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133-35 (7th Cir. 1979) ("convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class"); *see also Ortiz*, 527 U.S. at 857-58 (overturning class certification, among other reasons, because of impermissible trade off among class members).

Similarly, Tower Loan side-steps our reliance on the district court's decision not to certify the FDCPA claim on the explicit ground that only damages are available under that statute, *see* Opening Br. 17, 36, asserting that the plaintiffs here have "claims for which equitable relief is available." TL Br. 47. But the lack of an FDCPA injunctive remedy, and the fact that tens of thousands of class members will not benefit from an injunction, present the identical analytical

problem: In both situations, the *only* possible remedy is money damages.[6]

! **Is the monetary relief "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances?" *Allison*, 151 F.3d at 415.**

No. Tower Loan does almost nothing to rebut our opening brief on this point. Moreover, the analysis in the preceding section of this brief further buttresses our point that the plaintiffs' damages claims would be highly dependent on the particular interactions between plaintiffs and Tower Loan's agents and the particular circumstances of each plaintiff's loans. Those plaintiff-by-plaintiff distinctions presumably explain why, in the *City Finance* case, the compensatory damages awarded to each plaintiff varied very widely. *See* R. 1800, RE 166; Opening Br. 13.

Tower Loan's only response is that damages could be easily calculated by

---

[6]Tower Loan performs a sleight-of-hand when it suggests that the objectors' position is that the settlement's prospective relief is "limited to persons presently indebted to Tower." TL Br. 47. Quite the contrary, being "presently indebted to Tower" has nothing to do with whether the prospective relief will benefit a class member. The *only* people to whom that relief will apply are people who borrow during the five-year settlement period, *i.e.,* people who are not necessarily even members of the class, which is defined solely to include people who borrowed from Tower Loan in the past and does not include future borrowers. *See* Final Judgment, ¶ 4, R. 2432.

reference to its business records. TL Br. 44. That is manifestly untrue for any form of consequential damages associated with foreclosure or repossession of collateral. *See Bolin*, 231 F.3d at 978 (Rule 23(b)(2) certification improper because plaintiffs claimed consequential damages for having to defend allegedly improper collection actions); Opening Br. 35. In any event, given the myriad of individual factual circumstances related to damages (number of loans, type of insurance, loan period, amount of loan, etc.), the possibility that some such facts are buried somewhere in defendants' business records hardly makes the damages calculation "incidental" for the class as a whole.

! **Would a (b)(2) certification avoid "additional hearings to resolve the disparate merits of the individual case," involving "new and substantial legal or factual issues" and entailing "complex individualized determinations?"**

This is, perhaps, the easiest question, and the answer again is "no." The answer to the first question above shows that, as to liability, numerous individual questions would necessitate individual hearings about interactions with Tower Loan agents, the value of insured property, the terms of the loans, and other matters that vary class member to class member. The settling parties simply do not address this point.

As to damages, it is difficult to understand how additional, highly

complicated, individualized determinations and hearings could be avoided, despite Tower Loan's conclusory assertion to the contrary. TL Br. 44. To be sure, one would begin by looking at hundreds of thousands of loan documents and the terms of a wide variety of insurance policies, but it is inconceivable that an individual plaintiff would not be entitled to a hearing to determine whether she had been charged a premium for a period beyond the term of the loan — a practice defense counsel conceded was unlawful, R. vol. XI 157; whether the insured collateral was worthless or whether it was already insured by the plaintiff's homeowners' policy (which would *not* be reflected in defendants' business records), Class Counsel Br. 3, 7; Mullins Appellants' Br. 35; Affs. of Agee, Hust, & Brown, RE 182-83; whether two years' worth of premiums had been assessed on the plaintiff's 13-month loan, *see* Mullins Appellants' Br. 34; R. vol. XI 157; and so forth.

Indeed, these complications were exactly what caused class counsel to throw up their hands, eschew claim-by-claim damages relief, declare the problem a "morass," and substitute "flat-rate" settlement recoveries for all class members. R. Vol. XI 46-47, RE 173-74. It would be more than a little ironic to magically proclaim that the damages claims here involve a simple, objective calculation, not because they really do, but simply because the settling parties realized that they could not provide class relief without overlooking all of the class members'

individual circumstances.[7]

II. THE RULE 23(b)(1)(A) CERTIFICATION WAS IMPROPER.

Tower Loan's arguments regarding Rule 23(b)(1)(A) certification are based on the district court's certification order. *See* TL Br. 33-34 (quoting order). That order is fundamentally flawed.

The district court's principal justification for non-opt-out (b)(1)(A) certification, even for the class members' damages claims, is that "Tower is required by both law and practical circumstances to deal with its legions of borrowers the same" under federal and state law. *See id.* The district court's reasoning would effectively eliminate opt-out certification, at least in hybrid injunctive/damages class actions. All businesses are subject to laws that require

---

[7]The settling parties ignore our citation to *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), where the Court considered the propriety of Rule 23(b)(3) opt-out certification for proposed classes of antitrust business plaintiffs seeking damages for the defendant's monopolization in transmission of caller ID information on its phone lines. The Court rejected certification solely because of the difficulty of assessing damages to each plaintiff's business. It specifically rebuffed the plaintiffs' proposal to use a damages plan based on national damages averages because it was not "an adequate approximation of any single class member's damages." *Id.* at 304. In other words, what the Court refused to countenance was exactly the kind of one-size-fits-all damages assessment imposed by the settlement in this case. Unlike the unsophisticated borrowers here, the sophisticated business plaintiffs in *Bell Atlantic* could at least have opted out, which would have allowed them to litigate on their own if they feared that the damages plan would not adequately address their circumstances. Here, the class members have been given no choice.

them to act "the same way" under a given set of circumstances. That is what law does.

Medical device companies and drug companies are subject to myriad federal laws and FDA regulations; car companies are required by federal law and National Highway Traffic Safety Administration rules to "act the same way" in making their cars and protecting the driving public; and so are the makers of certain household products, which are subject to the strictures of the Federal Hazardous Substances Act, regulations of the Consumer Product Safety Commission, and state law.

A class action involving injuries from a defective drug, medical device, car, or hazardous substance could be properly certified under Rule 23(b)(1)(A) or (b)(2) for *claims seeking structural, injunctive-type relief* — such as a product recall or retrofit, or classwide research — because two conflicting judgments would, in fact, "establish incompatible standards of conduct." *See* Fed. R. Civ. P. 23(b)(1)(A). But opt-out rights must be preserved where damages are sought on behalf of each class member, because the payment of damages, based on each individual's losses, does not establish incompatible standards of conduct, even though some plaintiffs will win, some will lose, and different judges and juries will award damages in differing amounts. *See* Opening Br. 39-40 (citing cases); *see also Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (opt-out rights

preserved in class action seeking wide-ranging structural relief and damages against medical device maker, despite multiplicity of competing actions); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 846 F. Supp. 330 (E.D. Pa. 1993) (same regarding class claims against auto maker), *rev'd on other grounds*, 55 F.3d 768 (3d Cir. 1995).

The district court also noted that "multiplicative lawsuits [against Tower Loan] have already materialized" some of which "seek[] injunctive relief." TL Br. 34 (quoting district court). But those facts are irrelevant. The district court certainly had (and has) the power, whether through approval of a Rule 23(b)(1)(A) or (b)(2) certification and settlement, or through issuance of a genuine permanent injunction, to preclude another court from imposing structural relief that would establish "incompatible standards of conduct" for Tower Loan. Thus, if the district court were inclined to approve an injunctive-relief-only settlement or otherwise order Tower Loan to alter its lending practices, the Crystian Objectors could be required to drop any state-court claim for inconsistent prospective relief that they may have and to pursue only monetary relief. But that has nothing to do with class members' *damages claims* that cannot be certified and released without affording the class members a right to opt out.

Tower Loan acknowledges in passing that *Allison* addressed this very

question. TL Br. 36. Indeed, this Court held that, while (b)(1)(A) might justify certification of prospective, injunctive relief, it was an inappropriate basis for certifying "[c]laims for compensatory and punitive damages" because there was "no risk of inconsistent adjudications or incompatible standards of conduct in having those claims adjudicated separately." *Allison*, 151 F.3d at 421 n.16; *see* Opening Br. 40-41. Tower then concedes that, if the damages claims here are as individualized as those in *Allison*, (b)(1)(A) certification would be inappropriate. TL Br. 36. However, as shown in Part I above and in our opening brief, the claims here, both as to liability and damages, are far more individualized than the claims at issue in *Allison*.[8]

Finally, the settling parties make much of the fact that the proponents of the similar *Bryant Jones* litigation before Judge Pickering are opponents of the settlement now before this Court. *E.g.*, TL Br. 4-5, 17 n.7. What they do not

---

[8]Tower Loan complains that our reading of (b)(1)(A) renders (b)(2) "superfluous." TL Br. 37. That is an odd argument since Tower Loan itself interprets the two provisions identically here, albeit to eliminate, not to preserve, the absentees' opt-out rights. Our opening brief (at 38) explains that Rule 23(b)(1)(A) was intended to cover situations where two or more courts might come to differing conclusions on particular structural relief — *e.g.*, whether to require a bond issue or not, whether to require appropriation of public funds or not — where unitary treatment is an absolute, practical necessity and compliance with contrary rulings would be physically impossible. *See* 39 F.R.D. 69, 100 (1966). Whether Rule 23(b)(2) might also be extended to cover such situations is not before the Court.

mention is that Judge Pickering denied mandatory class certification, which was urged by Tower Loan in *Bryant Jones* based on arguments identical to those it advances here. Judge Pickering said:

> [I]f I were to grant the defendants' motion [for mandatory certification], I think I would exceed Rule 23. ... I've already told you that the basic reason for my decision today is I just don't think Rule 23 contemplates this. ... I do think that the arguments against class certification [are correct] in that 23(b)(1) does not apply to disparate decisions of state courts or disparate jury verdicts, I don't think that's what Rule 23(b)(1) addresses.

Oral Bench Opinion, at 1, 2-3, in *Bryant Jones v. Tower Loan, et al.*, No. 2:96cv63PG (S.D. Miss. Feb. 5, 1998), R. 1101, 1102-03.

We agree.[9]

---

[9]The settling parties' references to state-court "jackpot justice" and the plaintiffs' supposed "manipulat[ion] of joinder and venue rules" is nothing short of outrageous. *E.g.*, TL Br. 19. The objectors have employed Mississippi's admittedly liberal joinder rules properly. To be sure, the Crystian Objectors prefer their state-court forum to one in which they stand to gain less than $100 as recompense for what they believe is the defendants' unlawful conduct. *See* Record Excerpts of Mullins Appellants 5-35 (testimony of Thomas Dye Gober, former Mississippi Department of Insurance examiner, in *Buie v. Tower Loan*, discussing Tower Loan illegalities in detail), R. 1218-21, 1224-35, 1257-71. There is nothing wrong with that. In any event, the claim of forum shopping rings hollow. Tower Loan sought to obtain before Judge Bramlette the same class certification that it failed to obtain before Judge Pickering. Moreover, the settling parties obtained a federal forum based on federal causes of action, such as federal antitrust and civil rights, that appear to have little relation to injuries allegedly suffered. *See* R. 2374 & n.3, RE 92 & n.3.

III. DUE PROCESS REQUIRES THAT THE CLASS MEMBERS BE PROVIDED THE RIGHT TO OPT OUT.

On the due process question, the fundamental problem with Tower Loan's brief is that it does not come to grips with *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). As discussed in our opening brief (at 41-46), those cases and their progeny hold that the Constitution requires that absent class members be given the right to opt out whenever they hold substantial claims for money damages. Tower Loan says only that those cases involved "individualized, substantial damages claims" and "[t]here are no such claims here." TL Br. 49. In *Shutts*, the class members' monetary claims were, if fully vindicated, worth about $100 each on average, 472 U.S. at 801, yet the Court concluded that the plaintiffs could only be bound to the class judgment if they were afforded the right to exclude themselves from the class. *Id.* at 812-13. If those were the kinds of "substantial damages claims" entitling class members to an opt-out right, then surely the kinds of damages claims at issue here, for which other plaintiffs have been awarded and settled for large amounts of money, trigger that right as well. *See* R. 1750, 100, RE 163, 166; R. 1095, RE 156; R. 2008, RE 169; R. 2262, docket entry 222 (under seal).

Tower Loan relies on pre-*Shutts* precedents that provided courts in this circuit discretion to certify (b)(2) classes, even where money damages were

involved. TL Br. 50 (citing *Kincade* decision and *Penson* decision, both from 1981). Those decisions also pre-dated *Allison*, which, on a non-constitutional basis, narrowly defined the circumstances in which opt-out rights can be denied, as explained above. Oddly, Tower Loan relies on *Allison*, as well as *Monumental Life*, to respond to *Shutts*, making the uncontroversial claim that, under *Allison*, "there is no absolute right to opt out." TL Br. 50. But neither *Allison* nor *Monumental Life* even considered the *Shutts* issue. Moreover, *Allison* denied class certification, and thus could not have impaired the due-process right to opt out; and, as noted earlier, *Monumental Life* specifically directed the lower court to consider opt-out rights on remand. 343 F.3d at 341.

Unable to deal with the relevant precedents, Tower Loan argues that the objectors have forfeited their constitutional argument because they appeared below, submitting themselves to the jurisdiction of the district court. This argument fails for a number of independent reasons.

First, this argument was neither raised nor decided below. Therefore, it is waived. *See, e.g., Castillo v. Barnhart*, 325 F.3d 550, 553 (5th Cir. 2003).

Second, the Crystian Objectors moved to opt out in the district court; they did not object to the settlement on its merits. When objectors follow that course of action, they have *not* forfeited their constitutional right to opt out. *In re Real*

Estate Title & Settlement Services Antitrust Litig., 869 F.2d 760, 770-71 (3d Cir. 1989).[10]

Finally, and most fundamentally, this argument is foreclosed by *Ortiz*, 527 U.S. 815. In that case, the objectors appeared in the district court and raised a host of arguments on the merits of the settlement, as well as the right-to-opt-out argument based on *Shutts*. *See* Brief for Petitioners in *Ortiz v. Fibreboard Corp.*, No. 97-1704, at 39-42 (U.S. Aug. 6, 1998) (available in Lexis at 1997 U.S. Briefs 1704, *39-*42). The Supreme Court did not even intimate that the *Shutts* argument had been waived because arguments on the merits had also been raised. To the contrary, the Court dealt with *Shutts* at some length, using it as additional authority for its decision. 527 U.S. at 847-48.

CONCLUSION

The decision below certifying a mandatory class and approving the non-opt-out settlement should be reversed, with directions to lift the injunction barring class

---

[10]Paradoxically, at the same time that Tower Loan claims that the Crystian Objectors forfeited their constitutional rights by appearing before the district court, it faults the Crystian Objectors for not having challenged the fairness of the settlement. It claims, without any basis, that the Crystian Objectors "probably" believe there is no basis for challenging the settlement's fairness. TL Br. 53. Suffice it to say that the Crystian Objectors believe that the settlement is horribly unfair, but have not challenged it because they are content to litigate their state-court action after they vindicate their opt-out rights.

members from prosecuting individual damages actions against the defendants.

Respectfully submitted,

Brian Wolfman
Alan B. Morrison
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Robert B. McDuff
767 North Congress St.
Jackson, MS 39202
(601) 969-0802

Counsel for Appellants Rebecca Crystian
and Martha Shaffer

November 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on November 24, 2003, I caused to be served two hard copies, and one electronic copy pursuant to 5th Cir. R. 31.1, of the foregoing brief on the following counsel by first-class mail, postage prepaid:

Lawrence E. Abernathy, III
420 North 6th Avenue
P.O. Box 4177
Laurel, MS 39441-4177

Paul Stephenson, III
William Goodman, Jr.
Watkins & Eager
P.O. Box 650
Jackson, MS 39205-0650

Lawrence C. Gunn, Jr.
P.O. Box 1588
Hattiesburg, MS 39403-1588

Charles R. Mullins
Coxwell & Associates, PLLC
500 North State Street
Jackson, MS 39201

Marshall Smith
Barrett Law Office, P.A.
404 Court Square North
Post Office Box 987
Lexington, MS 39095

Wayne Hynum
1507 Hardy St., Suite 105
Hattiesburg, MS 39401

____

Brian Wolfman

CERTIFICATE OF COMPLIANCE

Pursuant to the 5th Cir. R. 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief contains 5753 words, excluding exempted portions, and it was prepared in WordPerfect 7.0 using proportionally spaced Times New Roman 14-point type.

____
Brian Wolfman
Attorney of Record for Appellants Crystian and Shaffer