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

OPENING BRIEF OF APPELLANTS REBECCA CRYSTIAN AND MARTHA SHAFFER

Brian Wolfman
Alan B. Morrison
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

August 7, 2003

CERTIFICATE OF INTERESTED PERSONS

No. 03-60339, *Smith v. Tower Loan of Mississippi*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Class Plaintiffs-Appellees
Claudia Smith, Wilbert Walker, and all those similarly situated

Counsel for Class Plaintiffs-Appellees
Lawrence E. Abernathy, III

2. Defendants-Appellees
Tower Loan of Mississippi Inc.
American Federated Insurance Company
American Federated Life Insurance Company
First Tower Loan Inc.

Counsel for Defendants-Appellees
William F. Goodman, Jr.
Pat H. Scanlon
Paul H. Stephenson, III
Watkins & Eager PLLC
Lawrence Gunn, Jr.
L. Clark Hicks, Jr.
John M. Herke
Gunn & Hickes, PLLC

3a. Appellants
Rebecca Crystian and Martha Shaffer

Counsel for Appellants Crystian and Shaffer
Brian Wolfman
Alan B. Morrison
Amanda Frost
Public Citizen Litigation Group
Robert B. McDuff

3b. Appellants
White Class Plaintiffs and Martin Class Plaintiffs

Counsel for White Class Plaintiffs and Martin Class Plaintiffs
Charles R. Mullins
Coxwell & Associates, PLLC

3c. Appellants
Hynum Class Plaintiffs

Counsel for the Hynum Class Plaintiffs
G. Wayne Hynum

3d. Appellants
Clifton Gray, Larry Pickens, and 693 Movant-Objectors

Counsel for Clifton Gray, Larry Pickens, and 693 Movant-Objectors
Don Barrett
Marshall Smith
Barrett Law Office, P.A.
Elizabeth Cabraser
Lieff, Cabraser, Heimann & Bernstein

_____
Brian Wolfman
Attorney of Record for Appellants Crystian and Shaffer

STATEMENT REGARDING ORAL ARGUMENT

Ordinarily, in circumstances like those presented here, where appellants believe that reversal of the district court's class certification decision is mandated by precedents of this Court and of the Supreme Court, appellants would not request oral argument. However, because of the importance of the underlying class action and the legal right at stake (the right of absent class members to opt out), on balance appellants believe that oral argument would assist the Court in resolving this appeal.

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MISCELLANEOUS

This appeal involves the propriety of the district court's class certification and approval of a settlement that purports to resolve claims for substantial money damages without affording the class members the opportunity to exclude themselves from the class. As explained below, the lack of an opt-out right dooms the certification and the district court's approval order.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court exercised federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367. Complaint, ¶ 5, R. 2. In accordance with a memorandum opinion, R. 2339, RE 57, and a final judgment, R. 2431, RE 34, both entered on March 31, 2003, the district court finally certified this class action on a non-opt-out basis pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(1)(A) and approved the proposed non-opt-out class action settlement. The district court determined that there was no just reason for delay and entered a final judgment pursuant to Fed. R. Civ. P. 54(b), as to all claim and all parties. R. 2453, RE 56. Appellants Crystian and Shaffer filed a notice of appeal on April 17, 2003. R. 2454, RE 32. This Court has jurisdiction under 28 U.S.C. § 1291. Because the district court's judgment also enjoins appellants' pending state-court suit, R. 2450 (¶ 15), RE 53, this Court also has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether, in light of this Court's decisions in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), and *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), the district court erred in certifying a non-opt-out class under Federal Rule of Civil Procedure 23(b)(2) where

> (a) individual money damages constitute the primary relief requested in the complaint and damages are provided under the class settlement;
>
> (b) the class settlement releases all money damages claims against defendants, including the claims in appellants' pending state-court suit; and
>
> (c) as to a large segment of the class, the requested injunctive relief is irrelevant because those class members will have no further dealings with the defendants and the settlement's non-monetary components will not benefit them.

2. Whether the district court erred in certifying a non-opt-out class under Federal Rule of Civil Procedure 23(b)(1)(A), absent a showing that the class members' individual claims for money damages would create a risk of establishing incompatible standards of conduct for the defendants.

3. Whether the district court's class certification and judgment, which purport to bind the absent class members with respect to their individual damages claims, but do not provide the class members an opportunity to opt out with respect to those claims, violate the class members' rights to due process under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and its progeny.

STATEMENT OF THE CASE

Introduction

This appeal is brought by class members Rebecca Crystian and Martha Shaffer (the "Crystian Objectors"), who objected below to the non-opt-out class action settlement approved by the district court. Along with other class members, including about 850 who are appellants before this Court, the Crystian Objectors allege that defendant Tower Loan of Mississippi and its affiliates engaged in a pattern of predatory loan practices. In particular, the class alleges that defendants used fraudulent and misleading disclosures and coercive marketing practices to induce thousands of borrowers to purchase, in conjunction with their loans, insurance at unfavorable rates and under unlawful conditions. For instance, as part of the loan agreements, class members were induced to buy personal property insurance that they claim was worthless because the property was fully insured under their existing homeowner's policies. *See, e.g.*, Affs. of Mary Agee ¶ 6, John

Hust ¶ 6, & Christine Brown, ¶ 5, Pls. Ex. 1(a), (b), & (c) (filed Oct. 12, 2001), RE 182-84. Ms. Crystian maintains that her loans with the defendants included charges for life and property insurance, but that she was not told that the insurance was optional. R. 1474. Ms. Shaffer's loans similarly included charges for life and property insurance. She was not told about the property insurance charges and was told that buying life insurance was required to obtain the loan. *Id.* In sum, the class asserts that defendants' practices violate a wide range of duties imposed by Mississippi common law and state and federal statutes.

Although the claims of the thousands of plaintiffs share some common characteristics, there are substantial differences as well. The plaintiffs purchased different kinds of insurance — credit life, credit disability, property, or some combination of the three. Other circumstances — such as whether or not the insurance was forced on a particular plaintiff, the individual terms of each loan, the length of the loan period, and the representations of Tower Loan agents to each plaintiff — differ from plaintiff to plaintiff.

The Crystian Objectors believe that their claims would result in awards of substantial money damages. Therefore, they sought to opt out of the class action settlement and pursue their individual claims in a Mississippi state court action that they had filed in February 1998, R. 1435, but that the district court had enjoined

seven months later. R. 189. The district court's order on appeal made that injunction permanent by certifying a non-opt-out class and approving a settlement that eliminates the class members' claims for money damages. *See* R. 2450 (¶ 15), RE 53.

To place in context the Crystian Objectors' contention that they have a right to opt out, Part A below explains the events leading up to the settlement. Part B describes the non-opt-out settlement reached by class counsel and the defendants. Part C addresses the district court's opinion approving the settlement and the non-opt-out certification.

A. The Crystian Objectors' Mississippi Suit And The Federal Action Enjoining It.

On February 17, 1998, the Crystian Objectors, along with numerous other plaintiffs, filed suit in the Circuit Court of Jefferson County, Mississippi, against Tower Loan and affiliated companies. The principal relief sought in the state court complaint is money damages, including compensatory and punitive damages. *See* Complaint ¶ 101, *Barnes v. First Tower Loan, Inc.*, No. 98-0022 (Cir. Ct. Jefferson Cty., Miss. filed Feb. 17, 1998), R. 1467. The complaint contains various counts, including breach of fiduciary duty, breach of the covenants of good faith and fair dealing, fraudulent misrepresentation or omission, negligent misrepresentation

and/or omission, civil conspiracy, restitution, unjust enrichment, fraud, and usury. *Id.* ¶¶ 28-93, R. 1451-64.

The state-court complaint, which does not seek class action certification, is based in part on allegations of "insurance packing" — that defendants, as part of the plaintiffs' consumer loans, included charges for insurance at high rates that offers little value to the borrowers and primarily protects creditors. Plaintiffs allege that the insurance was marketed through a "captive insurer," defendant American Federated, whose corporate affiliation with Tower Loan was not disclosed, and that plaintiffs were given no actual choice about whether to purchase the insurance. *Id.* ¶¶ 13, 15, R. 1448, 1448-49; *see* Aff. of Prof. Gene A. Marsh, University of Alabama School of Law, at 5-7, R. 1393-95, RE 158-60 (explaining "packing" and how it harms consumers). Plaintiffs further allege that defendants are guilty of "flipping" — that they encouraged plaintiffs to refinance, or renew, the balance due on their loans with a new loan at frequent intervals to pack additional insurance premiums on the new loan and to allow the lender to receive additional interest, or impose added costs, on the same amount of funds loaned. *Barnes* Complaint, ¶¶ 28-31, R. 1451; *see* March Aff. at 4, R. 1392, RE 157 (explaining "flipping" and why such credit renewals are costly to consumers).

In May 1998, several months after the state-court complaint was filed, the present class action was filed in the District Court for the Southern District of Mississippi. *See* Complaint, R. 1. The allegations against Tower Loan and its affiliates were similar to those advanced in the state court case, but the federal complaint included separate counts alleging violations of several federal statutes, including the Truth in Lending Act ("TILA") and the Fair Debt Collection Practices Act ("FDCPA"). R. 22-24, 27.

In September 1998, the district court granted class certification on a non-opt-out basis under Fed. R. Civ. P. 23(b)(1)(A), (b)(1)(B), and (b)(2). *See* Order of Class Certification, R. 189. (The court later rescinded the (b)(1)(B) certification. R. 883; *see* R. 2349, RE 67). The court denied opt-out certification under Rule 23(b)(3). *Id.* On the same day, the court enjoined at least a dozen actions brought against defendants in state court, including the state-court action in which the Crystian Objectors are plaintiffs. *See* Order, R. 191.

The Second Amended Complaint, filed on July 20, 2001, is the complaint that was resolved in the class action settlement at issue in this appeal. Like the Crystian Objectors' state-court complaint, it focuses almost entirely on obtaining money damages from the defendants. *See* R. 476. That complaint describes how the defendants harmed the plaintiffs financially by engaging in "insurance packing,"

charging excessive interest rates, selling the plaintiffs insurance on personal property that has little or no value, charging excessive premiums, and the like. Second Amended Complaint, ¶¶ 14-22, R. 480-83; *see also, e.g.*, *id.* ¶¶ 44, 51, 58, 66, 70-71, 74, 80, 85, 89, 92, 95-96, 100-01, 103, 109, R. 490, 494, 496-506, 508 (indicating that each of the first 18 counts of the Second Amended Complaint seeks compensatory damages). The last count of the complaint makes a brief, boilerplate request for declaratory and injunctive relief. *See id.* ¶¶ 113-15, R. 509-10.

Like the body of the Second Amended Complaint, the prayer for relief is principally concerned with money damages: It first asks to certify the class, *id.* ¶ 121(a), R. 513, RE 148, then requests "actual and compensatory damages," *id.* ¶ 121(b), "treble damages" under federal antitrust law, TILA, FDCPA, and other statutes, ¶ 121(c), "punitive damages in a fair and reasonable amount," ¶ 121(d), R. 514, RE 149, restitution and/or disgorgement, ¶ 121(e), and finally any monetary relief that might be available under Mississippi Code Annotated § 63-19-55. *Id.* ¶ 121(f). Only after requesting comprehensive remedies for compensatory and punitive damages and other forms of monetary relief does the Second Amended Complaint request declaratory and injunctive relief. *Id.* ¶ 121(g), R. 514, RE 149

B. The Non-Opt-Out Class Action Settlement.

On April 11, 2002, class counsel and defendants reached a proposed settlement. *See* Class Action Settlement Agreement, R. 948. The settlement provides that class members may not exclude themselves from the class, even as to their claims for money damages. Consequently, the settling parties sought final certification of the claims in the Second Amended Complaint on a non-opt-out basis under Rules 23(b)(1)(A) and (b)(2). *See* R. 962-63.

The settlement provides compensatory damages of about $2.23 million to be distributed among approximately 103,000 class members. *See* Settlement Agreement, at 12-13, R. 979. Approximately 67,000 class members will receive compensatory damages of $27.50, and approximately 28,000 class members, who were only co-obligors on loans, will receive compensatory damages of $13.75. R. 979 & n.2, RE 152. This total amount is less than 10% of the net insurance premiums paid by the class over the relevant period. *See* Mem. Op. at 76, R. 2390, RE 108. The settlement pays no greater compensatory damages to class members who have borrowed more than once during the class period than it does to class members who are one-time borrowers.

In providing compensatory relief, the settlement makes no attempt to differentiate among class members depending on the amount of their premiums, the

lengths of their loans, the kinds of insurance they purchased, whether and how defendants misled them, or any other characteristic of their loans or their interactions with defendants' agents.

According to class counsel's fairness hearing testimony, the settling parties originally attempted to provide compensatory relief on a "claim-by-claim" basis, but doing so was a "morass" because of the differences among the class members. Abernathy Testimony, R. vol. XI 46-47, RE 173-74. Ultimately, class counsel "figured, well, this [claim-by-claim relief] is just — this is unworkable." *Id.* at 47, RE 174. So, despite class counsel's understanding that class members' claims differed greatly from one another, they agreed to settlement awards on "a flat rate per person." *Id.* In other words, all class members — except those who were only co-obligors — are to receive the exact same amount in compensatory damages. *See* Parker Testimony, R. vol. XI 153-54, RE 178-79; Settlement Agreement, at 29, R. 979, RE 152.

The settlement agreement also provides punitive damages of about $4.39 million, with principal borrowers receiving $41.25 and co-obligors receiving $20.62. R. 980, RE 153. Repeat borrowers will receive another $18.00 in punitive damages. *Id.* According to the settling parties, approximately 45,000 class members, or 44% of the class, will not receive that additional payment because

about 45,000 class members were not repeat borrowers during the entire 8½-year class period (February 15, 1993, to September 1, 2001). *Id.*; *see also* Parker Testimony, R. vol. XI 149-51, RE 175-77 (approximately 47,000 class members not repeat borrowers). The maximum any class member will receive in compensatory and punitive damages — regardless of the number of loans, the type or amount of insurance involved, the amount of premiums paid, the conduct engaged in by the defendants' agents who sold the loans, and the class member's knowledge of whether the loans included insurance — is $88.75, which is the amount available to class members who were principal obligors on more than one loan.

The settlement agreement also provides prospective relief, which, according to the settling parties, justifies mandatory class certification: It bars the defendants from engaging in numerous loan practices, such as charging deferral fees and using the Rule of 78ths to refund insurance premiums. R. 972. The agreement also contains different measures aimed at providing adequate disclosure of Tower Loan's lending practices and its relationship with the insurer, defendant American Federated. However, this relief, which the district court and settling parties have characterized as injunctive, generally will affect only those class members who borrow again from Tower Loan and, even then, only for a period of five years. R.

963; Final Judgment, R. 2433-34 (¶ 11), RE 36-37. After that, the defendants are free to return to their old practices. *See id.*

Of critical importance to the issues raised by the Crystian Objectors on appeal is the settlement agreement's comprehensive release. Under it, the defendants are released from "all manner of claims, demands, actions, suits, causes of action..., *damages* whenever incurred, liabilities of any nature whatsoever, ... now or in the future, known or unknown, suspected, in law or equity, that any Class Member has, had or may have, which relate in any way to the allegations against" the defendants in this class action, prior related actions, "or relate in any way to the [defendants'] loan/insurance practices." Settlement Agreement at 36-37, R. 986-87, RE 154-55 (emphasis added). This release purports to bar any claim by any class member for money damages involving any aspect of defendants' loan practices. Thus, if the settlement agreement is sustained, all claims for money damages regarding Tower Loan's lending practices asserted by appellants Crystian and Shaffer, or by any other class member, would be barred.

C. Post-Settlement Proceedings Below And The District Court's Ruling Approving The Settlement And Non-Opt-Out Certification.

On June 17, 2002, the Crystian Objectors — who had involuntarily become members of the class certified by the district court — filed a motion to opt out of the litigation and objected to the settlement. R. 1474. They argued that

certification under the non-opt-out provisions of Rule 23(b)(1)(A) and (b)(2) was prohibited by this Court's decisions in *Allison v. Citgo Petroleum*, 151 F.3d 402 (5th Cir. 1998), and *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), because the class members' claims for individual monetary damages predominate over their claims for equitable relief.

A key element of their argument was that class certification under Rule 23(b)(2) was inappropriate because of the highly individualized nature of the claims involved. In support of this contention, they relied, among other things, on the affidavit of attorney Richard A. Freese, who had represented 23 plaintiffs in a similar case against a different Mississippi loan company. Freese Supp. Aff., R. 1748-52, 1800-01, RE 161-67. Those plaintiffs had won judgments that varied widely in amount, ranging from $5000 to $250,000 in compensatory damages. R. 1800, RE 166.

At the fairness hearing held pursuant to Federal Rule of Civil Procedure 23(e), class counsel conceded that the class members' circumstances differed radically from each other. Abernathy Testimony, R. vol. XI 47, RE 174; *see also* Ex. A to Aff. of Glenna Morgan, Defendants' Ex. 55 (chart delineating five different types of insurance sold in conjunction with defendants' loans); *supra* at 9-10 (discussing class members' varying circumstances). As explained above, class

counsel had recognized this problem, but to craft class-wide compensatory relief to take into account these myriad differences proved to be a "morass" that, in their view, necessitated treating everyone virtually identically. R. vol. XI 46, RE 173.

On March 31, 2003, over the objections of approximately 1200 class members, Mem. Op. at 31, R. 2359, RE 77, the district court approved the proposed class settlement. The court applied the six-part *Reed* criteria and determined that the settlement was within the range of reasonableness. *See Reed v. General Motors Corp.,* 703 F.2d 170, 172 (5th Cir. 1983).

The court sought to balance the strengths of the plaintiffs' claims against the settlement's benefits. Although recognizing that it should not opine definitively on the merits of those claims, the court explained that, in its view, the class would face significant barriers on the merits, despite evidence of large judgments involving similar claims, *see* Freese Supp. Aff., R. 1750, 1800, RE 163, 166, and despite class counsel's tacit concession that a large number of class members — 1000 to 1500 in his estimate — would likely be able to obtain significant damages if permitted to go forward with their state-court lawsuits. *See* Abernathy Testimony, R. vol. XI 37-38, RE 171-72; *see also* Aff. of Edward Blackmon, Jr., R. 1095, RE 156 (statement of attorney who litigated thousands of cases involving issues involved here that "all the individual settlements were far in excess of those contemplated by the Tower

Class Settlement"); Aff. of Anthony Sakalarios, R. 2008, RE 169 (statement of attorney who represented six clients in three cases involving claims of insurance packing and flipping that most settled prior to trial "for significantly more than $100, as is currently allocated under the proposed [class action] settlement").[1]

The court also considered the suit's complexity, expense, and likely duration and noted that "this controversy covers eight years of loans and insurance purchases . . . [concerning] virtually every aspect of the business practices of Tower and American Federated is in issue." R. 2366, RE 84. Thus, the court concluded, continued litigation would be a burden on all involved, which weighed in favor of settlement. *Id.*

Of particular relevance to the Crystian Objectors' appeal, the court certified the class on a non-opt-out basis under both Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2). The court held that certification under (b)(1)(A) was appropriate because defendants faced separate similar actions that, because of the nature of some of the equitable relief requested, might result in different courts establishing incompatible standards of conduct for the defendants. R. 2410, RE

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[1] Docket entry 222 contains information concerning prior settlements with Tower Loan that resolved claims similar to those alleged in this class action. That information was placed under seal and is the subject of a motion to unseal pending before this Court. *See* Motion to Unseal Records on Behalf of Appellants Rebecca Crystian, et al. (filed July 2, 2003).

126. The court acknowledged arguments made by the Crystian Objectors and others challenging the mandatory certification under Rule 23(b)(1)(A). However, the court rejected the argument that "one jury's decision to award damages and another jury's decision not to award damages (or to award damages in a different amount) do not 'establish incompatible standards of conduct for the party opposing the class.'" *See* R. 2409, RE 125. The court stated that this action was really one about "how Tower has and will in the future do business," and therefore that Rule 23(b)(1)(A) mandatory certification was appropriate. R. 2410, RE 126. The court did not, however, point to any precedents involving substantial claims for money damages in which Rule 23(b)(1)(A) certification had been upheld.

The district court also found that equitable relief predominated over monetary relief and thus that Rule 23(b)(2) certification was appropriate under this Court's decision in *Allison v. Citgo Petroleum*, 151 F.3d 402 (5th Cir. 1998). The court dismissed the Crystian Objectors' view that the federal complaint's near-exclusive focus on money damages, the settlement agreement's broad release of all kinds of damages claims, and the "highly individualized" claims of the plaintiffs demonstrated that damages predominate over equitable relief. *See* R. 2413, RE 129. The court found instead that the class's damages claims were "incidental" to the settlement's injunctive relief under *Allison*. Nonetheless, the court insisted that the

settling parties agree to decertify, and exclude from the release, the class's FDCPA claims. It did so because those claims did not warrant certification under the claim-by-claim approach mandated by *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000). The court believed that injunctive relief is not available under the FDCPA, s*ee* R. 2424-25, RE 140-41, leaving damages the only remedy. However, the district court did not explicitly address the related question raised by objectors: whether the class should be certified at all in light of the fact that more than 40% of the class will not do business with the defendants in the next five years and thus cannot benefit from prospective relief.

STANDARD OF REVIEW

The questions presented in this appeal — whether the district court's non-opt-out class certification violates Rule 23 or due process — are questions of law subject to de novo review. *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 408 (5th Cir. 1998).

Appellants recognize that, even where review is plenary, a district court's ruling on issues of law may be persuasive. In this regard, it is important that the district court's order under review is, from beginning to end, largely a word-for-word rendition of defendants' proposed findings of fact and conclusions of law. In particular, on the class certification issue presented here, the district court

reproduced defendants' proposed conclusions of law with almost no deviations, including verbatim adoption of headings, footnotes, cross-references, citations to objectors' briefs, and other details. *Compare, e.g.,* R. 2412-30, RE 128-46, *with* Defendants' Proposed Conclusions of Law, ¶¶ 114-140 & Conclusion, pp. 95-96. Although this practice does not alter the standard of review — which, as noted, is de novo in any event — this Court has looked with great disfavor on such "rubber-stamped" findings on many occasions, because they present this Court with an advocate's view of the case. *Matter of Complaint of Luhr Bros., Inc.,* 157 F.3d 333, 338 & n.4 (5th Cir. 1998); *see also, e.g, Sierra Club v. Cedar's Point Oil Co.*, 73 F.3d 546, 574 (5th Cir. 1996); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 502 (5th Cir. 1982); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980). Other courts have also criticized this practice in strong terms. *See, e.g., DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990) (adopting portions of briefs is "disapproved . . . because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. [citations omitted]. Judicial adoption of an entire brief is worse."); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 & n.46 (11th Cir. 1997) (similar).[2]

[2] Appellants have been unable to locate defendants' proposed findings in the docket, and, therefore, they have lodged copies of the findings with the Court.

SUMMARY OF ARGUMENT

Neither Rule 23 nor the Constitution permit certification of a mandatory, non-opt-out class action with respect to the individual claims for damages at issue in this case. Under *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the overwhelming number of individual issues encompassed by the class members' claims for damages preclude certification under Rule 23(b)(2), which was designed to address only the "group remedies" of injunctive and declaratory relief. The injunctive-type relief accorded by the class settlement does not suffice to support (b)(2) certification because the settlement also releases the class members' individualized state-law damages claims, such as those pled in the Crystian Objectors' pending state-court suit.

The class also fails, as a matter of law, to satisfy Rule 23(b)(1)(A), which applies only when separate claims by class members place the defendant at risk of being subject to "incompatible standards of conduct." The district court's reasoning in applying (b)(1)(A) here, if correct, would swallow the remainder of Rule 23 by holding that certification under that subdivision is permissible anytime two or more juries could reach different results in damages actions arising from related circumstances. This expansive view of Rule 23(b)(1)(A) is not the law. *See, e.g.*, *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984).

Finally, the district court erred by failing to acknowledge that due process prohibits binding plaintiffs to a class judgment that releases their individual claims for damages without providing them an opportunity to exclude themselves from the class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CERTIFYING THE CLASS AND APPROVING THE SETTLEMENT ON A NON-OPT-OUT BASIS UNDER RULES 23(b)(2) AND (b)(1)(A).

Before a class may be certified under Rule 23, it must meet each of Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, and it must be maintainable under at least one of the three subdivisions of Rule 23(b). The first two subdivisions of Rule 23(b) encompass "mandatory" class actions, so-called because they do not require that class members be allowed to exclude themselves from the class. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13 (1999). By contrast, in class actions certified under Rule 23(b)(3), all class members have the right to opt out and bring their own litigation. *See* Fed. R. Civ. P. 23(c)(2). The district court held that the Rule 23(a) criteria had been met, and that the class could be maintained as a mandatory class under both Rule 23(b)(1)(A) and (b)(2). It is possible that this case, involving as it does thousands of different individual circumstances, does not meet the Rule 23(a)

criteria or could not be certified on an opt-out basis for failure to meet Rule 23(b)(3)'s "predominance" requirement. However, because the Crystian Objectors seek only the right to opt out to pursue their pending state court action — which they would have exercised had the case been certified under Rule 23(b)(3) — they address only the question whether the case was properly certified under the non-opt-out provisions of the Rule.

A. This Court's Decisions In *Allison v. Citgo Petroleum* and *Bolin v. Sears* Doom The District Court's Rule 23(b)(2) Certification.

1. Certification under Rule 23(b)(2) is proper only where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as whole." No opt-out right is accorded under Rule 23(b)(2) because where an injunction or declaration of legal rights is obtained — for instance, to restructure a prison system or to abate a public nuisance — such relief necessarily affects all similarly-situated people and can only be achieved on a global basis.

The settling parties justify Rule 23(b)(2) certification here on the ground that the relief involved is injunctive. The Crystian Objectors acknowledge that much of the relief accorded by the settlement — the defendants' promise to follow certain procedures and alter certain conduct in making loans and selling insurance for five

years, but not thereafter — does affect defendants' future conduct for a limited period of time. The settlement thus accords injunctive-*like* relief.

It is improper, however, to focus on a *settlement* in characterizing the relief sought by the class and in determining which, if any, subdivision of Rule 23(b) is applicable to this case. As the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), teaches, this Court may not look to the settlement agreement to determine whether a class may be certified, but rather must examine the claims pled in the complaint and released by the settlement to make that determination. *Id.* at 622-23 & n.18. Thus, when Rule 23 speaks of the parties' "claim or defenses" it "manifestly refers" not to the manner in which they are described and resolved in the parties' settlement agreement, but "to the kinds of claims or defense that can be raised in courts of law as part of an actual or impending law suit." *Id.* at 623 n.18 (quoting *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring in part and concurring in the judgment)).

Viewed from the perspective of the operative pleading — the Second Amended Complaint, R. 476 — there is no serious dispute that this suit is one principally for money damages resulting from the defendants' past illegal conduct. As described in detail in the Statement of the Case above (at 7-8), the Second Amended Complaint's overwhelming objective, like that of the prior complaints, is

to obtain money damages from the defendants. That complaint describes how the defendants harmed the plaintiffs financially by engaging in "insurance packing," charging excessive interest rates, providing insurance on personal property with little or no value, charging excessive premiums, and the like, and the complaint's first 18 counts seek money damages only. R. 490-508. Thus, the only plausible reading of the complaint is that its request for equitable relief is purely ancillary — an afterthought to the principal claims for damages. Indeed, that is the way that the Second Amended complaint characterizes its request for injunctive relief. *See id.* ¶ 114, R. 510 (equitable relief is appropriate "because damages can not adequately compensate plaintiffs and the Class for the injuries suffered and threatened."). And, as explained above (at 8), nowhere is the predominance of the class's claims for damages more evident than in the prayer for relief, which asks for various forms of compensatory relief and then adds, seemingly as an afterthought, an unadorned and non-specific prayer for declaratory and injunctive relief. *Id.* ¶ 121(g), R. 514, RE 149. It is thus pure sophistry to suggest, as does the settlement agreement, that "the primary objective of the litigation" was to obtain prospective relief. *See* R. 952.[3]

[3] The Second Amended Complaint also requests pre- and post-judgment interest, R. 514, RE 149, which only makes sense as an adjunct to the class members' damages claims.

Even more important than consideration of the claims pled in the Second Amended Complaint is the release set forth at page 36 of the Settlement Agreement. R. 986-87, RE 154-55. In a settlement, the release is critical because it, and not the complaint, defines the res judicata effect of the action. Thus, if the release expressly applied only to injunctive relief, the Crystian Objectors would be free to litigate their state-court damages action.[4]

Tower Loan is released from "all manner of claims, demands, actions, suits, causes of action..., damages whenever incurred, liabilities of any nature whatsoever, ... now or in the future, known or unknown, suspected, in law or equity, that any Class Member has, had or may have, which relate in any way to the allegations against" the defendants in this class action, prior related actions, "or relate in any way to the [defendants'] loan/insurance practices." R. 986-87, RE 154-55. The release thus purports to bar any claim by any class member for money damages involving any aspect of the defendants' loan practices. In sum, properly understood — by considering the Second Amended Complaint and the settlement release — this case, if not one exclusively for money damages, is a hybrid action in which the

[4] The district court's final judgment permanently enjoins the Crystian Objectors' state-court suit and that injunction also has the effect of eliminating their damages claims. R. 2450 (¶ 15), RE 53.

class members' claims for money damages and other forms of monetary relief vastly predominate over the claim for declaratory and injunctive relief.

2. The circumstances in which a district court may certify a hybrid relief class action under Rule 23(b)(2) were addressed by this Court in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (1998), which upheld a district court's refusal to certify a class action challenging a defendant's employment practices. Like the class plaintiffs here, the *Allison* plaintiffs sought both injunctive and monetary relief and requested Rule 23(b)(2) certification. The district court refused to certify the class, finding that the plaintiffs' claims for monetary relief predominated over their claims for injunctive relief. *Id.* at 410. This Court agreed, finding that Rule 23(b)(2) certification is appropriate only when the nonmonetary relief predominates. It then announced a test for determining whether injunctive or monetary relief predominates:

> [M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be 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. Incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; they should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. at 415 (emphasis in original, citations omitted).

As noted above, in determining whether the class may be certified, *Amchem* requires that the court focus not on the substantive terms of the settlement, but "on the legal and factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." 521 U.S. at 623. Thus, in considering the propriety of (b)(2) certification, it is necessary to focus on the damages-based claims pled in the Second Amended Complaint that would be released in the settlement.

Those claims are certainly not "incidental" to injunctive relief under the *Allison* standard. The class members' claims are highly "individualized," and cannot be redressed through a "group remedy." Rather, at trial, each plaintiff would be required, among other things, to prove that he or she entered into a loan with one or more of the defendants, and that the particular loan documents violated TILA, the FDCPA, and a wide range of common-law duties. Resolving the class members' common-law claims would require knowing whether the class member was or was not told that insurance was optional (or whether the class member even

knew that "packing" had occurred); whether "flipping" (*i.e.*, the loan extension or renewal) occurred and was in fact economically disadvantageous to the class member; whether the class member relied on the misrepresentations of the defendants' agents; whether the terms of the particular loan were usurious; and so forth. Moreover, as to both the federal and common-law claims, the court would be required to consider the extent of the individual damages suffered (including questions relating to the length of each class member's loan, the type or quality of the personal property insured, mitigation, mental suffering and other consequential damages, and the like), and a host of other matters specific to that class member's claims.

Allison, in essence, requires the court to ask certain questions about the relationship between the legal claims pled or released and the remedies sought by the plaintiff class to determine whether damages are "incidental" to injunctive relief: First, would "damages . . . flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief?" 151 F.3d at 415. The answer to that question here is plainly "no." As noted above, the class members would have to show that they actually suffered tangible injury and in what amount.

Second, if an injunction were granted, would the class members receive damages "automatically" "once liability to the class (or subclass) as a whole is established?" *Id.* Again, the answer is "no." In *Allison*, a finding of discrimination would not have meant that every member of the class was entitled to individual compensatory damages (let alone of the kind that could be calculated on a formulaic basis). And so here, a finding, for instance, that insurance packing is unlawful in certain circumstances (such as where the agent said insurance was a mandatory loan component) and justified an injunction would not, without an individual hearing, establish that any particular absent class member was entitled to monetary relief, let alone in what amount. *See also Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (adopting *Allison* "incidental damages" standard and explaining that (b)(2) certification would only be appropriate where damages are "so tangential" as to defeat class member's constitutional right to trial by jury) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962)); *see id.* ("When substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out.").[5]

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[5] In a recent decision, this Court rejected Rule 23(b)(3) certification on the ground that no comprehensive damages formula was capable of capturing the

(continued...)

In several respects, the settling parties effectively conceded below that the *Allison* standard has not been met. First, the injunction purportedly sought by the class and the prospective relief accorded by the settlement would alter the defendants' practices in the making of loans only for five years after the settlement becomes effective. That type of relief can only affect class members who enter into new transactions with Tower Loan. For example, to the extent that the settlement requires Tower Loan to calculate charges and fees in conjunction with loan extensions in a certain manner — presumably a remedy to combat the consequences of "flipping" — that cannot possibly benefit someone who was harmed by "flipping" in the past but does not enter into a loan extension or renewal over the five-year settlement period. For those class members, the *only* relief available is damages, and Rule 23(b)(2) cannot possibly be applicable.

In this regard, the settlement agreement itself acknowledges that, at the least, more than 40% of the class falls into the "damages only" category. The agreement

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[5] (...continued)
differing circumstances of the class members' antitrust injuries. *Bell Atlantic Corp. v. AT&T Corp.*, ___ F.3d ___, 2003 WL 21660126, at *7-*9 (5th Cir. July 16, 2003). If anything, the class members' circumstances in *Bell Atlantic* were less variegated than they are here. Because, under *Bell Atlantic*, this case might not be certifiable on an *opt-out* basis under (b)(3), it surely cannot be certified on a *non-opt-out* basis under (b)(2).

notes that there are approximately 103,468 class members, R. 959 (¶ III.G), of whom 58,187 are repeat borrowers, R. 980 n.4, RE 153, leaving 45,281 class members, or nearly 44% of the class, who are not repeat borrowers. The class, moreover, is defined to include people who have borrowed over an *8½-year period*, R. 2432 (¶ 4), RE 35, and, therefore, the percentage of class members likely not to be repeat borrowers over the settlement's *five-year* life is considerably greater than 44%.[6]

As noted earlier, when the district court approved the settlement, it did so with the caveat that the settling parties agree not to release certain federal claims and to narrow the class certification accordingly. (This suggestion was readily agreed to by the settling parties, which was not surprising since it was the defendants' idea: The district court's order reflects nearly verbatim the defendants' proposed findings in this respect. *Compare* R. 2412-13, 2424-25, 2429, *with* Proposed Findings ¶¶ 114, 132-34, & Conclusion ¶ 2, p. 96.

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[6] The district court made passing reference to this issue — again, in a verbatim adoption of the defendants' proposed conclusions of law (at ¶ 127) — when it noted "the substantial probability that the vast majority of Class Members are or will be repeat borrowers[.]" R. 2421-22, RE 137-38. Of course, that someone *is* a repeat borrower says nothing about whether a class member will benefit from prospective relief. In any event, the district court's conclusory statement about who is or will be a repeat borrower cannot substitute for *the actual data based on defendants' records* stating that 44% of the class were *not* repeat borrowers over the entire 8½-year class period.

For instance, the court recognized that it could not certify the FDCPA claims because this Court had strongly indicated, though had not explicitly held, that injunctive relief is unavailable under the FDCPA. The court thus reasoned that, for FDCPA claims, only damages would be available and thus mandatory certification was inappropriate. R. 2424-25, RE 140-41. And yet the court overlooked the analytically indistinguishable argument that Rule 23(b)(2) certification must be rejected because damages are the *only* remedy *for all claims* of tens of thousands of class members for whom injunctive relief is irrelevant.

Aside from the evidence about the class's composition, other evidence demonstrates that the *Allison* test has not been met. First, as noted above, attorney Richard Freese tried a case to verdict against another loan company involving claims of "flipping" and insurance "packing" like those at issue in this action. R. 1749-51, RE 162-64. That case resulted in a large judgment, demonstrating that money damages are not "incidental," however one might define that term.[7] More important, this verdict involved 23 plaintiffs, and the jury awarded compensatory damages on a plaintiff-by-plaintiff basis, ranging from $5000 to $250,000, with

[7] As noted in the Statement of the Case (at 14-15), other lawyers also submitted affidavits stating that cases alleging the same kinds of causes of action as those at issue here have resulted in substantial settlements and judgments. In addition, the Crystian Objectors think it likely that the Tower Loan settlements currently under seal reveal similarly large money damages settlements.

many different amounts in between, depending on the facts of each case. R. 1800, RE 166. The Freese affidavit thus also shows that "damages [here are not] . . . capable of computation by means of objective standards and [are] dependent in a[] significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415. Therefore, this case would "require additional hearings to resolve the disparate merits of each individual's case." *Id.* And such hearings would demand that each plaintiff "introduce new and substantial legal or factual issues, [and would, in fact,] entail complex individualized determinations." *Id.*

Class counsel conceded as much at the fairness hearing. As noted earlier, class counsel recognized, in negotiating the settlement, that the plaintiffs' circumstances differ greatly from one another — some are repeat borrowers and some are not; some bought credit property insurance along with credit life or disability insurance, while others bought only property insurance; some had homeowners' insurance that duplicated what Tower Loan was selling, some did not; some had loan extensions, some were one-time borrowers; and insurance premiums and terms differed from class member to class member. In counsel's words, the plaintiffs' different situations ran "the gamut of the whole thing." R. vol. XI 47, RE 174; *see also* Testimony of Wiley Richards, R. vol. XI 223-25 (damages per class

member, if any, would depend in part on the length of the loans and the number of loans that each class member had taken out).[8] Class counsel recognized that the differences among the class members made it impossible to negotiate class relief on a "claim-by-claim" basis; because that was "unworkable," they opted for "a flat rate per person." Abernathy Testimony, R. vol. XI 47, RE 174; *see also* R. vol. XI 37-38, RE 171-72 (class counsel claims that 1000-1500 class members would "have very good cases" in state court). But class counsel misunderstood their obligations to the class: Under *Allison*, the difficulty (or impossibility) of providing individualized determinations is not a reason to provide "flat-rate" relief and certify the class anyway; rather, it is a reason why the class can be maintained, if at all, only on an opt-out basis under Rule 23(b)(3).

3. This Court's post-*Allison* decision in *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), underscores the error of (b)(2) certification in this case. In *Bolin*, the plaintiffs challenged Sears' practices in collecting pre-bankruptcy debt from consumers who had purchased merchandise from Sears on credit and later

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[8] The same point was made by Ronny Parham, former Commissioner of the Mississippi Department of Consumer Finance, who agreed that each consumer complaint about allegedly unlawful or unfair insurance practices has to be considered on an individual, case-by-case basis to determine whether a legal violation has occurred. R. vol. XI 202-05. In his words, "each case is definitely different." *Id.* at 204.

filed for bankruptcy. The class sought injunctive, declaratory, and monetary relief under the Bankruptcy Code, RICO, the FDCPA, and TILA, among other theories. *Id.* at 972-73. The Court acknowledged that some of Sears' practices involved uniform policies, but refused Rule 23(b)(2) certification under *Allison* because the case involved damages claims. In so ruling, *Bolin* made several observations and issued several holdings that are directly controlling here:

First, the Court noted that "[t]o determine whether damages predominate, a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate." *Id.* at 976. This statement forecloses (b)(2) certification here because even if some of the class members' monetary claims are susceptible to "computation by means of objective standards and not dependent in any significant way ... on each class member's circumstances[,]" *id.* (quoting *Allison*, 151 F.3d at 415), that is certainly not true for class members' compensatory damages that depend on each class member's particular interactions with defendants' agents, such as whether the class member was told that he or she was required to purchase insurance to obtain a loan.

Second, as *Bolin* explained, the FDCPA and TILA "authorize[] the award of actual damages to class members" as well as statutory damages — provisions

providing a flat dollar amount per statutory violation. 231 F.3d at 977. This Court acknowledged that some statutory damages provisions "require no individualized calculation," *id.*, but noted that "computation of some components of actual damages may require individualized treatment. Determining expenditures made by class members in defending against Sears's actions would require individualized hearings." *Id.* at 978. If assessment of damages other than statutory damages under the FDCPA and TILA require "individualized calculation," which they surely do, then the kinds of damages here — which vary depending on what kind of insurance is at issue, the value of the property or other item being insured, the length of the loan, the amount of insurance purchased, whether charges assessed for loan extension, and so forth — cannot possibly escape "individualized calculation" under *Bolin*.[9]

[9] *Bolin*'s holding in this respect was reinforced in *McManus v. Fleetwood Enters.,* 320 F.3d 545 (5th Cir. 2003). In *McManus*, plaintiffs alleged that defendant misrepresented the towing capacity of its motor homes, entitling them to both injunctive relief and damages. In denying Rule 23(b)(2) certification, the court explained that individualized relief, not a "uniform group remedy," would be required, because class members purchased different motor home models over a five-year period. *Id.* at 553. Here, as explained in the text, not only did the class purchase different "models" of insurance, but they did so in different amounts, for different premiums, and over different periods of time, in conjunction with different kinds of loans.

Third, *Bolin* noted that certification under Rule 23(b)(2) was inappropriate for class members "who [did] not face further harm from Sears's actions" because they no longer were subject to Sears' post-bankruptcy collection efforts. *Id.* That aspect of *Bolin* is controlling here because it confirms what we discussed above: The class certification cannot stand for all class members who will not do business with Tower Loan over the five-year settlement period; for them, it is money damages or nothing. Just as "the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion," *Bolin*, 231 F.3d at 977 n.39, the fact that injunctive relief is meaningless to nearly half the class renders the certification here an abuse of discretion.[10]

[10] *McManus* is instructive in this regard as well. There, the Court denied (b)(2) certification in part because the class members did not have an ongoing business relationship with the defendant, 320 F.3d at 553, thus making it unlikely that injunctive or declaratory relief would be meaningful to them. The same is true here, not only for class members who are not current borrowers, but for those who will not take out new loans over the five-year settlement period. *Accord In re Indus. Life Ins. Litig.*, 208 F.R.D. 571, 573 (E.D. La. 2002) (in case alleging discrimination in sale and administration of low-value life insurance policies, (b)(2) certification inappropriate because "many of plaintiffs' proposed class members, such as those who have already had their policies adjusted . . ., or those whose policies have lapsed, or those on which death benefits have been paid, would not benefit in any way from the injunctive relief requested, and thus, the request for declaratory relief only serves to bootstrap a more genuine interest in an award of monetary damages.").

Finally, in a passage that could have been written with this case in mind, *Bolin* reflected on the importance of opt-out rights:

> *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. The incentives to do so are large. Plaintiffs' counsel effectively gathers clients—often thousands of clients—by a certification under (b)(2). *Defendants attempting to purchase res judicata may prefer certification under (b)(2) over (b)(3).* *Allison* speaks to these realities.

Id. at 976 (emphasis added).

This Court should "speak to these realities," and to the defendants' efforts "to purchase res judicata" here, by decertifying the (b)(2) class, rejecting the non-opt-out settlement, and permitting class members to pursue their own litigation.

B. The District Court Also Erred In Certifying The Class Under Rule 23(b)(1)(A).

The court below also erred in certifying the mandatory class under Rule 23(b)(1)(A). That subdivision permits certification where prosecution of separate actions would create a risk of

> inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

Put simply, this section does not apply to class actions in which substantial damages are at issue because one jury's decision to award damages and another jury's

decision not to award damages (or to award damages in a different amount) do not "establish incompatible standards of conduct for the party opposing the class."

Class certification under Rule 23(b)(1)(A) was intended to eliminate the risk that a defendant would be required to take action by one court but be prohibited from taking that same action by another court. Thus, as the 1966 Rules Advisory Committee explained, "[s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations." Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 100 (1966). Mandatory treatment is necessary in those circumstances because a municipality may either issue a bond or not, or it may appropriate money or not; it cannot do both.[11]

In our view, the district court misunderstood the purpose of (b)(1)(A) certification by simply repeating its rationale for (b)(2) certification — that a "group remedy" is at issue here, and without mandatory treatment of all claims, defendants risk being ordered to act one way by one court and another way by a second court. R. 2409, RE 125. That rationale might be applicable to some claims

[11] The other examples given by the Rules Advisory Committee — suits concerning the rights and duties of riparian owners or to abate a nuisance — fall into the same category. *Id.* (citing cases).

for injunctive relief, where "incompatible standards of conduct" could indeed be established. For instance, an injunction requiring defendants to use the Rule of 78ths would impose a standard of conduct incompatible with an injunction from an other court barring defendants from using that Rule. But no standard for conduct — "incompatible" or not — is established by an award of *damages* relating to a defendant's *past conduct*, which is what the Crystian Objectors seek and which is why Rule 23(b)(3), and not the Rule's mandatory provisions, are applicable to damages claims.

The district court's reasoning does not support mandatory certification of damages actions because it would apply to any situation in which more than one plaintiff sued a defendant for damages arising from the same or even a similar event, thus destroying the carefully constructed differences among the subdivisions of Rule 23(b). It is therefore not surprising that the district court's ruling is at odds with the unanimous holdings of the courts of appeals recognizing that sweeping interpretations of subdivision (b)(1)(A) would negate the important protections, including the right to opt out, for individual class members under Rule 23(b)(3). *See In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) ("[I]f compensatory damages actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-

sections of Rule 23 meaningless, particularly Rule 23(b)(3)."); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) ("The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)"); *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (expansive interpretation of Rule 23(b)(1)(A) would render Rule 23(b)(3) "superfluous").[12]

In *Allison,* this Court addressed this very question — whether a hybrid action involving both damages and injunctive claims could be certified under subdivision (b)(1)(A). Without resolving whether that Rule could have served as a basis for certifying the injunctive aspects of the case, the Court resoundingly rejected (b)(1)(A) certification as to the damages claims:

> The plaintiffs briefly raise the possibility that this case could be certified as a class action under Rule 23(b)(1) because the prosecution of separate actions would create the risk of inconsistent adjudications with respect to individual class members and incompatible standards of conduct for Citgo. See Fed.R.Civ.P. 23(b)(1)(A). Given the individual-specific nature of the plaintiffs' claims for compensatory and punitive

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[12] The district court distinguished these circuit court cases on their facts, again in a word-for-word rendition of defendants' proposed findings. R. 2412-13. To be sure, those cases have different facts, but the legal principle that they establish is directly applicable here: If the possibility that different juries may come to differing conclusions in actions for damages suffices to allow certification under (b)(1)(A), then the opt-out provision of (b)(3) would become a nullity. As shown in Part II below, that interpretation of the Rule would also run afoul of the Constitution.

> damages, we perceive no risk of inconsistent adjudications or incompatible standards of conduct in having those claims adjudicated separately.

Allison, 151 F.3d at 421 n.16.

For all of these reasons, the certification under Rule 23(b)(1)(A) should be vacated and the class settlement rejected.

II. THE DISTRICT COURT ERRED BY CERTIFYING A NON-OPT-OUT CLASS BECAUSE DUE PROCESS REQUIRES THAT CLASS MEMBERS WITH MONEY DAMAGES CLAIMS BE PROVIDED AN OPPORTUNITY TO EXCLUDE THEMSELVES FROM THE CLASS.

Even if the Court were to agree that mandatory certification were permissible under Rule 23, that certification would violate due process. It is now well established that, in class actions that seek to bind plaintiffs with respect to "claims wholly or predominantly for money damages," "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985); *accord Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring in part and dissenting in part); 3 *Newberg on Class Actions* § 17.16, at 17-45 (3d ed. 1992) ("[W]hen unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter."). Those minimal rights are preserved because all members of a class have constitutionally-protected property

rights in their claims for damages, and those rights "implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). In *Ortiz*, the Supreme Court further explained the need for providing class members a right to opt out with respect to their individual damages claims:

> The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary. And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting. . . . [W]e raised the flag on this issue more than a decade ago in *Phillips Petroleum v. Shutts*. . . . [There] we also saw that before an absent class member's right of action was extinguishable due process required that member "receive notice plus an opportunity to be heard and participate in the litigation," and we said that "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class."

Id. at 846-48 (citations and footnotes omitted).[13]

In the years since *Shutts* and *Ortiz*, the circuit courts have regularly upheld the right to opt out whenever substantial money damages are at stake. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *writ dismissed as improvidently granted*, 511 U.S. 117 (1994), the Ninth Circuit refused to give preclusive effect to a prior class action for injunctive relief and money damages because, in the earlier case, the class members had not been provided an opt-out right. The court held that due process requires that class members be provided a right to exclude themselves, with regard to any substantial damages claim, while acknowledging that the suit's injunctive relief components were properly certified on a non-opt-out basis and therefore binding. *Id.* at 392. More recently, in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2002), the same court considered a non-opt-out settlement involving claims for both injunctive relief and damages. The court rejected this Court's "incidental damages" approach to (b)(2) certification in *Allison*, and found that Rule 23(b)(2)

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[13] Although the district court's initial certification orders were not "settlement-only" certifications as in *Ortiz*, the defendants here did not resist certification, but rather urged the district court to certify the class under Rule 23(b)(1) and (b)(2) in an unabashed effort to "purchase res judicata" on the broadest, cheapest scale possible. *See Bolin*, 231 F.3d at 976. Thus, as in *Ortiz*, the mandatory certification was not entered "in an adversarial setting," 527 U.S. at 847, but rather in a setting in which class counsel and defendants were in full agreement that mandatory certification was appropriate.

allowed certification of the damages claims at issue. *Id.* at 949-50. The Ninth Circuit nevertheless overturned the settlement on the ground that due process required that class members be provided a right to opt out because the settlement purported to release their claims for treble damages under California state anti-discrimination laws. *Id.* at 950-51.[14]

The Sixth Circuit has also recognized that the right to opt out is constitutionally guaranteed in cases involving damages. In rejecting a "limited fund" certification under a Rule 23(b)(1)(B), the court explained that, because of due process concerns, in cases involving money damages, "Rule 23(b)(3), with its notice and opt-out provisions, strikes a balance between the value of aggregating similar claims and the right of an individual to have his or her day in court." *In re Telectronics Pacing Sys.*, 221 F.3d 870, 881 (6th Cir. 2000). The court went on: "This entitlement [to opt out] can be overcome only when individual suits would confound the interests of other plaintiffs, such as with a limited fund that must be distributed ratably or an injunction that affects all plaintiffs similarly." *Id.*; *see also Coleman v. GMAC*, 296 F.3d 443, 447 (6th Cir. 2002); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (explaining that *Ortiz* "says in no uncertain

[14] Similarly, the settlement here releases the class members' claims for punitive damages. R. 986. Indeed, the settlement recognizes that fact by including "Punitive Damages Funds." R. 980, RE 150.

terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible").

In some cases, such as *Telectronics*, the courts have discussed the due process right to opt out as a means of constitutional avoidance: With due process in mind, a proposed Rule 23 certification that "does not include these [notice and opt-out] protections, must be carefully scrutinized and sparingly utilized." *Telectronics*, 221 F.3d at 881. That approach makes perfect sense because Rule 23 effectively codifies the constitutional right to opt out for class members with damages claims. The Civil Rules Advisory Committee explained that subdivision (b)(3) was drafted to accommodate the compelling due process interests of such class members:

> [T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of class certification altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.*

39 F.R.D. at 104-05 (emphasis added); *see id.* at 107 ("This mandatory [Rule 23(b)(3)] notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.") (citing, *e.g., Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974) (similar). As in *Ortiz*, the mandatory class established by the settlement agreement, and by the district court's certification order, undermines the "deep-

rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). In sum, without an opportunity to opt out, due process does not permit a court to bind absentees to a judgment with respect to their individual claims for money damages.[15]

CONCLUSION

For the reasons stated above, 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 members from prosecuting individual damages actions against the defendants.

Respectfully submitted,

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

[15] *Ortiz* also noted that mandatory class treatment of individual claims for damages raises serious Seventh Amendment issues by effectively denying class members their right to trial by jury. *Ortiz*, 527 U.S. at 845-46 & n.22. This Court should reject mandatory certification for that reason as well. *See also Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999).

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

Counsel for Appellants Rebecca Crystian
and Martha Shaffer*

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* Counsel acknowledge the assistance of Lauren Hash and Greg Beck, third-year students at Harvard Law School and the University of Illinois College of Law, respectively, who made substantial contributions to this Brief.

CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 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 10,955 words, excluding exempted portions, and it was prepared in WordPerfect 7.0 using proportionally spaced Times New Roman 14-point type.

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Brian Wolfman
Attorney of Record for Appellants Crystian and Shaffer