05-0607-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TERESA LOPEZ, on behalf of herself and all others similarly situated and ELIJAH STACKHOUSE, Potential Class Member Seeking to Opt Out,

Plaintiffs,

ALL STATE CONSULTANTS, INC. also known as City Mortgage Bankers, BANKERS TRUST COMPANY and NORWEST BANK MINNESOTA NATIONAL ASSOCIATION, Trustee For The Delta Funding Home Equity Loan Trust,

Defendants,

DELTA FUNDING CORPORATION, DELTA FINANCIAL CORPORATION and DELTA FUNDING HOME EQUITY LOAN TRUST,

Defendants-Appellees,

-against-

BERTHA MCKNIGHT, Objector Class Member,

Objector-Appellant,

WARREN SHIRLEY, Objector Class Member, ETHEL FORREST, Objector Class Member, LUCILLE HARDIN, Objector to Settlement Agreement, ANNA MAE DAWSON, Objector to Settlement Agreement, CHRISTINE NICOLL, Objector to Settlement Agreement, PEARLINE BROWN, Objector to Settlement Agreement, and NY ACORN, Objector to Settlement Agreement,

Objectors.

ON APPEAL FROM THE U.S. DISTRICT COURT EASTERN DISTRICT OF NEW YORK
No. CV 98 7204 (CPS)(MDG)

BRIEF FOR APPELLANT - OBJECTORS

(Counsel listed on inside cover page)

Nina F. Simon
Jean Constantine-Davis
Lead Counsel for Appellant-Objectors
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Tel. 202-434-2059
Fax 202-434-6424
Email: nsimon@aarp.org

April A. Newbauer
The Legal Aid Society
Queens Civil Division
120-46 Queens Blvd., 3rd Floor
Kew Gardens, N.Y. 11415
Tel. 718-286-2461
Fax 718-263-4234
Email: ANewbauer@legal-aid.org

Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Tel. 202-588-1000
Fax 202-588-7795
Email: brian@citizen.org

Irv Ackelsberg
Community Legal Service, Inc.
3638 N. Broad Street
Philadelphia, PA 19140
Tel. 215-227-2400, ext. 2417
Fax 215-227-2435
Email: iackelsberg@clsphila.org

Donna Dougherty
Dionne Woodburn
Legal Services for the Elderly in Queens
97-77 Queens Blvd.
Rego Park, NY 11374
Tel. 718-286-1500, Ext. 1515
Fax 718-275-5352
Email: ddougherty@jasa.org
Email: dwoodburn@jasa.org

Attorneys for Appellant-Objectors
Bertha McKnight, Tommie Lee Woods, Ethel Forrest,
Pearline Brown, Lucille Hardin and NY ACORN

RULE 26.1 DISCLOSURE STATEMENT

Appellant is a non-profit organization that focuses on a range of consumer protection issues through litigation, policy research, and advocacy. Part of that work includes efforts in recent years to stop predatory lending practices. In furtherance of this purpose, the New York chapter of the Association of Community Organizations for Reform Now (ACORN) has an interest in insuring the fairness of the approval of a class action settlement involving serious violations of TILA, HOEPA and other federal lending laws.

Pursuant to Fed. R. App. P. 26.1, Appellants state that ACORN does not have a parent corporation for which disclosure is required, and that as a non-profit corporation, it does not issue any stock.

DATED: July 11, 2005

Respectfully submitted,

Nina F. Simon
D.C. Bar No. 256396
nsimon@aarp.org

Jean Constantine-Davis
AARP Foundation Litigation
Lead Counsel for Appellant-Objectors
601 E Street, NW
Washington, DC 20049
Telephone: (202) 434-2059
Fax: (202) 434-6424

April A. Newbauer
The Legal Aid Society
Queens Civil Division
120-46 Queens Blvd., 3rd Floor
Kew Gardens, N.Y. 11415
Tel. 718-286-2461
Fax 718-263-4234
Email: ANewbauer@legal-aid.org

Donna Dougherty
Dionne Woodburn
Legal Services for the Elderly in Queens
97-77 Queens Blvd.
Rego Park, NY 11374
Tel. 718-286-1500, Ext. 1515
Fax 718-275-5352
Email: ddougherty@jasa.org
Email: dwoodburn@jasa.org

Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Tel. 202-588-1000
Fax 202-588-7795
Email: brian@citizen.org

Irv Ackelsberg
Community Legal Service, Inc.
3638 N. Broad Street
Philadelphia, PA 19140
Tel. 215-227-2400, ext. 2417
Fax 215-227-2435
Email: iackelsberg@clsphila.org

Attorneys for Appellant-Objectors
Bertha McKnight, Tommie Lee Woods, Ethel Forrest,
Pearline Brown, Lucille Hardin and NY ACORN

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to 28U.S.C.§1291. The district court entered judgment on January 13, 2005, A1961, and Appellant-Objectors timely appealed on February 3, 2005, A1967. The district court had jurisdiction pursuant to 28U.S.C.§1331 and 28U.S.C.§1367(a).

STATEMENT OF ISSUES

Can a mortgage class action settlement be fair, adequate, and reasonable, and meet the heightened scrutiny for a class not previously certified, when it provided token relief to class members in return for a broad release of valuable mortgage claims based on the erroneous finding that the claims had no value?

Can a class of homeowners victimized by predatory mortgage lending be certified where:

> class counsel irrationally diverted relief to ineligible class members and class representatives, harming class members with viable and valuable claims;
>
> class counsel allocated the lion's share of settlement funds to class representatives; and
>
> the finding of predominance ignored the value of individual claims capable of saving homes from foreclosure.

Can settling parties waive the right of objecting class members to have their claims adjudicated by an Article III judge?

STANDARD OF REVIEW

This Court reviews for clear error the district court's findings in support of class certification and settlement approval. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co*, 505 F.2d 989, 1004(2d Cir. 1974). It reviews for abuse of discretion the class certification, the settlement approval, and the denial of motions to intervene and to vacate the reference. *Moore v. PaineWebber, Inc.*,306 F.3d 1247, 1252 (2d Cir. 2002). It reviews *de novo* the district court's application of legal standards.

STATEMENT OF THE CASE AND THE FACTS

Nature of the Case

This appeal involves a challenge to a nationwide class action settlement of claims against Delta Funding Corporation, a New York-based subprime mortgage lender. The original case was filed on behalf of minority and elderly homeowners who refinanced mortgages with Delta. The lawsuit was intended[1] to save the plaintiffs' homes from foreclosure, but the approved settlement saved, at most, 27 of the 67,570 class members' homes. Only class representatives and a handful of others received relief that would enable them to save their homes—new loans worth over $1 million. In contrast, over 67,500 absent class members received nominal credits averaging less than $13 per absent class member. Appellants are

[1] A406, A913, A1047.

objecting absent class members who contend that the settlement was grossly inadequate and failed to meet Rule 23 requirements. Further, Appellant-objectors were deprived of their constitutional right to an Article III forum because the magistrate denied their motions to intervene and to vacate the reference of final decision-making authority to the magistrate judge.

Background

The 1990's saw a rapid increase in predatory mortgage lending, which has contributed to rapid growth in residential foreclosures, particularly in low-income, minority neighborhoods. Predatory lending practices include price gouging in rates and fees charged, costly or oppressive terms such as prepayment penalties and balloons, loan "flippings," fabricated appraisals and income verifications, and aggressive "push" marketing targeting minority and elderly homeowners. *See Curbing Predatory Home Mortgage Lending*, National Task Force on Predatory Lending, *available at* http://www.huduser.org/Publications/pdf/treasrpt.pdf; Elizabeth Renuart, *An Overview of the Predatory Mortgage Lending Process*, 15 Housing Policy Debate 467 (Fannie Mae Foundation, 2004). Delta has been accused of predatory lending for years leading up to the filing of this action. A1318-1320;A1489-1491.

Proceedings and Disposition Below

On November 18, 1998, Theresa Lopez, an elderly, homeowner from Queens filed a complaint on behalf of consumers whose mortgages Delta made or purchased from November 1992 forward, alleging violations of federal and state consumer protection laws, primarily the Home Ownership Equity Protection Act("HOEPA"), 15 U.S.C.§1639 and the Truth in Lending Act("TILA"), 15 U.S.C.§1601 *et. seq.* A1-2[2]. The complaint named defendants Delta Funding Corporation and Delta Financial Corporation ("Delta"); Delta Funding Home Equity Loan Trust and Bankers Trust Co.("assignees"); All State Consultants, Inc., a New York mortgage broker and "John Doe" corporations. It sought extensive remedial and injunctive relief, including damages and rescission of class members' mortgages. A323-324.

Early Motions

In December 1998, class counsel identified three putative class members (Clinton, Robinson and Loney) facing imminent foreclosure and moved to enjoin sale of their homes.[3] The court permitted intervention, and ruling that the class

[2] Exhibit A contains TILA and HOEPA statutory citations

[3] Class counsel searched foreclosure listings to identify Delta borrowers facing foreclosure. A3.

was likely to succeed on HOEPA claims, granted a preliminary injunction.[4] A332-333;A341-347.

After this action was filed, Delta faced increasing scrutiny from government agencies. On August 20, 1999, the New York Office of the Attorney General ("NYOAG") filed suit against Delta. Delta settled with the NYAOG and the New York State Banking Department ("NYSBD") in September 1999. A1497-1498;A1489-1490. Valued at $12 million, these settlements primarily achieved injunctive relief addressing Delta's lending practices and prospective payment reductions worth approximately $13,000 for each of 600 New York borrowers. A1490,A1498. The settlements obtained neither compensatory nor remedial relief sought by this class action nor secured relief for borrowers living outside of New York state.[5]

These settlements engendered a second round of litigation activity in late 1999. A boilerplate class certification motion was filed in September 1999, despite

---

[4] The court's finding that Delta required borrowers to use brokers to obtain a mortgage supports the HOEPA/TILA rescission claim, for loans from November 19, 1995–September 30, 1996, A329; and by Delta's SEC filings, A105-106;A174,A177;A264-266, which have never been corrected to state that Delta made retail loans prior to 1997.

[5] In March 2000, the U.S. Department of Justice ("DOJ") sued Delta. FTC, HUD and DOJ joined in the New York settlements and entered a Consent Order enjoining future violations of federal law. A805-8077.

the court's request for an expeditious motion in late 1998. A355;A205. Plaintiffs also moved to bar Delta from communicating with class members about the settlements. A359. Defendants moved to dismiss and opposed Plaintiffs' filing of amended complaints.[6] A359;A903-905.

Following hearings on the motions, Delta filed its opposition to class certification, appending depositions of class representatives revealing common deceptive practices: (1) no documents prior to closing, (2) rushed borrowers through closing without opportunity to review documents, (3) provided no documents that borrowers could take with them following closing and (4) loaned money at terms significantly different and more expensive than those promised. Defendants also added fabricated leases to several plaintiffs' loan files to justify the loans and high monthly payments. A758-763;A693-697;A592-594.

In March 2000, the court ruled that Delta's proposed communication with class members was misleading and that Delta could not inform borrowers of the settlements with the NYSBD and NYOAG except by using the court's approved notice. The court concluded: (1) class members were vulnerable and lacked sophistication and education, (2) the notice needed to be particularly clear about the benefits offered to New York homeowners and the rights they would forego in

[6] Amended complaints added plaintiffs: Young, Edwards, Williams and Murray, and defendant, Norwest. A345-349.

accepting these benefits; and (3) putative class members should be offered a choice between the settlements and the class action.[7] A783-799.

In June 2000, the court rejected Delta's Motion to dismiss, holding that *res judicata* did not extinguish HOEPA claims of four plaintiffs whose loans had been foreclosed through state court default proceedings and rejecting *Rooker-Feldman* as barring these plaintiffs from claiming HOEPA damages. Nevertheless, the court ruled that *Rooker-Feldman* barred Clinton, Loney, Robinson and Edwards from rescinding their mortgages under HOEPA. A914-922.

The court's decision rendered four class representatives unsuitable, as HOEPA's one-year limitations period for affirmative claims barred these plaintiffs' claims, which arose more than one year before the complaint was filed. Ignoring the consequence of this ruling, class counsel continued to assert that the four class representatives with foreclosure judgments could represent *all* subclasses, including the TILA and HOEPA subclasses. A1100.

Settlement

In June 2000, the case was in the early stages of litigation.[8] Plaintiffs had not completed class discovery, may not even have commenced factual discovery,[9]

---

[7] This ruling was completely disregarded by Magistrate Go in her later rulings on class notice. *See infra.*pp.59-63.

[8] *See infra* pp.41-44.

had conducted no depositions and reviewed few documents.[10] No answer was ever required of two key assignee defendants.[11] Nevertheless, class counsel turned its attention to settlement. A1733-1735.

Class counsel and defendants apparently agreed on settlement by late 2000,[12] but did not file settlement documents until March 1, 2002, shortly after named plaintiffs and defendants agreed to refer the entire case to a magistrate. A1205-1211. The same day, the magistrate preliminarily certified the class and approved the settlement; she scheduled a fairness hearing for May 24, 2002 and Delta arranged to mail approximately 67,000 class notices.[13] A1445,1505.

---

[9] The absence of a confidentiality order prior to 12/21/99 supports this conclusion. A1434.

[10] Plaintiffs' assertion that it "took and/or defended dozens of depositions . . . including depositions of Delta's key employees" is unsupported by the billing records and docket sheet on which it relies. *See, e.g.,* A557-566;A1143-1144;A1371-1385;A1501-1508,A1336. No pleadings identify any defendant deponents.

[11] Banker's Trust and Delta Home Equity Trust filed 22 stipulated extensions of time to answer. A1424-1445.

[12] A sealed letter filed in January 2001 outlined the principal settlement terms. A1767-1769.

[13] Notices were never sent to 900 untraceable class members whose loans Delta sold. With no remuneration, their claims and right to preserve their homes were settled and released. A1506.

Settlement Terms

The settlement proposed to provide the vast majority of the class—more than 67,500 absent class members—relief averaging less than $13. In exchange they forfeited their rights to defend their homes in present and future foreclosures. By trading their claims and defenses for pennies, the settlement would have left absent class members worse off than if the case had never been filed. A1211-1232;A1501-1508.

The chart below presents key terms of the proposed Settlement.[14]

		Named Subclasses					
		Class Reps.	HOEPA Early Payment Default	Disputed HOEPA Early Payment Default	HOEPA	Disputed HOEPA	All Other Class Mbrs.
Subclass Benefits	No. In Subclass	7	< 20	< 20	1180	150	66,220+
	NEW LOAN	YES	YES	YES	NO	NO	NO
	Credit	$10,000	NO	NO	$170	$400	< or equal to $10
	Release all claims	YES	YES	YES	YES	YES	YES

[14] For full settlement details, A1211-1232.

Class representatives, HEPD and DHEPD Subclasses—The proposed settlement offered the bulk of the funds—more than $1 million in relief[15]–to at most 28 out of a class of 67,570.[16] Loans of eight class representatives were to be restructured into new thirty-year, fixed-rate loans *with significantly reduced loan balances*, a $10,000 incentive reduction, new reduced interest rates, reduced loan payments and forgiveness of significant balances of accrued arrears and collection charges. They would also receive the relief allocated to their (unidentified) subclass. A1220-1221. Similar relief was allocated to twenty or fewer HEPD and DHEPD classified members, but not the incentive reduction.[17]

---

[15] Delta's recent claim that some of $1.15 million in funds dedicated to HEPD borrowers will be available for other class members, will not generate more than a few additional dollars for absent class members. Moreover, the named plaintiffs and defendants have consistently refused to provide data to support their assertions (A1757), and have never broken out the numbers of HEPD or DHEPD subclass members or disclosed the number and identity of class representatives in any subclass.

[16] 20 or fewer class members received notices as HOEPA or "disputed" HOEPA early payment default subclass members.("HEPD" or "DHEPD") A150").A1505. Adding these 20 to eight class representatives, at most 28 class members were eligible for significant relief. Requirements for HEPD and DHEPD subclass members were to be in foreclosure, having made fewer than six payments and not lost their homes. A1213-1216. Only a borrower represented by counsel could have met these stringent requirements.

[17] At first, even this relief was structured to make repayment difficult, requiring HEPD and DHEPD subclass members (who were not named plaintiffs) to make an additional monthly payment for each of the first 36 months following the settlement. by HEPD and DHEPD subclass members (who were not named plaintiffs). A1215,A1217; *see* A1491.

HOEPA and Disputed HOEPA Subclasses—Absent class members were eligible for HOEPA and Disputed HOEPA subclass relief *only* if they remained in their Delta loans. Class members whose homes had been foreclosed or who had refinanced their mortgages were not eligible. A1213;A1216-1218.

HOEPA subclass members whose loans Delta admitted were HOEPA and whose income Delta failed to verify or whose payments consumed more than 50% of their income—approximately 1180—were to receive average credits against their loan balances of only $170.[18] Approximately 35% of Delta's HOEPA loans during the class period admittedly were made without regard to repayment ability—a violation of HOEPA worth tens of thousands of dollars per homeowner.[19] No explanation was provided for this fractional relief or for excluding class members who had lost their homes to foreclosure or were forced into refinancings, the very borrowers HOEPA was designed to protect in outlawing lenders from practicing unaffordable, asset based lending. Borrowers able to remain in their loans were arguably the least harmed by this practice.

---

[18] $200,000 was allocated to this subclass. A1218;A1505-1507.

[19] Delta admits that of 67,570 loans—7715 or 11.4%—are HOEPA loans. 1180—or 35% of the 3310 HOEPA loans outstanding on 4/30/02—were presumptively made without regard to income necessary to support loans or were made to borrowers whose debt to income ratio exceeded 50%. A1505-A1507.

Approximately 150 disputed HOEPA class members who still had loans with Delta were to receive credits averaging $400.[20] Despite the lawsuit's premise that Delta made a vast pool of disputed HOEPA loans and many bases for disputing whether loans are HOEPA, the disputed HOEPA subclass was limited to a slender category of borrowers whose claims were identical to those litigated by class representatives. A327-333. Unlike their substantial claim for rescission, the "disputed" HOEPA relief cannot save their homes from foreclosure.

Other absent class members—The vast majority—66,212—absent class members will receive token credits or cash payments averaging less than $10. A1218-1219;A1505.

Objections

Appellant-Objectors, Bertha McKnight, Ethel Forrest, Lucille Hardin, Pearline Brown and Tommie Lee Woods are homeowners who were persuaded to enter into high-cost refinancing with Delta. NY ACORN objects on behalf of many constituent, absent class members. A1291. Ms. Woods, a 72-year old widow from Chicago, was unable to pay more than 15 payments on her $64,000 adjustable-rate refinancing whose payments consumed two-thirds of her monthly income Her homeownership was threatened by foreclosure.A1519-1522;A1541,A1547. Bertha McKnight, an elderly, widowed, African-American

[20] While no funds were set aside for this subclass, Delta's counsel asserted that $60,000 was available for disputed HOEPA credits. A1590.

homeowner from Washington, D.C., entered into a 1996 refinancing that was purchased by Delta. Her share in the settlement was to be approximately $10.75. A1279-1281. Ethel Forrest, an elderly Pennsylvania homeowner who was in foreclosure at the time she received her class notice, was offered $9.30.

These homeowners received a dense 4-page, single-spaced legally complex notice which identified relief in the amount of $2.42 million.[21] A1465-1468. The notice was silent regarding key information such as the total number of class members, the numbers in each subclass, and the dollar amount of relief for members of each subclass, making it impossible even for a sophisticated reader to calculate average recovery per class member or to assess the settlement's value to the class. The extensive relief offered to class representatives[22] was similarly unquantifiable. The only measurable information that could be gleaned from these obtuse documents was the $700,000 attorney fee to plaintiffs' counsel and the $10,000 incentive for class representatives.

As a result, Objectors focused on the settlement's broad release, which extinguished not only affirmative claims against all parties to the mortgage

---

[21] The settlement may be valued as high as $2,900,000-3,000,000. A1916;A1382;A1211-1232.

[22] The notice misleadingly asserted, "[e]xcept to the *limited extent* expressly provided otherwise . . . [n]amed Plaintiffs shall be treated the same as Participating Class Members." A1239 (emphasis added); however this substantial but unquantified relief was not offered to absent class members. A1465-1468.

transactions,[23] but even released the rights of Delta borrowers to defend against future foreclosure actions—thereby undermining their ability to preserve their homes. Further, Appellant-Objectors protested class counsel's decision to abdicate all responsibility for providing class notice, deciding subclass placement and determining eligibility, as well as the dollar amount and form of relief, for each class member. Class counsel retained virtually no role other than defending the settlement at the fairness hearing.[24]

Class counsel's brief, provided to Appellant-Objectors only one or two days before the fairness hearing, contained *no* evidence supporting the settlement. It falsely represented that class counsel had conducted extensive discovery prior to entering into settlement negotiations, inflated the value of the class settlement and failed to explain the basis on which it settled and extinguished so many homeowners' valuable claims. There was no analysis of the weight on the merits of the claims asserted by class members; nor was explanation provided for subclass parameters or selection of the closing date of October 31, 1999.

---

[23] All claims were released, including claims against non-settling defendants and parties, such as mortgage brokers nationwide, who never had been sued and could have been sued only as a defendant class. A1467-1468.

[24] Abbey Gardy failed even to maintain electronic notification with the court after August 2003, despite repeated admonitions from the court, A1771;A1729; Endorsed Order, Dkt Entry 1/5/04, and has not entered an appearance in this Appeal.

Only one day before the fairness hearing, Objectors were served with Delta's brief and learned the breadth of the class—67,570 borrowers[25]—and that the vast majority would receive an average of $13. For a pittance, these 67,500 homeowners were to forfeit their rights to defend against present and future foreclosures and risk losing their homes.[26] By trading their defensive claims for a few dollars, class counsel placed absent class members in a far worse position than if the class action had never been filed.

Objections to the settlement were filed by a number of Delta customers and by an organizational objector, NY ACORN. A1243,A1227,A1289. The NYOAG and NYSBD also objected to the settlement. A1489,A1497. Besides objecting to the fairness and adequacy of the settlement, Appellant-Objectors also filed motions to vacate the reference to the magistrate, to intervene and for leave to conduct discovery. A1471;A1481;A1509;A1701.

---

[25] The proposed Settlement Agreement defined an extremely broad class—all Delta borrowers with loans originated or purchased by Delta from November 19, 1992-October 31, 1999. A1212;A1505.

[26] It should have been crystal clear to class counsel and the magistrate that any absent class member who was then actively defending against a foreclosure would lose his/her house *solely by reason of the settlement.* The relief offered was insufficient to stop any foreclosure, but the release cancelled their litigation claims. No effort was made to preserve these class members' homes.

Fairness Hearing

On May 24, 2002, the courtroom was packed with so many confused class members that the fairness hearing had to be moved to the largest courtroom. A1662,A1664,A1874. The hearing was notable for class counsel's failure even to meet his burden of presenting a *prima facie* case. A1572-1585. He introduced no evidence in support of the settlement either in pleadings or at the fairness hearing. *See* A1371-1470. When called upon to defend the class settlement, class counsel, Beck, frequently deferred to Delta's counsel to advise the court about the merits of class members' claims, the analysis of the value of their claims and the legal underpinnings of the lawsuit. A1578,A1585-1600. Most remarkably, Beck stated that he had "made an informed judgment that it was not at all certain that a class would be able to be maintained, A1579, and, when asked to explain his evaluation of absent class members' claims, stated that "class members aren't giving up a great deal because they don't have a great deal to give up." A1580-1581. Delta's counsel presented minimal information about the extent of relief provided to the class, although as sole administrator of the settlement, this information was within its possession. A1585-1591.

The primary focus, indeed the passion, of the many objectors who addressed the court was to explain the important distinction between a class action involving small consumer claims and class actions involving valuable predatory mortgage

claims. A1606-1607,A1615,A1692;A1656-1687. Objectors, including government objectors, took great pains to explain unique characteristics of class actions involving class members' homes and to emphasize the unreasonable risks to class members from releasing valuable claims that might be essential to preserving homeownership. *See, e.g.*, A1658-1663. Objectors raised other specific concerns: (1) that the class settlement did not meet Rule 23 standards; (2) that class representatives were receiving a disproportionate amount of relief; (3) that class members had valuable claims which class counsel failed to acknowledge and agreed to release for a pittance; (4) that the release unfairly traded class members' rights to defend their homes from future foreclosure for an insignificant sum, leaving them far worse off than before the litigation; (5) that the settlement could not be effectuated without the agreement of trustee defendants who were non-settling, but released parties; (6) that the release unfairly eliminated state law claims of members residing outside of New York, discrimination claims and myriad claims not susceptible to class litigation; (7) that the notice was unintelligible, ineffective to inform the class, and failed to accurately reflect the terms of the settlement; (8) that Objectors be permitted to conduct discovery; (9) that the reference to the magistrate be vacated; and (10) that Objectors be permitted to intervene. A1604-1649.

At the end of the day, class members who had been able to remain throughout the hearing were given a very brief opportunity to speak. A1664. They were permitted only to state their names and loan numbers and indicate whether they wished to remain in the class, object or opt out. Their words revealed substantial confusion about the settlement and inability to interpret their notices or, even, to recognize, the small dollar amount promised to them. A1664-1679.

The magistrate committed to issue, within the week, a ruling on the motions to intervene and to vacate the reference, but those rulings were not forthcoming for more than two years. After seeking further briefing from the parties on the adequacy of counsel in Spring 2004, A1731-1732, the magistrate issued two orders on August 9, 2004: the first, denying Objectors' motions to vacate the reference and to intervene; A1843, the second, denying the motion for discovery and conditionally approving the settlement with reduced incentives to class representatives of $2,000 and modifications proposed by defendants and class counsel to limit the release for borrowers in foreclosure. A1859. Amendments were filed by defendants on August 19, 2004. A1921-1932. On January 5, 2005 the magistrate issued a further order finally approving the settlement and entered judgment on January 13, 2005. A1943;A1961. Objectors timely filed their notice of appeal to this Court on February 3, 2005. A1967.

SUMMARY OF ARGUMENT

The magistrate abused her discretion in approving a settlement that was grossly inadequate and unfair in light of the strength and value of absent class members' legal claims. The approval of the settlement despite its numerous and obvious shortcomings resulted from the magistrate's fundamental misapprehension of the legal standards underlying class members' consumer credit claims and her inability, in the absence of an evidentiary record, to make an independent assessment of those claims. The certification of a class settlement that allocated the lion's share of relief to class representatives created antagonism with absent class members. The improper approval of class representatives without standing was grievous error particularly in light of the obligation to exercise heightened scrutiny when reviewing a proposed class certification first presented in the form of a settlement. *See Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620(1997). Moreover, where class counsel failed to create an evidentiary record or present a *prima facie* case, promoted ineligible class representatives and created irrational and unfair classifications of absent class members, it was error to certify the class.

The magistrate ignored the heightened scrutiny necessary to ensure that class claims which implicate the rights of homeowners to retain their homes indeed predominate over valuable individual claims, and to assure the continued viability

of claims for homeowners facing foreclosure, whenever class claims fail to offer relief sufficient to save a home from foreclosure.

The magistrate's approval of a highly confusing notice to class members was error in light of the Chief Judge's ruling requiring a higher standard of clarity for elderly and poorly educated class members, who are releasing claims necessary to save their homes in the event of foreclosure.

Finally, in denying their motions to vacate the reference to the magistrate and to intervene, the magistrate deprived Appellant-Objectors of their constitutional right as parties to an Article III forum; this harm could not be adequately remedied by the right to Appeal with its heightened standard of review.

ARGUMENT

I. THE MAGISTRATE ABUSED HER DISCRETION IN APPROVING THE SETTLEMENT.

The settlement below was manifestly unfair, inadequate, and unreasonable. It left roughly 67,500 class members with virtually no relief and many worse off than they were before this litigation. In exchange for an average of $13 per class member, the settlement released claims worth tens of thousands of dollars. This paltry relief was based on an erroneous valuation of class members' claims. Even after modifications, the settlement remained grossly inadequate.

In evaluating a settlement, a district court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness." *D'Amato v.*

Deutsche Bank, 236 F.3d 78, 85(2d Cir. 2001). To assist this inquiry, the court should consider nine factors announced in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463(2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*,209 F.3d 43(2d Cir. 2000):

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

D'Amato, 236 F.3d at 86. Objectors argued that the relief to the class is miniscule compared to likely recoveries and that the settlement actually *harms* class members. A1606;A1615,A1624-1625;A1638-1640,A1660. The settlement fails under *Grinnell* because class members would be better off with no litigation at all.

In rejecting these objections, the magistrate abused her discretion and erred as a matter of law in myriad ways. Appellant-Objectors will focus on one abuse of discretion and two legal errors. First, the magistrate abused her discretion in approving a settlement releasing claims that she believed were not maintainable in a class action and also releasing uncompensated claims that cannot be raised as defenses to foreclosure. Then, the magistrate erred as a matter of law in comparing class members' potential recoveries in litigation with the settlement's value to

them. Her misunderstanding of HOEPA and TILA statutes of limitations and assignee liability led her to undervalue class members' claims.

A. *The Magistrate Erred by Releasing Claims That She Believed Were Not Amenable to Class Litigation.*

The magistrate abused her discretion by releasing claims that she believed were not amenable to class litigation. In reasoning that class members' claims were worth little, the magistrate relied in part on the conclusion that some of the claims were likely not maintainable in a class action because they require individualized showings. A1896-1898,A1913-1915. If the claims are not amenable to class treatment, they should not have been certified or released in a class action. A court cannot rationally certify a class *and* then devalue class claims because they cannot be maintained as a class action.

Class counsel himself determined that these claims were not amenable to class treatment. A1579,A1616. The release of class members' valuable individual rights after determining they were not amenable to class treatment illustrates the *exact* problem identified by the Supreme Court in rejecting the settlement in *Amchem,* 521 U.S. at 621. If Rule 23 "permitt[ed] class designation despite the impossibility of [class] litigation"—which is precisely what class counsel conceded here—"both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit

of adversarial investigation." *Id.*(citations omitted). The problem is not simply that class counsel neglected to negotiate valuable relief in exchange for release of HOEPA and other claims. The problem is more fundamental: Once class counsel concluded that the claims could not be certified, he was structurally incapacitated from obtaining valuable relief for the class. Similarly, once the magistrate concluded that the claims were not amenable to class treatment, under *Amchem,* she could not lawfully approve the settlement. A1913-1915.

This analysis applies to the magistrate's release of claims that were not preserved as defensive claims by the modified release. A1875,A1893-1894,A1927-1930. Many released claims arise against entities that have not contributed to the settlement, some of whom were never sued and never could have been sued, except as a defendant class.[27] These include the many mortgage brokers throughout the country who originated the majority of Delta loans during the class period and who were the exclusive originators of Delta loans prior to 1997. A105-106;A177;A264-266. Despite Delta's assertion that brokers were largely responsible for any victimization of its borrowers, Delta insisted on the brokers' release from liability. A1683;A1694-1695. ("Delta wanted complete peace." (A1650. Since brokers will not be parties to foreclosure actions against class members, their significant liability under state unfair deceptive practices laws is extinguished. *See, e.g.*,

[27] Based on representations to the court by class counsel and Delta, all funding for the settlement is from Delta and/or its insurer. A1907.

Cooper v. First Gov't Mortgage & Investors Corp., 238 F.Supp.2d 50 (D.D.C. 2002).

B. *The Magistrate Undervalued Claims Because She Misunderstood HOEPA and TILA Statutes of Limitations.*

The magistrate undervalued class members' claims because she erroneously believed the one-year statute of limitations had run on most HOEPA and TILA claims. A1894-1895,A1912-1913. She was mistaken. First, the filing of the class action tolled the statute of limitations for affirmative claims. *See Crown, Cork & Seal Co.*, 462 U.S. 345, 349-50(1983); *Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 553-54(1974); *Trief v. Dun & Bradstreet Corp.,* 144 F.R.D. 193, 202-03(S.D.N.Y. 1992). This tolling applies to damages as well as rescission claims. *See McIntosh v. Irwin Union Bank & Trust,* 215 F.R.D. 26, 32-33(D.Mass. 2003)(comprehensive analysis of class rescission); *Williams v. Empire Funding Corp.*, 109 F. Supp. 2d 352, 372(E.D. Pa., 2000). Second, as the magistrate had already recognized, even time-barred HOEPA and TILA damages claims are revived in foreclosure actions. A1893. Therefore, class members still retained *the full value of their claims for tens of thousands of dollars in HOEPA damages*, which they would have been able to assert in the event of foreclosure proceedings. Additionally, as discussed extensively in Objectors' Supplemental Brief, recoupment is available in virtually all states to revive a wide variety of state and federal claims as defenses to foreclosure. A1796-1797. The magistrate erred as a

matter of law in concluding that class members' claims were worth very little because the one-year statute of limitations had run on most of them.

C. *The Magistrate Undervalued Claims, Failing to Recognize that Assignees Bore Significant Liability Under HOEPA and TILA*

The magistrate applied the wrong legal standards for assessing assignee liability, and as a result, significantly undervalued class claims against assignees. A1894-1896;A1907-1909. HOEPA and TILA make assignees directly and absolutely liable for any rescission claims to the extent of the lender's liability. 15 U.S.C.§§ 1641(c); A1788-1790. Assignees are similarly liable for enhanced statutory damages claims for any HOEPA violation, as well as the full range of state and other federal law claims that the HOEPA borrower can assert against the lender. 15U.S.C§641(d)(1). *See Bryant v. Mortgage Capital Resource Corp.,* 197 F. Supp.2d 1357(N.D.Ga. 2002); *Cooper* at 55.

For any acknowledged HOEPA loan—Delta admits to 7,715—there is no opportunity for assignees to avoid liability for any claims chargeable to the lender. *See* 15U.S.C.§1641(d)(1), Ex. B. For all other HOEPA loans, HOEPA creates a legal presumption of liability intended to encourage assignees to police the high cost marketplace; this weighty presumption allows assignees to avoid liability only if they can meet the affirmative burden of proving that a reasonable assignee exercising due diligence could not have determined the loan to be subject to HOEPA. *See, e.g., Cooper* at 55. This burden of proof is not unlike that available

to defendants in securities litigation who can assert an affirmative defense of due diligence, only upon proof "*after reasonable investigation.*" *See In re WorldCom*, 219 F.R.D. 267, 289-90 (S.D.N.Y. 2003).

The magistrate's erroneous conclusion that assignees did not bear the evidentiary burden and therefore had only minimal liability for these claims resulted from her faulty conflation of the assignee liability standard for HOEPA damages with the more limited assignee liability standard for TILA damages, causing her to erect an imaginary burden for plaintiffs to overcome. *Compare* A1907-1908 *with Cooper*, 238 F. Supp. 2d at 55.

These errors resulted in a manifestly unfair, inadequate, and unreasonable settlement. No settlement that leaves class members worse off than they would have been without litigation can be deemed fair, reasonable, and adequate.

II. THE MAGISTRATE ABUSED HER DISCRETION IN CERTIFYING THE CLASS.

The magistrate abused her discretion in certifying a class that failed to meet several Rule 23 requirements. The class failed to meet the requirements of adequate representation, typicality of class representatives, predominance of class issues over individual issues, and superiority of the class action over individual litigation.[28]

[28] Adequacy and typicality are two of four class action prerequisites established by Rule 23(a). Rule 23(b) requires predominance and superiority.

In light of the requirement that class settlements be court approved, *see* Rule 23(e), a court must exercise heightened care when reviewing and deciding whether to approve proposed class certifications that are first presented in the form of a settlement class. A1867; *Amchem*, 521 U.S. at 620; *Plummer v. Chemical Bank*, 668 F. 2d 654, 658 (2d Cir. 1982). The danger of collusion between defendants and class counsel is heightened when a settlement is negotiated before class certification. *See Denney v. Jenkens & Gilchrist*, 2005 U.S. Dist Lexis 2507, at *34 (S.D.N.Y. Feb. 18, 2005).

The court's standard of care in reviewing a proposed settlement class is analogous to a fiduciary duty. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d. 20, 22 (2d Cir. 1987); *accord* A1887. In evaluating whether "a class action settlement is fair, adequate, and reasonable, and not a product of collusion," *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000), the court may not rely on "its gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 521 U.S. at 621. The "dominant concern" for the court—whether the settlement protects the rights of absent class members—demands strict adherence to the certification criteria set forth in Rule 23 (a) and (b) prior to approval of the proposed settlement class. *See Denney,* 2005 U.S. Dist. LEXIS 2507, at*34-35.

As demonstrated below, the magistrate failed to engage in the heightened scrutiny necessary to protect absent class members and abused her discretion in certifying the class.

A. *The Class Settlement Fails to Meet the Adequacy and Typicality Standards of Rule 23(a).*

Rule 23's adequacy and typicality requirements generally overlap, addressing adequacy of both class representatives and class counsel. *See Amchem*, 521 U.S. at 626 n.20. Here, class representatives and counsel inadequately represented absent class members.

1. *Class Representatives Did Not Represent Absent Class Members Adequately.*

a. *Class Representatives' Relief Is Grossly Disproportionate To That Offered To Absent Class Members.*

Class representatives inadequately represented absent class members by obtaining relief for themselves that far exceeded the relief for similarly situated class members. *See Amchem*, 521 U.S. 626 n.20 (interests of class representatives must not be antagonistic to the class). Simply stated, eight class representatives were awarded new loans, while more than 67,500 class members were not. A1211-1232;A1505. These new loans afforded the handful of class representatives the ability to retain their homes—setting lower monthly payments based on a significantly lower principal balance and lower interest rate and stretching those

payments out over a new thirty year loan term. A1220-1221. In contrast, over 67,500 other class members received no new loan and no relief that would enable them to remain in their homes. In fact, for non-named class members in foreclosure—even those actively litigating to block foreclosure—the settlement agreement proposed *would have guaranteed* the loss of their homes.

Class representative Lowe Murray presents a compelling example. As class representative, the settlement extends the term of his note, giving him an additional eleven years to pay off his loan; reduces the principal balance on his loan to $23,719 and drops his monthly payment from $314.68 to $191. *See* Ex.C. Default interest in arrears of approximately $45,000 is forgiven, and remaining arrears and default interest are deferred for thirty years without accruing additional interest. Murray would also receive a disputed HOEPA credit of approximately $247.

If Murray were not a class representative, he would receive only the $247 credit. He would continue to be obligated for the full $90,000 of accrued arrears on his loan. *See* Ex. C[29]. He would receive no new loan, no recalculation of arrears and would likely lose his home to foreclosure.

[29] This exhibit calculates relief afforded class representatives, Lowe Murray and Virginia Williams and their relief if ordinary class members based on information contained in the pleadings. It also calculates relief for Appellant-Objector Tommie Lee Woods, as class representative.

This gross discrepancy between relief to class representatives and absent class members reveals antagonism between class representatives and the class that prevented the court from certifying the class under Rule 23(a)(4). *See e.g. In re WorldCom*, 219 F.R.D. at 282.[30]

b. *Certain Class Representatives Were Unsuitable To Represent The Class And Lacked Standing To Pursue The Primary Claims.*

Certain class representatives were inadequate representatives because their claims were barred. Prior to this action, Delta obtained state foreclosure judgments against plaintiffs Clinton, Edwards, Loney and Robinson.[31] The court ruled that *Rooker-Feldman* extinguished these plaintiffs' rescission claims, "as they undermine the rights and interests established by the state foreclosure judgments." A922. While the court also ruled that statutory and punitive damages claims under HOEPA and TILA were not eliminated by *Rooker-Feldman*, these claims are subject to a one year statute of limitations, as compared to a three year statute for rescission. *Compare* 15U.S.C§1640(a)(4)(e) *with* 15U.S.C.§1635. *See supra* pp.23-24; *accord,*A1912-1913. Because each of their loan transactions was entered in

[30] Unlike *In re WorldCom*, Objectors have identified "genuine antagonism between the named Plaintiffs' interests and those of the Class." 217 F.R.D at 282.

[31] A11-13,A 30-31, A34-38,A56-59,A68-72,A93-96;A906-914.

1996, more than one year before the class action was filed,[32] these four plaintiffs no longer possessed any viable HOEPA or TILA claims and lacked standing to represent the class.[33] *See Baffa v. Donaldson, Lufkin, Jenrette,* 222 F.3d 52, 59 (2d Cir. 2000)(no standing because not member of the class); *see also Amchem,* 521 U.S. at 625-26 (class representatives must possess same interest and suffer same injury).

2. *Class Counsel Inadequately Represented the Class.*

Class counsel are held to a heightened standard to protect the interests of absent class members. *See Jostens Am. Yearbook Co.,* 78 F.R.D. 154, 163 (D. Kan. 1978) *aff'd,* 624 F.2d 125 (10th Cir. 1980). The court should focus its inquiry on the level of competency displayed in the present case. *See Ballan v. Upjohn Co.,* 159 FRD 473, 487 (W.D. Mich. 1994). Here, Abbey Gardy failed to adequately represent absent class members. Numerous acts illustrate the firm's incompetence to represent the class, promotion of some class members at the expense of others, and failure to prosecute claims zealously.

---

[32] Loan dates: Bertha Clinton, 3/29/96; Wilfred Loney, 11/27/96; James Robinson, 9/26/96; Juanita Edwards, 5/31/96. A907-909. As Delta aptly observed James Robinson's involvement in multiple real estate transactions subjects him to unique defenses, defeating typicality. A481,A497-500;A541-543. *See Baffa v. Donaldson, Lufkin, Jenrette,* 222 F.3d 52, 59(2d Cir. 2000); A481,A497-450,A541-543.2000.

[33] *Lopez* asserted federal claims for statutory damages, enhanced statutory damages and rescission under HOEPA and TILA. A941-942,A1043-1048.

a. *Class Counsel Incompetently Undervalued Claims, Relied on an Inexperienced Attorney and Defense Counsel's Self-Interested Legal Analysis, and Promoted Ineligible Class Representatives.*

Class counsel demonstrated incompetence to represent the class in several ways. First, class counsel seriously undervalued class claims based on misunderstandings of the law. The magistrate's order directly reflects these misunderstandings. Despite the Supreme Court's longstanding rule that the filing of a class action complaint tolls the statute of limitations, class counsel concluded that absent class members' claims were not tolled here. A1581-A1582,A1584;A1351-1352. ("They don't have any right to assert a defense in a cause of action where the statute of limitations has run so they are giving up essentially nothing and they are getting something in return", A1584). These claims are financially valuable to homeowners—generating as much as $50,000-100,000 per homeowner for rescission and statutory damages. Class counsel also failed to note that a class complaint preserves class members' rights to rescind. *See McIntosh,* 215 F.R.D. 26, 32-33. In the face of contrary law, class counsel concluded that virtually all of class members' claims had expired and, accordingly, assigned them no value. A1581-1582,A1584; *see also* A1592-1593,A1603. Having significantly undervalued these claims, class counsel agreed to release them for virtually nothing.

Second, class counsel relied on a single inexperienced associate—who in turn frequently relied on *defense counsel's* analysis rather than conducting his own. A1572-1603;("it had always been our intention that we bear the laboring oar [on analyzing the legal claims]"(Bryce, A1591). This is most evident from the fairness hearing. When the time came to present and prove its case, the firm simply abdicated.[34] Abbey Gardy associate Curt Beck was the sole advocate for the class at the fairness hearing. He failed to present even a *prima facie* case for certification under Rule 23, and conceded that the class did not qualify to be certified.[35] A1572-1584. *See Bishop v. N.Y. City Dept. of Hous. Pres.& Dev.,* 141 F.R.D. 229, 234 (S.D.N.Y.1992) (burden of proof on plaintiffs to establish criteria for class certification). He frequently deferred to Delta's counsel on issues central to the legitimacy and implementation of the settlement, revealing unfamiliarity with the class claims and the import of prior favorable rulings. A1574,1578-1579, 1581. His lack of preparedness "justifiably gave rise to concerns over Mr. Beck's ability to represent the putative class." A1886.

---

[34] Perhaps Abbey Gardy succumbed to Delta's frequent appeals "implor[ing] plaintiffs' counsel to 'get aboard' the settlement before it was too late. . . . using the promise of attorneys' fees to induce plaintiffs' counsel to settle the putative class action for no additional consideration." A414.

[35] Class counsel's brief and affidavit similarly failed to include the evidentiary information necessary to support the settlement. A1335-1470. (Only attorney billing records, the court's docket sheets and a firm resume were attached).

Delta's legal assessments were unsurprisingly unfavorable to the class. Delta's counsel explained away *prima facie* evidence that Delta's pattern and practice of lending based on the value of the home and without regard to the homeowner's ability to pay violated HOEPA, asserting, that named plaintiffs admitted they could afford their loans.[36] A1598. This assertion was intended to dispose of Delta's admission that approximately 35% of its high cost HOEPA loans were made to borrowers without ever confirming that they had income to support the payments or which charged payments that Delta knew would consume at least 50% of the homeowner's income—strong evidence of a class wide pattern and practice claim—entitling these homeowners to enhanced HOEPA damages worth tens of thousands of dollars. A1505-1508. By adopting Delta's analysis, class counsel compromised the claims of at least 1180 of these HOEPA borrowers for an average of $170, a fraction of their value. Class counsel made no effort to uncover the breadth of claims available to Delta borrowers whose loans were subject to HOEPA but were not acknowledged as HOEPA borrowers by Delta.

Beck also "finalized the settlement negotiations, prepared the settlement agreement, and submitted the application for final approval of the proposed

[36] Plaintiffs' deposition testimony reveals that their income was fabricated by the mortgage broker and/or Delta through fake leases and other creative means. *See* A693-699,A711-712;A758-763, A767-768;A592-594, A602-604.

settlement and for an award of attorneys' fees.".[37] A1721. Abbey Gardy's assertion that Beck was a conduit who merely channeled advice from partner Mark Gardy fails. A1735;A1768. Gardy played at most a minimal role in the class litigation. Unlike other partners, he charged *no* billable time to the case, and the text of the attorney fee records reflects only marginal involvement by Gardy from the initiation of the lawsuit through April 2002[38]. *Accord,* A1888, n.5.

Third, class counsel also demonstrated incompetence by retaining plaintiffs Clinton, Loney, Robinson and Edwards as class representatives following a ruling that *extinguished their federal claims.*[39] *See* p.6 *supra*; *Ballan*, 159 F.R.D.at 488. Only two months after this ruling, Abbey Gardy moved for class certification with these plaintiffs as representatives for all subclasses, A1110, defying the court's

[37] Since attorney billing records filed with Beck Affidavit, A1386, were, as the magistrate observed, unintelligible as filed, A1583-1584, Objectors scanned the records into a spreadsheet to enable analysis. *See* Ex.D.

[38] *See* Table Abbey Gardy billing records, Ex. E. It is unlikely that Gardy would have neglected to bill if he had any significant involvement in this case. Even marginal references to Gardy in Beck's billing records terminated four weeks before the fairness hearing. *See* Ex. F.

[39] In denying Ward's motion to intervene, the court cast doubt on these plaintiffs' ability to remain even in the state law subclass; ruling that Ward had no viable federal claim, the court declined to exercise jurisdiction over her state law claims. A936-937.

ruling and endangering the interests of legitimate members of the class.[40] Counsel compromised the claims of legitimate class members in order to provide for named plaintiffs who were ineligible to receive relief. This same error led to Arthur Abbey's disqualification as class counsel in *Ballan.* 159 F.R.D. at 488 ("Plaintiff's counsel inexcusably bollixed their selection of class representatives"); *see also Marisol v. Guiliani,* 126 F.3d 372, 378 (2d Cir. 1997) (imperative to identify subclass that each named plaintiff represents).

b. *Class Counsel Diverted Relief from Eligible to Ineligible Class Members and Undermined the Rights of Thousands of Class Members.*

The settlement reveals that class counsel advanced the interests of some class members at the expense of others and allocated settlement relief irrationally. *See Rules Advisory Committee Notes to 2003 Amendments to Rule 23* ("The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses."). Here, class counsel agreed to a settlement that diverted relief from eligible to ineligible class members and even *undermined* the rights of many class members.

---

[40] If this resulted from Abbey Gardy's inability to evaluate statutes of limitations applicable to the federal claims, it is further indication of Abbey Gardy's lack of fitness to represent the class.

The settlement diverted relief from eligible to ineligible class members in the following ways: HOEPA subclass relief was appropriately made available to a group of borrowers whose loans Delta admitted were subject to HOEPA and whose debt-to-income ratio exceeded 50% or whose income Delta admittedly failed to verify. A1218. These class members are eligible for enhanced statutory damages based on Delta's pattern and practice of lending without regard to the borrower's ability to repay the loan. *See* 15 U.S.C.§§1639(h);1640(a)(4). Anomalously, the subclass includes class members whose HOEPA claims are barred by the statute of limitations[41] but *excludes class members who have viable HOEPA claims* if they are no longer in their loans because of foreclosure or refinancing.[42]

The disputed HOEPA subclass was constructed much the same way—affording relief to subclass members ineligible for rescission or statutory damages and denying relief to class members who no longer have Delta loans but whose

[41] Subclass includes borrowers with loans from November 19, 1995-October 31, 1999. A1213-1216,A1218. Borrowers with loans prior to November 19, 1997 should have been excluded. *See* 15 U.S.C. §1640(e); *accord*A546;A1082-1083. "50 percent of the class is outside the one-year statute of limitations of Section 1640E [sic] of TILA" Bryce, A1593.

[42] While minimal, the average relief to HOEPA subclass members--$170—is significantly greater than the $10 offered most absent class members.

claims remain viable.[43] Class counsel's agreement to award relief to ineligible class members at the expense of eligible class members exposes either incompetence or unwillingness to adequately represent the class. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 875-76(1978).

Moreover, while bound to represent the interests of all class members, class counsel actively undermined the rights of class members who were in foreclosure in 2002 or would face foreclosure in the future. *See Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 19 (2d Cir. 1981). Abbey Gardy neglected the interests of approximately 4,195 class members in default or foreclosure when the firm filed its motion for approval of the class settlement—and an untold number of class members who would face foreclosure in the future—by proposing to release their defenses to foreclosure. A1506.

Abbey Gardy was aware of Delta's high foreclosure rate and the risk that class members could lose their homes. A1-8;A219;A361, *see e.g.,* A942. But Abbey Gardy's settlement proposal abandoned absent class members who were litigating foreclosure or might face such litigation in the future, *releasing* their

---

[43] Subclass includes class members with loans from November 19, 1995-October 31, 1999, whose loans are still in existence. A1213-1214,A1216-1218. Class members whose right to rescind was extinguished by foreclosure judgment and whose loans were outside the one year limitation for damages, were afforded disputed HOEPA relief, but relief was denied to class members with viable HOEPA claims who were no longer in their loans.

rights to defend against a foreclosure for an average of $13.[44] Moreover, Congress created a more lenient standard of eligibility for rescission which was available only as a defensive claim in the event of foreclosure. *See* 15 U.S.C.§1635(i); *see also* A1499. In releasing claims for class members in foreclosure, class counsel extinguished the future claims of homeowners for whom Congress had enacted special protections without providing them any compensation or otherwise justifying the decision.

Many private and public Objectors, including the U.S. Attorney, the NYOAG and the NYSBD, made clear in their written and oral objections to the proposed class action settlement that the release was grossly unfair: "For many class members, the settlement would leave them worse off than if no lawsuit had been brought in the first place." A1489; *see also* A1658-1664. The Assistant Attorney General elaborated:

> [T]he reason this is so different from any other kind of class action is because we have homeowners here whose homes are at risk. That makes it, of course, different from a class action involving a damaged dishwasher part or the like."
>
> . . . .
>
> [A] very, very small number of people . . . are served by the relief here and in exchange for that, as you have heard, folks are releasing all of their claims, current and future, and will have no claims left if in fact they are foreclosed upon. Assistant NY OAG, A1659-1660.

Landau, A1659-1660.

---

[44] Abbey Gardy took *no* steps to protect class members in foreclosure litigation, not even notifying their counsel of the proposed settlement to ensure that they might opt out. *See, e.g.* Order, 3/9/05 at 5.

> What is at issue here is a matter of gravity, it concerns people's homes and references to standard releases and standard class action provisions should be deemed inapplicable here.

Tepper, A1663.

A comparison of the dollar amount sought by Delta in foreclosure pleadings and the relief offered to the class illustrates that class counsel failed to secure relief for *any absent* class member in an amount that would enable them to preserve their homes from foreclosure. *See* Foreclosure Complaints for named plaintiffs and Objector/Woods, A11-13, A30-31,A34-38, A56-59,A68-72,A93-96,A1543. (The minimum amount sought by Delta was $68,105.87.as compared to maximum average relief of $400 for absent class members with Disputed HOEPA loans).[45] Class counsel's failure to address the impact of the release on these class members and its decision to release claims for all other borrowers in foreclosure was inexcusable neglect in light of its failure to secure relief sufficient to enable them to save their homes.[46]

---

[45] *See* pp.7-12 *supra.*

[46] Delta's later agreement to revise the release to exclude certain defensive claims (*see* A1809-1810) does not rehabilitate class counsel, who willingly agreed to extinguish class members' defensive claims in the proposed Settlement. A1223. "Most of the class members would have no defense." A1581.

c. *Class Counsel Failed to Conduct Adequate Discovery, and the Magistrate Abused Her Discretion in Denying Objectors' Motion to Take Discovery.*

Class counsel failed in its responsibilities to the class by neglecting to undertake any meaningful discovery of Delta and other defendants prior to entering into settlement discussions and by failing to secure any responsive pleading from the real parties in interest in this proceeding—the trusts that own the Delta loans. The resulting sparse evidentiary record was insufficient to enable the magistrate to engage in the heightened scrutiny necessary to certify a class or approve a settlement. *See Plummer,* 668 F.2d at 659. Thus, the magistrate abused her discretion in refusing to allow Objectors to conduct discovery. *See Malchman v. Davis*, 706 F.2d 426,429(2d Cir. 1983).

i. *Abbey Gardy failed to conduct discovery necessary to properly and adequately pursue the Lopez action.*

Court rulings, discovery orders, and billing records expose class counsel's significant neglect of discovery. In March and June 2000, the district court observed that the case was in the early stages of discovery. *See e.g.* A934;A785.[47] These observations are consistent with discovery orders and docket entries revealing repeated extensions of class and fact discovery deadlines. Without first

[47] By November 22, 1999 neither side had completed discovery on the motion for class certification. A424. The billing records reveal little or no class discovery after November 22, 1999-June 6, 2000. *See* Ex. D.

aggressively "ferret[ing] out facts helpful to prosecution of the suit," *Polar Int'l Brokerage Group v. Reeve*, 187 F.R.D. 108, 114 (S.D.N.Y. 1999) (citations omitted), class counsel began negotiations in April 2000 and reached a settlement in principle in early 2001.

The attorney billing records offer the best insight into the deficient conduct of discovery on behalf of the class. Only 238.25 hours are identified as devoted to discovery matters.[48] Of these, the text and dates confirm that the bulk—161.75 hours—was devoted to discovery of named plaintiffs' information. Ex.H. At most, 76.5 hours were spent on class or defendant-related discovery.[49] No depositions of defendants are identified; no significant time was spent reviewing defendants' documents; and no discovery data was attached to any of class counsel's pleadings. *See, e.g.,* A1371-1385; A1501-1508. *Compare Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 5318-95, 1997 N.Y. Misc. LEXIS 171, at *9-10 (N.Y. Sup. Ct. Jan. 7, 1997)(325,000 pages of defendants' documents reviewed;10 key depositions of defendants).

---

[48] This total includes all attorney hours which Abbey Gardy coded DOC, DIS, or DEP. *See* Ex. G.

[49] Recognizing the time records did not "clearly indicate the extent of discovery", the magistrate proceeded to assume without support that documents *sought* in discovery must have been received. A1889. Counsel received named plaintiffs' loan records. A215-217. However, neither the magistrate's findings nor the billing records reflect that *class discovery* was obtained.

Similarly, notwithstanding that the securitization trusts are the owners/holders of the notes at issue in this case and are liable for rescission and HOEPA damages claims of class members, Abbey Gardy never required an answer to any complaint filed in this case, stipulating to 22 extensions. Abbey Gardy never subjected either to deposition or discovery.

In light of the above and the magistrate's acknowledgement that class counsel "ha[d] not elaborated on the extent of discovery and substance of information received," her contradictory finding that "by the time settlement discussions began, both sides were in a position to make informed judgments about the merits of the case and the settlement" is inexplicable and unsupported by the record. A1906.[50] As far as can be determined, Abbey Gardy:

- never obtained data that would enable calculation of numbers of potential class members with HOEPA, TILA and state law claims;[51]
- never obtained loan files of all or a significant sampling of class members' loan files sufficient to enable evaluation of the existence and merits of class claims;[52]

---

[50] The magistrate made no effort to reconcile her contrary rulings nor to acknowledge their conflict with rulings of the Chief Judge.

[51] Both motions for class certification simply assert that class members with viable certifiable claims against Delta exceed 10,000. *No* supporting data is supplied. A355-358;A1089-1144.

- never deposed key Delta or assignee employees to assess their evaluation of loans for compliance with HOEPA and TILA and their procedures to verify information provided by brokers. *See e.g., Cooper*, 238 F. Supp. 2d at 56.(due diligence for assignees).

This failure to obtain essential discovery highlights Abbey Gardy's inexperience and incompetence in pursuing mortgage litigation.[53] Without basic information necessary to evaluate the merits of class claims, Abbey Gardy was at the mercy of its adversary.

ii. *The Magistrate Abused Her Discretion In Failing To Permit Objector-Appellants To Conduct Discovery.*

The magistrate abused her discretion in denying Appellant-Objectors' request for discovery where discovery was necessary to assist in the determination of the fairness and adequacy of the settlement. *See Malchman*, 706 F.2d at 426(2d Cir.1983) (remand—insufficient record to evaluate settlement). A court must ensure there is ample evidence to support a settlement, and should engage in fact-finding when evidence is lacking and the propriety of the settlement is in dispute.

---

[52] *See, e.g., Newton v. United Cos. Fin. Corp.*, 33 F. Appx 23, 25 (3d Cir. 2002); *Marks v. Global Mortgage Group, Inc.*, 218 F. Appx 23, 25 (3d Cir. 2002R.D. 492, 494, 497 (S.D.W. Va 2003).

[53] Abbey Gardy is a securities class action firm with minimal experience litigating consumer cases and no prior experience in mortgage litigation. *See* A1447-1458.

See Plummer, 668 F.2d at 659. Scrutiny of evidence is especially critical when named parties propose settlement prior to class certification. *See* A1876 (*citing D'Amato,* 236 F. 3d at 85).

The magistrate indicated she lacked sufficient facts to weigh the fairness of the settlement as compared to the probability of success if class claims were litigated. A1889,A1906; *Polar Int'l*, 187 F.R.D. at 112. In light of her findings that counsel failed to elaborate on the extent of discovery or information obtained during the litigation, that counsels' time records did not reflect the extent of discovery, and given the dearth of evidence before it, the magistrate should have provided Appellant-Objectors the opportunity to "test by discovery the strengths and weakness of the proposed settlement." *See Girsh v. Jepson*, 521 F.2d 153, 157(3d Cir. 1975), *compare Michels*, 1997 N.Y. Misc. LEXIS at *9-10(discovery adequate where plaintiff reviewed 325,000 documents and deposed 10 key employees).

Class counsel's insufficient research and discovery blunted the magistrate's ability to assess the adequacy of the settlement. For example, the lack of evidence led the magistrate erroneously to conclude that reduced interest rates on the Lopez and Williams refinancings showed an absence of HOEPA violations and improved loans. A1913. But expert testimony in the *Cooper* trial revealed that the equity-stripping effect of high loan charges, which increased the Lopez and Williams's

loan balances by more than 20%, A364, has a far more significant effect on affordability than interest rate alone. *See* Docket No.1:00-cv-00536-RMU(D.D.C 2002.

Moreover, given the magistrate's awareness that "for a large numbers of borrowers in the proposed class, the one-year statute of limitations pertaining to the non-rescission claims under TILA and HOEPA expired prior to the filing of suit," A1894-1895, she abused her discretion in failing to insist on discovery that would ensure eligible individuals received benefits as members of the HOEPA subclass. The magistrate had no material evidence justifying the subclass definitions, the allocation of relief to the various subclasses, and the small number of class members receiving substantive relief.

The objectors' motion for limited discovery should have been granted to ensure that settlement was the result of an arm's-length negotiation and that class counsel possessed the experience and ability, and engaged in the discovery necessary to provide effective representation of the class's interests. *See D'Amato* 236 F.3d at 85. Approval of a class settlement cannot survive appellate review when it is not based upon well-reasoned conclusions arrived at after a comprehensive consideration of all the relevant factors. *Plummer,* 668 F.2d at 659.

B. *It Was An Abuse Of Discretion For The Magistrate To Fail To Require Proof That The Class Claims Predominate.*

Certification of this Rule 23(b)(3) class required appropriate findings that common questions of law or fact predominate over individual questions, and a class action is a superior vehicle for resolving the controversy. *See Amchem*, 521 U.S. at 616. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and requires heightened scrutiny to protect the interests of absent class members when reviewing a class settlement prior to class certification. *See id.* at 620.

1. *When Homeownership Is At Stake, The Predominance Inquiry Requires Balancing Of The Significant Value Of Individual Claims.*

The magistrate failed to consider the overriding "interest of [homeowner] members of the class in individually controlling" the prosecution or defense of cases involving their homes. Rule 23(b)(3)(A).

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, ... the amounts at stake for individuals may be so small that separate suits would be impracticable.

Adv. Comm. Notes, 28 U.S.C. App., p. 698.

Whenever the home is at issue, the stakes are high. Unlike ordinary consumer classes, mortgage class actions purport to offer sweeping relief sufficient to save the homes of deceived and defrauded borrowers from foreclosure.

Ordinary consumer class actions typically aggregate numerous consumers with minimal individual damages to achieve a change in practice that benefits consumers generally. *See e.g. Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324, 327-28(N.D.Ill.1972). While ordinary consumer claims could rarely be prosecuted in the absence of the class action device,[54] individual mortgage claims are monetarily valuable and can generate tens of thousands of dollars per home. *See, e.g., Cooper v. First Gov't Mortgage & Investors Corp.*,1:00-cv-00536-RMU;Docket entries #331(damages for six homeowners totaling $194,302)& #335 (damages for three homeowners totaling $107,746) (D.D.C 2002); *Newton v. United Cos.*,24 F.Supp.2d 444(E.D.Pa. 1998)(80-130% loan reduction). In addition, attorneys are available to litigate individual or consolidated cases, obtain significant relief, and also receive awards of statutory attorney fees *See Coleman v.Coleman GMAC*, 296 F.3d 443, 449(6th Cir. 2003)(class treatment most appropriate where not economically feasible to pursue individual claims).

Many homeowners will be forcibly drawn into litigation to defend their homes from foreclosure. For example, Objector Tommie Lee Woods was sued in foreclosure and secured counsel to represent her. She rescinded her loan and asserted claims for damages under HOEPA and TILA which are valued at

---

[54] *See, e.g., Amchem,* 521 U.S. at 617; *Weber v. Goodman*, 9 F. Supp. 2d 163, 170 (E.D.N.Y. 1998)) (small damages claims, no likelihood of individual actions).

approximately $62,711. *See* Ex. I. Objector Christine Nicoll, who had been litigating her claims against Delta in foreclosure, obtained a settlement valued at $100,000. A1808.

Our society places a high value on homeownership. As Chief Judge Sifton observed,

> [A] single house is worth as much to the person who lives in it as all of the houses are to all of the people who live in it, so one of the things you've got to be cautious about as a class representative is, you got to represent the class, the legal principles, the general improvement of the law, the general improvement of how people behave, *but you also got to pay attention to the individuals involved.*

(emphasis added) A206-207. The importance of homeownership eclipses traditional notions regarding settlement of consumer class actions. "[T]he reason this is so different from any other kind of class action is because we have homeowners here whose homes are at risk." NY Assistant Attorney General, A1659. ". . . [T]his is not a standard case and should not be viewed as such." Assistant U.S. Attorney, A1662-1663.

> This settlement thus provides negligible benefits to the class members, while forcing them to forgo valuable rights . . . Because an enormous number of individuals covered by this class action risk the loss of their homes on account of potentially illegal loans, this settlement deserves intense scrutiny of its terms.

NYOAG, A1491, A1495.

As a result, where class counsel cannot secure relief for the class in an amount that is sufficient to outweigh the value of claims to those individuals who

will inevitably be forced to litigate them, class claims should not be found to predominate, certification should not be granted, and class settlements should not be approved. *See Grinnell,* 495 F.2d at 455.

2. *The Magistrate Failed to Consider the Overriding Interests and Value of Individual Homeownership Claims.*

Since the stakes in mortgage cases are so high and the individual claims are so valuable, the question of whether common claims predominate over individual claims necessitates a balancing that is absent in small consumer class actions.[55] *See Amchem*, 521 U.S. at 624-25; *In Re WorldCom,* 219 F.R.D. at 279. Certification under Rule 23(b)(3) ". . . invites a closer look at the case before it is accepted as a class action." *Amchem*, 521 U.S. at 615.

The magistrate's decision, which conditionally certified the class *and* conditionally approved the proposed settlement, undertakes no such "close look" and indeed, sidesteps the rigorous analysis and balancing required for Rule 23 predominance. A1859. The magistrate was unsympathetic to the concern that the class settlement threatened to compromise that ability of 67,500 Delta borrowers to save their homes. But for the concerns of Objectors, the magistrate would have allowed dismissal and waiver of *all claims and defenses* against Delta by class members who faced or would face foreclosure. *See* A1865;A1892-1893.

---

[55] *See, e.g., In re WorldCom*, 219 F.R.D. at 267, 279 (S.D.N.Y. 2003)(predominance inquiry is more demanding than commonality).

Abusive and predatory practices in mortgage origination and servicing that threaten people's homes give rise to mortgage litigation. *See, e.g., Empire Funding*, 183 F.R.D. at 434. Mortgage class certifications cannot proceed without careful consideration and balancing of the value to be gained for the class against the serious threat of foreclosure faced by thousands of borrowers. A proper predominance analysis obligated the court to determine that the value to be received by class members would outweigh the interest and need for individual control. "The interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong." *Amchem*, 521 U.S. at 616. The magistrate's failure to take account of these interests in evaluating predominance was an abuse of discretion.

3. Valuable Individual Claims Dependent on Individualized Proof Cannot Meet the Predominance Test.

Where a claim commonly held by class members is also dependant on individualized proof, and where the need for individualized proof *significantly diminishes* its value as a class claim, there cannot be predominance. HOEPA and TILA provide claims for damages and rescission based on the lender's failure to provide disclosure documents. These claims were asserted in the complaint[56] and supported by unequivocal deposition testimony of class representatives that they

[56] *See* A953; A963; A975; A982; A988-989; A1000.

were provided *no* documents at closing, but received them only days later—clear evidence of valid damages and rescission claims under HOEPA and TILA. *See* A618;A782; *see also* A709(no pre-closing disclosures); *In Re Williams*, 232 B.R. 629, 648 (Bankr. E.D. Pa. 1999), *aff'd*, 237 B.R. 590 (E.D. Pa. 1999).

Because proof of these claims is rarely straightforward, but requires highly individualized rebuttal evidence about the circumstances of each class member's loan transaction,[57] they can never support a finding of predominance. *See* Rule 23(b)(3). *See, e.g.,Cooper,* 238 F. Supp. 3d at 64-65; *Williams v. First Gov't Mort.,*275 F.3d 738, 751(D.C.Cir. 2000). Even in the context of a settlement, these claims cannot predominate where the compensation offered is grossly disproportionate to their value as an individual claim. *See Grinnell*, 495 F.2d at 455 (The most important factor is the strength of plaintiffs' claims balanced against the amount offered in settlement.). Here the class representatives' depositions reveal the likelihood that a significant number of class members possess these claims, but the need for individualized proof greatly diminished or nullified their value as a class claims. Although this claim is worth thousands of dollars to many of the individuals in the class (e.g. worth $62,711 to Tommie Lee Woods., Ex. I), it yielded at most a small sum, if anything, per borrower when it

[57] This rescission claim is equally available against an assignee of the loan, including the trusts sued in this case. *See* 15 U.S.C.§1641(c).

was settled as a class claim. *See* Chart, p. 9. Affording absent class members the opportunity to litigate this claim to save their homes far outweighs its settlement value. Predominance cannot be found where minimal sums are offered to the class to extinguish claims that offer vastly superior value to individuals. [58]

4. The Magistrate Effectively Disavowed the Predominance Determinations.

Having determined that the claims raised meet the predominance, superiority and other requirements of Rule 23 and are certifiable as a class, the magistrate reverses on substantive fairness. A1891-1915. Rather than determining, in light of the evidence, that many of the claims could not be certified, the magistrate first certified all class claims, then diminished their value, *seriatim*, by effectively disavowing predominance.

HOEPA/TILA Statutory Damages Claims: The magistrate's recognition that HOEPA/TILA statutory damages claims, certified as predominant claims for the entire class, had "expired prior to filing of suit," for almost half the class, A1894-1895, required a reversal on predominance or at a minimum a revision of class definition. *See generally Ortiz*, 527 U.S. at 854-55.

---

[58] "[T]he primary justification for class treatment of these claims is largely absent because [TILA/HOEPA's] provision for the award of attorneys' fees and costs to successful plaintiffs eliminates any potential financial bar to pursuing individual claims." *Coleman v. GMAC supra*, 296 F.3d *v. Coleman, supra,* at 479.

HOEPA/TILA Rescission Claims: The magistrate's treatment of class rescission claims warrants special attention as rescission is a valuable claim that returns to the homeowner all finance charges and fees paid on the loan *and* voids the mortgage, making foreclosure impossible. 15 U.S.C.§1635. While courts have taken differing views on whether rescission claims are appropriate in the class context, *see McIntosh*, 215 F.R.D. at 30-31, the .magistrate's explicit reliance on *McIntosh*, to find that common questions predominated over individual claims and that class action was the superior method for adjudicating them, precluded her from ignoring the decision in addressing substantive fairness. A1882-1884.

The *McIntosh* court undertook an extensive examination of class rescission prior to certifying a tightly defined class[59] of HOEPA borrowers with a single identical claim whose loans were made within three years of the filing of the complaint. *McIntosh,* 215 F.R.D. at 32-33. In so doing, the court ruled that: (1) a rescission class action is best maintained by seeking declaratory relief of the right to rescind; (2) a complaint can serve as notice of rescission under TILA; (3) rescission claims are not extinguished by a refinancing. *Id.* at 31--33. These rulings opened the door for the *McIntosh* court to certify the class. *Id.* at 33.

Having determined that rescission claims were properly certifiable as class claims under the analysis of *McIntosh,* the magistrate disavowed it when

[59] The class was limited to HOEPA borrowers who had refinanced and paid an illegal prepayment penalty. *McIntosh*, 215 F.R.D. at 33.

considering the substantive fairness and adequacy of the settlement. Ignoring the *McIntosh* analysis it had just embraced, the magistrate turned instead to the pre-certification concerns of other courts who refused to certify rescission classes "because of the individualized nature of such claims," A1896. She opined on the ". . . risk that the rescission claim will ultimately impede adjudication of this matter as a class action," and on the possibility that filing of the complaint did not toll the statute of limitations for rescission. A1895.

State Law Claims: Finally, having presumably (though silently) included state law claims in her determination that class claims predominate and meet the superiority and Rule 23(a) requirements for class certification, the magistrate's decision does a complete reversal when addressing the fairness of the settlement of UDAP claims. ". . . [S]ome, if not most, UDAP statutes require proof of detrimental reliance . . ." A1896. "Where proof of reliance is primarily based on unique false representations or individualized claims where reliance exists, *prosecution of claims on a class basis may not be appropriate.*" A1898 (emphasis added).

In backtracking on each of these claims, the magistrate justified as "fair" the paltry recovery the settlement afforded absent class members. What the magistrate effectively accomplished was an unraveling of her earlier determinations of predominance and superiority.

5. *Viable class claims remain that could afford significant relief to identifiable groups of class members on remand through litigation or settlement.*

A decision to disapprove the settlement would create the opportunity to reconfigure class members with common viable claims into truly workable and well-defined subclasses of absent class members whose claims were preserved by the filing of the complaint. The complaint tolled the statute of limitations for TILA and HOEPA statutory damages claims on loans made after November 18, 1997[60] and properly preserved the rescission claims on loans made after November 18, 1995. *See McIntosh*,215 F.R.D. at 3. Following a reversal of the decision below, class relief could still be obtained for several new and carefully defined subclasses. For example, though severely handicapped by the dearth of information available to them about Delta borrowers' loans, Objectors are able to construct at least three subclasses with viable common claims that could be represented on remand:

(1) HOEPA pattern and practice subclass

(2) HOEPA rescission and statutory damages subclass; and

(3) disputed HOEPA rescission subclass.

The HOEPA pattern and practice subclass would include borrowers whose loans were made after November 18, 1997. Of these borrowers, the subclass would include, at a minimum, all HOEPA borrowers whose debt to income ratio

[60] Even Delta admits this. A546.

was greater than 50% and all borrowers whose income was not fully verified. Delta has acknowledged making at least 7715 HOEPA loans during the class period.[61] *See* A1505. While Delta identified 1180 of these loans as meeting the requirements for placement in the HOEPA subclass, that group is both over and under-inclusive: Borrowers whose loans were made prior to November 19, 1997 would be excluded;[62]; borrowers who otherwise meet the above requirements but were excluded from the HOEPA subclass because they were no longer in their loan would be included.[63] These subclass members are eligible for HOEPA enhanced statutory damages.

The HOEPA rescission and statutory damages subclass would consist of two groups of HOEPA borrowers whose loans contain prohibited terms: increased default interest in violation of 15 U.S.C.§1639(d) and prepayment penalties in violation of 15 U.S.C.§1639(c). Borrowers with loans after November 18, 1995, whose loans had not been foreclosed, would have viable rescission claims relating back to the filing of the Complaint. A second group of borrowers with loans after

---

[61] Other HOEPA borrowers, not acknowledged by Delta would also be eligible for inclusion in this or a related subclass.

[62] Their claims were barred by the one year statute of limitations. 15 U.S.C.§1640(a)(4).

[63] Their claims were preserved. *See* discussion *supra* at 24-25.

November 18, 1997, would have viable statutory and enhanced statutory damages claims whether or not their loans had been foreclosed.

The disputed HOEPA and TILA rescission class would consist primarily of borrowers with loans between November 19, 1995 and September 30, 1996 whose loans had not been foreclosed.[64] This group of borrowers would include, at a minimum, all borrowers whose loan included a broker fee or a charge by attorney Horan that was not included in the finance charge of their loan.

Other subclasses with common claims might emerge following a real effort to conduct discovery of the defendants. However, it is unlikely that the broadly defined class certified below is or was ever eligible to receive class relief. *See* A1663;A1912-1915. The uncertainty of finding any predominant state law claims, particularly for borrowers in other states; the fact that many claims were long ago extinguished by foreclosure; were barred by statutes of limitation or were otherwise unsuitable as class claims will result in a much smaller but well defined and cohesive class.

Beyond this, the choice should not be viewed as between a very negligible settlement for the class and providing no relief at all. A decision to disapprove the settlement opens two options for class members. First, it revives the affirmative

---

[64] A small number of borrowers with loans closed by attorney Horan after 9/30/96 would also be included; any of these "Horan" closed loans made after 11/18/97would also be entitled to statutory damages.

claims of class members who are currently litigating with Delta or its assignees, thus affording them the opportunity to obtain substantially greater relief.[65] Second, it creates the opportunity to reconfigure class members with common viable claims into truly feasible and well defined subclasses and to seek relief on their behalf through litigation or settlement.

C. *Class Notice Was Grossly Inadequate to Inform Unsophisticated Class Members of the Terms of the Proposed Settlement.*

Class notice must be in "plain, easily understood language" that concisely and clearly explains the nature of the case, the parameters of class membership and the binding effect of class certification on individual claims. FRCP 23(c)(2)(B). Notice must adequately summarize the litigation and settlement and apprise class members of their rights. *In Re Prudential Ins. Co. of Am. v. Sales,* 148 F.3d 283, 326306 (3d Cir. 1998).

Chief Judge Sifton ruled that the vulnerability of this class required notice to meet a higher standard of clarity to ensure that the class is "fully informed" about the effect of any release. A795.

> . . . [A] great percentage of those to whom the notice will be sent are elderly and poorly educated. . . .it is not the fact of settlement itself with which this Court should be concerned, but with ensuring that putative members of the class are not misled into settling their claims. . .

[65] This would primarily benefit class members with rescission claims.

A795. The magistrate erred in approving the lengthy, dense and convoluted notice, by failing to order new notice after amending the settlement and in ignoring the court's prior ruling.

1. *The Class Notice Was Misleading.*

Class notice did not adequately inform class members of their rights, misleading them into believing that they would receive significantly greater benefits.

> My mother is almost 80 years old. . . . We got this letter in the mail. I had to read it seven times. My mother read it 14 times and didn't understand it. . . . says she is going to get $200,000 . . . after sitting here speaking with one of the lawyers, she is actually getting $7.82.

A1671-1672. Then I got here. I was enlightened to know that my amount is $17.97. A1677. *See also* A1669-1677.

Class notice is a dense, four-page single space document with numerous cross references to legal terms in sections which are not numbered or consecutive. A1465-1468. The convoluted notice prompted large numbers of confused class members to attend the fairness hearing in an effort to understand the settlement. The magistrate noted the unusual turnout and its relationship to the terms of the settlement:

> There are many of you here. I think we don't need to hear the same arguments repeated but since there is certainly an issue as to how well received the settlement, the proposed settlement is, I would take advantage of the fact that we do

> have people who have taken the effort to come to this courtroom to attend this proceeding.

A1664.

The Delta borrowers plainly informed the magistrate of their doubts. Their confusion was obvious: "I'm saying I don't know what is going on." A1676. "I received this notice from Delta and I would like to know what it's about." A1673. As the Assistant U.S.Attorney pointed out: "The fact that many borrowers are here today as others have stated suggests that many people did not understand the notice." A1662.

Magistrate Go's ruling that the notice "clearly advised class members as to the broad scope of the release required," A795, and was adequate, was astonishing in light of the many objectors' focused complaints, and is fully contradicted by the notice itself and the testimony at the fairness hearing. A1465-1468. Further, given the magistrate's January 5, 2005 decision approving an amended settlement, in the absence of subsequent notice to the class identifying the amendments, the initial class notice should not have formed the basis for approval of the settlement. A1943; *see* A1950-1951.

2. *Class Notice Failed To Comply With The Higher Standards In Chief Judge Sifton's March 2000 Ruling On Notice.*

The concern that Delta borrowers would be easily mislead was the precise reason cited by the court in requiring notice of Delta's settlement with the NYOAG to be redrafted.

> ". . . [D]efendants' proposed form of notice misleadingly fails to make clear that the notice recipients need not accept the payment reduction.
>
> . . . by monitoring defendants' communications with putative class members. . . the Court . . . .has ensured that no putative class member will make an uninformed decision."

A795; A798. Class counsel *then expressed* the identical concern: "The settlements. . . are sorely lacking in material information necessary for a Delta borrower to determine whether to accept a mortgage reduction offer from Delta." A407.

Yet the notice about the NYOAG's settlement was considerably clearer and shorter than the class notice ultimately approved by Magistrate Go. In addition, unlike the approved class notice, the original notice of the New York settlements, A446, included a clear expression that participants would be releasing claims. Nevertheless, the court required that notice be amended to present clearer information to Delta borrowers and a clear choice. A795-796;A800-801.

Most significantly, the court's expressed concern that these class members not release claims in *opt-in* settlements with New York authorities without full information has heightened importance here, where their claims were automatically released unless they timely *opted out* of the class. Magistrate Go's failure to reconcile or even reference the conflict between the court's explicit findings about notice, ignoring law of the case, and her use of the reasonable person standard in her own ruling, A1902-1904, was an abuse of discretion that requires remand.

III. THE MAGISTRATE ERRED IN DENYING THE MOTIONS TO VACATE THE REFERENCE AND TO INTERVENE.

Appellant-Objectors filed motions to vacate the reference and to intervene in May and June of 2002, within weeks after receiving notice and filing objections to the settlement. A1481; A1571;A1613; A1701. The motions were denied years later on August 9, 2004. A1843.

The magistrate erred in denying the motion to vacate the reference of final decision-making to a magistrate judge. References require the consent of all parties, and class members who timely object to a reference should be considered "parties" for the purpose of moving to vacate the reference. Alternatively, if

Appellant-Objectors were not parties, then the magistrate erred in denying their motion to intervene, which would have made them parties if granted. [66]

A. *The Magistrate Erred in Denying the Motion to Vacate the Reference.*

The reference of final decision-making authority to magistrate judges requires consent from *all* parties to the litigation:

> (1) Upon the consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

28 U.S.C.§636(c). "[W]hen *all* parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c)." FRCP 23(a). Courts strictly enforce this requirement demanding express, unanimous, noncoerced consent. *See, e.g., N.Y. Chinese TV Programs, Inc. v. U.EU. Enters.*, 996 F.2d 21, 24,25 (1993).

Absent class members who timely object to a reference should be considered "parties" for the purposes of §636(c)(1). *See Devlin v. Scardeletti*, 536 U.S. 1,1-2 14 (2002). *Devlin* held that absent class members who timely object to a settlement are "parties" for purposes of appeal because the settlement binds them

---

[66] The district court forwarded the motions filed with it in accordance with *New York Chinese TV Programs, Inc. v. U.E.U. Enters.*, 996 F.2d at21, 23 (2d Cir. 1993); to the magistrate . A1844-1845.

and appealing is their only means of protecting their interests. 536 U.S. at 7, 14; *see also In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49, 53(2d Cir. 1996).

Devlin's reasoning applies with even more force to objectors to a §636(c) reference. *Devlin* held that objectors are parties regardless of the substance of their objections. However, objectors to a reference uniformly assert the fundamental constitutional right to an Article III forum. *See, e.g., New York Chinese TV*, 996 F.2d at 24; *Rembert v. Apfel*, 213 F.3d 1331, 1334-35(11th Cir. 2000); Murret, 894 F.2d at 695. Surely the constitutional right to an Article III forum deserves of at least as much protection as the right to appeal a settlement.

The magistrate overlooked this critical aspect of *Devlin* by focusing only on whether §636(c)(1) requires the *affirmative consent* of *all* absent class members. In examining affirmative consent, the magistrate relied on just one case that addressed the question, *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998). A1853-1854. That case is inapposite because the court relied on precedent overruled by *Devlin*. *See Gen. Elec. Capital id.* at 269 [67] and because absent class members there did not object or move to intervene in the district court. *Gen. Elec. Capital* at 268. Because Appellant-Objectors participated in the

[67] Other cases on which the magistrate relied did not address §636(c)'s application to absent class members. *See* A1853 *citing Binder v. Gillespie*, 184 F.3d 1059 at 1063 (9th Cir. 1999)(appellant was named party;court did not consider whether absent class members were parties); *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 171 F.3d 1083(7th Cir. 1999).

proceedings below, this Court need only consider whether absent class members *who timely object to a reference* may vacate it.

Appellant-Objectors' motion to vacate the reference should have been granted.

B. *The Magistrate Erred by Denying the Motion to Intervene.*

If absent class members must intervene to vacate a reference, then the magistrate erred by denying the motion to intervene. The Appellant-Objectors readily meet the requirements for intervention as of right under Rule 24(a).

A prospective intervenor must "(1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action." *D'Amato*, 236 F.3d atatat 84. Appellant-Objectors moved to intervene promptly upon learning of a class action that would bind them, a decision by class counsel to waive their constitutional right to an Article III forum, and a settlement that would leave them worse off than they were before the lawsuit. It would be difficult to imagine a stronger case for intervention.[68]

---

[68] Indeed, under *Gen. Elec. Capital Williams*, the case on which the magistrate relied most heavily, vacateur would be required here. The *Gen. Elec. Capital* court *Williams* held that absent class members who wish to vacate a reference may move to intervene. 159 F. 3d at 269. Where the named plaintiffs inadequately protect absent class members' interests, the court held, the motion to intervene should be granted. *Id.* at 269-70. *Accord, Devlin,* 536 U.S. at 10.9.

The magistrate abused her discretion in denying the motion. After tacitly acknowledging that Appellant-Objectors have an interest in the litigation, her analysis faltered in erroneously concluding that Appellant-Objectors' interests would not be impaired, were adequately represented, and that the motion to intervene was untimely.

1. *This Litigation Impairs Appellant-Objectors' Ability to Protect Their Interests.*

Instead of adhering to the liberal standard of *Devlin* in assessing Appellant-Objectors' interests and rights in the proceedings below, the magistrate interpreted *Devlin* to constrain their rights. She imposed diametrically opposed standards to Appellant-Objectors in evaluating their separate motions to vacate the reference and to intervene. She held that they were not permitted to vacate the reference but denied their motion to intervene in part because she believed they were able to protect their interests (excluding, apparently, their interest an Article III forum). Her analysis that intervention was unnecessary to preserve Appellant-Objectors' interests would strip all absent class members of their right to an Article III forum. A1846-1847.

The magistrate reasonably read *Devlin* as "directly dispos[ing] of" the impairment of rights question, A1846, but interpreted it incorrectly. *Devlin* held that objecting class members need not intervene to appeal a settlement approval, in large part because the case for intervention is so strong that it would be a needless

formality. 536 U.S. at 11-13 ("Non-named class members will typically meet the requirements for intervention of right.") *see also id.* at 20-21 (dissent) (agreeing that intervention would only be a formality but requiring it nonetheless). Even if the Supreme Court were to require intervention as a prerequisite to vacating the reference, it would unanimously hold that the motion to intervene should have been granted.

In contrast, the magistrate reasoned that Appellant-Objectors have no interest that would be impaired by the litigation because they are permitted to appeal. A1846. An appeal right cannot remedy the inability to participate in litigation particularly when Appellant-Objectors' purpose is to ensure the district court proceedings are conducted in an Article III forum. Moreover, the ability to advance the uphill, *post-hoc* argument that a lower court abused its discretion cannot substitute for participation in the proceedings in the first place. If she ignored these asserted interests, the magistrate abused her discretion. *See Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 339-40 (7th Cir.1987). Moreover, to block parties who can appeal without intervening from participating until the appellate stage would cause inefficiency directly contradicting the goal of bringing interested parties to the table as early as possible. *See* FRCP 24, Notes of Advisory Committee on Rules—1966 Amendment. ("Whenever feasible, the persons

materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.")

After discussing *Devlin*, the magistrate mistakenly concluded that Appellant-Objectors' interests were not impaired by the litigation because they had the opportunity to object or opt out. *Devlin* makes clear that objectors' interests were impaired—indeed, were made subject to a *binding* judgment—even though the court heard their objections. Moreover, Appellant-Objectors' interests are still at stake in this litigation because they did not opt out.

2. *The Named Plaintiffs Do Not Adequately Represent the Interests of Appellant-Objectors.*

In concluding that Appellant-Objectors' interests were adequately represented, A1847, the magistrate ignored *Devlin*'s square holding that, *by definition*, named plaintiffs do not adequately represent objectors' interests.536 U.S. at 9. This case could not more clearly present named plaintiffs' failure to represent Appellant-Objectors' interests. Rule 24(a) requires only a "minimal" showing that representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10(1972). Here, named plaintiffs purported to waive absent class members' constitutional right to an Article III forum, which Appellant-Objectors do not waive, and settled on terms that are grossly unfair and inadequate for absent class members. *See id.* at 636-37. As discussed extensively,

the interests of named plaintiffs were antagonistic to those of absent class members and are clearly adverse to Appellant-Objectors on appeal.

3. *Objectors' Motion Was Timely.*

Appellant-Objectors timely moved to intervene. Timeliness requires prompt intervention when learning of one's interest in litigation. *United Airlines v. McDonald*, 432 U.S. 385, 394 (1977). Appellant-Objectors met that requirement, moving to intervene within a few weeks of receiving notice of the action.

The factors for assessing timeliness are: (1) how long the applicant had notice of an interest before moving to intervene; (2) prejudice to existing parties from delay; (3) prejudice to movants if the motion is denied; and (4) unusual circumstances militating for or against a finding of timeliness. *D'Amato*, 236 F.3d at 84.

a. *Appellant-Objectors Moved to Intervene Promptly Upon Learning of Their Interest in this Litigation.*

The magistrate correctly noted that the "the relevant consideration [for timeliness] is when Objectors had notice of their interest in this lawsuit." A1848; *see Catanzano v. Wing*, 103 F.3d 223, 233 (2d Cir. 1996). She erred, however, in thinking that absent class members had—or should have had—notice before they actually received the court-ordered notice. A1848. Absent class members have no affirmative duties in litigation before receiving notice. *See Am. Pipe*, 414 U.S. at 552 ("Not until the existence and limits of the class have been established and

notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it").

The magistrate imputed notice to Appellant-Objectors through counsel whom they ultimately retained. A1849-1850.[69] She would apparently require lawyers to file speculative motions to intervene in litigation because interested individuals may hire them someday. Such motions would create "the very multiplicity of activity which Rule 23 was designed to avoid," *See Am. Pipe*, 414 U.S. at 551, and would properly be denied for asserting imaginary interests of imaginary clients.[70]

In observing that class members knew of the litigation "at the very least" after receiving notice, the magistrate failed to explain why a motion filed within a few weeks of receiving that notice—and *before* the fairness hearing—is dilatory. *See* A1848. Indeed, the relevant case law supports Appellant-Objectors. *See, e.g.*, *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 882 (6th Cir. 2000) (intervention motions filed before fairness hearing were timely); *see also United Airlines*, 432 U.S. at 394. In moving to intervene within weeks after defendants

---

[69] The magistrate raised this argument when analyzing prejudice to existing parties, *see* A1849-1850, but it applies more properly to the question of delay.

[70] The magistrate based her reasoning on an inapposite case involving a class member who sought to add defendants to litigation on the eve of settlement. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 172 (S.D.N.Y. 2000); *D'Amato*, 236 F.3d at 82, 84.

commenced mailing notice, Appellant-Objectors moved as quickly as could be expected. *See Telectronics*, 221 F.3d at 882

b. *Granting the Motion to Intervene Would Not Prejudice Existing Parties.*

Appellant-Objectors did not seek to "sabotage[]" named parties "on the verge of settlement," as the magistrate believed. A1848. Rather, they moved to intervene and vacate the reference at precisely the moment when absent class members are supposed to raise objections. That Appellant-Objectors sought to vacate the reference does not distinguish this case from one in which Objectors simply challenge settlement terms. Appellant-Objectors seek the same relief sought by objectors to any proposed settlement, including those in *Devlin* itself: to defeat the settlement. Vacating the reference would not destroy the parties' prior negotiations. Appellant-Objectors do not seek to add parties or claims; nor do they wish to alter the scope of the litigation in any other manner that would require the parties to begin anew. They sought only to defeat a proposed settlement and have the matter heard before an Article III judge.

The magistrate therefore erred in finding prejudice to the named parties. The only relevant case she cited supports Appellant-Objectors. A1848. *See In re Nasdaq Mkt.-Makers Antitrust Litig.*, 184 F.R.D. 506, 511(S.D.NY. 1999) (absent class members who sought to intervene *post-judgment* should have intervened

before the fairness hearing—as Appellant-Objectors did here).*Id.* at 513-14. The magistrate's citation to *D'Amato*, 236 F.3d 78, is inapposite. *See Id.* at 82, 84.

Other cases cited did not involve absent class members, but concerned *nonparties* who had notice many months, or even years, earlier and sought to intervene only at the time of settlement. *See, In re Holocaust Victim Assets Litig.*, 225 F.3d 191,198-99(2d Cir. 2000) [hereinafter *In re Holocaust*]; *U.S. v.Pitney Bowes, Inc.*, 25 F.3d 66,70(2d Cir. 1994).[71] If these cases are relevant, they support Appellant-Objectors. These cases fault objectors who, unlike Appellant-Objectors, failed to seek intervention until many after filing objections. *See In re Holocaust*,225 F.3d at 198; *Pitney Bowes*, 25 F.3d at 71.

Here, Appellant-Objectors moved to intervene less than two weeks after objecting and cause no prejudice to the parties.[72]

c. *Failing to Grant the Motion Would Prejudice Appellant-Objectors, and Unusual Circumstances Weigh in Favor of Granting the Motion.*

The prejudice to Appellant-Objectors from denial of the motion is plain: they will be denied their constitutional right to an Article III forum. Even if the

---

[71] *New York News, Inc., v. Kheel*, 972 F.2d 482 (2d Cir. 1992), did not even consider timeliness under Rule 24(a).

[72] Appellant-Objectors filed separate objections in the District Court on May 9th and 10th, 2002; A1243;A1277;A1289; they filed motions to intervene on May 20, 2002 and on June 12, 2002 and orally moved to intervene at the fairness hearing on May 24, 2002. A1481; A1571;A1613;A1701.

motion had been untimely, unusual circumstances would have mitigated the untimeliness. Absent class members in this litigation are victims of a predatory lending scheme. Most are poor or elderly (or both) and have little legal knowledge. When they received class notice, many were unrepresented by counsel and did not understand the notice or know how to respond. Moreover, the magistrate had a fiduciary duty to protect their interests. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (quoting City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1099 (2d Cir. 1977). Thus, even if Appellant-Objectors filed late, basic fairness considerations favor granting of their motion.

In sum, the motion to vacate the reference should have been granted regardless of whether Appellant-Objectors were required to intervene to assert their right to be heard by an Article III judge.

CONCLUSION

The magistrate abused her discretion in approving a grossly unfair and inadequate class settlement that significantly undervalued class members' legal claims. In light of class counsel's inadequacy, class representatives' antagonism toward absent class members, the settlement's irrational allocation of relief to ineligible class representatives and class members and away from class members with viable claims, and the absence of an evidentiary record, this Court should reverse the certification and approval of the class settlement, grant Appellant-

Objectors' motions for discovery and to vacate the reference or to intervene, and remand to the district court for further proceedings.

Dated: July 11, 2005

NINA F. SIMON
D.C. Bar No. 256396
nsimon@aarp.org

AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Telephone: (202) 434-2059
Fax: (202) 434-6424

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point using Times New Roman Style.

Dated: July 11, 2005

NINA F. SIMON
D.C. Bar No. 256396
nsimon@aarp.org

AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Telephone: (202) 434-2059
Fax: (202) 434-6424

PROOF OF SERVICE

I, Stephanie Boyd being duly sworn, deposes and says:

1. I am not a part to this action, and I am over 18 years of age.

2. On the 11th day of July 2005, I caused to be served true and correct copies of the following documents: Appellant-Objectors' Brief, Exhibits and Joint Appendix thereto by first class mail, postage prepaid, upon the following:

Eugene Licker
Loeb & Loeb LLP
345 Park Avenue
New York, NY 10154

Angela T. Bellizzi
Davis Polk & Wardwell
450 Lexington Avenue
Room 2934
New York, NY 10007

Karin E. Fisch
Abbey Gardy, LLP
212 East 39th Street
New York, NY 10016

Martin C. Bryce
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

_____
Nina F. Simon