No. 09-31156

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: KATRINA CANAL BREACHES CONSOLIDATED LITIGATION

PLAINTIFFS CLASS,
Plaintiffs - Appellees

v.

BOARD OF COMMISSIONERS OF THE ORLEANS PARISH LEVEE DISTRICT; ORLEANS LEVEE DISTRICT; BOARD OF COMMISSIONERS OF THE LAKE BORGNE BASIN LEVEE DISTRICT; LAKE BORGNE BASIN LEVEE DISTRICT; BOARD OF COMMISSIONERS OF THE EAST JEFFERSON LEVEE DISTRICT; EAST JEFFERSON LEVEE DISTRICT; ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Defendants - Appellees

v.

MARY BRINKMEYER; MICHELLE LEBLANC; THOMAS C. STUART,
Interested Parties - Appellants

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consolidated with
09-31188

IN RE: KATRINA CANAL BREACHES CONSOLIDATED LITIGATION

LESLIE SIMS, JR.; ROSA MARQUEZ; FLOYD AARON III; HASSAR SLEEM; MADELINE BERTUCCI; ET AL,
Plaintiffs - Appellants

v.

BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT; SEWERAGE AND WATER BOARD OF NEW ORLEANS; EAST JEFFERSON LEVEE DISTRICT; ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS; ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Defendants - Appellees

VERA D. RICHARD; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

ELIZABETH H. DEPASS; ET AL,
Plaintiffs - Appellants
v.
BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT; SEWERAGE AND WATER BOARD OF NEW ORLEANS; EAST JEFFERSON LEVEE DISTRICT; ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS; ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Defendants - Appellees

MARIE ADAMS; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

LINDA C. BOURGEOIS; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

KEITH C. FERDINAND, M.D., A.P.M.C.; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

MARY CHRISTOPHE; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

SUSAN WILLIAMS; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

RHEALYNDA PORTER; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

XIOMARA AUGUSTINE, doing business as Bright Minds Academy; ET AL,
Plaintiffs - Appellants
v.
ORLEANS LEVEE DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants - Appellees

On Appeal From the United States District Court
for the Eastern District of Louisiana

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June 3, 2010

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INTRODUCTION AND SUMMARY OF ARGUMENT

The settling parties fail to confront several key legal issues in this case and ignore alternatives suggested by the objectors. First, in their statement of the issues and their summary of the argument, the settling parties do not even mention that, if this Court finds that the class settlement satisfies the requirements of Rule 23(b)(1)(B) as construed in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court must decide whether certification of a non-opt-out settlement class in a mass tort damages action violates the Constitution. The Supreme Court has recognized "the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale," *id.* at 845, yet the settling parties do not even acknowledge the issue until page 46 of their brief, and they fail to address the tension between certification of a mandatory settlement class and the due process rights of class members with damages claims that are not amenable to *pro rata* distribution.

The settling parties also ignore *Ortiz*'s requirement that the proponents of a limited fund settlement demonstrate that the fund has been set at its maximum, and instead argue, without citation to any authority, that assets exempt from seizure to satisfy a judgment are necessarily unavailable for contribution to a settlement fund. Further, the settling parties do not address the record evidence that the levee districts

have judgment funds and non-flood-control assets that could be contributed to the settlement.

Likewise, the settling parties ignore the suggestion that they can avoid both the constitutional issue and the need to show maximum contribution by simply allowing opt outs from a class settlement for the limits of the insurance fund. Fashioning such a proposal pursuant to Rule 23(b)(3) would avoid a race to collect the insurance proceeds because the opt outs would know that, as a practical matter, they would sacrifice their ability to collect insurance proceeds to preserve their ability to pursue a judgment against the levee districts. The settling parties act as if this alternative does not exist.

Finally, the settling parties fail to address convincingly the unfairness of requiring class members to release their claims in exchange for a settlement that is expected to provide them with no compensation, the inadequacy of a notice that failed to inform the class members that they should expect no direct distribution from the settlement fund, and the insurmountable problems associated with the district court's approval of the enhancement of expenses provision of the settlement agreement.

ARGUMENT

I. DUE PROCESS REQUIRES THAT CLASS MEMBERS BE PROVIDED THE RIGHT TO OPT OUT WITH RESPECT TO INDIVIDUALIZED DAMAGES CLAIMS.

Our opening brief explained that because class members have constitutionally protected property rights in their claims for damages, the Due Process Clause guarantees the right to opt out where class members' monetary claims vary from individual to individual and are not capable of computation on a formulaic basis. Brinkmeyer Opening Br. 16-23. We acknowledged that some of the cases on which we rely arose outside the limited-fund context, but we explained that the due process principle depends on the nature of the claims, not on the rationale for mandatory class treatment. Indeed, the Court in *Ortiz* discussed precedent from outside the limited-fund context to explain the need for providing class members a right to opt out with respect to their individual damages claims. 527 U.S. at 846-48 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985)).

Rather than address directly "the serious constitutional concerns" recognized by the Supreme Court in *Ortiz, id.* at 845, the settling parties erroneously claim that we have asserted that due process provides a right to opt out of *any* limited fund settlement, rather than a right to opt out of a settlement in a mass tort suit seeking individualized money damages. Appellees' Br. 45. Having mischaracterized our

position, the settling parties argue that any case that did not involve a limited fund settlement under Rule 23(b)(1)(B) is inapposite. *Id.* at 46. The settling parties are wrong. For example, in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998), this Court affirmed the denial of class certification under Rule 23(b)(2) because of the predomination of money damages and explained that "[b]ecause it automatically provides the right of notice and opt-out to individuals who do not want their monetary claims decided in a class action, Rule 23(b)(3) is the appropriate means of class certification when monetary relief is the predominant form of relief sought." *Cf. In re Monumental Life Ins. Co.*, 365 F.3d 408, 418-19 (5th Cir. 2004) (approving certification of a mandatory class where monetary claims were adjunct to claims for equitable relief and did not involve substantial variation from individual to individual but were capable of computation on a mechanical basis). Although *Allison* is not a limited-fund case and was based principally on a construction of Rule 23(b)(2), the decision supports our position that class members have a right to opt out in actions for money damages that require individualized determinations. Indeed, other courts have reached the same result on explicitly constitutional grounds. *See Molski v. Gleich*, 318 F.3d 937, 950-51 (9th Cir. 2002) (overturning settlement in a case certified under Rule 23(b)(2) on the ground that due process required that class members be provided a right to opt out where the settlement purported to release

substantial claims for damages); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *writ dismissed as improvidently granted*, 511 U.S. 117 (1994) (holding that due process requires that class members be provided a right to exclude themselves with regard to any substantial damages claim).

The settling parties also assert that the Supreme Court's decision in *Shutts* is not instructive because, according to the settling parties, *Shutts* was concerned only with the due process implications of binding absent class members over whom the court lacked personal jurisdiction.[1] Appellees' Br. 46-47. It is true that *Shutts* addressed the question whether a state court could bind class members who lacked minimum contacts with the state and found that it could if the trial court's procedures complied with due process. The Court identified the minimal due process protections that must be provided to absent plaintiff class members, including an opportunity to opt out, but did not limit its holding to only those class members who lack minimum contacts with the forum. 472 U.S. at 811-12. Rather, the Court limited its holding "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Id.* at 811 n.3.

[1]The settling parties also assert that *Shutts* is inapposite because it "recogniz[ed] opt-out rights in a Rule 23(b)(3) class action[.]" Appellees' Br. 46. In fact, *Shutts* involved a class action brought pursuant to a Kansas statute, not the Federal Rules of Civil Procedure. 472 U.S. at 809.

The settling parties further err by claiming that, in *Ortiz*, the Supreme Court noted that "an important caveat to its holding in *Shutts* was that the case examined only the procedural protections associated with binding out-of-state class members." Appellees' Br. 47 (citing *Ortiz*, 527 U.S. at 848 n.24). In fact, the "important caveat" noted in *Ortiz* was that *Shutts*'s holding applied only to claims "'wholly or predominantly for money judgments.'" *Ortiz*, 527 U.S. at 848 n.24 (quoting *Shutts*, 472 U.S. at 811 n.3). That is, *Ortiz*'s "caveat" amounted to no more than a statement that the reasoning of *Shutts* applied to precisely the types of claims asserted against the levee districts in this case.

Having argued that this Court should disregard the constitutional due process analysis of any case that did not arise in the limited-fund context, the settling parties argue that the Sixth Circuit's decision in *In re Telectronics Pacing Sys.*, 221 F.3d 870, 881 (6th Cir. 2000), "supports the settlement proponents' position and undercuts the objectors' argument," Appellees' Br. 48, because *Telectronics* held open the possibility that a mandatory class might not offend due process where a limited fund is amenable to *pro rata* distribution. The settling parties argue that the lack of opt-out rights in this case does not violate due process because the settlement does not preclude "the ultimate adoption of a *pro rata* or per-claimant distribution formula." Appellees' Br. 49. This argument misses the point. The issue is not whether the

settlement precludes the adoption of any particular distribution formula; it is whether the damages are liquidated or otherwise capable of computation on an objective basis. The damages claims released by the settlement in this case are unliquidated and wide-ranging and would necessarily depend on subjective differences in each class member's circumstances. Because of the nature of the claims, due process requires that class members have an opportunity to opt out of the settlement to pursue their individualized damages claims as they see fit.

II. THE SETTLEMENT DOES NOT SATISFY THE REQUIREMENTS OF *ORTIZ* BECAUSE THE FUND HAS NOT BEEN SET AT ITS MAXIMUM.

The Supreme Court held in *Ortiz* that "a limited fund rationale for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving the maximum fund." 527 U.S. at 863. In other words, each defendant that is released as part of the settlement must have made its maximum possible contribution to the fund. In this case, the proposed fund consists only of insurance proceeds; the levee districts have contributed nothing, although they will enjoy a full release from liability under the settlement. The issue for this Court is whether the settlement satisfies the requirement that the fund be set at its maximum where the levee districts have made no contribution.

The settling parties make two arguments. First, they argue that, as a matter of law, the levee districts may enjoy the benefit of a limited-fund settlement without making any contribution, no matter their ability to pay, because the levee districts' assets are exempt from seizure to satisfy judgments. Appellees' Br. 19. As we explained in our opening brief, the fact that the levee districts' assets are exempt from seizure does not negate the requirement of *Ortiz* that a limited fund must be set at its maximum, because assets exempt from seizure may nonetheless be contributed to a settlement. *See* La. Rev. Stat. § 13:5109(B)(2) (authorizing political subdivisions to appropriate funds to pay compromise agreements). To excuse the levee districts from the requirement that the fund be set at its maximum, just because their assets cannot be seized, is tantamount to finding the levee districts immune from suit in any case seeking damages in excess of available insurance. Such a result was clearly not the intent of the Louisiana constitutional and statutory scheme that prohibits seizure of assets but does not confer immunity from liability, and which explicitly allows the levee districts to appropriate funds to satisfy judgments or contribute to settlements. The settling parties admit that they "cannot cite to any case approving a limited fund settlement to which an insured defendant contributed nothing." Appellees' Br. 29. Nevertheless, the settling parties assert that exempt-from-seizure assets cannot be considered in determining whether a settlement fund has been set at its maximum, a

proposition that, if correct, provides an enormous incentive for public entities to be underinsured for mass torts.

The settling parties also argue that, as a matter of fact, the levee districts lack the resources to pay judgments and meet their flood-control obligations. *Id.* at 25. But the issue is not whether the levee districts could satisfy judgments in full; the issue is whether the levee districts' maximum possible contribution to the settlement fund is zero. The record shows that the levee districts can contribute *something* to the settlement fund. First, the levee districts have routinely maintained a judgment fund. *See, e.g.,* Exh. 88 (Orleans Levee District financial statement dated June 30, 2007, showing $292,522 for "legal settlement payments"). Second, the levee districts have non-flood-control assets that could be contributed to the settlement. For example, testimony at the certification and fairness hearings established that, at the time of the storm, the levee districts owned a casino, an airport, and marinas. R. 4742. Although maintenance of those assets was later transferred to the state, there is no evidence that the levee districts lack title to those assets. Indeed, in their brief, the settling parties are careful to state only that "[t]he Levee Districts' assets are *primarily* devoted to flood protection." Appellees' Br. 6 (emphasis added). To comply with *Ortiz*'s requirement that the settlement fund be set at its maximum, the levee districts must,

at a minimum, contribute the total of their judgment funds and the sale value of their non-flood-control assets.

III. ALLOWING OPT-OUTS WOULD NOT RESULT IN A RACE TO COLLECT THE INSURANCE PROCEEDS.

The settling parties argue that a mandatory class settlement is necessary to prevent "a race to the courthouse that could, at best, reward only the first few claimants at the expense of all others." Appellees' Br. 8. This argument is based on a false premise. As we suggested in our opening brief and before the district court, the settling parties could refashion their proposal as a Rule 23(b)(3) settlement, giving individual class members the choice whether to participate in a settlement for the insurance proceeds or to opt out of the settlement and take their chances on continued litigation against the levee districts, knowing that the levee districts' assets are exempt from seizure and that, as a practical matter, insurance would be unavailable because it would be claimed by the settlement class. Brinkmeyer Opening Br. 15. The settling parties have ignored this suggestion, choosing instead to pretend that a mandatory settlement class or collection of the insurance proceeds by the winner of a race to judgment are the sole alternatives. The settling parties even go so far as to argue that, in the absence of a mandatory class settlement, "[t]he potentially available insurance proceeds would necessarily be depleted by a very

small percentage of claimants, to the direct prejudice of the vast majority of claimants to follow." Appellees' Br. 19. To the contrary, there is virtually no chance that plaintiffs who opt out of the class settlement could successfully pursue individual litigation and get to the insurance proceeds before the settlement class, particularly where, as here, all related cases have been consolidated for case management before a single judge.

IV. THE SETTLEMENT DOES NOT SATISFY RULE 23(e).

A. A Settlement That Does Not Benefit the Class Is Not Fair, Reasonable, and Adequate.

Class members are unlikely to receive any compensation from this settlement. Brinkmeyer Opening Br. 24-28. The total settlement amount is equal to only about $20 per class member, and reimbursement of litigation expenses is likely to deplete the fund before any individual awards can be made. Both class counsel and the district court expect that, if any funds remain after expenses have been paid, such funds will be insufficient to allow for individual payments to class members and will have to be distributed as a *cy pres* award. The settlement thus provides a benefit for counsel (recovery of expenses), the insurance company (no further costs of defense), and the levee districts (no risk of being found at fault), but it provides no benefit to the class. As explained in our opening brief, the district court abused its discretion

by approving a settlement that requires all class members to release their claims in exchange for no benefit. The settling parties do not respond to this argument, other than to state that the settlement, however inadequate, is the best that can be done. Appellees' Br. 12. But even if the result of rejecting the settlement on this ground would be that some injured victims would obtain judgments that were satisfied by the defendants' insurance, while other victims would get nothing, that would still be a superior result to this settlement, where the entire class loses its claims (a species of property interest protected by due process) only to reimburse attorneys for expenses incurred primarily to benefit persons with claims against other defendants and to provide some potential *cy pres* payment as a windfall to some organization that has no claim to receive it.

B. The Class Should Have Been Notified That Individuals Would Likely Receive No Distribution from the Settlement Fund.

In response to our argument that the class notice was deficient because it failed to inform class members that they are likely to receive nothing in exchange for releasing their claims, the settling parties assert that allowing class members to "precisely estimate their individual recoveries . . . is not a legal requirement for valid notice, particularly in a limited fund settlement." Appellees' Br. 50. We did not, of course, argue that class members were entitled to a "precise estimate" of their

individual recoveries; rather, we argued that they are entitled to the best notice practicable, and it was certainly practicable to notify class members that they are likely to receive *no compensation* for their injuries. Indeed, class counsel told class members who inquired that "it is highly unlikely that the Court will make any distribution of these funds directly to claimants." Exh. 73. This important information should have been shared with all members of the class.

The settling parties argue that most of the absent class members must support the settlement because only 76 filed formal objections. Appellees' Br. 43. But if the notice had told the class members that they will probably receive nothing as a result of the settlement, many more would likely have objected, because "in deciding whether to object to a proposed settlement, the single most important fact that the average class member needs to know is how much she will receive under the settlement plan." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 92-93 (2007).

Moreover, the settling parties' assertion that a low number of formal objections relative to the size of the class is evidence of support for a settlement is highly suspect. As this Court observed in *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 217-18 (5th Cir. 1981), "a low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast

majority of class members lack the resources [] to object to the settlement[.]" *Accord In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) ("[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement."); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1994 WL 593998, at *5 (E.D. La. Oct. 28, 1994) ("The vast majority of class members have no ability to evaluate the fairness of the proposed settlement. The court must thus rely upon its own investigation and the input of the few objecting class members who do have the resources to provide the court with pertinent information."). Indeed, a relatively low number of objections may indicate that class members trust that the class representatives and attorneys have actually negotiated a decent deal for the class. But if the class members were explicitly told that will receive nothing in exchange for releasing their claims, they would be far less inclined to accept on faith that the settlement is somehow in their interest.

C. The Court Should Not Have Approved the Enhancement of Expenses Provision of the Settlement Agreement.

Our opening brief explained that the district court should not have approved the provision of the settlement agreement that allows counsel to make a profit through

an enhancement of expense awards because such conduct violates the Louisiana Rules of Professional Conduct and is the functional equivalent of an attorney fee, which class counsel has waived. Brinkmeyer Opening Br. 32-34. The settling parties offer no response to these arguments.

CONCLUSION

For the reasons stated above and in the appellants' opening briefs, the district court's decision certifying a mandatory class and approving a non-opt-out settlement should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 3, 2010, the foregoing Reply Brief of Appellants Brinkmeyer, LeBlanc, and Stuart was filed through the court's electronic filing system which constitutes service on all Filing Users. I further certify that, in accordance with Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, parties who are not Filing Users have been served by electronic transmission and first-class U.S. mail, postage prepaid, addressed to:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3,382 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2.

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 it has been prepared in a proportionally spaced typeface using WordPerfect in Times New Roman 14 point font.

3. This brief complies with the requirements for redaction of private information, 5th Cir. R. 25.2.13; it is identical to the paper copy of the brief, 5th Cir. R. 25.2.1; and the electronic file containing it has been scanned for viruses with an updated version of a commercial virus scanning program and is free from viruses.

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Dated: June 3, 2010