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

OPENING BRIEF OF APPELLANTS MARY BRINKMEYER, MICHELLE LeBLANC, and THOMAS C. STUART

Michael T. Kirkpatrick
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000

Jennifer J. Rosenbaum
New Orleans Workers' Center for Racial Justice
217 N. Prieur Street
New Orleans, LA 70112
615-423-0152

Counsel for Appellants Mary Brinkmeyer,
Michelle LeBlanc, and Thomas C. Stuart

March 29, 2010

CERTIFICATE OF INTERESTED PERSONS

No. 09-31156, *In Re: Katrina Canal Breaches Consolidated Litigation*

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

1. Class Plaintiffs-Appellees

Class

All persons (a) who at the time of Hurricane Katrina and/or Hurricane Rita (i) were located, present or residing in the Hurricane Affected Geographic Area [Parishes of Jefferson, Orleans, Plaquemine, and St. Bernard, Louisiana], or (ii) owned, leased, possessed, used or otherwise had any interest in homes, places of business or other immovable or movable property on or in the Hurricane Affected Geographic Area, and (b) who incurred any losses, damages and/or injuries arising from, in any manner related to, or connected in any way with Hurricane Katrina and/or Hurricane Rita and any alleged levee failures and/or waters that originated from, over, under or through the levees under the authority and/or control of all or any of the levee defendants.

Class Representatives

Kenneth Armstrong
Jeannine Armstrong
Thurman R. Kaiser
Donna Augustine

Counsel for Class Plaintiffs-Appellees

Joseph M. Bruno
Law Offices of Joseph M. Bruno
Gerald E. Meunier
Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C.

James P. Roy
Domengeaux Wright Roy & Edwards

2. Defendants-Appellees

Board of Commissioners of the Orleans 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

Counsel for Defendants-Appellees

Thomas P. Anzelmo, Sr.
McCranie Sistrunk Anzelmo Hardy McDaniel & Welch
Gary M. Zwain
Lawrence J. Duplass
Andrew D. Weinstock
Jennifer M. Morris
Joseph E. Bearden, III
Duplass, Zwain, Bourgeois, Morton, Pfister & Weinstock
Ralph S. Hubbard, III
Joseph P. Guichet
Lugenbuhl, Wheaton, Peck, Rankin & Hubbard
S. Ault Hootsell, III
Phelps Dunbar LLP

3. Appellants

Mary Brinkmeyer
Michelle LeBlanc
Thomas C. Stuart

Counsel for Appellants

Michael T. Kirkpatrick
Allison M. Zieve
Public Citizen Litigation Group
Jennifer J. Rosenbaum

New Orleans Workers' Center for Racial Justice

4. Plaintiffs-Appellants in Case No. 09-31188

Leslie Sims, Jr.
Rosa Marquez
Floyd Aaron III
Hassar Sleem
Madeline Bertucci
Vera D. Richard
Elizabeth H. Depass
Marie Adams
Linda C. Bourgeois
Keith C. Ferdinand, M.D., A.P.M.C.
Mary Christophe
Susan Williams
Rhealynda Porter
Xiomara Augustine
Bright Minds Academy

Counsel for Plaintiffs-Appellants in Case No. 09-31188

James K. Irvin
Michael J. Monistere
Chadwick W. Collings
Milling Benson Woodward L.L.P.
John J. Cummings, III
Cummings & Cummings

/s/ Michael T. Kirkpatrick

_____

Michael T. Kirkpatrick
Attorney of Record for Appellants
Mary Brinkmeyer, Michelle LeBlanc,
and Thomas C. Stuart

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the propriety of the district court's class certification and approval of a settlement that grants limited fund treatment under Federal Rule of Civil Procedure 23(b)(1)(B) to claims seeking money damages from solvent political subdivisions that have contributed nothing to the settlement, and purports to resolve a mass tort case without affording the class members a chance to opt out. Because of the importance of the underlying class action and the legal rights at stake, appellants request oral argument and believe that it would assist the Court in resolving this appeal.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The settled claims are set forth in the Second Supplemental Levee and MR-GO Master Consolidated Class Action Complaint[1] (R.4082), which does not allege any basis for the district court's subject matter jurisdiction, and the district court's decision does not address the issue. Because the settled claims arise entirely under state law and had previously been asserted in complaints that included claims over which the district court had original jurisdiction (*see* R.3197 and 3236), the district court appears to have exercised supplemental jurisdiction under 28 U.S.C. § 1367(a). In accordance with an opinion (R.5313) entered on September 8, 2009, as amended by an order entered on September 24, 2009 (R.5484), the district court entered a final judgment (R.5486) on September 24, 2009, certifying this class action on a non-opt-out basis pursuant to Fed. R. Civ. P. 23(b)(1)(B), and approving the proposed non-opt-out class action settlement. The district court determined that there was no just reason for delay and entered a final judgment pursuant to Fed. R. Civ. P. 54(b), as to all claims and all parties included in the operative complaint. R.5491. Appellants Brinkmeyer, LeBlanc, and Stuart filed a timely notice of appeal on October 14, 2009. R.5616. This Court has jurisdiction under 28 U.S.C. § 1291.

[1]Citations in this brief to pages in the Record on Appeal take the form R.__.

STATEMENT OF THE ISSUES

1. Whether, in light of the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the district court erred in certifying a non-opt-out settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B), where the settlement releases three solvent and potentially liable levee districts that have the means and authority to contribute to the settlement fund but have made no contribution beyond the limits of their insurance policies.

2. Whether the district court's class certification, which binds the absent class members with respect to their individual and unliquidated tort claims without providing them an opportunity to opt out, violates the class members' rights to due process.

3. Whether the district court erred in approving a class settlement under Federal Rule of Civil Procedure 23(e) where

(a) class members are unlikely to receive any benefit from the settlement;

(b) the notice failed to inform class members that they are likely to receive nothing; and

(c) the settlement allows counsel to seek an enhancement of their actual costs.

STATEMENT OF THE CASE

This appeal is brought by class members Mary Brinkmeyer, Michelle LeBlanc, and Thomas C. Stuart (the "Brinkmeyer Objectors"), who objected below to certification of this mass tort case as a limited fund class action and to approval of the settlement. This appeal has been consolidated with that of another group of objecting class members, the "Sims Objectors."

This case arises out of catastrophic flooding in Orleans and surrounding parishes caused by levee failures during Hurricanes Katrina and Rita. Numerous actions, including class actions, were brought by people harmed by the flooding. The cases were consolidated in the Eastern District of Louisiana as *In re Katrina Canal Breaches Consolidated Litigation*, C.A. No. 05-4182, and divided for case management purposes into several categories. This case is part of the "LEVEE" category, which collected in a single Superseding Master Consolidated Class Action Complaint (R.3197), all claims that the flooding was caused by the negligent design, construction, and maintenance of the levees.

Following the dismissal of various claims and defendants, class counsel negotiated a settlement between a putative class of all those who, at the time of either hurricane, lived, owned property, or were present within the Parishes of Jefferson, Orleans, Plaquemines, and St. Bernard, Louisiana, and suffered damages from levee

failures, and seven defendants: the Orleans, East Jefferson, and Lake Borgne Basin Levee Districts, the Board of Commissioners for each levee district, and the St. Paul Fire and Marine Insurance Company (in its capacity as the insurer for each levee district).[2] Under the terms of the settlement, class members release all claims against the defendants related to the hurricanes and/or levee failures, in exchange for insurance proceeds of $17 million plus interest. Most significantly, the settlement agreement provides that the case "shall be maintained as a non-opt-out, mandatory class action pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure[,]" and that any change "that entails providing opt-out rights to Class Members" will enable any settling defendant to terminate the agreement. R.5529.

On December 9, 2008, the settling parties filed a joint motion seeking preliminary certification of a settlement class under Rule 23(b)(1)(B) and preliminary approval of their agreement. R.3824. The district court granted the motion on December 15, 2008. R.4066. As authorized by the preliminary approval order, class counsel filed an amended complaint against the settling defendants only (R.4082), and notice of the proposed settlement was provided to the class. Among other things, the notice set forth the procedure for class members to object to certification of the

[2]The class is further divided into three subclasses corresponding to which levee defendant caused their damages. A class member can be in more than one subclass. R.5316.

settlement class and approval of the agreement, and announced the date of the certification and fairness hearings.

Prior to the hearings, the Brinkmeyer Objectors and the Sims Objectors filed objections with the district court (R.4271, 4263, 4266), and the court received 185 submissions from individual class members (R.5316-17). On April 2, 2009, the district court held a class certification and settlement fairness hearing. Following the hearing, the court received further briefing from the Brinkmeyer Objectors, the Sims Objectors, and the settling parties.

In their objections and post-hearing submissions, the Brinkmeyer Objectors urged the district court to deny the settling parties' motion to certify the class under Rule 23(b)(1)(B), arguing that the settling parties had failed to establish that the settlement qualified as a limited fund under the standards stated in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and that certifying a non-opt-out settlement class in a mass damages action violates the Due Process Clause. The Brinkmeyer Objectors also argued that the settlement should not be approved under Rule 23(e) because it provides no benefit to the class, the content of the notice was deficient and misleading, and the settlement allows counsel to seek an enhancement of any award of costs and expenses actually incurred. The Brinkmeyer Objectors suggested that the settling parties could address the most serious problems by refashioning their

proposal as a Rule 23(b)(3) settlement that would provide class members a right to opt out.

Despite the objections, the district court granted the settling parties' motion, certified a limited fund settlement class under Rule 23(b)(1)(B), and approved the settlement. The district court acknowledged that the settling parties had to "fulfill the stringent standards for class certification of limited fund classes set forth in *Ortiz*[,]" (R.5323), but found that the *Ortiz* requirements had been met. The district court also acknowledged the "'serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale[,]'" (R.5325, quoting *Ortiz*, 527 U.S. at 844-45), but noted that the Supreme Court had "explicitly refrained from deciding" whether it is constitutional to certify a mandatory settlement class in a mass damages action (*id.*). The district court concluded that Rule 23(b)(1)(B) can be used to aggregate individual tort claims, but it did not explain the basis for its conclusion or address the constitutional issue other than to acknowledge that it exists. Finally, the district court found that the settlement fulfilled the requirements of Rule 23(e) even though class members are not likely to receive anything of value and were not notified of that fact, because the court concluded that the settlement represents the maximum amount that the class is likely to collect from the levee districts and their insurer.

STATEMENT OF FACTS

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Brinkmeyer Objectors adopt by reference the statement of facts in the brief filed by the Sims Objectors, appellants in No. 09-31188.

STANDARD OF REVIEW

The first two issues presented in this appeal—whether the district court's certification and approval violates Rule 23(b)(1)(B) or the Due Process Clause—are questions of law that this Court reviews de novo. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998). The third issue presented—whether the district court erred in approving the settlement under Rule 23(e)—is reviewed for an abuse of discretion. *Id.*

SUMMARY OF ARGUMENT

The Supreme Court has held that a non-opt-out settlement class can be certified on a limited fund rationale only where the district court finds that the settling defendants have made the maximum possible contribution to the settlement fund. *Ortiz*, 527 U.S. at 838. In this case, the district court made no such finding with respect to the levee defendants, holding instead that, because the levee districts' assets are exempt from seizure to satisfy a judgment, available insurance constitutes a limited fund and the levee districts need not make any contribution regardless of

their ability to do so. The district court erred because, although their assets are exempt from seizure, the levee districts are solvent, not immune from suit, and are authorized to appropriate funds to settle claims. The district court's certification of a non-opt-out class provides a better result for the defendants than would ordinary litigation, because the insurance company will save defense costs and the levee districts will avoid the risk of being found at fault. Indeed, the district court's decision provides a powerful incentive for public entities to be under-insured for mass torts, because the decision allows such entities to force multiple injured parties into a mandatory settlement class whenever aggregated claims exceed available insurance. Such a result is contrary to the intent of the limited fund doctrine.

Even if the settlement satisfied the requirements of *Ortiz*, the district court's decision should be reversed because certification of a non-opt-out settlement class in a mass tort damages action violates due process. The right to opt out is constitutionally guaranteed in cases involving substantial money damages, particularly where, as here, the individual class members have suffered injuries of varying severity that make it impossible to equitably distribute the settlement fund on a pro rata basis. In these circumstances, due process requires that class members have the ability to opt out and seek their own day in court.

The district court further erred by approving the settlement under Fed. R. Civ. P. 23(e)(2). First, the settlement forces class members to release all their claims against the defendants in exchange for nothing of value. The size of the class and the extent of the damages, compared to the amount of the settlement fund and the expenses that will be paid from the fund, make clear that class members will not receive individual payments, and class counsel and the district court have acknowledged this fact. Second, the class notice failed to inform class members that they will likely receive no payment in exchange for releasing their claims. The notice was also misleading because it erroneously stated that class members could get nothing further from the levee districts, even though the levee districts are authorized to appropriate funds to pay claims and have contributed nothing to this settlement. Third, the district court should not have approved the settlement because it allows counsel to seek an enhancement of costs and expenses. The Louisiana Rules of Professional Conduct prohibit lawyers from making a profit on the advancement of costs and expenses of litigation, and allowing such a profit conflicts with class counsel's waiver of any right to seek attorneys' fees.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CERTIFYING A NON-OPT-OUT SETTLEMENT CLASS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)(B).

Federal Rule of Civil Procedure 23(b)(1)(B) provides for certification of a class whose members have no right to opt out where separate actions "would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]" One type of suit encompassed by Rule 23(b)(1)(B) is the "limited fund class action," which aggregates numerous claims against a fund insufficient to satisfy them all. *Ortiz*, 527 U.S. at 834 (citing Advisory Committee's Notes on Fed. R. Civ. P. 23, p. 697).

In *Ortiz*, the Supreme Court explained that "to justify binding absent members of a class under Rule 23(b)(1)(B)," three conditions are "presumptively necessary[.]" *Id.* at 838, 842. First, "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims." *Id.* at 838. "Second, the whole of the inadequate fund [is] devoted to the overwhelming claims." *Id.* at 839. "Third, the

claimants identified by a common theory of recovery [are] treated equitably among themselves." *Id.*

In this case, there is no dispute that the total value of the claims against the levee districts likely exceeds the defendants' ability to fully satisfy them. Evidence introduced at the certification and fairness hearings established that the levee defendants' potential liability to the class exceeds $20 billion for property damage alone, and adding estimates for personal injury and wrongful death claims would push the liability figure even higher. R.5329, 5340. Thus, it is highly unlikely that the defendants could fully pay all the claims.

The issue in dispute is whether the limit of the levee districts' insurance policies represents the maximum possible "fund" available to pay the claims. *See Ortiz,* 527 U.S. at 863 ("[A] limited fund rationale for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving the maximum fund[.]"). The district court concluded that the $17 million of insurance available under the levee districts' policies with St. Paul is the maximum fund available for settlement (R.5331), because the levee districts' assets are exempt from seizure to satisfy judgments (R.5333). As the district court explained (R.5333-34), under Louisiana law, the levee districts are "political subdivision[s]" of the state, La. Rev. Stat. § 38:281(6), and although political subdivisions are not immune from suit and

liability, La. Const. art. XII, § 10(A), their assets may not be seized to satisfy judgments. La. Const. art. XII, § 10(C); La. Rev. Stat. § 13:5109(B)(2). However, Louisiana law provides that political subdivisions can appropriate funds to satisfy judgments or make payments as part of a compromise agreement, La. Rev. Stat. § 13:5109(B)(2), and the levee districts have routinely budgeted funds for such purposes. Nevertheless, the district court reasoned that, because the levee districts cannot be forced to pay a judgment entered against them, they are entitled to the benefits of a limited fund settlement without making any contribution at all, no matter the value of their assets.

This conclusion was incorrect. Although the district court held that it "does not have the authority to seize any assets of the Levee Districts to satisfy a judgment under state law[,]" (R.5335), it does not follow that the court may not consider the value of such assets in determining whether the levee districts have made the maximum possible contribution to a settlement fund. Because the levee districts are authorized by law to appropriate funds to settle claims, the district court should have made factual findings as to the total net worth of the levee districts and the maximum contribution that they could make to the settlement. *See Ortiz*, 527 U.S. at 849-50 (holding that a limited fund can be established only after a searching inquiry into the "upper limit of the fund itself"); *id.* at 860 (noting that where a defendant retains

"nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members").

The district court heard testimony from Timothy P. Doody, president of the Southeast Louisiana Flood Protection Authority-East, the umbrella government agency that oversees the levee districts, who testified that the levee districts have substantial present and future obligations and that their tax base has been reduced since the hurricanes. Based on Mr. Doody's testimony, the district court found that "the Levee Districts have limited assets available, and these assets will likely be almost entirely spent in maintaining levees and other flood control projects." R.5332-33. This finding may indicate that the levee districts can contribute relatively little to the settlement fund without impeding their flood control obligations, but it does not establish that the levee districts' maximum possible contribution is zero. Indeed, Mr. Doody admitted that, at the time of the storm, the levee districts had substantial revenue-generating non-flood-control assets, including a casino, an airport, and marinas (R.4742), and it was established that the levee districts had first-party insurance policies that paid them for the damages to those assets (R.4771). Accordingly, the settlement fund is not the "maximum fund" as *Ortiz* requires.

Moreover, by holding that funds exempt from seizure cannot be considered in determining whether a settlement fund has been set at its maximum, the district court

has created a powerful incentive for public entities to be under-insured for mass torts. Under the district court's decision, public entities in Louisiana can avoid trial and findings of liability whenever the aggregated claims of multiple injured parties exceed available insurance by forcing the injured parties into a limited fund settlement class. Public entities can obtain this result without regard to the value of their available assets, and despite provisions of Louisiana law establishing that public entities are not immune from suit and are authorized to appropriate funds to satisfy judgments or fund settlements. Such a result is contrary to the intent of the limited fund doctrine—to produce the best possible result for the plaintiff class by ensuring an equitable distribution of the maximum possible fund. *See Ortiz*, 527 U.S. at 839 (explaining that limited fund cases ensure that the class gets the best deal and that the defendant does not get a better deal than ordinary litigation would have produced).

In this case, the settlement produces a far better result for the defendants than would ordinary litigation. The insurance company will save the costs of defense of their insured levee districts, which is not subject to any cap and which the district court found would far exceed the limits of the insurance policies. R.4770. The levee districts will enjoy a full release of all claims in exchange for making no contribution to the settlement fund, and they will never risk being found at fault for the levee breaches and overtoppings.

Nevertheless, the district court found that the settlement was in the best interest of the class because continued litigation might reduce the available fund due to attorney fee claims (R.5342), and, according to Mr. Doody, "it would be highly unlikely that [the levee districts] would appropriate additional funds for a judgment" (R.5336). The court concluded that it was appropriate to certify a mandatory limited fund class because "ordinary litigation would allow very few to recover to the detriment of the vast majority of the class" and "[t]his problem is precisely what limited fund settlements are intended to solve." R.5347. Although the district court is correct about the basis for the limited fund rationale, there is no reason that the resolution of this case has to be either a limited fund class settlement or a series of individual suits resulting in the insurance proceeds being claimed by the first parties to obtain judgments. Rather, as the Brinkmeyer Objectors suggested in their post-hearing brief, the settling parties could refashion their proposal as a Rule 23(b)(3) settlement, giving individual class members the choice whether to settle for the insurance proceeds or to opt out of the settlement and take the risk that no funds are appropriated to satisfy any judgments obtained. In any event, regardless of how the settling parties choose to proceed, because they have failed to demonstrate that the settlement meets the requirements of *Ortiz*, this Court should reverse the district court's certification of a non-opt-out class under Rule 23(b)(1)(B).

II. THE DISTRICT COURT'S CERTIFICATION OF A NON-OPT-OUT SETTLEMENT CLASS IN THIS MASS TORT CASE VIOLATES THE DUE PROCESS CLAUSE.

In *Ortiz*, the Supreme Court rejected the certification of a limited fund settlement class that did not satisfy Rule 23(b)(1)(B), and thus avoided "the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment[.]" 527 U.S. at 842. Nevertheless, the Supreme Court noted "the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale." *Id.* at 845; *see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam) (noting "at least a substantial possibility" that "actions seeking monetary damages . . . can be certified only under Rule 23(b)(3), which permits opt out"). If this Court finds that the district court's certification of a mandatory settlement class satisfies Rule 23(b)(1)(B), it must reach the constitutional question.

It is well-settled that a legal claim is a form of property that may not be extinguished without due process of law. *See Logan v. Zimmereman Brush Co.*, 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."). In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that, in class actions that seek to

bind plaintiffs with respect to claims for money damages, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. 797, 812 & n.3 (1985); *accord Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring in part and dissenting in part); 3 Newberg on Class Actions § 17.16, at 17-45 (3d ed. 1992) ("[W]hen unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter."). Although *Shutts* did not involve the certification of a mandatory class under a limited fund rationale, the principle is the same—because all members of a class have constitutionally protected property rights in their claims for damages, the right to opt out "implicate[s] the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz*, 527 U.S. at 846 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

In *Ortiz*, the Court further explained the need for providing class members a right to opt out with respect to their individual damages claims:

> The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the

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

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

In the years since *Shutts* and *Ortiz*, the courts of appeals have regularly upheld the right to opt out whenever substantial money damages are at stake. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *writ dismissed as improvidently granted*, 511 U.S. 117 (1994), the Ninth Circuit refused to give preclusive effect to a prior class action for injunctive relief and money damages because, in the earlier case, the class members had not been provided an opt-out right. The court held that due process requires that class members be provided a right to exclude themselves with regard to any substantial damages claim, while acknowledging that the suit's injunctive relief components were properly certified on a non-opt-out basis and their resolution was therefore binding on the class. *Id.* at 392. In *Molski v. Gleich*, 318

F.3d 937, 950-51 (9th Cir. 2002), the same court overturned a 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 because the settlement purported to release substantial claims for damages under state anti-discrimination laws.

The Sixth Circuit has also recognized that the right to opt out is constitutionally guaranteed in cases involving damages. In rejecting a proposed limited fund certification, the court explained that "Rule 23(b)(3), with its notice and opt-out provisions, strikes a balance between the value of aggregating similar claims and the right of an individual to have his or her day in court." *In re Telectronics Pacing Sys.*, 221 F.3d 870, 881 (6th Cir. 2000); *see also Coleman v. GMAC*, 296 F.3d 443, 447-50 (6th Cir. 2002) (noting concern over the constitutionality of certifying a mandatory class that includes claims for compensatory damages); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (explaining that *Ortiz* "says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible"). In *Telectronics*, the court discussed the due process right to opt out as a means of constitutional avoidance: With due process in mind, a proposed Rule 23 certification that "does not include these [notice and opt-out] protections, must be carefully scrutinized and sparingly utilized." *Id.* That approach makes perfect sense because Rule 23 effectively codifies the constitutional right to opt out

for class members with damages claims. The Civil Rules Advisory Committee explained that subdivision (b)(3) was drafted to accommodate the compelling due process interests of such class members:

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

39 F.R.D. 69, 104-05 (1966); *see id.* at 107 ("This mandatory [Rule 23(b)(3)] notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.") (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974) (similar).

Indeed, this Court has 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." *Allison*, 151 F.3d at 413 (affirming denial of class certification under Rule 23(b)(2) because of the predomination of money damages in the case and under Rule 23(b)(3) because of numerous individual-specific issues relating to damages). In contrast, where monetary claims are adjunct to claims for equitable relief, and the monetary claims

do not involve substantial variation from individual to individual but are capable of computation on a mechanical basis, this Court has approved the certification of a mandatory class under Rule 23(b)(2). *In Re Monumental Life Ins. Co.*, 365 F.3d 408, 418-19 (5th Cir. 2004).

The court in *Telectronics* left open the possibility that the right to opt out might be overcome "when individual suits would confound the interests of other plaintiffs, such as with a limited fund that must be distributed ratably[,]" 221 F.3d at 881, and the court below found that this case fits that "narrow exception." R. 5346. But this case is not one in which a fund will "be distributed ratably," because the class members' unliquidated tort claims are not amenable to pro rata distribution. If they were, and if the fund were truly limited and set at its maximum, the lack of an opt-out right and corresponding day in court would make little difference because the fund would be distributed based on a formula. But here, an equitable distribution of a settlement would require complex individualized determinations because the class members suffered a wide variety of injuries—ranging from property damage to personal injury to death. Compensation for such injuries is not capable of computation by means of objective standards but is dependent on the intangible, subjective differences in each class member's circumstances. Thus, if they choose it, due process requires that class members have their day in court.

Further, sharing in the distribution of the insurance proceeds is not the only meaningful choice for class members. The levee districts are solvent, subject to suit and judgment, and will continue to exist after the insurance fund is distributed. Even if it is unlikely that the levee districts will appropriate funds to satisfy judgments obtained by any class members who opt out of the insurance settlement, there is at least that possibility, and due process requires that class members decide for themselves how best to pursue their claims. Injured parties may not be denied a day in court just because the tortfeasor may be judgment-proof, and collecting a judgment may not be a class member's only motivation for pursuing a claim. For example, an injured party may want to establish the fault of the levee districts even if the resulting judgment will not be collected, because the finding of liability may provide impetus for changes in levee district practices. The decision whether to be included in a class action or to file one's own damages action is not class counsel's, and it is certainly not the defendants'—it is the class members' to make.

As in *Ortiz*, the mandatory class established by the district court's certification order undermines the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (*quoting Martin v. Wilks*, 490 U.S. 755, 762 (1989)). Because it violates due process to release individual monetary claims for

particularized tort damages without granting plaintiffs a right to opt out of the settlement, this Court should reverse the district court's certification order.[3]

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE SETTLEMENT FULFILLS THE REQUIREMENTS OF RULE 23(e).

Even if this case met the requirements for limited fund treatment under Rule 23(b)(1)(B) and *Ortiz*, and even if it were constitutional to certify a mandatory class in a mass tort suit, the district court abused its discretion in approving the settlement because it fails to satisfy Rule 23(e) for at least three reasons. First, the settlement will provide little or no value to the class. Second, the class notice was deficient and misleading. Third, the provision allowing class counsel to seek an enhancement of costs is unethical and unfair to the class.

A. The Settlement is Not Fair, Reasonable, and Adequate Because It Does Not Benefit The Class.

The claims of a certified class can be settled only with court approval based on a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). To meet this standard, a settlement must benefit the class. As Congress noted when it enacted the Class Action Fairness Act: "Class members often receive

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

little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees, while leaving class members with . . . awards of little or no value." 28 U.S.C. § 1711, note (Findings and Purposes at (a)(3)). In such circumstances, a proposed class action settlement must be rejected. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 (D. Me. 2003) ("[A] settlement is not fair where all the cash goes to expenses and lawyers"); *Clement v. Am. Honda Fin. Corp*., 176 F.R.D. 15, 28 (D. Conn. 1997) (disapproving settlement where "there is a strong danger that the settlement will have absolutely no value to the class"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 222177, *6 (E.D. La. Mar. 15, 1995) (rejecting proposed settlement that would release claims "for no or highly speculative consideration" even where "plaintiffs may face serious and significant barriers to recovery").

In this case, the parties concede that individual class members are likely to receive nothing. The size of the class compared with the amount of the settlement fund shows that if all class members made a claim, individual recoveries would average only about $20 per class member—if the entire fund were disbursed to class members.[4] Importantly, the entire fund will *not* be disbursed to class members.

[4]The precise number of class members is unknown, but is probably about one million. Evidence introduced at the certification and fairness hearing shows that the class area had about 999,349 residents, 440,269 residential structures, 94,564 businesses operating, and a residential

Instead, the fund will be used to pay "Notice Costs, Special Master fees and costs, Escrow Agent costs and fees, CADA [Court Appointed Disbursing Agent] fees and costs, the fees and costs of any Person retained by the Special Master or CADA, and other costs, fees and expenses incurred in the implementation of the Class Settlement Agreement (including but not limited to the costs and fees of all experts of the Parties)[.]" R.5493-94. Most significantly, "Class Counsel and counsel of any Class Member shall have the right to seek an award from the Escrowed Funds for fees, costs and expenses (including any enhancement of costs and expenses as may be awarded by the Court)[.]" R.5492. These costs and expenses could be staggering because discovery conducted in other parts of the consolidated litigation has relevance to this case, and this settlement may be the only part of the consolidated litigation where counsel can seek reimbursement. For this reason, at the certification and fairness hearings, class counsel was unable to provide any estimate of the costs incurred thus far, other than to admit that it had been "expensive." R.4811. Class counsel explained that the master class action named all of the defendants potentially responsible for the flooding, but with the splitting off of the levee district defendants for purposes of this settlement, the discovery costs are "not in any way divisible."

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employment base of 495,689, (R.5326-27), and that notice was mailed to more than 745,000 households, businesses, and individual class members (R.5350).

R.4817. Further, although class counsel have pledged not to seek attorneys' fees, such fees could be sought by other counsel for class members.

The district court erred by approving the settlement without determining the amount of the expenses, their reasonableness, the reasonableness of any enhancement, and the reasonableness of the settlement once all these expenses are deducted from the fund. This Court has repeatedly held that a district court abuses its discretion if it approves a class action settlement without determining that any attorneys' fees claimed as part of the settlement are reasonable and that the settlement itself is reasonable in light of those fees. *See, e.g., Strong v. BellSouth Telecomm. Inc.*, 137 F.3d 844, 850 (5th Cir. 1998)("To properly fulfill its Rule 23(e) duty, the district court must not cursorily approve the attorney's fees provision of a class settlement[.]" "[T]he court must thoroughly review the attorneys' fees agreed to by the parties in the proposed settlement agreement."); *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980)(holding that the district court has a "responsibility to assess the reasonableness of attorneys' fees proposed under a settlement of a class action" and where it fails to do so, "its approval of the settlement must be reversed on this ground alone").

Class counsel have long anticipated that individual class members will receive nothing from the settlement. Even before the district court granted final approval of the settlement, class counsel told class members who inquired that "in view of the

extraordinary number of claims it is highly unlikely that the Court will make *any* distribution of these funds directly to claimants." Exh. 73 (emphasis added). Class counsel was right. The district court has recognized "that the mere cost of adjudicating individual claims may swallow the entire settlement[,]" and thus the special master who will recommend a plan for distribution will be instructed to evaluate *cy pres* distribution methods. R.5345.

The district court acknowledged that "this settlement is certainly hollow to the hundreds of thousands of potential claimants[,]" but approved the settlement anyway on the basis that "insurance funds are the only funds that may be seized for a judgment, and the $17 million settlement represents the maximum level of insurance recovery." R.5356. But as explained in Part I above, even if the settlement fund is all the class could collect from St. Paul, the defendant levee districts have assets and the authority to appropriate funds to satisfy judgments or contribute to settlements. Because the levee districts have contributed nothing to this settlement, the class should not be forced to release all their claims against the levee districts. Indeed, even if no more were available, it would still be an abuse of discretion to approve a settlement that gives no benefit to the class, merely to allow for their attorneys to receive expense reimbursements. Moreover, although the district court has suggested that the special master should suggest *cy pres* distribution methods if any money

remains after payment of all the costs, there has been no showing that such a distribution will benefit the class. Thus, the district court erred in finding that this settlement, in which the class releases all of their claims against the levee districts and their insurer for a fund that will likely be exhausted by expense reimbursements and, in any event, is unlikely to provide any payments to individual class members, is fair, reasonable, and adequate.

B. The Content Of The Notice Was Deficient and Misleading.

Under both Rule 23(e) and constitutional standards of due process, class members are entitled to notice of the content of a proposed class action settlement and how it affects them. The notice provided in this case was deficient because it failed to provide class members any way of estimating the amount of money, if any, that they could expect to receive in exchange for releasing their claims. As the settling parties' notice expert, Shannon Wheatman, has elsewhere explained, "the best notice practicable under the circumstances cannot stop with . . . generalities. It must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member." Hilsee, Wheatman, & Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More than Just Plain Language: a Desire to Actually Inform*, 18 Geo. J. Legal Ethics 1359, 1366 (2005) (quoting

Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1227 (11th Cir. 1998)); *see also Shutts*, 472 U.S. at 812 ("The notice should describe the action and the plaintiffs' rights in it."). In particular, a notice of proposed class action settlement should "provide information that will enable class members to calculate or at least to estimate their individual recoveries, including estimates of the size of the class and any sub-classes . . . ." *Manual for Complex Litigation* § 21.312, at 417-18 (4th ed. 2007); *see also* National Consumer Law Center, *Consumer Class Actions* §10.1.5.2, at 162 (6th ed. 2006) (notice must include "information necessary to evaluate the settlement, costs and expenses, and attorney fees"). Accordingly, each of the model class action settlement notices prepared by the Federal Judicial Center explains how individual class members' awards will be calculated and/or specifies the range of awards. *See* Fed. Jud. Center, Class Action Notices Page, www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/816. Likewise, in the 2008 cases listed in the declaration of the settling parties' notice expert, the settlement notices describe the range of recovery for individual class members.[5]

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[5] *See*, *e.g.*, notices in *Lockwood v. Certegy Check Servs., Inc*. (M.D. Fla.), *available at* datasettlement.com/ (final approval Sept. 3, 2008); notices in *Shaffer v. Continenal Cas. Co.* (C.D. Cal.), *available at* www.ltcclassaction.com/ (final approval June 11, 2008) (non-monetary relief); notices in *Palace v. DaimlerChrysler Corp*. (Cir. Ct. Ill.), *available at* www.neonsettlement.com/ (final approval May, 29, 2008); notices in *Gray's Harbor v. Carrier Corp*. (W.D. Wash.), *available at* www.furnaceclaims.com/ (final approval April 22, 2008);

The failure to provide the class with any information regarding their likely recovery from the fund is particularly egregious in this case because, as noted earlier, neither class counsel nor the district court anticipate that *any* class member will receive *any* payment. As one of the class attorneys explained at the hearing, he disclosed this information to class members who inquired because he "wanted to make sure that they understood [] that there is little likelihood they would receive an individual check out of the proceeds of this settlement." R.4805. All members of the class were entitled to this information—not only those who contacted class counsel.

In addition to failing to inform class members that they are unlikely to receive any distribution from the proposed settlement fund, the notice misinforms the class members about their ability to receive compensation from the levee districts. Both the long-form and short-form notices state: "Please note that, under law, the Settlement Class can get no additional money or property in this settlement because the Settling Defendants are governmental bodies." R.4025. This statement is misleading. The class can get no additional money or property "in this settlement" because the settlement does not provide for any additional recovery. However,

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Sherrill v. Progressive NW Ins. Co. (18th D. Ct. Mont.), *available at* http://www.uimclaims.com/ (final approval April 4, 2008); *Webb v. Liberty Mutual Ins. Co.* (Cir. Ct. Ark.), *available at* www.webbsettlement.com/ (final approval March 3, 2008). Ms. Wheatman also lists a case entitled *Gunderson v. AIG Claim Services*, approved on May 29, 2008. Exh. 63, Att. 1 at 6. We were unable to locate notices for that case.

"under law," the class could get additional recovery because the law authorizes the levee districts to appropriate additional money to contribute to a settlement or satisfy a judgment.

The notice is also deficient because it does not give class members any idea of how much class counsel's costs and expenses may be, or of the many types of expenses to be paid from the fund. Thus, the class has no way to know or estimate by how much these costs and expenses will reduce the settlement fund. The notice's failure to provide even an estimated amount of costs makes it impossible for class members to evaluate whether the settlement will afford them any real value. *Cf. In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 222177, *9 (E.D. La. Mar. 15, 1995) (rejecting proposed settlement, where, among other things, "[w]hile plaintiffs receive no to little compensation for their claims, class counsel seek attorneys' fees and expenses of $4,000,000 . . . [and] [t]he class has never been notified of the amount of fees requested by class counsel"); *see also In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1130 (7th Cir. 1979) (without a "reliable estimate of the aggregate amount of attorneys' fees and expenses," class members "could not determine the possible influence of attorneys' fees on the settlement in considering whether to object to it"); *General Motors Corp. v. Bloyed*, 616 S.W.2d 949, 957 (Tex. 1996) ("[T]he settlement must be set aside

because the class members did not receive adequate notice of all the material terms of the proposed settlement, specifically the projected amount of attorney's fees and expenses.").

C. The District Court Should Not Have Approved a Settlement That Allows Counsel to Seek an Enhancement of Actual Costs.

The district court approved the settlement even though it provides that class counsel and counsel of any class member can seek an "enhancement of costs and expenses[.]" R.5492. The district court erred in approving this provision because, although a court may, in some circumstances, enhance an award of *attorney fees, see, e.g.*, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (listing factors for determining a reasonable attorney fee award), any enhancement of an award of *expenses* is contrary to the Louisiana Rules of Professional Conduct and is unsupported in the case law. *See Billiot v. K-Mart Corp.*, 764 So. 2d 329, 335 (La. App. 2000) (observing that rationales for award of attorney fees may not apply to litigation expenses); *Parks v. Eastwood Ins. Serv., Inc.*, 240 Fed. Appx. 172, 176 (9th Cir. 2007) (on appeal of a decision applying a multiplier to both attorney's fees and costs, the prevailing party "conceded that applying the multiplier to costs was not appropriate.").

An award of court costs and expenses of litigation is intended to reimburse counsel for sums actually paid in the litigation. The district court's only explanation for allowing counsel to seek an enhancement of their costs is to compensate them "for the risk they bore in prosecuting this suit." R.5342. But such a scheme contemplates conduct that would violate the Louisiana Rules of Professional Conduct. Those Rules allow a lawyer to "advance court costs and expenses of litigation, . . . provided that the expenses were reasonably *incurred*." La. R. Prof. Conduct 1.8(e)(1) (emphasis added); *see also id*. at 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect . . . an unreasonable amount for expenses."). Rule 1.8(e)(3) provides that a lawyer may charge certain items as recoverable costs "provided they are charged at the lawyer's *actual*, invoiced costs for these expenses" (emphasis added). Similarly, Rule 1.8(e)(5)(i) provides that "[a]ny financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature." And where a lawyer borrows funds "to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender[.]" Rule 1.8(e)(5)(ii). These rules make clear that although a lawyer may seek repayment of expenses, such reimbursement may not include a profit for the

lawyer. The proper way for an attorney to make a profit, or to receive compensation for the risks assumed in undertaking a case, is through the attorney's fee.

Further, the proposed settlement agreement should not have been approved because the fees and costs provision is misleading to class members. Both the agreement and the notice declare that class counsel will seek no attorney fees from the settlement fund and will oppose any requests for attorney fees by other counsel for class members. *See* R.5528. However, allowing counsel to recover more than actual costs and expenses is the functional equivalent of allowing an attorney fee. The Court should not approve a settlement that on the one hand promises class members that no attorney fee will be awarded to counsel, but on the other hand provides a mechanism for counsel to be awarded a reimbursement that contains a profit component. In the context of a purported "limited fund" settlement, in which individual class members are likely to receive no payment at all, that counsel would contemplate a profit on expenses incurred is particularly inappropriate.

CONCLUSION

For the reasons stated above, the decision below certifying a mandatory class and approving the non-opt-out settlement should be reversed.

Respectfully submitted,

/s/ Michael T. Kirkpatrick

Michael T. Kirkpatrick
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000

Jennifer J. Rosenbaum
New Orleans Workers' Center for Racial Justice
217 N. Prieur Street
New Orleans, LA 70112
615-423-0152

Counsel for Appellants Mary Brinkmeyer, Michelle LeBlanc, and Thomas C. Stuart

CERTIFICATE OF SERVICE

I certify that on March 29, 2010, the foregoing Opening 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:

Joseph M. Bruno
LAW OFFICES OF JOSEPH M. BRUNO
855 Baronne Street
New Orleans, LA 70113
jbruno@brunolaw.com

Gerald E. Meunier
GAINSBURGH, BENJAMIN, DAVID, MEUNIER & WARSHAUER, L.L.C.
2800 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2800
gmeunier@gainsben.com

James P. Roy
DOMENGEAUX WRIGHT ROY & EDWARDS
556 Jefferson Street
Lafayette, LA 70502
jimr@wrightroy.com

Attorneys for Class Plaintiffs-Appellees

Gary M. Zwain
Lawrence J. Duplass
Andrew D. Weinstock
Jennifer M. Morris
Joseph E. Bearden, III
DUPLASS, ZWAIN, BOURGEOIS, MORTON, PFISTER & WEINSTOCK
Three Lakeway Center, Suite 2900
3838 N. Causeway Boulevard
Metairie, LA 70002-0000
gzwain@duplass.com

Attorneys for Defendant-Appellee Board of Commissioners of the Lake Borgne Basin Levee District, Defendant-Appellee Lake Borgne Basin Levee District, Defendant-Appellee Board of Commissioners of the East Jefferson Levee District, and Defendant-Appellee East Jefferson Levee District

Thomas P. Anzelmo, Sr.
MCCRANIE SISTRUNK ANZELMO HARDY MCDANIEL & WELCH
3445 N. Causeway Blvd., Suite 800
Metairie, LA 70002
tanzelmo@mcsalaw.com

Attorney for Defendant-Appellee Board of Commissioners of the Orleans Levee District, and Defendant-Appellee Orleans Levee District

James K. Irvin
Michael J. Monistere
Chadwick W. Collings
MILLING BENSON WOODWARD LLP
909 Poydras Street - Suite 2300
New Orleans, Louisiana 70112-1010
jirvin@millinglaw.com

Attorneys for Plaintiffs-Appellants Sims, et al.

Ralph S. Hubbard, III
Joseph P. Guichet
LUGENBUHL, WHEATON, PECK, RANKIN & HUBBARD
601 Poydras Street, Suite 2775
New Orleans, LA 70130
rhubbard@lawla.com

S. Ault Hootsell, III
PHELPS DUNBAR LLP
Canal Place
365 Canal Street, Suite 2000
New Orleans, LA 70130-6534
hootsela@phelps.com

Attorneys for Defendant-Appellee St. Paul Fire & Marine Insurance Co.

/s/ Michael T. Kirkpatrick

_____

Michael T. Kirkpatrick

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,218 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.

/s/ Michael T. Kirkpatrick

_____

Michael T. Kirkpatrick
Attorney of Record for Appellants
Mary Brinkmeyer, Michelle LeBlanc,
and Thomas C. Stuart

Dated: March 29, 2010