Appeal Nos. 03-4294, 03-4316, 03-4837, and 03-4838

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re: COMMUNITY BANK OF NORTHERN VIRGINIA AND GUARANTY NATIONAL BANK OF TALLAHASSEE SECOND MORTGAGE LOAN LITIGATION

Appeal No. 03-4294
Scott C. Borison, Appellant
Appeal No. 03-4316
Badeaux Class Member Opt-Outs, Appellants
Appeal No. 03-4837
Michael Lane, Marcos Escalante, Cheryl White-Berry,
William P. Gorny, Rinaldo Swayne
Appeal No. 03-4838
Badeaux Class Member Opt-Outs, Appellants

COMBINED REPLY BRIEF OF APPELLANTS BADEAUX CLASS MEMBER OPT-OUTS, SCOTT C. BORISON, AND MICHAEL LANE, ET AL.

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

Attorneys for Appellants
Badeaux Class Member Opt-Outs
and Scott C. Borison

Scott C. Borison
Legg Law Firm, LLC
5500 Buckeystown Road
Frederick, MD 21703
(301) 620-1016

Attorney for Appellants
Michael Lane, et al.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

LEGISLATIVE HISTORY

ARGUMENT

I. THE DISTRICT COURT ERRED IN INVALIDATING THE BADEAUX CLASS MEMBERS' OPT-OUTS AND PREVENTING BORISON FROM COMMUNICATING WITH HIS CLIENTS.

A. Introduction

Before addressing the particular points raised in the settling parties' brief ("Def. Br."), it is important to confront its basic theme. The brief is suffused with the notion — directly at odds with cases such as *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 640-43 (1985), and *Bates v. State Bar of Arizona,* 433 U.S. 350, 376-77 (1977) — that there is something inherently disreputable about a lawyer seeking out potential clients, and that, in a class action in particular, class members must make the stay-in/opt-out decision free from any outside influence. *See, e.g.,* Def. Br. 30, 35. We agree, of course, that lawyers may not lie to or deliberately mislead their current or prospective clients. But while the notion of class member "free will" may sound reasonable in the abstract, it makes little sense in the context of a case like this one.

The class members learned of this case only when they received the settlement notice. Joint Consolidated Supplemental Appendix ("SA") Vol. I 137. Although reasonably clear and well written, the notice is full of complicated legal terminology. *See, e.g., id.* 139 (definition of "settled claims"), 137 (definition of

the class). Moreover, although the settling parties complain that Scott Borison's letter to class members did not set forth the potential weaknesses of the plaintiffs' case, discussed *infra* at 7-9, the notice does *nothing* to explain the strengths and weaknesses of the plaintiffs' claims or the banks' defenses; it merely sets out the range of settlement recoveries. SA Vol. I 138. It does not, for instance, explain the kinds of damages that may be available to prevailing plaintiffs under The Truth in Lending Act ("TILA"), the Home Ownership and Equity Protection Act ("HOEPA"), or various state laws. Nor do we suggest that it should have, given the complexities of the underlying transactions and applicable law.

But in light of those complexities, there would be no way, without advice of counsel, for a class member sensibly to decide on his or her own whether to stay in or opt out. How, for example, would a class member know that a loan is subject to HOEPA when the loan fees exceed a certain percentage of the loan amount? 15 U.S.C. § 1602(aa)(1)(B). How would that class member know, in turn, under what circumstances HOEPA would entitle her to damages equal to or greater than the entire finance charge? *Id.* § 1640(a)(4). And, although the notice explains that the class settlement would release the class members' defenses to future collection or foreclosure actions, SA Vol. I 140, how would the class members possibly know that HOEPA and TILA effectively erect barriers to foreclosure that are potentially

extremely valuable? After all, such defenses are not subject to the statute of limitations for affirmative claims, *id.* § 1635(e), and they can help people keep their most prized possession — their homes — because TILA remedies include substantial damages under 15 U.S.C. § 1640(a), which may be exercised by way of recoupment or offset, as well as rescission rights if timely exercised under 15 U.S.C. § 1635.

We do not mean, of course, that all class members unquestionably held such rights. But the answer to all these questions is that, in a case like this one, the right to opt out is only meaningful if class members have the counsel of an expert lawyer, such as Scott Borison, who is available for advice on an individual basis. And, realistically, the lawyer's availability will only be known to most class members if the lawyer reaches out to potential clients, as occurred here. *See Bates*, 433 U.S. at 376-77. As explained more fully below, the settling parties' efforts to undermine the formation of such lawyer-client relationships should be rejected.

* * *

As explained in our opening brief and further below, even if Borison's initial letter to Maryland and Florida class members could be considered misleading, there are ample independent reasons to reverse the decision below: (1) the ex parte prior restraint on Borison's future communications with his clients was unlawful;

(2) the district court erred in refusing to approve Borison's proposed follow-up letter to his clients during the second opt-out period;, and (3) the district court's order invalidating the opt-outs and restricting future lawyer-client communications was drafted entirely by the settling parties and thus violated the rule in *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004).

But the Court need not reach those issues. The settling parties do not dispute that if Borison's initial communications with his prospective clients were proper, then the district court order would not have had an independent basis for invalidating the Badeaux class members' opt-outs. In section B below, we show that, in fact, those initial communication were entirely proper.

First, however, we must confront one other argument made by the settling parties. Without citation to *any* authority, Def. Br. 36, they assert that the district court was empowered to abrogate the opt-outs en masse and impose a one-size-fits-all remedy based on the cumulative conduct of all the outside lawyers, regardless of the particular facts of any one lawyer's interactions with class members. The district court's October 14, 2003 order should be reversed in its entirety for a host of reasons discussed below and in our opening brief. However, the appellants — like any litigants — are entitled be judged on *their* conduct, not the conduct of others over whom they had no control. As the settling parties' brief makes clear (at

4-5, 9-12), the record reflects exactly which lawyers sent which letters and had which contacts with class members and the court; there is no dispute over which lawyers represent which opt-out class members; and the different "curative" notices sent to opt-out class members purport to take into account the differences between each lawyer's conduct. Thus, assuming that voiding opt-outs is an appropriate remedy for misleading or improper communications from attorneys, it should be limited to those who actually received improper communications when it is clear who they are, and the settling parties' "gestalt" approach to class member rights should be rejected as an assault on due process.

The settling parties' effort to merge the distinct conduct of various outside lawyers is part of parcel of their efforts below to claim that the lawyers were working in an "alliance," SA Vol. II 665, which they now describe as "a letter writing campaign calculated to disrupt the settlement." Def. Br. 4 (argument heading). We repeat once again: Borison was not acting in "alliance" with any of the other appellant lawyers. He did not consult them (or even know of them) prior to sending out his initial letter to class members, and no record evidence indicates otherwise. Although we believe these statements are legally irrelevant — surely, Borison would have had the right to consult with other lawyers who had similar concerns — it is nothing short of outrageous to continue to try to paint a picture

that is not true simply to gain a perceived litigation advantage.

B. Borison's Letter Was Accurate And Non-Misleading.

At pages 39 to 42 of their brief, the settling parties list the reasons why, in their view, the appellant-lawyers' communications with prospective clients were misleading or otherwise improper. None of those reasons applies to Borison's conduct.

First, the settling parties assert that the lawyers' communications "overstated borrowers' potential for success" and "stated (or strongly implied) that the individual borrower possessed alternative claims of much greater value than the amount he or she could receive through the settlement." Def. Br. 40. Borison's letter did nothing of the sort. Borison's letter stated, based on his firm's "investigat[ion] of [the bank's] lending practices" and experience in similar cases, that he "believes that your claim *may* be worth much more than the settlement offer *and that you should have someone review your settlement papers to determine whether the proposed settlement makes sense* . . . ." Affidavit of Scott C. Borison ("Third Cir. Aff."), Exh. 7 (emphasis added); *see also id.* ¶ 15 ("No person was advised to opt out until a review of their information was conducted and a determination, based on experience of handling hundreds of these cases, was made that the individual case had sufficient merit to pursue individually."); *accord* SA

Vol. V 2058-59 (¶ 18). After reviewing each prospective client's situation individually to see whether opting out would be the best option for that client, SA Vol. III 787-877 (examples of documents reviewed), Borison recommended opting-out to about half of the class members who responded to his letter. Third Cir. Aff. ¶ 13; SA Vol. V 2057 (¶ 16).

Second, the settling parties falsely claim that the lawyers' letters "contained statements likely to cause recipients of the letters to believe (incorrectly) that the lawyer . . . already had investigated the facts of his or her loan transaction." Def. Br. 40. Borison's letter *did exactly the opposite*. It repeated what the class members already knew: that Borison had *not* yet reviewed the class members' particular loan transactions, but that he would do so if any recipient of the letter wished him to. Thereafter, the class member would be free to retain Borison or not and to stay in the settlement or not. The settling parties' argument serves only to contrast Borison's conduct with that of class counsel, who plainly did not "investigate[] the facts [of the class members'] loan transaction[s]." Thus, the settling parties' complaint simply underscores that it was the class members who contacted Borison, and not the vast majority of the 44,000 class members, who received individualized attention from the lawyer of their choice.

Third, the settling parties claim that Borison was obligated to include in his

initial letter chapter-and-verse about "the substantial risks of litigation," "the benefits of the Settlement," and "the role of the court." Def. Br. 40-41. This assertion makes no sense for several reasons. In the first place, no decision of which we are aware — and the settling parties cite none — suggests that, to be proper, a lawyer's communication to prospective clients must inform the recipient of every possible legal eventuality, all potential sources of information, and the defenses the client's opponent is likely to assert. As noted at the outset of this brief, even a comprehensive class notice cannot sensibly do that.

The settling parties maintain that Borison was required to disclose, among other things, "the split of authority on key legal issues, including significant decisions in Defendants' favor in related cases filed by some of the campaigning attorneys" and "the strength of the defenses the banks and RBC had asserted or likely would assert." Def. Br. 40. The defendants no doubt would have preferred that Borison submit a legal treatise to his prospective clients because if Borison had done what defendants suggest the materials would have quickly found their way into the waste basket. The case law does not remotely require such comprehensive disclosures, and such a requirement would undermine the very purpose of protecting lawyer solicitation as free speech: helping prospective clients receive clear and accurate information about their rights. *See Bates*, 433 U.S. at

374 (rejecting argument against lawyer advertising on ground that it "does not provide a complete foundation on which to select an attorney" and noting that "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision."). Finally, it bears repeating: Borison himself took into account the strengths and weaknesses of each class member's case when he met with the class members and reviewed their individual loan documents. Thus, contrary to the settling parties' assertion, Borison did, in fact, offer to consider "the substantial risks of [individual] litigation," Def. Br. 40, by stressing that a review of each client's circumstances would be needed before Borison could make a stay-in/opt-out recommendation.[1]

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[1]The settling parties' particular gripes about the opt-out lawyers' alleged failures to disclose the purported strengths of defendants' case have no bearing on the Badeaux class members' situation. The claim that Borison's letter should have disclosed the dismissal of *one* supposedly "related" lawsuit in Illinois on statute of limitations grounds is truly bizarre, *see* Def. Br. 40 n.22, since the date that the causes of action accrued in that case obviously has no relation to the accrual dates for other class members, which would depend, among other things, on when they entered into their loans. Moreover, one of the key issues considered by Borison in his review of individual class members' loan documents was potential limitations concerns. Defendants also claim that a very small number of cases against them have been dismissed for failure to state a claim under *Missouri* law or because certain state claims were held preempted by federal law. *Id.* Those decisions are irrelevant to Borison's clients because they are planning to pursue claims principally under *federal* law, along with supplemental state claims under

(continued...)

Fourth, the settling parties assert that Borison's letter should have been accompanied by a copy of the class notice and contact information for class counsel Bruce Carlson. Not surprisingly, the settling parties cite no supporting case law. *See* Def. Br. 41. In most cases involving communications with absent class members during the opt-out period, including this one, the class members would have just received the notice, which includes class counsel's contact information, in the mail. *See* SA Vol. I 140. To send that information again would, at best, be redundant, and, at worst, confusing about the source of the information. The class member would rightly wonder: Is the class notice coming from the court again, and, if so, why? Does this notice concern a different, albeit similar case? In Borison's case, including the class notice would have transformed a simple, one-page offer to review the class member's circumstances into a multi-page explication of the settlement (which, again, the class members had just received).[2]

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[1](...continued)
Maryland and Florida law.

[2]Although not cited by the settling parties, *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478 (E.D. Pa. 1995), did indicate that outside lawyers who urged class members to opt out, without *any* review of the class members' circumstances, should have sent the class members the class notice. In *Georgine*, however, the class consisted of people who might contract asbestos-related disease *in the future*,
(continued...)

Fifth, the settling parties claim that Borison "failed to reveal" his "direct financial interest" in the advice he was providing. Def. Br. 41. Once again, this statement is simply false. Borison's letter explained that he would review the class member's case for free before deciding whether to offer the firm's legal services. And it explicitly stated that if Borison were retained, his fee would be a one-third contingency. SA Vol. V 2088-89. Borison revealed his precise financial interest; he would earn a fee *only* if his clients prevailed through judgment or settlement in their individual cases. Thus, he had no incentive to recommend that clients opt out willy nilly, as reflected by his many recommendations that class members stay in the settlement. Third Cir. Aff. ¶ 13.[3]

But the settling parties' complaint in this regard is more than simply false; it is highly ironic. Although, as just noted, Borison's financial interests were aligned with those of his prospective clients and were fully disclosed, that is not

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[2](...continued)
and they were unknown to the settling parties. Therefore, except for a small number of mailed notices to lawyers whose clients had already sued defendants, the notice was carried out by publication and had *not* already been sent individually to the millions of class members. *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 320-23 (E.D. Pa. 1993).

[3]The Florida Bar expressly approved the letter for compliance with its lawyer advertising rules, which include a rule concerning disclosure of contingent fee arrangements. *See* Fla. R. Prof. Conduct 4-7.2(c)(4).

necessarily true of the settling parties. The defendants' financial self-interest in preventing opt outs (and avoiding additional, potentially costly suits) is not disclosed in the settlement notice. (That self-interest may explain why the opt-out right is mentioned very briefly on the last page of the notice, after four full pages of dense, single-spaced text. *See* SA Vol. I 141.) More importantly, although the notice contains a brief reference to class counsel's mammoth $8.1 million fee request, *id.* 140, neither the notice, nor the subsequent court-ordered "curative" notices drafted by the settling parties, disclosed class counsel's clear financial interest in preventing opt-outs. As explained in our opening brief (at 37-38), defendants had the right to abandon the settlement if as few as 220 class members opted out (far fewer than the 435 who did opt out). Thus, it was in class counsel's financial interest in their fee, which defendants agreed not to oppose, SA Vol. I 140, to assist defendants in their efforts to invalidate the opt-outs, *even when opting out represented the genuine desires of the very class members whose interests class counsel was duty-bound to protect.* We understand that class counsel claims that abrogation of the opt-outs was for the class members' own good. But if the issue is *disclosure* of *potential* financial conflicts of interest,

Borison did a far better job than did the settling parties.[4]

Finally, the settling parties claim that the outside lawyers' supposed "misstatements and omissions" "were exacerbated by the air of urgency the solicitation letters sought to create." Def. Br. 41. Borison's letter did not "create" urgency. It simply told the truth: that the class members should act promptly if they wanted to consider opting out because, as a matter of fact, the opt-out period was quite short and would soon expire. Indeed, Borison would have been terribly remiss if he had not urged class members to request a consultation, if they desired one, in advance of the opt-out deadline (which is why Borison sent a second letter supplying the correct opt-out date).

* * *

With each purported inaccuracy and deception thoroughly rebutted, nothing remains of the settling parties' claim that the court had the authority to abrogate the

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[4]In this regard, the settling parties' citation to *Georgine*, 160 F.R.D. at 496, is puzzling. There, the outside lawyers did not, in fact, reveal their financial interest, and, as the quote employed by the settling parties indicates, the outside lawyers suggested that they were "disinterested officers of the court." Def. Br. 41 n.24 (quoting *Georgine*). Here, to the contrary, Borison's letter was on his firm's letterhead, and one of its key purposes was to explain that Borison was *not* associated with the settlement. Ironically, if Borison had enclosed the court-approved notice, as the settling parties suggest he should have (*id.* 41), his mailing may have given the false impression of disinterested court sponsorship that the settling parties (paradoxically) condemn.

Badeaux class members' opt-outs. But one further point bears emphasis. Even if Borison's letter had the potential to mislead in some respect or omitted something that, ideally, should have been included, the district court nevertheless erred in abrogating the opt-outs. Borison's letter did *not* urge the recipients of the letter to opt out without undergoing a review of their individual circumstances; and it did *not* promise the recipients that he would represent them in individual suits or in any capacity at all. He simply urged class members to contact him promptly if they wanted an expert review of their cases. A small minority of the recipients responded to his letter, and about half of that small minority opted out after Borison's review. Thus, even assuming that something about Borison's letter was inaccurate or misleading — and we stress that nothing was — the process that Borison followed before he entered into attorney-client relationships and recommended a course of action remedied any deficiency.

C. The Court's October 14, 2003 Communications Ban Was Unlawful.

We have previously explained that, even assuming that Borison's initial communication with class members was improper and justified invalidation of the opt-outs, Rule 23 and the First Amendment prohibited the court from enjoining Borison from all further communications with his clients during the second opt-out period. Our opening brief (at 52-61) generally rebuts the settling parties'

arguments in this regard, and we reply here only to the settling parties' incorrect claim that a raft of case law supports their position.[5]

Despite the settling parties' protestations to the contrary, the district court's ban on future communications is, as we said, a "distant outlier" among class action decisions that have considered such bans. *See* Def. Br. 47-48 (quoting Badeaux Opening Br. 48). The cases relied on by the settling parties involve egregious behavior by *defendants* to derail class actions — conduct that could not possibly benefit class members and was undertaken by defendants for the explicit purpose of undermining their rights. *See, e.g., Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1197 (11th Cir. 1985) (defendant "seized upon the idea of soliciting exclusion requests as a means to reducing its potential liability"); *Hampton v. Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994) (enjoining communications where defendant had repeatedly threatened plaintiffs, who were its business customers, not to participate in suit; defendant was "an interested party" and thus "faces a conflict of interest in advising [class] members on the merits of participation in the lawsuit due to its direct pecuniary interest in

[5]We recognize that the court purported to devise a procedure whereby Borison could submit future written communications for pre-screening by the court. The unlawful way in which the court implemented that procedure is addressed in the next section of this brief.

the outcome"); *Cobell v. Norton*, 212 F.R.D. 14, 16-17, 18 (D.D.C. 2002) (defense counsel sent class members "the effect of which was to extinguish the very rights of the class members that were at issue in the ongoing class action"); *Haffner v. Temple Univ.*, 115 F.R.D. 506 (E.D. Pa. 1987) (defendants engaged in a series of dishonest tactics deliberately designed to prevent class members from meeting with class counsel to discuss case).

None of these cases remotely resembles the situation here. Borison was not seeking to harm the class members, and the settling parties have never suggested otherwise. He was seeking only to assist a small number of class members in making the stay-in/opt-out choice.[6]

The settling parties' citations thus do not rebut our basic point: Aside from the decision below, not a single court has banned future communications by outside lawyers offering to advise clients on whether to opt out of a class action.

Indeed, it is telling that, in this regard, the settling parties simply ignore a case that they otherwise trumpet: *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478. There, the outside lawyers urged class members to opt out regardless of the

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[6]At least two of the cases cited by the settling parties are inapplicable for another reason: They involved defense counsel's contacts with members of an already-certified class, and thus the injunctions were based on a simple application of the ethical rule prohibiting contact with individuals known to be represented by another lawyer. *See Cobell*, 212 F.R.D. at 17; *Haffner*, 115 F.R.D. at 510.

class members' personal circumstances; they did not reveal their financial interests in procuring opt-outs; and they affirmatively misrepresented the settlement benefits in many ways. *Id.* at 489, 496, 492-95. Although the court abrogated the first round of opt-outs and established a second opt-out period, the court did *not* impose *any* communications restrictions on the outside lawyers. The court recognized the serious First Amendment implications of impinging on the speech rights of both the lawyers *and* the class members, *id.* at 510-17, and that its remedy could be "no greater than is necessary or essential." *Id.* at 517. Thus, the court specifically noted that its order would "not interfere with the [future] rights of the speakers" or "restrain or burden speech prior to its articulation." *Id.* Indeed, as explained in our opening brief (at 50-51), the remedy in *Georgine* not only permitted the outside lawyers to communicate freely with class members during the second opt-out period, but the court refused the settling parties' request to order the outside lawyers to include a "disclosure statement" along with future communications. *Id.*[7]

In sum, the court's order was not "narrowly tailored" to remedy the perceived harm. Assuming for the sake of argument that any remedy was called

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[7]The settling parties are similarly silent regarding *In re Worldcom, Inc. Sec. Litig.*, 2003 WL 22701241, *3-5 (S.D.N.Y.), discussed in Borison Opening Br. 49-50, which, like *Georgine*, involved factual findings of egregious misconduct, but in which the remedy did not bar future communications between outside lawyers and class members.

for, a decision establishing a second opt-out period and guiding future attorney-client communications through a reasoned analysis of the underlying facts and applicable law would have sufficed.

D. The District Court's Refusal To Allow Borison To Communicate With His Clients During the Second Opt-Out Period Was Reversible Error That Imposed Severe Harm On The Badeaux Opt-Outs.

On October 14, 2003, the court signed an order drafted by the settling parties that invalidated all opt-outs from six states, including those of the Badeaux class members from Maryland and Florida. SA Vol. I 143. That order barred Borison from having *any* oral communications with his clients during the second opt-out period. It also ruled that no written communications could take place unless they were approved in advance by the court.

Because he still believed that opting out was in the best interest of some of the individuals who consulted him, Borison moved, on October 16, 2003, the day after he received the court's order, for permission to send the following letter to his clients:

> In response to the submission of your opt out from the class to allow you to file an individual lawsuit to enforce your rights, the plaintiffs and defendants in the class action filed a joint motion to invalidate your opt out. Our firm offered to review your loan documents with you. After review of your particular loan terms, it was recommended that you opt out of the class.
>
> The joint motion that was filed was granted by the court before

> we filed any response to the motion. We respectfully disagree with the court's order and plan on seeking reconsideration or other review of the order as to our clients. Included in the order granting the motion was a provision that provides that we may not communicate with you without the court's advance approval of any written communication. I have submitted this letter to the court before I sent it. If you try to contact our office and do not receive a response, this is the sole reason the firm cannot respond.
>
> I am enclosing a copy of the response that was prepared to address the issues raised by the plaintiffs' and defendants' joint motion. It sets forth the terms of a loan made to one of our clients as an illustration and explains some of the reasons that claims can be asserted against the loans. Since the court entered the order before a response was filed, we were unable to provide the court with the information that we had available to us when we made our recommendation to you. The firm previously handled cases involving some of the defendants in the class action. Our experience with some of the defendants involved in the class action as well as experience from hundreds of other cases in which we have represented consumer borrowers like you for claims under the Truth in Lending Act and the Home Ownership and Equity Protection Act supported our recommendation to you. In addition to reviewing loan documents in the other cases, we had also taken the deposition of a representative of Community Bank.
>
> I know that Bruce Carlson, an attorney representing the plaintiffs in the class action may have spoken to you and made comments that the settlement was good because the banks always win these types of cases. Our experience is different than his experience. The banks do not always win. The courts give you an opportunity to present your case. It remains our opinion that an individual case for you is the best option and therefore you should again elect to opt out.

SA Vol. III 775-76. In his motion, Borison also asked for permission to enclose a copy of his clients' objection to the settling parties' joint motion to invalidate the opt-outs, *id.* 775, which he filed contemporaneously with the motion seeking

approval of the letter. *See id.* 888.[8]

For two reasons, the district court committed reversible error in refusing, *the very next day*, to permit Borison to send the proposed letter to his clients. **First**, the court failed entirely to provide reasons why it rejected Borison's proposed communication, thus effectively banning *all* communications between Borison and his clients during the second opt-out period, a result that, as explained in the previous section of this brief, no court has ever countenanced. The settling parties claim that "[i]n its October 17 order, the court refused to authorize [Borison's] Firm to send those materials to members of the Class," Def. Br. 13, suggesting that the court carefully considered Borison's submission. But the district court did not do so. Rather, the court erroneously treated Borison's submission as a request for reconsideration of the invalidation order, and rejected it, along with *other* class members' requests for reconsideration, on the ground that "there should be" an ethical rule that would have barred the dissemination of initial letters sent by any outside lawyers on the ground that the class members were already represented by counsel. SA Vol. I 145.[9]

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[8]Borison's motion also informed the district court that some of the class members who contacted Borison "were not advised to opt out." *Id.* 776.

[9]Our opening brief (at 31-35, 39-40) explains why Borison and other outside (continued...)

Even assuming that the district court had authority to invalidate the opt-outs and channel all communications between Borison and his clients through its pre-screening mechanism, it abused its discretion in failing to provide *any* reasons for rejecting Borison's letter. As Judge Becker explained in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 197 (3d Cir. 2000), a district court abuses its discretion when its decision is bereft of "relevant case law" and is "unsupported by careful analysis explicated in written opinions or rulings from the bench." Thus, even where a district court says that it carefully reviewed the record — and here, it said *nothing* regarding Borison's submission — it commits reversible error, because, without further analysis, such statements "give . . . a reviewing court [little] with which to work." *Id.*

Second, quite apart from the district court's failure to provide a reasoned explanation for its October 17 ruling, there was no lawful basis to reject Borison's proposed letter. That letter explains, in very respectful language, why Borison was

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[9](...continued)
lawyers were permitted to contact class members about the litigation and did not violate any ethical rule in doing so. Significantly, the settling parties have never argued that outside lawyers' communications with potential opt-outs are per se unethical or otherwise inappropriate. Of course, if there were an ethical (or other) rule barring all such communications, then the order setting a procedure for screening further communications — which presupposes that some communications between outside lawyers and class members are proper — would have been nonsensical.

unable to speak to his clients, Borison's prior relevant experience, and his views of the settlement, and it reiterates his opinion that these particular clients should opt out. *Even the settling parties take no issue with Borison's proposed letter. See* Def. Br. 11-13. Rather, the settling parties' complaints, though couched as if they apply to the proposed letter, concern *only* the attached objection, which Borison filed in court on his clients' behalf. *See id.* 12. But the notion that Borison could be barred from providing his clients a copy of *their own* court filing — which would be available at the courthouse for all the world to see — is preposterous; indeed, offering to provide a client with key filings is, arguably, part of the ethical demand that a lawyer "shall keep a client reasonably informed about the status of a matter . . . ." A.B.A. Model R. Prof. Conduct 1.4(b).[10]

In any event, the settling parties' complaints about the content of the court

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[10]Borison began drafting the objection immediately after he received word that the settling parties had moved to invalidate the opt-outs. That objection contains the arguments that Borison would have filed *before* issuance of the invalidation order had the court not acted ex parte without hearing from any of the adversely affected parties. Contrary to the settling parties' contentions, the objection, *see* SA Vol. III 888-96, although hard-hitting, is well within the range of responsible advocacy. For instance, in order to suggest that Borison was impugning the court's integrity, the settling parties assert that Borison "implied that, by granting the Joint Motion, the court had 'transcend[ed] [its] neutrality.'" Def. Br. 12. But what the objection actually says is that the *settling parties'* efforts to impose restrictions would, if successful, "transcend," *i.e.*, override, the court's required neutrality. *See* SA Vol. III 889 n.1 (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)).

filing prove too much. Even if there were something inappropriate about Borison sending the filing to his clients, the remedy was obvious: The court should have approved the proposed letter (to which, again, even the settling parties do not object), but disapproved inclusion of the filing.

Nor can there be any doubt that the communications ban harmed the Badeaux opt-outs. To begin with, based on discussions with clients that took place after the ban (and the second opt-out period) expired, Borison learned that his clients still wished to opt out, as evidenced by their status as appellants in this Court. Moreover, even before the ban expired, Borison received e-mail correspondence and "numerous client calls . . . want[ing] to know what is happening," but he could not respond because of the ban, Third Cir. Aff. ¶ 12; SA Vol. V 2057 (¶ 15), demonstrating that his clients were confused or wanted further information after receiving the court's "curative" notice. This problem was compounded by the bizarre statement in that notice that the Badeaux opt-outs "should contact your own attorney" or class counsel if they had any questions about the case, SA Vol. V 2065 (¶ 7), even though their "own attorney" was enjoined from speaking to them. *See* Third Cir. Aff. ¶ 12.

In sum, despite the settling parties' assertions to the contrary, the communications ban and the "curative" notice severely stifled the relationship

between Borison and his clients and effectively deprived the Badeaux class members of the right to opt out.[11]

E. This Court's Recent Decision In *Bright v. Westmoreland County* Also Requires Reversal.

Apart from all the other infirmities in this case, it is undisputed that, in invalidating the opt-outs, banning lawyer-client communications, and issuing "curative" notices, the district court did no more than sign an order that had been prepared by the settling parties' counsel. That process ran afoul of the Court's recent ruling in *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004), which condemned as reversible error the judicial practice of adopting a decision prepared largely by counsel for one of the parties. Here, the order prepared by counsel represents, in our view, the *entire* work product of the court on the opt-out issues. *Compare* SA Vol. II 541-42 (order drafted by settling parties), *with* SA Vol. I 143-44 (order signed by court). Moreover, even if one accepts the settling parties' peculiar notion that the "curative" notices should be construed as judicial findings, Def. Br. 55 n.28, they, too, were drafted solely by counsel, and thus they

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[11]On the other hand, all of the Walters Bender firm's opt-out clients, who did, in fact, communicate with their lawyers during the second opt-out period, *see* Def. Br. 13, chose to opt out during the second opt-out period. Thus, the communications ban did exactly what the settling parties hoped it would do: prevent opt-outs.

cannot save this case from reversal under *Bright*.

Bright's dual rationales apply with full force here. First, because the court's October 14 order resolved all of the factual and legal issues regarding the class members' opt-out rights, it should have, but did not, provide "tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic." 380 F.3d at 732. Indeed, the court could not have "wrestled" with the Badeaux class members' (or any other opt-out class member's) "claims and arguments," since it ruled ex parte, just four business days after the settling parties' joint motion was served on Borison and before receiving any opposing submissions.

Second, as the settling parties acknowledge in their brief to this Court regarding settlement approval, Def. Settlement Approval Br. 16 n.21 (quoting *Bright*, 380 F.3d at 731), even a court's adoption of counsel's proposed factual findings alone constitutes reversible error if the record fails to reveal that the court exercised its own "independent judgment" in doing so. Here, again, the docket reflects only that the court signed the settling parties' order; there was no hearing, no consideration of opposing views — in short, no evidence of "independent judgment."

Moreover, *Bright* applies with special force here. As discussed in our

opening brief (at 59-61), because the Badeaux class members' right to receive information about their claims was protected by the First Amendment, the court had a heightened obligation to make its own factual findings, to take into account opposing points of view, and to issue an order that guided Borison and the other lawyers about what future communications would be permissible.[12]

For this reason as well, the decision below should be reversed.

II. THE DISTRICT COURT ERRED IN APPROVING THE SETTLEMENT AS FAIR, ADEQUATE, AND REASONABLE BECAUSE IT RELEASED NON-CLASS HOEPA AND TILA CLAIMS WITHOUT COMPENSATION.

Page 1 of the district court's memorandum approving the settlement reveals a fundamental problem. It says:

> Plaintiffs . . . allege in their consolidated amended complaint that defendants . . . acted in violation of the Home Ownership and Equity Protection Act . . .

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[12] *Bright* is, of course, binding here, and it bears noting that *Bright* is fully consistent with the rulings of other circuits. The Fifth Circuit, for instance, has consistently looked with great disfavor on what it terms "rubber-stamped" findings because they present the reviewing court with an advocate's view of the case. *Matter of Complaint of Luhr Bros., Inc.,* 157 F.3d 333, 338 & n.4 (5th Cir. 1998); *see also, e.g., Sierra Club v. Cedar's Point Oil Co.*, 73 F.3d 546, 574 (5th Cir. 1996); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 502 (5th Cir. 1982). Other circuits have also criticized this practice in strong terms. *See, e.g., DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990) (adopting portions of briefs is "disapproved . . . because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own.") (citations omitted); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 & n.46 (11th Cir. 1997) (similar).

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SA Vol. I 174.

The principal objection to the settlement is that although HOEPA claims were *not* asserted, and not considered by class counsel because they were allegedly not susceptible to class treatment, they were nevertheless gratuitously included in a class-wide release. Even though this issue was the focal point of the dispute below, the district court mistakenly thought that the class complaints included HOEPA claims. If the district court believed the case involved HOEPA claims, objections based on the release of HOEPA claims might appear spurious. However, because the class complaints did *not* include HOEPA claims, as we now explain, the district court erred in rejecting those objections.

In what amounts to an admission of class counsel's inadequacy, the settling parties assert that class counsel "recognized 'almost immediately' that such a claim 'could not be certified as a class action.'" Def. Settlement Approval Br. 33. The approach taken by class counsel to this litigation was, and is, that if a claim is not amenable to class treatment, the claim is somehow worthless and can be easily released in the class settlement. Indeed, the settling parties' brief concedes that the settlement treats the HOEPA claims as worthless. The settling parties break down the settlement relief as follows:

> All Class Members will receive either $250.00 or $600.00 for this part of their RESPA claim . . . The individuals who receive the lower amount will be eligible to receive an additional $302 by participating in the claims submission process . . . . Class Members who resided in states where a state law-based statutory claim could have arguably been asserted . . . are automatically entitled to receive an additional $325.00.

Def. Settlement Approval Br. 54. Thus, by the settling parties' own admission, the settlement explicitly provides relief under RESPA and state law, but nothing is paid for the HOEPA claims.[13]

There are two basic reasons why the class members' HOEPA claims are so important. First, if HOEPA claims are raised affirmatively, damages can include all finance charges paid on the loan. 15 U.S.C. § 1640(a)(4); *see* SA Vol. V 2086-87 ($21,000 settlement of HOEPA claim).[14]

Second, HOEPA can be raised by recoupment or setoff, when collection is

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[13]For an excellent review of HOEPA's purpose and its rights and remedies, see S. Rep. 103-169, at 21-28, 63-65 (1994), 1994 U.S.C.C.A.N. 1881, 1905-1912, 1947-49.

[14]The settling parties make a significant factual error in their quest to demean the value of the HOEPA claims. They assert that "none of th[e appellant law] firms has managed to recover any funds for any of their clients in connection with these transactions." Def. Settlement Approval Br. 22. This statement is false. One of the settling defendants paid $21,000 to a single client of Borison's law firm. *See* SA Vol. V 2086-87. Moreover, the evidence disclosed two additional settlements, but the amounts could not be divulged under a confidentiality provision, which defendant RFC could have waived. *Id*. 2054 (¶ 8).

sought on the loan. *See* 15 U.S.C. § 1640(e). The setoff can be substantial given that, as noted, damages for violation of a HOEPA loan are equal to the finance charges paid on the loan. Many of the loans in this class action had large initial, up-front fees. Class member Jones, for instance, paid fees of $4,400 on a $35,000 loan, well above the 8% HOEPA trigger. SA Vol. V 2079 (lines 801, 802, 811, & 1600). The annual percentage rate on his loan was 18.7280%, *id.* 2078, resulting in a very large finance charge. If Mr. Jones faced foreclosure, the ability to claim a setoff could make the difference in saving his home.[15]

Class counsel's release of class members' valuable individual rights under HOEPA after determining that they were not amenable to class treatment illustrates the *exact* problem identified by the Supreme Court in rejecting the settlement in

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[15]The settling parties suggest that there are no concerns in this case regarding release of future rights as there were in certain asbestos class actions. *Id.* 60. Not so. This case involves long-term, high-value loans. Mr. Jones' loan, for instance, runs for 25 years. SA Vol. V 2078. Like "future" members of an asbestos class, class members here have no way of knowing whether they will be subject to collection or foreclosure proceedings in which HOEPA rights may be interposed as a defense. If a class member were subject to future collection or foreclosure proceedings, absent the class settlement, he could have rights to rescission, recoupment, and setoff, which, as explained above, can be extremely valuable. Under the settlement, all such rights are purportedly released. The notice explicitly states that, under the settlement, class members may *not* raise any such claims in defending a *future* collection or foreclosure proceeding. SA Vol. I 140 (¶ III(D)). (We believe that this provision would be subject to collateral attack in any future collection or foreclosure proceeding).

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). 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 adversary investigation." *Id.* at 621 (citations omitted). Thus, the problem is not simply that class counsel neglected to negotiate valuable relief in exchange for release of the HOEPA claims. The problem is more fundamental: Once class counsel came to the conclusion that the HOEPA claims could not be certified, he was structurally incapacitated from obtaining such relief for the class.

Nor can this problem be explained away by class counsel's self-serving post-hoc statements that *some* kinds of HOEPA violations were absent from the loan documents of *some* class members, including those of the named representatives. Def. Settlement Approval Br. 33. That argument only exacerbates the problem because it underscores class counsel's elemental misunderstanding of his obligation to represent the *whole* class. In this regard, Judge Friendly could have been talking about this very case when he refused to approve a settlement because it released absentees' claims that the class representatives were "willing to throw to

the winds in order to settle their own claims." *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9, 17 n.6 (2d Cir. 1981); *see also id.* at 19 (even if settlement benefits class members who do not hold released claims, "[a]n advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of members, whether few or many, *which were not within the description of claims assertable by the class*") (emphasis added); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133-35 (7th Cir. 1979) ("convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class").

Under these circumstances, the district court's decision approving the settlement should be reversed.

CONCLUSION

For the reasons stated in Part I above and in our opening brief, the district court's orders invalidating the Badeaux class members' opt-outs, imposing a second opt-out period, and enjoining Scott Borison from communication with his clients should be reversed, with instructions that the Badeaux class members' requests for exclusion from the class action be reinstated.

For the reasons stated in Part II above and in our opening brief, the district court's decision approving the class action settlement should be reversed.

Respectfully submitted,

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

Attorneys for Appellants Badeaux Class Member Opt-Outs and Scott C. Borison

Scott C. Borison
Legg Law Firm, LLC
5500 Buckeystown Road
Frederick, MD 21703
(301) 620-1016

Attorney for Appellants Michael Lane, et al.

November 22, 2004

CERTIFICATE OF BAR MEMBERSHIP

I, Brian Wolfman, counsel of record in this appeal, am a member of the bar of this Court.

_____
Brian Wolfman

November 22, 2004

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), and in accordance with this Court's order of April 26, 2004, which permitted this brief to contain up to 10,500 words, I certify that this brief contains 7,783 words according to WordPerfect 7, the word-processing program used to prepare this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I further state that this brief was prepared in 14-point Times New Roman proportional font.

_____
Brian Wolfman

November 22, 2004

CERTIFICATE OF SERVICE

I, Brian Wolfman, certify that two copies of the foregoing reply brief were served on the following counsel for the parties by regular mail on November 22, 2004.

Daniel A. Edelman, Esq.
Edelman, Combs & Latturner
120 South LaSalle Street
18th Floor
Chicago, IL 60603

Eric G. Calhoun, Esq.
Lawson, Fields & Calhoun
14135 Midway Road
Suite 250
Addison, TX 75001

R. Bruce Carlson, Esq.
Specter, Specter, Evans & Manogue
Koppers Building
26th Floor
Pittsburgh, PA 15219

Thomas L. Allen, Esq.
Roy W. Arnold, Esq.
James C. Martin, Esq.
Reed Smith
435 Sixth Avenue
Pittsburgh, PA 15219

David G. Oberdick, Esq.
Meyer, Unkovic & Scott
1300 Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222

Richard B. Tucker III, Esq.
Gary P. Hunt, Esq.
Tucker Arensberg
1500 One PPG Place
Pittsburgh, PA 15222

J Michael Vaughan, Esq.
David M. Skeens, Esq.
R. Frederick Walters, Esq.
Walters, Bender, Strohbehn & Vaughan
1100 Main Street
2500 City Center Square
Kansas City, MO 64105

Franklin R. Nix., Esq.
Law Offices of Franklin R. Nix
1020 Foxcroft Road, N.W.
Atlanta, GA 33032-2624

David J. Armstrong, Esq.
Dickie, McCamey & Chilcote
Two PPG Place
Suite 400
Pittsburgh, PA 15222-5402

Scott C. Borison, Esq.
Legg Law Firm
5500 Buckeystown Pike
Frederick, MD 21703

John W. Sharbrough III, Esq.
The Sharbrough Law Firm
156 St. Anthony Street
Mobile, AL 36603

_____
Brian Wolfman