

**GARY B. HALL, INDIVIDUALLY, AND AS REPRESENTATION OF A CLASS  
v. MIDLAND GROUP AND MIDFIRST BANK a/k/a MIDLAND MORTGAGE  
COMPANY SSB**

**CIVIL ACTION NO. 99-3108**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

**2000 U.S. Dist. LEXIS 16751**

**November 17, 2000, Decided**

**DISPOSITION:**

[\*1] Motion GRANTED.

**CORE TERMS:** settlement, subclass, class action, affiliate, mortgage, premium, adequacy, notice, settlement agreement, flat-cancelled, mortgagor, pendency, serviced, entity, lender, predicated, class certification, memorandum, certification, subserviced, overlapping, placement, escrow, virtually identical, summary judgment, class member, common fund, predominance, multiplier, impairment

**COUNSEL:**

For GARY B. HALL, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, PLAINTIFF: CAROL B. MC CULLOUGH, MC CULLOUGH LAW OFFICES, P.C., WARMINSTER, PA USA. STUART A. EISENBERG, MCCULLOUGH & EISENBERG, P.C., WARMINSTER, PA USA.

For MIDLAND GROUP, MIDFIRST BANK, A/K/A MIDLAND MORTGAGE COMPANY SSB, DEFENDANTS: ROBERT J. PRATTE, ALAN H. MACLIN, MARGARET K. SAVAGE, BRIGGS & MORGAN, MINNEAPOLIS, MN USA. MARTIN C. BRYCE, JR., BURT M. RUBLIN, BALLARD, SPAHR, ANDREWS AND INGERSOLL, PHILA, PA USA.

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For THRUBERT E. BAKER, OBJECTOR: SIDNEY R. BARRETT, JR., OFFICE OF THE ATTORNEY GENERAL, ASSISTANT ATTORNEY GENERAL, ATLANTA, GA USA.

For SHAKIRA LEMON, OBJECTOR: MICHAEL D. DONOVAN, DONOVAN MILLER, LLC, PHILADELPHIA, PA USA.

For MIKE MOORE, OBJECTOR: LEYSER Q. HAYES, ASSISTANT [\*2] ATTORNEY GENERAL, OFFICE OF ATTORNEY GENERAL, JACKSON, MS USA.

For ELIZA KIRKLAND, OBJECTOR: MICHAEL D. DONOVAN, DONOVAN MILLER, LLC, PHILADELPHIA, PA USA. JOHN C. BELL, JR., BELL & JAMES, AUGUSTA, GA USA.

**JUDGES:**

JAY C. WALDMAN, J.

**OPINIONBY:**

JAY C. WALDMAN



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**OPINION:**

**MEMORANDUM**

**WALDMAN, J.**

**November 17, 2000**

**Background**

This is a consumer class action. The essence of plaintiff's allegations is that defendant Midland engaged in the forced placement of hazard insurance through agencies owned by affiliates for residential properties with mortgages serviced by Midland and debited the affected mortgagors' escrow accounts in the amount of excessive and unauthorized premiums charged by the affiliates which received commissions for these placements.

Plaintiff has asserted an array of claims including breach of contract, breach of a duty of good faith and fair dealing, fraud, unfair trade practices, and violations of the federal Fair Debt Collection Practices Act and the civil RICO statute. Each claim, however, is predicated on the alleged impropriety of the challenged practice. The court has subject matter jurisdiction pursuant to 28 U.S.C. § § 1331 [\*3] & 1367(a).

The proposed class consists of those mortgagors for whom Midland force placed such insurance over the past twenty years. The class is divided into three subclasses reflecting the time periods in which the insurance was obtained and the pendency or non-pendency of premium assessments, as some policies were flat-cancelled.

Subclass I includes class members for whom lender placed insurance was obtained between February 1, 1991 and September 30, 1999 who, as of September 30, 1999, had a net lender placed premium assessment. Subclass II includes class members for whom lender placed insurance was obtained between February 1, 1991 and September 30, 1999 whose insurance was canceled and who, as of September 30, 1999, had no net lender placed premium assessment. Subclass III consists of class members for whom lender placed insurance was obtained between June 17, 1979 and January 31, 1991.

The court granted plaintiff's motion for provisional certification of a settlement class pursuant to Fed. R. Civ. P. 23(a) & 23(b)(3) and for preliminary approval of the settlement agreement executed by the parties. Presently before the court are plaintiff's Motion for Final Approval of Settlement [\*4] and Certification of Settlement Class and plaintiff's Motion for Attorney Fees and Costs which includes a request for an incentive award to the representative plaintiff.

The court held a hearing on final certification and approval, and has considered the voluminous submissions of the parties presented in connection with that hearing. The court has also considered the seven objections, four of which were presented or solicited by counsel for plaintiffs in an overlapping class action filed in the Southern District of Georgia captioned Kirkland v. Midland Mortgage Company. All parties who appeared were afforded an opportunity to make a full presentation.

The objections were directed at the adequacy of notice, the adequacy of the relief and the adequacy of representation. In a manner reminiscent of a political campaign, the Kirkland objectors have questioned the professional and personal integrity of class counsel in Hall. The court will address the various objections in connection with its discussion of the pertinent factors to which they relate.

**Adequacy of Notice**



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Notice was provided by mail to all class members who could be located from records available [\*5] to Midland and the issuing insurer as well as databases utilized by a national direct mail firm engaged by Midland, and by publication in USA Today plus seven metropolitan newspapers in various regions and Midland's principal markets. The record shows that ultimately 37,557 of 43,211 class members were reached by mail.

The notice contained the pertinent details about the action necessary to allow class members to make an informed decision, including the information contemplated by Fed. R. Civ. P. 23(c)(2). The notice did not, as the Kirkland objectors stress, discuss the pendency of the Kirkland case. Indeed, they contend that counsel in Hall breached a "duty of candor" in failing to advise the court prior to approval of notice about the Kirkland case and that a class had been certified therein.

Counsel did in fact advise the court about the pendency of Kirkland as reflected in the court's memorandum order addressing the motion for preliminary approval. Counsel did not advise the court that a motion for class certification had been granted in that case and it is not altogether clear that it had been.

It appears that the Court in Georgia did hold a hearing on [\*6] a motion for class certification in Kirkland and seemed to conclude that certification would be appropriate at least on a single claim of breach of fiduciary duty under Oklahoma law, the state of Midland's incorporation and principal place of business. The Court in Kirkland stated that "I intend to certify," that a class "will be certified" and that "I expect" to certify a class after reviewing proposed orders to be submitted by the parties.

The Court, however, did not enter an order detailing its Rule 23 findings and certifying the Kirkland class for another fifteen months, by which time the Hall settlement had received preliminary approval. It appears that in the interim the Kirkland case had been placed in suspense while the parties engaged in settlement negotiations.

In any event, the pendency of a parallel or overlapping class action does not preclude certification and adjudication of a subsequent class action. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 838 (7th Cir. 1999). n1 Class notice of a proposed settlement need not describe parallel actions. See *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1317-18 (3d Cir. 1993). [\*7] n2

- - - - -Footnotes- - - - -

n1 Kirkland counsel suggests that litigation of the instant case may be precluded by the first-filed rule. Hall and Kirkland are not co-extensive. They do not involve the same parties and same issues. Mr. Hall is not a member of the Kirkland class. The claims in Hall are broader and the class more inclusive than in Kirkland. Class counsel in Kirkland sought an order from the Court in Georgia enjoining Midland from settling the Hall action which that Court declined to issue.

n2 Kirkland counsel has suggested that because settlement of Hall would effectively resolve claims of Kirkland class members, such a settlement must be approved by the Court in Georgia to comport with Rule 23(e). Under this reasoning, none of scores of overlapping class actions often spawned by allegedly defective products or widespread fraudulent practices could be settled without the approval of the presiding judge in each. In short, Rule 23(c) requires only that any settlement of the Hall action be approved by the court in Hall.

- - - - -End Footnotes- - - - -

[\*8]

Kirkland counsel also objected to the fact that the final postmark date for respondents was a Sunday, a day on which he suggests a letter cannot be postmarked. In fact, letters are postmarked on Sundays at main post offices in

Philadelphia and other large cities. In any event, it is uncontroverted that any letter postmarked on the following day was accepted by counsel. n3

-Footnotes-

n3 Kirkland counsel also questioned the use of claim forms and the provision for reversion of unclaimed funds which creates a potential counter-incentive to distribution. In a class of this size, the use of such forms is not unusual or inappropriate. See Manual for Complex Litigation, Third § 30.47. The reversionary provision has been eliminated by stipulation of the parties.

-End Footnotes-

The court concludes that class members were provided with the best notice practicable under the circumstances and the notice provided, as to mode and content, satisfied Rule 23(c)(2) and the requirements of due process. See, e.g., *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994); [\*9] *Carlough v. Amchem Prod.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993); *Sanders v. Robinson Humphre/American Express, Inc.*, 1990 WL 105894, \*3 (N.D. Ga. May 23, 1990).

**Class Certification**

Rule 23(a) requires that a class satisfy the criteria of numerosity, commonality, typicality and adequacy of representation.

Numerosity is satisfied when the class is so numerous that joinder of all class members is impracticable. See *In re Prudential Ins Co. of America Sales Lit.*, 148 F.3d 283, 309 (3d Cir. 1998). Joinder of each of the tens of thousands of class members would be impracticable. See *Weiss v. York Hosp.*, 745 F.2d 786, 809 n.35 (3d Cir. 1984) (numbers exceeding one hundred will generally sustain numerosity requirement), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985).

Commonality is satisfied when there are questions of law or fact common to the class but does not require an identity of claims or a lack of "factual differences among the claims of the putative class members." *In re Prudential*, 148 F.3d at 310. The alleged existence of a common unlawful practice [\*10] generally satisfies the commonality requirement. See *Anderson v. Dep't. of Public Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998). There are common questions of fact and law as the suit challenges a common practice and the same legal standards govern each class member's claims.

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996). The claims of the representative plaintiff are typical as they and the claims of each class member are advanced under the same legal theories and arise from the same practice or course of conduct. See *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992).

Adequacy of representation requires that the interests of the named plaintiffs are aligned with those of the absentees and that the class counsel is qualified and generally able to conduct the litigation in the interest of the class. See *Georgine*, 83 F.3d at 630. There is no apparent conflict of interests between the representative plaintiff and other class members. n4 Class [\*11] counsel appear to have the experience and skill ably to represent the proposed class.

-Footnotes-

n4 Kirkland counsel has suggested that separate representation may be appropriate for subclass II, those who were flat-cancelled and whose damages consist of loss of the use of funds. Interestingly, no suggestion of a need for

separate representation for Kirkland class members who were flat-cancelled was made by counsel in Kirkland. In any event, the interests of all class members appear to be harmonious. It is entirely reasonable that those who lost more money may receive more under the settlement formula.

- - - - -End Footnotes- - - - -

Mr. Eisenberg has been counsel in ten class actions involving the mortgage or banking industry, five of which involved force placed insurance. He has considerable experience representing both creditors and debtors in bankruptcy and consumer litigation. Co-class counsel Carol McCullough has experience representing both creditors and debtors in litigation, and served as counsel for a large class in a prior successful [\*12] case against a substantial mortgagee involving force placed insurance.

The character and ethics of class counsel may conceivably bear on the adequacy of representation. See *Kinsepp v. Wesleyan University*, 1992 WL 230136, \*1-2 (S.D.N.Y. Sept. 3, 1992); *Stavrides v. Mellon Nat'l. Bank & Trust Co.*, 60 F.R.D. 634, 636-37 (W.D. Pa. 1973). One, however, should not lightly impugn the integrity or professional ethics of another.

Kirkland counsel charged collusion by class counsel in this case with defendant Midland. That charge was predicated on assumptions which have been unsupported and flatly contradicted by the sworn statements of those with knowledge. Kirkland counsel also cites to the imposition on Mr. Eisenberg of a \$ 250 sanction by a bankruptcy court in 1989 for making an insupportable Chapter 13 filing and to a reference by the same court in a subsequent opinion to the failure of Mr. Eisenberg to make required filings in another 1989 bankruptcy case.

Kirkland counsel stresses that Mr. Eisenberg was disbarred between 1990 and 1998. That disbarment was upon consent and was occasioned by an impairment which admittedly affected his ability [\*13] to function as an attorney. That impairment contributed to the noted failures in 1989. Mr. Eisenberg overcame his impairment and was reinstated to practice after an investigation by state bar authorities and upon a finding of fitness. He was not found fit to represent only certain clients in particular kinds of cases. He was found fit to practice. To accept that the disbarment is disqualifying is to give at most limited recognition to the reinstatement. There has been no showing of any conduct by Mr. Eisenberg in the two and a half years he has been reinstated to suggest he is not fit to conduct this litigation.

Kirkland counsel has also questioned Mr. Eisenberg's adequacy because of "suits against former clients and business associates" and a prior personal bankruptcy. The referenced suit against a former client was one for payment for services rendered in which the Court held that Mr. Eisenberg had presented a viable claim. In the suit against his former partners, Mr. Eisenberg alleged that money to which he was entitled had been converted or misappropriated. The Court in that case dismissed his RICO claim after finding the two predicate acts did not constitute a "pattern" of [\*14] racketeering and otherwise simply declined to exercise supplemental jurisdiction over the related state law claims. The suits suggest nothing disqualifying about Mr. Eisenberg's character. Neither does the fact he found himself in a position almost ten years ago that resulted in personal bankruptcy.

Rule 23(b)(3) sets forth the additional requirements of predominance and superiority. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). The predominance requirement is generally satisfied in cases alleging a pattern of consumer fraud. *Id.* at 625. This suit which challenges the use of virtually identical methods employed with regard to each class member falls into such a category. Common questions of law and fact predominate because the pertinent

factual and legal predicates of each class member's claims are virtually identical.

"The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods [\*15] of adjudication." *In re Prudential Ins.*, 143 F.3d 16 316 (quotations omitted). Any interest of members of the class in individually controlling the prosecution of separate actions, see Rule 23(b)(3)(A), is significantly outweighed by the efficiency of the class mechanism given the size of the class and the relatively modest size of each individual damage claim. See *id.* (modest size of individual claims suggests class procedure is superior).

This district appears to be as appropriate a forum as any in which to concentrate the claims presented in this case. See Rule 23(b)(3)(C). Potential management problems at trial need not be considered because this is a settlement class. See *Amchem Products*, 521 U.S. at 260. Moreover, no such problems are apparent.

The court concludes that the requested class certification is appropriate.

### Settlement Approval

The touchstone for approval of a class action settlement is whether it is fair, adequate and reasonable under the circumstances. *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995). This determination is guided by several pertinent considerations -- the so-called [\*16] Girsh factors. See *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975).

The court first considers the complexity, expense and duration of any litigation. The litigation of this action to conclusion would entail substantial time, effort and expense including the presentation of motions involving novel and complex issues, enormous preparation and utilization of various expert witnesses.

The court next considers the reaction of the class. Of tens of thousands of class members, twenty-one have opted out and six have objected. Nancy Cronin stated she does not believe the amount of the settlement is sufficient to compensate for the effort and frustration of having to deal with Midland personnel. Ricky Brown also expressed frustration in dealing with Midland and believes the settlement is deficient because it does not require Midland to effect internal administrative and procedural changes to improve its performance. Dennis and Dolores Sabree jointly filed an objection relating to matters not encompassed by the lawsuit. They contend that Midland unfairly reported them as delinquent and began foreclosure proceedings for failure to make installment mortgage payments, and then [\*17] failed to cooperate with HUD in an inquiry triggered by the mortgagors' call to a HUD hotline. As noted, counsel for the Kirkland class filed objections on behalf of Eliza Kirkland and another class member Shakira Lemon. n5

-----Footnotes-----

n5 Objections were also filed by the Attorneys General of Georgia and Mississippi, the latter consisting of a single sentence joining in the objections of the Georgia Attorney General. It was acknowledged at the hearing that those objections were solicited by Kirkland counsel. Ordinarily, only parties to a proposed settlement have standing to object. See *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989), cert. denied, 493 U.S. 1058, 107 L. Ed. 2d 953, 110 S. Ct. 870 (1990); *In re Sunrise Sec. Lit.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990); 2 Newberg on Class Actions, § 11.55. See also *In re Real Estate Title and Settlement Antitrust Lit.*, 1986 WL 6531, \*6 n.5 (E.D. Pa. June 10, 1986) ("it is not at all clear that [state attorneys general] have standing to object on behalf of their residents as *parens patriae*"). The court has nevertheless considered the objections which, in any event, largely track those of Ms. Kirkland. The objections are that the settlement does not prohibit Midland from continuing to force place insurance through affiliates, the release is unduly broad because it

encompasses future violations, the settlement may hamper the investigation of Midland's escrow practices by the Georgia Office of Consumer Affairs and the timing of the settlement during the pendency of the Georgia class action is suspect. In fact, the settlement proposed by class counsel in Kirkland did not prohibit Midland from continuing to force place insurance through affiliates, the release addresses future claims and not future violations, there has been no demonstration that the settlement would thwart any effort by Georgia to enforce its consumer protection laws, there has been absolutely no showing of collusion and the parties note with some force that if anything is suspect, it may be the initiation of the referenced investigation one day before the filing of these objections.

- - - - -End Footnotes- - - - -  
[\*18]

The court next considers the extent of discovery and the stage of the proceedings. Kirkland counsel contends that the settlement agreement was not the product of sufficient legal research and factual investigation. Hall class counsel expended 4.2 hours on pre-litigation legal research. While this is not an insignificant amount of time for a proficient lawyer, one would expect more of an attorney starting from scratch. Class counsel, however, had recent experience with force placed insurance litigation and need not replicate their work in each case. While formal discovery in Hall was limited, counsel had access to considerable material before effecting the settlement agreement. Counsel spent 36 hours reviewing all discovery provided in Kirkland, as well as additional documents voluntarily produced by Midland. Hall class counsel conducted two key depositions, no less than those conducted by Kirkland counsel before undertaking settlement negotiations. The court is satisfied that the settlement agreement was informed by adequate legal and factual knowledge.

The court next considers the risk of establishing liability. The court will not set forth in detail its [\*19] assessment of each of the many interrelated and overlapping claims. The court does note its conclusion that the risk of establishing liability is substantial. As to the RICO claim, for instance, there is no allegation of investment injury, no allegation of an enterprise distinct from defendants and no showing of gambling or usurious loans to support the alleged predicate act of unlawful debt collection. It is far from clear that defendants qualify as debt collectors under the FDCPA or that they engaged in conduct creating a likelihood of confusion. Midland had a contractual right to ensure that mortgaged properties were insured and before a policy was force placed, the mortgagor received three warning letters. The relationship of mortgagor and mortgagee, including one who escrows sums to ensure satisfaction of tax and insurance obligations, is not per se a fiduciary one. Any commissions earned by the affiliates were paid by the insurer and not from escrow accounts. Perhaps most significant, others have asserted similar claims predicated on virtually identical theories without success. n6

- - - - -Footnotes- - - - -

n6 The Court in Kirkland notably certified for interlocutory appeal its denial of the motion for summary judgment of the defendant in that case. In another case from the same district raising similar issues regarding force placement of hazard insurance by a mortgagee, the Court granted the defendant's motion for summary judgment. That decision was recently affirmed by the Eleventh Circuit. See *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1340-42 (11th Cir. 2000).

- - - - -End Footnotes- - - - -  
[\*20]

The court also considers the risk of establishing damages. Those whose policies were flat-cancelled sustained only a relatively brief loss of the use of funds. Damages might be calculable by multiplying the number of days applicable to each sub-class member by the rate of return at the pertinent time on a conservative short-term deposit or investment. To establish damages for others, one would have to produce evidence of market rates and available alternatives in the pertinent regions at the pertinent times. This would likely involve a battle of experts and considerable documentation. It also appears that some class members may have received a net benefit from the force placement of insurance as they successfully made claims to the insurer for losses which would otherwise have been uncovered. The court believes that some damages could likely be established but the process could be quite cumbersome.

There are far more similarities than differences among the various state consumer protection and unfair trade practices laws, and the same is true of the law regarding fiduciary relationships. The court believes that the risk of maintaining a class action through trial is minimal. Midland [\*21] is clearly financially able to withstand a larger judgment.

The court finally considers the reasonableness of the settlement in view of the best recovery and in view of the attendant risks. The settlement fund is \$ 1.75 million including costs and attorney fees, contemplated at twenty per cent. n7 The settlement figure is comparable to those in similar suits. n8 It results in a fund equivalent to 16.3% of the commissions realized. It would likely result in a recovery of at least ten per cent of the average force placed insurance premium charged and half that amount for claimants who were flat-cancelled. n9 Should all pertinent legal and factual issues be resolved in favor of plaintiffs, the total recovery could certainly be more substantial. As noted, however, such a resolution is far from assured. Kirkland is the only force placed insurance case certified other than for settlement purposes to survive summary judgment. n10 Given the arduousness and expense of full litigation, the obstacles to any recovery and the value of obtaining the benefit of any recovery now rather than years from now, the settlement amount is well within the range of reasonableness.

- - - - -Footnotes- - - - -

n7 The settlement also provides some meaningful equitable relief including disclosures by Midland to borrowers of information about the nature, cost and scope of force placed coverage which would, inter alia, underscore the advantage to borrowers of maintaining their own insurance. [\*22]

n8 Kirkland counsel notes that the settlement figure is less than a third of that demanded by them. The reasonableness of a settlement, however, will rarely be discernible from a demand which was rejected. Kirkland counsel also suggested that they refused an offer of a larger amount, however, this has not been demonstrated. It is unclear whether an offer of \$ 1.6 million was inclusive or exclusive of fees and costs, a subject which was apparently not discussed. The court is convinced that the offer contemplated not merely a fund for the approximate 10,000 persons in the initial Kirkland group but a global settlement for a redefined class, encompassing at least those in Hall subclasses I and II. The subsequent delineation of subclass III was in reaction to a lone district court opinion suggesting that the limitations period for a claim predicated on a mortgage is twenty years. In their presentation, even the Kirkland objectors acknowledged this is likely a "phantom" subclass.

n9 With a claim rate approximating that in another recent force placed insurance class action initiated in this district (Robinson v. Countrywide Home Loans Inc.), the figure would approximate fifty per cent of the average premium charged. Also, the funds available for distribution to claimants will be further increased by seven per cent with the court's resolution of the request for fees. [\*23]

n10 Should the Eleventh Circuit rule adversely to plaintiffs on the pending appeal in Kirkland, of course, any value of the Hall case would plummet.

- - - - -End Footnotes- - - - -

The court concludes that the settlement is fair, adequate and reasonable under all of the circumstances. It will be approved.

**Fees and Costs**

The costs claimed are \$ 18,348.30. An attorney who has created a common fund for the benefit of a class is entitled to recover reasonable litigation costs from the fund. See *Lachance v. Harrington*, 965 F. Supp. 630, 651 (E.D. Pa. 1997). The costs have been documented, appear reasonable and have not been challenged by anyone.

It is typical and appropriate in common fund cases to award percentage fees, cross-checked against the lodestar method. See *In re Prudential Ins. Co. of America Sales Practice Lit.*, 148 F.3d 283, 333 (3d Cir. 1998); *Lachance*, 965 F.2d at 647. The requested fee of \$ 350,000 represents twenty per cent of the settlement fund. Given the result in view of the legal obstacles, the efficiency of the recovery, the experience [\*24] of class counsel, the quality of opposing counsel and percentage fees typically awarded in other class actions, the fee request is reasonable. See *In re Pacific Enterprises Sec. Lit.*, 47 F.3d 373, 379 (9th Cir. 1995) (benchmark in common fund cases is twenty-five per cent adjustable upward or downward depending upon circumstances); *In re SmithKline Beckman Corp. Sec. Lit.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990) (noting fee awards have generally ranged from nineteen to forty-five per cent of settlement fund).

Class counsel have calculated the lodestar at \$ 173,453.75. This includes \$ 12,772.50 for some initial bankruptcy related work performed for Mr. Hall which was tangential to the class action. The documented hours otherwise expended and the corresponding rates normally charged appear reasonable. This results in a lodestar figure of \$ 160,681.25.

The lodestar would thus be subject to a multiplier of 2.19 to reach the percentage amount requested. Such a multiplier is not beyond the range typical in comparable class actions. See *In re Prudential*, 148 F.3d at 341.

Nevertheless, the court concludes that because of a particular circumstance, [\*25] the requested fee should be reduced. It appears that Hall counsel could have settled at one point for \$ 1.5 million exclusive of fees and costs. A fee award of \$ 350,000 would result in \$ 1.4 million for distribution. The court received no satisfactory explanation for this anomaly in response to its query at the hearing. In this circumstance, the fund for claimants should be enhanced by the \$ 100,000 differential and the amount for fees correspondingly reduced.

The court will approve the recovery of \$ 18,348.30 in costs and an award of attorney fees to class counsel of \$ 250,000. n11

- - - - -Footnotes- - - - -

n11 This will result in a fee of just under fourteen and a half percent of the fund and a multiplier of just under 1.6.

- - - - -End Footnotes- - - - -

With their request, class counsel also seek permission to distribute a \$ 2,000 incentive award to Mr. Hall. Mr. Hall served as class representative and actively assisted counsel to the benefit of the class. In such circumstances, an incentive award is appropriate and the amount requested is reasonable. See [\*26] *In re SmithKline*, 751 F. Supp. at 535.



## Conclusion

Consistent with the foregoing, plaintiff's Motion for Final Approval of Settlement and Certification of Settlement Class will be granted. Plaintiff's Motion for Attorney Fees and Costs will be granted in that fees of \$ 250,000, costs of \$ 18,348.30 and a \$ 2,000 incentive payment will be awarded.

Appropriate orders will be entered.

## ORDER and JUDGMENT

**AND NOW**, 17th this day of November, 2000, upon consideration of plaintiff's Motion for Final Approval of Settlement and Certification of Settlement Class, and after a hearing thereon and review of all submissions by the various interested parties, consistent with the findings set forth in the accompanying memorandum, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** and accordingly a class is certified consisting of:

all persons with residential mortgage loans secured in whole or in part by real property located in the United States which were serviced or subserviced by Defendant at any time between June 17, 1979 and September 30, 1999 who had Lender Placed Insurance obtained in connection with such a residential mortgage loan at [\*27] any time or times during the aforementioned period and comprised of the following three subclasses:

"Subclass I" which consists of Class Members for whom Lender Placed Insurance was obtained between February 1, 1991 and September 30, 1999 who, as of September 30, 1999, had a Net Lender Placed Premium Assessment in excess of \$ 0.00;

"Subclass II" which consists of Class Members for whom Lender Placed Insurance was obtained between February 1, 1991 and September 30, 1999 whose Lender Placed Insurance was Flat Canceled and who, as of September 30, 1999, had a Net Lender Placed Premium Assessment of \$ 0.00; and,

"Subclass III" which consists of Class Members for whom Lender Placed Insurance was obtained between June 17, 1979 and January 31, 1991.

**IT IS FURTHER ORDERED** that the parties' settlement is finally approved and accordingly:

the claims of all members of the Class (except those who timely excluded themselves from the Class pursuant to Fed. R. Civ. P. 23 and Paragraph 4 of the Preliminary Approval Order) are **DISMISSED** with prejudice and without costs except as provided in the Settlement Agreement;

as of the effective date, each member of the Class [\*28] (except those who timely and properly excluded themselves from the Class pursuant to Fed. R. Civ. P. 23 and Paragraph 4 of the Preliminary Approval Order) forever releases, discharges and is enjoined from suing: (i) Defendants, (ii) the entities for which Defendants service, serviced, or subserviced mortgage loans ("entities") (for the period during which Defendants service, serviced or subserviced the mortgage loans); (iii) each officer, director, principal, agent, attorney, employer, employee, division, owner, or partner of Defendants or such entities (for any period during which Defendants serviced or subserviced the mortgage loans), (iv) any Affiliate; and, (v) any successor (with respect to the period for which Defendants did the servicing or subservicing), predecessor acquired by Defendants, personal representative, estate, heir, beneficiary, administrator or executor of any of the entities and persons described in (i), (ii), (iii) or (iv) above, on any and all past and present released claims of the Class, claims, actions, causes of action, rights or liabilities based on, arising out of or in any way relating or pertaining to: (a) Defendants' Lender Placed Insurance Program; [\*29] (b) Defendants' collection, accumulation, handling, custody, control, or use of the premiums, rebates, commissions, fees, expenses or revenues of the Lender Placed



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Insurance Program; (c) the receipt of commissions, premium splits or rebates, risk sharing participations or any other consideration by Defendants or by any Affiliate of Defendants; (d) disclosures which were or should have been made by Defendants in connection with the Lender Placed Insurance Program; and, (e) any of the events, statements or allegations contained in Plaintiff's complaint;

the released claims of the Class include all claims or causes of action arising from the facts and circumstances alleged in the complaint or which could have been brought in this litigation, and class members waive all rights they have or in the future may have by virtue of Section 1542 of the California Civil Code and any other similar law or provision with respect to such claims;

for purposes of this Order, "Affiliate" means: (i) Midland Financial Co., MidFirst Bank, Midland Mortgage Co., FirstInsure, Inc., Midfirst Insurance Agency, Inc., Homeshield Capital Co., Homeshield Insurance Co., Homeshield Fire and Casualty Insurance Co. [\*30] (collectively the "Companies"), (ii) any employee, agent, officer, or director of the Companies (collectively referred to as "Affiliated Individuals"); (iii) any trust of which any such Affiliated Individual is a grantor, trustee or beneficiary; (iv) any corporation of which any such Affiliated Individual or entity is a shareholder or, as applicable, an employee, officer or director; (v) any partnership or any other unincorporated form of business, or limited liability company in which any such Affiliated Individual or the Companies own an interest; and, (vi) all affiliated companies (i.e. any corporations, business entities, partnerships or other unincorporated forms of business, or limited liability companies which are or were controlled directly or indirectly by the Companies or Affiliated Individuals, or which control or controlled directly or indirectly the Companies or the Affiliated Individuals, or which are or were directly or indirectly under common control with the Companies or the Affiliated Individuals); and,

this civil action is closed.

**BY THE COURT:**

JAY C. WALDMAN, J.

**ORDER**

**AND NOW**, this 17th day of November, 2000, upon consideration of plaintiff's [\*31] Motion for Attorney Fees and Reimbursement of Costs, consistent with the court's memorandum herein of this date, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that McCullough & Eisenberg, P.C. is awarded attorney fees of \$ 250,000 and litigation costs of \$ 18,348.30, and is authorized to distribute to the class representative, Gary B. Hall, an incentive award of \$ 2,000.

**BY THE COURT:**

JAY C. WALDMAN, J.



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