Chapter Seven

COLLATERAL PROTECTION INSURANCE LITIGATION: [1] *GRAHAM v. SECURITY PACIFIC HOUSING SERVICES, INC.*[2]

PROLOGUE

The banking industry suffered a series of devastating failures in the 1980s. One result of these failures was closer regulatory examination of the solvency of banks and the financial arrangements into which banks entered.[3] Banking regulators suggested that one practice of the banking business that contributed to the crises of the 1980s was that some banks undersecured their loans.

To head off the potential problems caused by undersecured loans, banking regulators recommended that all borrowers who secured their loans with collateral such as a car or a home carry insurance so that the loan would be safe if the collateral suffered damage or failure. Therefore, beginning in the late 1980s through the mid-1990s, new loan agreements typically required that all assets securing loans be insured. If a borrower could not qualify for the insurance or allowed an existing insurance policy to lapse, banks would obtain insurance for the borrower and include the costs of the insurance in the loan premium. This practice became known as "force-placed collateral protection insurance" (CPI). Borrowers with CPI loans paid the insurance premiums as they paid down the original loan; the premiums were added to the principal, bumping up the total loan value. Either the number of installments or the size of installment payments was increased.

Borrowers soon began suing creditors, arguing that CPI contracts breached the terms of loan agreements as well as the appropriate relationship between the borrower and the creditor. Moreover, borrowers claimed banks were charging above-market premiums and commissions for the insurance and placing unnecessarily high coverages on the loans. Consequently, a family of litigation arose in many different consumer contexts—including loans for cars, homes, construction, and other forms of consumer credit—targeting not only regional and national banks but consumer credit firms and other lending companies as well.[4]

Graham v. Security Pacific Housing Services was one such case. The *Graham* case seems to have grown out of earlier litigation. Both the plaintiffs and defendants had had prior experience with CPI suits in other lending lines by the time the *Graham* complaint was filed. The defendants had negotiated two settlements involving mobile home loans: *Adams v. Security Pacific Housing Services* and *Burke v. Bank of America*.[5] *Graham's* place in the story comes at the end of the string of CPI actions defended by Bank of America, and after the bank had changed at least some of its practices pertaining to CPI.

CLASS LITIGATION BEGINS

John Deakle, a consumer attorney in Hattiesburg, Mississippi, devotes a large portion of his active practice to class action litigation. In early 1996, John Graham, who had formerly hired Deakle to represent him on a workers' compensation claim, visited Deakle's office after having read a newspaper story about a case Deakle had just settled. *Bentley v. Deposit Guaranty* was a federal class action filed by Deakle on behalf of borrowers from Deposit Guaranty National Bank who claimed that they were paying excessive insurance premiums on the collateral for their loans. This case aroused Graham's suspicions about his own mobile home loan, and he asked Deakle to review his loan documents with Security Pacific Housing Services, Inc., a former division of Security Pacific National Bank that had merged with Bank of America in 1994. After reviewing the documents, Deakle agreed to take Graham's case.

THE INITIAL COMPLAINT AND ITS ALLEGATIONS

Deakle filed suit on April 1, 1996, in the U.S. District Court for the Southern District of Mississippi in Hattiesburg, a university town of some 45,000 people.[6] The case was assigned to Judge Charles Pickering, a Bush appointee who had been on the bench since 1990. Neither Deakle nor class actions were new to Judge Pickering; in fact, he had just heard the *Deposit Guaranty* class action within the past year.[7] The representative plaintiffs named on the new complaint included John Graham and his wife Connie, and Dewey Brady and his wife Elmer,[8] another couple who had borrowed money from BankAmerica Housing Services to purchase a mobile home. When the Bradys filed for Chapter 13 bankruptcy in 1992, BankAmerica placed insurance on their mobile home. Consequently, the complaint named Security Pacific Housing Services, Inc. and BankAmerica Housing Services, Inc., a division of BankAmerica Corp., as defendants.[9] Both banks had force-placed CPI before their merger.[10]

In their complaint, the plaintiffs alleged various contractual, statutory, and negligence causes of action, including (1) breach of fiduciary duties, (2) breach of the implied covenants of good faith and fair dealing, (3) fraudulent misrepresentation, (4) negligent misrepresentation, (5) unfair trade practices under the Federal Fair Debt Collection Practices Act, (6) antitrust violations, (7) conspiracy, (8) negligence, and (9) failure to disclose under Regulation Z of the Truth in Lending Act. The plaintiffs sought compensatory and punitive damages and an injunction preventing the defendants from engaging in future illegal behavior.[11] Deakle asserted the appropriateness of federal jurisdiction by alleging causes of action under the Federal Fair Debt Collection Practices Act[12] and the Truth in Lending Act.[13]

The plaintiffs sought certification of a statewide class of similarly situated plaintiffs defined as follows:

> All persons residing in the State of Mississippi who had loans or who co-signed or guaranteed loans with BankAmerica, secured by collateral in the form of automobiles, trucks, motor homes, mobile homes, boats, recreational vehicles, farm/contractor equipment, motorcycles, homes, or other personal property, who were charged for collateral protection insurance and related charges by BankAmerica, and/or any of its affiliates, agents, representatives or controlled persons.[14]

The complaint alleged that the defendants acted as the plaintiffs' fiduciary, or agent, and that the particular transgressions committed by the defendants could be described as two related breaches of their fiduciary duties to the plaintiffs, instances when the defendants were allegedly not acting according to the best interests of the plaintiffs. First, the insurance that Bank of America was placing for the borrower allegedly had coverage limits exceeding those required under the provisions of the loan agreement, and sometimes it insured types of losses not required to be covered under the terms of the insurance agreement.[15] Second, the plaintiffs alleged that the insurance was obtained from wholly owned insurance-broker subsidiaries of Bank of America and that the rates obtained from the insurance brokers were up to ten times higher than competitive market rates.[16] In addition, they alleged that the insurance brokers were awarded commissions that were then incorporated into the loan principal.[17]

As a result of these practices, plaintiffs claimed several hundreds of dollars in damages per policy holder. For example, representative plaintiffs Dewey and Elmer Brady, who had been charged $818 per year over a two-year period for insurance for a loan that had previously cost them only $440 per year, alleged damages totaling approximately $800.[18]

THE DEFENDANTS' POSITION

The defendants never directly answered these allegations because the parties began settlement negotiations almost immediately after the complaint was filed. Nonetheless, the defendants' likely position may be gleaned from pleadings entered during similar litigation and interviews with the defense attorneys. They took the position that the practice of placing insurance for their borrowers is an important and necessary function. They thought that the insurance policies that were placed for their borrowers contained terms that did not vary materially from those required under the loan agreements, and that these terms provided significant benefit to the borrower.[19] Where the terms did vary, the insurance provisions included were often those that borrowers would have sought if they had been able to afford them. For example, force-placed insurance for mobile home security might include flood or fire coverage even though the loan agreement did not require that the borrower carry these coverages.

The defendants also held that the insurance was competitively priced. Force-placed insurance is always more expensive than other collateral insurance policies because borrowers who have insurance placed for them are often a high-risk population. In addition, the defendants pointed out that any insurance premiums charged to the borrowers were approved by the insurance commissioner in each state, a point that countered the claim that premiums were unreasonably expensive.

The defendants also felt that the insurance brokers provided important value for the borrowers, and deserved to receive commissions. Brokers were required to seek competitive bids for force-placed policies to obtain the best terms and premiums available, producing a significant value for borrowers. In addition, brokers served as agents for borrowers if they needed to collect benefits under the insurance contracts. But, as the defendants acknowledged, insurance brokers also provided services like foreclosure assistance that more directly benefited the banks than borrowers.

Furthermore, the defendants believed that one theory upon which the plaintiffs' complaint was based—the existence of a fiduciary relationship between the bank and the borrower—was inapplicable. A fiduciary relationship exists between parties when one places trust and confidence in the other; in that case the trusted party must exercise a corresponding degree of fairness and good faith with regard to the other. The defendants viewed the relationship between a bank and a borrower as a business or consumer relationship, not one that creates the level of trust necessary to create a fiduciary relationship.

PRIMARY ISSUES IN THE LITIGATION

According to our interviews, Deakle initially brought the case as a statewide (rather than nationwide) class action because he worried that a judge might not certify a nationwide class in this action and because different legal standards would be applied to state-law claims in each state. However, Deakle did not limit the investigation or the litigation to Mississippi. He filed complaints in six other state and federal courts around the country over the next few months.[20] According to our interviews, these actions were filed for two reasons. First, Deakle wanted to expand the jurisdiction of the Mississippi case to the nation; or if the judge refused to do so, he wanted to preserve his opportunities in these other states for a series of statewide class actions. In addition, a judge in another state might certify a nationwide class if Judge Pickering in Mississippi refused to do so. By filing in other states, Deakle might be able to preclude competitive class actions by other attorneys.

To file complaints in these other states, Deakle recruited attorneys and firms licensed in these states with whom he had already worked.[21] In addition to assisting Deakle with the cost, expense, and labor involved in this case, these attorneys would be able to coordinate class enrollment in other jurisdictions. Ultimately, they were named co–class counsel in *Graham*.[22]

Deakle and his associates chose Mississippi as their preferred venue for several reasons. Mississippi juries were viewed as generous to plaintiffs because of a 1995 Mississippi state court jury verdict against Trustmark National Bank in which two individual plaintiffs received $500,000 in compensatory damages and $38 million in punitive damages in a CPI case for an automobile loan agreement.[23] In addition, the plaintiffs' attorneys felt that there was a good chance that Judge Pickering would certify a statewide—if not a nationwide—class in this case because he had certified similar classes previously. And finally, Hattiesburg was convenient for Deakle as lead class counsel.

The defendants were represented by local attorneys in Mississippi, who were assisted by attorneys from the New York office of Morrison & Foerster, a large national law firm based in San Francisco. In addition, in-house counsel for Bank of America played an important role in the litigation.

PARTIES MOVE TOWARD SETTLEMENT

Even though the defendants consistently denied the plaintiffs' allegations, they were receptive to settlement negotiations because of the costs of litigating the dispute and the possibility of a large recovery if the plaintiffs won. In fact, Bank of America had already settled other similar suits arising out of both home loans and other lending lines;[24] therefore, it knew the potential settlement value and costs of litigating the case to trial. In addition, because the plaintiffs had filed complaints in a number of states representing a large fraction of the nation's population, the defendants were receptive to the idea of expanding the Mississippi case to include all potential plaintiffs nationwide.

Settlement negotiations were also facilitated by the defendants' belief that the Fifth Circuit Court of Appeals (which Mississippi is subject to) would be favorable to a mandatory, non-opt-out class (under Rule 23(b)(2)). If defendants could obtain a non-opt-out settlement, they could eliminate all exposure to subsequent suits.

Since settlement negotiations began almost immediately after filing, the case proceeded without the defendants ever answering the initial complaint. No formal discovery was undertaken by either side. Instead, the parties exchanged relevant information voluntarily. The defendants gave business and financial information to the plaintiffs so that class counsel could establish the claimants' actual losses and the value of their claims. (The defendants did not, however, give the plaintiffs any information that would have established the strength of the claim for liability.) The parties' readiness to settle was also reflected in Judge Pickering's issuance of an order temporarily certifying the class in June, just two months after the complaint was filed. The express purpose of this order was to facilitate settlement negotiations.

On October 1, 1996, the plaintiffs filed an amended complaint in which they expanded the class definition to include:

> All persons residing within the United States of America and all of its territories who had loans or who co-signed or guaranteed with BankAmerica, secured by collateral in the form of automobiles, trucks, motor homes, mobile homes, boats, recreational vehicles, farm/contractor equipment, motorcycles, homes or other personal property, who were charged for collateral protection insurance and related charges by BankAmerica, and/or any of its affiliates, agents, representatives or controlled persons.
>
> Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of the Defendants, the officers, directors, agents, servants, or employees of the Defendants, and the members of the immediate family of any such person.[25]

This emendation expanded the potential class from residents of Mississippi only to all U.S. residents for whom the defendants had placed CPI for any secured personal loan products.

At the same time, the parties informed the judge that another order temporarily certifying the class would assist their settlement negotiations.[26] The court issued this order on the same day without briefs or argument and at the agreement of the parties. The order certified a mandatory non-opt-out class under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), and included a paragraph enjoining "all potential class members . . . from commencing new actions against the defendants which arise from or relate in any way to the subject matter of this action."[27] Consistent with the rules for (b)(1) and (b)(2) classes, no notice of the pending class action was issued at this time.

TERMS OF THE INITIAL SETTLEMENT

After temporary class certification, the parties continued negotiations and reached a settlement in December 1996—nine months after filing—that was granted preliminary approval and entered by the judge on January 10, 1997.[28] At this time, the parties filed a second amended complaint in which they changed the class definition to read:

> All customers who financed mobile or manufactured home loans with defendants (as defined below) or whose mobile or manufactured home loans were serviced by defendants, and whose loans at defendants were charged any amount for earned insurance premiums as a result of collateral protection insurance placed by defendants. Specifically excluded from this class are all customers who are members of the certified classes in either of the following cases: 1) *Adams v. Security Pacific Housing Services* (N.D. Ala.) (CV 95-P-1958-W) or 2) *Burke v. Bank of America* (Maricopa County Superior Court) (No. CV-93-23222).
>
> The term defendants as used in this Complaint includes Security Pacific Housing; Security Pacific Housing Services, Inc.; Security Pacific Financial Services, Inc.; Security Pacific Housing Services, a division of Bank of America, F.S.B.; BankAmerica Housing Services, a division of Bank of America, F.S.B.; and each of their respective parents, affiliates, subsidiaries, predecessors, successors and assigns.[29]

The Second Amended Complaint reduced the scope of the class to only those CPI borrowers from the defendants who had not been included in the other class action settlements that had been reached by this time. The terms of the settlement required that the defendants cease their policies regarding collateral protection insurance, and create a fund to compensate plaintiffs.[30] Judge Pickering set April 16, 1997, as the date for the final fairness hearing.

Common Fund

The defendants agreed to create a common fund of $6.7 million from which all payments would be made. The basis for this figure was not indicated in the public documents.[31] The negotiations focused on the potential size of the class and the amount of each individual claimant's damages, but the public documents said nothing about the relationship between total losses to the class members and the actual settlement amount.[32] Under the proposed settlement, any amount of money remaining in the common fund after payment of claims and attorney fees and costs would revert to the defendants.[33]

Individual Recovery Amounts

The amount each individual class member who successfully claimed compensation would receive in the settlement was calculated based on the insurance premiums charged to that person. Each claiming class member was to receive a portion of the common fund (minus attorney fees and costs) based on the premiums each had paid to the defendants as a percentage of the total premiums paid by all class members. This portion was calculated for each class member using the following formula:

$$\frac{\text{individual premium paid by claimant}}{\text{total premiums paid by all class members}} \times \text{common fund} - \text{attorney fees}$$

Thus, the total amount of money to be paid out of the fund (after deducting attorney fees) would depend on both the premiums paid out by all class members (whether or not they eventually submitted a claim) and the total premiums paid by actual claimants. If the total of claimants' premiums were half of all class member premiums, then only half of the net settlement fund would be paid out. If all class members claimed a share, the average amount paid to each would be about $22.[34]

The class was divided into three subclasses. Subclass One included all class members who were residents of a state other than Mississippi. Subclass Two included all class members who were residents of Mississippi who had compensatory damages claims. Subclass Three included all class members who were residents of Mississippi who claimed punitive damages. Functionally, Mississippi residents were members of both Subclasses Two and Three. Subclass One members would receive one share of the compensation fund, calculated using the formula above. Each member of Subclass One or Subclass Two could opt out of the settlement for purposes of claiming compensation.[35]

Subclass Three members were not allowed to opt out of the punitive damages aspect of the settlement. Each member in this subclass was given an additional share to compensate him or her beyond other class members.[36] Therefore, each Mississippi resident who was a member of the class could opt out of the settlement and pursue a compensatory damage claim individually; however, Mississippians could not opt out of the settlement and pursue a punitive damage claim.[37]

The creation of Subclass Three, limited to Mississippi, reflects the defendants' particular concern about their exposure to punitive damages in that state. Although punitive damages were available in other states, the defendants did not perceive them to be a serious threat.

Claims-Made Distribution

Significantly, the fund was to be distributed on a "claims-made basis," meaning that money would be paid out only to those class members who submitted forms to the claims administrator within one month of notice and that any residual amount would revert to defendants. The short turnaround time made notice provisions crucial to class members. If a class member did not submit a claim or opt out (Subclasses One and Two), he or she would not receive compensation and would give up the right to pursue compensation individually later.[38]

Injunction

The settlement required that the defendants agree to the terms of a permanent injunction enjoining and restraining them from a variety of acts until June 30, 1999. The injunction prohibited defendants from charging for insurance other than physical damage coverage, charging borrowers for commissions paid to insurance brokers, and imposing coverage limits higher than those required under the terms of the loan agreement.[39] According to our interviews, at least some of the policies that these provisions addressed had already been changed by the defendants.

For purposes of the settlement, the parties attempted to monetize the benefit of the injunction to the class and consumers generally so as to include this amount in the value placed on the settlement. A higher value settlement might be viewed kindly by the judge; it might also generate higher fees for class counsel. The plaintiffs introduced the testimony of economist G. Richard Thompson, a professor of economics at Clemson University in South Carolina, who performed calculations on the future and present value of the injunctive relief.[40] In his analysis, Thompson estimated the difference between insurance rates with and without the injunction in place for the years 1997–1999 for all customers of the defendants. Based on this analysis, Thompson placed the value of the injunction at about $11.7 million.[41]

Attorney Fees and Costs

Under the agreement negotiated by the parties, class counsel were to receive no more than $5,398,500 from the common fund, which represented 29.5 percent of the estimated value of the total settlement—the value of the injunction plus the monetary benefits.[42] If the value of the injunction were not included in the value of the settlement, the attorney fees would represent 80.5 percent of the common fund.

All costs of notice and administration of the class were to be paid directly by the defendants, not out of the common fund. At one point these costs were estimated as unlikely to exceed $100,000.[43] However, if some residual amount remained after the distribution of the settlement fund, then defendants' costs of notice and administration would be paid out of that residual. Only after the payment of notice and administration costs from the residual of the settlement fund would any amount be returned to the defendants. The distribution of the attorney fees among all of the class counsel was subject to a private fee-sharing agreement not part of the public record. There was also a provision for the defendants to reimburse class counsel's incurred costs of notice and administration.

Notice

The best practicable notice in this case was determined to be a direct mailing to all customers of the defendants for whom the defendants still had addresses. Supplemental notice was made via publication in the national edition of *USA Today* on February 3, 1997. The parties hired Gilardi & Co., a California company with considerable experience in class fund administration, to coordinate the mailing program. Based on a review of the defendants' records, the class was determined to include 60,379 individuals.[44] (This count excludes Alabama and Arizona policy holders who had separately settled with the defendants in previous statewide class actions.) The notice schedule agreed to by the parties and the court consisted of a first notice mailed on January 27, 1997, with a claim-filing deadline 30 days later, and a second notice and claim form mailed on February 27, 1997, with another 30-day claim-filing deadline.[45] Coupled with other settlement provisions, the filing deadlines allowed both parties to decide whether to agree to the final settlement. If five or more individuals opted out of the settlement, the defendant would have the option to void it. Therefore, even though Subclasses One and Two allowed opt-outs, defendants would ensure that any class settlement they agreed to would effectively extinguish the litigation. In addition, if too many claims were made against the settlement fund, the judge could decide that each individual reimbursement would be so small as to render the settlement unfair.

The notice consisted of a description of the litigation and settlement, the right to object or opt out, and the final fairness hearing, scheduled for April 16, 1997. Second notice was mailed to those class members whose addresses were returned as undeliverable after additional searching for addresses.[46] Opt-out cutoff for those class members who received notice from the first direct mailing or the newspaper ad was February 26, 1997, and for those who received the second mailing it was March 13, 1997. In either case, objections had to be received by the court by March 2, 1997.

The defendants' addresses for potential class members were screened by the National Change of Address System maintained by the U.S. Postal Service. The first notice was mailed to 60,372 class members. Of the first notices, 8439 were returned as undeliverable. Altogether, the second notice was mailed to 4286 addresses. Of the second notices, 323 were returned. An additional search was made, and 168 of these potential class members were eventually located and notified of the pending settlement.[47]

OBJECTIONS

In early 1997, Arthur Bryant, the executive director of Trial Lawyers for Public Justice (TLPJ), a Washington, D.C.–based public interest law firm funded by plaintiff attorney firms, reviewed the *Graham* settlement. As part of its Class Action Abuse Protection Project, TLPJ routinely monitors class action settlements specifically to protect class members' rights. The firm intervenes in cases if it feels that those rights are not being adequately represented by class counsel. According to our interviews, TLPJ had intervened in the *Bentley* case, Deakle's earlier CPI case that had also been heard by Judge Pickering. Consequently, TLPJ decided to look into *Graham* after an attorney informed the firm that Deakle was proposing another CPI settlement before Judge Pickering.

Bryant was concerned about the provisions limiting Mississippi class members' opportunity to opt out. On April 9, 1997, TLPJ filed a motion to intervene and entered an opposition to the stipulation of settlement on behalf of five class members—William Overstreet, Diane Rowell, Darin Padgett, Christine Page, and Randall Newman.[48] TLPJ had made an earlier attempt to intervene in the action, but that attempt failed when the class members they had recruited as intervenors settled privately with the defendants.[49]

TLPJ and the intervening class members made a number of arguments in opposition to the settlement. First, TLPJ asserted that Mississippi class members with punitive damage claims should be afforded the opportunity to opt out of the settlement. Second, it argued that the common fund amount was too small to adequately compensate the class for its damages, and that the amount was inappropriate in comparison to the fees awarded the class counsel under the terms of the settlement. Third, TLPJ claimed that compensation of each class member should not depend on his or her filing a special claim application. Instead, TLPJ thought that each member's compensation should be calculated based on the defendants' records and automatically forwarded to the last known address pursuant to the procedures employed for the class notice. Fourth, TLPJ argued that Mississippi class members should not be entitled to a double claim because of the greater probability of punitive damages being awarded in that state.[50] Finally, TLPJ objected to the reversion of any residual amount in the common fund to the defendants.[51]

FINAL FAIRNESS HEARING

The final fairness hearing was set for April 16, 1997. In addition to hearing arguments from the parties and any objectors as to the fairness of the settlement, the judge would hear TLPJ's arguments on the motion to intervene on behalf of class members Overstreet, Rowell, Padgett, Page, and Newman. At stake for the parties was a final approval of the settlement that would bind to the settlement agreement all potential class members who had not opted out and all Mississippi class members as to punitive damages.[52]

Before the hearing, there was some indication that it would be contentious. In an April 11, 1997 memo to Deakle and Mike Wallace, a defense attorney who helped negotiate the settlement, Judge Pickering raised many questions about the logic and merits of the settlement, including: (1) the valuing of the injunctive relief at $11.6 million and the termination of this relief on June 30, 1999; (2) the change in CPI coverage calculation methods after the settlement; (3) the double payment for Mississippi class members allowing for punitive damages; (4) the apparent exclusion of other class members from claiming punitive damages; and (5) the adequacy of the notice program.[53] One of the memo's salient points was the judge's "serious reservations" about the requested attorney fees and "the fact that the claimants will only receive one-third of the amount negotiated to be put in the common fund."[54] He concluded the memo by stating, "I am not at all sure that this is a proposed settlement that can be found to be fair and reasonable. I await your comments."[55]

As the hearing date approached, the terms of the settlement appeared to be in flux. In the Application of Plaintiffs' Class Counsel for Award of Attorneys' Fees and Expenses Pursuant to the Proposed Settlement Agreement, the description of the terms of the settlement had changed from those originally set out in the Stipulation of Settlement. The new document increased the common fund to approximately $7.7 million, out of which class counsel sought an award of $3.9 million, increasing the funds available to the class by $2.5 million and *decreasing* attorney fees by about $1.5 million.[56] No other settlement terms were changed. Our interviewees did not explain this change; it may have been an attempt to anticipate and derail any opposition to the settlement.

However, this amended settlement was never introduced into court. According to our interviews, at the hearing Judge Pickering first met with the parties in his chambers and indicated his initial thoughts. In the afternoon, the judge listened only to arguments on the motion to intervene. At the end of the day, he took the motion to intervene under advisement and continued the fairness hearing for a period of two weeks. On the record and in open court, the judge advised the parties that during this period they should modify the settlement.

At this time, TLPJ began to play a more active role in the settlement process. After the fairness hearing, Judge Pickering gave TLPJ access to information from the parties that allowed it to evaluate the settlement more effectively and to react to the provisions of the settlement as they were being negotiated.

For the next two weeks, the parties attempted to negotiate a settlement that would satisfy the judge. On April 22–23, 1997, in an Enhancement to the Stipulation of Settlement signed by the parties, the common fund was increased by $1.9 million to $9.6 million.[57] Each claimant's recovery was calculated as before, and, importantly, each claimant still needed to submit a proof of claim. The attorney fees, costs, and expenses to be deducted from the common fund were reduced to not more than 20 percent of the common fund, $1.92 million—or about $3.5 million less than their initially negotiated share. However, up to $300,000 in notice and administration costs—previously the sole responsibility of the defendant—were now to be deducted from the common fund, meaning that the net value of the settlement fund available to the claimants would be reduced (plaintiffs' attorneys' fees and other expenses were protected by the 20-percent agreement based on the value of the common fund prior to any deductions). The cost amount was to include both costs incurred by the defendant and any amount the defendant paid to the class counsel to reimburse its own costs of notice and administration.[58] The value of the injunction was no longer included in evaluating the monetary benefit of the settlement to the class.

The revised settlement included an additional notice program providing for notice to be mailed within 30 days of the court's final judgment and order of dismissal. This notice allowed class members an additional opportunity to file claims, but did not provide any class member with an additional opportunity to opt out.[59]

The fairness hearing resumed on April 30, 1997. According to our interviews, at this hearing the judge received the enhanced settlement reached by the parties and heard additional arguments about the agreement. However, Judge Pickering was still dissatisfied with the agreement and continued the fairness hearing for another month, keeping the motion to intervene under advisement and directing the parties to continue to negotiate the terms of the settlement with the intervening class members. TLPJ continued to voice its concerns over the fairness of the settlement, and at this time the judge explicitly directed the parties to include TLPJ in the settlement negotiations.

During May, the parties, including TLPJ, engaged in additional negotiations focused mostly on the opt-out provision. TLPJ was adamant that all Mississippi class members be given the opportunity to opt out of the settlement; the defendants were equally adamant that they not be. The defendants' position reflected their continued concern about the potential for costly liability resulting from punitive-damage jury awards. If Mississippi class members with punitive-damage claims opted out of the settlement and brought lawsuits, the defendants might face a high-cost verdict. If that happened, the defendants' purpose of controlling liability through a nationwide settlement would have been defeated.

In the days leading up to the resumed fairness hearing, all issues other than the opt-out for Mississippi class members were resolved. The parties even obtained the assistance of the judge to mediate a share of the fees for TLPJ. However, two issues remained unresolved: Mississippi claimants could not opt out of the class with respect to their punitive damage claims, and they were treated differently from claimants from other states. On May 28, 1997, the day of the fairness hearing, the defendants agreed to allow Mississippi class members with punitive damage claims the opportunity to opt out of the settlement. With that concession, all parties—including TLPJ—accepted the settlement.

On June 6, 1997, the parties signed a Second Enhancement to the Stipulation Agreement that embodied the agreement reached on May 28. In this agreement, the common fund was increased to $10.5 million—50 percent larger than the originally negotiated amount.[60] Class counsel fees sought under the Second Enhancement remained at $1.92 million;[61] however, the notice and administration reserve in the common fund that the defendant could claim against to recover its costs was increased to $350,000.[62] In addition, TLPJ attorneys were awarded $350,000.[63] The restrictions contained in the Permanent Injunction were also extended to June 30, 2001.

Other settlement terms were also altered. First, class members were no longer required to submit claim forms in order to qualify for a disbursement from the common fund. Instead, all those who did not opt out of the class would receive payments automatically.[64] Different procedures applied to those class members who still owed money to the defendants and those who had paid off their debts. For those who still owed money, the claim amount would be credited to their account (and deducted from the common fund). For those who had paid off their loans, a check would be issued to the most current address known to the defendants or the settlement administrator.[65] This new policy of automatic disbursement meant that all (or almost all) of the settlement fund available to claimants would eventually be paid out.

Second, all amounts remaining in the common fund after distribution, including all checks returned as undeliverable and all those not cashed within 180 days of issuance, would be distributed to one or more charities proposed by the parties in the agreement.[66] Third, six payments of $2000 each would be made out of the common fund to the Grahams and the Bradys as plaintiffs in the matter and to Overstreet, Rowell and Padgett (jointly), Page, and Newman as intervenors. Last, Mississippi claimants would have the opportunity to opt out of the settlement and would be given notice to this effect.[67] No other additional notices would be issued.[68]

Under these terms, class members who filed claims would get, on average, about $130 each.[69]

DISTRIBUTING SETTLEMENT AWARDS

Final judgment was entered on June 26, 1997,[70] and the distribution of funds from the common fund took place on November 17, 1997, and December 17, 1997—110 and 140 days respectively after the effective date of the settlement.[71] In addition to retaining continuing jurisdiction over the implementation of the settlement, the court approved provisions in the settlement agreement that require the administrator or the defendant to make a final report to the court regarding settlement distribution and administration. The close-out date of the administration of the class was February 17, 1998, or as soon thereafter as the distribution of the residual of the common fund to a charity took place.[72] Although distribution has taken place, some of the checks have not yet been cashed by the recipients, and final close-out of the settlement had not yet occurred as of August 1998.

As of May 1, 1998, 41,960 claimants who were current bank customers at the time of the distribution had their accounts credited by a total of $5,976,607. Those who were no longer customers of the bank—18,235 in all—were issued checks totaling $1,891,444. However, 3689 of these checks had not been presented for payment and $284,952 remained in the settlement fund. At this time it is unclear how much of this remainder will eventually be claimed by class members or be paid to charities as the Second Enhancement of the settlement directs.

Key Events	Date
Complaint filed	April 1, 1996
Amended Complaint	October 1, 1996
Order temporarily certifying the class	October 1, 1996
Second Amended Complaint	January 10, 1997
Settlement Agreement signed	January 10, 1997
Preliminary approval of settlement	January 10, 1997

First notice mailed	January 27, 1997
Notice published in *USA Today*	February 3, 1997
Opt-out cutoff for first notice recipients	February 26, 1997
Claims cutoff for first notice recipients (later dropped)	February 26, 1997
Second notice mailed	February 27, 1997
Objection filing cutoff	March 2, 1997
Opt-out cutoff for second notice recipients	March 13, 1997
Claims cutoff for second notice recipients (later dropped)	March 26, 1997
TLPJ Motion to Intervene	April 9, 1997
Fairness hearing	April 16, 1997
Enhancement to Stipulation of Settlement	April 22–23, 1997
Final fairness hearing	May 28, 1997
Second Enhancement of the Stipulation Agreement	June 6, 1997
Final Judgment	June 26, 1997
Permanent injunction on BankAmerica's CPI policies expires	June 30, 2001

NOTES

[1]As part of our research on this litigation, we collected information from the primary plaintiff, defense, and intervenor attorneys; defendant spokesmen; and judicial officers. We also reviewed the pleadings and papers filed in the case as well as other publicly available documents including newspaper articles, magazine articles, and press releases.

[2]*Graham v. Security Pacific Housing Services, Inc.,* No. 2:96-CV-132 (S.D. Miss. filed Apr. 1, 1996).

[3]For a good discussion of the mid-1980s banking crisis, see Lawrence J. White, *The S & L Debacle: Public Policy Lessons for Bank and Thrift Regulation* (New York: Oxford University Press, 1991).

[4]See Kenneth Cline, "Collateral Protection Insurance Cases Are Fewer but Remain Expensive," *American Banker*, Sept. 14, 1994, at 5; Kenneth Cline, "Once Obscure Auto Insurance Product Brings an Avalanche of Costly Lawsuits," *American Banker*, Dec. 9, 1993, at 4.

[5]*Adams v. Security Pacific Housing Services*, No. CV 95-P-1958-W (N.D. Ala. filed 1995) and *Burke v. Bank of America*, No. CV-93-23222 (Ca. Super. Ct. Maricopa County filed 1993).

[6]*Graham v. Security Pacific Housing Services, Inc.,* No. 2:96-CV-132 (S.D. Miss. filed Apr. 1, 1996)(hereinafter Complaint).

[7]*Bentley v. Deposit Guaranty National Bank* (S.D. Miss. 1995). However, according to our interviews, this was his only previous CPI case.

[8]Complaint at 1–2. The Bradys had obtained a loan from BankAmerica Housing Services, Inc., a division of BankAmerica Corp. *Id*. at 5–6. The Grahams had obtained a loan from Security Pacific Housing Services, Inc., a division of BankAmerica Corp. *Id*. at 3–5.

[9]*Id.* at 1.

[10]Hereinafter, we use the term "Bank of America" to refer to all defendants, including the former Security Pacific National Bank and its subsidiaries and the former Bank of America and its subsidiaries.

[11]*Id.* at 13–31.

[12]15 U.S.C. § 1692.

[13]15 U.S.C. §§ 1430 *et seq*.

[14]Complaint at 2–3.

[15]*Id.* at 5–7.

[16]*Id.* at 3.

[17]First Amended Complaint (Oct. 1, 1996) at 27.

[18]*Id.* at 11–14.

[19]In addition, according to our interviews, Security Pacific National Bank actually offered its borrowers the option of forgoing any coverage that was not required under the terms of the loan agreement.

[20]*Bennet v. BankAmerica Corp.*, No. CV-96-L-108 (Ill. Cir. Ct. Champaign County filed Mar. 25, 1996); *Dawley v. BankAmerica Corp.*, No. 96CV1290 (Wis. Cir. Ct. Racine County filed Aug. 5, 1996); *Jackson v. BankAmerica Corp*., No. CV-96-7728-CA01 (Fla. Cir. Ct. Dade County filed Apr. 17, 1996); *Lockhart v. BankAmerica Corp.*, No. CV196-620CC (Mo. Cir. Ct. Franklin County filed July 25, 1996); *Monk v. BankAmerica Corp*., No. 96-CVS-655 (N.C. Super. Ct. Duplin County filed July 29, 1996); *Morley v. Security Pacific Housing Services*, No. CV-96-72568 (E.D. Mich. filed June 3, 1996); *Smith v. Security Pacific Housing Services*, No. 6:96CV505 (E.D. Tex. filed June 13, 1996); and *Yauck v. BankAmerica Corp*., No. 96-CV2517CC (Ore. Cir. Ct. Douglas County filed July 3, 1996). See also the complaint for *Chandler v. BankAmerica Corp*., drafted for the state trial court of Pulaski County, Ark., but never filed (on file with authors). However, according to our interviews, many of these complaints would have been easily dismissed on the pleading because of jurisdictional and procedural defects.

[21]Phebus, Winkelmann, Wong & Bramfield of Illinois; Carey & Danis of Missouri; Dole, Coalwell & Clark of Oregon; Roesti, James & Sirlin of Michigan; and Richard Worsham of Arkansas.

[22]See Stipulation of Settlement (Jan. 10, 1997) at 4.

[23]*Smith v. Trustmark National Bank,* No. 93-4-47 (Miss. Cir. Ct. Jones County 1995) (verdict reduced to $500,000 compensatory damages and $5 million punitive damages by trial judge). See also Christopher Rhoads, "Flood of Car Insurance Suits Threatens To Swamp Small Banks in Mississippi," *American Banker,* Feb. 15, 1996, at 1.

[24]See *Adams v. Security Pacific Housing Services,* No. CV 95-P-1958-W (N.D. Ala. filed 1995) and *Burke v. Bank of America,* No. CV-93-23222 (Ca. Super. Ct. Maricopa County filed 1993).

[25]First Amended Complaint at 11.

[26]Order Temporarily Certifying Class (Oct. 1, 1996) at 1 (hereinafter Certification Order).

[27]Certification Order at 3.

[28]Stipulation of Settlement at 1.

[29]Second Amended Complaint (Jan. 10, 1997) at 10–11.

[30]Stipulation of Settlement at 16.

[31]*Id.* It is interesting to compare this settlement with those resolving other contemporary CPI cases. These settlements—some of which involved statewide classes and others nationwide classes—ranged from $5.6 million to $58.3 million. See Kenneth Cline, "NationsBank and Toyota Are Latest to Be Hit with Collateral Protection Suits," *American Banker*, Dec. 2, 1994, at 5. In Mississippi, for example, one case was settled for $38 million. See Rhoads, *supra* note 23.

[32]Permanent Injunction, Exhibit E to Stipulation of Settlement.

[33]Stipulation of Settlement at 19.

[34]This estimate is made using the Gilardi & Co. estimate of 60,379 class members and $1,301,500 available in the common fund (after deducting $5,398,500 in potential attorney fees).

[35]Stipulation of Settlement at 11.

[36]*Id*. at 17. Each Mississippi class member who claimed compensation would receive a second identical share, but the amount of the total is not quite doubled because the addition of each

punitive damage claim would increase the denominator of the formula and consequently decrease the payment to each claiming class member.

[37]*Id.* at 17, 20.

[38]*Id.* at 26. See Affidavit of Daniel Rosenthal re Publication and Mailing of Notices, and Initial Class Member Telephone Support (Apr. 7, 1997) at 2–3 (hereinafter Rosenthal Affidavit).

[39]Exhibit E to Stipulation of Settlement, 1–2, 4.

[40]Affidavit of G. Richard Thompson, Ph.D. (Apr. 8, 1997) (hereinafter Thompson Affidavit).

[41]Stipulation of Settlement at 16. This value reflects the benefit for all current customers as well as the benefit for future customers. It appears that Thompson's calculations assume that without the injunction all premiums would be priced at what he terms "full package rates"; presumably this would require the defendants to employ all the practices enjoined by the injunction regardless of whether the practice had ended prior to settlement.

[42]Stipulation of Settlement at 18.

[43]*Id.*

[44]Rosenthal Affidavit at 1.

[45]Stipulation of Settlement at 25.

[46]Rosenthal Affidavit at 3.

[47]*Id.* at 3.

[48]Motion to Intervene by Randall A. Newman, William A. Overstreet, Diane Rowell, Darwin Padgett, and Christine Page (Apr. 9, 1997); Response by Movants Randall A. Newman, William A. Overstreet, Diane Rowell, Darwin Padgett, and Christine Page in Opposition to Stipulation of Settlement (Apr. 9, 1997).

[49]See Vivien Lou Chen, "Attorneys Lose $3.4 million in New B of A Deal," *Los Angeles Daily Journal*, Apr. 20, 1997, at A1.

[50]This treatment is consistent with allowing Mississippi class members the opportunity to opt out of the punitive damage part of the settlement.

[51]Opposition to Settlement.

[52]It is reasonable to assume that at this point both parties knew how many class members had filed claims since the deadline had passed, but this number is not part of the public record and was not given to us during our interviews.

[53]Memorandum from Judge Charles Pickering, Sr., to John Deakle and Mike Wallace (Apr. 11, 1997). Mike Wallace is a partner at Phelps Dunar, L.L.P., a Jackson, Mississippi firm retained by the defendants to represent them in Mississippi. Ross Bass, Jr. served as lead counsel for Phelps in this matter.

[54]*Id.* at 1–2.

[55]*Id.* at 2–3.

[56]Application of Plaintiffs' Class Counsel for Award of Attorneys' Fees and Expenses Pursuant to the Proposed Settlement Agreement (Apr. 16, 1997) at 1–3.

[57]Enhancement to Stipulation of Settlement (Apr. 23, 1997) at 2.

[58]*Id.*

[59]Additional Notice of Proposed Class Action Settlement at 2, Exhibit 1 to Enhancement to Stipulation of Settlement.

[60]Second Enhancement to the Stipulation of Settlement (June 6, 1997).

[61]*Id.* at 2–3, 5.

[62]*Id.* at 2–3.

[63]*Id.* at 5.

[64]*Id.*

[65]*Id.*

[66]Defendants suggested that any residual be shared equally with the Mississippi Bar Foundation's Legal Aid for the Poor program, the Legal Aid Association of Los Angeles, and the Legal Aid Association of San Francisco. Class counsel wanted the residual to go to the Cancer Treatment Unit of St. Jude's Children's Hospital. Intervenor's counsel suggested that at least one-third of the residual be shared equally with the Public Citizen Foundation and the National Consumer Law Center.

It is unclear from the wording of the Second Enhancement whether the defendant would still be able to make claims against any residual amounts left in the settlement fund for uncompensated costs of notice or administration as set forth in the original settlement agreement.

[67]Interestingly, the Second Enhancement also contained a provision preventing counsel for the intervenors from soliciting Mississippi class members for the purpose of exercising their newly granted ability to exclude themselves from the settlement.

[68]*Id.*

[69]Per class member allocation of the settlement fund assumes 60,372 class members and the payment of the full $350,000 reserve to the defendant for its costs of administration and notice.

[70]Final Judgment and Order of Dismissal (June 26, 1997).

[71]Second Enhancement to Settlement at 6.

[72]According to the Stipulation of Settlement, 200 days after the effective date (July 28, 1997).