

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

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|--------------------------------|---|----------------|
| GENE CHRISTOPHER SMITH AND | : | |
| CAROLINE ANN SMITH, | : | |
| on behalf of themselves and | : | |
| all others similarly situated, | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | CIVIL ACTION |
| | : | NO. 98-CV-5360 |
| | : | (CLASS ACTION) |
| FIRST UNION MORTGAGE | : | |
| CORPORATION AND HUTCHENS, | : | |
| McCALLA, RAYMER & ECHEVARRIA, | : | |
| Defendants. | : | |

MEMORANDUM ORDER

In the amended submission of July 29, 1999, plaintiffs have addressed the concerns regarding the scope of the proposed class referenced in the court's memorandum order of July 19, 1999. The court, however, still harbors some concern regarding the provision for legal fees.

The parties have conflated common-fund and fee-shifting principles. The pertinent statute does provide for fee-shifting. Ordinarily, however, a prevailing claimant's attorney fees would be paid by the defendant in addition to and not from the proceeds of the claimant's recovery. As contemplated by the parties in this case, the amount recoverable by each class member would be directly affected by the amount of attorney fees ultimately authorized. What is essentially proposed is a lodestar fee as contemplated by the statutory fee-shifting provision but paid from a common fund of a fixed total amount.

A statutory fee case may be converted into a common fund case by virtue of a settlement. See Report of the Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 255 (1985). Such a case should be treated differently because unlike the typical statutory fee case, the protection afforded by a defendant with interests adverse to those of plaintiffs' counsel is no longer present and the class lawyers' interests are no longer aligned with the class members. Id. The existence of a statutory fee-shifting provision does not itself make more reasonable the allocation to attorney fees of over 70% of a fixed sum otherwise available for distribution to the class.

The parties could have structured a settlement of each class member's claim for \$220, the pro rata amount with 100% class participation and a \$200,000 fee, plus a lodestar fee capped at \$200,000 to be paid by defendant consistent with the statutory fee-shifting provision. Based on the complaint, the copies of the allegedly offending letters and the other information available to the court at this juncture, such a pro rata payment would fall within the range of possible approval. See Manual for Complex Litigation § 30.41 at 237 (3d ed. 1995). It would thus champion form over substance to deny preliminary approval of the parties' settlement which, however worded, effectively provides for at least \$220 per class member. In an effort to prevent a misunderstanding regarding any future authorization of fees, however, the court cautions that a common

fund case does not cease to be one by pronouncement of counsel and that any fees awarded will be based on what is reasonable under all of the circumstances.

ACCORDINGLY, this day of August, 1999, upon consideration of the parties' joint Motion for Preliminary Approval of Settlement and Notice to Class (Doc. #35), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and an appropriate order to implement such preliminary approval and notification to the class will be entered on this date.

BY THE COURT:

JAY C. WALDMAN, J.