

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil No. 06-0725 (RBS)
	:	
PAYMENT PROCESSING CENTER, LLC, et al	:	
	:	
Defendants	:	
	:	

**BRIEF OF AMICI CURIAE REPRESENTATIVES BARNEY FRANK, EDWARD
MARKEY, AND JOSEPH SESTAK IN SUPPORT OF THE INTERVENOR
FALONEY PLAINTIFFS' MOTION FOR AN INJUNCTION UNDER THE ALL
WRITS ACT 28 U.S.C. § 1651**

I. INTEREST OF AMICI CURIAE

Representatives Barney Frank, Edward Markey and Joseph Sestak (“Amici Members of Congress”) are elected officials, who represent their constituents’ interests in the United States House of Representatives.

Representative Frank is the Chairman of the House Committee on Financial Services. The Financial Services Committee oversees all components of the nation's housing and financial services sectors including banking, insurance, real estate, public and assisted housing, and securities. The Committee continually reviews the laws, regulations, and programs relating to the U.S. Department of Housing and Urban Development, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Securities and Exchange Commission, Fannie Mae and Freddie Mac, and international development and finance agencies such as the World Bank and the International Monetary Fund.

Representative Markey is a senior member of the House of Representatives' Committee on Energy and Commerce, which has jurisdiction over the Federal Trade Commission. He serves as Chairman of the Energy and Commerce Subcommittee on Telecommunications and the Internet, which has jurisdiction over interstate and foreign telecommunications including, but not limited to all telecommunication and information transmission by broadcast, radio, wire, microwave, satellite, or other mode.

Representative Markey is a long-time consumer champion and also Co-Chairman of the Bi-Partisan Congressional Task Force on Alzheimer's Disease.

Representative Sestak represents the Seventh Congressional District in Pennsylvania. He is a member of the House Education and Labor Committee. Like Representatives Frank and Markey, Representative Sestak has a particular interest in preventing the victimization through telemarketing of his constituents, especially those who are elderly or impaired.

The specific interests of the Amici Members of Congress are three-fold. First, the Amici Members of Congress have a direct interest in ensuring that the injuries suffered by victims of telemarketing fraud are redressed in the most efficacious manner possible. Second, the Amici Members of Congress also have a direct interest in ensuring that banking entities like Wachovia, N.A. comply with all applicable laws and that violations of those laws are properly punished. Those laws are designed, in large measure, to be self-executing, and the Office of the Comptroller of the Currency's (OCC) investigation and findings that Wachovia failed to comply with its obligations to police its own banking behavior is of significant concern to the Amici Members of Congress. Third, the Members of Congress have a direct interest in ensuring that federal regulatory

entities, such as the OCC, properly carry out their regulatory functions and fulfill their consumer protection responsibilities.

Consistent with that threefold interest, the Amici Members of Congress have been closely monitoring litigation in *Faloney et. al. v. Wachovia, N.A.*, Civil No. 07-CV-1455 (E.D. Pa.), and related matters for over a year. Representatives Frank and Markey wrote to the OCC in June, 2007 after the initial press reports¹ of the *Faloney* litigation, expressing their concern over the continued acceptance of unsigned checks or “demand drafts” in telemarketing transactions (a copy of the June 11, 2007 letter from Reps. Frank and Markey is attached hereto as Exhibit A). When the OCC announced its recent Agreement with Wachovia, Representatives Markey and Sestak wrote to the OCC to express their concerns that the plan for the distribution of the purported \$125 million restitution fund was fatally flawed in that it failed to proactively identify and recompense victims directly by mailing checks despite the existence of databases clearly identifying the majority of the victims and the amounts taken from them. Instead, the settlement opts for a cumbersome claims form process that will likely result in only a small fraction of injured victims receiving restitution (copies of the letters from Representatives Markey and Sestak are attached hereto as Exhibits B and C, respectively).

The Amici Members of Congress have reviewed the Motion for Injunctive Relief pursuant to the All Writs Act, 28 U.S.C. § 1651 filed by the *Faloney* Plaintiffs and concur in it. Because of their interest in the welfare of their own constituents and their oversight responsibilities involving both the banking industry and commerce in the telecommunications industry (of which telemarketing is an significant sub-sector) the

¹ See Charles Duhigg, “Bilking the Elderly with a Corporate Assist,” *New York Times*, May 20, 2007 at 1.

Amici Members of Congress respectfully urge this Court to grant the Motion as necessary to secure these interests.

II. INTRODUCTION AND BACKGROUND

Federally chartered financial institutions, like Wachovia, N.A., have a fundamental obligation to protect consumers from uses of the banking system by schemes to commit fraud such as those operated by the telemarketers and PPC in this case. The governmental institutions charged with the responsibility for regulating the financial services industry, like the OCC, also have an obligation to ensure that the financial institutions within their jurisdiction are complying with the letter and spirit of the laws and regulations designed to protect consumers, and that when violations of those standards are detected, to provide vigorous enforcement and restitution to victims in the manner most likely to maximize the return of stolen funds directly to victims with the fewest complications possible.

The body of laws and regulations place a clear expectation on regulated financial institutions to comply with the letter and spirit of the law. For example, in September 2000, the OCC released the Comptroller's Handbook, "Bank Secrecy Act/Anti-Money Laundering." The Handbook explains that pursuant to regulations adopted under the Bank Secrecy Act, national banks such as Wachovia are required to have a written, comprehensive compliance program adopted by the Board and administered by a compliance officer. The program must include: "A system of internal controls to ensure ongoing compliance;" "Independent testing of compliance;" "Daily coordination and monitoring of compliance by a designated person;" and "Training of appropriate personnel." One of the purposes of the compliance program is to enable the bank to "Test

transactions in all areas of the bank with emphasis on *high-risk* areas, products, and services to ensure the bank is following prescribed regulations.” (emphasis added). Telemarketers are specifically identified in the Handbook as “High-Risk” businesses.

The findings the OCC set forth in its Consent Order demonstrate a clear failure by Wachovia in this regard. The OCC Consent Order includes specific findings of misconduct: (1) Wachovia failed to conduct suitable due diligence regarding its payment processing customers despite clear notice that those customers posed a high risk of fraud to consumers; (2) Wachovia failed to recognize and properly address the risks posed by the activities of payment processors and direct telemarketers; (3) Wachovia failed to monitor the number of remotely created checks deposited into its accounts that were subsequently returned and failed to heed clear warnings of fraud from other banks; and (4) Wachovia failed to follow its own normal procedures and implemented policies that had the effect of minimizing consumer complaints and scrutiny of its business practices. Consent Order, Article I, ¶ (5)(a-d).

1. The OCC and its Remediation of Consumer Fraud

As an initial matter, the Amici Members of Congress seek to provide this Court with the necessary background to understand the OCC and its role in the remediation of consumer frauds committed by national banks.

The OCC is a bureau of the Treasury Department that supervises national banks. 12 U.S.C. § 21 et seq. Although it is located within the Treasury Department, the OCC does not receive appropriations from Congress. Instead, its operations—like the operations of the other bank regulators—are funded primarily by the assessments it charges its member banks. *See* OCC, Annual Report, Fiscal Year 2007 at “Revenue and

costs”, available at <http://www.occ.gov/annrpt/2007HTML/2007AnnualReport.htm#X>.

Member fees represent \$666 million out of total revenues of \$695 million, or 96 percent.

Id. Large banks produce 67.5 percent of those fees. *Id.*

With respect to the enforcement of consumer protection laws, the OCC has taken the position that it has exclusive authority over law enforcement activities directed towards its member banks. *See, e.g., Clearing House Ass’n, LLC v. Cuomo*, 510 F.3d 105 (2d Cir. 2007) (OCC sued state attorney general to enjoin him from directing predatory lending investigation at national banks); *Minnesota v. Fleet Mortgage Corp.*, 181 F.Supp. 2d 995 (D. Minn. 2001) (OCC intervening in support of defendant bank subsidiary in opposing power of state attorney general to enforce the FTC telemarketing practices rule and asserting its exclusive authority to enforce that rule). Despite its claim of exclusive jurisdiction, the OCC has not historically been particularly active in bringing consumer protection enforcement actions. Where the OCC has taken action against a national bank to enforce consumer protection laws, it has tended to be—as was the case here—in situations in which there was an existing proceeding against the bank by other governmental agencies or by private class action plaintiffs.²

² Concerns regarding the need for OCC action in regard to the telemarketing frauds at issue in this litigation were raised in public testimony by the Attorney General of Iowa at a hearing before the House Committee on Financial Services (“Improving Federal Consumer Protection in Financial Services”) on June 13, 2007. *See* Testimony of Hon. Tom Miller, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/ht061307.shtml (summarizing the states’ efforts to stop fraudulent telemarketing schemes and the *N.Y. Times* reports about Wachovia’s participation, and calling on the OCC “to use its extraordinary leverage to force national banks to cease helping criminals steal from vulnerable victims”).

This was true in the case of Providian Bank, a small national bank that was accused of abusive credit card practices by the District Attorney of San Francisco and the subject of a nationwide class action. It was that case in which the OCC initiated, for the first time, an enforcement action based on its consumer-protection interest separate and apart from its traditional “safety and soundness” concerns.³ That case involved an agreement with the OCC to pay restitution to consumers—in the amount of \$300 million—for a variety of enumerated deceptive practices, including fee-based products that were sold through telemarketing calls. *See* Consent Order, *In the Matter of Providian Nat. Bank, Tilden, N.H.*, No. 2000-53, available at <http://www.occ.gov/ftp/release/2000-49b.pdf>.⁴ Restitution was made by direct account credits—in the case of existing customers—and by checks mailed to last known addresses for other victims. Where checks were returned, the bank was required to engage in skip-tracing activities. *Id.* at 44.⁵

³ The current OCC General Counsel acknowledged that it was the Providian case in 2000 that caused bank regulators to ponder “why it took . . . more than twenty-five years to reach consensus on their authority to enforce the FTC Act.” Julie L. Williams and Michael S. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 *Bus. Lawyer* 1243, 1244 (May, 2003).

⁴ All of the OCC’s consumer-protection actions, including copies of the respective orders and agreements, are available at <http://www.occ.gov/Consumer/Unfair.htm>.

⁵ Other features of the *Providian* settlement provide an interesting point of comparison because they are missing from the OCC Restitution Agreement with Wachovia. They include:

- While the bank was to provide restitution to all injured consumers, the \$300 million figure was designated as a “payment floor,” i.e., a guaranteed minimum payment. *Id.* at 1.
- The Consent Order provided detailed, pre-determined formulas for calculating the amounts due each consumer for each of the designated deceptive practices, without the necessity of the consumers certifying anything in advance. For example, in the case of the telemarketed products, the restitution included the total fees paid for the supposed products *plus interest at 10 percent*. *Id.* at 22.

In light of this background, Amici Members of Congress believe the OCC had three fundamental obligations in the present matter. The first was to appropriately penalize Wachovia, including reimbursement to its victims in the maximum feasible amount. The second was to structure its action against Wachovia to act as a deterrent and warning to the entire banking community that such conduct will not be tolerated. The third is an obligation to the public that relies on the integrity of the banking system (and particularly in this case to a particularly vulnerable segment of the public consisting of a large proportion of senior citizens, many of whom lack financial sophistication, and persons with mental impairment),⁶ to ensure that when a regulated institution fails them as Wachovia did, they will be properly recompensed.

Unfortunately, the Restitution Agreement announced on Friday, April 25, 2008 between the OCC and Wachovia Bank does none of these things.

2. Deficiencies in the Proposed Plan of Restitution

In its finding in the Consent Order, the OCC properly recognized that consumers suffered direct harm from Wachovia's conduct. As the OCC unequivocally determined:

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- In addition to the restitution calculated under these formulas, the bank also agreed to solicit complaints regarding any additional damages incurred and agreed to "correct any actual harm." *Id* at 41.
 - The bank was required to pay for an outside audit of its compliance to ensure the effectiveness of the global restitution plan. *Id.* 49.
 - And, most significantly, for purposes of this motion, the OCC's restitution plan was coordinated with the parallel distribution efforts of the San Francisco D.A.'s office. *Id.* at 47-48.

These elements have been included in other recent OCC actions. See *In the Matter of First Nat'l Bank of Marin, Las Vegas, Nev.* (No. 2004-45); *Household Bank (S.A.), N.A. Las Vegas, Ne.* (No. 2003-17); and *First Consumers Nat'l Bank, Beaverton, Or.* (No. 2003-100).

⁶ As noted at the outset of this Memorandum, Representative Markey is Co-Chair of the Congressional Task Force on Alzheimer's. In the companion case to *Faloney, Harrison v. Wachovia Bank, NA*, which is also swept up in the OCC/Wachovia Agreement, the plaintiff is 80 years old and suffers from dementia.

“Consumers were harmed in connection with the payment processors’ and direct telemarketers’ relationships with [Wachovia].” Consent Order, Article I, ¶ (4). The OCC characterized Wachovia’s conduct as a “pattern and practice” of disregard of the interests of consumers . . .” *Id.* at ¶ (7). The OCC concluded that Wachovia had engaged in unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

In light of these findings, Amici Members of Congress welcomed the OCC announcement that it had concluded its investigation into Wachovia’s conduct and that it was requiring Wachovia to make “full restitution”⁷ to injured consumers in an amount that was estimated to be a least \$125 million.⁸ Agreement, Article III, ¶ 2. However, under the terms of the Restitution Agreement it is possible that only a fraction of victims will receive restitution, with Wachovia standing to recoup a large portion of the fund it has been ordered to create. The Restitution Agreement also stipulates that any funds that remain unclaimed by victims will revert to Wachovia. The inadequacies and deficiencies in the restitution program are fully set forth in the motion of the *Faloney* plaintiffs and are fully subscribed to and adopted by Amici Members of Congress.

⁷ Amici Members of Congress note that the term “full restitution” used in the Restitution Agreement does not encompass recovery of any overdraft or other bank charges incurred by consumer victims as a result of the unlawful removal of funds from their accounts by telemarketers. The *Faloney* plaintiffs have shown that Wachovia itself recognizes that overdraft charges and bank fees are the highly likely result of the use of unauthorized demand drafts. *See* Wachovia email, July 21, 2004 WACH 06028 (“As we have seen in the past they [payment processors] sometimes get a bad egg . . .and that bad egg can cause a lot [sic] of problems for consumers. Yes we reimburse them . . . but in the interim they may have bounced their mortgage payment, etc. . .) *cited in Intervenor, Faloney* Plaintiffs Memorandum of Law in Support of a Motion for Injunctive Relief Under the All Writs Act, at 3.

⁸ *See* OCC Press Release: “OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank’s Relationships with Telemarketers and Payment Processors.” (Release Date: April 25, 2008) available at <http://www.occ.gov/ftp/release/2008-48.htm>.

a. Representatives Markey's and Sestak's letter to the OCC

Consistent with those issues set forth in the motion, and concerned that such an outcome is contrary to the goals of ensuring the most complete restitution to victims possible and ensuring strict compliance with the letter and spirit of a financial institution's obligations to protect consumers, Representative Markey wrote immediately to the OCC requesting an explanation "why this settlement was not structured so that victims could be identified and proactively reimbursed, as has been the practice in previous settlements into which the OCC and other financial regulators have entered." Letter of Hon. Edward Markey, April 25, 2008. (Attached hereto as Exhibit B). Likewise, Representative Sestak wrote to the OCC on April 26, 2008 expressing his concern that the settlement, while publicly trumpeted as "one of the largest penalties ever demanded," would likely fall short of its goals. Letter of Hon. Joseph Sestak, April 26, 2008. (Attached hereto as Exhibit C). Representative Sestak also asked the OCC to provide an explanation "why the settlement was not structured to proactively identify the victims and reimburse them directly." *Id.*⁹

b. The OCC's response

The OCC responded to Representative Markey's letter on May 2, 2008. Letter of John C. Dugan, Comptroller of the Currency, May 2, 2008. (Attached hereto as Exhibit E). That letter only serves to make the need for an All Writs Injunction even clearer. The Comptroller's response never adequately explains why the simplest, most direct means of distribution – mailing of checks directly to victims – is not being employed under the Agreement.

⁹ A similar letter of inquiry was also sent by the Attorney General of North Dakota, Wayne Stenehjem, on May 2, 2008. (Attached hereto as Exhibit D).

Instead, the Comptroller explains his intention that the procedures outlined in the Restitution Agreement comport with that to be employed under the Permanent Injunction in *United States v. PPC*. See Dugan Letter at 1 (“the Agreement adopts the claims procedure and reimbursement process previously approved by order of the federal court in *United States v. Payment Processing Center, LLC*.”) Yet, the Comptroller fails to explain why a claims procedure deemed appropriate for the limited fund of \$6 million in *United States v. PPC*, where reimbursement payments will necessarily be insufficient to compensate all victims, should serve as a model of an essentially unlimited restitution fund where the goal is to ensure “full restitution” to all victims.

Amici Members of Congress do approvingly note that the Comptroller’s letter emphasizes his commitment that victims of Wachovia’s misconduct should receive “full restitution.” Dugan Letter at 1 (the intent of the Agreement is to “require[] Wachovia to fully reimburse all individuals harmed by the bank’s relationships with several telemarketers and payment processing companies.”). The Comptroller also acknowledges that this Court should have final review over any distribution plan. *Id.* at 3. The Comptroller also endorses the commonsense proposition that the OCC should not create a distribution process that competes with any distribution process approved by a federal court. *Id.* at 2. Amici Members of Congress applaud these expressions of intent and believe they are fully consistent with the request for injunctive relief under the All Writs Act, which, as described below, seeks to assure that all forms of restitution and notice necessitated by Wachovia’s misconduct are designed to provide restitution to victims in the most direct and efficient manner possible.

III ARGUMENT

A. All Writs Injunction Will Enable the Court to Protect the Remedial Interests of Consumers by Avoiding an Unnecessary and Cumbersome Claims Process.

Amici Members of Congress are deeply concerned about the proposed claims procedure in the Restitution Agreement. As the *Faloney* Plaintiffs have explained, “claims made” distributions, such as that planned by the OCC, typically result in less than 10 percent of eligible claims being filed. See *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d. 34, 44 (D. Me. 2005) (Signal, Chief Judge) (“‘Claims made’ settlements regularly yield response rates of 10 percent or less.”). The problem of low claims rates in “claims made” settlement distributions has been documented in academic studies. See Gail Hillebrand and Daniel Torrence, “Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits,” 28 *Santa Clara Law Review* 747 (1988). That study stressed the extremely low claims rates which can be expected in distributions to consumers. *Id.* at 751 – 753 (citing consumer cases with claim rates as low as 3 percent and 5 percent). In addition, the authors noted that disadvantaged consumers, i.e., consumers with low incomes or other forms of socioeconomic disadvantage, are even less likely to return claim forms. *Id.* at 757-761.

This information is of particular concern because the victims involved here are likely to be disproportionately elderly persons and persons with lower incomes. The Federal Trade Commission, the American Association of Retired Persons, and the National Association of Attorneys General have estimated that 85 percent of victims of telemarketing fraud are over the age of 65. See 148 Cong. Rec. S. 5055 (Daily Ed. June 5, 2002 (Statement of Senator Collins)). Moreover, these persons, having already been

victimized by frauds over the phone and through the mail, are particularly unlikely to respond to a claim form no matter how simple it is. By contrast, when checks are sent directly to victims, redemption rates are regularly in the 90 percent range.¹⁰

Amici Members of Congress understand that electronic databases exist making it feasible to mail checks directly to the vast majority of victims. Moreover, they further understand that data exist that account for previous refunds to consumers and would thus protect against double recovery.

B. All Writs Injunction Will Enable the Court to Protect the Remedial Interests of Consumers by Avoiding Multiple Notices.

Amici Members of Congress are also concerned that, to the greatest extent possible, multiple notices to the victims should be avoided. Sending multiple notices would create unnecessary confusion among injured victims. That would only further degrade the expected claims rate and make it more likely that only a fraction of injured victims will receive restitution. Moreover, notice is expensive and the administrative costs of multiple notices will erode restitution dollars that should go to compensate victims.

C. All Writs Injunction Will Enable the Court to Protect the Remedial Interests of Consumers by Ensuring that Consumer Victims Are Represented and Have a Voice in All Proceedings Concerning Restitution.

¹⁰ As the *Faloney* Plaintiffs note in support the motion, Wachovia has experience with this form of distribution. In a matter in Pennsylvania state court, *Parsky v. Wachovia*, No 771 (Phila. Ct. Com. Pls. 2000), settlement checks were mailed directly to victims with the result that 99 percent of the checks sent were deposited. The direct mailing of checks is also a practice that the OCC itself has favored in other proceedings. *See In the Matter of Providian National Bank, supra.* Likewise, the SEC has used direct issuance of checks to make distributions. *See In re MFS Administrative Proceeding*, SEC File No. 3-11393 (2008).

In light of the significant hindrances to full restitution for victims of the misconduct at issue, Amici Members of Congress are also concerned that the Restitution Agreement between the OCC and Wachovia was concluded without meaningful input from those victims. The proposed All Writs Injunction will ensure that no distribution process is initiated without victims being represented and having an opportunity to be heard. Although classes have not yet been certified in the *Faloney* or *Harrison* actions, victims of the telemarketing frauds at issue nonetheless enjoy the interim representation of interim class counsel. Interim class counsel have demonstrated their zealous representation of the name plaintiffs and putative classes and they will provide victims with effective advocacy in this process.

IV. Conclusion

For all of the reasons stated, and consistent with their Congressional duties, Amici Members of Congress urge the Court to grant the All Writs Injunction requested by the *Faloney* Plaintiffs. Such an order would allow this Court to assert control and ensure that distribution is done in such a way as to maximize the return to the victims of Wachovia's conduct, consistent with the letter and spirit of both the Consent Order and OCC-Wachovia Agreement, and that whatever notices are deemed necessary are coordinated and to the greatest extent possible consolidated so that restitution dollars can be maximized and confusion among victimized consumers minimized.

Dated: May 29, 2008

Respectfully submitted,

WILLIAMS CUKER BEREZOFKY

A handwritten signature in black ink, appearing to read 'M. Quirk', written over a horizontal line.

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