

Statement of Commissioner Pamela Jones Harbour  
*Schneider v. Citicorp Mortgage, Inc.*  
File No. P024210

Today the Commission has voted to file a brief *amicus curiae* in a consumer class action lawsuit pending in a United States district court.<sup>1</sup> One purpose of the Commission's brief is to critique the proposed settlement coupon, which the Commission believes is of negligible value to the class, and I concur with that portion of the Commission's brief.<sup>2</sup> The Commission advises the court and the litigants that the settlement is not fair, adequate or reasonable from the perspective of the class members, and therefore should not be approved. Were that substantially all the brief had to say, I gladly would vote to file it, without dissenting in part.

I take issue, however, with the Commission's decision to opine on the "highly fact-based, difficult and complex"<sup>3</sup> issues of class certification and attorneys' fees. The Commission criticizes the litigants, and implicitly the court, by suggesting that it knows better how to resolve

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<sup>1</sup>*Schneider, et al. v. Citicorp Mortgage, Inc., et al.*, Dkt. No. CV 97-837 (NG) (CLP) (E.D.N.Y.).

<sup>2</sup>The proposed settlement in this case would deliver to the class \$100 coupons that could be used only to obtain a new mortgage or refinance an existing one (which many class members most likely have done recently and are unlikely to do again soon); must be redeemed within a narrow two-year period; are not transferable at public sale or auction; and cannot be combined with any other offers. In return for these largely valueless coupons, the class members will give a complete release to the defendants.

Not all coupon settlements are inherently bad. *See, e.g.*, In re Western New York Coupon Litigation, 1998-1 Trade Cas. (CCH) ¶ 72,119 (W.D.N.Y. 1998) (antitrust settlement of claims that a retailer conspired with manufacturers to limit the availability of consumer coupons in Western New York; New York Attorney General authorized to issue consumer coupons up to the value of the \$4.2 million settlement fund, net of expenses, to be distributed in Western New York via Sunday papers and to be redeemable at multiple retailers by consumers); Connecticut ex rel. Lieberman v. Stop & Shop Companies, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,796 (D. Conn. 1989) (\$3 million in coupons, redeemable at both defendant and non-defendant grocery stores, issued to consumers in Connecticut to remedy an alleged antitrust conspiracy to limit coupon redemption rates in Connecticut).

<sup>3</sup>*Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part) ("The law gives broad leeway to the district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion."). *Accord* *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13 (2<sup>nd</sup> Cir. 2003) (class decision reviewed for abuse of discretion); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2<sup>nd</sup> Cir. 2000) (class action attorneys' fee decision reviewed for abuse of discretion).

these intensely factual inquiries – even though the Commission is uninformed as to the underlying facts, especially compared to the parties and the court. Under these circumstances, offering these other opinions weakens the strength of the Commission’s legitimate advocacy on the objective merits of this proposed settlement. Therefore, I dissent in part from the Commission’s decision to file the brief.

The district court – not the Commission – is in the best position to determine whether the fees requested in this particular case are proper or excessive. For example, in making its fee award decision, the court will have the opportunity to hold hearings, obtain testimony (including expert testimony), and review any other evidence it deems relevant.<sup>4</sup>

In stark contrast, the Commission currently has almost no record upon which to evaluate class counsel’s work. The brief asserts that "Class Counsel's Fee Request May Be Excessive Given the Likely Low Value of the Settlement;" that the court should tie plaintiffs' attorneys fees to coupon redemption; and that the fees "cannot be justified in light of the poor result achieved." In support of these arguments, the brief itself notes that the court acknowledged a lack of "evidence of what the scope of discovery was that [counsel] took, what investigations were made, or any other bases for calculating the strength of [the] case." If so, then the Commission likewise has no record of the discovery that was completed; the motions that were made and possibly resolved; the investigations undertaken and their results; the hours class counsel invested in this matter; or the manner and effect of counsel’s investment. In other words, the Commission lacks substantial knowledge of numerous facts that are directly material to the court’s resolution of the fee issues in this case.<sup>5</sup>

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<sup>4</sup>In a similar case where the Commission decided to issue an *amicus* brief shortly before I was appointed as a Commissioner, the brief also argued that the attorneys’ fees requested were excessive in relation to the value delivered to the class. *Haese v. H & R Block, Inc.*, No. CV-96-423 (Tex. 105th Dist., Kleberg Cty.) (June 4, 2003). The court in that case, after a full hearing (including expert testimony), rejected the Commission’s arguments and found the settlement – including attorneys' fees – to be "fair and reasonable." Gene Meyer, *Judge Approves Block Settlement; Five-year coupons, \$26 million in cash for 700,000 Texas consumers called fair*, KANSAS CITY STAR (June 25, 2003).

<sup>5</sup>*Goldberger*, 209 F.3d at 50 (district courts should always look at the time and effort expended by counsel, the magnitude and complexity of the issues involved, the litigation risks confronted, the quality of representation, the fees requested in relation to the settlement, and other

I am confident that the district court is well aware of the quality and quantity of evidence reviewed by other courts in the Second Circuit in making awards of fees to class counsel. I am equally confident that the district court is aware of how the Second Circuit has responded in reviewing those cases. This issue is vested in the sound discretion of the district court,<sup>6</sup> and I would let the district court do the job entrusted to it. I do not think the Commission necessarily assists the district court in the discharge of its duties by casting aspersions on class action counsel when, as here, the Commission lacks an adequate factual record upon which to rely.<sup>7</sup>

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public policy considerations in the award of fees to class counsel).

<sup>6</sup>*See supra* note 3.

<sup>7</sup>In a case with an adequate district court record, or where the Commission's own investigation has provided an adequate factual basis to support the Commission's opinion, I likely would vote to file such a brief without dissenting in part.