FLORIDA SUPREME COURT
CASE NO.: SC 05-1384

KEVIN BARNHILL, RAMONA TORRES; D. WILSON; WILLIAM McWHORTER; EUGENIA FIALA;

Petitioners,

vs.

IN RE: FLORIDA MICROSOFT ANTI-TRUST LITIGATION,

Respondents.

CASE NO.: 3D04-2051

CONSOLIDATED WITH:
3D04-1590
3D04-1986

BRIEF ON JURISDICTION OF PETITIONERS BARNHILL, TORRES, WILSON, McWHORTER, & FIALA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

STATEMENT OF THE CASE AND FACTS

On November 5, 1999, after a seventy-six day bench trial, U.S. District Court Judge Thomas Penfield Jackson issued 412 findings of fact in a consolidated anti-trust action filed by the U.S. Justice Department and the New York Attorney General. The findings show an array of anti-competitive acts by Microsoft in the market for personal computer operating systems. *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999). Judge Jackson's findings set off a chain reaction of class actions alleging that Microsoft's unlawful monopolization of the market injured purchasers of its software. The Florida case at issue was only one of the more than 130 such cases filed in various state and federal courts. *See In re Microsoft Corp. Antitrust Litig.*, 127 F.Supp. 2d 702, 704-705 (D.Md. 2001).

In April 2003, Microsoft entered into an agreement to settle this case with a class of Florida purchasers of Microsoft operating systems or application software. Class counsel originally requested more than $37 million in fees, based on a lodestar of $8.8 million and a multiplier of 4.25. Eventually, class counsel and Microsoft settled on attorneys' fees of $15.50 million ($8.8 million times a multiplier of 1.77). The trial court preliminarily approved the settlement on April 15, 2003.[1]

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[1]The Settlement Agreement requires Microsoft to provide coupons in varying amounts to those class members who successfully complete a claims process. The coupons will be redeemable for purchases of software or computer

On November 3, 2003, Kevin Barnhill, Ramona Torres, D. Wilson, William McWhorter and Eugenia Fiala (hereinafter, "Petitioners" or the "Barnhill Objectors") served their Preliminary Objections[2] to the proposed class action settlement, and

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equipment. The asserted *"Face Amount"* of the settlement is approximately $203 million in coupons. This figure represents the theoretical maximum value of the coupons that Microsoft must make available to class members, in the unlikely event that sufficient numbers of class members successfully complete the claims process to exhaust that amount. The value of the coupons that eligible claimants receive depends on the type of software they previously purchased.

The parties expect that the claimants who successfully complete the claims process will not be sufficient in number to exhaust the $204 million *"Face Amount"* of the Settlement. As a result, the parties also agreed that a portion of the unclaimed coupons will be transferred to the Florida public school system, and that the remaining portion of the Settlement's value will revert to Microsoft.

[2]The Barnhill objections were: (1) This is a coupon settlement. In the Multi-District litigation against Microsoft in Federal Court, wherein more or less the same practices by Defendant that are alleged in this matter were alleged therein, a proposed coupon settlement valued at approximately $1 billion was not found acceptable by the court, primarily because the class was to receive coupons; (2) The Justice Department's Anti-Trust case against Microsoft established that Microsoft is a monopoly, therefore, providing consumers with more than $200 million in Microsoft coupons will create additional Anti-Trust issues by increasing Microsoft's presence in the market place; (3) Because Florida is an "indirect purchaser" state in which treble damages are available to consumers, a settlement such as this which consists entirely of coupons is always grossly inadequate regardless of the alleged value of the coupons. This inadequacy of remedy is exacerbated by a truly cumbersome claims process in this matter; (4) The "Overview of Settlement Benefits" section of the "Notice"alleges these coupons will have "cash value", that the coupons "can later be redeemed for cash" and that "the vouchers are good for cash rebates". However, the truth is that the coupons have little value unless the class members use them in conjunction with the purchase of an additional approved product. Like the coupons in the Sunday paper, these "vouchers" are simply Microsoft discount coupons which have no

appeared by counsel at the hearing on November 24, 2003.

On June 29, 2004, the trial court issued a Final Judgment giving final approval to the terms of the settlement. Appellants' appeal was timely filed on July 27, 2004.

On April 6, 2005, the Third District affirmed the trial court's Order approving the settlement including the award of attorneys' fees with a multiplier of 1.77. On July 13, 2005, the Third District denied rehearing, and rehearing en banc. On the 5th day of August, 2005, the Barnhill Objectors filed a Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

The Court should take jurisdiction of this case because the district court's decision directly conflicts with two other district court cases as well as prior decisions

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absolute "cash value" absent the purchase of an additional product. If class counsel finds these coupons to be so valuable, then the Court should consider paying a part of the attorneys' fees in coupons; (5) There is an arbitrary $650 limit on the transferability of the vouchers, which further reduces their limited value. Economically, there is no reason to limit the ability of the class member to sell their vouchers at a discount if they have no interest in purchasing additional products; (6) The Notice leads class members to believe that Microsoft will donate cash in the amount of 50% of the difference between $202 million and the value of vouchers actually distributed. However, in reality, Microsoft has the option to donate its own products in lieu of money; (7) Because the Fairness Hearing is scheduled for November 24, 2003 but the deadline for filing claims is not until December 24, 2003, the actual use rate of the settlement maybe projected, but will be unknown, at the time of the fairness hearing. Therefore, the Court can only guess whether this settlement is fair because it will not know the actual amount of vouchers issued through the claims process; and, (8) the amount of attorneys' fees.

of this Court. In *Stewart Select Cars, Inc. v. Moore,* 619 So.2d 1037, 1038 (Fla. 4th DCA 1993), the Fourth DCA held that a "contingency risk multiplier is inappropriate" when setting fees under the FDUTPA. In *Corvette Shop & Supplies, Inc. v. Coggins,* 779 So.2d 529, 531 (Fla. 2d DCA 2000), the Second DCA said "we ... hold that the contingency risk multiplier should not have been applied in this case where the award of attorney's fees was based on section 501.2105." Equally significantly, in *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828, 834 (Fla. 1990), this Court stated that in fee shifting "public policy enforcement cases" involving matters such as "consumer protection", specifically, citing FDUTPA as an example – there is no multiplier. Similarly, the United States Supreme Court in *City of Burlington v. Dague,* 505 U.S. 557 (1992) explicitly rejected multipliers in fee shifting cases.

The District Court's decision also directly conflicts with this Court's decision in *Schick v. Department of Agric. & Consumer Svcs.*, 599 So.2d 641 (Fla.1992).

Although the District Court's opinion purported to distinguish *Stewart Select Cars* and *Corvette Shop,* because the instant case was settled rather than fully litigated, such a distinction is contrary to both common sense and public policy.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE THIRD DISTRICT'S DECISION AFFIRMING THE AWARD OF A MULTIPLIER TO CLASS COUNSEL UNDER A FEE SHIFTING STATUTE CONTRARY TO THIS COURT'S EARLIER DECISIONS AND OTHER DCA OPINIONS.

The "lodestar" of $8.8 million reflecting some 20,000 hours of time (over 9 person years of time) is not challenged by Objectors. Rather, it is Objectors' position that the application of a multiplier is legal error. Under Florida law, class counsel are not entitled to an award of a multiplier.

The only cause of action claimed was a violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). No multiplier is permitted when awarding attorneys' fees in cases brought under the FDUTPA. In *Stewart Select Cars, Inc. v. Moore*, 619 So.2d 1037, 1038 (Fla. 4th DCA 1993) the Fourth DCA said "contingency risk multiplier is inappropriate" when setting fees under the FDUTPA. In *Corvette Shop & Supplies, Inc. v. Coggins*, *779* So.2d 529, 531 (Fla. 2d DCA 2000) the Second DCA said "we ... hold that the contingency risk multiplier should not have been applied in this case where the award of attorney's fees was based on section 501.2105." Additionally, in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828, 834 (Fla. 1990) this Court stated that in fee shifting "public policy enforcement cases" involving matters such as "consumer protection", specifically

citing FDUTPA as an example – there is no multiplier. This mirrors the opinion of the United States Supreme Court rejecting multipliers in fee shifting cases. *Dague, supra*, at 562, 566, 567.

The District Court's decision also directly conflicts with this Court's decision in *Schick v. Department of Agriculture and Consumer Services,* 599 So.2d 641, 643 (Fla.1992) wherein this Court held:

> [T]hat where the legislature has set forth specific criteria for determining reasonable attorney's fees to be awarded pursuant to a fee-authorizing statute, the trial judge is bound to use only enumerated criteria.[3]

The United States Supreme Court has "established a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992). In *Dague,* the Court determined "that enhancement for contingency is not permitted under the [federal] fee-shifting statutes at issue." *Dague, supra,* at 567. This ruling is applicable to *all* federal fee-shifting statutes regardless of their subject matter. The Court explicitly stated that "our case law construing what is a 'reasonable' fee applies uniformly to all of them [federal fee-shifting statutes]." *Id.*

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[3] Although *Schick* was apparently superseded by statute as it applies to eminent domain cases; *see State Dept. of Transp. v. Skinners Wholesale Nursery, Inc.*, 736 So.2d 3 (Fla. 1st DCA 1998), the Court's holding still applies to other fee-shifting statutes such as DUPTA.

at 562. Consequently, a reasonable fee is to be determined without regard for contingent risks. *Id.* at 566.

Further, the Court found that if contingency enhancement were to be used in *any* contingent fee cases (brought under fee-shifting statutes), it would have to be applied to *all* such cases. *Id.* at 565. This result would, the Court reasoned, encourage non-meritorious claims to be brought, which is against public policy and Congressional intent. *Id.* at 563. The Court therefore concluded that "just as the statutory language limiting fees bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss." *Id.* at 565. The Court was especially concerned with the fact that "[t]o award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail." *Id.* Thus, the Court concluded, "[i]t is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies of the fee-paying market in every respect." *Id.* at 566-67.

The Third District held that *Stewart Select Cars* and *Corvette Shop* are inapplicable to the instant case because the instant case involved a fee agreement rather than an award of fees after a jury verdict. This distinction is without merit. The Third District did not elaborate on its reasoning as to why a negotiated fee

agreement would render a multiplier acceptable when it is clearly not warranted in cases which are actually litigated through trial. Neither *Stewart Select Cars* nor *Corvette Shop* limited their holdings to cases which went to trial. Moreover, the policy concerns outlined in *Dague* are not affected by the fact that the fees were part of a negotiated settlement.[4]

Furthermore, there is a significant conflict of interest at issue which should have precluded class counsel from seeking a fee in excess of their lodestar. Had the case been tried, class counsel would have been limited to their lodestar to be paid by the defendant pursuant to F.S. §501.2105. In this FDUTPA case, the plaintiffs, if the case had been tried, were entitled to have a statutory award of their counsel's hourly fees paid by the defendant. However, class counsel agreed to settle the case. By so

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[4] The Third District apparently accepted the Respondents' arguments that because the parties settled, there was no "prevailing party" under FDUPTA and therefore the Court was free to apply a multiplier that would have been precluded by this statute if they were to prevail at trial. This argument defies logic as well as the public policy concerns set forth in *Dague. See generally Staton vs. Boeing, 327* F.3d 938 (9th Cir. 1993) in which the court stated that if the "amount of fees that Boeing agreed to pay in the settlement agreement [was] distinctly higher than the fees class counsel could have been awarded by the district court using the lodestar method, the court would have almost surely have had to find the fees unreasonable." Although this particular situation was not before the Third Circuit in *Brytus vs. Spang,* 203 F.3d 238 (3d Cir. 2000) the court nonetheless warned "courts have to be alert to the possibility that the parties have adopted [their particular settlement agreement] precisely because the fee award is in fact higher than could be supported on a statutory fee-shifting basis. . . ." *Id.* at 970.

doing, they created circumstances permitting them to now seek, and be awarded, a fee which exceeds their lodestar by almost $7 million. Thus, class counsel in negotiating a settlement set the stage by which they became the exclusive beneficiaries of a $6.8 million windfall.

The basic conflict of interest is this: if class counsel proceeded to do their work, complete the trial, with the hope of prevailing at trial, they would be entitled to only their hourly fees and these fees would be paid by defendant. By settling, the case class counsel are in conflict with their clients' interests because: (a) the fee they seek exceeds what they would be entitled to under the fee shifting statutory fee award pursuant to F.S. §501.2105 and (b) those fees must be seen as diminishing the amount Microsoft was willing to expend in payment to class members for Microsoft's unfair and deceptive trade practices in Florida.

The conflict is clear if the court contrasts the lucrative fees negotiated by class counsel with the settlement in the Florida action. The settlement is grossly inadequate particularly when compared with the settlement entered into by Microsoft in the national direct purchaser case in the U.S. District Court of Maryland (subsequent to the objection deadline in this case) which provides that:

> a) Each class member will receive one hundred percent of the alleged damages, i.e., **55%** of the purchase price of the Microsoft products;

b) That settlement amount is payable one hundred percent in **cash;**

c) The attorney's fees agreed to by counsel are actually less than the **lodestar** in the case when combined with expenses.

d)

In this case, however, the Class Members are not getting even remotely close to 55% of the purchase price, and even that amount is being "paid" in coupons and not in cash. All for this the attorneys are receiving a 1.7 multiplier of their lodestar although Florida law and the FDUTPA precludes a multiplier.

CONCLUSION

This case presents precisely the type of policy concern that the United States Supreme Court outlined in *Dague* and further illustrates the conflict between the Third District's decision with that of *Dague*. Even ignoring *Dague,* the Third District's decision approving the multiplier flies in the face of Court's rulings in *Quanstrom* and *Schick*. The decision conflicts directly with the Second DCA and the Fourth DCA. For the foregoing reasons, this Court should take jurisdiction of this case.

DATED this 9th day of September, 2005.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that pursuant to Fla.R.App.P. 9.210(a)(2), the foregoing Brief complies with the font requirement as it is produced using 14-point Times New Roman font.

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