UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-3923

In re New Century TRS Holdings, Inc., et al.*, Debtors*

Alan M. Jacobs, in his capacity as Liquidating Trustee to the New Century Liquidation Trust,

Appellant,

Molly S. White and Ralph N. White,

Appellees

Appeal from the United States District Court for the District of Delaware and its Bankruptcy Court

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AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS

Amicus Curiae National Association of Consumer Bankruptcy Attorneys (NACBA) is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumers in the bankruptcy system. Formed in 1992, NACBA now has more than 3,000 members located in all 50 states and Puerto Rico. NACBA files amicus briefs in selected appellate and Supreme Court cases that could significantly impact the rights of consumers, including those involving the treatment of consumer creditor classes in large chapter 11 cases. The NACBA amicus program has achieved national recognition and has influenced many important judicial decisions. *See, e.g.*, *Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012) (adopting NACBA's position concerning the procedural handling of class proofs of claim in a chapter 11 case); *In re Puffer*, 674 F.3d 78 (1st Cir. 2012) (noting the helpful submission of NACBA); *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012) (stating NACBA's amicus brief "ably argued the point" related to the role of particular Bankruptcy Code sections).

Chapter 11 cases involving debtors engaged in controversial consumer-related business activity often enter the bankruptcy system with potentially large numbers of consumer claims. How to provide fairness to such consumers, while also serving the important bankruptcy goals of efficiency and finality, is a concern that presents difficult issues for the bankruptcy courts, particularly where, as here, consumers are attempting to assert their rights without the benefit of counsel.

The issue involved in this appeal—the kind of notice of a claims bar date required by due process—is presented here in a novel context. This debtor was among the largest of the notorious subprime lenders, all of whom collapsed prior to the international economic meltdown they and their investors produced. Its borrowers, who were saddled with highly risky and complicated loan products, were likely claimants, as the proliferation of pre-bankruptcy consumer litigation indicated. Except for those borrowers who had subsequently refinanced their way out of these loans or lost their homes to foreclosure, each of their names and addresses were known to the debtor.

Appellees are Florida residents. They obtained a subprime mortgage from the debtor company less than a year prior to the bankruptcy filing. Yet instead of providing them actual notice of the bankruptcy and about the deadline for asserting any claims they might have against the debtor —which could have been easily provided them with their monthly mortgage statements—the debtor "notified" them via a one-day legal advertisement in the Wall Street Journal and in a California local newspaper, the Orange County Register.

The Bankruptcy Judge approved this notice program under the mistaken belief that this Court's decision in *Chemetron Corp. v. Jones*, 72 F.3d 341 (3d Cir.

1995) constrained him from requiring the debtor to provide actual notice to known borrowers who had not filed pre-petition litigation. Despite their lack of representation, the Appellees convinced the District Court that the Bankruptcy Court's action was based on an insufficient record. However, the District Court's Memorandum Opinion reveals that it shared the Bankruptcy Court's misconception about *Chemetron*, insofar as the remand instructions focused merely on the details of the publication notice, rather than the propriety of publication as a substitute for individualized notice by mail. Neither of the parties to this appeal are confronting the core question whether the publication notice approved in *Chemetron*—involving unascertainable potential tort claimants who were exposed to a debtor's toxic dump site—is appropriate for notifying consumer claimants like Appellees who purchased a known, dangerous credit product from the debtor and whose identity was known.

NACBA desires to offer an independent legal analysis to assist the Court in reaching a result that is in accordance with the legal authorities insufficiently discussed by the parties to this appeal. While NACBA supports affirmance, it believes, for the reasons stated in this Brief, that the proper analysis is different from the one presented by the *pro se* Appelles, and that an appropriate remand order should expand on the instructions provided by the District Court.

Both the Appellant and the Appellees have consented to the filing of this Brief.

PRELIMINARY STATEMENT

The Debtor in this liquidating chapter 11 case is New Century Mortgage Co., which, until shortly before it filed for bankruptcy protection in April, 2007, was the nation's second largest originator of "subprime" residential mortgages. *See* Final Report of Michael J. Missal Bankruptcy Court Examiner, 1 (filed March 3, 2008, Bankr. D.I. 5518) (hereafter "the Missal Report"). Like many of the reckless originators in the boom-to-bust subprime scandal, New Century's sales grew at astronomical rates during the ten years of its operation, from $357 million in loans in 1996, its first year, to $60 billion in 2006, its last. *Id*.

The practices driving this explosion in originated loans were documented extensively by the Bankruptcy Court Examiner in his March 2008 report.[1] In the Examiner's words, New Century "had a brazen obsession with increasing loan

[1] The most comprehensive analysis of the scandal and the disastrous economic consequences it wrought is the official report of the congressionally appointed Financial Crisis Inquiry Commission ("FCIS"), *see* Financial Crisis Inquiry Report (January 2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf ,which relied heavily on the work of the Bankruptcy Examiner in this case. New Century is also mentioned in the investigative journalism that followed the 2008 financial meltdown. *See, e.g.*, Michael W. Hudson, THE MONSTER: HOW A GANG OF PREDATORY LENDERS AND WALL STREET BANKERS FLEECED AMERICA (Time Books 2010); Gretchen Morgenson and Joshua Rosner, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITIONS, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (Times Books 2011).

originations, without due regard to the risks associated with that business strategy." *Id*. at 3. The poor quality of these loans—more than 70% of which were structured as adjustable-rate loans carrying an initial "teaser" rate and nearly 40% of which were so-called "liars' loans" because they were made without any borrower income verification—made them, in his words, "a time bomb." *Id*.

Although the principal purpose of the Missal Report was to identify possible causes of action for the bankruptcy estate, its findings should have sounded the alarm indicating a high likelihood of claims by the borrowers whose homes were burdened with such mortgage "time bombs."[2] Unfortunately, with regard to the notice procedures established in the case, no such alarm went off, or, if it did, the participants in this case chose not hear it. Most borrowers who, prior to the bankruptcy filing, had not initiated litigation were classified as "unknown creditors," meaning that the only provision made for notifying them about the claims bar date was the single legal advertisement published in the Wall Street Journal on July 23, 2007, requiring any claim to be filed no later than August 31,

[2] The Missal Report noted the commonly misplaced assumption that subprime loans were made exclusively to "higher risk" borrowers, when, in actuality, the pressure to increase originations resulted in numerous borrowers with good credit getting these loans, as well. *Id*. at 24, n. 6. Obviously, such borrowers, once realizing that they had been put into an inappropriate, expensive loan product, would be likely candidates for consumer litigation against the originator.

2007. Affidavit of Publication (A-115 to 117).[3] Thus, for the numerous borrowers with these "time bomb" mortgages, who were presumed to be scanning the legal advertisements in the Wall Street Journal on that single publication date, they were given thirty-nine (39) days to file a claim, or were forever barred from doing so.

The Appellees Mr. and Mrs. White were homeowners who obtained refinancing from New Century in the closing months of the lenders' operations. After discovering that New Century was in bankruptcy, they filed proof of claim No. 4073 on November 22, 2008, after the claims bar date but almost a year before the Debtor's plan was finally confirmed on November 20, 2009. Memorandum Opinion of District Court, 2-3 (A-8-9). Appellees later supplemented their proof of claim by filing an adversary action. *White vs. New Century TRS Holdings, Inc.*, Adv. No. 10-55357. Attached as Exhibit B to their adversary complaint is a copy of their mortgage note, an illustration of one of New Century's "time bomb" mortgages, providing for two years of payments at a rate of 9.525 %, and 28 years of payments at an adjustable rate which "will never be greater than 16.525 %." According to their complaint, the loan product they had been offered and what they thought they were getting was a fixed-rate loan at 8.525%. Complaint, ¶ 19. Without addressing the merits of the Whites' deception claim, the Bankruptcy

[3] The Debtor placed an additional single publication notice in a local newspaper in the southern California county where it was headquartered as an attempt to reach its ex-employees, *see* Hring. Tr. 108 (A-250), but designed only the single ad in the Wall Street Journal to reach its borrowers.

Court ruled that their claim, and the other borrower claims heard with theirs, were precluded by the 2007 bar order, absent a showing of excusable neglect.

In reversing the Bankruptcy Court, the District Court correctly concluded that the Appellant Trustee failed to establish that the Whites were provided notice consistent with constitutional due process, as defined in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950). However , the District Court did not question the Bankruptcy Court's assumption that the Whites were entitled to publication notice only, based on its interpretation of *Chemetron Corp. v. Jones*, 72 F.3d 341 (3d Cir. 1995). It decided only that the sufficiency of the particular publication notice had not been established. This assumption that the Whites did not have to be individually noticed—shared by both the Bankruptcy and District Courts—was based on a misreading of *Chemetron*.

Chemetron concerned the problem of notifying unknown, potential tort claimants, not potential claimants like the Whites, whose identity and address was known to this debtor. Because *Chemetron* has been applied inappropriately by the lower courts to cases like this—treating ascertainable consumers affected by a debtor's business as being "unknown" for purposes of notice merely because they have not filed suit pre-petition—this appeal offers an opportunity for this Court to provide much-needed guidance to the bankruptcy courts and practitioners concerning the factors that should be taken into account in developing notice plans covering ascertainable, potential consumer claimants.

C. Due Process Does Not Permit a Business Debtor that Sold a Notoriously Defective Product to Provide Notice of A Claims Bar Date by Publication Only with Regard to Purchasers for Whom It Has a Name and Address

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), is the seminal due process case concerning the provision of legal notice by publication. In *Mullane*, a trustee provided notice to all beneficiaries of a judicial settlement of accounts by a publication in a local newspaper, once a week for four successive weeks, in conformity to the procedure established by state statute. A specially appointed guardian, representing all beneficiaries "known or unknown," challenged the sufficiency of that notice under the right to due process guaranteed by the Fourteenth Amendment. In reversing the New York Court of Appeals' approval of the trust settlement, the Supreme Court, in words often quoted, instructed as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutionality of any chosen method may be defended on the ground that it is itself reasonably

> certain to inform those affected, or where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.
>
> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts.

Id. at 314-15 (citations omitted).

The Court distinguished between the notice required for the trust beneficiaries whose name and address were known from those "whose interests or whereabouts could not with due diligence be ascertained." *Id*. at 317. According to *Mullane*, ascertainability is the key factor for determining the kind of notice that interested parties should receive. While for unknown beneficiaries a resort to some form of publication may be reasonable, "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id*. at 318. *Mullane* emphasized as an important fact the existence of the trustee's ongoing relationship with the known beneficiaries, "periodically remit[ting] their income to them, [such that these beneficiaries] might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests." *Id*.

Three years after *Mullane*, in *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293 (1953), the Supreme Court expressly applied the same ascertainability principle to the kind of notice that had to be provided creditors in a bankruptcy proceeding, when it invalidated the sufficiency of publication notice to the state of New York, a creditor whose name and address were obviously known to the debtor. Reiterating that “[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,” the Court held that no “excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from ‘constructive notice’ by newspaper.” 344 U.S. at 296. Only “when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication.” *Id*. *See also Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 491 (1988) (applying *Mullane* to a challenge to the sufficiency of notice by publication of claims bar date in state probate proceeding, remanding for a determination whether the appellant claimant’s identity as a creditor was “known or reasonably ascertainable”).

This Court applied the *Mullane* distinction between creditors “known” and “unknown” in *Chemetron.* That case involved the sufficiency of a notice of claims bar date provided by publication to “a group of former residents and occasional visitors” to a toxic dump site owned by the debtor. 72 F.3d at 344. Viewing these potential claimants as being like the trust beneficiaries in *Mullane* whose identify could *not* be reasonably ascertained, this Court rejected as impractical and speculative claimants’ demand for an expensive and time-consuming investigation that might have identified them, noting that even the advocated title search "would have come to no avail in this case [since the] vast majority of the claimants involved here were not property owners, but guests." The Court "decline[d] to impose any Orwellian monitoring requirements on Chemetron and similarly situated corporations," *id*. at 348, but it also expressly declined to address different bankruptcy situations where the identity of potential claimants could be reasonably ascertained. *Id*. at 347, n. 2.

In this proceeding, the Bankruptcy Court effectively abandoned the ascertainability focus mandated by *Mullane* and *Chemetron*, and, instead, accepted as proper the Debtor's distinction between borrowers who had initiated pre-petition litigation—who were notified of the bar date by mail—and those borrowers who had not filed litigation and who, for that reason, were classified as "unknown creditors," entitled only to publication notice. Memorandum, October 18, 2013 at 14 (A-34) (quoting declaration of Debtor's counsel, Suzzanne Uhland, who explained that "the Debtors generally did not view borrowers as creditors or potential creditors unless and until a borrower filed a complaint or commenced litigation").[4] The District Court did not question the propriety of this classification,

[4] In her redirect testimony in the Bankruptcy Court hearing, Attorney Uhland clarified that the Debtor may have also treated as "known creditors" some additional borrowers who had sent unspecified, pre-petition "correspondence." Hring. Tr. at 136 (A-278).

i.e., treating *known* borrowers as "unknown creditors" by virtue of their failure to initiate pre-petition litigation. Memorandum Opinion, August 8, 2014 at 9-10 (A-15-16) (noting that "[i]t is well settled that constructive notice of the claims bar date by publication satisfies the requirements of due process for unknown creditors," and summarizing the Uhland Declaration).

Both the Bankruptcy Court and the District Court incorrectly conflated questions about the likelihood of particular borrowers actually asserting a claim from the proper question, namely, what kind of notice was appropriate for New Century borrowers whose identity was completely ascertainable. As other courts have recognized, in distinguishing *Chemetron*, due process requires actual notice to any ascertainable creditor whether or not there is a reasonable expectation that she will assert a claim. *See, e.g., Levin v. Maya Constr. (In re Maya Constr. Co.)*, 78 F.3d 1395, 1400 (9th Cir. 1996) (even reasonable belief that potential tort claimant "did not intend to sue did not obviate the fact that he had a claim on which he could sue, if he learned more or changed his mind"); *Monster Content, LLC v. Homes.com, Inc.*, 337 B.R. 438, 443 (N.D. Cal. 2005) (distinguishing *Chemetron*, noting that speculative nature of claim does not render ascertainable person "unknown"); *Kewanee Boiler Corp. v. Smith (In re Kewanee Boiler Corp.)*, 198 B.R. 519, 537-38 (Bankr. N.D. Ohio 1996) (distinguishing known purchaser of defective product manufactured by debtor from the non-ascertainable tort claimants in *Chemetron*).[5] Particularly given the nature of this debtor's business and the fact that many of its borrowers, like its investors, were bringing law suits against it for alleged deceptive conduct, there was no reason—and the record below established no basis—for treating those borrowers who had not yet filed a suit, as of the date of the bankruptcy filing, as "unknown creditors."

With regard to the consumer claims at issue here, New Century's borrowers who were still in their homes had known names and addresses that could be easily gleaned from the Debtor's mortgage origination records. Under *Mullane* and *Chemetron*, that should have enough to classify them as "known creditors" for purposes of developing an appropriate notice program. *Chemetron*, 72 F.3d at 347, n. 2 (instructing that, if the potential claimants can be identified from an examination of the debtor's "books and records," that is enough to make them "reasonable ascertainable," and suggesting that even some additional investigation might be warranted in particular cases). Moreover, the monthly mortgage statements being sent to these claimants, like the periodic remittances in *Mullane*, provided a simple and cost-effective method to communicate directly with them, instead of the "hopeless substitute," *New York, N. H. & H. R. Co.*, 344 U.S. at 296,

[5] Both the Bankruptcy Court and the District Court, besides citing *Chemetron* as support for the classification that occurred here, also relied on this Court's decision in *Wright v. Owens Corning*, 679 F.3d 101 (2012). But *Wright* provides no support for classifying a known subprime borrower of New Century as an "unknown creditor," since in *Wright* the creditors conceded that they were properly classified as "unknown claimants." 679 F.3d at 103, n. 3.

of notice by publication in the Wall Street Journal. Under these circumstances, the deliberate decision by this Debtor to deny these borrowers actual notice of the claims bar date was, by itself, reversible error.

An affirmance ruling that Appellees were entitled to actual mail notice would, of course, correct the legal error that occurred with regard to the handling of their bankruptcy claim. However, Amicus suggests that some additional guidance from this Court may be beneficial here. It appears from the hearing transcript below that Judge Carey, in facing the Appellees and the other borrowers who had asserted claims after the deadline they were never informed of, realized that something was amiss, but believed, incorrectly, that *Chemetron* constrained his better judgment, and mandated the sufficiency of some form of publication notice.[6] Because the District Court, in reversing, appeared to feel similarly

[6] During the hearing, one of the other objecting borrowers, a Ms. Cromwell, argued that the "executives of New Century knew before they ever filed a piece of paper that the consumers were potential claimants" and that "the subprime borrower is the exact kind of person who's not going to read the Wall Street Journal." Tr. 168 (A-310). Judge Carey responded to Ms. Cromwell as follows:

> THE COURT: Ms. Cromwell, let me tell you this.The case law, including the controlling case law in this circuit, is clear, that national publication is sufficient. Now, is that a perfect way to notify people like the ones you described? No. And even the Supreme Court of the United States has recognized this in one or more of its decisions that arise -- the one I find doesn't arise in the bankruptcy context, but so why then do courts find from trial courts up to the U.S. Supreme Court that publication by notice is sufficient?

constrained by *Chemetron*, Amicus offers in the next section some additional discussion, in the event the Court wishes to articulate more general standards for

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In my own way of divining the reason, is that there's just no other way that's better, given the economics involved. It's not a perfect solution, I agree with that. And that's why I've wrestled so mightily, much to the frustration of the trustee, with the sufficiency of the notice and why I've required that a record be made about how the decision-making was arrived at, was undertaken and arrived at.

So I guess one way to say it, which I know is unrewarding to you, is you're right but you're wrong. And you understand what I mean by that?

MS. CROMWELL: I do.

THE COURT: Yeah. And the other thing that the Court has to do in a situation like this is divorce itself from the underlying substantive claims, okay. All of which may have merit. But in the bankruptcy context, one of the overriding principles is finality, you know, cases have to come to an end. And the reason bar dates are set is part of that process.

So that's why the focus on -- is on whether the process was correct, as opposed to whether your underlying claims have merit. And you must understand that while it may appear to individuals, a number of them in this case particularly, that the Court is focusing on the wrong things because you believe so passionately that a wrong has been done to you.

. . .

I've tried to say things in some of the opinions I've written in this case on these issues, I do understand, and I do get it. And when I sat on the bench in Philadelphia, I tried and decided and wrote on many predatory 1oan cases. I don't know whether you've had the opportunity to look up some of my decisions, but I've written a number of them.

So I understand what has happened, and what can happen in connection with consumer 1oan transactions. (A-311-312).

developing appropriate notice programs in cases involving potential consumer claims by known and unknown persons.[7]

D. Proposed Factors for Developing a Creditor Notice Plan Appropriate for This Case

Amicus respectfully suggests that the Bankruptcy Court should have considered at least the following factors in evaluating the adequacy of this Debtor's notice program for Appellees and other borrowers:

6. The nature of the product sold by the debtor;
7. The nature and extent of any pre-bankruptcy litigation against the debtor;
8. The existence of any ongoing relationship with potential claimants that presented notice opportunities;
9. Any geographic concentration of the debtor's sales;
10. The extent to which claimant classes were actively organized or represented in the case.

A discussion of each of these proposed factors follows.

1. The nature of the product sold by the debtor

As noted by one bankruptcy court, in evaluating the sufficiency of efforts to identify potential claimants, "Different products and circumstances may require different outcomes. One rule does not fit all cases where future claims may arise,"

[7] Even within this bankruptcy case itself, the disposition of this appeal will likely guide disposition of the two other borrower appeals which, according to the Appellant's Statement of Related Cases, are still undecided and pending before the same District Court. *Russell v. New Century Liquidating Trust*, No. 14-cv-821-SLR; *Cromwell v. New Century Liquidating Trust*, No. 14-cv-822-SLR.

In re Kewanee Boiler Corp., 198 B.R. at 537, noting, as an example, "in the case of defective automobiles, the purchasers can easily be found and noticed to file claims." *Id*. That was even clearer in this case, where the nature of the product or service sold—residential mortgage loans—required the seller to know the name and address of the purchaser at the time of sale. Staying with the comparison to an auto manufacturer who sold cars with known defects, the mortgages sold by this particular debtor also had known defects. As discussed above, these were subprime mortgage loans, characterized by, among other things, exploding interest rates and underwriting based on unverified income. These facts made it highly likely that there would be many consumers with potential disputes concerning the debtor's sales practices.

The existence of the extraordinarily detailed report by the New Century Bankruptcy Examiner—effectively describing the vast consumer fraud factory that was the Debtor's sales operation—made the casual attention to notice in this case particularly troublesome. Even though the potential claimants who were the focus of the Missal Report were New Century's investors rather than the borrowers, the Report essentially provided the Bankruptcy Court with an open window for viewing the many kinds of consumer claims that should have been anticipated.[8]

[8] Much of the focus of the Missal Report was on trying to assess the reason for the high level of loan "kickouts," referring to the loans that New Century was compelled to buy back from the secondary market because of an early payment

Thus, not only the identity of potential claimants but the nature of the claims they might have was plainly ascertainable here. Some degree of borrower claims beyond those which had emerged in pre-petition litigation should have been anticipated. And, the reasonably diligent effort to identify claimants, required of all debtors, in this case would have involved little more than generating a list of the name and addresses of the homeowners who got New Century mortgages.

2. The nature and extent of pre-bankruptcy litigation

The nature and extent of pre-bankruptcy litigation will often be a useful indicator of the kind of potential claims that a debtor's former or present customers are likely to have. In this case, besides the Missal Report, there was a substantial

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default or some other defect in loan quality. To use one example, the Examiner found that in just one month, July 2004, around $90 million in loans were rejected "due to unsupported property values" or "missing appraisal documentation." Missal Report at 143. From the perspective of the borrowers who got these loans, this would likely mean that many were induced to encumber their homes far in excess of the properties' real value. During the hearing, the Examiner's "kickout" analysis was brought to the attention of the Bankruptcy Court by one of the objecting borrowers during an extensive cross-examination of the Appellant trustee, who concluded with this query: "on a loan level basis, the borrowers and the reasons for those kick-outs, and when those kick-outs were fraudulent appraisals, TILA violations, RESPA violations, state or federal violations, do you not feel that the debtors, and you as the trustee now responsible for the debtors and their behavior, when you read that in the Missal report, you felt no -- I just want to be clear, you felt no obligation to the borrowers?" Hring. Tr. at 221-220 (A-361-362). Appellant's counsel took the position in the hearing that the Missal Report was irrelevant to the question of what kind of borrower notice was appropriate because that "the focus of the Missal report was to determine the accounting irregularities of New Century, … not … the claims that the borrowers may have." *Id*. at 52 (A-194).

pre-bankruptcy litigation docket involving consumer claims against the Debtor. *See, e.g., Grimes v. New Century Mortg. Corp.*, 340 F.3d 1007 (9th Cir. 2003) (bait-and-switch allegation by borrower who was promised mortgage "in the range of 6% to 8%" but ended up with adjustable rate starting at 10.95%); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874 (S.D. Ohio 2002) (multi-plaintiff action alleging that borrowers were targeted because of their race for dangerous and inappropriate loan products); *James v. New Century Mortg. Corp.*, No. 04-194, 2006 U.S. Dist. LEXIS 79314 (E.D. La. 2006) (victim of Hurricane Katrina who was offered "grant" to reconstruct her home ended up with high-rate mortgage); *Bonner v. Home123 Corp.*, No. 05-cv-146, 2006 U.S. Dist. LEXIS 37922 (N.D. Ind. May 25, 2006) (action against one of the New Century companies under Fair Credit Reporting Act for ordering consumer reports about potential customers who had not given required permission); *Phillips v. New Century Fin. Corp.*, No. 05-692, 2006 U.S. Dist. LEXIS 18498 (C.D. Cal. Mar. 1, 2006) (class action alleging company's salespeople were obtaining consumer reports without the knowledge or consent of the homeowners being targeted).

The Debtor here treated those plaintiffs and the other borrowers who had initiated suit as "known" creditors—along with some unidentified other borrowers who, according to Attorney Uhland, had simply written to the company. But the Appellees, who had obtained a mortgage within the year preceding the bankruptcy filing, were treated as "unknown" creditors merely because they had not yet taken any legal action. Plainly, under *Mullane*, Appellees were just as much "known" as the borrowers who had initiated suit, insofar as their name and address were known to the Debtor. The fact that they had not yet come forward, well within the limit of any relevant statute of limitation, did not make them "unknown."

3. Any ongoing relationship which might itself present notice opportunities

For borrowers like Appellees, who had an open mortgage obligation and, therefore, were obtaining a monthly statement from whoever was servicing their New Century-originated loan, this already existing mailing presented an obvious, opportunity for providing them notice. *Mullane*, 339 U.S. at 318 (finding that the periodic distribution checks mailed to trust beneficiaries provided the trustee an opportunity to communicate about the legal proceeding affecting their rights). *See In re Residential Capital, LLC*, No. 12-12020, Order Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof (Bankr. S.D.N.Y. filed Aug. 29, 2012, Doc. 1309) (in a claims bar date order entered in a chapter 11 involving a different mortgage lender, requiring the debtor to provide actual mail notice to "individual borrowers whose loans are serviced by the Debtors"). By the time the Debtor had filed for bankruptcy protection it was not itself "servicing" its mortgage origination portfolio, but it certainly knew or could easily find out who was. That monthly mailing—the use of which the Debtor could undoubtedly have accessed at a cost lower than sending a separate mailing—presented an overlooked opportunity for informing borrowers of their time-limited right to assert claims relating to the origination of their mortgages.[9]

4. Any geographic concentration of the debtor's sales

There was evidence in the record below that 40 percent of New Century's originations were concentrated in three states: California, Florida and Texas. Hring. Tr. 165 (A-307). For that reason, the borrowers were reasonably objecting to the Debtor's singular use of the Wall Street Journal for the publication notice.[10] For those potential claimants who, like the tort claimants in *Chemetron*, were not reasonably ascertainable, publication notice would have been sufficient. However, given the geographic concentration of the Debtor's business, it was not reasonable to rely solely on the Wall Street Journal for delivering such notice.

5. The extent to which consumer classes were actively organized or represented in the case

[9] Using the monthly statement system would have reached most but not all of the potential claimants here. For those consumers who had already managed to refinance out of their New Century loan, most would still be living in the property so a mailing to them at the address on their loan documents would also be effective. Even for those borrowers who were foreclosed upon, a mailing to the property would reach those still there or with postal forwarding orders.

[10] Appellees reside in Florida, one of those states with a high concentration of New Century borrowers.

A final factor that should be relevant to ensuring that potential consumer claimants are informed about bankruptcies and relevant deadlines is the extent to which they are collectively organized and/or represented. One mechanism that has been used in other lender cases is the formation of a special committee to represent borrowers.[11] *See, e.g, In re First Alliance Mortg. Co.*, 471 F.3d 977 (9th Cir. 2006). Such a committee could focus on obtaining a special classification for such claims in a liquidation plan and on proposing a special claims process and notice plan for borrowers. The record does not indicate any consideration of using the special committee mechanism here.

Another mechanism available for possible use is the class action device, *Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012), which has been used in other subprime lender cases to consolidate and streamline consideration of borrower claims. *See, e.g., United Cos. Financial Corp.*, 276 B.R. 368 (Bankr. Del. 2002). Even in the absence of any pre-bankruptcy class certification orders, the existence of pending putative class actions may provide useful information regarding the nature and ascertainability of potential consumer claimants. *See, e.g. In re Residential Capital, LLC* (requiring mail notice not only to borrowers whose loans were being serviced by the debtor but also to "all known members of potential

[11] *See* 11 U.S.C. § 1103(a) (empowering United States Trustee to appoint unsecured creditors committee and such "additional committees of creditors . . . as [he] deems appropriate").

class action lawsuits"). The record here does not reveal any consideration by the debtor of existing class litigation in its development of a notice plan for potential consumer claimants.

The absence in this case of any collective action by borrowers made individualized notice "reasonably calculated, under the circumstances, to apprise [Debtor's borrowers] of the pendency of the [bankruptcy] and afford them an opportunity to present their objections," *Mullane*, 339 U.S. at 314, even more essential to ensure that potential claimants received more than a "mere gesture" of notice, *id*. at 315, that their legal rights might be diminished by a failure to take timely action to file a proof of claim.

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE UNDER FED.R.APP.P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains no more than 7,000 words. It contains 5,826 words, including the footnotes from the beginning of page 1 to “Respectfully submitted” on the last page. It complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). It was prepared using Microsoft Word 2010; Times New Roman; 14-point typeface.

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CERTIFICATION UNDER LOCAL RULE 31.1(C)

I, Irv Ackelsberg, hereby certify that (a) I ran a scan of my computer and of this file using Windows Defender and Norton and no virus or malware was found and (b) the text of the electronic brief is identical to the text in the papers copies.

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CERTIFICATE OF SERVICE

Irv Ackelsberg, Counsel for Amici Curiae, certifies that on this date I served a copy of the foregoing Amicus Curiae Brief on all parties by way of ECF transmission and, in addition, by regular mail, addressed as follows:

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