Case No. 2001-~~TS~~CA-01911

Supreme Court of Mississippi

WASHINGTON MUTUAL FINANCE GROUP, LLC,

Defendant and Appellant,

vs.

GRETA BLACKMON, LOUISE BLUE, et al.,

Plaintiffs and Appellees.

Appellant's Opening Brief

per order of 11/27/02

Appeal from a Judgment of the Circuit Court
of Holmes County, Mississippi (No. 98-0026).

The Honorable Jannie Lewis, Circuit Judge

OF COUNSEL:

JAN T. CHILTON
SEVERSON & WERSON
A Professional Corporation
One Embarcadero Center, 26th Floor
San Francisco, CA 94111-3600
Telephone: (415) 398-3344

JESS H. DICKINSON (MSBN [redacted])
KATHARINE M. SAMSON (MSBN [redacted])
JOHNNY L. NELMS (MSBN [redacted])
DICKINSON, ROS, SAMSON & NELMS, PLLC
2301 14th Street, Suite 600
Gulfport, MS 39501
Telephone (228) 863-8861
Facsimile (228) 863-8871

Attorneys for Defendant and Appellant
Washington Mutual Finance Group, LLC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeal may evaluate possible disqualification or recusal.

1. Defendant and appellant: Washington Mutual Finance Group, LLC.

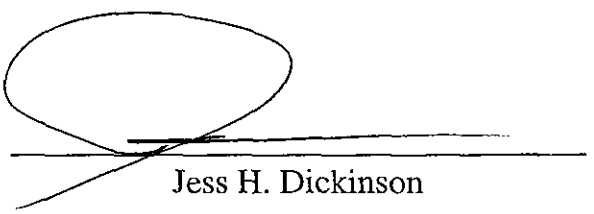
2. Plaintiffs and appellees: Greta Blackmon, Louise Blue, Glenda Chambers, Annie Clark, Willie Earl Conway, Lillie Harris, Robin Horton, Lindsey Horton, Lorene Jackson, Lizzie Lofton, Jessie McClung, Willie McGee, Lou Waters, Earnest Claiborne, Tina Cross, Alfred Garrett, Percy Mason, Kenneth Hill, Zenester Moore, Mattie Miles, Patrishane Gordon, Janie Mason, and Doris Garrett.

3. Attorneys for defendant and appellant Washington Mutual Finance Group, LLC: Jess H. Dickinson, J. Henry Ros, Katharine M. Samson, Johnny Nelms, Angelique White, Dickinson, Ros, Wooten & Samson, PLLC; Jan T. Chilton, Severson & Werson, and Mary Brown.

4. Attorneys for plaintiffs and appellees: Edward Blackmon, Jr., Trent Walker, Blackmon & Blackmon, Richard Freese, Leslie McFall, Langston, Sweet & Freese, P.A., Tim K. Goss, Mikel J. Bowers, Capshaw, Goss & Bowers, Don Brock, Jr., Whittington, Brock, Swayze & Dale, and Michael Hartung.

5. Circuit Court Judge: Hon. Jannie Lewis.

6. Washington Mutual Finance Group, LLC is a lower tier subsidiary of corporations owned by Washington Mutual, Inc., a corporation whose shares are publicly traded.



Jess H. Dickinson

Attorney of record for Defendant and Appellant Washington Mutual Finance Group, LLC

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I

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in submitting plaintiffs' breach of fiduciary duty claim to the jury and in denying defendant's rule 50 and 59 motions since there was no substantial evidence from which a reasonable jury could conclude that defendant owed plaintiffs a fiduciary duty?

2. Did the trial court err in submitting plaintiffs' fraud claim to the jury and in denying defendant's rule 50 and 59 motions as there was no substantial evidence that (a) defendant owed plaintiffs a duty of disclosure, (b) any misrepresentation or non-disclosure was material, and (c) any plaintiff reasonably relied to his or her detriment on any misrepresentation or non-disclosure?

3. Did the trial court err in submitting plaintiffs' claim for breach of the duty of good faith and fair dealing to the jury and in denying defendant's rule 50 and 59 motions because plaintiffs presented no evidence of any breach in defendant's performance or enforcement of their contracts, but—at most—only in the contracts' negotiation or formation, to which the duty of good faith does not apply?

4. Did the trial court err in submitting plaintiffs' negligence claim to the jury and in denying defendant's rule 50 and 59 motions since defendant owed plaintiffs no duty of care with respect to the conduct plaintiffs claimed was negligent?

5. Did the trial court err in failing to strike plaintiffs' claims regarding loan transactions consummated more than three years before the filing of the complaint since

plaintiffs presented no substantial evidence of the elements needed to invoke delayed discovery tolling?

6. Did the trial court err in permitting the jury to award compensatory and punitive damages against defendant for wrongs committed by Easy Finance Co. and other non-parties before they assigned plaintiffs' loans or retail installment contracts to defendant?

7. Must the award of compensatory damages for emotional distress be reversed because (a) there is no substantial evidence that defendant intentionally committed conduct that evokes outrage or revulsion, (b) there is no substantial evidence that plaintiffs suffered emotional harm of sufficient severity to be compensable, (c) the damage awards are excessive?

8. Must the punitive damage awards be reversed because (a) City did not commit conduct evincing malice, fraud or gross disregard of plaintiffs' rights, or (b) the awards are excessive?

9. Did the trial court err in giving the jury plaintiffs' proposed instructions P-10, P-11, P-12, and P-17?

10. Did the trial court err in admitting, over defendant's objection, a previously undisclosed expert opinion regarding defendant's net worth?

II

STATEMENT OF THE CASE

This is one of many mass actions recently filed against small loan companies in Mississippi. As the first to proceed to judgment and appeal, it has importance beyond the confines of this case and beyond the enormity of the $53 million judgment entered here. It will set the trend for the dozens of similar cases already on file and many others which may be filed if this one succeeds.

A. Proceedings Below

On January 30, 1998, Jessie Allen and 51 other plaintiffs filed this suit against City Finance Company,[1] alleging a wide variety of wrongs City purportedly committed in extending loans and selling credit insurance to plaintiffs in the decade from 1986 to 1996. 1 C.T. 13-33, 52, 99, 104. Later, plaintiffs filed a first amended complaint which added two causes of action. 3 C.T. 406-409. City answered denying the complaint's allegations and asserting a variety of affirmative defenses including the statute of limitations. 3 C.T. 410-420.

Five plaintiffs were dismissed voluntarily a year after the case was filed. 2 C.T. 280. The trial court later ordered 11 other plaintiffs to arbitration, based on the alternative dispute resolution agreements they had entered into with City. 4 C.T. 515-516.

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[1] City Finance Company merged with another lender; Washington Mutual Finance Group, LLC was the surviving corporation in that merger and succeeded to City's rights and liabilities. 13 R.T. 155:10-156:5. For simplicity, this brief refers to the defendant as "City" throughout, whatever its proper corporate name was at the time.

During trial, seven additional plaintiffs were voluntarily dismissed when City was unable to find any documents reflecting transactions with them. 19 R.T. 1177:10-1180:12.

In August 2000, City filed six motions for partial summary judgment. 4 & 5 C.T. 581-614. The motions sought judgment (a) on all claims arising from transactions which were entered into more than three years before the action was commenced or were entered into with other lenders or sellers and later assigned to City, 4 & 5 C.T. 581-597, (b) on several plaintiffs' claims for emotional distress based on their deposition testimony showing they had suffered no distress, 5 C.T. 598-601, (c) on plaintiffs' claim for breach of fiduciary duty, 5 C.T. 602-605, and (d) on plaintiffs' claims for improper late fees and excessive interest, 5 C.T. 606-614. In December 2000, the trial court entered its order, granting City's motions as to excessive interest and as to the emotional distress claims of six plaintiffs,[2] and denying the motions in all other respects. 7 C.T. 982-983.

What remained of the case proceeded to a jury trial on May 29, 2001. 12 R.T. 123. During jury selection, City moved unsuccessfully to strike from the venire potential jurors who exhibited actual prejudice against small loan companies like City.[3] City also moved unsuccessfully for a mistrial on the ground that plaintiffs had systematically and inten-

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[2] The six plaintiffs were Carolyn Baker Hemphill, Annie Clark, Louis Blue, Doris Garrett, Debra Blackmon, and Della Robertson. 5 C.T. 697.

[3] Potential jurors Larry Chambers and Robert Buck testified they thought small loan companies were "bad." When the trial court refused to strike these potential jurors for cause, City had to exercise two of its peremptory challenges to remove them from the jury.

tionally exercised their peremptory challenges to remove white persons from the jury on account of their race.

At the conclusion of plaintiffs' case, City moved for non-suit on many of plaintiffs' claims. 19 R.T. 1188:23 et seq. The motions were granted in part[4] and denied in part[5]. City then presented its evidence on plaintiffs' remaining claims. 20 R.T. 1288 et seq. With the trial court's permission, 22 R.T. 1524:11-20, City renewed its denied non-suit motions as motions for directed verdict after plaintiffs had presented their rebuttal

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[4] Non-suit was granted as to plaintiffs' claims of (a) excessive interest rates, 20 R.T. 1218:10-14, (b) excessive closing costs, 20 R.T., 1221:2-4, (c) padding loan amounts to be able to charge higher interest rates, 20 R.T. 1223:10-18, 1 C.T. 22 ¶66, (d) selling credit insurance to borrowers ineligible for that insurance, 20 R.T. 1224:8-23, (e) damage to credit and reputation, 20 R.T. 1228:8-1229:2, (f) physical pain and suffering, 20 R.T. 1229:16-18, (g) concealed use of the Rule of 78s, 20 R.T. 1237:1-7, (h) excessive points, 20 R.T. 1238:9-11, (i) civil conspiracy, 20 R.T. 1284:11-13, (j) wrongful collection practices, 20 R.T. 1284:24-26, and (k) discount interest, 20 R.T. 1286:10-1286:22; 1 C.T. 20 ¶55. Nonsuit was also granted on Janie Mason's emotion distress claim. 20 R.T. 1281:26-1284:10. Plaintiffs also agreed that they had presented no evidence to support their claims of asset-based lending, improper prepayment penalties, improper filing and docket fees, and setting up a secret default reserve, 20 R.T. 1219:24-25, 1221:14-16 1223:19-22, and that they did not contend credit insurance in itself was a wrongful or bad product or that the premiums charged for it were excessive, 20 R.T. 1221:17-28. Plaintiffs also withdrew their breach of contract claim. 20 R.T. 1224:24-1225:1.

[5] Non-suit was denied as to plaintiffs' claims (a) for punitive damages, 20 R.T. 1193:7-12, (b) arising from check-in-the-mail loans, 20 R.T. 1197:8-13, (c) regarding City's affiliate's reinsurance arrangements with credit insurers, 20 R.T. 1238:12-1240:6, (d) arising from transactions consummated before January 1995, 20 R.T. 1252:17-22, 1272:27-1273:4, 1274:5-1275:2, (e) for breach of fiduciary duty, 20 R.T., 1253:5-1255:12, 1271:12-16, 1273:12-14, 1275:3-23, (f) for emotional distress on behalf of all plaintiffs other than Patrishane Gordon, Kenneth Hill, Janie Mason, Mattie Miles, and Zenester Moore, 20 R.T., 1252:23-1253:4, 1270:29-1271:4, 1273:5-11, 1278:22-1284:10, 22 R.T. 1534:3-11, 1535:9-22, (g) for "flipping," 20 R.T. 1260:15-19, 1272:6-13, 1273:15-25, 1275:24-1276:28, (h) for "packing," 20 R.T. 1261:17-19, 1272:14-20,
(Fn. cont'd)

evidence, 22 R.T. 1531:26-1534:1. The directed verdict motions were denied. 22 R.T. 1536:10-11.

The day the case was submitted to the jury on liability and compensatory damages, a plaintiff said to juror Martha Jo Killebrew, as she walked into court, "all we want is money" and "don't forget about us." 22 R.T. 1613:18-1614:17. Plaintiffs moved to have Ms. Killebrew dismissed as a juror. 22 R.T. 1619:28-1620:4. Defendant moved for a mistrial. 22 R.T. 1621:15-1622:8. The trial judge then examined each juror in chambers with no parties present. 22 & 23 R.T. 1626-1643. Thereafter, the trial court denied both the motion to remove Ms. Killebrew and the mistrial motion, finding that, despite the inappropriate remarks made to her, Ms. Killebrew could be fair and render a fair decision, and that none of the other jurors had heard any similar remarks. 23 R.T. 1644:3-27, 1646:15-1647:10.

The jury was then instructed, closing arguments were presented, and the case was submitted to the jury on liability and compensatory damages. 23 R.T. 1647-1734. By a vote of 10 to 2, the jury returned verdicts in favor of each plaintiff and against City, awarding compensatory damages in the amounts indicated in Appendix 1. 23 R.T. 1735:11-1738:4, 1738:23-1739:26; 9 C.T. 1320-1327.

The trial court then heard argument and ruled that sufficient evidence had been introduced to permit submission of plaintiffs' punitive damage claims to the jury. 23 R.T.

(Fn. cont'd)
1273:26-1274:4, 1277:6-29, 1287:9-14, (i) for negligence, fraud and negligent misrepresentation, 20 R.T. 1284:14-20.

1743:13-29. Argument and evidence were then presented on those claims. 23 R.T. 1758 et seq. Over City's objection that her opinion had not properly been disclosed before trial, 23 R.T. 1744:5-1746:25, 1749:25-1750:8, 24 R.T. 1799:25-1800:9, plaintiff's expert, Glenda Glover, was permitted to testify regarding City's net worth, 23 R.T. 1753:15-24, 1783:3-1784:4, 24 R.T. 1795:17-1796:27, 1800:17-18, and the exhibits supporting her testimony were admitted in evidence, 24 R.T. 1800:20-1801:16. Following renewed instructions and closing argument, the case was resubmitted to the jury on plaintiffs' punitive damage claims. 24 R.T. 1813:29-1814:12. By a vote of 10 to 2, the jury returned verdicts awarding each plaintiff $3 million in punitive damages against City. 24 R.T. 1814:20-1817:15; 10 C.T. 1347-1352.

On June 12, 2001, judgment was entered in plaintiffs' favor based on the jury's verdicts. 10 C.T. 1353-1354. On June 22, 2001, City filed its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or to alter or amend judgment. 10 C.T. 1355-1392. On November 1, 2001, the trial court entered its order denying City's JNOV and new trial motions, and granting its motion to alter judgment in a single respect; namely, reducing the compensatory and punitive damage awards to the six plaintiffs who presented no proof of emotional distress damages.[6] 11 C.T. 1549-1550. On November 5, 2001, plaintiffs accepted the trial court's reduction of those damage awards. 11 C.T. 1551-1554.

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[6] The six were Doris Garrett, Patrishane Gordon, Kenneth Hill, Janie Mason, Mattie Miles, and Zenester Moore. 11 C.T. 1550. Appendix 1 lists the original and reduced compensatory and punitive damages awards for each of these plaintiffs.

On November 29, 2001, City filed its notice of appeal from the judgment and the order on its post-trial motions. 11 C.T. 1571-1573.

B. Statement Of Facts

Despite the lengthy record, this case is really quite simple. Plaintiffs claim damage from only two allegedly wrongful practices that they pejoratively dub "flipping" and "packing"—that is, refinancing rather than extending a second loan when a borrower wants another advance or to cure a delinquency, and selling plaintiffs credit insurance they now say they did not need and were not orally told was optional.

Plaintiffs claims rest largely on their supposed recollections and testimony about the 5-10 minute loan closings that occurred as much as a decade ago. Their testimony that they were not informed of important information about their loans and credit insurance was contradicted by the loan documents they signed as well as the testimony of City's branch manager—a woman who closed similar loans every day for decades and who testified the key terms of the loan and credit insurance, including the type(s) of insurance purchased and its optional nature, were always discussed with borrowers at loan closings. 15 R.T. 506:25-507:23.

Unable to present the evidence needed to their packing and flipping claims, plaintiffs spent much of the lengthy trial decrying City's other practices and asserted failings—none of which, even in plaintiffs' own estimation, caused them any harm. As they caused no injury, none of those other practices or alleged failings are relevant to damages assessed or to this appeal.

To shorten the brief and avoid distraction, the following section summarizes only the evidence relevant to plaintiffs' claims about refinancing and credit insurance. Also, only one plaintiff's evidence regarding those claims is described in detail. Significant facts about the other plaintiffs' claims are presented in chart form in Appendix 1, and a summary of the irrelevant evidence about other practices is set forth in Appendix 3.

1. Glenda Chambers' Relevant Evidence

Ms. Chambers is 39 years old and a high school graduate. 16 R.T. 620:25-621:14. She worked hard to support her four children and a niece. 16 R.T. 621:20-622:17, 624:13-626:14, 629:20-630:21. She has borrowed from three other small loan companies. Having been through the loan process several times, she is familiar with how it works. 16 R.T. 658:14-28.

Ms. Chambers bought a car on credit from Ruston Auto. Her contract was assigned to City. She paid it off. 16 R.T. 636:2-9, 641:11-19. Later, City sent her a "check in the mail" which she cashed and successfully repaid. 16 R.T. 636:8-13, 638:25-640:1, 641:14-23; 2 C.T. Ex. 208.

In 1995, City sent Ms. Chambers a second "check in the mail" which she also cashed. 16 R.T. 640:2-641:7; 2 C.T. Ex. 196. In 1997, she fell delinquent in repaying that debt. 16 R.T. 628:11-629:10, 636:14-24, 641:11-23. After receiving several collection calls from City, 16 R.T. 630:25-631:4, 636:14-637:8, 644:16-645:1, Ms. Chambers

contacted City's branch manager, Dolly Andrews, about lowering her payments.[7] 16 R.T. 631:5-12. Other than the collection calls, this was the first time Ms. Chambers had spoken with City's employees. 16 R.T. 641:8-23.

Ms. Andrews was "real nice" and said it would be best if Ms. Chambers refinanced her loan. A refinance loan would bring her existing debt to City current, not adversely affect her credit rating, and lower her payments somewhat.[8] 16 R.T. 631:5-12, 637:9-23, 643:1-21. The refinance loan also increased the total amount Ms. Chambers owed City. That fact was apparent on the face of the loan documents but was not discussed orally. 16 R.T. 649:14-26; 2 C.T. Ex. 185, 187.

As an accommodation to Ms. Chambers, who did not wish to be away from work for long, Ms. Andrews kept the loan closing brief. 16 R.T. 631:13-632:1, 632:10-27, 664:27-665:2. The necessary credit information was taken by telephone[9] and Ms. Cham-

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[7] By then, Ms. Chambers was so far delinquent that City's branch office had requested authority from the regional supervisor to file a collection action against her. However, the supervisor disapproved the request, writing that the branch should work to refinance the debt instead. 13 R.T. 264:14-266:1; 2 C.T. Ex. 199.

[8] As Ms. Chambers admitted, the refinance loan did exactly what Ms. Andrews said it would: it brought Ms. Chambers' debt current, restored her credit rating, lowered her payments, though only slightly, and even gave $100 or so in cash. 16 R.T. 660:13-661:14. Moreover, though the refinance loan increased her outstanding balance and might, in the long run have been more expensive than a second, concurrent loan, Ms. Chambers admitted that, at the time, she could not have afforded payments on a second loan and that she had fallen so far delinquent on her existing loan she could not otherwise bring it current. 16 R.T. 637:27-638:8, 644:6-645:1, 662:4-27.

[9] Among other things, Ms. Chambers was asked to identify personal property she pledged as collateral for the loan. R.T. 632:4-21, 646:5-21. Ms. Chambers said that, contrary to City's policy, she was not asked for her estimate of the collateral's value. Some-

(Fn. cont'd)

bers was called to come in only when all the documents were ready for her to sign. 16 R.T. 631:13-632:1, 632:10-27, 634:14-29, 645:29-464:6, 650:29-651:21.

When Ms. Chambers arrived to sign, Ms. Andrews reviewed the principal terms of the refinance loan with her orally, while Ms. Chambers read along on the loan documents. 16 R.T. 632:28-633:20, 633:29-634:29, 651:14-28, 675:1-15. Purporting to recall the rushed loan closing four years later, Ms. Chambers said she noted that the loan documents showed she was buying credit life insurance, though Ms. Andrews had not mentioned that fact.[10] 16 R.T. 634:14-29, 653:16-24, 664:22-665:2, 672:26-672:10.

Ms. Chambers admitted she did not read her loan documents' clear disclosures that credit life insurance was optional. 16 R.T. 670:4-18. Her Federal Disclosure Statement, for example, said:

> Credit Life Insurance and Credit Disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

16 R.T. 669:21-670:3; 2 C.T. Ex. 187.

(Fn. cont'd)
one else had supplied those inaccurate figures. R.T. 646:22-647:4. Ms. Chambers did not purchase credit property insurance, however. *See* n. 11 below.

[10] As already mentioned, Ms. Andrews testified she always mentioned the type(s) of insurance purchased in reviewing key loan terms with a borrower at the loan closing. 15 R.T. 506:25-507:23. At the time, Ms. Chambers had her own $5,000 or $10,000 life insurance policy, but she said she was not asked about it, and she did not volunteer that information. 16 R.T. 635:13-636:1, 649:27-650:15, 656:24-657:19, 671:27-672:12. Ms. Andrews did ask if Ms. Chambers had homeowners insurance; Ms. Chambers said she did. 12 R.T. 672:4-12.

The same document also stated: "Neither Creditor nor Insurer is your broker, agent, or fiduciary for obtaining insurance. You understand that the Creditor and its insurance affiliate anticipate profits from the sale of credit insurance." 16 R.T. 669:1-16; 2 C.T. Ex. 187. Ms. Chambers said she read neither of these disclosures. 16 R.T. 670:4-14.

Instead, Ms. Chambers simply assumed she had to buy credit life insurance because she had not been asked whether she wanted it and because Ms. Andrews said nothing about it.[11] 16 R.T. 649:27-650:15, 653:16-24, 673:5-15. Ms. Chambers asked no question about the insurance, though she said she would not have bought it if given the choice. 16 R.T. 685:12-20.

Nor did Ms. Chambers read the other loan documents she signed—either at the closing or later, though she was given copies to take home.[12] 16 R.T. 633:15-16, 634:14-29, 650:22-28. She did not, she said, because she was in a hurry, trusted Ms. Andrews and figured that she had explained everything Ms. Chambers really needed to know. 16 R.T. 634:14-29, 651:29-652:17.

At the time she got her refinance loan, Ms. Chambers felt "real good" about it because it brought her current and stopped the collection calls. 16 R.T. 652:18-653:5. The refinance loan got Ms. Chambers "caught back up" so she did not have to worry

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[11] City did *not* sell Ms. Chambers credit disability insurance or property insurance on her collateral. 16 R.T. 647:14-18, 665:17-21, 671:20-26, 673:16-24; 2 C.T. Ex. 186, 187.

[12] City did not prevent Ms. Chambers from reading the loan documents or insist that she do so. 16 R.T. 666:6-14, 670:4-14.

about back payments, it lowered her monthly payments, and it enabled her to keep a good credit rating. 16 R.T. 660:20-661:14. In other words, the refinance loan accomplished just what Ms. Andrews told Ms. Chambers it would, affording Ms. Chambers benefits she could not have achieved without the loan. 16 R.T. 631:5-12, 661:15-662:8. Now, however, Ms. Chambers says she feels "terrible about it" and "like I have been taken advantage of." She "trusted [Ms. Andrews] to be honest with me" but has now discovered that Ms. Andrews signed her up for insurance she did not need,[13] when, at the time, she needed the money for other purposes. 16 R.T. 653:6-654:29.

Ms. Chambers said that it was not until the end of 1997 that she first found out about what she is suing City for. Then, her sister told her City was getting sued. So she took her loan papers to a lawyer who reviewed them and told her she had grounds to sue. 16 R.T. 656:3-19.

2. City Tries To Maximize Its Sales

City sells small loans, mostly secured by personal property, and credit life, disability and property insurance. 13 R.T. 217:21-218:10. City strives to maximize its profits by increasing the amount of its outstanding loans and selling insurance. 13 R.T. 164:23-165:12, 235:27-236:11, 14 R.T. 300:25-301:11.

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[13] Ms. Chambers never asked Ms. Andrews for advice; she just figured Ms. Andrews would do everything in her best interest to help her lower her monthly payments. 16 R.T. 670:23-671:1.

City tries to lend each existing customer[14] "the maximum amount of money for which he or she is qualified,"[15] even if the customer initially requests less. 13 R.T. 193:3-15, 234:24-235:2, 235:27-236:11, 290:2-7, 291:1-6, 14 R.T. 299:16-300:8, 15 R.T. 479:10-25, 498:24-499:11, 20 R.T. 1289:25-1290:27; 12 C.T. Ex. 1699.

By mail, telephone and in person, City regularly solicits customers with unused borrowing capacity to take additional loans. 14 R.T. 295:25-296:28, 298:8-25, 391:4-10, 15 R.T. 479:26-480:21, 526:21-527:24; 13 C.T. Ex. 1819-1821, 1828. City sends former customers who have repaid all prior loans, so-called "checks in the mail," which the customer may cash, to get money easily and create a new loan.[16] 15 R.T. 549:26-550:12, 16 R.T. 659:8-18, 1291:3-29; 2 C.T. Ex. 156-157, 178.

All branch personnel are involved in sales efforts. 14 R.T. 391:4-26. Part of the branch manager's job is to motivate the other branch employees to sell loans and insurance, a subject discussed a weekly meetings of the branch personnel. 14 R.T. 384:4-385:12.

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[14] City obtains new customers through advertising and referrals and by acquiring retail credit or small loan accounts from retailers and other small loan companies. 10 C.T. Ex. 1424. For example, City purchased a portfolio of loans from Easy Finance in a bulk sale. 14 R.T. 321:15-22, 322:5-17, 20 R.T. 1292:1-1293:14; 20 C.T. Ex. 2872-2879.

[15] For each customer, City set a credit limit or maximum loanable amount based on the customer's type of job, amount of income, credit history, amount of other outstanding debt and similar factors. 15 R.T. 474:13-476:21; 520:19-524:14; 10 C.T. Ex. 1446-1447 §214.4.

[16] "Check in the mail" loans never refinance pre-existing debt, nor is credit insurance sold in connection with these loans. 20 R.T. 1291:3-29.

City's management sets budgets or quotas of new loan volume which the branch is to try to meet each month.[17] 13 R.T. 174:16-175:12, 14 R.T. 386:4-20, 387:3-18. As branch employees know, the branch manager's annual bonus depends, in part, on the branch meeting its sales quota. Also, employees may be considered for raises if they and the branch perform well. 13 R.T. 167:17-26, 14 R.T. 313:25-314:27, 394:15-395:16.

3. Refinancing Existing Loans

In accordance with its policy of allowing a customer only one personal-property-secured loan at one time, City usually makes a single loan refinancing any existing debt if the customer wants to borrow more money. 15 R.T. 471:9-472:8, 473:17-25; 10 C.T. Ex. 1436 §202.1.

Refinancing is more profitable for City than keeping an existing loan intact and giving the same customer a new loan.[18] 14 R.T. 296:20-28, 473:26-474:9. City does not disclose this fact to borrowers. 14 R.T. 294:11-16, 300:9-21, 301:12-20.

A refinanced loan may be offered as a way of bringing a delinquent loan current, thus avoiding default and a collection action. 13 R.T. 289:18-291:6; 10 C.T. Ex. 1441-

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[17] The quota is based on total loan amount and thus includes insurance premiums as well as other sums borrowed. 14 R.T. 389:13-28.

[18] Interest on City's loans is pre-computed and added to the loan balance at the beginning of the loan. 14 R.T. 292:20-293:13. When a loan is refinanced, unearned interest and unearned insurance premiums are rebated using the Rule of 78s. 15 R.T. 514:10-27. The combination of these factors makes refinancing more profitable for City than making a second loan. 14 R.T. 293:26-294:13, 15 R.T. 473:26-474:9. (City also charges "points" or prepaid finance charges, but they are not increased by a refinance since City charges them only on the new credit extended. 15 R.T. 294:21-295:4.) Thus,
(Fn. cont'd)

1442 §209. City offers a refinance loan to a delinquent borrower if it determines that the borrower has the ability to repay but has experienced temporary problems in doing so. *Id.* It is up to the borrower to decide whether a refinance loan is in his or best interest.

4. Selling Credit Insurance

As a matter of company policy, City never requires a customer to buy credit insurance as a condition of obtaining a loan.[19] 13 R.T. 173:13-28, 230:2-11, 14 R.T. 343:10-20, 427:10-23; 10 C.T. Ex. 1453, 1454 §§302, 303. Customers are not forced to buy credit insurance, nor are they treated any differently if they decline credit insurance. 14 R.T. 419:10-25, 427:3-23; 15 R.T. 535:29-536:14. The loan papers clearly disclose this fact (see pp. 11-12 above), and many plaintiffs obtained loans without buying some or all of the credit insurance City offered for sale. *E.g.,* 16 R.T. 647:14-18, 665:17-21, 671:20-26, 2 C.T. Ex. 186, 187.

It is against City's corporate policy to place credit insurance on a loan without first discussing with the customer, either initially or at the loan closing, whether the customer wishes to buy insurance. 13 R.T. 167:27-168:2, 172:4-173:6. It is City's policy and practice for its employees to review with the customer at the closing what credit

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(Fn. cont'd)
City has an economic incentive to refinance rather than make separate new loans. 14 R.T. 293:26-294:13, 295:5-20.

[19] On some loans secured by cars or other items of unusually high value, City may require the customer to maintain hazard insurance during the life of the loan. 13 R.T. 229:11-27. When insurance is required for those items, the customer is told he or she may buy it wherever he or she chooses, not just from City. 14 R.T. 347:16-28.

insurance, if any, the customer is purchasing. 14 R.T. 327:15-328:8; 15 R.T. 506:25-507:23.

City does try to sell credit life, disability and property insurance to each qualified borrower.[20] 13 R.T. 165:1-12, 185:18-186:21, 187:23-28, 232:19-233:18, 280:15-24. To do so, City employees are supposed to inform borrowers about the insurance, stress its advantages, and try to convince the borrower to buy insurance. 13 R.T. 165:13-166:7, 167:27-168:19, 169:27-171:1, 187:29-189:1, 223:23-225:2, 14 R.T. 419:16-421:27. However, all but three of the plaintiffs said City employees never mentioned credit insurance to them at all.[21] *E.g.*, 16 R.T. 649:27-650:15; for other plaintiffs' testimony see Appendix 1.

City does not try to determine whether the credit insurance is "suitable" for the borrower. It leaves that decision to the borrower. 13 R.T. 185:18-28, 186:22-27, 192:13-26, 223:5-22, 226:17-27, 227:4-21, 20 R.T. 1290:4-27. City does not ask borrowers whether they already have other life, disability or property insurance. 13 R.T. 187:11-15, 222:1-223:4. Even if he or she already has a policy, a borrower may wish to purchase

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[20] A borrower is "qualified" for credit life insurance if he or she is not older than 65 and for credit disability insurance if not currently disabled. 13 R.T. 233:3-16, 280:15-20. A borrower is "qualified" for credit property insurance if he or she has pledged personal property, other than a car, as security for the loan. 13 R.T. 282:10-20.

[21] The three exceptions were Lizzie Lofton, Lou Waters, and Kenneth Hill. They each testified they were told they had to buy credit insurance in order to obtain the loans they wanted. 17 R.T. 879:15-29, 880:22-24, 18 R.T. 897:22-8898:6, 972:3-19, 973:18-974:8, 19 R.T. 1117:2-16.

credit insurance to obtain additional benefits in the event of death, disability or property damage.[22] 20 R.T. 1293:24-1295:25, 1297:23-1298:12; 8 C.T. Ex. 1160.

City requires personal property collateral for most of its loans, although it rarely forecloses on the collateral to collect unpaid loans. 13 R.T. 217:21-218:10, 282:29-283:3, 288:2-289:8. City accepts most consumer goods as defined by the FTC as collateral for a loan. 13 R.T. 218:11-28, 230:14-25, 281:21-282:5, 15 R.T. 468:25-469:13. City's employees are supposed to list the collateral and its value, as given by the customer, on a schedule attached to the loan documents. 13 R.T. 218:26-219:12, 266:26-267:25, 14 R.T. 407:9-29. In most instances, the borrower also signed the schedule listing the collateral and its stated value. *E.g.*, 1 C.T. Ex. 12; 2 C.T. Ex. 228-229, 270; 3 C.T. Ex. 356. Nevertheless, some plaintiffs asserted that their loan documents showed exaggerated values for their collateral, values they had not supplied. *E.g.*, 16 R.T.646:11-647:26, 18 R.T. 952:20-954:13.

Property insurance premiums are based on the property's estimated value and increase as the property's value increases, up to a maximum when property value equals loan amount. Coverage cannot exceed loan amount, so the premium stops rising at that point.[23] 13 R.T. 285:1-14, 286:15-28, 14 R.T. 409:24-410:7. City does not tell its

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[22] For example, homeowners' policies often have deductibles or other limitations on coverage that would prevent a borrower from recovering for loss to property pledged as collateral on a City loan. 20 R.T. 1297:16-1298:12; 8 C.T. Ex. 1160.

[23] City cannot sell property insurance for more than the value of the collateral or the total loan amount, whichever is lower. 13 R.T. 220:5-12.

borrowers this fact or attempt to verify the collateral values given by borrowers.[24] 13 R.T. 219:13-26, 228:8-21. It trusts them to state the value of their property honestly. 15 R.T. 463:25-464:3.

Plaintiffs dealt with City's Greenwood branch which was more successful—selling credit life insurance with 74% of its loans—than many other City branches, some of which sold credit life insurance as little as 26% of the time. 14 R.T. 301:26-302:7, 306:14-308:1, 316:15-318:5; 13 C.T. Ex. 1823-1826, 1829-1832.

III

SUMMARY OF ARGUMENT

The judgment in this case is riddled with error and must be reversed. To begin with, plaintiffs failed to prove at least one essential element of each of their four causes of action. Their breach of fiduciary duty claim faltered for lack of evidence that City owed plaintiffs such a duty. Lenders generally owe borrowers no fiduciary duty. The general rule applied to this case as there was nothing unusual about plaintiffs' loans and City exercised no overmastering influence upon plaintiffs.

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[24] To verify property values would take too long (and cost too much) for the small loans City makes. 13 R.T. 285:15-19. On the few occasions when City forecloses on personal property collateral, it often finds that the collateral is actually worth substantially less than the amount the customer estimated it was worth. 13 R.T. 284:4-22. For that reason, City's loan manual says that in deciding whether to extend a loan, its employees should be careful not to rely too heavily on collateral value. 14 R.T. 349:10-350:26; 10 C.T. Ex. 1437 §204. City's witnesses testified that City allows customers to state high values for their collateral not to drive up property insurance premiums, as plaintiffs insinuated, but to show a greater likelihood the customer will repay the loan rather than face foreclosure on highly valued property. 13 R.T. 285:1-9.

Plaintiffs failed to prove fraud as well. They failed to prove that City owed them any duty of disclosure; hence, their many accusations of nondisclosure led nowhere. Furthermore, the alleged nondisclosures were neither material nor relied upon reasonably or justifiably, as all material terms were fully disclosed to plaintiffs in writing.

City fully performed its contracts with plaintiffs, giving them exactly what they bargained for: loans and insurance. Plaintiffs' real complaint lay not in City's performance or enforcement of the contracts, but in its negotiation of them—acts which the covenant of good faith and fair dealing does not govern.

Plaintiffs' negligence claim failed because plaintiffs did not prove facts showing that City owed them a duty of care in negotiating with plaintiffs for loans or credit insurance. Sellers of goods and services generally owe customers no duty of care to select "suitable" products for them or to disclose all information about the goods or services that the customer may later deem important but fails to ask about at the time.

Plaintiffs' claims failed for other reasons as well. Plaintiffs' claims arose from transactions which occurred as long ago as 1986, yet were all governed by a three-year statute of limitations. Plaintiffs could not rely on delayed discovery to toll that the statutory time bar because they did not show they could not reasonably have discovered their claim earlier or that they acted with reasonable diligence to discover their claims from available sources of information—such as their copies of the loan documents. Hence, their claims arising from loans made before January 1995 were barred by the statute of limitations.

Many of plaintiffs' claims based on wrongs allegedly committed by Easy Finance Co. and other third parties that later assigned the loan or contract to City. As assignee, City took the loans and contracts subject to any *defenses* which plaintiffs might have asserted against the assignor, but City could not be held liable for damages plaintiffs sustained by reason of the assignor's fraud, breach of fiduciary duty, or other wrong. The trial court erroneously allowed the jury to award both compensatory and punitive damages against City for the assignors' alleged wrongs.

Even if plaintiffs had established liability, reversal is required for error in the emotional distress and punitive damage awards which constitute well over 99.9% of the judgment. Damages could not properly be awarded for emotional distress in this case because the evidence did not establish either that City's conduct evokes "outrage" or "revulsion" or that plaintiffs suffered emotional harm of sufficient severity to support a damage award. Punitive damages were improperly awarded for much the same reason: City's conduct was not "extreme" or "egregious" and did not evince malice, fraud or gross disregard of plaintiffs' rights. Further, if permissible at all in this case, the amounts awarded for emotional distress and punitive damages were clearly excessive under all applicable standards, including the excessive fines and due process clauses of the federal constitution.

Finally, reversal is also required because of the trial court's error in instructing the jury and in admitting a previously undisclosed expert opinion on a critical subject.

IV

ARGUMENT

A. City Breached No Fiduciary Duty

1. City Owed Its Borrowers No Fiduciary Duty

"A fiduciary duty must exist before a breach of the duty can occur." *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79, 83 (1991). Plaintiffs failed to clear this first hurdle, introducing no substantial evidence, and certainly no "clear and convincing evidence," that City owed them any fiduciary duty. *Peoples Bank & Trust Co. v. Cermack*, 658 So.2d 1352, 1358 (Miss. 1995). The trial court erred in denying City's motion for non-suit on plaintiffs' breach of fiduciary duty claim, in instructing the jury on that theory, and in denying City's post-trial motions for judgment notwithstanding the verdict and for a new trial.[25]

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[25] This Court reviews *de novo* the trial court's rulings on the motions for non-suit and judgment notwithstanding the verdict as well as its decision to instruct the jury on this claim, asking, as the trial court should have, whether, if all credible evidence in plaintiffs' favor is accepted as true and all reasonable inferences are drawn in their favor, there is "evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions ...." *C & C Trucking Co. v. Smith*, 612 So.2d 1092, 1098 (Miss. 1992). Further, this Court reviews the evidence to see whether there is sufficient evidence for a reasonable jury to find by "clear and convincing evidence" that a fiduciary duty existed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-55, 106 S.Ct. 2505, 2512-13, 91 L.Ed.2d 202 (1986). The Court reviews the trial court's denial of City's new trial motion for abuse of discretion. *C & C Trucking Co.*, 612 So.2d at 1099.

a) A Lender Is Not A Fiduciary

"[G]enerally the relationship between a debtor and a creditor is a contractual one and 'not a confidential or fiduciary one.' " *Hopewell Enterprises, Inc. v. Trustmark Nat'l Bank*, 680 So.2d 812, 816 (1996); *Cermack*, 658 So.2d at 1358. A contrary rule would improperly "serve to impose fiduciary concepts upon what is in many cases, a standard contractual relationship between parties with fundamentally different interests." *Merchants & Planters Bank v. Williamson*, 691 So.2d 398, 404 (1997).

A lender is a borrower's fiduciary only when the lender steps outside its accustomed role and when, based on past dealings with the lender, the borrower justifiably relies upon the lender's advice. *Id.*; *First American Nat'l Bank v. Mitchell*, 359 So.2d 1376, 1379 (Miss. 1978). As this Court said in *Lowery,* 592 So.2d at 83, "[a] fiduciary duty may arise ... where there appears 'on the one side an overmastering influence or, on the other, weakness, dependence or trust, *justifiably* reposed.' "[26] (Italics added.)

To show that a fiduciary relationship arose in the context of an ordinary commercial or consumer transaction, the plaintiff must prove by clear and convincing evidence that "(1) the parties have 'shared goals' in the other's commercial activity, (2) one party

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[26] In *American Bankers Ins. Co. v. Wells*, 819 So.2d 1196, 1205-06 (Miss. 2001), an appeal from a judgment after a jury trial, this Court reaffirmed that neither the lender nor the credit insurer owes the borrower a fiduciary duty. *American Bankers Ins. Co. v. Alexander*, 818 So.2d 1073, 1085 (Miss. 2001) marks no departure from that settled principle. It cites and follows *Lowery*. It holds only that plaintiffs had sufficiently *alleged* both their own weakness, dependence and justifiably reposed trust as well as defendant's overmastering influence so that the case could not be disposed of on a motion to dismiss, but required development of the facts at trial.

justifiably places trust or confidence in the integrity and fidelity of the other, ***and*** (3) the trusted party has effective control over the other party." *Cermack*, 658 So.2d at 1359 (emphasis added).

Whether considered singly or in combination, the four types of evidence, which plaintiffs introduced in this case, fell far short of meeting these exacting standards, showing only the trust ordinarily reposed in the other party to a contract, not any over-mastering influence exercised by City over its borrowers. *See Strong v. First Family Financial Serv., Inc.*, 202 F.Supp.2d 536, 541-42 (S.D. Miss. 2002) (finding no fiduciary duty under virtually identical circumstances).

b) Blind Trust Does Not Impose A Fiduciary Duty

Plaintiffs' first type of evidence was their testimony that they "trusted" the City employees they dealt with and for that reason did not read the loan documents they signed and were given. To quote one of them:

> ... I figured that she [City's employee] had explained to me all of the stuff that was necessary for me to know. And I didn't [read the loan documents], and I trusted her to be honest with me about everything. I never thought that she would have something in there that I didn't need to be paying, especially when I was struggling trying to pay the first bill. I thought she was trying to make it easier for me to pay. ...

R.T. 651:28-652:5.[27]

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[27] For similar testimony by other plaintiffs, *see* 16 R.T. 688:5-13 (Greta Blackmon); 710:11-27 (Ernest Claiborne); 736:22-737:27 (Alfred Garrett); 17 R.T. 776:16-19, 777:29-778:6 (Jessie McClung); 867:21-868:18 (Tina Cross); 882:24-28 (Lizzie Lofton); 18 R.T. 920:3-6 (Lorene Jackson); 976:16-977:3 (Lou Waters); 19 R.T. 1118:14-23 (Kenneth Hill).

This evidence fails to support plaintiffs' fiduciary duty claim for two reasons. First, " '[w]hile one normally does not enter into a contract with another unless he trusts and has confidence in him, contract and debt amount to a business and not a fiduciary relationship.' " *Cermack*, 658 So.2d at 1358. This sort of trust in another contracting party does not create a fiduciary relationship.[28]

Second, any higher level of trust must be "justifiably reposed." *Lowery*, 592 So.2d at 83. One cannot impose a fiduciary duty upon another simply by neglecting to look out for one's own interest and blindly trusting another. Plaintiffs showed no justification for reposing any unusual or heightened "trust" in City.

Ms. Chambers, for example, said she "trusted" City's employees even though she had never met or spoken with them before, apart from receiving their insistent collection calls. 16 R.T. 628:20-26, 641:8-10.[29] She "trusted" them despite the fact that the loan papers she signed clearly disclosed that City was *not* her agent or fiduciary. 16 R.T. 669:5-16; 2 C.T. Ex. 187. The other plaintiffs told similar stories, "trusting" City no more—or more justifiably—than any other business with which they dealt.[30] Indeed, in

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[28] "The mere fact that [plaintiff] 'trusted' [defendant] does not make [defendant] his fiduciary." *James, Hereford & McClelland, Inc. v. Powell*, 198 Ga.App. 604, 606, 402 S.E.2d 348, 350-51 (1991); *accord: Williams v. Dresser Industries*, 120 F.3d 1163, 1168 (11th Cir. 1997); *Dover v. Burns*, 186 Ga. 19, 26, 196 S.E. 785, 789 (1938).

[29] Similarly, Earnest Claiborne said he trusted a City employee with whom he had not previously dealt and who never indicated she would be acting in his best interest. 16 R.T. 722:8-27.

[30] Lorene Jackson did not read the loan papers when she got loans from two other finance companies because she "trusted" them as she "trusted" City. 18 R.T. 931:3-16. Greta Blackmon would sign a contract with any bank without reading it first because she

(Fn. cont'd)

many instances, plaintiffs said they trusted City despite the fact that, as in Ms. Chambers' case, City had clearly adopted an adversarial stance in attempting to collect their delinquent loans. *E.g.*, 16 R.T. 628:20-26, 630:27-631:4; 17 R.T. 828:23-832:10.

Nor, according to plaintiffs' own testimony, was there anything about the loan closings or plaintiffs' dealings with City personnel which could reasonably have led them to believe City was acting in their interests, not its own. They said the loan closings were rushed, 5-10 minute affairs, in which they were just asked to "sign here, sign here, and sign here" with no explanation of the loan terms. *E.g.*, 15 R.T. 558:26-561:6; 16 R.T. 680:25-681:15, 715:10-15, 807:10-19, 817:1-4, 854:9-855:17.

Blind, unjustifiable trust is insufficient to impose a fiduciary duty on the other party to a contract. A Mississippi federal court has recently so held, rejecting plaintiffs' "packing" and "flipping" claims against another small lender:

> [A]lthough all the plaintiffs proclaim that the "trusted" the [lender's] employee with whom they dealt ... a review of the evidence relating to their respective transactions including plaintiffs' deposition testimony, reflects no history of prior dealings or other basis for justifiable reliance. The only basis any of them has assigned for allegedly trusting [the employees] is the fact that he/she was the lender (or the lender's agent) and hence was more knowledgeable than plaintiffs

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(Fn. cont'd)
would trust them. 16 R.T. 696:16-18. Jessie McClung did not read the loan papers when he obtained a loan from Easy Finance. 17 R.T. 784:18-785:28. Kenneth Hill "trusted" the Otasco air conditioning salesman, as well as City, with which he never dealt. 19 R.T. 1116:22-1117:12. Tina Cross, a business administration major in college, "trusted" someone she could identify only as "a white male" salesman at Unclaimed Freight; she never dealt with any City employee. 17 R.T. 867:21-868:6, 871:18-21, 872:4-873:12. Earnest Claiborne "trusted" Ms. Andrews, a City employee, though he had never met her before and she never told him she would act in his best interest. 16 R.T. 722:14-723:1.

> about the details of the transaction; and yet under the [Mississippi] authorities referenced, that plainly is not a sufficient predicate for a fiduciary or confidential relationship, which requires not merely trust, but trust *justifiably* reposed.

Harrison v. Commercial Credit Corp., 2002 WL 548281 at *5 (S.D. Miss. 2002); *accord: Williams v. Norwest Financial Alabama, Inc.*, 723 So.2d 97, 104 (Ala. App. 1998).

c) No Fiduciary Duty Arises Just Because A Business Wishes Its Customers To Trust Its Employees

Plaintiffs' second type of evidence was testimony[31] and a snippet from a policy manual[32] showing that City wanted borrowers to "trust" or rely on its employees.

Like plaintiffs' own testimony that they "trusted" City's employees, this evidence fails to meet plaintiffs' burden. Every company wants its employees to be trusted. Otherwise, it would be difficult to enter into contracts or conduct any business. But that common degree of trust and confidence—reposed in the other party to every contract—is not enough to create a fiduciary relationship; else, every business would be its customers' keeper. *Cermack,* 658 So.2d at 1358 and cases cited at p. 25 n. 28 above.

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[31] 13 R.T. 233:19-234:23, 15 R.T. 517:1-10.

[32] The policy manual said: "Financial services are as old as civilization itself. From earliest times there is a record of lending, the extension of credit by one person who has faith in some other person's ability to repay. In fact, the term 'credit' is derived from the Latin verb meaning belief. Belief, faith, trust, all these words describe what we [City] mean by credit as well." 12 C.T. Ex. 1696; 13 R.T. 162:20-163:15, 20 R.T. 1289:3-20; *see also* 15 R.T. 491:1-20, 516:25-517:19. Plaintiffs' claimed this showed City wanted its customers to have "belief, faith and trust" in City. 12 R.T. 136:22-29. City's witness testified, however, that it meant that City had faith in its borrowers' ability and willingness to repay their loans. 20 R.T. 1289:3-20.

d) A Phrase In An Unseen Policy Manual Does Not Create A Fiduciary Relationship

Plaintiffs' third category of evidence was another section of City's training manual which said:

> Our lending philosophy is to maximize the loanable worth of each and every customer, that is, to lend to each customer the maximum amount of money for which he or she is qualified, keeping in mind that all transactions must be in the customer's and the company's best interest.

12 C.T. Ex. 1699; 13 R.T. 193:4-195:9.

By the last six quoted words, plaintiffs claim, City voluntarily assumed the burden of deciding for its customers whether specific loan and credit insurance terms were in their best interest. 12 R.T. 136:22-29, 13 R.T. 194:18-195:24.

Whatever the manual's correct meaning,[33] it could not impose such a duty on City in this case for a simple reason: Neither plaintiffs nor the City employees with whom they dealt were aware of it. No plaintiff ever saw the manual; it was not given to customers. 13 R.T. 196:20-197:1. No employee at City's Greenwood branch ever saw the manual either.[34]

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[33] City's witnesses testified that plaintiffs misinterpreted City's manual and policy, that City never undertook to decide for customers what was in their best interest, but merely endeavored to give them the information they needed to make that decision for themselves. 13 R.T. 192:13-26, 193:26-195:24, 15 R.T. 500:2-501:4, 20 R.T. 1290:4-27.

[34] The manual was prepared for use in a 10-day orientation program for branch managers. 15 R.T. 489:16-27. The Greenwood branch's manager testified she had never seen it. 15 R.T. 489:28-490:11. She had never gone to any orientation or training program. 15 R.T. 490:9-11. The only training she had received was on-the-job training. 14 R.T. 368:16-369:25, 372:11-18, 374:10-20, 375:26-376:8, 377:17-26, 380:10-27, 382:12-17, (Fn. cont'd)

Customers were not told City would offer them only services it thought in their best interest, nor did City's employees actually try to make such decisions for customers. City employees simply offered its loans and credit insurance, and accepted the customer's decision as to whether they wanted those services. 15 R.T. 500:2-501:4.

To create a fiduciary relationship, something must create a justifiable expectation on the plaintiff's part that the defendant was protecting him or her from a particular risk and lull the plaintiff into a false sense of security so he or she does not protect his or her own interest as he or she might ordinarily have done. *Deramus v. Jackson Nat'l Life Ins. Co.*, 92 F.3d 274, 278 (5th Cir. 1996). A single phrase in an unsigned, unseen policy manual that no one knew about or followed cannot create such an expectation or lull anyone into not protecting his or her own interest. Hence, the manual cannot create a fiduciary duty.

e) A Business' Greater Sophistication And Financial Resources Do Not Make It A Fiduciary

Plaintiffs' final type of evidence was testimony from City's witness acknowledging that City is more sophisticated and knowledgeable about loans and insurance than its customers and that City is more financially sound than they are. 13 R.T. 197:10-198:6.

(Fn. cont'd)
397:16-398:13. All the other employees at the Greenwood office received training the same way. 14 R.T. 397:16-398:13. Since none of the other Greenwood branch employees was a manager, none would have attended the 10-day orientation course or been given the manual.

These commonplace realities cannot convert a normal commercial transaction into a fiduciary relationship; else, every business and lender would be its customers' trustee,[35] and there would be nothing left of the rule that "generally, the relationship between a debtor and a creditor is a contractual one and 'not a confidential or fiduciary one.' " *Hopewell Enterprises, Inc.*, 680 So.2d at 816. "[T]he fact that he/she was the lender (or the lender's agent) and hence was more knowledgeable than plaintiff about the details of the transaction ... is not a sufficient predicate for a fiduciary or confidential relationship." *Harrison*, 2002 WL 548281 at *5.

f) The Missing Element: Overmastering Influence

Plaintiffs' proof of fiduciary duty failed for another reason as well: "the critical element that [City] exercised dominion or overmastering control over [plaintiffs] is lacking." *Braidfoot v. William Carey College*, 793 So.2d 642, 651 (Miss. App. 2000); *accord: First Security Bank v. Banberry Development Corp.*, 786 P.2d 1326, 1333-34 (Utah 1990).

On this point, the evidence is undisputed. Each plaintiff decided for him- or herself whether and when to obtain a loan. Each signed loan papers making it clear that they could choose whether to buy credit insurance. *E.g.*, 16 R.T. 669:21-670:3; 2 C.T. Ex. 187. In fact, plaintiffs exercised that choice and took control of their own affairs, not asking

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[35] City did not differ from any other business in being more sophisticated in its line of business and more financially sound than its customers. Grocery stores are more sophisticated about food than consumers; Sears knows more about lawn mowers. Almost by definition any lender is more financially secure than a borrower; the one has money to lend; the other needs it. *See* 13 R.T. 198:3-6.

City to act for them, buying some but not all insurance City offered and accepting its loan solicitations only when they needed money. 16 R.T. 665:8-21, 671:16-26, 673:16-24, 17 R.T. 748:27-750:10. They did not even ask City for advice, let alone request it to run their affairs for them. 16 R.T. 670:23-671:1.

City sought to influence plaintiffs' choice. It tried hard to sell them loans and credit insurance. But a salesman's pitch does not make him a fiduciary.

> As lenders ... Defendants are not—and did not hold themselves out to be—caregivers for their customers. In the commercial setting, the classic warning, *caveat emptor*, reminds the buyer the seller is not necessarily his friend, much less his guardian or trustee.

Knapp v. American General Finance, Inc., 111 F.Supp.2d 758, 766 (S.D. W.Va. 2000).

The evidence showed only a normal lending relationship between plaintiffs and City. There was no evidence sufficient to show that City owed plaintiffs a fiduciary duty, and certainly not enough to establish such a duty by clear and convincing evidence. The trial court erred in denying City's motions for non-suit and judgment notwithstanding the verdict on this ground and in instructing the jury on plaintiffs' breach of fiduciary duty theory. Insofar as they rest on that theory, the verdict and judgment must be reversed.

B. Plaintiffs Failed To Prove Their Fraud Claim

Like a blunderbuss, plaintiffs' fraud claim sprayed pellets in all directions, and like many shots from that inaccurate firearm, none of plaintiffs' found their mark. Each failed

one or more of the nine elements required to prove fraud under Mississippi law,[36] as shown below. The trial court erred in submitting this claim to the jury and denying City's post-trial motions concerning it.[37]

1. City Owed Plaintiffs No Duty Of Disclosure

Unable to produce evidence of false affirmative statements,[38] plaintiffs based their fraud claim almost entirely on supposed non-disclosures.[39]

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[36] To prevail on a fraud claim in this state, the plaintiff must prove (a) a representation, (b) its falsity, (c) its materiality, (d) the speaker's knowledge of its falsity or ignorance of its truth, (e) his intent that it would be acted on by the hearer in the manner reasonably contemplated, (f) the hearer's ignorance of its falsity, (g) reliance on its truth, (h) right to rely thereon, and (i) consequent and proximate injury. *General Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 269-270 (Miss. 1999).

[37] The appropriate standards for reviewing these trial court rulings are explained above. *See* p. 22, n. 25. Like breach of fiduciary duty, fact that fraud must be proved by clear and convincing evidence. *Boling v. A-1 Detective & Patrol Serv., Inc.*, 659 So.2d 586, 590 (Miss. 1995).

[38] Lou Waters, Kenneth Hill, and Lizzie Lofton did testify they were told they had to buy credit insurance in order to obtain the loans they wanted. 17 R.T. 879:15-29, 880:22-24, 18 R.T. 897:22-8898:6, 972:3-19, 973:18-974:8, 19 R.T. 1117:2-16. This is the only affirmative misrepresentation of which plaintiffs presented any evidence. It cannot form the basis of a viable fraud claim because plaintiffs could not have reasonably relied upon it as it was contradicted by the clear written terms of the loan documents they signed, and copies of which each was given. See pp. 37-38 below.

[39] Despite the statement in City's Federal Disclosure Statements that "You understand that the Creditor and its insurance affiliate anticipate profits from the sale of credit insurance," plaintiffs claimed City did not tell them, among other things, that (a) its affiliates received 96% of the credit insurance premiums plaintiffs paid through reinsurance agreements between the affiliates and the credit insurance companies; (b) it received commissions on the credit insurance it sold; (c) its branches were rewarded based on their profitability; (d) City tried to lend to each customer up to his maximum loanable amount; (e) refinance loans were more profitable for City than separate new loans, (f) credit insurance was optional, not mandatory; and (g) customers could (and sometimes already had) insured the same interest by other means. 11 C.T. 1519-1521.

To establish fraud by non-disclosure, plaintiffs had to prove that City had a legal duty to tell them material facts it knew. *Guastella v. Wardell*, 198 So.2d 227, 230 (Miss. 1967). This, plaintiffs failed to do. *See Harrison*, 2002 WL 548281 at *6.

As shown above, pp. 22-31, plaintiffs failed to show City owed them a fiduciary duty, absent which "no obligation to disclose arises when information is not requested." *Williams*, 723 So.2d at 104; *Amerson v. Gardner*, 681 So.2d 570, 574 (Ala. 1996). Nor did plaintiffs show that City had made any untrue or misleading "previous representations" which required correction by further disclosure. *Compare Guastella*, 198 So.2d at 230; Rest.2d Torts, §551(2)(b), (c). Quite to the contrary, City gave plaintiffs written disclosures that were true and correct and covered the essential terms of the loans and credit insurance plaintiffs obtained in full compliance with state and federal law. *E.g.*, 2 C.T. Ex. 187; 15 U.S.C. §1601 et seq.; 12 C.F.R. part 226.

Having given plaintiffs comprehensive *written* disclosures, City had no duty to repeat those disclosures *orally*. *Williams*, 723 So.2d at 102; *Robinson v. JMIC Life Ins. Co.*, 697 So.2d 461, 462 (Ala. 1997). Otherwise, each consumer transaction would be burdened by a lengthy, time-consuming oral recitation of terms and disclosures, greatly inconveniencing consumers and increasing costs.

City had no legal duty to disclose the fact that it or an affiliate profited from sale of the services it offered.

> We decline to recognize a common law duty that would require the seller of a good or service, absent special circumstances, to reveal to its purchaser a detailed breakdown of

> how the seller derived the sales price of the good or service, including the amount of profit to be earned on the sale.

Ex parte Ford Motor Credit Co., 717 So.2d 781, 787 (Ala. 1997).[40]

City likewise owed no duty to disclose other terms it could offer customers that might be more advantageous to them. A seller need not tell customers they might obtain a better deal from it or other sellers if they bargain harder. *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 898, 900 (S.D. Miss. 1998).

There was also no duty to disclose City's internal procedures or policies, such trying to lend as much as borrowers could repay or rewarding branches for meeting sales goals. As this Court held in *Baymon*, 732 So.2d at 270, once the creditor fully disclosed the nature of insurance coverage and its price, it owed the customer "no duty to disclose its internal policies relating to [contract] enforcement." *Accord: Ex parte Ford Motor Credit Co.*, 717 So.2d at 787; *see also Miller v. Pawn World, Inc.*, 705 So.2d 467, 469 (Ala. App. 1997) (no duty to explain pawn process orally to customer).

Finally, there was no evidence to support plaintiffs claim of fraudulent concealment. To prove such a claim, the plaintiff must demonstrate that the defendant "took some action, affirmative in nature, which was designed or intended to prevent and which

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[40] *Accord*: *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 749 (7th Cir. 2001); *Langford v. Rite Aid of Alabama, Inc.*, 231 F.3d 1308, 1313 (11th Cir. 2000); *Bonilla v. Volvo Car Corp.*, 150 F.3d 62, 71 (1st Cir. 1998); *Blon v. Bank One, Akron, N.A.*, 35 Ohio St.3d 98, 102, 519 N.E.2d 363, 368 (1988); *see also California Service Station & Auto. Repair Ass'n v. American Home Assur. Co.*, 62 Cal.App.4th 1166, 1173, 73 Cal.Rptr.2d 182 (1998). In *Baymon*, 732 So.2d at 270, this Court followed the same reasoning in holding that a creditor owed customers no duty to disclose that it purchased insurance from its subsidiary.

did prevent the discovery of the facts giving rise to the fraud claim." *Rankin v. Brokman*, 502 So.2d 644, 646 (Miss. 1987). There was no evidence City took any steps to prevent plaintiffs from learning all relevant facts about their loan and credit insurance transactions. To the contrary, as in *Rankin*, the face of the written loan documents disclosed all the essential loan terms. *Id.*; *see also Turner v. Terry,* 799 So.2d 25, 37 (Miss. 2001). City showed plaintiffs those documents before signing and gave them copies afterwards. *E.g.*, 16 R.T. 650:22-28, 674:29-675:15. There was no evidence of concealment.

2. The Alleged Nondisclosures Were Not Material

To prove fraud, the claimed misrepresentation or non-disclosure must be shown to be "material." *Baymon*, 732 So.2d at 270. That is, it must concern a matter which a reasonable person would think important in entering into the transaction or deciding on a course of action with respect to it. Rest.2d Torts, §538(2); *In re Mercer*, 246 F.3d 391, 416 (5th Cir. 2001) (en banc); *see Nash Miss. Valley Motor Co. v. Childress*, 156 Miss. 157, 125 So. 708, 709-10 (1930).

Many of the non-disclosures plaintiffs alleged were not "material" in this sense. A reasonable customer would not have found them important in obtaining a loan or buying credit insurance from City. For example, a reasonable customer would not deem it important to know that City tried to lend its customers as much as they could afford to repay. That fact would not make the offered loan terms any more or less desirable, nor the offered loan funds any more or less needed.

The same is true with respect to the fact City rewarded its branches for meeting sales goals, the amount of the commission City earned, and the reinsurance premium its

affiliate earned on credit insurance sold. A reasonable customer would already realize—from reading the written loan disclosures and from common experience—that City, like any other retailer, gave its sales staff incentives to sell and earned a profit on their sales of loans and insurance. So long as the total price was disclosed, as it was here, disclosure of the amount of retail markup or other profit City earned on the deal was not material. A customer can comparison shop knowing total price; knowing profit margin in addition does not aid in doing so.

Most of the rest of the non-disclosures plaintiffs claimed suffered from the same failing: They were immaterial, not important to a reasonable person in obtaining a loan or buying credit insurance.

3. Plaintiffs Could Not Rely On Nondisclosures Or Oral Misrepresentations When The Pertinent Terms Were Fully And Correctly Disclosed In Writing

To prove fraud, plaintiffs also had to show their own actual and justifiable reliance upon the alleged representation or omission. "[T]he plaintiff must demonstrate his reliance on the statement and his right to do so." *Crockett v. CitiFinancial, Inc.*, 192 F. Supp.2d 648, 653 (S.D. Miss. 2002).[41] The evidence refuted this necessary element.

Plaintiffs never tried to prove they actually relied on most of the non-disclosures they asserted. None of them testified that they would not have taken a loan or bought

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[41] *Accord: Braidfoot,*793 So.2d at 654 ("[N]ot every spoken untruth is actionable as a fraud. It is only if that untruth was designed to, and did, in fact, induce the hearer to change his position in justifiable reliance on the untruth that it becomes potentially actionable."); *McGee v. Swarek*, 733 So.2d 308, 312 (Miss. App. 1998) (same).

credit insurance if only they had been told that City's affiliate reinsured the credit insurer and was paid a large portion of the premium, that City tried to lend them up to the maximum loanable amount, or that separate loans might in the long run be cheaper than refinancing an existing loan.[42]

Plaintiffs also failed to prove that any actual reliance was reasonable or justifiable. In particular, they could not justifiably rely on any misstatement or failure to state orally that credit insurance was optional. The written documents clearly disclosed that "Credit Life Insurance and Credit Disability Insurance are not required to obtain credit ...." *E.g.*, 16 R.T. 669:21-670:22; 2 C.T. Ex. 187.

When the contract's terms are made available in writing, "any reliance on alleged misrepresentations of those terms is, as a matter of law, unreasonable." *Howard v. Citi-Financial, Inc.*, 195 F.Supp.2d 811, 820 (S.D. Miss. 2002).[43] This is so because knowledge of a contract's written terms is imputed to the party who signs it even if he or she did not read the document. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington*

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[42] To the contrary, some plaintiffs testified that even if a separate loan were cheaper in the long run, they could not afford the added payments it would require in the short run. *E.g.*, 16 R.T. 668:22-29 (Glenda Chambers), 18 R.T. 984:2-26 (Lou Waters). Others never refinanced. *E.g.*, 17 R.T. 887:10-888:9 (Lizzie Lofton). The supposedly hidden advantage of separate loans as opposed to refinances was immaterial to both groups and something they could not have relied upon.

[43] *Accord: Strong*, 202 F.Supp.2d at 543-44; *Harrison*, 2002 WL 548281 at *3; *Carter v. Union Security Life Ins. Co.*, 148 F.Supp.2d 734, 737 (S.D. Miss. 2001); *Watson v. First Commonwealth Life Ins. Co.*, 686 F.Supp. 153, 155 (S.D. Miss. 1988); *Williams*, 723 So.2d at 102-03; *see also Gulf Nat'l Bank v. Wallace*, 394 So.2d 864, 866-67 (Miss. 1980).

Lumber & Supply Co., 584 So.2d 1254, 1257 (Miss. 1991).[44] This rule applies even to the blind or illiterate, since they can protect themselves by having another person read the written documents to them. *Dunn v. Dunn*, 786 So.2d 1045, 1050 (Miss. 2001).[45]

Because the written documents here disclosed the material terms of the transactions, including the fact that credit insurance was optional, plaintiffs could not reasonably rely on any failure to disclose the same fact orally, or even on a contrary oral misrepresentation. *Howard*, 195 F.Supp.2d at 820; *Williams*, 723 So.2d at 102-03.

Plaintiffs thus failed to prove actual and justifiable reliance as well as duty to disclose and materiality. For that reason, the trial court erred in denying City's motions for non-suit and judgment notwithstanding the verdict on the fraud claim and in instructing the jury on fraud. Insofar as they rest on that theory, the verdict and judgment must be reversed.

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[44] *Accord: Dockins v. Allred*, 755 So.2d 389, 394 (Miss. 1994); *Hicks v. Bridges*, 580 So.2d 743, 746 (Miss. 1991); *Ivy v. Grenada Bank*, 401 So.2d 1302, 1303 (Miss. 1981); *Koenig v. Calcote*, 199 Miss. 435, 438, 25 So.2d 763, 764 (Miss. 1946); *Howard*, 195 F.Supp.2d at 820; *see Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss 1987).

[45] *Accord*: *Howard*, 195 F.Supp.2d at 822; *Johnnie's Homes, Inc. v. Holt*, 790 So.2d 956, 960-61 (Ala. 2001); *Hutchins v. TNT/Reddaway Truck Line, Inc.*, 939 F.Supp. 721, 724 (N.D. Cal. 1996); *Randas v. YMCA of Metropolitan Los Angeles*, 17 Cal.App.4th 158, 163, 21 Cal.Rptr.2d 245 (1993); *Statewide Realty Co. v. Fidelity Management & Research Co.*, 259 N.J. Super 59, 73, 611 A.2d 158, 165 (Law Div. 1992); *Horn v. Cooke*, 118 Mich.App. 740, 747, 325 N.W.2d 558, 561-62 (1982); *Gaskin v. Stumm Handel GmbH*, 390 F.Supp. 361, 366 (S.D. N.Y. 1975); *Richardson v. McGee*, 193 Tenn. 500, 505, 246 S.W.2d 572, 574 (1952); *Sponseller v. Kimball*, 246 Mich. 255, 260, 224 N.W. 359 (1929); *Austin v. Brooklyn Cooperage Co.*, 285 S.W.2d 1015, 1017 (Mo. 1926); *Chicago, St. P. M. & O. Ry. Co. v. Belliwith*, 83 F. 437, 440 (8th Cir. 1897).

C. City Did Not Breach The Implied Covenant Of Good Faith

1. Plaintiffs Did Not Claim Or Prove City Committed Any Wrong In Performance Or Enforcement Of Plaintiffs' Contracts

"All contracts contain an implied covenant of good faith and fair dealing in *performance and enforcement.*" *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992) (emphasis added). Plaintiffs proved no breach of that covenant; no wrong committed in performance or enforcement of their loan contracts.

City fully performed; it paid plaintiffs the promised loan funds and bought the credit insurance they ordered. Plaintiffs never contended, let alone proved, otherwise. *See Braidfoot*, 793 So.2d at 651. Nor did plaintiffs claim or prove that City had in any manner injured their right to enjoy full benefit of their loans and credit insurance—the contractual benefits promised them.[46] *See Cothern v. Vickers, Inc.*, 759 So.2d 1241, 1248 (Miss. 2000).

Nor did City hinder or prevent plaintiffs from performing the loan agreements on their part. To the contrary, the evidence showed that City made every effort to remind

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[46] Jessie McClung and Percy Mason testified that they had not submitted claims on their credit disability insurance when they might have been eligible for benefits under those policies. 17 R.T. 774:24-775:19, 777:1-6, 856:14-20. Plaintiffs claimed City was to blame because it had not disclosed to McClung and Mason "that they had purchased the insurance or its terms." 11 C.T. 1515. Both McClung and Mason received copies of their loan documents, which included a clear disclosure that they had purchased credit disability insurance. 17 R.T. 650:22-28, 17 R.T. 785:4-786:29, 845:18-848:15; 5 C.T. Ex. 621, 622, 623, 627, 629, 633, 635. McClung and Mason are legally presumed to

(Fn. cont'd)

plaintiffs to repay their loans as agreed. When they could not do so, City often accommodated them by refinancing the debt or making other arrangements to facilitate their performance.

Evidence of any bad faith in enforcement of the loan contracts was equally lacking. While a couple plaintiffs complained about City's efforts to enforce their individual loans, plaintiffs neither claimed nor proved that those efforts were not contractually authorized remedies.[47] Plaintiffs were non-suited on any damages flowing from any overzealous or improper collection activity.[48] 20 R.T. 1284:24-26.

2. The Implied Covenant Of Good Faith Does Not Apply To Negotiation And Formation Of A Contract

Here, as in *Howard*, 195 F.Supp.2d at 824, "the breaches alleged go to the formation of the contract, rather than the performance and enforcement of the contract." Plaintiffs claim they were not given information they needed to decide whether to obtain loans or buy credit insurance.

These assertions cannot support a claim for breach of the implied covenant of good faith. "[T]he implied duty of good faith and fair dealing does not extend to the formation

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(Fn. cont'd)
know the contents of their written agreements. *Howard*, 195 F.Supp.2d at 820. The implied covenant of good faith did not require City to explain those terms orally as well.

[47] "[I]n performing a contract, the parties are not prevented from 'protecting their respective economic interests' or from asserting their rights in the event of default." *Baymon*, 732 So.2d at 269 (citations omitted); *Williamson*, 691 So.2d at 405.

[48] Janie Mason, who said she suffered physical and emotional distress from repossession of her car, was ruled not to be entitled to recover any damages as a result. 17 R.T. 829:10-831:23; 20 R.T. 1281:26-1284:10.

of the contract. 'The implied covenant of good faith concerns the performance of the contract, not the negotiation of terms leading to the agreement.' " *Hill v. Galaxy Telecom, L.P.*, 176 F.Supp.2d 636, 642 (N.D. Miss. 2001).[49]

Since plaintiffs claimed, and tried to prove, only wrongs in the *formation* of their agreements, they failed to establish any breach of the implied covenant of good faith. The trial court erred in denying City's motions for non-suit and judgment notwithstanding the verdict on this ground and in instructing the jury on plaintiffs' breach of implied covenant theory.[50] Insofar as they rest on that theory, the verdict and judgment must be reversed.

D. Plaintiffs Did Not Prove Their Negligence Claim

"To succeed on a claim for negligence, the plaintiff must prove duty, breach, causation and injury." *Donald v. Amoco Production Co.*, 735 So.2d 161, 174 (Miss. 1999). "Duty and breach of duty are essential to finding negligence and must be demonstrated first." *Id.*; *Gant v. Maness*, 786 So.2d 401, 405 (Miss. 2001).

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[49] *Accord: Wells,* 819 So.2d at 1207; *Cothern*, 759 So.2d at 1248; *Cenac*, 609 So.2d at 1272; *Howard,* 195 F.Supp.2d at 824; *Baldwin*, 32 F.Supp.2d at 899; *4-County Elec. Power Ass'n v. Tennessee Valley Authority*, 930 F.Supp. 1132, 1142 (S.D. Miss. 1996); *Atchison Casting Corp. v. Dofasco, Inc.,* 889 F.Supp. 1445, 1464 n. 13 (D.Kan.1995); *Professional Serv. Indus., Inc. v. Kimbrell*, 834 F.Supp. 1305, 1310 (D.Kan.1993); *Racine & Laramie, Ltd. v. Department of Parks & Recreation,* 11 Cal.App.4th 1026, 1032-33, 14 Cal.Rptr.2d 335 (1992); Rest.2d Contracts, §205, cmt. c.

[50] The standards for review of these rulings are stated at page 22 footnote 25 above. Insofar as the issue turns on the legal question of the scope of the duty of good faith, however, the Court considers it *de novo*. *Sennett v. U.S. Fidelity & Guar. Co.*, 757 So.2d 206, 209 (Miss. 2000).

"[T]he existence vel non of a duty of care is a question of law to be decided by the Court" based on "consideration[s] of ... policy matters and ... precedent." *Donald,* 735 So.2d at 174.[51]

When economic loss is the only foreseeable or actual harm, however, a duty of care is the exception, not the rule, at least when the defendant has not voluntarily assumed a duty to protect the plaintiff against economic loss. *See Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 368 (Miss. 1993); *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 58, 960 P.2d 513, 77 Cal.Rptr.2d 709 (1998). Prime among "the reasons for not allowing recovery in tort when only economic damages are sought to be recovered" is the fact that otherwise "tort law would subsume contract law." *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So.2d 384, 387 (Miss. App. 1999).

Plaintiffs' negligence claim poses that danger. Plaintiffs claim only economic loss—alleged overcharges—and emotional distress purportedly suffered from discovering they had previously been overcharged. They seek to impose on City a duty of care, requiring it to disclose information that plaintiffs did not bother to ask about at the time, but

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[51] "The policy factors which must be considered in determining whether a duty exists have been judicially defined as follows: the foreseeability of harm, the degree or certainty of injury, the closeness of the connection between the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, costs, and prevalence of insurance for risk involved." *Foster v. Bass*, 575 So.2d 967, 979 (Miss. 1990), *quoting Richard P. v. Vista Del Mar Child Care Service,* 106 Cal.App.3d 860, 165 Cal.Rptr. 370 (1980); *accord: Deramus*, 92 F.3d at 282.

now claim City should have told them before they agreed to enter to loans or to buy credit insurance and not to sell them loans or insurance they now think they did not really need.

Imposing such a duty of care would gravely undermine freedom of contract. In entering into a contract, parties act at arms' length, each looking out for his or her own interest, not the opposing party's. Were a party subject to a duty of care to inform the opposing party about all information that the opposing party later deemed important or sell only goods or services a buyer really needed, contract negotiations would be utterly transformed. Instead of looking out for his or her own interest, a contracting party would be forced to watch out for the opposing party's.

Under such a rule, every retailer would have to question every consumer purchase. Does Mrs. Jones really need a Cadillac Escalade? Perhaps, a Honda Civic is better suited to her needs? The retailer would be required to repeat orally everything Mrs. Jones might later think important to her purchase decision, presumably including the fact that many parts in the car are manufactured by GMC affiliates that turn a tidy profit on their sales to the Cadillac division. The burden on business would be immense, and consumers would have every incentive to neglect their own interests and sue at the first twinge of buyer's remorse.

Such a duty of care is particularly inappropriate in connection with credit transactions. State and federal statutes and regulations already thoroughly regulate the disclosures a creditor must make. *E.g.,* 15 U.S.C. §1601 et seq.; 12 C.F.R. part 226; 12 U.S.C. §2600 et seq.; 24 C.F.R. §3500 et seq. Additional common law disclosure duties run the risk of "information overload," which would dilute the effectiveness of the statutorily

required disclosures. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 100 S.Ct. 790, 798, 63 L.Ed.2d 22 (1980).

In terms of the policy factors cited in footnote 51 above, plaintiffs' proposed duty of care would impose severe burdens on defendants and adversely affect the community in general by radically altering most consumer transactions. Insurance is not generally available for the losses such a duty would impose on merchants. Claims like plaintiffs fall outside the coverage of general liability insurance policies because they do not involve physical injury to person or property. Injury is neither certain nor severe. Any injury suffered is economic, not physical. A customer can avoid even that injury by simply exercising care on his or her own behalf in deciding which products or services to buy, by reading written agreements before signing them and by asking questions if further information is needed. For the same reason, there is no close connection between the defendant's conduct and the injury suffered.

Not surprisingly, other courts have repeatedly rejected the notion that a lender owes its borrower the sort of duty of care that plaintiffs propose. *Howard,* 195 F.Supp.2d at 825; *Ross v. CitiFinancial, Inc.*, 2002 WL 461567 at *11 (S.D. Miss. 2002); *Harrison,* 2002 WL 548281 at *6; *see also California Service Station & Auto. Repair Ass'n*, 62 Cal. App.4th at 1173; *Armstrong Business Services, Inc. v. AmSouth Bank*, 817 So.2d 665, 678-81 (Ala. 2001).

City owed plaintiffs no duty of care to determine whether loans or credit insurance were suitable for plaintiffs' needs or to disclose orally information they now say was material. Owing plaintiffs' no duty of care, City cannot be held liable to them in negli-

gence. The trial court erred in denying City motion for nonsuit and judgment notwithstanding the verdict on this ground.[52] Insofar as they are based on plaintiffs' negligence claim, the verdict and judgment against City must be reversed.

E. Plaintiffs' Claims Were Barred By The Statute Of Limitations

Each of plaintiffs' claims was governed by a three-year statute of limitations. Miss. Code Ann. § 15-1-49. Having filed this action in January 1998, plaintiffs could not recover on claims that accrued before January 1995.[53] Plaintiffs failed to prove the elements of delayed discovery or any other means of tolling the limitations period.

To establish delayed discovery, plaintiffs had to prove that (a) plaintiffs could not reasonably have discovered their claim at the time of the acts complained of, (b) plaintiffs acted with reasonable diligence to discover their claims from available sources of infor-

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[52] The standard for review of the trial court's rulings are explained above. *See* p. 22 n. 25. However, whether City owed plaintiffs a duty of care, is a question of law to be determined by the trial court initially and is reviewed *de novo* in this Court. *Belmont Homes, Inc. v. Stewart*, 792 So.2d 229, 232 (Miss. 2001).

[53] Plaintiffs' claims accrued when they entered into a loan, purchased credit insurance, allegedly due to City's non-disclosures, and became legally obligated to pay more than they would otherwise have agreed to pay. Plaintiffs entered into many of the loans, for which they claimed and were awarded damages, well before January 1995; indeed, in some cases as far back as 1986. *E.g.*, 19 R.T. 1109:5-17, 1113:15-1114:21; 2 C.T. Ex. 208 (1991 loan), 209 (same), 284-285 (1989 loan), 292 (1990 loan) 3 C.T. Ex. 381 (1986 retail installment contract), 384 (1986 loan).

mation, and (c) despite that diligence, plaintiffs did not and could not reasonably have discovered their claims before January 1995.[54]

Plaintiffs' evidence proved none of those elements. For example, Earnest Claiborn, a college graduate and analyst for Wells Fargo Home Mortgage, 16 R.T. 702:3-18, obtained a loan from City in 1991, 16 R.T. 705:16-706:25; 2 C.T. Ex. 231, 233. He claimed he was improperly charged for insurance in connection with that loan because he was not told orally that insurance was optional or that he was sold credit property insurance. 16 R.T. 708:6-23, 710:28-711:5, 712:1-23. Those facts were, however, clearly disclosed in the loan documents he signed, 16 R.T. 720:6-25; 2 C.T. Ex. 210, 211, 213, 231, and he admitted he was told one of those "sheets was insurance," 16 R.T. 710:21-23. He just did not bother to read what he signed. 16 R.T. 710:11-13, 720:12-14.

As to delayed discovery, Mr. Claiborn's sole testimony was:

> Q. Did she tell you about that, that it was insurance?
>
> A. No. I just found out I had property insurance from my attorneys. I never knew that.
>
> Q. You didn't know before, previously to your attorney?
>
> A. No.
>
> Q. Let's talk about that for a minute. When was that that you found out for the first time that you had property insurance?

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[54] *Hall v. Dillard*, 739 So.2d 383, 387-88 (Miss. App. 1999); *McCain v. Memphis Hardwood Flooring Co.*, 725 So2d 788, 794 (Miss. 1998); *Womble v. Singing River Hospital*, 618 So.2d 1252, 1266 (Miss. 1993); *Gulf Nat'l Bank v. King*, 362 So.2d 1253, 1255 (Miss. 1978).

> A. I would imagine maybe '98 when I took the papers over and talked to Mr. Brock. I was—it had to be somewhere after that time, either '98 or sometime in '98.

16 R.T. 708:24-709:8.

Mr. Claiborn's testimony did not establish the first of the three required elements of delayed discovery. *Bryant v. Mortgage Capital Resource Corp.*, 197 F.Supp.2d 1357, 1367 (N.D. Ga. 2002). The wrong he alleged was not "secretive or inherently undiscoverable." *McCain,* 725 So.2d at 794; *Staheli v. Smith*, 548 So.2d 1299, 1303 (Miss. 1989). To the contrary, he could easily have discovered it by simply reading the loan documents he signed. 2 C.T. Ex. 210, 211, 213, 231. He is charged with knowledge of those documents' terms even though he chose not to read them. *Godfrey, Bassett & Kuykendall Architects,* 584 So.2d at 1257 and cases cited in n. 44 above. Hence, Mr. Claiborn not only could, but in legal contemplation did, discover the claimed wrong at the time of the acts complained of. *Wells,* 819 So.2d at 1202; *Howard*, 195 F.Supp.2d at 822-23; *Ross*, 2002 WL 461567 at *6.

Mr. Claiborn's testimony also failed to establish delayed discovery's second element—exercise of reasonable diligence to discover his claim from available sources of information. A plaintiff who fails to seek or read documents that would reveal his or her claim cannot rely on delayed discovery to toll the statute of limitations. *Sarris v. Smith*, 782 So.2d 721, 725 (Miss. 2001); *Womble*, 618 So.2d at 1266. Here, Mr. Claiborn admitted he received copies of the loan documents, but he never read them. 16 R.T. 721:27-722:3. He made no effort to review the documents in his possession or to obtain

records or information from City. He was not diligent. *Howard*, 195 F.Supp.2d at 822-23.

Finally, Mr. Claiborn's testimony failed to prove delayed discovery's third element. He said nothing to show that despite diligence he could not have discovered his claim before January 1995. Mr. Claiborn waited until after that date to show his loan documents to a lawyer and only then discovered his claim. 16 R.T. 708:24-709:8. But nothing prevented him from taking his copies of the loan documents to a lawyer earlier or reading those documents himself. *First Nat'l Bank v. Johnson,* 177 Miss. 634, 171 So. 11, 14 (1936) ("when ... a person has knowledge of such facts as to excite the attention of a reasonably prudent man and to put him upon guard and thus to incite him to inquiry, he is chargeable with notice, equivalent in law to knowledge, of all those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed.").

The other plaintiffs' testimony followed the same pattern. Their claims were as open to discovery, as Mr. Claiborn's was, by simply the documents they signed.[55] *E.g.*, 16 R.T. 669:21-670:3; 2 C.T. Ex. 151, 187, 287 (Glenda Chambers); *see* App. 1. They all were given copies of those documents. *E.g.,* 16 R.T. 633:15-16, 634:14-29, 650:22-28

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[55] Though some of plaintiffs' other complaints—such as not being told about City's affiliate's reinsurance agreements—were not so easily discoverable, the limitations period began to run once plaintiffs knew or should have known they had any claim against City. Once they suspected or should have suspected any wrong, the limitations period began running on all their claims arising from the same transaction since they were then on notice of the need to protect their legal rights by suing and could use the process of pretrial discovery to develop the specific facts and legal theories to support their claims. *Kline v. Turner*, 87 Cal.App.4th 1369, 1374-75, 105 Cal.Rptr.2d 699, 702-03 (2001).

(Glenda Chambers). They all could have discovered their claims at any time after the loans were made by reading, or having an attorney read, those copies. Like Mr. Claiborn, they all just slept on their rights until they heard about this lawsuit or that there was "something wrong" with City in 1997 or 1998. *E.g.,* 16 R.T. 656:3-19 (Glenda Chambers); *see* App. 1.[56] Delayed discovery does not rescue those who fail to act diligently on their own behalf—as plaintiffs did here by failing to read the loan documents they had in their possession the entire time. *Cooley v. Washington Mutual Finance Group*, 2002 WL 1768897 at *1-2 (S.D. Miss. 2002).

The trial court erred in denying City's motions for summary judgment, non-suit, judgment notwithstanding the verdict and new trial on plaintiffs' time-barred claims.[57] The judgment includes damages for those claims.[58] Those improper awards cannot be separated from other portions of the jury's general verdicts since many plaintiffs were awarded a single amount of damages for claims arising both before and after the January

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[56] As another example, Kenneth Hill testified that he first found "out about the things that are being asserted in this lawsuit" "around '97" and before that he knew nothing about it. 19 R.T. 1119:15-23. That was all he said to explain away a decade of delay in bringing suit on a contract and loan he entered into in 1986. 3 C.T. Ex. 381, 382, 384.

[57] The standards for reviewing the trial court's rulings on the last three motions are stated above. *See* p. 22 n. 25. This Court reviews a summary judgment ruling *de novo*. *Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So.2d 1351, 1354 (Miss. 1998).

[58] For example, Mr. Hill was awarded actual and punitive damages though his last loan transaction was consummated in 1986. 19 R.T. 1108:26-1109:28, 1114:3-16; 3 C.T. Ex. 381, 384; 10 C.T. 1353, 11 C.T. 1550, 1551. Plaintiffs' expert lumped pre- and post-1995 loans together in computing plaintiffs' asserted economic damages, 18 R.T. 1003:23-1011:19; 22 C.T. Ex. [pages unnumbered]. No plaintiff distinguished between pre- and post-1995 loans in describing his or her asserted emotional distress.

1995 limitations cutoff.[59] The punitive damage awards must fall with the compensatory damage awards since it is impossible otherwise to assure that the punitive damage awards will bear the necessary reasonable relationship to any compensatory damages awarded on remand. *Poullard v. Turner*, 298 F.3d 421, 423-24 (5th Cir. 2002).[60] Hence, as to 20 of the 23 plaintiffs, the entire judgment must be reversed.[61]

F. Liability Was Improperly Imposed On City For Its Assignors' Alleged Wrongdoing

Many of the transactions on which plaintiffs sued were originated by Easy Finance or by various retailers and only later assigned to City. The trial court erred allowing the jury to award damages against City based on these transactions.

"[I]t is a cardinal rule of law that one cannot plead fraud against A because B has misled or taken advantage of him." *Johnson v. Durrence*, 136 Ga.App. 439, 442, 221 S.E.2d 652 (1975). Yet, that is just what the trial court erroneously allowed plaintiffs

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[59] For example, the Hortons were awarded lump sum compensatory damages of $100,000 and $250,000 as well as $3 million apiece in punitive damages for three loans before the limitations cutoff and one afterwards. 18 R.T. 934:15-935:26; 3 C.T. Ex. 399, 402, 407, 408; 10 C.T. 1353.

[60] *Accord: Elliott v. Hurst*, 307 Ark. 134, 141, 817 S.W.2d 877, 881 (1991); *Ramona Manor Convalescent Hospital v. Care Enterprises*, 177 Cal.App.3d 1120, 1140, 225 Cal. Rptr.2d 120, 131 (1986); *Dierker Assoc. v. Gillis*, 859 S.W.2d 737, 750 (Mo. App. 1993); *First Nat. Bank v. Sanchez*, 112 N.M. 317, 325, 815 P.2d 613, 621 (1991); *Stroud v. Elliott*, 316 S.C. 242, 245, 449 S.E.2d 261, 262 (S.C. App. 1994); *Houston Mercantile Exchange Corp. v. Dailey*, 930 S.W.2d 242, 249 (Tex. App. 1996); *see also Zaffuto v. City of Hammond*, __ F.3d __, 2002 WL 31175126 at *6 (5th Cir. 2002).

[61] Only Louise Blue, Glenda Chambers, and Tina Cross claimed damages solely from post-1995 loans. *See* App. 1.

to do: recover compensatory and punitive damages against City for fraud and other wrongs allegedly committed by Easy Finance or retailers.

City incurred no greater liability for those wrongs by accepting assignment of the loans or contracts. "While an assignee of a ... contract ordinarily takes it subject to defenses which may be raised against the assignor, the assignee does not '... assume personal liability to the ... buyer for damages sustained by reason of the ... seller's false representations or breach of warranty ...." *McGraw-Edison Co. v. Haverluk*, 130 N.W.2d 616, 621 (N.D. 1964).[62]

At most, plaintiffs could assert Easy Finance's or the retailers' supposed frauds or other wrongs *only* as defenses to a collection action by City, and *not* as a basis for affirmative relief against City in excess of the amount of the assigned loan or contract. *Shepard v. Commercial Credit Corp.*, 123 Vt. 106, 110, 183 A.2d 525, 528 (1962).[63] Plaintiffs acquired no greater rights simply because City collected payments under the assigned loans and contracts and thus, in some sense, was paid for the credit insurance plaintiffs were allegedly defrauded into buying. The sole purpose of assignment is to permit collection by the assignee. Hence, the legal rules cited above must apply when the assignee collects. They would be meaningless otherwise.

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[62] *Accord: Midsouth Rail Corp. v. Citizens Bank & Trust Co.*, 697 So.2d 451, 455 (Miss. 1997); *Meyers v. Postal Fin. Co.*, 287 N.W.2d 614, 617 (Minn. 1979).

[63] *Accord: McGraw-Edison Co.*, 130 NW.2d at 621; Rest.2d Contracts, §336, cmt. c; 3 Farnsworth on Contracts, §11.8, p. 107 (2d ed. 1998).

The trial court appears to have been led astray on this issue by a curious inversion of the holder-in-due-course doctrine. 13 R.T. 109:6-112:26; 20 R.T. 1284:27-1285:19. When applicable, that doctrine even more drastically limits the debtor's rights, preventing the debtor from raising the assignor's fraud or other wrongs as a defense to the assignee's collection on the contract. Miss. Code Ann. § 75-3-305; 2 White & Summers, Uniform Commercial Code, § 17-10, pp. 190-91 (4th ed. 1995). There is no dispute that holder-in-due-course doctrine is inapplicable to the transactions at issue in this case.[64]

The trial court apparently thought that the inapplicability of the holder-in-due-course doctrine subjected City to affirmative liability for its assignors' wrongs. But that notion is clearly wrong. A transferee that is *not* a holder in due course stands in the same position as an ordinary assignee at common law; that is, the transferee is subject to defenses to enforcement of the contract arising from the assignor's wrongs, but *not* to affirmative claims for damages based on those wrongs. *Household Fin. Corp. v. Mowdy*, 13 Ill.App.3d 822, 829, 300 N.E.2d 863, 868 (1973). The case law under the FTC rule is in accord, allowing the debtor to assert the assignor's wrongs as a defense or as a ground

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[64] It does not apply to the Easy Finance loans because they were acquired in a bulk purchase out of the ordinary course of business. Miss. Code Ann. § 75-3-302(c)(2). It does not apply to the retail installment contracts by reason of the FTC's Holder Rule. 16 C.F.R. §433.2; 2 White & Summers, § 17-1, p. 150

for a refund of sums already paid under the contract, but barring any affirmative recovery of damages against the assignee.[65]

The trial court erred, as a matter of law, in allowing the jury to assess compensatory and punitive damages for the wrongs assertedly committed by Easy Finance and the retailer-assignors.[66] The error cannot be cured except by reversal of the entire judgment as to plaintiffs with assigned loans or contracts[67] since either they never obtained loans directly from City or the jury's lump sum awards of compensatory and punitive damages cannot be allocated between direct loans and assigned loans or contracts. As previously pointed out, reversal of the compensatory damage award will also require reversal of the punitive damage award. *Poullard*, 298 F.3d at 423-24.

G. The Compensatory Damage Award Must Be Reversed; The Award For Emotional Distress Is Unsupported And Excessive

Ninety percent or more of the compensatory damages awarded plaintiffs in this case was for alleged emotional distress.[68] These awards must be reversed as there was no

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[65] *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1096 (W.D. Mich. 2000); *Riggs v. Anthony Auto Sales, Inc.*, 32 F.Supp.2d 411, 416 (W.D. La. 1998); *see also* 16 C.F.R. §433.2(a), (b); 41 Fed. Reg. 20,022, 20,023-24 (1976).

[66] The facts pertinent to this issue are undisputed and the issue thus raises solely a question of law which this Court reviews *de novo*. *Sennett*, 757 So.2d at 209.

[67] There are 18 of these plaintiffs: Louise Blue, Glenda Chambers, Annie Clark, Willie Earl Conway, Tina Cross, Patrishane Gordon, Lillie Harris, Kenneth Hill, Lindsey Horton, Robin Horton, Lizzie Lofton, Jessie McClung, Willie McGee, Janie Mason, Percy Mason, Mattie Miles, Zenester Moore, and Lou Waters. See Appendix 1.

[68] For example, plaintiffs own evidence showed that Lindsey and Robin Horton were overcharged, at most, $1,707.95. 18 R.T. 1016:24-27. Emotional distress was their only

(Fn. cont'd)

substantial evidence of either sufficiently reprehensible conduct on City's part or of sufficiently severe emotional harm on plaintiffs' part.[69] The awards are grossly excessive and should be reversed for that reason as well.

1. There Was No Evidence Of Conduct Evoking Outrage Or Revulsion

To recover emotional distress damages, a plaintiff must prove either that (a) the defendant intentionally committed conduct that evokes outrage or revulsion or (b) the defendant acted negligently foreseeably causing "demonstrable harm" and emotional trauma. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 742 (Miss. 1999). In this case, plaintiffs proceeded solely on the first of these alternatives. They proposed and the Court gave a jury instruction allowing an award of emotional distress damages only if the jury found City's conduct "was wanton or willful and that it would evoke outrage or revulsion." 9 C.T. 1317.

(Fn. cont'd)
other claimed injury. The jury awarded the Hortons a total of $350,000 in compensatory damages. 9 C.T. 1323-1324, 10 C.T. 1348, 1349, 1353. Other plaintiffs received similarly disproportionate awards for emotional distress, as Appendix 1 illustrates.

[69] In reviewing the sufficiency of the evidence and the trial court's instruction on emotional distress as well as its denial of City's motions for non-suit and judgment notwithstanding the verdict, this Court examines all the evidence, not just that favoring plaintiffs, to determine whether there is "evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions ...," assuming all credible evidence in plaintiffs' favor is accepted as true and all reasonable inferences are drawn in their favor, *C & C Trucking Co.*, 612 So.2d at 1098. The Court reviews the trial court's denial of City's new trial motion for abuse of discretion. *Id.*, at 1099.

It is a "tall order" to prove conduct of this sort. *Speed v. Scott*, 787 So.2d 626, 630 (Miss. 2001). Plaintiffs manifestly failed to do so here. At most, their evidence showed that City did not tell them orally what their loan documents clearly revealed in writing—that credit insurance was optional—and/or refinanced their existing loans rather than extending them new, separate loans when plaintiffs needed more money or fell delinquent on their existing loans.

This kind of conduct does not begin to approach the standard necessary for an award of emotional distress damages. As the Restatement points out:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults ... petty oppressions, or other trivialities. ... [P]laintiffs must necessarily be expected and required to be hardened to ... occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case were some one's feelings are hurt.

Rest.2d Torts, §46, cmt. d.

Mississippi law follows the Restatement and permits recovery of emotional distress damages only for truly outrageous or despicable conduct. *Wong v. Stripling*, 700 So2d 296, 306 (Miss. 1997); *Pegues v. Emerson Elec. Co.*, 913 F.Supp. 976, 982-83 (N.D. Miss. 1996).

Thus, this Court has permitted emotional distress damage awards (a) when the plaintiff "[r]eceived death threats from an armed man [the defendant] who shot at their vehicle, handcuffed them, and had taken them prisoner," *Whitten v. Cox*, 799 So.2d 1, 10 (Miss. 2000), (b) when a debt collector verbally abused a woman debtor and threatened to send her and her son to jail, *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 143, 150 So.2d 154, 155 (1963), (c) when a car dealer forged a person's name to a loan and exposed him to the risk of a destroyed credit rating, *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So.2d 481, 483, 485 (Miss. 1972), and (d) when an unwed mother concealed her and her child's location to deprive the father of the chance to assert his parental rights and instead to give the child up for adoption, *Smith v. Malouf*, 722 So.2d 490, 498 (Miss. 1998).

By contrast, this Court has held conduct like the allegedly wrongful acts in this case not to be "outrageous" and insufficient to support an award of emotional distress damages. Among this Court's cases finding no basis for emotional distress damage awards are *Speed,* 787 So.2d at 630 (fire chief called volunteer fireman a liar and thief in heated exchanges before other firemen); *Brown v. Inter-City Fed. Bank*, 738 So.2d 262, 264-65 (Miss. 1999) (employer disparaged employee as too old, asked her when she would retire, removed her from the main office, saying he needed a man's help, and ultimately fired her); *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So.2d 139, 150 (Miss. 1998) (gas company failed properly to cap broken gas pipeline, causing fire which destroyed plaintiff's home); *Wong*, 700 So.2d at 305-07 (hospital review committee revoked physician's privileges, failed to consider all his evidence or allow him access to his complete personnel file; chairman was biased against him and one committee member

called him a thief and liar); *Cermack*, 658 So.2d at 1365-66 (a bank told its debtor that he would have to reduce his operating costs, rejected his first proposal to do so, and accepted his second proposal which involved firing the plant manager); *Fuselier, Ott & McKee v. Moeller*, 507 So.2d 63, 69 (Miss. 1987) (employer fired an employee, ordered him to leave immediately and not return, and changed the locks).

In its decision bearing the closest resemblance to this case, this Court held that a seller's failure to give the buyer a full refund as allegedly promised was not sufficiently outrageous conduct to permit an award of emotional distress damages. *Morrison v. Means,* 680 So.2d 803, 806 (Miss. 1996). In *Morrison*, as here, the plaintiff claimed to have acted "like 'an honest farmer who expects a man's handshake to be every bit as significant as his signature at the bottom of a contract' " and to have been cheated by the defendant who refused to make the promised refund. *Id.* That was not enough to support an award of emotional distress damages in *Morrison,* and it is not enough here.

Here, plaintiffs acknowledged that City employees treated them politely, answered their questions, and were nice to deal with.[70] Plaintiffs suffered no distress immediately as a result of their dealings with City.[71] Instead, in some cases as much as a decade later, the plaintiffs felt "bad"—not because of anything City had done meanwhile, but because

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[70] *E.g.*, 15 R.T. 607:9-609:27, 16 R.T. 643:10-21, 699:8-11.

[71] *E.g.*, 16 R.T. 653:16-24. Indeed, to avoid the statute of limitations bar based on delayed discovery, plaintiffs must argue they were unaware of their claim—and hence, suffered no emotional distress over feeling cheated—until shortly before filing suit.

plaintiffs' lawyers told them City had cheated them by refinancing their loans or selling them credit insurance without orally warning them it was optional.[72]

As in *Morrison*, plaintiffs accuse City, at worst, of cheating them out of small amounts of money—in this case by failing to tell plaintiffs orally what was clearly disclosed to them in writing. To be sure, cheating is not conduct society encourages. But neither is it so unusual, so atrocious, so utterly intolerable in civilized society, that it can be deemed "outrageous" and support an award of emotional distress damages. Least of all is such an award appropriate when the emotional distress first arises many years after the conduct which allegedly triggered it. No Mississippi case has ever upheld an award of such delayed-reaction emotional distress damages. The Court should not do so here either.

Because there was no evidence of that City engaged in any conduct that would evoke outrage or revulsion or otherwise met the high threshold for an award of emotional distress damages unaccompanied by any physical injury, the trial court erred in denying City's motion for non-suit on plaintiffs' claims for emotional damages, instructing the jury on those damages, and denying City's post-trial motions under rules 50 and 59.

2. Plaintiffs Suffered No Emotional Distress Of Sufficient Severity To Support A Damage Award

The compensatory damage awards for emotional distress must also be reversed because plaintiffs adduced no substantial evidence of emotional injury. Even if a defen-

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[72] *E.g.*, 16 R.T. 653:6-15, 653:25-654:8, 688:16-19, 712:11-27, 714:21-715:9, 17 R.T. 883:27-884:26, 19 R.T. 1091:25-1092:10, 1173:3-6.

dant's conduct is outrageous, a plaintiff may not recover emotional distress damages without proof that he or she has in fact suffered severe emotional distress as a result. Plaintiffs failed to do so here.

To quote again from the Restatement:

> It is only where it [emotional distress] is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress so inflicted is so severe that no reasonable man could be expected to endure it.[73] ... Severe distress must be proved ....

Rest.2d Torts, §46, cmt. j.

Again, Mississippi law is in accord with the Restatement's rule. "It is axiomatic that in addition to suffering conduct that is outrageous or repulsive, this tort also requires proof of injury, i.e., that the conduct in question caused *actual mental distress*." *Wong*, 700 So.2d at 307; *Morrison*, 680 So.2d at 806-07. This Court has also repeatedly held that evidence of emotional upset, stress, worry, depression, irritability, loss of weight, and inability to sleep fail to satisfy a plaintiff's burden of proving such actual and severe emotional distress and are insufficient to support an award of emotional distress damages. *Adams*, 744 So.2d at 743-44; *Wong*, 700 So.2d at 307; *Morrison*, 680 So.2d at 807; *Strickland v. Rossini*, 589 So.2d 1268, 1275-76 (Miss. 1991); *Sears, Roebuck & Co. v*

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[73] The Restatement's standard of emotional distress "so severe that no man could be expected to endure it" is designed "to convey the extraordinary nature of the tort as well as the rarity of its occurrence." *Witherspoon v. Rent-A-Center, Inc.*, 173 F.Supp.2d 239, 242 (D. N.J. 2001).

Devers, 405 So.2d 898, 899, 901 (Miss. 1981); *see also Harbin v. Jennings*, 734 So.2d 269, 273-74 (Miss. App. 1999); *Greer v. Burkhardt*, 58 F.3d 1070, 1074 (5th Cir. 1995) (applying Miss. Law).

Plaintiffs' proof of emotional distress fell woefully short of this high standard in this case. Here, plaintiffs testified to symptoms no more serious than the emotional upset and stress that *Adams, Morrison, Strickland,* and *Devers* hold to be insufficient. To be sure, some plaintiffs added that they felt "cheated," but that added nothing of legal significance. *See Wong*, 700 So.2d at 307 (feeling "outraged" and "repulsed" insufficient to support emotional distress damage award).

Typical of plaintiffs' emotional distress evidence was the following testimony from Willie Earl Conway, the first plaintiff to testify:

> Q Do you believe that City Finance has done anything to you that was wrongful?
>
> A Yeah, I feel like they charged me too much interest and stuff.
>
> Q How does that make you feel?
>
> A It makes me feel bad. It makes me feel like I've been ripped off.
>
> Q Does it have any effect on you emotionally?
>
> A Yeah, cause the money that I paid them, I could have been doing something else with.
>
> Q Did you have a lot of money to spend?
>
> A No.
>
> Q Has it had any affect on you physically?

A Not really.

Q How else has it made you feel?

A Well, it made me feel like, you know, I had been cheated, like I had been ripped off, like I said.

15 R.T. 574:27-575:16.

Feeling "bad," "cheated," and "ripped off" is not "distress ... so severe that no reasonable man could be expected to endure it." It does not meet the high legal threshold set in this Court's prior opinions and cannot support the jury's award of $149,400 in emotional distress damages to Mr. Conway.[74]

The same is true of all the other plaintiffs who were awarded compensatory damages in excess of their claimed economic loss. None of them testified to distress so severe no reasonable man could be expected to endure it. Instead, their testimony regarding emotional distress was no different from Mr. Conway's. *See* App. 1. Like him they felt "bad"[75] and "cheated."[76] A couple said they had lost sleep.[77] But none suffered

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[74] The jury awarded Mr. Conway $150,000 in compensatory damages. 9 C.T. 1323, 10 C.T. 1353. Plaintiffs own evidence showed that he suffered only $596.96 in monetary loss. 18 R.T. 1013:25-28. All the rest could only have been recompense for feeling "bad," "cheated," and "ripped off."

[75] Some plaintiffs used other words to describe feeling "bad"; e.g., "stressed," "nervous," "under pressure," "frustrated," "angry," or "terrible." 16 R.T. 653:6-15 (Glenda Chambers), 712:24-713:24 (Earnest Claiborne), 735:3-10 (Alfred Garrett); 17 R.T. 793:8-14 (Jessie McClung), 795:28-797:9 (Jessie McClung), 857:5-859:7 (Percy Mason) , 867:21-868:28 (Tina Cross), 883:27-884:19 (Lizzie Lofton); 18 R.T. 921:15-922:13 (Lorene Jackson), 941:10-29 (Robin Horton), 942:1-17 (Lindsey Horton), 950:19-951:16 (Lindsey Horton); 19 R.T. 1091:22-26 (Louise Blue), 1092:4-10 (Louise Blue), 1142:3-1143:14 (Mattie Miles), 1150:13-1151:23 (Annie Clark), 1173:3-6 (Willie McGee).

anything more serious from City's alleged wrongs.[78]

The unpleasant emotions to which plaintiffs testified are commonly experienced in every day life. "[A]ll of us have suffered" from similar feelings. *Morrison,* 680 So.2d at 805. "[S]ome degree of transient and trivial emotional distress is a part of the price of living among people" else every hurt feeling or emotion will generate its own lawsuit. Rest.2d Torts, §46, cmt. j.

Stated another way:

> [E]ach person going through this life experiences a few unfair—and non-actionable—slings and arrows. The law cannot and does not undertake to prove a remedy for "all bruised feelings." Rather, a plaintiff ... may recover damages only for substantial emotional distress, not necessarily rising to the dignity of a diagnosable mental disorder, but surely approaching such.

(Fn. cont'd)

[76] Feeling "cheated" was also described as being "used," "duped," "betrayed" or "taken advantage of." 16 R.T. 653:25-654:8 (Glenda Chambers), 688:8-19 (Greta Blackmon), 714:24-715:9 (Earnest Claiborne); 17 R.T. 793:8-14 (Jessie McClung), 795:28-797:9 (Jessie McClung), 814:23-815:1 (Lillie Harris), 867:21-868:28 (Tina Cross); 18 R.T. 974:4-13 (Lou Waters).

[77] 16 R.T. 687:4-9 (Greta Blackmon); 17 R.T. 883:27-884:19 (Lizzie Lofton).

[78] Some plaintiffs did claim additional distress from City's collection efforts. 19 R.T. 1150:13-1151:23 (Annie Clark), 18 R.T. 941:10-29, 942:1-17, 950:19-951:16 (Lindsey, Robin Horton), 17 R.T. 829:14-831:25, 841:20-842:5 (Janie Mason), 19 R.T. 1142:3-1143:14 (Mattie Miles), 19 R.T. 1126:28-1127:4, 1127:19-22 (Zenester Moore), 18 R.T. 980:2-11 (Lou Waters). However, the trial court properly non-suited plaintiffs on their claim for improper collection activities, 20 R.T. 1284:24-26, sustained City's objection to testimony on that subject, 19 R.T., 8-15, and struck the jury's award of emotional distress damages to Janie Mason and Zenester Moore who had complained solely of emotional distress from collection activities, 11 C.T. 1550, 1551. Thus, the jury could not properly award damages for mental distress allegedly caused by collection efforts.

Singleton v. Stegall, 580 So.2d 1242, 1247 (Miss. 1991) (citations omitted).

Following the same reasoning, *Adams, Wong, Strickland, Morrison,* and the other cases cited above all hold that testimony of worry, anxiety, vexation, embarrassment or anger is insufficient to support an award of damages for emotional distress, even when the defendant has intentionally acted in a manner that evokes outrage and revulsion. Such evidence did not support an award of $3,500 for emotional distress in *Morrison.* It falls even farther short of supporting the awards of $5,000 to $250,000 to plaintiffs in this case. To quote this Court's latest opinion on the issue:

> This Court has stated repeatedly that testimony regarding sleeplessness and nightmares is insufficient to support an instruction or award of damages for emotional distress. Winters's only addition to her insufficient testimony regarding nightmares and sleeplessness is that she went to an unnamed doctor in Jackson three times. We find that such vague testimony regarding visits to a psychiatrist cannot support a damage award for emotional distress, particularly one of $1.5 million.

Illinois Central R.R. Co. v. Hawkins, __ So.2d __, 2002 WL 31194975 at *8 ¶27 (Miss. 2002) (citations omitted).

In this case, the evidence did not show that plaintiffs had suffered any emotional distress severe enough to support an award of damages. Hence, the trial court erred in denying City's motion to non-suit plaintiffs on their claims for emotional distress, in instructing the jury on those claims, and in denying City's post-trial motions under rules 50 and 59.

3. The Damage Awards For Emotional Distress Were Excessive, If Permissible At All

Even were there evidence sufficient to support an award of emotional distress damages in this case, the jury's actual awards would still have to be reversed. They are clearly excessive, particularly in light of the non-existent or, at most, minimal, evidence of any emotional distress.

While it is primarily the jury's province to determine the amount of damages, the appellate courts may intervene, reversing or granting additur or remittitur if the jury was influenced by bias, prejudice, or passion or the damage award is contrary to the overwhelming weight of the evidence. Miss. Code Ann. §11-1-55; *Harvey v. Hall*, 649 So.2d 184, 187 (Miss. 1995). Though phrased differently, these two tests are essentially one and the same. *Odom v. Roberts*, 606 So.2d 114, 119 n. 5 (Miss. 1992). Both are objective and depend on circumstantial evidence since there is no way to know what was in the jury's mind. *Id.* "[E]vidence of corruption, passion, prejudice or bias on the part of the jury is an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages" and "by comparing the awards at issue with rulings in other factually similar cases ...." *Harvey*, 649 So.2d at 187; *Cade v. Walker*, 771 So.2d 403, 408 (Miss. App. 2000). While this test leaves the jury substantial leeway, it is nevertheless true that "the sky is not the limit." *Cade*, 771 So.2d at 408.

The few times this Court has upheld awards for emotional distress damages, the verdicts have been for relatively modest sums. In *Whitten*, 799 So.2d at 5, for example, this Court upheld awards of $50,000, $30,000 and $30,000 to three plaintiffs for emo-

tional distress. In that case, the plaintiffs had been terrorized by an armed man who shot at their truck, handcuffed them, took them prisoner, and threatened to kill them. *Id.*, at 10. And the plaintiffs presented substantial evidence of severe and enduring distress as a result: One plaintiff testified the incident changed him, causing him marital problems and ultimately a divorce as well as a 30-pound loss of weight. *Id.*, at 11-12. Another plaintiff suffered continued nervousness and worry that prevented him from concentrating at work, made him short-tempered with his family, and afraid to leave them alone. *Id.*, at 12. The third plaintiff testified he was so terrified by the incident he moved his family out of town so as to avoid seeing the defendant again. *Id.*, at 12-13.

In *T.G. Blackwell Chevrolet Co.*, 261 So.2d at 485-86, this Court upheld a $9,000 verdict for combined economic loss, emotional distress and punitive damages, but in doing so noted that it had no authority to review the amount of the award since the defendant had not moved for a new trial or sought a reduction of the award in the trial court. In *Cherry Bark Builders v. Wagner*, 781 So.2d 919, 920, 922-24 (Miss. App. 2001), the Court of Appeals upheld a $10,000 award for emotional distress and unjust enrichment on evidence the homeowner-plaintiff was visibly upset for months while her home was being incorrectly built, she was lied to, forced to hire an attorney to get any relief, and eventually had to settle for less than she bargained for.

Also instructive are cases regarding damage awards for pain and suffering. In *Cade*, for example, an award of nearly $29,000 was affirmed on evidence that plaintiff suffered intermittent back pain which afflicted her during work, she had problems bending and lifting heavy objects, and had suffered emotional trauma, including nervousness

whenever a large truck passed her. *Id.*, 771 So.2d at 406, 410.[79] In *U.S. Fidelity & Guar. Co. v. Estate of Francis*, ___ So.2d ___, 2002 WL 1980426 at *8 (Miss. 2002), this Court upheld a $35,000 award to a six-year old who suffered only minor injuries herself in a car crash, but had her grandmother killed beside her in the crash, and was trapped beneath the grandmother's corpse for about 30 minutes. Finally, in *Entex, Inc. v. McGuire*, 414 So.2d 437, 444 (Miss. 1982), this Court upheld an award of $30,000 to a plaintiff who, after pulling his wife from their burning house following a gas explosion, suffered from clinically diagnosed anxiety neurosis and depressive neurosis which aggravated his Parkinson's Disease, caused him sleepless nights and recurrent nightmares, and caused him to lose interest in doing things he formerly enjoyed.

Measured against these relatively modest awards for well-supported claims of true emotional distress or pain and suffering, the awards in this case are patently excessive. In this case, plaintiffs testified only that they felt "bad" or the like when, years after the event, they were told by their attorneys they had been overcharged relatively small amounts on loans long since repaid or otherwise closed. *See* pp. 60-62 above & App. 1. None of plaintiffs testified to any enduring or severe emotional distress. There was no evidence remotely comparable to that shown in *Whitten, Estate of Francis,* or *Entex.*

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[79] But see *Savage v. LaGrange*, 815 So.2d 485, 491 (Miss. App. 2002) overturning verdicts of $25,000 and $8,000 to two plaintiffs in a similar car crash case for lack of sufficient evidence of physical injury or pain and suffering. *See also Rawson v. Midsouth Rail Corp.*, 738 So.2d 280, 285-86 (Miss. 1999), affirming trial court's remittitur of $187,000 to $75,000 for employee who suffered three months of pain from an injury.

Yet, in this case, for such evanescent and comparatively trivial distress, the jury awarded two plaintiffs over $245,000 each,[80] another six plaintiffs between $99,000 and $184,000,[81] and, with one exception,[82] the remaining eight plaintiffs between $73,000 and $84,000.[83] These amounts are at least double and in some cases five times as much as the amounts awarded in *Whitten, Estate of Francis,* or *Entex*, while as already noted, the evidence of suffering, if any, was far less in this case. The gross disparity in these awards plainly reveals the verdicts in this case to be excessive.

Yet, that is not the only indication that the awards were the result of passion and prejudice in this case. An equally sure, objective indication of that same fact lies in the jury's awards of between $4,800 and $14,500 in excess of economic damages to each of five plaintiffs who presented no evidence of emotional distress at all,[84] and $249,700 to

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[80] Lindsey Horton and Lou Waters were each awarded $250,000 in compensatory damages, while claiming only $1,707.95 and $2,625.38 in economic loss, respectively. 18 R.T. 1016:24-27, 1021:19-26; 9 C.T. 1324, 1325; 10 C.T. 1353.

[81] The six were Glenda Chambers ($159,000), Annie Clark ($99,400), Earl Conway ($149,400), Lillie Harris ($184,300), Robin Horton ($99,000), and Percy Mason ($99,700). The total compensatory awards to these plaintiffs as well as their claimed economic losses are shown in Appendix 1 at pages 4, 6, 8, 13-14, 18, and 27.

[82] Tina Cross is the exception. The jury awarded her only $39,000 in emotional distress damages. 9 C.T. 1326, 10 C.T. 1353.

[83] The eight are Greta Blackmon ($84,300), Louise Blue ($79,900), Earnest Claiborne ($74,800), Alfred Garrett ($79,800), Lorene Jackson ($79,700), Lizzie Lofton ($74,600), Jessie McClung ($73,600), and Willie McGee ($79,000). The total compensatory awards to these plaintiffs as well as their claimed economic losses are shown in Appendix 1 at pages 1, 2, 5, 10, 19, 20, 22, 23, and 25.

[84] The five were Doris Garrett ($9,800), Patrishane Gordon ($4,800), Kenneth Hill ($9,900), Mattie Miles ($9,900), and Zenester Moore ($14,500). The total compensatory (Fn. cont'd)

Janie Mason, who was distressed only by the repossession of her car, an act which even plaintiffs did not claim was wrongful, *see* Appendix 1, p. 26. While the trial court properly remitted these inappropriate awards as a condition of denying City's new trial motion, 10 C.T., 1550, that it had to do so shows beyond any doubt that the jury failed in its most basic duty of properly evaluating the evidence of damage in accordance with the law as stated in the jury instructions.

In this case, the emotional distress awards that the trial court failed to overturn were just as excessive as those it remitted. It erred in allowing them to stand and denying City's new trial motion. This Court should therefore reverse the compensatory damage awards to all plaintiffs and either remand for a new trial or order a remittitur of all amounts exceeding plaintiffs' economic losses. Either way, the punitive damage awards must also be reversed. *Poullard*, 298 F.3d at 423-24.

V

THE PUNITIVE DAMAGE AWARDS SHOULD BE REVERSED

The jury awarded each plaintiff $3 million in punitive damages for a total of $69 million in punitive damages. In denying City's post-trial motions, the trial court ordered a remittitur of some of the punitive damages awarded the six plaintiffs who had

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(Fn. cont'd)
awards to these plaintiffs as well as their claimed economic losses are shown in Appendix 1 at pages 11, 12, 15-16, 28, and 29.

presented no evidence of emotional distress, leaving a total punitive damage award of $51,251,200. *See* Appendix 2.

This award should be reversed because (a) there was no substantial evidence of highly reprehensible conduct for which punitive damages may properly be awarded, and (b) the punitive damages are excessive in amount.

A. City Did Not Engage In Conduct Warranting An Award Of Punitive Damages

"Punitive damages are to be assessed only in 'extreme cases,' and since they are intended 'as an example and warning to others,' they should be allowed only with caution and within narrow limits." *Boling,* 659 So.2d at 588-89. "Punitive damages are only appropriate in the most egregious cases ... where the actions are extreme." *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 442 (Miss. 2000).

The jury should be allowed to award punitive damages only if "under the totality of the circumstances and in light of defendant's aggregate conduct, ... a reasonable, hypothetical juror could have identified either malice[, fraud,] or gross disregard for the rights of others ..." as having been established by clear and convincing evidence. *Id.*; Miss. Code Ann. § 11-1-65(1)(a), (d).

As already discussed, the evidence in this case does not show that City acted wrongfully at all, let alone with malice, fraud or gross disregard of its borrowers' rights. At worst, City offered borrowers renewed loans without telling them they could instead have separate loans that, though more expensive in the short run—requiring often substantially higher monthly payments—might prove less costly in the long run. And City

did not warn borrowers orally that credit insurance was optional—a fact it nevertheless clearly disclosed in the loan documents.[85]

Neither course of conduct was wrongful, let alone "egregious" or "extreme." A seller or lender is under no legal duty to offer its customers only its cheapest products or only those it thinks best suited to its customers' circumstances. Rather, the onus is on the customer to seek out the options and alternatives offered by the particular vendor and by its competitors. *See* pp. 43-44 above.

Likewise, one contracting party has no obligation to warn the other about facts clearly disclosed in writings both sign to clinch their deal. Instead, the law clearly imposes a duty on every person who signs a written contract to read the document and understand its terms before executing it. *Godfrey, Bassett & Kuykendall Architects, Ltd.*, 584 So.2d at 1257. Had plaintiffs merely done so, there would have been no need to warn them orally. They would have known credit insurance was optional, as that is what the loan documents clearly stated.

Considering all the evidence, City's conduct, if wrongful at all, was not "egregious" or "extreme," and evidenced neither malice, fraud nor gross disregard for others' rights. Hence, the trial court erred in submitting the punitive damage issue to the jury and

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[85] As pointed out before, p. 32 n. 38, three plaintiffs claimed they were told credit insurance was mandatory. That misstatement to three plaintiffs obviously cannot support punitive damage awards to 20 other plaintiffs, even assuming it were a sufficient showing of fraud as to those three.

in denying City's non-suit and post-trial motions on that issue.[86] The awards of punitive damages against City should therefore be reversed.

B. The Punitive Damage Awards Must Be Reversed Or Remitted As They Are Excessive In Amount

In reviewing punitive damage awards for excessiveness, this Court employs three different standards, one under the federal constitution, and the two others under Mississippi law. As will be shown below, the punitive damages awarded in this case are excessive under all three tests, though the Court need only find that they fail one of the three in order to require reversal or remittitur.

1. The Punitive Damage Awards Are Excessive Violating Federal Constitutional Limits

This Court reviews "de novo a challenge to the constitutionality of the size of a punitive damages award." *MIC Life Ins. Co. v. Hicks*, ___ So.2d ___, 2002 WL 1722168 at *5 (Miss. 2002); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). In doing so, the Court considers three factors: (1) the reprehensibility of the conduct, (2) the ratio of compensatory damages to punitive damages, and (3) the comparison of the punitive damage award to any possible civil or criminal sanction. *Ibid.*

A review of those three factors shows the punitive damages awarded in this case are unconstitutionally excessive.

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[86] The standards for reviewing those trial court rulings are set forth at p. 22 n. 25 above.

a) City's Conduct Was Not Reprehensible

"Reprehensibility is the most important guidepost in determining the reasonableness of a punitive damage award." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1229 (10th Cir. 2000). The amount of punitive damages should reflect the "enormity of the offense." "This principle reflects the accepted view that some wrongs are more blameworthy than others." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599, 134 L.Ed.2d 809 (1996). The less blameworthy the conduct, the lower the permissible punitive damage award.

Here, City's conduct was not high on the scale of reprehensibility, if deserving of punishment at all. *See* pp. 54-58 above. No violence was involved. The only harm was economic in nature. *Gore*, 517 U.S. at 576, 116 S.Ct. at 1599. It inflicted no injury on plaintiffs' health or safety, apart from the mildly bruised feelings plaintiffs claimed as a result of their alleged economic losses. *See Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 638 (10th Cir. 1997) ("[T]orts causing only economic injury [are] less worthy of large punitive damage awards than torts inflicting injuries to health or safety."); *FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (same).

City's allegedly wrongful acts were primarily non-disclosures of purportedly undesirable features of the products sold, not deliberately false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. *Gore*, 517 U.S. at 579-80, 116 S.Ct. at 1601. "[T]he omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists." *Id.* Here, City had such a good faith belief. *See* pp. 33-35

above. In short, City's conduct does not rise to a level warranting any award of punitive damages. At worst, its conduct was at the lower end of the scale of reprehensibility and any punitive award should have been minimal.

b) The Punitive Damage Awards Were Not Reasonably Related To Actual Harm

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff—that is, the ratio of compensatory damages to the punitive damages awarded." *Hicks*, 2002 WL 1722168 at *5, *citing Gore*, 517 U.S. at 580, 116 S.Ct. at 1589.

While no "simple mathematical formula" marks the statutory or constitutional line between reasonable and excessive punitive damages, the United States Supreme Court has held that a punitive damage award of "more than 4 times the amount of compensatory damages" might be "close to the line" while a "breathtaking 500 to 1" ratio, *Cooper Indus.*, 517 U.S. at 581, 583, 116 S.Ct. at 1602-03, is "clearly outside the acceptable range." *Paracelsus Health Care Corp.*, 754 So.2d at 445.[87] In *Hicks*, this Court struck down as "mind-boggling" and "absolutely beyond excessive" a punitive damage award

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[87] In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 2721, 125 L.Ed.2d 366 (1993), the United States Supreme Court stretched to affirm a punitive damage award that was ten times the harm that the victim would have sustained if the defendant's tortious plan had succeeded. *See Cooper Indus.*, 517 U.S. at 581, 116 S.Ct. at 1602. In *Paracelsus Health Care Corp.*, 754 So.2d at 445, this Court affirmed two punitive damage awards totaling $3 million though they were 150 and 43 times the amount of compensatory damages awarded the two plaintiffs. While in a pre-*Gore* decision, this Court once approved an award of punitive damages approximately 600 times the amount of compensatory damages. *Independent Life & Acc. Ins. Co. v. Peavy*, 528 So.2d 1112 (Miss. 1988).

that was 1,567 times the compensatory damage award. *Hicks*, 2002 WL 1722168 at *5; *see also Dixie Ins. Co. v. Mooneyhan*, 684 So.2d 574, 587 (Miss. 1996) (punitive damage award 1,875 times compensatory damages held excessive); *Baymon*, 732 So.2d at 275 ($5 million punitive damage award and $35,000 compensatory damage award both excessive in light of plaintiff's proof of only $762 in economic loss).

The comparison of actual or threatened harm to punitive damages is complicated in this case by the jury's award of excessive emotional distress damages as well as excessive punitive damages. *See* pp. 64-68 above. Leaving the excessive emotional distress damages aside, the ratio of punitive damages to plaintiffs' economic losses clearly exceeds constitutional limits. Even after the trial court's remittitur, the average ratio of punitive damages to economic loss is 4,202 to 1, with a range from 1,143 to 1 (for Lou Waters) to 33,523 to 1 (for Louise Blue). *See* Appendix 2. Plainly, these ratios vastly exceed those this Court found "absolutely beyond excessive" in *Hicks* and *Mooneyhan*.[88]

Even if some recognition is given to the emotional distress awards in this case, the punitive damage awards are still far beyond any reasonable relationship to actual damages. The large compensatory damage awards based on minimal, if not non-existent, evidence of severe emotional distress, strongly suggest that the compensatory awards themselves already contain a punitive element. *See Blue Cross & Blue Shield of Miss.*,

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[88] The ratio of punitive damages to economic damages also vastly exceeds the 250-to-1 ratio that the trial court implicitly found appropriate in framing its remittitur with respect to the six plaintiffs for whom no relevant evidence of emotional distress was introduced at trial.

Inc. v. Campbell, 466 So.2d 833, 845 (Miss. 1984) (in making a punitive damage award, a jury may consider plaintiff's emotional distress); *see also Orkin Exterminating Co. v. Jeter*, __ So.2d __, 2001 WL 1391443 at *11 (Ala. 2001) (noting that a jury's strong feelings about impropriety of defendant's conduct should not be allowed to increase emotional distress awards). Under these circumstances, punitive damages must be confined to very low multiples of total compensatory damages to avoid double-counting and excessive punishment.

The ratio of punitive damages to total compensatory damages, including the excessive emotional distress damage awards, in this case are anything but low. After the trial court's remittitur, the average ration was 26 to 1, ranging from a low of 12 to 1 (for Lindsey Horton and Lou Waters) to a high of 75 to 1 (for Tina Cross), apart from the six plaintiffs for whom the trial court remitted all emotional distress damages and who received punitive damages in an amount 250 times their reduced compensatory damages. *See* Appendix 2. These ratios are well above anything the United States Supreme Court has ever approved. Indeed, 10-to-1 is the highest ratio that Court has allowed. *Gore*, 517 U.S. at 581, 116 S.Ct. at 1602.

As one federal court has distilled *Gore's* teaching: "[I]n economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio." *Continental Trend Resources,* 101 F.3d at 639. Here, the compensatory damage awards were "significant"—the lowest not remitted was $40,000, the highest, $250,000. The jury clearly had no trouble detect

ing injury. Even the lowest ratio of punitive damages to total compensatory award in this case exceeded the constitutional maximum of 10 to 1, while the average and high ratios of 26 and 75 to 1 balloon far past the proper limit. "The colossal size of the jury's punitive award for what amounts to unethical business tactics creates the inevitable inference that it was the product of antipathy toward the defendant, rather than the gravity of [its] wrongful conduct." *Seeley v. Seymour*, 190 Cal.App.3d 844, 868, 237 Cal.Rptr. 282, 295 (1987).

c) The Punitive Damage Awards Vastly Exceed Comparable Civil Or Criminal Penalties

The final constitutional guidepost for assessing whether a punitive damage award is excessive is "the difference between this remedy and the civil [or criminal] penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575, 116 S.Ct. at 1598-99. As this Court stated in *Hicks*:

> A reviewing court engaged in determining whether an award of punitive damages is excessive should "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue" as the sanctions imposed by the legislature are duly considered by the courts to be those the legislature has determined to be necessary to achieve the goal of deterring future misconduct. The sanction imposed in the case sub judice cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.

Hicks, 2002 WL 1722168 at *6 (citation omitted).

Also, "comparable civil or criminal penalties alert a defendant to the possibility of substantial punitive damages in the wake of his illegal conduct ..." *United Phosphorus*,

205 F.3d at 1231. The constitutional question presented is whether the defendant had fair notice that it could be punished in such large amounts for the conduct which harmed the plaintiff. *Hicks*, 2002 WL 1722168 at *6.

Here, City had no such notice. The cumulative $51 million in punitive damages awarded against City, post-remittitur, vastly exceeds civil penalties authorized in comparable cases. For example, the $3 million in punitive damages awarded each plaintiff in this case is 300 times greater than the maximum $10,000 civil penalty for engaging in unfair or deceptive trade practices. Miss. Code Ann. §§ 75-24-5, 75-24-19.[89] The punitive damage awards in this case exceed by even wider multiples other comparable penalties. Under Miss. Code Ann. § 63-19-55(3), City could be penalized $500 at most for violating the consumer finance law under which it is licensed. Other types of lenders are subject to similarly low penalties under their licensing laws. Miss. Code Ann. § 75-67-333(5) ($500 per violation of pawnshop act); § 81-1-121(1) ($20,000 per violation of state bank act); § 81-12-213 (same for violation of savings & loan act); § 81-14-203 (same for violation of savings bank act); § 81-18-39 ($3,000 per violation of mortgage consumer protection law). The maximum penalty for unfair or deceptive practices in the business of insurance is $5,000. Miss. Code Ann. § 83-5-45(5).

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[89] For willful violations, the *criminal* penalty is only a $1,000 fine. Miss. Code Ann. § 75-24-20. Likewise, the maximum penalty for willful violation of the Insurance Commissioner's cease and desist order is only $1,000 per violation. Miss. Code Ann. § 83-5-49.

These statutory civil penalties convincingly demonstrate that the Legislature has determined that penalties in the range of $500-$20,000 per violation are adequate to punish wrongs and deter future misconduct like that alleged in this case. The punitive damage awards in this case "cannot be justified on the ground that [they were] necessary to deter future misconduct" when the Legislature has determined that penalties 1/150 to 1/6,000 that size can be expected to achieve that goal. *Hicks*, 2002 WL 1722168 at *6. Nor did those small statutory penalties "alert [City] to the possibility of substantial punitive damages in the wake of [its allegedly] illegal conduct." *United Phosphorus,* 205 F.3d at 1231.

Thus, the judgment in this case fails each of the three constitutional tests for excessive punitive damage awards. This Court need go no further. Even if the punitive damage awards could pass muster under Mississippi law, their constitutional infirmity would require reversal of the judgment or a substantial remittitur of punitive damages. Nevertheless, for the sake of completeness, City also shows below that the awards also are excessive under Mississippi law.

2. The Punitive Damage Awards Are Excessive In Violation of Mississippi Code Section 11-1-65

a) Standard of Review Under Section 11-1-65

Under Miss. Code Ann. § 11-1-65(1)(f), before rendering judgment, a trial court is required to ascertain whether a punitive damage award is reasonable, taking into consideration: (1) whether the award is reasonably related to the harm caused or likely to be caused by the defendant's conduct; (2) the degree of reprehensibility of the defendant's

conduct; (3) the defendant's financial condition and net worth; and (4) in mitigation, the existence of other civil awards against the defendant for the same conduct.[90]

This Court has not yet decided what standard of review governs its scrutiny of the trial court's determination under section 11-1-65(1)(f), but *de novo* review is the appropriate standard for several reasons. First, this Court's review under federal constitution is *de novo* and requires consideration of many of the same factors. Section 11-1-65(1)(f)'s first and second factors are the same as and factor four is similar to those the Court must weigh in deciding whether a punitive damage award exceeds federal constitutional limits. It would be needlessly complicated and time-consuming for this Court to review the same issues *de novo* for constitutional purposes but by another standard under section 11-1-65(1)(f).

Second, there is little reason for appellate courts to defer to trial courts on these issues. *Cooper Indus.*, 121 S.Ct. at 1687-88. Appellate courts are better able to assess whether the defendant has already been punished sufficiently in other cases. Appellate courts are just as able as trial courts to compare punitive damage to actual or threatened harm. Trial courts enjoy only a small advantage in assessing reprehensibility of the defendant's conduct.

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[90] In its post-trial motions, City brought this section to the trial court's attention and sought a reversal or reduction of the punitive damage awards under its terms. The motion was denied except as to the six plaintiffs who had presented no evidence of emotional distress.

Third, the standards set by section 11-1-65(1)(f) are as "fluid" in concept as the factors considered in the constitutional test. *Cooper Indus.*, 121 S.Ct. at 1685. They gain content only through application. "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." De novo review will unify precedent and stabilize the law. *Ibid.*

b) Section 11-1-65's First Two Factors Show That, At Most, Only A Small Award Is Proper

The first two factors courts are to consider in determining whether a punitive damage award is excessive under Miss. Code Ann. §11-1-65(1)(f)(ii) are the same as the first two factors that *Gore* requires a court to take into account in reviewing a punitive damage award for excessiveness under the federal constitution—that is, relationship to actual harm and reprehensibility of the defendant's conduct.

Those factors have already been discussed. *See* pp. 72-76 above. For the reasons there stated, no award of punitive damages is appropriate in this case. Under no circumstance should any award approach the wholly oversized $3 million per plaintiff levies actually assessed here.

c) City's Financial Condition Does Not Justify The Large Punitive Damage Awards

The third statutory factor to be considered is the "financial condition and net worth of the defendant." Miss. Code Ann. § 11-1-65(1)(f)(ii)(3). Punitive damages are meant to sting, not kill, the defendant. *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878, 885 (Ala. 1991). Punitive damages are excessive in relation to the defendant's financial

condition if they impose financial hardship. *See Paracelsus Health Care Corp.*, 754 So.2d at 445.

On the other hand, punitive damages are not a wealth tax. An otherwise excessive punitive damage award cannot be justified simply because the defendant is wealthy. *Gore*, 517 U.S. at 585, 116 S.Ct. at 1604; *Continental Trend Resources,* 101 F.3d at 641.

Here, the analysis is complicated by the fact that the trial court erred in permitting plaintiffs' expert to testify to an opinion regarding City's value which was never properly disclosed to City until the last day of trial—one that the expert had not even concocted until well after her deposition was taken. *See* pp. 93-98 below. That improperly admitted opinion was the only evidence of City's financial condition or net worth that plaintiffs presented to the jury.

Even if the expert's opinion have been properly disclosed and admitted, the punitive damages awards would be excessive in relationship to the evidence of City's financial condition. According to the expert, City had, at the time of trial, a net worth of about $415 million. 23 R.T. 1783:9-15. The punitive damages awarded in this case—after taking the trial court's remittitur into account—totaled $51 million, or nearly an eighth of City's net worth (12.4%).

No Mississippi case has ever upheld a punitive damage award that represented such a large proportion of a financially secure defendant's wealth or financial condition. In *Paracelsus Health Care Corp.*, 754 So.2d at 445, this Court affirmed an award of 5.6% of the defendant's net worth as punitive damages. *See also Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172, 1191 (Miss. 1985) (5¼%). That is the highest this Court has

thus far allowed, with most other awards being under 2% of the defendant's net worth. *E.g., Cooper Tire & Rubber Co. v. Tuckier*, __ So.2d __, 2002 WL 24605 at *11 (Miss. 2002) (under 1%); *Valley Forge Ins. Co./CAN Ins. Co. v. Strickland*, 620 So.2d 535, 541 (Miss. 1993) (1½%); *compare Mooneyhan*, 684 So.2d at 586 (reversing award equal to 1.67% of net assets).

Punitive damage awards at so high a percentage of the defendant's net worth have been repeatedly stricken by other courts as excessive. *Jeter*, 2001 WL 1391443 at *14 (award's equals 10% of defendant's net worth is factor showing punitive damage award is excessive); *Proctor v. Davis*, 291 Ill.App.3d 265, 287, 682 N.E.2d 1203, 1217 (1997) (punitive damage award 2% of large company's net worth is excessive); *BMW of North America, Inc. v. Gore*, 701 So.2d 507, 514 (Ala. 1997) ("a punitive damages award that exceeds 10% of the defendant's net worth crosses the line from punishment to destruction"); *Stafford v. Puro*, 63 F.3d 1436, 1444 (7th Cir. 1995) (noting most awards equal about 1% of net worth).

Even measured against the improperly admitted evidence of City's supposed net worth, the punitive damage award is excessive, being well over the 10 percent limit set in the foregoing cases and more than double the highest percentage of net worth this Court has ever approved.

d) Cumulative Punitive Damage Awards Exceed The Amount Needed To Punish And Deter

The last factor to be considered under section 11-1-65(1)(f)(ii) is the imposition of criminal sanctions or the existence of other civil awards against the defendant for the

same conduct. This factor is considered "[i]n mitigation" only. If a defendant has already been sanctioned, civilly or criminally, for the same conduct, any punitive damage award must be reduced accordingly to avoid punishing more than necessary to deter future misconduct.

Having been punished once for such a course of conduct, a defendant has "paid its debt to society" and may not constitutionally be punished repeatedly thereafter for the same wrongs. *Haynes v. Alfa Financial Corp.*, 730 So.2d 178, 185 (Ala. 1999) (Houston, J., concurring); *accord: Dunn v. Hovic*, 1 F.3d 1371, 1391 (3d Cir. 1993); *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989); *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053, 1065 (D. N.J. 1989), *vac. on other grounds*, 718 F.Supp. 1233 (D. N.J. 1989).

While City has not been punished *before* for the same course of conduct, the multiple punitive damage awards to individual plaintiffs in this single case have the same effect, repeatedly punishing City for the same course of conduct. In awarding each plaintiff the same amount of punitive damages—$3 million per plaintiff—the jury clearly meant to punish City Finance for the entire course of conduct that it found wrongful, not just for the individual wrongs done a particular plaintiff.[91] That fact, alone, requires reversal of the punitive damage awards since punitive damages should be proportioned to

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[91] Had the jury intended to punish City Finance only for wrongs done each particular plaintiff, it surely would have awarded varying amounts of punitive damages to each plaintiff since their circumstances, claimed economic and emotional damages, and the allegedly wrongful acts of City Finance with respect to them differed significantly.

the harm caused the particular plaintiff(s) who sued, "not some 'potential,' hypothetical aggregate of harm to persons not before [the c]ourt ...." *Hicks*, 2002 WL 1722168 at *6; *see also Cooper Indus.*, 532 U.S. at 435, 440, 121 S.Ct. at 1685, 1687; *Gore*, 517 U.S. at 575, 581, 116 S.Ct. at 1598, 1602.

City Finance has now been punished 23 times for the same purportedly wrongful course of conduct. So many successive punishments for the same offense is excessive. Such repeated punishment no longer serves the purpose of retribution and deterrence; it simply serves to unjustly enrich the plaintiffs at the defendant's expense.[92]

"[T]here is a constitutional limit on the amount of punitive damages that may be awarded against a defendant for a tortious course of conduct affecting multiple claimants." *Holland v. Auto Mart of the Southeast, Inc.*, 692 So.2d 811, 820 (Ala. 1997); *accord: W.R. Grace & Co. v. Waters*, 638 So.2d 502, 506 (Fla. 1994). That limit has been transgressed here.

The punitive damage awards in this case are as excessive when reviewed under the factors listed in Miss. Code Ann. §11-1-65(1)(f)(ii) as they are when tested by the three constitutionally relevant factors. The trial court erred in denying City's motion to reduce or reverse the verdicts under that section. That erroneous ruling and the awards it incorrectly preserved should be reversed.

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[92] The punitive damage awards are likewise excessive if viewed as a single collective award of $51 million in punitive damages for a course of conduct that caused only economic harm, and did so in the comparatively tiny amount of $12,175.

3. The Punitive Damage Awards Are Excessive Under Mississippi Common Law

Under Mississippi common law, the Court may reverse or remit a punitive damage award "when it is so excessive that it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience." *Paracelsus Health Care Corp.*, 754 So.2d at 444; *C & C Trucking Co. v. Smith*, 612 So.2d at 1106-07.

While "no hard and fast rule exists for establishing the maximum amount of punitive damages which can be awarded in any given case," the common law factors that the Court considers are: (1) whether the amount serves to punish the wrongdoer and deter similar future conduct, (2) whether the amount serves as an example to deter others from similar offenses, and (3) whether the amount is commensurate with the defendant's net worth and pecuniary ability. *Paracelsus Health Care Corp.,* 754 So.2d at 444; *Mooneyhan*, 684 So.2d at 585.

Each of these factors has already been discussed, in different guises, above. While it can be argued that the punitive damage awards here serve to punish City and deter both it and others, the same could be said of any punitive damage award, no matter how excessive. Indeed, the more excessive the greater the deterrence. That, of course, is not the proper analysis. Instead, as noted in *Hicks*, a punitive damage award "cannot be justified on the ground that it is necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve the same goal." *Hicks,* 2002 WL 1722168 at *6; *see Gore*, 517 U.S. at 584, 116 S.Ct. at 1602.

Here, less drastic punishment would surely suffice. Mississippi's Legislature certainly thought so. *See* pp. 77-78 above. This Court has never approved such drastic punishment, even for the most reprehensible conduct. *See* pp. 74-76, 81-82 above. And, in this case, City's conduct, if warranting punitive damages at all, is barely on the scale of reprehensibility. *See* pp. 64-70, 72-73 above. The first two common law factors, thus, cannot support the outsized punitive damage awards in this case. Further, as already shown, the awards are excessive under the third common law factor, totaling an impermissible 12.4% of City's net worth. *See* pp. 81-82 above.

Applying the three common law factors, the punitive damage awards are "so excessive that [they] evince[] passion, bias, and prejudice on the part of the jury so as to shock the conscience." *Paracelsus Health Care Corp.*, 754 So.2d at 444. Those awards must be reversed under common law standards as well as under the constitutional and statutory standards discussed above.

VI

THE TRIAL COURT COMMITTED PREJUDICIAL PROCEDURAL ERRORS

A. The Trial Court Erroneously Gave Plaintiffs' Proposed Instructions On Their Four Causes Of Action

For two separate reasons, the trial court erred, as a matter of law, in giving plaintiffs' four proposed jury instructions, P-10, P-11, P-12, and P-17, defining the elements of

their causes of action.[93]

First, the four instructions were improper for the same reason this Court found error in the instructions given in *Baymon*, 732 So.2d at 273-74: they suggest that City has done what plaintiffs allege and fail to tell the jury it is to decide whether the allegations are true. The plaintiffs' four instructions also eliminate key elements of their claims from the jury's consideration.

Second, the four instructions conflict with the legally correct instructions that City proposed and the trial court also gave. It is reversible error to give instructions that, like the two sets in this case, conflict in material respects.

1. Plaintiffs' Four Instructions Were Legally Improper

Plaintiffs' four instructions, P-10, P-11, P-12 and P-17,[94] are erroneous because they follow exactly the form this Court found to be improper in *Baymon*, 732 So.2d at 273-74.

After a brief introduction, each of these instructions recites plaintiffs' allegations of wrongdoing, and each then concludes by stating that if the jury finds that City breached its duty or otherwise acted improperly, the jury should render a verdict for plaintiffs. A comparison of plaintiffs' breach of duty of good faith instruction in this case with the instruction on the same subject in *Baymon* demonstrates how the two follow the same improper form:

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[93] The propriety of jury instruction raises a question of law which this Court reviews *de novo*. *Munford, Inc. v. Fleming*, 597 So.2d 1282, 1286 (Miss. 1992).

Plaintiffs' Instruction P-10

The Court instructs you that in every contract entered into in Mississippi there exists a duty of good faith and fair dealing. This means that parties to a contract must perform that contract with the good faith and fair dealings toward one another. The Court further instructs you that defendant Washington Mutual Finance Group, LLC, formerly known as City Finance Company, and plaintiffs both had duties of good faith and fair dealing toward one another. The plaintiffs allege that defendant breached its duty of good faith and fair dealing by accepting undisclosed commissions or other payments from the selling of insurance products, ailing to disclose relationship between defendant and the reinsurers, failing to disclose defendant's policy to target each customer to the extent of his or her maximum loanable amount, failing to disclose that defendant's branch offices were rewarded annually based on their profitability, including the amount of insurance premium dollars collected less any claims paid, selling plaintiffs insurance products without disclosing or offering other available options, or whether any insurable interest was already otherwise protected or insured. If you find by a preponderance of the evidence that by such acts Washington Mutual Finance Group, LLC, formerly known as City Finance Company, did not act in good faith and fair dealing with a plaintiff and such acts caused injury if any, you must return a verdict in favor of that plaintiff.

***Baymon* Instruction**

The Court instructs you that in every contract entered into in Mississippi there exists a duty of good faith and fair dealing. This means that parties to a contract must perform that contract with the good faith and fair dealings toward one another. The Court further instructs you that Defendant [GMAC] and Plaintiff, Menola Baymon, both had duties of good faith and fair dealing toward one another. The Plaintiff alleges that Defendant GMAC breached its duty of good faith and fair dealing by accepting undisclosed commissions or other payment from MIC, or engaging in self-dealing, or failing to search for competitive pricing, or failing to disclose the relationship between GMAC and MIC, or using the threat of repossession to collect insurance premiums and failed to disclose GMAC's policy not to repossess, or transferring GMAC's tracking expenses to Plaintiff, without disclosing this fact to Plaintiff, or automatically fore-placing Plaintiff with MIC insurance without disclosing or offering other available options, and if you further find that by such acts GMA did not act in good faith and deal fairly with Plaintiff, you must return a verdict in favor of Plaintiff.

Baymon, 732 So.2d at 274.

(Fn. cont'd)

[94] The four instructions are found at 9 C.T. 1282, 1284, 1307-08, and 1311.

However, if you do not find that City Finance Company committed these acts for any plaintiff, then your verdict must be for defendant City Finance as to that plaintiff.

9 C.T. 1307-1308.

As this Court explained in *Baymon*, 732 So.2d at 273-74, instructions in this form are legally improper because they suggest that the defendant has in fact done what plaintiffs' allege and fail to convey to the jury its obligation to determine whether or not the plaintiffs' factual allegations were supported by the evidence, suggesting to the contrary that the trial court believes the allegations to have been proven, and that the jury's only task is to decide if those supposedly proven allegations constitute a breach of duty or other wrong.

Each of plaintiffs' instructions, P-10, P-11, P-12 and P-17, follow this form. Each is improper for the reasons stated in *Baymon*. In addition, each of the four instructions is legally erroneous because it fails to tell the jury each of the elements the jury must find before reaching a verdict in plaintiffs' favor, and instead, tells the jury it "must" return a verdict in the plaintiffs' favor upon finding only a few of the claim's elements to have been met.

For example, the next to last sentence of P-12 tells the jury it must return a plaintiffs' verdict if it finds City made material misrepresentations and some harm was suffered as a result of relying on that fraud. 9 C.T. 1282. Missing from the instruction are at least four elements that Mississippi law requires the jury to find, by clear and convincing evidence, in the plaintiff's favor before rendering a plaintiff's verdict for fraud; namely,

(1) defendant's knowledge of the falsity of the representation, (2) defendant's intention to induce plaintiff's reliance on the representation, (3) plaintiff's ignorance of the falsity, and (4) plaintiff's justifiable or reasonable reliance on the representation. *Baymon,* 732 So.2d at 270; *Franklin v. Lovitt Equip. Co.*, 420 So.2d 1370, 1373 (Miss. 1982). P-12 tells a jury it must return a verdict in plaintiffs' favor even if it finds that a plaintiff was not ignorant of the falsity of a statement or relied on it unreasonably or without justification. That is not Mississippi law.[95]

Baymon reversed based in part on the trial court's having given this type of legally improper instructions. The Court should follow the same course here.

2. It Is Reversible Error To Give The Jury Conflicting Instructions

In this case, the trial court followed a procedure guaranteed to result in error. It received conflicting proposed instructions from plaintiffs and defendant. Rather than attempting to resolve the conflicts and decide what the law actually provided, it simply gave the jury both sets of instructions.[96]

Giving conflicting instructions is an abdication of the trial court's proper duty to decide legal questions. Doing so leaves the jury adrift, "without any definite guide in assessing" the evidence. *Mississippi State Highway Com'n v. Thomas*, 202 So.2d 925,

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[95] In the same way, P-10 omits the element of plaintiff's performance; P-11 omits the element of existence of a fiduciary duty; and P-17 omits the elements of existence of a duty of care and proximate cause.

[96] City's matching instructions were D1A, D2A, D3A, and D4A. 9 C.T. 1306, 1309-1310, 1312-1314.

927 (Miss. 1967). This Court has roundly condemned the practice. "It is well settled that it is reversible error to give contradictory or conflicting jury instructions." *Elam v. Pilcher*, 552 So.2d 814, 817 (Miss. 1989).[97] Any material conflict in the instructions is sufficient to invoke this rule. *E.g., Thomas*, 202 So.2d at 927 (conflicting instructions on the measure of damages); *see also Bridges v. Crapps*, 214 Miss. 126, 134-35, 58 So.2d 364, 366-67 (1952).

In this case, plaintiffs' and defendant's instructions on each of plaintiffs' claims—both of which the trial court gave—conflicted in numerous material respects. For example, plaintiffs' fraud instruction omits four elements (defendant's knowledge of falsity, intent to induce reliance, plaintiff's lack of knowledge of falsity, and reasonable or justifiable reliance) and directs the jury to enter a plaintiffs' verdict if it finds City made material misrepresentations and plaintiffs suffered harm from relying on them. 9 C.T. 1282. In direct conflict with that instruction, City's fraud instruction states that plaintiffs bear the burden of proving all nine elements of fraud by clear and convincing evidence. 9 C.T. 1313-1314.

The conflicts do not end there. Plaintiffs' fraud instruction states that "***fraud consists of*** anything which is calculated to deceive whether it is ... acts or words which amount to a suppression of the truth or ***merely silence*** ...." 9 C.T. 1282 (emphasis

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[97] *See also Griffin v. Fletcher,* 362 So.2d 594, 596 (Miss. 1978) ("It is error for the court in any case to grant instructions which are likely to mislead or confuse the jury as to the principles of law applicable to the facts in evidence; and the two instructions referred to above, which must be read and considered together, are instructions of that kind."); *Moak v. Black*, 230 Miss. 337, 351, 92 So.2d 845, 851 (1957) (same).

added). City's instruction, on the other hand, states that to recover for a defendant's failure to disclose material facts, a plaintiff must prove defendant took an affirmative act designed to prevent plaintiff from discovering the truth. "***The defendant's silence is not enough*** to support a claim for intentional concealment or omission." 9 C.T. 1314 (emphasis added).

Similar material conflicts exist between plaintiffs' and City's instructions on each of plaintiffs' other causes of action.[98] "[I]t is reversible error to give contradictory or conflicting jury instructions." *Elam*, 552 So.2d at 817. Here, the instructions undeniably conflict; the judgment must therefore be reversed.

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[98] Plaintiff's breach of good faith instruction tells the jury to return a plaintiff's verdict without finding several elements of the claim. 9 C.T., 1307-1308; *see* pp. 39-41 above. City's instruction says plaintiffs must prove each of those elements. 9 C.T. 1309-1310. Plaintiffs' instruction lists as allegations, which if true could lead to liability for breach of good faith, a number of acts which occur only during negotiation of a loan or other contract—e.g., "selling plaintiffs insurance products without disclosing or offering available options." 9 C.T. 1308. City's instruction correctly states that the covenant of good faith "applies only to the parties' performance or enforcement of the contract, not to the parties' conduct during the negotiation of terms leading to the contract." 9 C.T., 1309.

Plaintiffs' breach of fiduciary duty instruction omits the crucial element of existence of such a duty. 9 C.T. 1311. City's instruction states that plaintiff must prove that element. 9 C.T. 1312.

Plaintiffs' negligence instruction tells the jury to return a plaintiffs' verdict without finding the elements of duty and proximate cause, 9 C.T. 1284, while City's instruction states plaintiff must prove those elements, 9 C.T. 1306.

B. The Trial Court Abused Its Discretion In Admitting Plaintiffs' Undisclosed Expert Opinion

"Rules of discovery are to prevent trial by ambush. In no other area is a litigant more vulnerable to ambush than" when confronted by expert testimony. *Nichols v. Tubb*, 609 So.2d 377, 384 (Miss. 1992). Therefore, Miss. R. Civ. P. 26(b)(4) requires that a party identify each of its experts and disclose "the *substance of every* fact and *every* opinion" the expert is expected to give at trial as well as the grounds for the opinion. *Id.* Miss. R. Civ. P. 26(f)(1)(B) imposes a further duty on a party to supplement its discovery responses regarding the subject matter and substance of an expert's testimony if either changes after the initial disclosure.

Scrupulous compliance with these requirements is essential since the rules of evidence now "place the full burden of exploration of the facts and assumptions underlying testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980).

> Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.

Id., at 794; *accord: Nichols*, 609 So.2d at 384.

Expert opinions not timely disclosed in compliance with Rule 26's requirements should not be admitted in evidence at trial. *Smith*, 626 F.2d at 794. And, though the trial court has discretion in handling discovery and admitting evidence at trial, both this Court and others have reversed judgments when the prevailing party's expert "was permitted to

testify to facts [or opinions] only generally referred to in the pretrial discovery." *Nichols*, 609 So.2d at 384-85; *Smith*, 626 F.2d at 794.

Here, these rules were flouted, and plaintiffs' expert, Glenda Glover, was allowed to testify, during the punitive damage phase of the trial, to an opinion of City's net worth that had not previously been disclosed. City was prejudiced by the introduction of this opinion, which was the sole evidence regarding its net worth. Hence, the punitive damage award should be reversed.

Under the amended scheduling order in this case, plaintiffs were required to disclose their experts by May 1, 2000. 3 C.T. 428. On that date, plaintiffs did file an expert designation which listed Ms. Glover and stated that she "will provide testimony regarding Plaintiffs' damages, the loan transactions, and punitive damages. [Para.] Her testimony will be based upon the loan files, depositions, documents provided herein, and expertise as reflected in her curriculum vitae." 4 C.T. 484.

That disclosure was plainly inadequate. As this Court said of similar responses in *Nichols,* 609 So.2d at 385:

> These answers were as foolish and dangerous as they were arrogant. They contained no more information than a pleading. Had this matter gone to trial with no more answer than this, the circuit judge would have been acting well within his discretion in excluding all the specific facts and opinions which [Ms. Glover] expressed.

Plaintiffs did make additional disclosure. They produced Ms. Glover for a deposition. At the deposition, Ms. Glover testified to two opinions; the first, as to the net worth of Washington Mutual, Inc. (a holding company four steps removed from City in the

corporate hierarchy), 10 C.T. 1414:4-1415:10, and the second, as to the net worth of Washington Mutual Finance Corporation (City's parent corporation), 10 C.T. 1420:3-25.

Both opinions were based on Washington Mutual, Inc.'s most recent 10-K. 10 C.T. 1418:4-13. The opinion regarding Washington Mutual, Inc. was based directly on shareholder equity, retained earnings, and market value of its stock, all figures disclosed in that public report. 21 C.T. Ex. 3124-3126. The opinion regarding Washington Mutual Finance Corporation was derived from Ms. Glover's opinion of Washington Mutual, Inc.'s value, reducing it, however by the percentage of Washington Mutual, Inc.'s income or assets which Ms. Glover thought Washington Mutual Finance Corporation's income or assets represented. 10 C.T. 1434:2-20, 1436:21-1437:8, 1441:19-25; 11 C.T. 1489, 21 C.T. Ex. 3132.

At trial, Ms. Glover testified to neither of these two opinions. Instead, she offered a brand new opinion. First, it was an opinion about a different corporation, Washington Mutual Finance, LLC, the successor by merger to City Finance Company, and the defendant in the case. 23 R.T. 1779:3-13. Second, it was an opinion based not on Washington Mutual, Inc.'s 10-K report, but rather solely on City's financial statements for the years 1997-2000. 23 R.T. 1779:15-28, 1783:3-15.

As Ms. Glover admitted, 23 R.T. 1784:15-27, 1787:1-3, 24 R.T. 1794:14-28, and the trial court found, 24:R.T. 1795:17-1796:20, she came to this new opinion only after completion of her deposition. Despite the fact that plaintiffs plainly recognized their duty to supplement their expert witness disclosures when the experts came to new opinions,

see 5 C.T. 687, 710; 7 C.T. 966 (plaintiffs' supplemental disclosures regarding other experts), they never supplemented their disclosure regarding Ms. Glover.

The first time plaintiffs disclosed that Ms. Glover would render an opinion regarding City's net worth (as opposed to the net worth of another company) was in response to City's oral motion, at the beginning of the punitive damage phase of the trial, to exclude her testimony. 23 R.T. 1744:5-1748:5. City immediately objected that this new opinion had never previously been disclosed and should therefore be excluded. 23 R.T. 1748:7-1750:8. The trial court overruled the objection based largely on plaintiffs' false assertion that they had previously produced to City their Exhibit 160 which, they said, contained all of Ms. Glover's opinions.[99] 23 R.T. 1750:11-1753:24, 1754:21-1755:19.

After Ms. Glover testified, City again objected to her new opinion. 24 R.T. 1789:11-16, 1791:13-1792:13. Though finding that Ms. Glover's new opinion "was not provided to the defendant," the trial court overruled City's objection, stating "no preju-

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[99] Exhibit 160, 21 C.T. Ex. 3122-3132, is a composite of disparate materials. The first six pages are Ms. Glover's opinion regarding Washington Mutual, Inc.'s net worth. 21 C.T. Ex. 3122-3127. It was prepared in June 2000 as its cover indicates, and it was produced to City before Ms. Glover's deposition. The last page of the exhibit is Ms. Glover's opinion as to Washington Mutual Finance Corporation's net worth. 21 C.T. 3132. It was produced at her deposition. 10 C.T. 1417; 11 C.T. 1489. Sandwiched between those documents are four pages constituting her new opinion. 21 C.T. 3128-3131. Those pages were not disclosed to City because they were not prepared until after Ms. Glover's deposition. 23 R.T. 1784:15-27, 1787:1-3, 24 R.T. 1794:14-28. Though plaintiffs did produce the entire exhibit, along with more than a thousand pages of their other exhibits shortly before trial, doing so was hardly the disclosure contemplated by Rule 26(b)(4) or (f)(1). Rather than calling attention to the fact that Ms. Glover had formed a new opinion, the exhibit was carefully constructed to conceal, insofar as possible, the fact that it contained new material by carefully placing that material between old bookends.

dice to the defendant or a surprise in that the information that the expert used in arriving at her ultimate net value was supplied to the expert by the defendant." 24 C.T. 1796:12-20. The trial court also denied City's new trial motion which was based in part on error in admitting Ms. Glover's new opinion. 10 C.T. 1355, 1375-1376 ¶12, 1393-11 C.T. 1489; 11 C.T. 1549.

The trial court abused its discretion in so ruling. First, as the trial court itself found, plaintiffs had grossly violated their duty under Miss. R. Civ. P. 26 to disclose expert opinions and supplement prior expert disclosures when new opinions were formed. They sprang Ms. Glover's new opinion on City just before she testified on the last day of trial.

Second, the fact that the opinion was based on numbers City provided in no way lessens the prejudice it suffered from hearing the opinion for the first time from the witness stand. Numbers in a financial statement are not self-explanatory, at least to non-accountants. Not forewarned that Ms. Glover would testify about City's net worth using numbers from its financial statements, City had no accounting expert available in the courtroom to help it interpret the numbers. Also, City's lawyers were unprepared to cross-examine Ms. Glover on her new opinion. "[I]f trial counsel is not afforded time prior to trial to meet and prepare for a particular ... contention requiring specialized knowledge to grasp and understand, he is ill-equipped to suddenly do so in the middle of the trial." *Nichols*, 609 So.2d at 384.

The trial court abused its discretion in admitting Ms. Glover's new opinion. *See Smith*, 626 F.2d at 797 (listing factors considered in deciding whether a trial court abused

its discretion in admitting a previously undisclosed expert opinion). That opinion came as a total surprise to City, 23 R.T. 1748:7-1749:20, which was consequently unprepared to cross-examine Ms. Glover[100] or otherwise respond to her testimony. When the new opinion was first revealed—just before the jury returned to hear the punitive damage phase of the trial on the last day of trial—there was nothing City could do to cure the prejudice. It could not then obtain a continuance to take Ms. Glover's deposition again and prepare to cross-examine her regarding her new opinion, not with twelve jurors waiting—an adjournment at that stage would have seriously disrupted the trial. *Smith*, 626 F.2d at 799. Plaintiffs never provided any explanation for their failure to inform City's attorneys earlier regarding Ms. Glover's new opinion. Moreover, the new opinion was plainly prejudicial as it was the only evidence offered on an issue, City's net worth, that was of critical importance in the punitive damage phase of the trial.

The trial court's error in admitting this surprise testimony requires reversal of the punitive damage portion of the judgment.

VII

CONCLUSION

For the reasons stated above, the Court should reverse the judgment and direct entry of judgment in City's favor, or in the alternative, reverse for a new trial, with or

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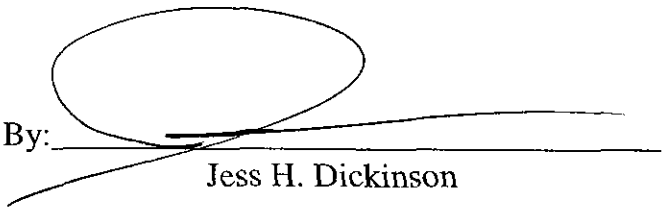
[100] In fact, the cross-examination of Ms. Glover was limited to establishing that her new opinion had been formed after her deposition was taken. 23 R.T. 1784-1787.

without giving plaintiffs the alternative of accepting a substantial remittitur of emotional distress damages and punitive damages.

RESPECTFULLY SUBMITTED, this the 12th of November, 2002.

SEVERSON & WERSON,
A PROFESSIONAL CORPORATION

DICKINSON, ROS, SAMSON & NELMS, P.L.L.C.



By: _____
Jess H. Dickinson

Attorneys for Defendant and Appellant
Washington Mutual Finance Group, LLC

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

1.	Testimony	Page:Line
Plaintiff:	Greta Blackmon	
Age, Schooling, Disability, Other Loan Experience	Ms. Blackmon is 34 years old. She finished high school and also had a few night courses.	16 R.T. 676:28-29, 677:26-678:1.
Employment:	Ms. Blackmon is a medical records clerk for the Mississippi Department of Health.	16 R.T. 678:7-11, 689:24-690:6.
City Loans:	Ms. Blackmon borrowed from City in 1993, 1994, and 1996.	16 R.T. 679:17-680:24; 1 C.T. Ex. 1-5.
Refinance or Insurance:	Ms. Blackmon bought credit life, disability and property insurance with each loan.	16 R.T. 682:19-27; 1 C.T. Ex. 1-5.
Discussion of Refinance or Insurance:	No discussion with City about credit insurance.	16 R.T. 683:23-684:4, 697:19-24.
Emotional Distress:	Ms. Blackmon trusted City and thought it treated her fairly before; now she distrusts it and feels duped. Previously, she stayed awake nights worrying about where to get extra money so her children would have a good Christmas.	16 R.T. 687:4-9, 688:8-19, 699:8-11.
Discovery of Claim:	The first time Ms. Blackmon found out about problems with her loan or got in touch with a lawyer was in 1997.	16 R.T. 687:10-16.
Asserted Monetary Loss:	$669.61.	18 R.T. 1011:20-1012:4.
Jury Award:	Compensatory Damages: $85,000. Punitive Damages: $3 million.	9 C.T. 1321, 10 C.T. 1347, 1353.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

2.	Testimony	Page:Line
Plaintiff:	Louise Blue	
Age, Schooling, Disability, Other Loan Experience	Ms. Blue is 38 years old. She graduated from high school.	19 R.T. 1081:2-3, 1083:28-1084:5.
Employment:	Ms. Blue works at the Freshwater (catfish) Farm, filleting fish.	19 R.T. 1081:23-1082:20.
City Loans:	In 1994, Ms. Blue obtained a loan from Easy Finance which was later assigned to City. She received and cashed a check in the mail from City and also obtained a loan from City in 1996.	19 R.T. 1085:18-1087:29, 1094:18-1095:23; 2 C.T. Ex. 152, 161, 177.
Refinance or Insurance:	Ms. Blue bought credit life insurance with the 1996 loan, which was a refinance loan.	19 R.T. 1089:18-28; 2 C.T. Ex. 152.
Discussion of Refinance or Insurance:	No discussion of insurance at City.	19 R.T. 1088:27-29, 1089:25-1090:5.
Emotional Distress:	Ms. Blue feels bad now knowing she paid money she did not have to.	19 R.T. 1091:22-26, 1092:4-10.
Discovery of Claim:	In October 1997, Ms. Blue first discovered something she believed was wrong with the way City had treated her.	19 R.T. 1093:20-24.
Asserted Monetary Loss:	$89.49.	18 R.T. 1013:2-5.
Jury Award:	Compensatory Damages: $80,000. Punitive Damages: $3 million.	9 C.T. 1321, 10 C.T. 1347, 1353.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

3.	Testimony	Page:Line
Plaintiff:	Glenda Chambers	
Age, Schooling, Disability, Other Loan Experience	Ms. Chambers is 39 years old, and has a 12th grade education. She has borrowed from First Family, Bank Plus and Crescent Bank. She has been through the loan process on a number of occasions and is familiar with how it works.	16 R.T. 620:25-621:14, 658:21-659:6.
Employment:	Ms. Chambers sews car arm-rest covers for Irvin Automotive. She also has a part-time job at Belzoni Nursing Home.	16 R.T. 625:7-626:23.
City Loans:	Ms. Chambers bought a car on credit from Ruston Auto. Her account was assigned to City. After she repaid it, City sent her a check in the mail in 1991 which she cashed and repaid. In 1995 City sent her another check in the mail which she also cashed. When she had trouble repaying that loan, City refinanced it in 1997.	16 R.T. 628:11-629:2, 636:2-24, 638:25-641:23, 642:12-29; 2 C.T. Ex. 186, 196, 208
Refinance or Insurance:	Neither the Ruston Auto contract nor the two checks in the mail involved any refinance or purchase of insurance. The 1997 loan was a refinance. In connection with it, Ms. Chambers bought credit life insurance, but not credit disability or property insurance.	16 R.T. 640:2-641:23, 647:14-18, 659:12-18, 665:8-21, 671:20-26, 673:16-24; 2 C.T. Ex. 186.
Discussion of Refinance or Insurance:	City's branch manager told Ms. Chambers in 1997 a refinance would be best for her because it would bring her existing debt to City current, not adversely affect her credit rating, and lower her payments somewhat. The manager did not mention credit life insurance, though Ms. Chambers noted, before she signed, that her loan papers showed she was buying it.	16 R.T. 631:2-23, 637:9-23, 643:1-21, 649:27-650:15, 653:16-24, 672:26-673:15.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

Cont'd	Testimony	Page:Line
Plaintiff:	Glenda Chambers	
Emotional Distress:	Ms. Chambers feels "terrible" about the refinance loan now and "like I have been taken advantage of." She "trusted [City] to be honest with me" but has now discovered that City signed her up for insurance she did not need when, at the time, she needed the money for other purposes.	16 R.T. 653:6-654:8.
Discovery of Claim:	Ms. Chambers said she discovered what she is suing City for at the end of 1997 when her sister told her City was getting sued. Ms. Chambers took her loan papers to a lawyer who reviewed them and told her she had grounds to sue.	16 R.T. 656:3-19.
Asserted Monetary Loss:	$996.74.	18 R.T. 1012:15-23.
Jury Award:	Compensatory Damages: $160,000. Punitive Damages: $3 million.	9 C.T. 1323, 10 C.T. 1347-48, 1353.

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4.	Testimony	Page:Line
Plaintiff:	Earnest Claiborne	
Age, Schooling, Disability, Other Loan Experience	Mr. Claiborne is 32, and a college graduate. He has also borrowed from Valley Bank, Bank of Winona, Tower Loan, Pioneer Credit and Public Finance.	16 R.T. 701:26-702:9, 717:3-21; 2 C.T. 248.
Employment:	Mr. Claiborne now is an analyst for Wells Fargo Home Mortgage; previously he was a corrections officer for the Mississippi Corrections Dept.	16 R.T. 702:10-21.
City Loans:	Mr. Claiborne borrowed from City in 1991 and thinks he may have renewed the loan two or three times.	16 R.T. 705:16-706:25; 2 C.T. Ex. 233.
Refinance or Insurance:	Mr. Claiborne bought credit life, disability and property insurance on the 1991 loan.	16 R.T. 708:6-8; 2 C.T. Ex. 231, 233.
Discussion of Refinance or Insurance:	No discussion with City about credit insurance, but Mr. Claiborne admits he knew he was buying some insurance; he just did not know what type.	16 R.T. 708:9-27, 709:28-711:5, 722:8-17.
Emotional Distress:	Now that he has learned he paid for credit insurance, Mr. Claiborne is angry, because City did not look out for his best interest. He feels betrayed and like he was taken advantage of.	16 R.T. 712:11-713:24, 714:21-715:9.
Discovery of Claim:	Mr. Claiborne first learned he had purchased property insurance when he took his loan papers to a lawyer in 1998.	16 R.T. 708:24-709:8.
Asserted Monetary Loss:	$135.68.	18 R.T. 1014:9-16.
Jury Award:	Compensatory Damages: $75,000. Punitive Damages: $3 million.	9 C.T. 1325, 10 C.T. 1350, 1353.

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5.	Testimony	Page:Line
Plaintiff:	Annie Clark	
Age, Schooling, Disability, Other Loan Experience	Ms. Clark is 48 years old.	19 R.T. 1144:25-29.
Employment:	Ms. Clark works at Yazoo Industries making seat belt harnesses for cars.	19 R.T. 1145:12-22.
City Loans:	Ms. Clark bought a car from Park Avenue. The contract was assigned to City. She had loans from City in 1992 and 1993.	19 R.T. 1149:2-1150:12, 1152:16-1153:2, 1155:18-1156:5; 2 C.T. Ex. 251, 252.
Refinance or Insurance:	The two City loans refinanced prior debt. Ms. Clark bought credit life and disability insurance with the 1992 City loan and property insurance as well with the 1993 loan.	19 R.T. 1152:24-1153:2, 1155:24-1156:5; 2 C.T. Ex. 251, 252.
Discussion of Refinance or Insurance:	No discussion at City about insurance.	19 R.T. 1153:9-27.
Emotional Distress:	Ms. Clark felt "real bad" and mad when City sued her rather than taking her non-functioning car to collect on her loan.	19 R.T. 1150:13-1151:23.
Discovery of Claim:	Ms. Clark found out about the claims in this lawsuit in 1997.	19 R.T. 1157:9-11.
Asserted Monetary Loss:	$554.80.	18 R.T. 1007:12-20, 1013:20-24.
Jury Award:	Compensatory Damages: $100,000. Punitive Damages: $3 million.	9 C.T. 1323, 10 C.T. 1348, 1353.

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Summary of Plaintiffs' Testimony

6.	Testimony	Page:Line
Plaintiff:	Willie Earl Conway	
Age, Schooling, Disability, Other Loan Experience	Mr. Conway is 54 years old. He dropped out of school after third grade. Mr. Conway says he can't read, but did not tell City this fact. He brought no one with him to the loan closings. Mr. Conway had loans from First Family and Tower loan and is pretty familiar with the loan process. He has high blood pressure that is aggravated by stress.	15 R.T. 539:9-25, 547:26-548:13, 555:1-6, 559:24-560:22, 564:10-12, 584:23-586:3, 588:24-589:6, 16 R.T. 605:8-15; C.T. Ex. 268.
Employment:	Mr. Conway is the shop foreman on Stonewell Plantation.	15 R.T. 541:7-14.
City Loans:	Mr. Conway bought a car from Mike Turner on credit; the contract was assigned to City. Responding to mail solicitations, Conway borrowed from City in 1989, 1990, and 1996 and had a check in the mail loan from City in about 1992.	15 R.T. 549:7-550:12, 551:27-552:15, 557:2-25, 562:14-27, 563:25-29, 564:13-22, 581:23-582:29, 16 R.T. 617:12-618:24; 2 C.T. Ex. 271, 273, 284, 285, 289, 290.
Refinance or Insurance:	Mr. Conway bought credit life and disability insurance with each loan. He also bought property insurance on the 1996 loan. The 1990 loan refinanced the 1989 loan.	15 R.T. 552:20-553:2, 557:14-558:19; 2 C.T. Ex. 284, 286, 289.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

Cont'd	Testimony	Page:Line
Plaintiff:	Willie Earl Conway	
Discussion of Refinance or Insurance:	No discussion of insurance. Mr. Conway says he did not tell City he wanted to buy insurance. On the 1996 loan, Mr. Conway says he was not asked to value the collateral he pledged, and City over-valued it. Mr. Conway had life insurance from 1993 on; City did not ask him whether he did, and he did not mention it. Mr. Conway says he was never given the option to refuse insurance.	15 R.T. 552:28-554:7, 566:14-569:24, 571:18-573:11, 577:17-578:4, 16 R.T. 607:5-8; 2 C.T. Ex. 270, 8 C.T. 1187.
Emotional Distress:	Mr. Conway feels bad, cheated, "like I've been ripped off because City charged him "too much interest and stuff" and he could have used the money for other purposes.	15 R.T. 574:27-575:16.
Discovery of Claim:	Mr. Conway heard about lawsuit from a friend after last loan from City. He didn't know anything about the lawsuit before that loan, and didn't learn what the lawsuit was about until after a lawyer had reviewed his loan papers.	15 R.T. 573:22-574:26, 590:20-591:13.
Asserted Monetary Loss:	$596.96.	18 R.T. 1013:25-28.
Jury Award:	Compensatory Damages: $150,000. Punitive Damages: $3 million.	9 C.T. 1323, 10 C.T. 1348, 1353.

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Summary of Plaintiffs' Testimony

7.	Testimony	Page:Line
Plaintiff:	Tina Cross	
Age, Schooling, Disability, Other Loan Experience	Ms. Cross is 33 years old. She graduated from college with a business administration degree.	17 R.T. 860:13-22, 873:8-15.
Employment:	Ms. Cross worked for the Mississippi Department of Human Services.	17 R.T. 861:20-25.
City Loans:	In July 1995, Ms. Cross bought furniture on credit from Unclaimed Freight. The credit was extended by and the account was assigned to City. [Ms. Cross also received and used checks in the mail from City later, but did not testify about those loans and had no complaints about them.]	17 R.T. 862:28-864:26; 3 C.T. Ex. 298, 300-302, 306, 307.
Refinance or Insurance:	Ms. Cross bought credit life, disability and property insurance in connection with the Unclaimed Freight contract.	17 R.T. 864:18-865:1; 3 C.T. Ex. 298, 310-314.
Discussion of Refinance or Insurance:	The Unclaimed Freight salesman did not discuss insurance with Ms. Cross.	17 R.T. 864:18-23.
Emotional Distress:	Ms. Cross feels she was cheated, so now she does not trust finance companies. She is angry but it had no physical impact on her.	17 R.T. 867:21-868:28.
Discovery of Claim:	Ms. Cross first discovered there was something wrong with City at the end of 1997.	17 R.T. 868:29-869:3.
Asserted Monetary Loss:	$129.89.	18 R.T. 1014:28-1015:9.
Jury Award:	Compensatory Damages: $40,000. Punitive Damages: $3 million.	9 C.T. 1326, 10 C.T. 1350, 1353.

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8.	Testimony	Page:Line
Plaintiff:	Alfred Garrett	
Age, Schooling, Disability, Other Loan Experience	Mr. Garrett is 40 years old. He graduated from high school.	16 R.T. 726:16-17, 728:5-9.
Employment:	Mr. Garrett has a car wash and window tint shop; previously he did top assembly and painting for the Fleetwood mobile home factory.	16 R.T. 728:10-729:1.
City Loans:	Mr. & Mrs. Garrett borrowed $750 from City in 1993.	16 R.T. 729:8-730:3; 3 C.T. Ex. 322.
Refinance or Insurance:	The Garretts bought credit life, disability and property insurance with the 1993 loan.	16 R.T. 730:5-20; 3 C.T. Ex. 322.
Discussion of Refinance or Insurance:	No discussion of insurance with City, but Mr. Garrett did notice something about insurance in the loan documents.	16 R.T. 731:29-732:2, 17 R.T. 747:4-15.
Emotional Distress:	Mr. Garrett felt under pressure and frustration when he couldn't provide for his family, but says the loan from City helped him through the rough times.	16 R.T. 735:3-10, 17 R.T. 749:22-750:3.
Discovery of Claim:	Sometime in 1998 when he visited a lawyer, Mr. Garrett first learned that maybe something had gone wrong with the loan.	16 R.T. 731:5-9.
Asserted Monetary Loss:	$261.54 [same economic loss as wife, Doris Garrett].	18 R.T. 1015:16-19.
Jury Award:	Compensatory Damages: $80,000. Punitive Damages: $3 million.	9 C.T. 1326, 10 C.T. 1350, 1353.

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9.	Testimony	Page:Line
Plaintiff:	Doris Garrett	
Age, Schooling, Disability, Other Loan Experience	[no relevant evidence; Ms. Garrett did not testify]	
Employment:	[no relevant evidence; Ms. Garrett did not testify]	
City Loans:	[See Alfred Garrett]	
Refinance or Insurance:	[See Alfred Garrett]	
Discussion of Refinance or Insurance:	[See Alfred Garrett]	
Emotional Distress:	[no relevant evidence; Ms. Garrett did not testify]	
Discovery of Claim:	[no relevant evidence; Ms. Garrett did not testify]	
Asserted Monetary Loss:	$261.54 [same economic loss as husband, Alfred Garrett].	18 R.T. 1015:16-19.
Jury Award:	Compensatory Damages: $10,000. Punitive Damages: $3 million. accepted remittitur to: Compensatory Damages: $130.77. Punitive Damages: $32,500.	9 C.T. 1322, 10 C.T. 1352, 1353, 11 C.T. 1550, 1551.

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10.	Testimony	Page:Line
Plaintiff:	Patrishane Gordon	
Age, Schooling, Disability, Other Loan Experience	[no relevant evidence]	
Employment:	Ms. Gordon works seasonally for a cotton gin. Before that she worked in a sewing factory.	19 R.T. 1098:15-27.
City Loans:	Ms. Gordon had one loan with Easy Finance in 1994. It was assigned to City.	19 R.T. 1100:22-1101:7, 1104:28-1105:15; 3 C.T. Ex. 325.
Refinance or Insurance:	Ms. Gordon bought credit life, disability and property insurance on the Easy Finance loan.	19 R.T. 1100:22-1101:7; 3 C.T. Ex. 325.
Discussion of Refinance or Insurance:	No one at Easy Finance told Ms. Gordon about the insurance, and she did not know she was paying for it.	19 R.T. 1101:8-13.
Emotional Distress:	[no evidence of emotional distress]	
Discovery of Claim:	[no relevant evidence]	
Asserted Monetary Loss:	$64.38.	18 R.T. 1015:27-1016:1.
Jury Award:	Compensatory Damages: $5,000. Punitive Damages: $3 million. accepted remittitur to: Compensatory Damages: $130.77. Punitive Damages: $16,000.	9 C.T. 1327, 10 C.T. 1351, 1353, 11 C.T. 1550, 1551.

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Summary of Plaintiffs' Testimony

11.	Testimony	Page:Line
Plaintiff:	Lillie Harris	
Age, Schooling, Disability, Other Loan Experience	Ms. Harris is 68 years old. She has glaucoma, cataracts and high blood pressure. She has a hard time seeing.	17 R.T. 799:16-800:14.
Employment:	Ms. Harris has been on Social Security and/or Social Security Disability since 1981.	17 R.T. 801:11-17.
City Loans:	Ms. Harris borrowed $575 from Easy Finance in 1992. The loan was assigned to City. She obtained loans from City in 1993, February and November 1995, 1996.	17 R.T. 802:18-26, 804:19-805:10, 805:29-807:9; 3 C.T. Ex. 331, 332, 344, 345, 357, 358, 361, 362.
Refinance or Insurance:	Ms. Harris' City loans were refinances. She bought credit life insurance with each loan.	17 R.T. 802:18-26, 804:19-805:10, 807:10-19; 3 C.T. Ex. 331, 332, 344, 345, 357, 358, 361, 362.
Discussion of Refinance or Insurance:	No discussion about insurance, but Ms. Harris knew her loans were refinances: ; each time she got behind, City would call and she refinance her loan to catch up.	17 R.T. 802:18-26, 807:10-19, 811:8-11, 812:17-29.
Emotional Distress:	The way City treated Ms. Harris makes her feel really used.	17 R.T. 814:23-815:1.
Discovery of Claim:	Ms. Harris learned something was up with City loans when a friend called her in 1998, talked about the suit and told her to take her papers in.	17 R.T. 815:19-816:1, 816:20-26.
Asserted Monetary Loss:	$630.69.	18 R.T. 1016:9-14.

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Cont'd	Testimony	Page:Line
Plaintiff:	Lillie Harris	
Jury Award:	Compensatory Damages: $185,000. Punitive Damages: $3 million.	9 C.T. 1323, 10 C.T. 1348, 1353.

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12.	Testimony	Page:Line
Plaintiff:	Kenneth Hill	
Age, Schooling, Disability, Other Loan Experience	[no relevant evidence]	
Employment:	Mr. Hill drives a lift van to transport the elderly.	19 R.T. 1107:26-1107:7.
City Loans:	Mr. Hill bought an air conditioner on credit from Otasco in June 1986. The contract was assigned to City. Mr. Hill obtained a loan from City a month later.	19 R.T. 1108:27-1110:4, 1113:15-1114:16, 1116:22-26; 3 C.T. Ex. 381, 384.
Refinance or Insurance:	Mr. Hill bought credit life and disability with the air conditioner and on the later loan from City. The City loan refinanced the Otasco debt.	19 R.T. 1110:15-1111:9, 1114:17-1115:6; 3 C.T. Ex. 381, 384.
Discussion of Refinance or Insurance:	The Otasco salesman did not discuss insurance with Mr. Hill. City employees told Mr. Hill he had to have insurance to get the loan.	19 R.T. 1110:15-1111:9, 1117:2-24.
Emotional Distress:	[no relevant evidence]	
Discovery of Claim:	Mr. Hill first found out about the things asserted in this lawsuit in 1997.	19 R.T. 1119:15-23.
Asserted Monetary Loss:	$95.23.	18 R.T. 1017:28-1018:1.

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Cont'd	Testimony	Page:Line
Plaintiff:	Kenneth Hill	
Jury Award:	Compensatory Damages: $10,000. Punitive Damages: $3 million; accepted remittitur to: Compensatory Damages: $95.23. Punitive Damages: $23,750.	9 C.T. 1326, 10 C.T. 1351, 1353, 11 C.T. 1550, 1551.

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13.	Testimony	Page:Line
Plaintiff:	Lindsey Horton	
Age, Schooling, Disability, Other Loan Experience	Mr. Horton has trouble reading; his eyes are not good.	18 R.T. 950:3-11.
Employment:	Mr. Horton worked at Fleetwood. Mobile Homes.	18 R.T. 937:9-16.
City Loans:	[See Robin Horton]	
Refinance or Insurance:	[See Robin Horton]	
Discussion of Refinance or Insurance:	[See Robin Horton]	
Emotional Distress:	When he was not able to provide for his family, and felt awful when City garnished his wages and he could not pay City, Mr. Horton felt real sad, stressed out and worried, which made him sicker.	18 R.T. 942:1-17, 950:19-951:16.
Discovery of Claim:	[See Robin Horton}	
Asserted Monetary Loss:	$1,707.95 [same economic loss as wife, Robin Horton]	18 R.T. 1016:24-27.
Jury Award:	Compensatory Damages: $250,000. Punitive Damages: $3 million.	9 C.T. 1324, 10 C.T. 1349, 1353.

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14.	Testimony	Page:Line
Plaintiff:	Robin Horton	
Age, Schooling, Disability, Other Loan Experience	Ms. Horton is 55 years old. She attended high school.	18 R.T. 932:10-12, 934:2-4.
Employment:	Ms. Horton is retired, but previously worked as a teacher's assistant at an elementary school.	18 R.T., 933:16-28.
City Loans:	Ms. Horton and her husband had loans from Easy Finance in 1992 and 1993, and from City in 1994 and 1996.	18 R.T. 934:15-935:26; 3 C.T. Ex. 399, 402, 407, 408, 4 C.T. Ex. 426, 428.
Refinance or Insurance:	The Hortons bought credit life, disability and property insurance on the two Easy Finance loans, and the 1996 City loan, but only credit life and disability on the 1994 City loan. Several of the loans refinanced prior ones.	18 R.T. 935:12-15; 3 C.T. Ex. 399, 402, 407, 408, 4 C.T. Ex. 426, 428.
Discussion of Refinance or Insurance:	No discussion of insurance at City.	18 R.T. 937:6-8, 946:5-10.
Emotional Distress:	Ms. Horton was stressed out, worried and her blood pressure went up when her husband was sick, out-of-work, they were unable to pay bills and City garnished his wages.	18 R.T. 941:10-29.
Discovery of Claim:	In 1998, Ms. Horton and husband first learned something might be up with City and these loan transactions.	18 R.T., 943:17-20.
Asserted Monetary Loss:	$1,707.95 [same economic loss as husband, Lindsey Horton]	18 R.T. 1016:24-27.
Jury Award:	Compensatory Damages: $100,000. Punitive Damages: $3 million.	9 C.T. 1323-1324, 10 C.T. 1348, 1353.

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15.	Testimony	Page:Line
Plaintiff:	Lorene Jackson	
Age, Schooling, Disability, Other Loan Experience	Ms. Jackson is 68 years old. She left school after the 10th grade.	18 R.T. 901:12-14, 902:11-16.
Employment:	Ms. Jackson works in the cafeteria at a Head Start school.	18 R.T. 902:1-10.
City Loans:	Ms. Jackson's first loan from City was in the 1960s or 70s. She applied for and/or obtained loans from City in 1991, 1995, 1996 and 1997.	18 R.T. 904:4-17, 906:26-907:9, 908:9-909:3, 916:10-19, 917:17-918:9; 4 C.T. Ex. 506, 511, 523, 545, 546.
Refinance or Insurance:	Ms. Jackson bought credit life and disability insurance on the 1995 and 1997 loans. On the 1995 loan she bought property insurance as well.	4 C.T. Ex. 511, 545, 546.
Discussion of Refinance or Insurance:	No discussions with City about insurance.	18 R.T. 912:10-913:1, 914:26-28, 915:6-11, 918:20-919:6.
Emotional Distress:	Ms. Jackson does not think City dealt fairly with her because it did not tell her insurance was optional. That makes her angry at this point. She has had heart attacks and strokes but does not blame them on City.	18 R.T. 921:15-922:13.
Discovery of Claim:	Ms. Jackson first heard about lawsuit and claims asserted against City in 1997 or 1998.	18 R.T. 922:14-19, 925:12-926:9.
Asserted Monetary Loss:	$246.35.	18 R.T. 1017:11-14.

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Summary of Plaintiffs' Testimony

Cont'd	**Testimony**	**Page:Line**
Plaintiff:	Lorene Jackson	
Jury Award:	Compensatory Damages: $80,000. Punitive Damages: $3 million.	9 C.T. 1324, 10 C.T. 1349, 1353.

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Summary of Plaintiffs' Testimony

16.	Testimony	Page:Line
Plaintiff:	Lizzie Lofton	
Age, Schooling, Disability, Other Loan Experience	Ms. Lofton is 51 years old. She has high blood pressure and glaucoma in one eye.	17 R.T. 875:20-21, 876:20-26.
Employment:	Ms. Lofton works as a jailer at a juvenile detention center.	17 R.T. 876:9-19.
City Loans:	Ms. Lofton bought a car on credit from Mims Auto Sales in 1989. It was later assigned to City. Ms. Lofton also obtained loans from City in 1990 and 1995 as well as checks in the mail in 1994 and 1997.	17 R.T. 877:1-878:2, 881:2-10, 887:16-888:9; 5 C.T. Ex. 564, 571, 586, 593-596, 598.
Refinance or Insurance:	Ms. Lofton bought credit life and disability insurance on the 1990 loan; credit life only on the 1995 loan.	17 R.T. 881:22-26, 889:10-29; 5 C.T. Ex. 571, 598, 599.
Discussion of Refinance or Insurance:	On one occasion a City employee told Ms. Lofton she had to have insurance; otherwise no discussion of insurance. None of Ms. Lofton's loans refinanced other debt.	17 R.T. 879:15-29, 880:22-24, 881:22-882:3, 887:10-888:9, 18 R.T. 896:1-14, 897:22-898:11, 899:15-900:10.
Emotional Distress:	Now that she knows what happened, Ms. Lofton feels angry, which has made her nervous, caused her sleepless nights sometimes and made it sort of hard for her to trust others.	17 R.T. 883:27-884:19.
Discovery of Claim:	Ms. Lofton first found out something was up with City in 1998. She heard City was being sued for over-charging in connection with insurance among other things.	17 R.T. 884:20-22, 18 R.T. 892:20-894:6.

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Cont'd	Testimony	Page:Line
Plaintiff:	Lizzie Lofton	
Asserted Monetary Loss:	$349.28.	18 R.T. 1018:8-10.
Jury Award:	Compensatory Damages: $75,000. Punitive Damages: $3 million.	9 C.T. 1324, 10 C.T. 1349, 1353.

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Summary of Plaintiffs' Testimony

17.	Testimony	Page:Line
Plaintiff:	Jessie McClung	
Age, Schooling, Disability, Other Loan Experience	Mr. McClung is 42 years old. He left school after the 11th grade.	17 R.T. 765:13-24.
Employment:	Mr. McClung is currently disabled due to injuries to his knee and back, and diabetes. He previously worked for a collection agency, a beer distributor and a farm.	17 R.T. 765:28-766:21.
City Loans:	Mr. McClung borrowed from Easy Finance in 1994. That loan was assigned to City. He obtained additional loans from City in 1995 and 1996.	17 R.T. 772:3-773:20, 777:7-21, 782:10-783:26, 784:4-10; 5 C.T. Ex. 627, 633, 637.
Refinance or Insurance:	Mr. McClung purchased credit life and disability, but not property insurance on each of his loans. The 1995 and 1997 loans refinanced prior debt.	17 R.T. 774:20-775:6, 777:7-25; 5 C.T. Ex. 627, 633, 637.
Discussion of Refinance or Insurance:	No discussion with City about credit insurance.	17 R.T. 774:12-27, 777:22-25.
Emotional Distress:	Mr. McClung is mad and feels like he was done wrong and used because City did not tell him about insurance premiums they charged him.	17 R.T. 793:8-14, 795:28-797:9.
Discovery of Claim:	At the end of 1997, Mr. McClung heard friends talking about the suit; that was when he first found out about what led him to sue.	17 R.T. 771:26-29, 781:6-16.
Asserted Monetary Loss:	$1,388.21.	18 R.T. 1018:27-29.
Jury Award:	Compensatory Damages: $75,000. Punitive Damages: $3 million.	9 C.T. 1324, 10 C.T. 1349, 1353.

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Summary of Plaintiffs' Testimony

18.	Testimony	Page:Line
Plaintiff:	Willie McGee	
Age, Schooling, Disability, Other Loan Experience	Mr. McGee is not good at reading.	19 R.T. 1166:16-23.
Employment:	Mr. McGee is a stock clerk in a grocery store.	19 R.T. 1160:24-29.
City Loans:	Mr. McGee bought furniture on credit at Unclaimed Freight and a car from Gross Auto Sales. Both accounts were assigned to City. He also borrowed from City in 1989, 1992, 1993, and 1994.	19 R.T. 1163:7-1164:15, 1167:21-1168:3, 1170:27-1171:13, 1172:16-18; 5 C.T. Ex. 651, 655, 673, 687, 705.
Refinance or Insurance:	Mr. McGee bought credit life and disability insurance with his City loans. The 1993 and 1994 loans refinanced prior debt.	19 R.T. 1165:13-28, 1167:5-13, 1171:24-26, 1172:18-23; 5 C.T. Ex. 651, 655, 673, 687, 705.
Discussion of Refinance or Insurance:	No discussion about insurance at City.	19 R.T. 1165:5-25, 1166:5-13, 1169:3-6, 1171:19-1172:2.
Emotional Distress:	Now that he has found out he did not have to pay for insurance, Mr. McGee "feel[s] kind of bad the way they did me."	19 R.T. 1173:3-6.
Discovery of Claim:	Mr. McGee found out about the claims involved in this lawsuit in 1996 or 1997.	19 R.T. 1173:22-28.

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Summary of Plaintiffs' Testimony

Cont'd	Testimony	Page:Line
Plaintiff:	Willie McGee	
Asserted Monetary Loss:	$939.25.	18 R.T. 1019:7-9.
Jury Award:	Compensatory Damages: $80,000. Punitive Damages: $3 million.	9 C.T. 1325, 10 C.T. 1349, 1353.

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Summary of Plaintiffs' Testimony

19.	Testimony	Page:Line
Plaintiff:	Janie Mason	
Age, Schooling, Disability, Other Loan Experience	Ms. Mason is 47 years old. She quit school after 4th grade to work in the cotton fields. She is a diabetic with high blood pressure. She has trouble reading.	17 R.T. 825:7-8, 828:5-11, 828:16-22, 833:7-14.
Employment:	Ms. Mason is not employed outside home because health is bad and had so many children so fast.	17 R.T. 826:10-25.
City Loans:	Ms. Mason bought a car from Moorhead Motors on credit. Her account was assigned to City. In 1990 she and her husband got a loan from City.	17 R.T. 831:26-832:12, 843:19-25, 844:27-845:11; 5 C.T. Ex. 621.
Refinance or Insurance:	The 1990 loan was a refinance. The Masons bought credit life, disability and property insurance in connection with that loan.	17 R.T. 834:27-835:2, 845:18-846:19; 5 C.T. Ex. 621.
Discussion of Refinance or Insurance:	No discussion of insurance with City.	17 R.T. 834:16-835:17, 836:12-18, 848:12-17.
Emotional Distress:	No evidence of emotional distress apart from distress at City's collection efforts and feeling angry about not having enough money to buy food.	See 17 R.T. 829:14-831:25, 841:20-842:5.
Discovery of Claim:	Ms. Mason first found out about the lawsuit against City when her sister told her about it in 1997 or 1998.	17 R.T. 842:6-28.
Asserted Monetary Loss:	$256.43 [same economic loss as husband, Percy].	18 R.T. 1018:13-15.
Jury Award:	Compensatory Damages: $250,000. Punitive Damages: $3 million; accepted remittitur to: Compensatory Damages: $256.43. Punitive Damages: $64,000.	9 C.T. 1327-1328, 10 C.T. 1351-1352, 1353, 11 C.T. 1550, 1551.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

20.	Testimony	Page:Line
Plaintiff:	Percy Mason	
Age, Schooling, Disability, Other Loan Experience	Mr. Mason's reading is bad.	17 R.T. 854:8-8.
Employment:	In 1990 Mr. Mason was working as a mechanic at the Stonewell Plantation. He has been disabled since 1993.	17 R.T. 827:11-17, 852:7-16, 856:14-20.
City Loans:	Mr. Mason got a loan from City in 1990 along with his wife, Janie.	17 R.T. 853:4-23; 5 C.T. Ex. 621.
Refinance or Insurance:	The 1990 loan was a refinance. The Masons bought credit life, disability and property insurance in connection with that loan.	5 C.T. Ex. 621.
Discussion of Refinance or Insurance:	No discussion of insurance at City.	17 R.T. 854:9-18, 856:4-20.
Emotional Distress:	When he found out had been charged for insurance he was not aware of, it made Mr. Mason feel bad because he could have called on the disability insurance when he could not work in 1993. He thinks City was not fair to him. He also felt bad when he could not provide for his children; his blood pressure would go up, his stomach gets upset and he is nervous.	17 R.T. 857:5-859:7.
Discovery of Claim:	Mr. Mason first found out there was something going wrong with City in 1998.	17 R.T. 859:8-12.
Asserted Monetary Loss:	$256.43 [same economic loss as wife, Janie].	18 R.T. 1018:13-15.
Jury Award:	Compensatory Damages: $100,000. Punitive Damages: $3 million.	9 C.T. 1326, 10 C.T. 1350-1351, 1353.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

21.	Testimony	Page:Line
Plaintiff:	Mattie Miles	
Age, Schooling, Disability, Other Loan Experience	[no relevant evidence]	
Employment:	Ms. Miles is a teacher's assistant at a Head Start school.	19 R.T. 1132:3-7.
City Loans:	Ms. Miles bought furniture from Ferguson Furniture in 1992. The account was assigned to City. She borrowed from Easy Finance in 1992, 1993, and 1994. The last of these was assigned to City.	19 R.T. 1133:27-1135:21, 1137:17-1138:14; 6 C.T. Ex. 714, 715, 717, 748.
Refinance or Insurance:	Ms. Miles bought credit life and property insurance from Ferguson and Easy Finance.	19 R.T. 1136:4-10, 1138:15-21; 6 C.T. Ex. 714, 715, 717, 748.
Discussion of Refinance or Insurance:	No discussion of insurance at Ferguson Furniture or at Easy Finance. Ms. Miles had no discussions with City employees; she just made payments there.	19 R.T. 1136:1-13, 1138:15-21.
Emotional Distress:	Ms. Miles felt ashamed and bad when City made collection calls to her work and later sued her to collect.	19 R.T. 1142:3-1143:14.
Discovery of Claim:	Ms. Miles found out about what this lawsuit is all about in 1997 or 1998.	19 R.T. 1143:21-26.
Asserted Monetary Loss:	No expert testimony regarding Ms. Miles' economic loss. The Ferguson Furniture contract shows $22.80 paid for insurance.	6 C.T. Ex. 713.
Jury Award:	Compensatory Damages: $10,000. Punitive Damages: $3 million; accepted remittitur to: Compensatory Damages: $22.80. Punitive Damages: $5,700.	9 C.T. 1327, 10 C.T. 1351, 1353, 11 C.T. 1550, 1551.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

22.	Testimony	Page:Line
Plaintiff:	Zenester Moore	
Age, Schooling, Disability, Other Loan Experience	Ms. Moore is 38 years old.	19 R.T. 1121:15-16.
Employment:	Ms. Moore is a certified nursing assistant but went on maternity leave in 1999.	19 R.T. 1122:14-24.
City Loans:	Ms. Moore borrowed from Easy Finance in 1992, 1993 and 1994. The last of these loans was assigned to City.	19 R.T. 1123:7-1124:15; 6 C.T. Ex. 766, 768, 775.
Refinance or Insurance:	The 1993 and 1994 loans refinanced prior debt. Ms. Moore bought credit life, disability and property insurance on each of the Easy Finance loans.	19 R.T. 1124:5-12, 1124:22-1125:5; 6 C.T. Ex. 766, 768, 775.
Discussion of Refinance or Insurance:	No discussion of insurance with Easy Finance.	19 R.T. 1124:22-1125:15.
Emotional Distress:	Ms. Moore felt bad when City sued her after she missed a payment.	19 R.T. 1126:28-1127:4, 1127:19-22.
Discovery of Claim:	Ms. Moore first found out she might have a claim against City in 1997.	19 R.T. 1128:29-1129:2.
Asserted Monetary Loss:	$437.16.	18 R.T. 1021:5-6.
Jury Award:	Compensatory Damages: $15,000. Punitive Damages: $3 million; accepted remittitur to: Compensatory Damages: $437.16. Punitive Damages: $109,250.	9 C.T. 1327, 10 C.T. 1351, 1353, 11 C.T. 1550, 1551.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

23.	Testimony	Page:Line
Plaintiff:	Lou Waters	
Age, Schooling, Disability, Other Loan Experience	Mr. Waters is 50 years old. He left school after the 5th grade. He cannot read or write.	18 R.T. 963:3-23.
Employment:	Mr. Waters works as a tractor driver at Peaster Farm.	18 R.T. 962:25-28, 963:24-29.
City Loans:	Mr. Waters bought a car on credit from Mims Auto Sales. The account was assigned to City. He later obtained loans from City in 1990, 1992, 1993 and 1994.	18 R.T. 966:16-969:24; 6 C.T. Ex. 794, 802, 819, 835, 867.
Refinance or Insurance:	Each of the City loans was a refinance. Mr. Waters bought credit life and disability on the 1990 and 1992 loans. He also bought property insurance with the 1993 and 1994 loans. Mr. Waters suffered a fire loss while insured and received a $600 check plus $1,200 paid on his account from the insurance company.	18 R.T. 975:10-19, 982:16-985:21; 6 C.T. Ex. 794, 802, 819, 835, 867.
Discussion of Refinance or Insurance:	In 1990 a City employee told Mr. Waters he had to take out insurance to get a loan. Thereafter, though he knew he was buying insurance, Mr. Waters never questioned City employees about whether he had to buy insurance and he was not told anything further about it. City had Mr. Waters refinance every time he got behind in payments so he could catch back up, which he could not have done without the refinance.	18 R.T. 972:3-10, 973:12-28, 974:16-28, 975:10-19, 976:16-23, 983:26-985:26.
Emotional Distress:	Mr. Waters trusted the employee who said he had to have insurance; now he feels betrayed. Mr. Waters had to go to the hospital for a day or two in 1994 and 1995 because City was calling him at work to collect his loan.	18 R.T., 974:4-13, 980:2-11.

Washington Mutual Finance Group v. Blackmon
Summary of Plaintiffs' Testimony

Cont'd	Testimony	Page:Line
Plaintiff:	Lou Waters	
Discovery of Claim:	First thought something was not right and found out about claims against City in 1997.	18 R.T. 981:3-9.
Asserted Monetary Loss:	$2,625.38.	18 R.T. 1021:19-26.
Jury Award:	Compensatory Damages: $250,000. Punitive Damages: $3 million.	9 C.T. 1325, 10 C.T. 1350, 1353.

Washington Mutual Finance Group v. Blackmon
Punitive Damage Award Comparison

Name	Economic Loss Per Sauls' Testimony	Ratio Of Punitive Damages To Economic Loss	Total Compensatory Damage Award	Ratio Of Punitive Damages To Total Compensatory Award	Compensatory Award After Remittitur	Punitive Damages After Remittitur
Greta Blackmon	$669.61	4,480 to 1	$85,000	35.3 to 1	$85,000	$3,000,000
Louise Blue	$89.49	33,523 to 1	$80,000	37.5 to 1	$80,000	$3,000,000
Glenda Chambers	$996.74	3,010 to 1	$160,000	18.75 to 1	$160,000	$3,000,000
Earnest Claiborne	$135.68	22,111 to 1	$75,000	40 to 1	$75,000	$3,000,000
Annie Clark	$554.80	5,407 to 1	$100,000	30 to 1	$100,000	$3,000,000
Earl Conway	$596.96	5,025 to 1	$150,000	20 to 1	$150,000	$3,000,000
Tina Cross	$129.89	23,096 to 1	$40,000	75 to 1	$40,000	$3,000,000
Alfred Garrett	$130.77[†]	22,941 to 1	$80,000	37.5 to 1	$80,000	$3,000,000
Doris Garrett	$130.77[†]	22,941 to 1[*]	$10,000	300 to 1[*]	$130.77	$32,500
Patrishane Gordon	$64.38	46,598 to 1[*]	$5,000	600 to 1[*]	$130.77[‡]	$16,000
Lillie Harris	$630.69	4,757 to 1	$185,000	16.2 to 1	$185,000	$3,000,000
Kenneth Hill	$95.23	31,503 to 1[*]	$10,000	300 to 1[*]	$95.23	$23,750
Lindsey Horton	$853.98[†]	3,513 to 1	$250,000	12 to 1	$250,000	$3,000,000
Robin Horton	$853.97[†]	3,513 to 1	$100,000	30 to 1	$100,000	$3,000,000
Lorene Jackson	$246.35	12,178 to 1	$80,000	37.5 to 1	$80,000	$3,000,000
Lizzie Lofton	$349.28	8,589 to 1	$75,000	40 to 1	$75,000	$3,000,000
Jessie McClung	$1,388.21	2,161 to 1	$75,000	40 to 1	$75,000	$3,000,000
Willie McGee	$939.25	3,194 to 1	$80,000	37.5 to 1	$80,000	$3,000,000
Janie Mason	$128.22[†]	23,399 to 1[*]	$250,000	12 to 1[*]	$256.43	$64,000
Percy Mason	$128.21[†]	23,399 to 1	$100,000	30 to 1	$100,000	$3,000,000

Washington Mutual Finance Group v. Blackmon
Punitive Damage Award Comparison

Name	Economic Loss Per Sauls' Testimony	Ratio Of Punitive Damages To Economic Loss	Total Compensatory Damage Award	Ratio Of Punitive Damages To Total Compensatory Award	Compensatory Award After Remittitur	Punitive Damages After Remittitur
Mattie Miles	$22.80	131,579 to 1	$10,000	300 to 1	$22.80	$5,700
Zenester Moore	$437.16	6,862 to 1	$15,000	200 to 1	$437.16	$109,250
Lou Waters	$2,625.38	1,143 to 1	$250,000	12 to 1	$250,000	$3,000,000
TOTALS	**$12,197.82**	**5,657 to 1**	**$2,265,000**	**30.5 to 1**	**$1,966,073.16**	**$51,251,200.00**
		4,202 to 1[§]		**26 to 1[§]**		

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† Alfred and Doris Garrett co-signed the same loans. According to plaintiffs' testimony, they suffered a combined economic loss of $221.54, or $130.77 a piece. Lindsey and Robin Horton also co-signed loans. Their combined economic loss was $1,707.95 or $853.975 each. Janie and Percy Mason also co-signed loans. Their combined economic loss was $256.43 or

* The ratio shown is that between the punitive damages the jury awarded and economic loss or total compensatory damages the jury awarded. On post-trial motions, the trial court remitted all compensatory damages in excess of economic loss for each of these six plaintiffs and reduced their punitive damage award to an amount 250 times their economic loss.

‡ Apparently, due to a clerical error, the trial court's order on the post-trial motions directs that Patrishane Gordon's compensatory damages be reduced to $130.77, though her true economic loss was only $64.38, a fact that the trial court implicitly recognized in reducing Ms. Gordon's punitive damages to $16,000, 250 times $64. The trial court also inexplicably attributed all of the Masons' $256.43 in economic damages to Janie Mason rather than only half, as the trial court did in remitting Doris Garrett's compensatory damage award.

§ The first ratio is before the trial court's remittitur; the second takes the remittitur into account.

Washington Mutual Finance Group v. Blackmon
Additional Irrelevant Facts

Loan Closing

City's policies require its employees to discuss with the customer a loan's principal terms, such as interest rate, amount borrowed, any insurance sold, and the like. 13 R.T., 167:27-168:19; 14 R.T. 324:11-327:27; 15 R.T. 505:18-24, 506:17-508:11. Often, some or all of these terms are discussed by telephone before the customer comes to sign the loan documents. 13 R.T., 167:27-168:19; 14 R.T. 326:15-327:9.

City policy required its employees to show the customer each loan document and review orally each provision stated in boldface, and City's employees may also review other principal loan terms orally with the borrower at that time. 14 R.T. 327:1-27. City employees should not tell borrowers to "sign here, sign here, and sign here" without letting them look at the papers. 14 R.T. 327:28-328:21. Yet, many plaintiffs testified that their loans were closed in just that manner. *E.g.*, 15 R.T. 560:23-561:4 (Conway); 17 R.T. 777:29-778:6 (McClung); 807:25-808:6 (Harris) 18 R.T. 912:10-24 (Jackson), 936:25-937:5 (Robin Horton).

City does not typically ask customers whether they can read, what their educational background is, or how experienced they are with loans or insurance. 14 R.T. 352:26-353:6. So long as the customer appears to understand the

transaction, City will make him or her a loan and sell credit insurance if he or she desires it. 14 R.T. 353:7-13; 15 R.T. 508:15-25.

For its own protection, City requires that two of its employees execute a customer's promissory note as witnesses of the customer's signature. 13 R.T. 205:1-23, 213:7-216:13; 20 R.T. 1309:7-1310:9. It would be wrong for a City employee to sign as a witness when he or she did not actually see the borrower execute the note. 13 R.T. 212:3-6.

Yet, most of the plaintiffs testified that only one City employee was present in the signing cubicle with them when they executed their loan papers, though a second City employee's signature appeared on the papers as a witness. *E.g.*, 15 R.T. 551:17-26, 554:23-29 (Conway); 16 R.T. 648:4-649:1 (Chambers), 735:19-736:8 (Alfred Garrett), 17 R.T. 808:26-809:4 (Harris), 833:22-834:2 (Janie Mason). No plaintiff claimed any damage from this fact. They all admitted having signed the loan documents that they implied were improperly witnessed. 20 R.T. 1310:10-17.

Furthermore, the signing cubicles are open to the rest of the office so other City employees could observe the execution of the loan documents from where they worked. 14 R.T. 327:10-14; 20 R.T. 1309:16-1310:3, 1310:18-1311:5.

Washington Mutual Finance Group v. Blackmon
Additional Irrelevant Facts

Training

Employees at City's Greenwood, Mississippi branch received all of their job training on the job, rather than at separate courses or seminars. 14 R.T. 366:2-15, 368:16-369:25, 374:10-20, 375:26-376:8, 377:17-20, 380:6-23, 382:12-17, 383:5-10, 385:14-25, 392:5-28, 397:9-398:25, 412:24-413:5; 15 R.T. 490:2-15, 534:12-535:13. Company policy manuals and pamphlets were given to new employees and were available to others but were studied intently only by the new hires. 14 R.T. 368:25-369:18, 374:14-17, 381:8-15, 404:20-405:17, 406:5-22.

Dolly Andrews, who was the Greenwood branch's manager when most of plaintiffs' loans were made, does not know what an "actuary" is or how insurance premiums are set, though she sold credit life, disability and property insurance. 14 R.T. 399:8-400:4. No one gave her training on those subjects. 14 R.T. 400:5-9, 400:26-401:4. Nor were employees trained in how to value personal property collateral. 14 R.T. 402:18-22, 403:18-21, 408:1-409:1.

Dolly Andrews also was unable to explain correctly some of the more complex features of credit insurance, such as the meaning of "reducing term," or the meaning of legal wording of the promissory note, such as "jointly and severally" or the Rule of 78s. 14 R.T. 413:6-416:10; 15 R.T. 510:17-515:26. Nevertheless, she understood the gist of the loan documents borrowers signed. 15 R.T. 516:2-24.

Washington Mutual Finance Group v. Blackmon
Additional Irrelevant Facts

Reinsurance

City employees are licensed agents, authorized to sell credit insurance, for only three insurers: American Security, Union Security and American Bankers. 13 R.T. 175:22-176:6, 14 R.T. 340:12-341:27, 20 R.T. 1311:6-1312:6. City cannot and does not sell credit insurance issued by any insurer other than the three insurers for which its employees are licensed agents.[1] 13 R.T. 175:22-176:6; 14 R.T. 340:12-341:27; 20 R.T. 1311:26-1312:6; 12 C.T. Ex. 1723:21-1724:14; 13 C.T. Ex. 1807:10-22.

City has established commission agreements with those three insurers. 14 R.T. 341:15-27; 21 C.T. Ex. 3165:10-3166:9. Also, two of City's affiliated companies, City Holdings Reinsurance Company and Aristar Insurance Company, entered into reinsurance agreements with American Security, Union Security and American Bankers. 13 R.T. 176:20-177:24; 14 R.T. 342:9-25; 21 C.T. Ex. 3151:7-3152:6, 3156:17-3157:4, 3166:10-3167:11. Under the terms of those agreements, City Holdings and Aristar agree to pay losses insured under the policies and in return receive 96% of the premiums paid under those policies. 13 R.T. 177:19-178:1; 14 R.T., 351:26-352:6; 21 C.T. Ex. 3152:1-3153:5.

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[1] Of course, a City customer is free to obtain his or her own insurance from any insurance company he or she desires apart from the City loan. But, in that case, City will not finance the premiums as it does for credit insurance it sells in conjunction with its loans. 14 R.T. 343:21-347:28.

Washington Mutual Finance Group v. Blackmon
Additional Irrelevant Facts

City does not tell its customers that it profits from the sale of credit insurance. It figures customers assume that any company profits from the sale of its products. 14 R.T. 347:29-348:6. City also does not tell customers about the reinsurance arrangements its affiliate has with the insurers whose policies City sells. 14 R.T. 348:19-21; 21 C.T. Ex. 3158:9-13.

Plaintiffs do not claim any damage from this nondisclosure. The trial court nonsuited plaintiffs on any claim that the insurance premiums they paid were excessive in amount. 20 R.T. 1221:17-28. They neither alleged nor proved any other sort of harm from not being told City's affiliate profited from reinsuring their risks. *Id.*

CERTIFICATE OF SERVICE

I, Jess H. Dickinson, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing pleading to the following counsel of record:

Edward Blackmon, Jr. Esq.
Blackmon, Blackmon & Evans
901 E. Peace Street
Canton, MS 39046

H. Donald Brock, Jr., Esq.
Whittington, Brock, Swayze & Dale
P.O. Box 941
Greenwood, MS 38935-0941

Michael Hartung, Esq.
120 North Congress Street, Suite 500
Jackson, MS 39201

Richard Freese, Esq.
2900 Hwy 280
Morgan Keegan Center, Suite 240
Birmingham, AL 35223

Tim Goss, Esq.
Capshaw, Goss & Bowers, L.L.P.
901 Main Street, Suite 2600
Dallas, Texas 75202

SO CERTIFIED this the 12th day of November, 2002.

JESS H. DICKINSON