[J-88-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

ANDREA D. WILKES, DAVID H. EHRENWERTH AND CHARLES K. CLARK, AS TRUSTEES OF THE MARK E. AND MYRNA L. MASON IRREVOCABLE TRUST, MARK E. MASON AND MYRNA L. MASON	:	Nos. 11 & 12 WAP 2005
	:	Appeal from the Order of the Superior Court, entered May 26, 2004, at Nos. 126 WDA 2003 and 153 WDA 2003, reversing and remanding the Order of the Court of Common Pleas of Allegheny County, entered December 24, 2002, at No. GD 00-0745.
v.	:	
	:	851 A.2d 204 (Pa. Super. 2004)
PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, A CORPORATION AND BALANCED EQUITIES, INC., A CORPORATION	:	
APPEAL OF: PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, A CORPORATION	:	ARGUED: September 12, 2005

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: JULY 18, 2006**

I respectfully dissent from the Opinion of the Majority. In particular, I find that based on the facts involved in the present matter, Appellees could prove fraud at trial and, as such, the doctrine of *res judicata* does not apply.

Two issues frame my discussion. First, this is a summary judgment proceeding. Therefore, we must review the record “in the light most favorable to the non-moving

party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." Payne v. Dep't of Corr., 871 A.2d 795, 800 (Pa. 2005); Pappas v. Asbel, 768 A.2d 1089, 1095 (Pa. 2001). Second, it is well-established that the doctrine of *res judicata* does not apply where fraud may be found. Morris v. Jones, 329 U.S. 545, 550-51 (1947). "Where fraud is found, the party that used fraud should be deprived of the benefit of the judgment and any inequitable advantage gained. Courts should not forfeit truth for the sake of finality . . . ." Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 901 (2d Cir. 1985) (internal citation omitted); see also In re Aegis Realty Corp., Nos. 02-16464 RDD, 03-10467 RDD, 2003 WL 22520394 (Bankr. S.D. N.Y. Oct. 31, 2003) (holding that, pursuant to New York law, a judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata* only in the absence of fraud or collusion); Bedrock Servs. v. Int'l Bhd. of Elec. Workers Local Union Nos. 238, 342, & 495, 285 F. Supp. 2d 693, 698 (W.D.N.C. 2003) (noting that, without fraud or collusion, a judgment of a court having jurisdiction over the parties and over the subject matter operates as *res judicata*). Further, a judgment is not binding on a class member where notice of the class action settlement was inadequate. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)). Such inadequate notice may be a result of the continued fraudulent acts of one party towards another specific party.

Fraud

My differences with the Majority center on the fraud allegedly committed by Appellant and its agent, Sander Lenenberg (Lenenberg), which makes the doctrine of

res judicata inapplicable to the instant matter. The Majority states the standard as follows:

> To establish a *prima facie* case of fraud in New York, one must allege a representation of a material fact, falsity, scienter, reliance, and injury. See Small v. Lorillard Tobacco Co., Inc., 720 N.E.2d 892, 898 (N.Y. 1999). Moreover, reliance on a fraudulent misrepresentation must be reasonable. See Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 796 N.Y.S.2d 790, 791-92 (App. Div. 2005); Ruffino v. Neiman, 794 N.Y.S.2d 228, 229 (2005).

Maj. slip Op. at 37. The Majority then goes on to misapply the test to the facts of this situation. In fact, the discussion and application of this test to the facts is cursory and consists of one paragraph dismissing the claim of Appellee.

The factual background governs the case *sub judice* and, as a result, I come to a different conclusion. The issue of which jurisdiction's *res judicata* doctrine should apply was not explicitly granted by this Court and was not briefed in full by both parties. Moreover, as noted by the Majority Opinion, this issue has not been fully addressed by this Court. Ultimately, I agree with both the Majority and Chief Justice Cappy that we shall apply that of New York as both parties argued the issue on that basis. Id. at 15. I do not make a final judgment on the legal merits of the issue as to do so would be mere *dicta*.[1] Perhaps most importantly, the choice of law question is irrelevant in my final

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[1] Mr. Chief Justice Cappy opines that, "[i]n Durfee v. Duke, the Supreme Court stayed true to this principle, stating in clear terms that 'full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.' 375 U.S. 106, 109 (1963) (emphasis supplied)." Concurring slip Op., C.J. Cappy, at 2. Further, his analysis of the Full Faith and Credit Clause of the U.S. Constitution, U.S. CONST., art. IV, § 1, (continued…)

analysis, as fraud is clearly present in the facts as alleged. Consequently, to engage in a purely theoretical discussion concerning *res judicata* would be to remove focus from the egregiousness of the acts allegedly committed by the insurance company and its agent in this case. Further, I agree with the Majority's discussion of the scope of collateral review by this Court of the sufficiency of notice and its adoption of the approach in Stephenson v. Dow Chemical, 273 F.3d 249 (2d Cir. 2001), 539 U.S. 111 (2003) (permitting a merits-based attack by absent class members not specifically covered in prior determination). However, irrespective of which approach is used, that of the Concurring Opinion of Chief Justice Cappy, adopting Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (plurality opinion advocating narrow collateral review of rendering court's due process determinations), or that of the Majority using Stephenson, in the end, both the *res judicata* doctrine and the related review of adequate notice contain fraud exceptions to allow for full review of a claim settled in another jurisdiction.

In Michels v. Phoenix Home Life Mut. Ins. Co., Index No. 5318-95 (N.Y. Sup. Ct. Albany Cty. 1995), the court addressed neither Appellees' allegations of fraud nor their factual scenario concerning ongoing fraud. Appellees' claim is highly factually specific, has not been addressed, and, if viewed in the light most favorable to Appellees as the

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(…continued)
accurately summarizes the history and importance of such a clause. Id. (citing Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 703-04 (1982) (quoting Hampton v. McConnel, 16 U.S. 234, 235 (1818))). Although his discussion is well-written and is a persuasive argument concerning the choice of *res judicata* doctrine, I cannot join it at this time because it is not properly before us. Again, as discussed *infra*, because fraud is found in the record as viewed in the light most favorable to Appellees, the matter should not be precluded or governed by the *res judicata* doctrine.

non-moving party, vitiates the adequacy of the notice given because of the actions taken by Appellant to convince Appellees to ignore the otherwise potentially adequate notice.[2] Most important to our ability and need to review *de novo* the adequacy of the notice, no substantive review could have taken place regarding the adequacy of notice specific to Appellees.

As noted by the Majority:

> [T]he present case is sufficiently analogous to Stephenson [v. Dow Chemical Co., 273 F.3d 249 (2d Cir. 2001)] to permit substantive collateral review here, as appellees' allegation (taken at face value for purposes of deciding our review paradigm) is premised on the notion that **nothing** in the class notice would have alerted them to the fact that they were inappropriately included in the class and the Michels court never addressed whether notice was adequate for class members with SLP policies. Inadequate notice, in fact, is a recognized exception to the effect of the *res judicata* doctrine. See Kealoha v. Castle, 210 U.S. 149, 155, 28 S.Ct. 684, 687 (1908). Moreover, this Court has previously noted that, in light of the requirements of due process, we are not obliged to give full faith and credit to a judgment of another state where notice was inadequate. See Barnes, 346 A.2d [778], [] 782 [(Pa. 1975)] (citing Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958) and RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 104 (1971)). To ensure that this Court renders an independent judgment on this constitutional question, we believe that a broad collateral review of the notice is warranted for the limited purpose of assessing the appropriate *res judicata* effect. Furthermore, it

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[2] In addition, I would err on the side of allowing review of the decision of another jurisdiction when it is possible that fraud, a different issue, or any other material difference exists. In particular, every care should be taken by this Court to protect the rights of Pennsylvania citizens and, thus, full review given where it either is or may be warranted.

> is not entirely clear to us that the inquiry into adequacy of notice for class action purposes is coterminous with the inquiry into notice for purposes of *res judicata*; this is an additional reason weighing in favor of an independent review.

Maj. slip Op. at 28-29 (footnote omitted). The fraud alleged in the case before us goes towards both the general fraud exception to the *res judicata* doctrine as well as the constitutionality of the notice. See Morris, supra; Mullane, supra. Accordingly, I turn to those facts I deem relevant.

The first problems came to the attention of Appellees in the sixth year of the policy, 1994, when the premium due was not reduced from $80,813.00 to $60,813.00. Accordingly, a trustee of Appellees wrote to Appellant on January 28, 1994, and asked for confirmation of the reduced premium and for assurances that the policy was still in full effect.

At that time, Appellant sent a new illustration showing that the premiums would decline more slowly than in the original policy illustration and that expiration of the premiums would not occur in the sixteenth year of the policy but, instead, in the twenty-third year. Importantly, and apparently discounted by the Majority, is the fact that no death scenario was included in the illustrations. Appellees again contacted Appellant's agent, Lenenberg,[3] about the inconsistency, and a new set of illustrations was produced

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[3] I note that a dispute exists concerning the status of Lenenberg; namely, whether he is an Agent of either Appellant or Appellee or both. However, as discussed above, this is in the summary judgment phase, we must review the record "in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." Payne v. Dep't of Corrections, 871 A.2d 795, 800 (Pa. 2005); Pappas v. Asbel, 768 A.2d 1089, 1095 (Pa. 2001). (continued…)

in April of 1994 showing the original payment schedule and the premium payments vanishing in the sixteenth year of the policy. Again, no death scenario was included.

Yet another set of illustrations was run in June of 1994 and provided to Appellees. Once again, the important factor is that no death scenario was included. In January 1995, a lawyer for Appellees reviewed the policy with Lenenberg and asked for an updated projection based on decreased dividends. As a result, in February of 1995, Appellant again supplied new premium schedules with reduced dividends and did not include a death scenario with the illustrations.

The following year, in February and March of 1996, Appellant supplied additional illustrations regarding varied premium payments but once more failed to include a death scenario. As such, Appellees understandably assert that they were led to believe that the original premium schedule would remain in effect regardless of the death of one party. However, Appellant had internal documents showing that it set the rates on the policy to reflect the dramatic change in actuarial status when one of the Masons died. Those rates were not disclosed to Appellees, and the information provided to them did not show that, if Mark Mason predeceased Myrna Mason, the previously vanished premiums would not only reappear but also escalate far beyond the original $80,813.00 premium.

(…continued)
Accordingly, I will address Lenenberg as the agent of Appellant until further notice. Accord Maj. slip Op. at 2 n.1 ("For purposes of this suit, appellees allege that Lenenberg acted as an agent of [Appellant])."

In August or September of 1996, Appellees received notice of a proposed settlement of a nationwide class action brought in New York state court against Appellant. See Michels v. Phoenix Home Life Mut. Ins. Co., Index No. 5318-95 (N.Y. Sup. Ct. Albany Cty. 1995). The notice itself did not clearly implicate Appellees' policy; instead, it included a four-page question-and-answer brochure that summarized the details concerning the claims made in the suit and how policyholders would be affected by the settlement. The brochure did explicitly note that vanishing premium policies were involved in the claim and that a settlement would include an offset for "Optionterm" policies. As quoted by the Majority, that offset provided:

> Class members will automatically receive the Optionterm Charge Offset if they (1) have in-force whole life policies with Optionterm riders and (2) do not elect to submit a claim to the ADR Process. Optionterm coverage is term insurance generally paid for by dividends. In some cases, dividends may in the future be insufficient to maintain coverage, and certain out-of-pocket payments may be required. If your policy has an Optionterm rider, the Optionterm Charge Offset will eliminate your out-of-pocket costs during the first two years for which an out-of-pocket outlay is required. (Class members will have the option of deferring the offset to the second and third years if they wish.)

Maj. slip Op. at 6-7 (citing Question and Answer Brochure for Michels Proposed Settlement at 3). A toll-free number was given if a policyholder wished to talk to class counsel concerning his or her policy in relation to the suit.

The notice of settlement provided further notice:

> The Plaintiffs make allegations concerning (i) how Phoenix made use of a method of using dividends to pay premiums on a whole life policy, or interest credited on a universal life policy, rather than paying them in cash, in order that no further out-of-pocket premium would be due after a fixed

> period of time, which sales concept was variously referred to as "Quick Pay" or "Rapid Pay," as well as Phoenix's use of dividends to help meet the costs of a rider known as Optionterm; (ii) the sale of life insurance by portraying it as an investment, savings, retirement or similar plan without disclosing that it is life insurance or the nature of the policy's benefits; (iii) the replacement of any existing life insurance policy with a new life insurance policy, or the sale of a new life insurance policy funded in whole or in part using an existing policy's cash value; and (iv) the failure to disclose material information in connection with the introduction of new methods for calculating dividends and crediting rates. The allegations in the lawsuits include claims that Phoenix misled policy owners in these and other circumstances.

Id. at 7 (citing Notice of Proposed Settlement for Michels Class Action at 2). In addition, policyholders were warned about the preclusion of certain claims if they chose not to opt out of the settlement. "The notice warned that policyholders who failed to opt out of the settlement would be bound by its terms and policyholders in the class would be precluded from bringing any other lawsuit against appellant, specifically detailing that policyholders would be prohibited from making any claim about the number of premium payments required to keep the policy active." Id. (citing Notice of Proposed Settlement for Michels Class Action at 11).

The Majority properly notes that the notice advised class members that they could opt out of the settlement until October 18, 1996, and thus not be bound by the settlement terms. Moreover, no recommendation was made to call the agent who sold the policy. Id. at 8. Appellees, however, did not contact the class action attorneys. Rather, they contacted Lenenberg, who falsely advised them that their policy was not affected and told them not to opt out of the class action. As a result, Appellees did not

opt out. Thereafter, Appellant continued to provide Appellees with policy illustrations showing the same coverage as that originally represented in 1989.

In April of 1997, Appellees received a second notice indicating that class members who had not opted out of the Michels class action could either accept General Policy Relief or, if they believed that they could provide evidence of misrepresentation, could invoke an alternative dispute resolution (ADR) process. Appellees again contacted Lenenberg, who, for a second time, falsely advised them not to invoke ADR because their policy was not affected. "In January and March of 1997, Phoenix provided the Masons and their [t]rustees, through Lenenberg, further illustrations detailing the future premium schedule payments, illustrations that closely resembled the initial payment schedule provided when the [t]rustees purchased the policy." Id. at 8-9.

In my mind, great weight should be given to the fact that Appellant internally produced another set of illustrations including a "death scenario" showing that if Mr. Mason died at eighty years old the out-of-pocket premium that had previously vanished would return in the twenty-fourth year. The internal illustration also provided that, in order to keep the policy in effect, Mrs. Mason would need to pay up to $630,774.00 in additional out-of-pocket premiums. The Majority glosses over this internal representation and the fact that for several years Appellees had repeatedly requested documentation regarding their policy and were given false or incomplete illustrations each time. This illustration was prepared approximately one month prior to the deadline for invoking the Alternative Dispute Resolution (ADR) option in the class action suit but never given to Appellees. As such, it is unclear how Appellees would know that

misrepresentation had occurred and that they should pursue the ADR option as all information relevant to their specific policy was in the control of Appellant.

At this point in time, Appellants, through both the illustrations and representations of Lenenberg, had misrepresented material facts, including whether Appellees' policy was covered in the suit, the premium structure, and the hidden or non-disclosed scenario of death of one of the insured. Such representations were explicitly false or were reasonably relied upon to draw a false conclusion concerning Appellees' policy. The actions alleged were knowing in nature and made for the purpose of having Appellees reasonably rely upon the false information and directly resulted in an injury to Appellees of their inability to be fully compensated or opt-out of the settlement. See Small v. Lorillard Tobacco Co., Inc., 720 N.E.2d 892, 898 (N.Y. 1999) (outlining factors governing fraud). Thus, Appellees have established a prima facie case of fraud pursuant to the alleged facts.

In August of 1998, Appellees learned for the first time that the FBI was investigating Lenenberg for fraud, which included Lenenberg diverting to himself substantial premiums that Mark Mason had paid for insurance with another insurance company. Upon learning this, Appellees wrote directly to Appellant and requested a complete history of all transactions concerning the insurance policy from its inception. On March 12, 1999, Appellees received from Appellant a letter with 110 pages of attached illustrations. All of the illustrations indicated that the policy was covered by the class action settlement, and some of the illustrations showed death scenarios with vanished premiums returning. This was the first time that Appellant provided illustrations revealing that vanished premiums would return upon the death of one

spouse and, under certain likely scenarios, would rise to exorbitant levels totaling up to $5,000,000.00 of total out-of-pocket premiums. Armed with this new information and the freshly provided illustrations, Appellees commenced the present suit alleging both breach of contract and, importantly for the *res judicata* argument, fraud.

The crux of Appellant's argument is that the Superior Court violated the Full Faith and Credit clause of the United States Constitution by failing to afford the Michels settlement and judgment *res judicata* effect and by reviewing *de novo* the adequacy of the class notice provided by the Michels court. Specifically, Appellant argues that the Michels court made express findings that the class notice satisfied minimal due process requirements, as required pursuant to Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), and that the Superior Court violated the Full Faith and Credit clause and statute, 28 U.S.C. § 1738, by disregarding that finding. See Michels v. Phoenix Home Life Mut. Ins. Co., No 95/5318, 1997 WL 1161145 (N.Y. Sup. Ct. Jan. 07, 1997).

Appellant further asserts that, even if *res judicata* does not bar Appellees' underlying causes of action, the class notice provided by the Michels court was constitutionally adequate. Appellant maintains that the class notice fully informed Appellees of their rights and responsibilities as members of the class and of the details of the judgment and settlement. According to Appellant, the Superior Court erred by requiring the class notice to be narrowly tailored to Appellees' specific claims including the increased premiums upon the death of one of the insured.

Appellees counter that the class notice provided by Appellant was insufficient to enable them to make an informed decision about whether to opt out of the Michels class

action. According to Appellees, Appellant defrauded them and attempted to obfuscate their injuries rather than notify them of their rights.

As the Superior Court panel noted, the appropriate threshold question in a case such as that *sub judice* is whether Appellees' suit is barred, in fact, by the doctrine of *res judicata*. See Wilkes, 851 A.2d at 210 (quoting Taylor v. Shiley, Inc., 714 A.2d 1064, 1066 (Pa. Super. 1998)). However, where the initial lawsuit was in the nature of a class action, a plaintiff otherwise estopped by *res judicata* will not be barred from suing individually if the notice received by the plaintiff of the class action suit was not adequate to satisfy the constitutional demands of due process. See Phillips Petroleum, 472 U.S. at 811-12.

The threshold issue of whether *res judicata* barred the instant action was never fully addressed by either the trial court or the Superior Court. The doctrine of *res judicata* bars repetitious litigation of the same cause of action. As we have stated, application of this doctrine requires that the lawsuits possess the following common elements: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued. Safeguard Mut. Ins. Co. v. Williams, 345 A.2d 664, 668 (Pa. 1975).

However, a judgment procured by fraud is generally not entitled to *res judicata* or full faith and credit. See Morris v. Jones, 329 U.S. 545, 550-51 (1947). "Where fraud is found, the party that used fraud should be deprived of the benefit of the judgment and any inequitable advantage gained. Courts should not forfeit truth for the sake of finality .

. . ." Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 901 (2d Cir. 1985) (internal citation omitted).

Here, the facts of the case reveal that the judgment rendered against Appellees in the Michels class action was procured by fraud. Upon receiving notice of the Michels action, Appellees contacted Appellant's agent, Lenenberg, who on two separate occasions falsely advised Appellees not to invoke ADR because their policy was not affected. Moreover, during this same time period, Appellees received numerous assurances from Appellant and Lenenberg that their policy coverage was as originally represented in 1989 and would not be affected by the Michels action. I am not swayed by the Majority's statement that "[t]he trial court further found that it was unreasonable for appellees to have relied on any representations that Lenenberg might have made concerning the class action's effect on the instant policy, stating, '[y]ou do not consult your enemy about how to interpret documents in dispute.'" Maj. slip Op. at 11 (quoting Trial ct. slip Op. at 2). In particular, Appellees did not only rely on the statements of Lenenberg, who it should again be stated could be considered a dual-agent and not one of the enemy, but on the illustrations provided by Appellant. These are not interpretative matters but a clear allegation of fraud related to the disclosure of information held only by Appellant.

If proved at trial, such deliberate false representations to absent class members concerning their rights and options would clearly negate any boilerplate notice provided by Appellant in the Michels settlement. Accordingly, in light of Appellant's allegedly fraudulent misrepresentations, the class action settlement and release in Michels does not preclude the present action filed by Appellees.

Notice

Even if we ignore the fraudulent behavior of Appellant and assume that *res judicata* bars Appellees' underlying causes of action, a review of the facts shows that the notice of the class action settlement received by Appellees was not constitutionally adequate to fix Appellees' rights in light of their decision not to opt out of the out-of-state class action suit.

Adequate notice of a class action settlement is required by the constitutional mandate of due process. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950). As this Court has previously stated, notice is "the most basic requirement of due process." Coal Mining Ass'n v. Ins. Dep't., 370 A.2d 685, 692 (Pa. 1977). To satisfy due process, notice of a class action settlement must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314.

The Superior Court concluded that the trial court erred in granting Appellant's motion for summary judgment because a question of fact existed as to whether, under all of the circumstances of this case, the notice provided to Appellees was constitutionally adequate.

> [N]othing in the class action notice specifically referred to second-to-die policies, or to the possibility that a vanished premium for a second-to-die policy including an Optionterm component could reappear and quickly escalate.
>
> Neither did anything in the notice disclose that after the two

years of Optionterm Charge Offset had been funded by Phoenix, policyholders such as Appellants with a second-to-die policy could have to pay millions of dollars of out-of-pocket payments to maintain sufficient Optionterm coverage to meet a target amount of insurance projected, sold, and repeatedly illustrated even during the opt-out phase of the class action as requiring no out-of-pocket payment whatsoever.

¶Significantly, Phoenix's own corporate designee, Robert Lautensack, admitted in his deposition that nothing in the class action notice provided specific information to enable the Masons and the Trustees to make an informed decision with respect to claims concerning out-of-pocket premiums required after the death of the first insured:

Q. I've already asked you this but I want to be sure it is covered, because it is one of the specific items in the corporate notice.

You indicated that there's no specific information within the class action notice to enable the plaintiffs-to make the Masons and trustees to make an informed decision with respect to claims concerning out-of-pocket premium payments required after the death of the first insured under the policy, is that correct?

A. That is correct.

(Deposition of Robert Lautensack, 10/30/01, at 189-90 (Exhibit F to Memorandum In Support of Plaintiffs' Motion for Summary Judgment, Vol. I) (R.R. 697a).) Paul Michael Fischer, Phoenix's Vice President of Life and Annuity, similarly testified that he did not recall the issue of out-of-pocket premiums due upon the death of the first insured being part of the settlement. (Deposition of Paul Michael Fischer, 6/28/02, at 219 (Exhibit D to Memorandum In Support of Plaintiffs' Motion for Summary Judgment, Vol. I) (R.R. 560a).)

Wilkes, 851 A.2d at 212. The Superior Court properly noted that, by Appellant's own admission, the notice was not complete with regard to either death scenarios or the escalating premiums. Coupled with the fraud demonstrated above, it defies common sense to determine that Appellees had adequate notice.

In addition, at the time of the Michels settlement, Appellees had no reason to believe they had been or were being defrauded because they had received numerous assurances from Appellant and Lenenberg that their policy coverage was as originally represented in 1989. Moreover, all records sent by Appellants concealed the true nature of Appellees' policy.[4] The Superior Court described the present situation in a logical manner considering the nature of this matter is one of summary judgment:

> [T]here was at least a question of fact regarding the adequacy of the notice, and it was not unreasonable as a matter of law for them to rely on Phoenix's representations under the circumstances, where they had an ongoing business relationship with Phoenix relating to the policy, Phoenix was the only source of information concerning their policy, and Phoenix was specifically obligated to provide information about the class action by the terms of the settlement.

Id.

At the very least, because a question exists regarding the role of Lenenberg and the allegedly fraudulent and concealing activities undertaken by Appellant, the matter

[4] In relation to the choice of law between New York and Pennsylvania, should the standards differ, I would be hesitant to apply a lesser protection standard to Pennsylvania citizens when it comes to protection from fraud.

should not be dismissed at the summary judgment level and Appellees should be allowed to proceed to trial and attempt to prove fraud on the part of the insurance company. Specifically, Appellant and Lenenberg continued to provide Appellees with illustrations that showed the policy premiums vanishing, which was consistent with the policy's original explanation. Meanwhile, around the same time, Appellant was generating internal projections for the policy that showed exorbitant premiums upon the death of one beneficiary; yet it chose not to inform Appellees of these illustrations. Appellees did not know that this aspect of their policy varied from their original discussions and request for coverage. Nor did they have any reason to doubt the veracity of Appellant's and Lenenberg's representations until over one year after the period for invoking ADR ended. Appellant and its agent deliberately kept Appellees ignorant of their situation. As such, Appellees did not have the information or foresight needed to decide, intelligently, whether to stay in or opt out of the Michels class action or whether the notice of settlement applied to them.

Accordingly, I agree with the Superior Court that the trial court erred in granting Appellant's motion for summary judgment because a question of fact exists as to whether, considering all of the circumstances of this case, the notice given to Appellees was constitutionally adequate.

Conclusion

As the doctrine of *res judicata* does not apply in cases where fraud may be found, such fraud is currently alleged, and that fraud vitiates an already questionable notice, I would affirm the Superior Court. As such, I would remand to the trial court and

allow the matter to proceed past the summary judgment stage and allow Appellees the opportunity to prove the alleged fraud.

Mr. Justice Baer joins this dissenting opinion.