

**GERALD ETTER** \* **NO. 2006-CA-0646**  
**VERSUS** \* **COURT OF APPEAL**  
**HIBERNIA CORPORATION, J.** \* **FOURTH CIRCUIT**  
**HERBERT BOYDSTUN, E.R.** \*  
**"BO" CHAMPBELL, PAUL** \* **STATE OF LOUISIANA**  
**CANDIES, RICHARD W.** \*  
**FREEMAN, JR., DICK H.** \*  
**HEARIN, RANDALL E.** \*  
**HOWARD, ELTON R. KING,** \*  
**SIDNEY W. LASSEN, JANE E** \* \* \* \* \*  
**"GEE" MERCADEL-TUCKER,**  
**ET AL.**

**MURRAY, J., CONCURS AND ASSIGNS REASONS**

In the instant case, the Objectors had standing *as class members* to object to the terms of the proposed settlement. In their initial notice to the court, the Objectors stated that they opposed the settlement on the grounds that the notice to the parties was inadequate, the terms of the settlement were not beneficial to the class members, and the amount of attorney fees was disproportionate in comparison with the benefits to the class. Although not requesting to opt out of the class, the Objectors additionally argued that the settlement should not be approved because the shareholders had not been given an opportunity to opt out. In my view, the Objectors cannot have it both ways. They had the choice of *either* requesting to opt out of the class (thereby objecting to the proposed certification as a non-opt out class) or of

using their standing as members of the class to oppose the terms of the settlement. The position of the Objectors herein is inherently inconsistent.

Moreover, the trial court did not err by certifying a non-opt out class in the instant case. The class action petition clearly states: “This is a shareholder class action which seeks *injunctive* relief with regard to a merger between Hibernia Corporation and Capital One Financial Corporation...” (Emphasis added). Although the Objectors opposed the settlement because it provided for the release of all claims, including damage claims, by the class members, they never asserted any damage claims, nor could they name any potential damage claims when questioned by the trial court about same at the hearing (other than those related to Hurricane Katrina, which are expressly excepted from the settlement). In the absence of some showing that damage claims exist, I cannot say that the trial court abused its discretion by certifying the class or by approving the settlement.

For these reasons, I respectfully concur in the result reached by the majority.