

IN THE SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

CLERK OF SUPERIOR, STATE
AND JUVENILE COURT
FILED FOR RECORD

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ELAINE C. JOHNSON, CLERK
RICHMOND COUNTY, GA.

IRENE CANADA, individually)
and as representative of a)
Class of all others similarly)
situated)

Plaintiff,)

v.)

LIBERTY LENDING SERVICES dba)
LIBERTY SAVINGS BANK, F.S.B.,)

Defendant.)

CIVIL ACTION FILE
NO. 2001-RCCV-966

ORDER ON CLASS CERTIFICATION

The Court held a hearing on class certification on Wednesday, October 24, 2007, beginning at 10:30 a.m. All parties were present and represented by counsel. The Plaintiff seeks certification of a class and a subclass defined as follows:

The Class

All persons whose home loans were serviced by Defendant and:

- 1) who have filed a Chapter VII or Chapter XIII bankruptcy proceeding, and
- 2) who have, since May 1, 1999, been charged fees for inspections and/or attorney fees without having been given written prior notice before the assessment of each inspection fee and each attorney fee; and
- 3) the assessed fees were not approved by a bankruptcy court.

The Georgia Subclass

All persons whose home loans were secured by residential property located in the State of Georgia, whose home loans were serviced by Defendant and:

- 1) who have filed a Chapter VII or Chapter XIII bankruptcy proceeding, and
- 2) who have, since May 1, 1999, been charged fees for inspections and/or attorney fees without having been given written prior notice before the

assessment of each inspection fee and each attorney fee; and
3) the assessed fees were not approved by a bankruptcy court.

The Court received the testimony of Plaintiff Irene Canada; the affidavit of Plaintiff Irene Canada; the deposition of her taken by Defense counsel; the affidavit and supplemental affidavits of J.B. Stamper submitted by Defendant; the 30(b)(6) deposition of Defendant in which Defendant designated Mr. Stamper as its spokesperson; Plaintiff's exhibits P-2, P-4, P-5, P-6, P-7, P-8, P-10, P11, P-12 and P-13; and the testimony of Brook Morris. The Court heard argument of counsel.

The issue to be resolved in determining whether a case should be certified as a class action is not whether the plaintiff will ultimately prevail on the merits of his or her claim, but whether the requirements of O.C.G.A. § 9-11-23 have been met. *Taylor Auto Group, Inc. v. Jessie*, 241 Ga.App. 602, 603 (1999). The decision of whether or not to certify a case as a class action lies within the discretion of the trial court.

The Georgia class action statute provides, in pertinent part:

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards

of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The difficulties likely to be encountered in the management of a class action.

O.C.G.A. §§ 9-11-23 (a), (b).

Where the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole, the party seeking class certification need not demonstrate that common questions predominate over questions affecting only individual class members (“predominance”) or that a class action is a superior method for the fair and efficient adjudication of the controversy (“superiority”). *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d

402, 414 (5th Cir. 1998).

As to numerosity, the weight of authority is that a class containing more than thirty-nine class members meets the numerosity requirement, and classes as low as twenty-one may be found to meet it. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). See *Stevens v. Thomas*, 257 Ga. 645, 649 (1987).

As to commonality, "the threshold of commonality is not high." *Jenkins v. Raymark Ind.*, 782 F.2d 468, 472 (5th Cir. 1986).

The typicality requirement is directed to whether the "named representatives' claims have the same essential characteristics as the claims of the class at large." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (disapproved of on other grounds by *Green v. Mansour*, 474 U.S. 64 (1985)). Typicality is present where a defendant commits "the same unlawful acts in the same method against an entire class." *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983). Accord, *Appleyard* at 958 (strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences).

"The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." *Jessie*, 241 Ga. App. at 603-04.

Common questions of law and fact predominate "when action is brought on behalf of purchasers of agreements from a common source, the character of the right sought to be enforced is common, and common relief is sought." *Sta-Power Industries, Inc.*, 134 Ga. App. at 954 (1975) (citing *Georgia Investment Co. v. Norman*, 229 Ga. 160 (190 S.E.2d 48)); *Trend Star Continental, Ltd. v. Branham*, 220 Ga. App. 781, 782-83 (1996). Accord, *Unum Life Ins. Co. of America v.*

Crutchfield, 256 Ga. App. 582, 583 (2002).

The superiority requirement is rooted in ensuring that claims, especially claims by large groups of people for small amounts of money, are adjudicated in a fair, efficient, and economical manner:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone (usually an attorney's) labor.

Amchem Products v. Windsor, 521 U.S. 591, 617 (1997). *Accord, Brady v. LAC, Inc.*, 72 F.R.D. 22, 28 (S.D.N.Y. 1976); *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 732 (N.D.Ill. 1977); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628-29 (E.D.Pa. 1994).

The U.S. Supreme Court has confirmed the power of state courts to exercise jurisdiction over claims of class members residing outside the state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Our Court of Appeals affirmed certification of a nationwide class of plaintiffs in *Unum Life Ins. Co. v. Crutchfield*, 256 Ga.App. 582 (2002), *cert. den.*

As to foreign law, it is presumed that the law of other states is the same as Georgia, unless a party asserting a difference pleads and proves the foreign law. *Avnet v. Wyle Laboratories, Inc.*, 263 Ga. 615, 620 (1993).

Pursuant to O.C.G.A. § 9-11-23(f)(1), the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1.

Irene Canada executed a note and security deed in favor of Nationwide Lending Group, Inc.

on July 31, 1984, in the principal amount of \$65,500.00. The note and security deed were subsequently sold and assigned to Defendant Liberty Lending Services for servicing.

2.

Ms. Canada filed for Chapter XIII bankruptcy protection on April 5, 1996, to avert foreclosure proceedings that had been commenced by Liberty. During the course of her Chapter XIII, Ms. Canada brought her loan current, paying all arrearages and making her regular monthly payments.

3.

On August 5, 2001, Ms. Canada was discharged by the bankruptcy court. She continued to make her regular payments, with the records of Liberty showing a balance due on her loan of \$48,817.09 as of August 14, 2001. On September 7, 2001, Liberty asserted a right to collect an additional \$2,748.02 for attorney fees, inspection fees and other charges allegedly accrued during her bankruptcy, but which Liberty had not sought to collect through the bankruptcy court.

4.

Liberty claimed that these newly added charges put Ms. Canada into default and it again began foreclosure proceedings.

5.

Ms. Canada filed this action to enjoin the pending foreclosure. This Court enjoined the foreclosure and denied the Liberty's motion to dismiss.

6.

Ms. Canada's security deed states, in pertinent part:

7. Protection of Lender's Security. If Borrower fails to perform the covenants and agreements contained in this Deed or if any action or proceeding is commenced which materially affects Lender's interest in the Property, including, but

not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankrupt or decedent, then Lender, at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums and take such action as is necessary to protect Lender's interest, including, but not limited to, disbursement of reasonable attorney's fees and entry upon the Property to make repairs. If Lender required mortgage insurance as a condition of making the loan secured by this Deed, Borrower shall pay the premiums required to maintain such insurance in effect until such time as the requirement for such insurance terminates with Borrower's and Lender's written agreement or applicable law. Borrower shall pay the amount of all mortgage insurance premiums in the manner provided under paragraph 2 hereof.

Any amounts disbursed by Lender, pursuant to this paragraph 7, with interest thereon, shall become additional indebtedness of Borrower secured by this Deed. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof, and shall bear interest from the date of disbursement at the rate payable from time to time on outstanding principal under the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate permissible under applicable law. Nothing contained in this paragraph 7 shall require Lender to incur any expense or take any action hereunder.

8. Inspection. Lender may take or cause to be made reasonable entries upon and inspections of the Property, provided that Lender shall give Borrower notice prior to any such inspection specifying reasonable cause therefor related to Lender's interest in the Property.

7.

The standard form Fannie Mae/Freddie Mac Mortgage, for all but three states, provides, in pertinent part:

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released

proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in

writing.

8.

The form mortgage security instruments for Georgia, Maine and New York contain variations in paragraphs seven and nine.

9.

Paragraphs seven and nine are the only two paragraphs of the form mortgage security instruments that relate to the issues raised by this case, *i.e.*, the right of the mortgagee servicer to assess against the mortgagor attorney fees and curb-side inspection fees that it had incurred without prior notice to the mortgagor and without any approval or adjudication by a bankruptcy court.

10.

The variations in language found in paragraphs seven and nine of the form mortgage security instruments for Maine, New York and Georgia are not material as to the core issues asserted in this class action.

11.

The Court adopts as findings of fact the uncontested facts testified to by Liberty through its designated spokesperson, J.B. Stamper, as follows:

- a. It is the standard procedure of Liberty to follow objective guidelines as to when to order inspections and incur costs for inspection fees.
- b. These procedures do not vary state by state, but are uniform for loans regardless of where in the country the mortgaged property is located.
- c. These objective guidelines have not changed in any significant way in the last fifteen years.
- d. When a mortgagor files a bankruptcy proceeding, it is and has been the standard procedure

of Liberty to order monthly curb-side inspections that continue for the duration of the bankruptcy regardless of whether the debtor is in arrears or not.

- e. Liberty does not give any notice either before or after these inspections to the debtor.
- f. Liberty's inspection procedure is standard throughout the United States.
- g. It is a standard procedure for Liberty to assess all charges for inspections and all attorney fees it incurs from the date of filing of a bankruptcy petition against the mortgagor after the bankruptcy proceeding has been dismissed or discharged.
- h. The only form of notice to mortgagors prior to the assessment of any attorney fees would be a standard acceleration letter giving notice of foreclosure.
- i. Other than the acceleration letter, no notice is sent to mortgagors of the fact that Liberty was accruing attorney fees that it would, in due course, assess against its mortgagor.
- j. Liberty's procedure for notice and for assessment of attorney fees against its mortgagors was standard throughout the United States.
- k. These inspection fees and attorney fees would be assessed against the mortgagor after the bankruptcy proceeding had been discharged or dismissed regardless of whether the mortgage was ever in arrearage.
- l. It was the standard practice and uniform policy of Liberty to assess inspection fees and attorney fees against its mortgagors who had filed a bankruptcy proceeding after the bankruptcy proceeding had been discharged and the mortgage would not be deemed satisfied until these inspection fees and attorney fees had been paid.
- m. It was the standard practice of Liberty to withhold from its mortgagors the fact that monthly inspections had been ordered, the identify of the party doing the inspections, the charge for

each inspection, the identity of attorneys rendering legal services for Liberty, a description of the services that were rendered by the attorneys for Liberty, copies of bills or other instruments itemizing what services were rendered and how the rates were calculated.

- n. Liberty has records that include a state code that identifies the state from which each mortgage comes and a bankruptcy code that identifies each mortgage in which the mortgagor has filed a petition for relief in bankruptcy.
- o. Liberty identified eighty-five mortgage loans that it serviced that came from the State of Georgia, and in which the mortgagor had filed a bankruptcy proceeding.
- p. Liberty's portfolio of mortgages that it services is presently approximately 22,000 mortgages and has in the past been significantly higher.
- q. Liberty has not calculated the number of mortgages that it services nationwide in which the mortgagor has filed a bankruptcy proceeding, but it acknowledged that there was nothing unusually high or low about the number from Georgia. It could be in the thousands.
- r. Liberty asserts that its right to order inspections and to assess inspection fees against mortgagors after a bankruptcy is discharged or dismissed is derived solely from standard language found in mortgage security instruments.
- s. It is the position of Liberty that its right to assess its attorney fees against its mortgagors is derived from standard mortgage language that is essentially standard throughout the United States.
- t. For home mortgages to be marketable in bundles and sold to large investors such as Fannie Mae, it is necessary that the underlying security instruments contain essentially uniform

language, language that Liberty calls, "agency paper."¹

12.

The Plaintiff Irene Canada asserts claims that place her within the definition of the proposed class and subclass. The claims that she has asserted on behalf of herself are the same substantive claims that she asserts on behalf of class members. A fact that distinguishes her from members of the proposed class is the injunctive relief enjoining foreclosure of her loan prior to the time that she

¹ The Court notes and gives credence to the testimony of J.B. Stamper, noting in particular the following testimony:

Q. In this assessment of these attorneys' fees against a borrower who had filed some sort of bankruptcy proceeding, did Liberty follow any different procedure based on what state the mortgage property was located?

A. No.

Q. As to inspection fees assessed against borrowers who had filed a bankruptcy proceeding, did Liberty follow any different procedures based upon what state the borrower or the mortgage property was located?

A. No.

Q. As to the assessment of inspection fees for borrowers who had filed some sort of bankruptcy proceeding, did Liberty's procedures for assessment of these fees vary in any way based on variations in the language of the security deeds, deed of trust, or mortgages for these properties?

A. No.

Q. As to Liberty's practices for the assessment of attorneys' fees to the accounts of borrowers who had filed some sort of bankruptcy procedure, did Liberty's procedures vary any in the assessment of these fees based on some peculiarities of the language in particular security deeds, deeds of trust, mortgage?

A. No.

Stamper dep., pp. 115-116.

amended her complaint to add allegations to bring this claim on behalf of a class. She has obtained counsel willing and able to advance expenses and prosecute the case on behalf of the class.

13.

Based upon the affidavit of class counsel and the Court's familiarity with class counsel in the handling of class actions, the Court concludes, as a matter of fact, that class counsel will adequately represent the interests of the class.

14.

Foreign law is a question of fact that must be pled and proved. No evidence was presented by the parties showing any variations in state law that would affect construction of the meaning of the standard mortgage language before the Court.

15.

The core and predominant issues presented by this class action are whether or not the provisions of paragraphs seven and nine of the standard Fannie Mae mortgage language authorizes mortgagees and their servicers such as Liberty to assess against mortgagors after they have been discharged or dismissed from bankruptcy the attorney fees and inspection fees that the mortgagee or its servicer has incurred since the filing of bankruptcy and without any adjudication by a bankruptcy of its entitlement to such fees.

16.

A construction of the standard language under established rules of construction, including the parol evidence rule and the statute of frauds, should be determinative of the issues as to Ms. Canada and all members of the class and subclass. No party presented any evidence or pointed out any factual variations in the language of mortgages that would affect the adjudication of these issues

as to individual members of the proposed class and subclass.

CONCLUSIONS OF LAW

1. NUMEROSITY

The evidence before the Court is that Liberty has identified eighty-six mortgagors whose loans it serviced in Georgia that filed proceedings for relief in bankruptcy. Liberty acknowledged that it is standard procedure for every mortgage in which the mortgagor files a bankruptcy proceeding for it to assess inspection fees and attorney fees against the mortgagor. The Court concludes, as a matter of fact and law, that there are at least eighty-six members of the Georgia Subclass. All of these members of the Georgia Subclass would also be members of the proposed class. The evidence before the Court and logical inferences to be drawn from that evidence supports a factual conclusion that there are probably over 1,000 members of the proposed class. As a matter of fact and law, the Court concludes that numerosity is present both for the proposed class and Georgia Subclass.

2. TYPICALITY AND COMMONALITY

The evidence before the Court supports the conclusion, as a matter of fact and law, that the claims of Ms. Canada are sufficiently typical of claims of members of the proposed class and that the factual and legal issues raised by the claims of Ms. Canada present issues of fact and law common to members of the proposed class and subclass.

The defenses raised by the Defendant, including the new defense pled by Liberty of federal preemption set out in the affidavit of J.B. Stamper, present questions of law common to all members of the Class and the Georgia Subclass. The requirements of commonality and typicality found in O.C.G.A. § 9-11-23(a)(2), (3) are met as a matter of fact and law.

3. ADEQUACY OF REPRESENTATION

The Court takes judicial notice that lead counsel for the class in this case was lead counsel for the plaintiff class in *Taylor Auto Group, Inc. v. Jessie*, 241 Ga.App 602 (1999) and *Unum Life Insurance Co. of Amer. v. Crutchfield*, 256 Ga.App. 582 (2002). The Court concludes, as a matter of fact and law, that Irene Canada and class counsel will adequately protect the interests of members of the Class and the Georgia Subclass. Should the Court ever conclude that adequate representation is not being provided, the Court will require supplementation or substitution of representation.

The Court concludes, as a matter of law, that the requirements of O.C.G.A. § 9-11-23(a) for certification of the proposed class and Georgia subclass have been met.

4. O.C.G.A. § 9-11-23(b)

The amended complaint seeks injunctive relief on behalf of the all class members. The undisputed evidence before the Court, coming from the designated spokesperson for Liberty, Mr. Stamper, is that Liberty asserts that its right to assess its inspection fees and attorney fees against its mortgagors is derived solely from standard uniform language in the mortgages that secure the loans and that this policy is followed uniformly without variation throughout the United States. Thus, Liberty, as the party opposing the class, "has acted ... on grounds generally applicable to the class." O.C.G.A. § 9-11-23(b)(2). The logical conclusion to be drawn from examination of the mortgage forms in evidence for the fifty states and the District of Columbia and the testimony of Liberty is that a construction of paragraphs seven and nine of the standard mortgage language would effectively adjudicate the right *vel non* of Liberty to assess its inspection fees and attorney fees against any and all of the members of the proposed class. Mortgage documents such as these are governed by the parol evidence rule and the statute of frauds, and thus are not subject to modification by oral or

extrinsic evidence. The standard language should be construed by application of standard precepts for the construction of such documents. The determination of the meaning of this standard language would be for the Court to decide as a matter of law. Following construction of the documents as to the two issues central to this case, appropriate injunctive relief could be granted as was done in *State Farm Mutual Automobile Ins. Co. v. Mabry*, 274 Ga. 498 (2001). As a matter of fact and law, the Court concludes that appropriate final injunctive relief or corresponding declaratory relief with respect to the whole class could be granted and that the proposed class meets the requirements for certification of the class and Georgia subclass under O.C.G.A. § 9-11-23(b)(a)(2).

It is appropriate for the Court to further examine the requirements for class certification found in O.C.G.A. § 9-11-23(b)(3) as to whether or not such is met and therefore provides an additional basis for class certification. The Court has further found, as a matter of fact, that there are questions of law and fact common to the members of the class. The central and core issues before the Court are whether or not the standard security deed language authorizes Liberty to assess against its mortgagors the costs incurred by Liberty for inspections and for attorneys after a bankruptcy has been dismissed or discharged. The issues raised by this determination are, as a matter of fact and law, the core and predominant issues in the case.

In its deposition, Liberty did not identify any other individual actions seeking to adjudicate the claims against Liberty being asserted in this class action. It would be difficult to financially justify the cost of litigation over the few thousand dollars involved in each individual claim. Clearly, as a matter of fact and law, it is not in the interests of members of the class to be relegated to individually prosecuting their separate claims to adjudicate the right of Liberty to assess its costs for inspections and attorneys against each borrower. This argues for a finding of superiority of class

treatment.

The nonexistence of other litigation pending against Liberty that asserts the same claims as those asserted in this case leads to the conclusion that there is not any other litigation to which this Court should defer. The core questions for the Court are for the Court to construe standard written language as a matter of law. The Defendant has not asserted that it would be desirable for Liberty to have numerous cases brought against it in numerous courts. It is certainly far more efficient to present this litigation in this Court. Under the facts before the Court, the issues raised by sections (a), (b) and (c) of 23(b)(3) argue for certification of the class.

Under the record before this Court, the Court concludes that this is a manageable class action. The Defendant has a file coding system that enables it to identify members of the class and their addresses. The Defendant has, as a matter of course, sent bills and other mailings to its mortgagors. Identification and location of class members is manageable. The funds at issue in this class action are the inspection fees and attorney fees that Liberty has assessed against the members of the proposed class post-bankruptcy. The fact of assessment, the amount of assessments and whether or not Liberty succeeded in collecting these assessments against individual class members is a matter that can be derived from the records of Liberty. There should be no need for individual testimony of class members on the issue of damages. Testimony of individual class members would be unnecessary and irrelevant as to the matter of construction of the meaning of the relevant provisions of the mortgages. The Court thus concludes, as a matter of fact and law, that identification of class members, decision of the core legal issues as a matter of law and determination of damages, if the Plaintiff class prevails, are manageable and can be done much more efficiently in a single class action than in numerous state-only class actions or in individual actions.

The complaint includes a claim under O.C.G.A. § 16-14-4, *et seq.*, that pleads, as predicate acts, theft by deception and theft by conversion. The claim can be asserted only by members of the Georgia Subclass. Proof of the underlying acts of theft by deception or theft by conversion raise issues of reliance on the part of individual subclass members. It would not be manageable to try this action if class counsel proposed to call each individual subclass member to testify.

Individual reliance can be proved by individual testimony, but it can also be shown by common evidence, by actions, such as the act of paying a sum of money to another, and by inferences drawn from circumstantial evidence, particularly inferences of reliance drawn from omissions of disclosures to the class members.

Reliance upon a fraud may be proved by circumstantial evidence. E.g. *Poulsen v. Treasure State Industries, Inc.*, 626 P.2d 822 (Mont. 1981); *Peine v. Murphy*, 46 Haw. 233, 377 P.2d 708 (1962); *Hunter v. McKenzie*, 197 Cal. 176, 239 P. 1090(1925); *Davis v. Re-Frac Manufacturing Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967). Courts have noted that circumstantial evidence of reliance may be more reliable than a fraud victim's direct testimony. *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F.2d 541, 549 (5th Cir. 1968) ("In law, as elsewhere, actions may speak louder than words."); *Witzig v. Philips*, 144 N.W.2d 266, 270 (Minn. 1966) ("[T]he facts and circumstances surrounding the situation are the best measure of whether there was reliance or not."). *Doctors Hosp. v. Bonner*, 195 Ga.App. 152, 164 (1990) ("[R]eliance is subject to proof by circumstantial evidence."). The Court in *Taylor Auto Group, Inc. v. Jessie*, 241 Ga.App 602 (1999), affirmed certification of a class that included a claim under O.C.G.A § 16-14-4 with the same predicate acts here alleged. The Eleventh Circuit has done likewise, expressly rejecting the contention that proof of reliance could only come from individual testimony. *Klay v. Humana, Inc.*,

382 F.3d. 1241, 1257-1260 (11th Cir. 2004).

The undisputed testimony is that Liberty used standard procedures for incurring the attorney fees and inspection fees at issue and standard procedures as to when class members were informed of the fees and what they were and were not told. The Court does not, at this point, attempt to make any substantive determination as to whether or not the actions of Liberty could be viewed as deceptive acts or omissions. The Court does conclude that the procedures followed by Liberty were sufficiently standard and uniform to permit adjudication of the reliance issue on a subclass-wide basis if counsel for the class seeks to prove such by proof of common acts and omissions. Such a decision by class counsel certainly does not limit the rights of Liberty to defend its actions by presentation of whatever relevant evidence it deems appropriate to present. If it develops that proposed evidence relative to reliance will, in fact, be unmanageable, the Court can decertify certification of the subclass as to this claim.

CONCLUSION

The Court concludes, as a matter of fact and law, from the record before it, that the claims of members of the class and members of the Georgia Subclass can be managed as a class action, and that a class action is the superior method for adjudication of these claims.

For the reasons set forth above, IT IS HEREBY ORDERED:

1. The Court HEREBY CERTIFIES a class of Plaintiffs defined as follows:

All persons whose home loans were serviced by Defendant and:

- 1) who have filed a Chapter VII or Chapter XIII bankruptcy proceeding, and
- 2) who have, since May 1, 1999, been charged fees for inspections and/or attorney fees without having been given written prior notice before the assessment of each inspection fee and each attorney fee; and
- 3) the assessed fees were not approved by a bankruptcy court.

The Court CERTIFIES a Georgia subclass defined as follows:

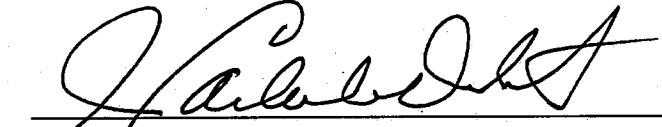
All persons whose home loans were secured by residential property located in the State of Georgia, whose home loans were serviced by Defendant and:

- 1) who have filed a Chapter VII or Chapter XIII bankruptcy proceeding, and
- 2) who have, since May 1, 1999, been charged fees for inspections and/or attorney fees without having been given written prior notice before the assessment of each inspection fee and each attorney fee; and
- 3) the assessed fees were not approved by a bankruptcy court.

2. The Court HEREBY ORDERS that Irene Canada be designated as representative of the Class and of the Georgia Subclass.
3. The law firms of Bell & Brigham and Clays & Magruder are designated as class counsel for the Class and the Georgia Subclass
4. The Defendant Liberty is directed to provide class counsel within sixty (60) days with the names and address of members of the class by identifying the name and last known address of mortgagors that its records show filed a petition in bankruptcy.
5. Class counsel is directed to confer with opposing counsel as to an appropriate form of notice and to submit to the Court a proposed form of notice within forty-five (45) days.
6. Within thirty (30) days of the mailing of notice to class members, Plaintiffs shall file with this Court a motion seeking the Court's ruling as to whether or not the language found in paragraphs seven and nine of the Fannie Mae form security instruments and the language found in paragraphs seven and eight of the security deed executed by Ms. Canada permit a mortgagee to assess, after a discharge or dismissal of a bankruptcy proceeding, fees for curb-side inspections and fees of attorneys employed by the mortgagee during the course of the bankruptcy that were not expressly approved by a bankruptcy court and for which specific notice was not sent to the mortgagor prior to the incurring of these expenses for inspections

and attorneys. The Defendant Liberty shall have thirty (30) days from the filing of such motion and brief to reply. The Defendant Liberty may further file such other motions as it may deem appropriate.

SO ORDERED, this the 3rd December day of ~~November~~, 2007.



J. Carlisle Overstreet
Judge, Augusta Judicial Circuit

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing **ORDER**, upon opposing counsel by depositing same in the United States mail with proper postage affixed thereto and addressed as follows:

Lori L. McGowan, Esquire
Larry W. Johnson, Esquire
Morris, Schneider & Prior, L.L.C.
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David P. Dekle, Esquire
Fulcher Hagler
Post Office Box 1477
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This 5th day of December, 2007.



John C. Bell, Jr.
Counsel for Plaintiff