UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

IN RE:	*	**NO. 05-17697**
ENTERGY NEW ORLEANS, INC.	*	
	*	**CHAPTER 11**
DEBTOR		
	*	**SECTION "B"**

*** * * * * * * ***

ENOI'S MEMORANDUM ON GROUP CLAIMS IN BANKRUPTCY

Entergy New Orleans, Inc., the debtor and debtor-in-possession herein (the "Debtor" or "ENOI"), files this Memorandum regarding the permissibility of group claims in bankruptcy. At the conclusion of the July 13, 2006, hearing on ENOI's Motion for Summary Judgment—when this Court denied the certification of two classes of ratepayers sought by the Gordon Claimants and the Lowenburg Claimants—the Court specifically asked the parties to brief the case of *In re Great Western Cities, Inc.*, 107 B.R. 116 (N.D. Tex. 1989) and its possible application to this matter.

Great Western did not involve the filing of claims by representative plaintiffs on behalf of a putative class, although the Trustee had so argued. Rather, as the district court found, a large number of individual plaintiffs were individually represented by several law firms in the

filed proofs of claim: "Each plaintiff on whose behalf a proof of claim was filed is identified in that proof of claim by name and the person's address is shown. No plaintiff or group of plaintiffs purports to act as the representative of a class of similarly situated, but unnamed plaintiffs." 107 B.R. at 118. Thus, the district court concluded, the group claim was essentially a "permissive joinder" in accordance with Federal Rule of Civil Procedure 20(a). *Great Western*, therefore, stands for the rather unremarkable proposition that a bankruptcy court can adjudicate group claims as if the claimants were permissively joined under Federal Rule of Civil Procedure 20(a).[1]

A small group claim is precisely what is now left before this Court after the denial of class certification. That is, the Gordon and Lowenburg claimants filed their proofs of claim individually for each of the named plaintiffs and on behalf of the putative class. After the denial of class certification, the individual claims of the named plaintiffs persist, and the denial of certification does not dismiss the individual claims on their merits.[2] *E.g., Sherri A.D. v. Kirby*, 975 F.2d 193, 205 (5th Cir. 1992). "The order denying class certification . . . does not affect the merits of Sherri's individual claim . . . ." *Id. See also Dugas v. TransUnion Corp.*, 99 F.3d 724, 726 (5th Cir. 1996) ("[A] class representative wears two hats. He represents both his personal interests and the interests of the class."). Accordingly, the nine Lowenburg claimants and the

[1] Rule 9014 of the Federal Rules of Bankruptcy Procedure does not expressly make Federal Rule of Civil Procedure 20 applicable to contested matters. Nevertheless, Rule 9014 does imbue a bankruptcy court with authority to order that other rules, such as Rule 20, apply in contested matters upon notice to the parties.

[2] Nevertheless, disallowance of the individual claims on their merits is appropriate for many of the same reasons that the denial of class certification was appropriate. Among other reasons, the City Council has already addressed the merits of these claims, and appeals of those decisions are pending in the Louisiana court system.

four Gordon claimants still have individual claims that must be allowed or disallowed. Consistent with *Great Western*, the individual claims can be considered permissively joined and adjudicated together as group claims.

At the July 13 hearing, this Court expressed some concern about whether the rights of the absent members of the putative class would be prejudiced by the denial of class certification after passage of the bar date and contemplated whether some notice should be given to absent proposed class members so that claimants' lawyers could solicit other ratepayers to join in the filing of individual claims. But to require notice of the denial of class certification would be inconsistent with the class action rule itself and Fifth Circuit precedent. Federal Rule of Civil Procedure 23(c) provides that for "any class **certified** under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." (emphasis added). Certification is the necessary prelude to individual notice to the class; denial of certification is not. "[W]here a court has ruled under Rule 23(c)(1) that an action cannot properly be maintained as a class action the notice requirements of Rule 23(e) do not apply . . . ." *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975), *cert. denied sub nom*, 425 U.S. 912 (1976).[3] "Further, we have held that notice to the class of denial of class certification is not necessary." *Jones v. Caddo Parish School Brd.*, 735 F.2d 923, 936 n. 16 (5th Cir. 1984).

In *Pearson*, the Fifth Circuit also addressed the issue lurking here of whether the absent

[3] Although P*earson* applied the then current version of Rule 23 regarding notice of settlements under Rule 23(e), the same reasoning applies with equal, if not stronger, force to notice under Rule 23(c).

putative class members' hypothetical reliance on the pendency of the class action could have prejudiced their rights to seek relief: "[S]ince no Rule 23(c)(3) notice of the maintenance of this litigation was ever given or required to be given to nonparty members of the originally alleged class, reliance by those individuals on this action to recover their losses would be particularly misplaced." *Pearson*, 522 F.2d at 178. So it is with the absent putative class members in this bankruptcy, who were not notified of the filing of the class proof of claim in the first instance and thus could not have relied on it to protect their purported rights. Indeed, the case for not permitting solicitation of additional claimants is even more compelling here than in *Pearson* because, as briefed and argued by ENOI, the City Council acts to protect the ratepayers in matters regarding rates, such as the Gordon and Lowenburg complaints, and because ENOI widely published notice of its bankruptcy bar date such that any ratepayer who thought he or she had an individual claim was provided a date certain by which to file. Those two protections simply do not exist in the typical class action in which certification is denied, yet notice of the denial of certification or of the existence of potential individual claims is neither contemplated nor required. *See id.*

In the alternative, however, to the extent that the Court is still concerned, this Court certainly has the authority to re-open the bar date for a limited time[4] and for the limited purpose of permitting the lawyers for the Gordon and Lowenburg claimants to solicit individuals who

[4] Outside of bankruptcy, "the commencement of a class action tolls the applicable statute of limitations as to all members of the class, until a determination of the propriety of maintaining the action as a class action is made by the trial court." *Pearson*, 522 F.2d at 178. Once class certification is denied, any applicable statute of limitations generally commences to run again.

believe they are aggrieved to join in the previously filed proofs of claim—as long as they do so at their own expense and consistent with the ethical rules governing the solicitation of potential clients.

WHEREFORE, Entergy New Orleans, Inc. requests that this Court treat the proofs of claim already filed as individual claims for the individually named Gordon and Lowenburg claimants, that it treat them as permissively joined under Federal Rule of Civil Procedure 20(a), and that the bar date not be re-opened to permit the Gordon and Lowenburg claimants or their lawyers to solicit ratepayers to join in the proofs of claim filed for the individual claimants.

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Respectfully submitted,

/s/ Nan Roberts Eitel

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