Case Nos. 08-56536, 08-56538
In the Court Below: CV 07-03796 SJO (FFMx) (C.D.Cal.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENISE P. EDWARDS, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

FIRST AMERICAN FINANCIAL CORPORATION, SUED AS
THE FIRST AMERICAN CORPORATION AND
FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendants-Appellees.

PETITION FOR REHEARING *EN BANC* AND PETITION FOR PANEL REHEARING OF FIRST AMERICAN FINANCIAL CORPORATION, SUED AS THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY, DEFENDANTS-APPELLEES

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RULE 35 AND RULE 40 STATEMENTS

The Panel decided three questions of exceptional importance and national application under the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.* (“RESPA”), in conflict with other Circuits. There is an overriding need for national uniformity, warranting *en banc* rehearing. The Panel decided an additional issue in conflict with an *en banc* decision of this Court, warranting panel or *en banc* rehearing.

First, the Panel held that Plaintiff has statutory and constitutional standing to pursue a RESPA claim if Plaintiff alleges that she was referred to a title insurer in violation of RESPA, even if there was no overcharge (*e.g.*, as here, because the insurance premium is set by state law) or other concrete injury-in-fact (*e.g.*, a deficient title policy—not claimed here). The Panel’s decision conflicts with *Durr v. Intercounty Title Co. of Illinois*, 14 F.3d 1183 (7th Cir. 1994), and *Moore v. Radian Group*, 233 F.Supp.2d 819 (E.D.Tex. 2002), *aff’d without opinion*, 69 F.App’x 659 (5th Cir. 2003), and violates Article III, *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

Second, the Panel held that Plaintiff may recover treble the full amount she paid for title insurance—not just treble any overcharge—while retaining the insurance policy. That holding likewise conflicts with *Durr* and *Moore*. The Panel’s decision establishes a *per se* measure of punitive damages that is grossly excessive and unconstitutional under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), bearing no "reasonable relationship to compensatory damages."

Third, the Panel held that the district court abused its discretion by not certifying a class of all persons who purchased title insurance through the same agency, holding that "a single, overwhelming common question of fact" predominated: whether a prior investment by the title insurer in the title agency was an unlawful referral fee. The Panel's decision ignores the individualized elements of each RESPA claim, including whether a particular loan was "federally related," and whether the allegedly unlawful referral fee "affirmatively influenced" selection of the title insurer. The Panel's decision conflicts with prior decisions of this Circuit, *Bjustrom v. Trust One Mortgage*, 322 F.3d 1201 (9th Cir. 2003) and the Eighth Circuit, *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002).

Finally, the Panel held that the district court erred in denying Plaintiff discovery to support certification of a nationwide class, improperly ignoring the applicable standard of review—a "*strong showing* that the district court's decision was a *clear abuse of discretion*," *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010)(*en banc*)(emphasis added). The Panel did not address the district court's finding that, if the class included persons who purchased title insurance through the 180 different agencies in which the title insurer invested, discovery could not eliminate the predominance of individual issues.

FACTS AND PROCEEDINGS

I. FACTS

When Plaintiff, Denise Edwards, purchased her home in Ohio in 2006, she and her seller purchased title insurance from Tower City, an agent for First American Title Insurance Company. (ER98 ¶24). In Ohio, all title insurers charge identical premiums set by a rating bureau. OHIO REV. CODE §§3935.04, 3935.07. Edwards and her seller paid $728.85—the uniform rate—for the insurance and were not, and could not have been, overcharged. (ER98 ¶24). Edwards makes no claim that her policy is deficient; she has sustained no losses relating to title. (ER94-95 ¶5).

Eight years earlier, First American purchased a 17.5% interest in Tower City for $2 million, matching a competitor's offer. (ER462-63). First American has made investments in approximately 180 title agencies across the country (including majority and complete-ownership investments). (ER15). So have other underwriters. These investments are common, and well-known to the Department of Housing and Urban Development ("HUD") and state regulators.

Some title agents sell only one underwriter's policies; others sell for multiple underwriters. (ER448-49). Tower City sold title insurance policies written by two insurers—First American and Stewart Title. In Ohio, if a customer or lender expressed no preference, Tower City provided a First American policy. (ER474).

The Tower City agreement for other states (where it was also authorized to issue First American policies) did not have any provision favoring First American (and, in 2006, that provision was eliminated in Ohio). (ER435-36, 473-96).

II. RESPA

Congress enacted RESPA to "eliminat[e] kickbacks for referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. §2601(b)(2). Section 8(a) prohibits the payment of "any fee, kickback, or thing of value" in exchange for referrals. §2607(a).

RESPA applies only to "federally related" mortgage loans on one-to-four family residences, when the lender is a federally-insured bank, intends to sell the loan in the secondary mortgage market, or meets other statutory criteria. §2602(1).

RESPA has four complementary enforcement mechanisms: criminal actions by the Department of Justice ("DOJ"); enforcement actions by HUD; enforcement actions by state attorneys general and insurance commissioners; and private civil actions by parties who have sustained actual damage. §2607(d).

In a Section 8(a) private civil action, a person who paid an unlawful referral fee, resulting in an overcharge, may be found liable to the person "charged for the settlement service *involved in the violation* in an amount equal to three times the amount of any charge paid for such settlement service." §2607(d)(2)(emphasis added). In contrast, Section 9, which prohibits a seller from requiring a buyer to use a particular title company, provides for damages "in an amount equal to three times *all charges* made for [] title insurance." §2608(b)(emphasis added).

To establish a Section 8(a) violation, proof of a "referral" is required. A "referral" is "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service," 24 C.F.R. 3500.14(f)(1), and thus requires an individualized showing that a particular purchaser was "affirmatively influence[ed]" in her selection of a settlement service.

III. PROCEEDINGS IN THIS CASE

A. Edwards' Complaint

In her class-action complaint under Section 8(a), Edwards avers that when First American invested in Tower City and other title agencies, it paid too much, and that the "overpayment" is an unlawful referral fee. (ER93-103). Edwards alleges that is why Tower City referred her to First American.

While Edwards paid the uniform rate for title insurance, mandated under Ohio law, she still seeks to represent either a "Tower City" class of all persons who purchased First American policies through Tower City, or a nationwide class of all persons who purchased First American policies through any of 180 title agencies in which it invested. (ER2, 13). Edwards seeks to recover three times the title insurance premium paid by each putative class member.

B. The District Court's Decisions

First American moved to dismiss for lack of statutory and constitutional standing because RESPA authorizes private actions only in cases involving overcharges or other tangible harm and, in the absence of injury-in-fact, Edwards lacks Article III standing. The district court denied the motion. (ER21).

Edwards moved to certify a nationwide class of all purchasers of title insurance from any of the 180 title agencies in which First American owned an interest. (ER12-17). The district court denied the motion. Because Edwards' theory was that First American had overpaid for each investment, the district court found that trial would require a valuation analysis of each of the investments in the 180 title agencies to determine whether there was an "overpayment" that might constitute an unlawful referral fee. (ER8-9, 12-17).

After discovery concerning a putative "Tower City" class, the district court denied certification, finding that individualized proof was required as to whether each consumer was "affirmatively influenced" by Tower City to choose First American (or whether, for example, the lender selected First American). (ER1-7).

C. The Panel's Decisions

This Court granted Edwards' petitions to appeal the denials of class certification. First American moved to dismiss the appeal, arguing that Edwards lacks Article III standing.

In a published Opinion, the Panel held that the standing inquiry turned on whether RESPA "prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III." Opinion 9094. The Panel held that RESPA provides that Defendants are liable for "three times the amount of *any* charge paid," and "does not limit liability to instances in which a plaintiff is overcharged." *Id.* 9095.

In an unpublished Memorandum, the Panel reversed the district court's order denying certification of a Tower City class, holding that the "overwhelming common question of fact [was] whether the arrangement between Tower City and First American violated" RESPA. Memorandum ¶3. The Panel held that there was no need for individualized proof of who, in fact, chose First American in each individual transaction. The Panel did not address the need for individualized proof of whether each putative class member's purchase was covered by RESPA.

The Memorandum also directed the district court to permit nationwide discovery, without addressing how nationwide discovery could eliminate the need for a valuation analysis of each of First American's investments in 180 different agencies. *Id.* ¶2.

ARGUMENT

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REHEARING SHOULD BE GRANTED

I. THE PANEL'S DECISION—THAT PLAINTIFF, WHO SUSTAINED NO INJURY WHEN SHE PAID THE UNIFORM RATE FOR TITLE INSURANCE UNDER OHIO LAW, NEVERTHELESS HAS RESPA AND ARTICLE III STANDING—CONFLICTS WITH DECISIONS OF THE SEVENTH AND FIFTH CIRCUITS

Even though Edwards makes no claim that she suffered any injury-in-fact—the premium rate was mandated by Ohio law, and the title insurance policy was not deficient—the Panel held:

> [W]e must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III.

Opinion 9094. The Panel held that, by merely alleging that RESPA prohibited Defendants' conduct, Edwards established an Article III "injury."

The Panel's reading of RESPA conflicts with decisions of the Seventh Circuit in *Durr*, the Fifth Circuit in *Moore*, and district courts in the Fourth and Eleventh Circuits.[1] The Panel's decision, consistent with those of the Third and Sixth Circuits,[2] deepens the conflict among the Circuits.

[1] *See, e.g.*, *Mullinax v. Radian Guar.*, 311 F.Supp.2d 474 (M.D.N.C. 2004); *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F.Supp. 1418 (S.D.Fla. 1997).

[2] *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009).

The Opinion attributes an unreasonable intent to Congress, and would render RESPA unconstitutional, by purporting to confer Article III standing on persons who have not "suffered sufficient injury to satisfy the 'case or controversy' requirement." *Cetacean Cmty.*, 386 F.3d at 1174; *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 949 (9th Cir. 2006).

The importance of the issue is evident. The arrangements at issue here—in which title insurers invest in title agencies and enter into cooperative arrangements with them—are widespread. Hundreds of thousands, if not millions, of home purchases have involved such agencies. For many reasons, including state regulations mandating title insurance fees, these arrangements often have no impact on the title insurance fees that any person pay—much less the quality of insurance purchased. *See* Opposition to Brief of Amicus Curiae, Dkt. 6857345, at 4-13.

If these arrangements all run afoul of RESPA, the title insurer is subject to criminal actions by the DOJ, and enforcement actions by HUD, state attorneys general, and state insurance commissioners. If these arrangements cause actual damage (*e.g.*, an overcharge or deficient title policy) an insurer also is subject to a private action for damages by the persons injured. §2607(d). Contrary to the Panel's decision, however, RESPA does not provide a private cause of action to a title insurance purchaser who sustains no actual injury. The Panel's creation of this cause of action encourages senseless litigation and imposes extraordinary costs, including those associated with *in terrorem* settlement value.

Other Circuits have rejected the Panel's reading of RESPA, in decisions that were cited to the Panel, but that it failed to mention. In *Durr*, the plaintiff purchased a home and hired a title company to perform settlement services. 14 F.3d at 1184. He then filed a putative class action, claiming that the title company overcharged him for recording fees in violation of Section 8(b) (which applies to fee-splitting, rather than kickbacks) and sought treble damages of *all recording fees paid*. The Seventh Circuit affirmed the imposition of sanctions against the plaintiff's attorney because "there was no basis for" the plaintiff's RESPA claim for treble the full amount paid for the recording fees. *Id.* at 1187-88; *see id.* at 1188 ("There was never an allegation that these fees were illegitimate. . . . The question, then, is why did [the plaintiff] include these legitimate charges in his damage request?").

In *Moore*, a putative class action, plaintiffs alleged an illegal kickback and referral scheme, but made no claim that the scheme increased settlement costs. 233 F.Supp.2d at 819-22. Noting that "[e]ven if Congress enacts a statute to grant the plaintiffs a cause of action, the plaintiffs 'still must show actual or threatened injury of some kind to establish standing in the constitutional sense,' *Warth v. Seldin*, 422 U.S. 490, 501 (1975)," the district court held:

> [A] violation of a statute, standing alone, might have the effect of prompting a suit by a federal or state enforcement agency against the malefactors, but such a violation would be insufficient to confer standing on a private plaintiff absent a showing of actual or threatened injury. . . .
>
> That neither RESPA nor the HUD regulations require direct or indirect injury to a consumer to make out a RESPA *violation* is beside the point for purposes of Article III standing. This is bedrock. Article III requires, at a minimum, that a private litigant suing in federal court have suffered an actual or threatened injury . . . . If there is no actual or threatened injury, there is no case or controversy sufficient to confer jurisdiction on the federal courts.

Id. at 823. The Fifth Circuit affirmed. 69 F.App'x 659.

The Panel held that if RESPA "prohibited Defendants' conduct . . . then Plaintiff has demonstrated an injury sufficient to satisfy Article III." Opinion 9094. This is a non-sequitur. Congress has the authority to create legal rights. Congress also has the authority to provide that, *if a private party sustains injury* as a result of the violation of those statutorily-created rights, the private party shall have a statutory remedy. But Congress cannot bestow Article III standing on a private plaintiff if a defendant's alleged violation of a statutorily-created right did not cause a "concrete and particularized" "injury in fact" to that plaintiff. *Summers v. Earth Island Inst.*, 555 U.S. 1142, 1149 (2009).

> As we said in *Sierra Club*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the

> requirement that the party seeking review must himself have suffered an injury."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992), *quoting Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

Purchasing title insurance does not involve non-economic or intangible rights, like the right to live in an integrated community, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-78 (1982), or the aesthetic benefits of environmental laws, *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 183 (2000), or rights under the free-exercise clause, *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1250-51 (9th Cir. 2007). The only "concrete and particularized" injury that could be sustained by a title insurance purchaser who has received the benefits of her policy is paying too much. Edwards cannot and does not so claim, and Edwards therefore lacks RESPA and Article III standing.

This critical statutory and constitutional issue of nationwide importance warrants *en banc* review.

II. THE PANEL'S DECISION—THAT THE MEASURE OF DAMAGES UNDER RESPA IS TREBLE THE ENTIRE TITLE INSURANCE PREMIUM—IS CONTRARY TO RESPA'S LANGUAGE AND ENFORCEMENT STRUCTURE, ADDS TO A SPLIT AMONG THE CIRCUITS, AND WOULD ADOPT AN UNCONSTITUTIONAL MEASURE OF PUNITIVE DAMAGES

The Panel's decision that RESPA's measure of damages is treble the entire title insurance premium—not three times any overcharge or other actual damage—is contrary to the language, intent, and purpose of RESPA; upsets the balance between public and private enforcement struck by Congress; adds to a split among federal courts; and imposes an unconstitutional measure of punitive damages.

The Fifth and Seventh Circuits, and several district courts, have correctly held that the reference in Section 8(d)(2) to the settlement services "involved in the violation" refers to the amount attributable to the claimed kickback or referral scheme, *e.g.*, an overcharge. *Durr*, 14 F.3d at 1188 ("To the extent the claim exceeded three times the [overcharge], however, there was no basis for it."); *Moore*, 233 F.Supp.2d at 826; *Morales*, 983 F.Supp. at 427. Had Congress intended to treble *all* settlement service charges as a penalty for a Section 8 violation, it would have used the language that appears in the very next section of RESPA, providing that, if a seller unlawfully requires a buyer to use a specific title agency, the seller is liable for damages "in an amount equal to three times *all charges* made for [] title insurance." §2608(b)(emphasis added).

This measure of Section 8 damages—three times any overcharge—is consistent with RESPA's express purpose: to protect consumers from "*increase[d]*" settlement costs. §2601(b)(2)(emphasis added). This measure of damages does not create a loophole for settlement service providers to escape liability for Section 8 violations. Regardless of actual damages, the DOJ may pursue criminal charges, and HUD, state attorneys general, and state insurance commissioners may pursue enforcement actions. §2607(d).

The Panel's decision cannot be justified as providing a penalty for statutory violations. The Constitution requires that such a punitive award "bear a 'reasonable relationship' to compensatory damages." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996). Congress may not award private plaintiffs damages that bear no relationship to their injuries without running afoul of due process.

This case demonstrates the need for nationwide uniformity. Plaintiff purchased her home in Ohio, but brought suit in California, seeking to represent either a nationwide class, or a class of persons who bought title insurance through Tower City, which does business in Ohio, Florida, Michigan, Georgia, Virginia, Maryland, and the District of Columbia. (ER437 ¶10). The absence of a nationwide rule will not only cause different results among different purchasers and title insurers, but will promote forum shopping.

This Court should grant *en banc* review.

III. IN MANDATING CLASS CERTIFICATION, THE PANEL'S DECISION OVERLOOKED THE PREDOMINANCE OF INDIVIDUAL ISSUES INHERENT IN RESPA CLAIMS, INCLUDING WHETHER A LOAN WAS "FEDERALLY RELATED," AND WHETHER A REFERRAL "AFFIRMATIVELY INFLUENCED" SELECTION OF THE TITLE INSURER

In holding that the district court abused its discretion in not certifying a "Tower City" class—accepting Plaintiff's theory that, if First American overpaid for its investment in Tower City, that would, *per se*, establish the existence of unlawful referrals—the Panel overlooked the predominance of individual issues inherent in RESPA claims.

RESPA extends only to "federally-related" loans on one-to-four family homes, and provides a cause of action only to the person who paid for the title insurance. §2602(1). Although Plaintiff contends that it is a simple matter to determine these requisites from the "HUD-1" Settlement Statement, that is not so. The HUD-1 (required for RESPA transactions, but also used for non-RESPA transactions, 24 C.F.R. 3500, app. A) does not necessarily indicate: (1) the type of property (*e.g.*, residential or commercial; single-family or apartment); (2) whether the loan is "federally related," unless discernable from the lender's identity (*e.g.*, a federally-insured bank); or (3) who paid for title insurance.

For example, Edwards' own HUD-1 shows a non-institutional, non-government lender, Aegis Funding Corp. To determine whether an Aegis loan is federally-related would require individualized evidence of (1) Aegis' intent to sell Edwards' loan in the secondary market and (2) Aegis' underwriting volume. (ER517-19). Edwards' own HUD-1 also does not show who paid for title insurance—it lists a settlement charge to Edwards of $455.43 for title insurance, but states that the seller reimbursed her $6,600.00 for unspecified settlement charges. (ER517-19). The district court found, "there appears to be no simple or common basis for determining who paid and how much. Edwards provides evidence solely on a transactional basis." (ER6).

These individualized requisites are predominant. *Carter v. Welles-Bowen Realty, Inc.*, 2010 U.S. Dist. LEXIS 22476, at *7 (N.D.Ohio Mar. 11, 2010).

Furthermore, whether a "referral" occurred necessarily raises an individualized inquiry as well, since the "affirmative influence" element requires a *subjective*, *transaction-specific* inquiry—the converse of a "reasonableness" standard that may give rise to common proof. *E.g.*, *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F. 3d 1087, 1092 (9th Cir. 2010). The district court properly found:

> Consequently, [a] class action would require proof at trial concerning each class member and whether that class member was affirmatively influenced by Tower City's actions. This proof would involve direct- and cross-examination of each class member.

(ER5). *Gardner v. First Am. Title Ins. Co.*, 2003 WL 221844, at *7 (D.Minn. Jan. 27, 2003) (identifying the need "to individually adjudicate whether the use of Defendant's title service in each of the . . . transactions at issue was, in fact, 'affirmatively influenced,' and by whom").

Nonetheless, the Panel overruled the district court, deferring to Edwards' contention that Tower City agreed to refer all customers to First American which, "if true," would allow "common proof." Memorandum ¶3.[3] The Panel ignored the need to determine what actually happened in each transaction. For example, a mortgage lender, as the insured on a policy, selects the underwriter regardless of whether the borrower pays the premium. (ER439 ¶16). If a lender specified a First American policy, then whatever arrangements existed between First American and Tower City did not "affirmatively influence" the selection of the title insurer. The Panel's Memorandum conflicts with *Bjustrom v. Trust One Mortgage*, 322 F.3d 1201, 1208 (9th Cir. 2003), and *Glover v. Standard Federal Bank*, 283 F.3d 953, 965 (8th Cir. 2002), holding that RESPA requires a transaction-specific analysis. The class action device cannot obviate these requirements.

These questions warrant rehearing *en banc*.

IV. CONTRARY TO *DUKES* , THE PANEL APPLIED AN IMPROPER STANDARD OF REVIEW OF THE DISTRICT COURT'S DECISION DENYING NATIONWIDE CLASS ACTION DISCOVERY, WHICH THE DISTRICT COURT PROPERLY FOUND COULD NOT ELIMINATE THE PREDOMINANCE OF INDIVIDUALIZED ISSUES

In holding that the district court erred in denying nationwide discovery for a possible nationwide class, the Panel applied an improperly diluted standard of review. Under *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010)(*en*

[3] Edwards' averment is untrue. The agreement: (1) did not obligate Tower City to refer all customers to First American; (2) removed the purported referral clause during the class period; and (3) differed from other Tower City-First American agreements that did not contain any referral clause. (ER435-36, 473-96).

banc), which held that such decisions cannot be disturbed absent a “strong showing” of a “clear” abuse of discretion, the Panel should have affirmed the district court.

The district court denied nationwide discovery because Section 8(a) and Edwards’ own liability theory require an examination of each of First American’s investments to determine whether First American paid too much for its interest in the agency. RESPA makes clear that if First American paid a fair price for its investment in a particular agency, the investment was lawful. §2607(c)(2)(“Nothing in this section shall be construed as prohibiting” the payment to any person of “compensation or other payment for goods or facilities actually furnished or for services actually performed.”); *Lane v. Residential Funding Corp.*, 323 F.3d 739, 742-43 (9th Cir. 2003).

Whether First American paid too much—which would need to be addressed separately for each transaction—requires a detailed valuation analysis based on, *inter alia*, the financial statements of each agency; its business plan, financial projections; competitors; the local housing market; the investment’s terms and conditions; and the percentage interest acquired. The inherently individualized nature of that analysis could not be eliminated through discovery.

The task of attempting to litigate the value of 180 title agencies in one case would be staggering; each party could, for instance, be expected to introduce an expert valuation opinion for each agency interest—or 360 opinions.

> Complex factual inquiries such as valuation require the trial judge to evaluate a number of facts: whether an expert appraiser's experience and testimony entitle his opinion to more or less weight; whether an alleged comparable sale fairly approximates the subject property's market value; and the overall cogency of each expert's analysis.

Gross v. Comm'r, 272 F.3d 333, 352 (6th Cir. 2001), quoting *Ebben v. Comm'r* , 783 F.2d 906, 909 (9th Cir. 1986).

Plaintiff did not, and could not, meet an initial burden of showing that discovery would enable her to establish Rule 23's requirements for a nationwide class. *Mantolete v. Bolger*, 767 F.2d 1416, 1424-25 (9th Cir. 1985); *Donninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977).

Panel rehearing or rehearing *en banc* is warranted.

CONCLUSION

First American respectfully requests that this Court grant *en banc* or panel rehearing.

Dated: July 6, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, according to the word count provided by Microsoft Word 2003, the body of the foregoing petition contains 4,194 words, exclusive of those parts excluded by FED.R.APP.P. 32(a)(7)(B)(iii), which is less than the 4,200 words permitted by Circuit Rule 40-1. The text of the brief is in 14 point Times New Roman, which is proportionately spaced.

/s/ Charles A. Newman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Rehearing *En Banc* of The First American Corporation and First American Title Insurance Company, Defendants-Appellees, was served on July 6, 2010, on the following via operation of this Court's CM/ECF system and via United States mail, first class.

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