

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO. 04-21160-CIV-MORENO/GARBER**

SCHECK INVESTMENTS, L.P., et al.

Plaintiffs,

v.

KENSINGTON MANAGEMENT, INC., et al.

Defendants.

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**NOTICE OF PENDENCY OF CLASS ACTION,  
PROPOSED SETTLEMENTS AND FINAL HEARING**

**THIS NOTICE EXPLAINS YOUR RIGHTS.  
PLEASE READ IT CAREFULLY.**

**THIS IS NOT A LAWSUIT AGAINST YOU.  
IT IS THE PARTIAL SETTLEMENT OF A LAWSUIT IN WHICH YOU  
MAY BE ENTITLED TO RECEIVE MONETARY COMPENSATION.**

**TO: ALL PERSONS WHO PURCHASED INTERESTS IN DISCOUNTED LIFE INSURANCE POLICIES KNOWN AS VIATICAL SETTLEMENTS OR LIFE SETTLEMENTS FROM MUTUAL BENEFITS CORPORATION OR VIATICAL BENEFACTORS, LLC.**

**I. PURPOSE OF NOTICE**

The Plaintiffs in the above-captioned class action (“Action”), pending before the Honorable Federico A. Moreno in the United States District Court for the Southern District of Florida (“Court”), and Roberto Martínez, the Receiver for Mutual Benefits Corporation, have agreed to settlements with Defendants Citibank, N.A., Union Planters, N.A. and American Express Tax and Business Services Inc. n/k/a RSM McGladrey, Inc. (“Bank Defendants”). These parties have agreed to these settlements (the “Settlements”) to resolve all claims related to Bank Defendants’ alleged provision of services to Mutual Benefits Corporation (“MBC”), its affiliates and agents. The plaintiffs and the Receiver may continue to pursue their claims against the non-settling defendants for their involvement with MBC. The Settlements are described in more detail in Section IV below. The proposed Settlements are subject to approval by the Court at a final approval hearing.

The purpose of this Notice is to inform members of the Settlement Class (described below) of their rights. The provisions in this Notice are qualified and subject in their entirety to the terms of the Stipulations of Settlement, copies of which are available for review in the manner provided in Section VIII below. Capitalized terms used but not defined in this Notice have the meanings given to them in the Stipulations of Settlement.

## **II. THE SETTLEMENT CLASS**

The “Settlement Class” or “Class,” which this Court has conditionally certified for the purposes of the Settlements, consists of all persons who purchased, between October 1, 1994 and May 4, 2004, interests in discounted life insurance policies known as viatical settlements or life settlements from MBC or Viatical Benefactors, LLC (“VBLLC”) and have been damaged thereby. Excluded from the Class are: Defendants, MBC and any agent or broker who offered to sell viatical settlements or life settlements through MBC or VBLLC, including any of the foregoing companies’ respective subsidiaries, affiliates, officers, agents or employees.

## **III. BACKGROUND TO THIS LAWSUIT**

From late 1994, MBC operated as a viatical and life settlement provider, raising money from the Class to purchase viatical and life settlement contracts. Plaintiffs allege that MBC promised Plaintiffs guaranteed, fixed rates of return ranging from 12% to 72% depending on the term of investment chosen by the investor. The life expectancy of the insured, which MBC represented would be determined by independent medical doctors, in turn, was to be used to determine the total rate of return. No registration was filed with the Securities and Exchange Commission (“SEC”) or Florida’s Division of Securities in connection with the investment contracts offered by MBC.

On May 3, 2004 the SEC filed a Complaint against MBC and other related entities and individuals, alleging that MBC’s sale of viatical settlements was in violation of the federal securities laws. On May 4, 2004, the Court entered an Order appointing Roberto Martínez as Receiver for MBC and related entities and MBC was placed into receivership.

On May 17, 2004, Lead Plaintiffs filed a class action complaint against a number of defendants in connection with the failure of MBC. Plaintiffs have entered into settlements with some of the defendants, which settlements have been approved by the Court. Plaintiffs’ allegations against the Bank Defendants, which are subject to the Settlements described in this Notice, are summarized below.

In their Third Amended Complaint, Plaintiffs allege that beginning in 1994, MBC included in its offering and sales materials to Plaintiffs a Purchase Agreement in which it represented to Plaintiffs that future premiums for a minimum of the life expectancy of the insured or longer would be escrowed at the time of closing, that for each policy the escrow agent would transfer these premiums directly to a trustee and that additional reserves would be maintained for payment of premiums where the insured outlives the projected life expectancy. The Trust Agreement between Plaintiffs and the Trustee represented that the Trustee would hold in escrow future premiums received at the time of closing for the projected life expectancy of any policy in an interest bearing account, that additional reserves would be maintained by both the Trustee and Viatical Services,

Inc., that a five-tiered system existed for the payment of premiums, including payment from the Trustee from the funds designated for the particular policy at the time of closing, and payment from reserve funds, and that if the Trustee could not confirm that future premiums on any policy would be satisfied from the sources provided, then the Trustee would notify the purchaser within 90 days before the next premium was due. Plaintiffs allege that combined, these representations assured investors of the segregation of premium escrow funds, the creation of additional and adequate premium reserves, the tracking of premium deficiencies and the prompt notification of premium deficiencies.

Plaintiffs allege that the Trustee, Defendant Anthony Livoti, Jr. (“Livoti”), failed to establish separate premium escrow accounts for each policy, failed to track premium escrow deficiencies, failed to establish additional and adequate premium reserve accounts and failed to notify investors if specifically identified premium escrows and reserves were inadequate to fund future premiums for any given policy. Instead, Livoti commingled escrowed premium funds for more than 6,500 policies into several money market accounts. With Livoti’s knowledge and active participation, MBC paid premiums on the policies from its own operating accounts, and used escrowed premium funds from new viatical settlements to fund premium payments for older insurance policies that had exceeded their life expectancies. As insureds began to outlive fraudulent life expectancies provided by MBC, Livoti became aware that the escrowed premium balances for thousands of individual policies were inadequate. Plaintiffs allege that in order to conceal this, Livoti began diverting premium escrows from newer policies to cover premium deficiencies for earlier policies.

Defendants, Citibank, N.A. (“Citibank”), Union Planters, N.A. (“Union Planters”) and American Express Tax and Business Services Inc. n/k/a RSM McGladrey, Inc. (“AETBS”) served in the capacity as escrow agents for MBC. In December 2001, Citibank executed a written Escrow Agreement with MBC. At the end of July, 2002, Citibank's relationship as escrow agent terminated with MBC, at which point AETBS agreed to serve in this capacity. On June 7, 2002, MBC and AETBS executed an Escrow Agreement, which essentially mirrored the terms of the 2001 Citibank Escrow Agreement. On April 2, 2003, Union Planters executed a written Escrow Agreement with MBC.

Plaintiffs allege that the Bank Defendants aided and abetted Livoti’s breach of fiduciary duty by, among other things, not segregating premium escrows or tracking premium deficiencies.

The Bank Defendants each denied liability and have vigorously opposed these claims. They have asserted numerous defenses to the claims against them.

Attorneys for the Class (“Class Counsel”) and/or the attorneys for the Receiver (“Receiver’s Counsel”) have met several times with counsel for each of the Bank Defendants to discuss the potential settlements of this Action. Written Settlement Agreements resolving all issues relating to the Banks’ provision of services to MBC were executed in November, 2008 and were preliminarily approved.

Plaintiffs, Class Counsel, the Receiver and the Receiver’s Counsel all have concluded that it would be in the best interests of both the Class and the Receivership to enter into the Settlement Agreements with the Settling Parties because the Settlements are fair, reasonable and adequate

resolutions of this Action. These Settlements call for the Bank Defendants to immediately pay Nine Million Seven Hundred and Fifty Thousand Dollars (\$9,750,000) into a fund for the benefit of members of the Settlement Class (“Class Members”). As a result, the Class Members will receive a considerable amount of money without the uncertainty, delay and expense of protracted litigation.

#### **IV. PROPOSED SETTLEMENTS OF THE ACTION**

After extensive negotiations among the attorneys for the settling parties, the parties have agreed to the Settlements, subject to final approval by the Court. The parties agree that the Settlements shall not be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by the Bank Defendants or of the truth of any of the claims or allegations in the Action. The Bank Defendants, while continuing to deny vigorously Plaintiffs’ allegations and any liability with respect to any and all claims asserted in this Action, nevertheless recognize the costs and uncertainties attendant upon further litigation of the claims in this Action, and have therefore concluded that it is desirable to enter into the proposed Settlements to avoid further expense. The terms and conditions of the Settlements are incorporated into Stipulations of Settlement, which are on file with the Court. The following is a summary description of the Stipulations of Settlement:

##### **Settlement Fund**

The primary terms of the Settlements are as follows. The Bank Defendants shall pay Nine Million Seven Hundred and Fifty Thousand Dollars (\$9,750,000) into a settlement fund (“Settlement Fund”) as follows: \$4,750,000 to be paid by AETBS; \$3,000,000 to be paid by Union Planters; and \$2,000,000 to be paid by Citibank, in exchange for a release of all claims asserted against each Bank Defendant by the Class and the Receiver, and for other promises and consideration set forth in the Settlement Agreements, including the Court’s issuance of an order that bars any defendant from asserting any claim for contribution or indemnity against the Bank Defendants, which is identical to the bar order that has been provided to other settling defendants. The Settlement Fund, net of attorneys’ fees and expenses as awarded by the Court, and net of the expenses of administering the Settlements (“Net Settlement Fund”), will be transferred to the Receiver for distribution to the Settlement Class. Specifically, if the Court grants final approval of these Settlements at the Final Hearing described in Section VII below, the Receiver, in consultation with Plaintiffs and Class Counsel, shall then submit a proposed Distribution Plan to the Court. If approved, distribution of the Net Settlement Fund would immediately proceed in accordance with the approved Distribution Plan.

##### **Attorneys’ Fees and Costs**

The award of attorneys’ fees to Class Counsel is a matter committed to the sole discretion of the Court. The Settlements provide that Class Counsel and the Receiver will apply for an award of: (1) attorneys’ fees not to exceed thirty percent (30%) of the Settlement Fund; and (2) reimbursement of their reasonable expenses and costs incurred in connection with prosecuting this action (the “Fee Request”). Any award made by the Court in response to the Fee Request shall be paid from the Settlement Fund. Any award of incentive payments to the Lead Plaintiffs also shall be paid from the Settlement Fund. The fairness, reasonableness, and adequacy of the Settlements may be

considered and ruled upon by the Court independently of any award of attorneys' fees and costs or incentive payments.

## **V. RELEASE AND DISCHARGE OF CLAIMS**

The following is a summary of the Release agreed to by the Settling Parties as part of the Settlements: In the event that the Court gives final approval to these Settlement Agreements, each Bank Defendant, and each and all of his, her or its respective past, present or future parent companies, subsidiaries, divisions, affiliates, predecessors, successors, and insurers, if any; and each and all of the preceding entities' officers, directors, shareholders, partners, agents, employees, attorneys, representatives, heirs, executors, personal representatives, administrators, and assigns, if any, past, present and future, shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever, known or unknown, in law or in equity, which a Class Member who does not exclude himself, herself or itself from the Settlements, whether or not the Class Member makes a claim on or participates in the Settlement Fund, ever had, now has or hereafter can, shall or may have, which relate to the subject matter of this Action, or which arise out of the Bank's dealings with MBC, MBC's affiliates, Anthony Livoti, Jr., or Anthony Livoti, Jr., P.A. The exact language of the Release is included in the Stipulations of Settlement.

## **VI. YOUR RIGHT TO BE EXCLUDED FROM THE SETTLEMENTS**

If the Settlements are finally approved, you will be bound by the final judgment and release as entered by the Court, unless you exclude yourself from these Settlements. If you have previously excluded yourself from prior settlements you will not automatically be excluded from these Settlements. Rather, you must specifically exclude yourself in the procedure provided in this Notice. By remaining a Class Member, you will be barred from asserting in any other lawsuit any claims against any of the Bank Defendants arising from their provision of services to MBC, MBC's affiliates, Anthony Livoti, Jr., or Anthony Livoti, Jr., P.A. Also, by remaining in the Settlement Class, you will have the opportunity at a later date to receive a distribution from the Settlement proceeds in accordance with the Distribution Plan approved by the Court. If you do not submit an exclusion you will be bound by the judgments in this case with respect to the Bank Defendants and you will be entitled to participate in the Settlements with the Bank Defendants. This Settlement Class has been conditionally certified for purposes of the Settlements with the Bank Defendants, as described in this Notice, and your right to be excluded is with respect to the three Settlements with the Bank Defendants collectively, not individually.

If you want to exclude yourself from these Settlements, and not participate in the recovery provided by them, you must make a written request for exclusion from the Class and send it to: Bank Settlements Exclusion, c/o Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130 **to be received no later than JANUARY 22, 2009**. Your request for exclusion should include: (1) your name; (2) your address; and (3) a statement that you want to be excluded from the Settlement Class. By making an election to be excluded, you will not share in any recovery to be paid to the Settlement Class as a result of the Settlements with the Bank Defendants, you will not be entitled to appear at the Final Hearing discussed in Section VII below, and you will not be bound by the Release set forth in the Stipulations of Settlement.

## **VII. THE FINAL HEARING**

The Court has scheduled a hearing to be held on **MARCH 10, 2009** at **2:30 P.M.** before the Honorable Federico A. Moreno, Judge of the United States District Court of the Southern District of Florida, at the United States Courthouse, 400 North Miami Avenue, Room 13-3, Miami, Florida 33128, for the purpose of determining whether to: finally approve the terms of the Settlements, approve Class Counsel's motion for attorneys' fees and costs, finally certify the Settlement Class, and such other matters that the Court deems appropriate to consider ("Final Hearing"). The time and date of the Final Hearing may be continued or rescheduled by the Court without further notice. Furthermore, the Court may approve the proposed Settlements at or after the Final Hearing with any modification agreed to by the Settling Parties and without further notice to the Settlement Class.

If you wish to comment in support of, or in opposition to, the Settlements or motion for attorneys' fees and costs, you may do so, but **you must first mail** your comments and/or objections in writing, postage prepaid, to Class Counsel, Receiver's Counsel and Counsel for each Bank Defendant, **and file your comments and/or objections with the Court, no later than JANUARY 22, 2009**. You must include your name and current address with your comments and/or objections.

If you also wish to be heard at the Final Hearing in person or through your own attorney, you or your attorney must file a written Notice of Appearance with the Clerk of the Court for the United States District Court for the Southern District of Florida, 400 North Miami Avenue, 8<sup>th</sup> Floor, Miami, Florida 33128, on or before **JANUARY 22, 2009** and include a statement of the position to be asserted and the reasons for your position, together with copies of any supporting papers or briefs. Your notice must include in a prominent location the name of the case (*Scheck Investments, et al. v. Kensington Management, Inc., et al.*) and the case number (No. 04-21160-CIV-MORENO). You must also mail a copy of your Notice of Appearance along with all accompanying papers to Class Counsel, the Receiver's Counsel and Counsel for each Bank Defendant.

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Except as provided in this Notice, no person shall be entitled to contest the terms and conditions of the Settlements, or to object to Class Counsel's motion for attorneys' fees and costs, and persons who fail to object as provided in this Notice shall be deemed to have waived and shall be foreclosed forever from raising any such objections. You need not appear at the Final Hearing in order to mail and file written objections to the Settlements or motion for attorneys' fees and costs.

**VIII. ADDITIONAL INFORMATION**

The above is only a summary of the Settlements. A copy of the Stipulations of Settlement, which include the Release, as well as other pleadings, are on public file with the Clerk of the Court for the United States District Court for the Southern District of Florida, 400 North Miami Avenue, 8<sup>th</sup> Floor, Miami, Florida 33128. In addition, Class Counsel will file with the Court their Motion for Attorneys' Fees and Costs as previously described on or before **MARCH 3, 2009**. The Stipulations of Settlement and Class Counsel's Motion for Attorneys' Fees and Costs will be available for inspection during normal business hours at the Office of the Clerk.

The Stipulations of the Settlement, as well as additional information, can be reviewed at the Receiver's Website – [www.mbcreceiver.com](http://www.mbcreceiver.com)

**PLEASE DO NOT CONTACT THE COURT OR THE BANK DEFENDANTS  
REGARDING THE SETTLEMENT**

Dated: December 23, 2008

BY ORDER OF THE COURT  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA