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## Haynes and Boone Appellate Team Prevails Before En Banc 5th Circuit in Arbitration Case

**DALLAS** – An en banc federal circuit court of appeals has ruled for New Century Mortgage Corporation in a case discouraging post-award litigation based on claims of arbitrator partiality by losing parties in arbitration.

The decision handed down Jan. 18 by the 5<sup>th</sup> U.S. Circuit Court of Appeals sets the standard by which arbitration awards can be vacated for evident partiality of an arbitrator in the 5th Circuit. Requiring a "significant compromising relationship" for vacating arbitration awards for evident partiality, the 5th Circuit is now aligned with six of seven circuits that have adopted a more stringent requirement than an appearance of partiality. The en banc court decided, in addition, that the facts of the case did not even rise to an appearance of partiality.

In addition to New Century Mortgage, the appellants included New Century Financial Corporation, eConduit Corporation, The Anyloan Company and former employees Frank Nese and Jeff Lemieux.

"The decision reinforces the viability of arbitration as an effective alternative to litigation," said Sharon Freytag of Haynes and Boone, one of three firm lawyers who handled the appeal. Ms. Freytag was joined by Robin Hartmann and Anne Johnson. Had the lower court's ruling been affirmed, it would have encouraged post-award satellite litigation based on immaterial, non-economic and tenuous connections between an arbitrator and lawyers for a party.

"Just as happened here, losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made," wrote Judge Edith Jones, whose majority opinion was joined by 10 of 16 judges.

"New Century is pleased not only to have prevailed but to have achieved a legal decision that clarifies the law and provides greater certainty to litigants in future proceedings," said Mark M. Malovos, Vice President, Litigation & Intellectual Property, New Century Mortgage Corporation. "We commend our outside counsel, specifically Sharon Freytag, for recognizing the need to petition for full court review and having the skill to argue for and achieve a reversal of the vacatur decision. Although well justified under these facts and the law, it is rare to achieve such a resounding en banc victory after a unanimous adverse panel decision."

In the case, Positive Software Solutions, Inc. sued New Century and five other defendants for \$38 billion in damages, alleging that New Century had infringed on copyrights for a software program, LoanForce. The dispute went to an arbitrator who did not disclose a 10-year-old co-counsel connection with a New Century attorney involved in an unrelated patent case.

The arbitrator ruled for New Century, ordering that Positive Software take nothing and that New Century recover over \$1.5 million in attorneys' fees and fraud damages. Susman Godfrey attorneys Barry Barnett, Ophelia Camina and Kenneth Gardner prevailed at arbitration on behalf of New Century. A U.S. District Court judge later granted Positive Software's motion to vacate the award, ruling that the arbitrator's lack of disclosure created an appearance of partiality. In January 2006, a panel of the 5<sup>th</sup> Circuit affirmed the lower court, prompting New Century Mortgage and the remaining defendants to petition the full court to hear the case. Haynes and Boone and Susman Godfrey represented the New Century parties while Peter Vogel and Cynthia Hollingsworth of Gardere Wynne represented defendants Frank Nese and Jeff Lemieux. The en banc court characterized the past, undisclosed co-counsel connection as trivial, not warranting the draconian remedy of vacating the award (*vacatur* in legal parlance).

The court remanded to the district court for consideration of Positive Software's other objections to the arbitral award.

Haynes and Boone, LLP is an international corporate law firm with offices in Texas, New York, Washington, D.C., Mexico City and Moscow, providing a full spectrum of legal services. With more than 450 attorneys, Haynes and Boone is ranked among the largest law firms in the nation by *The National Law Journal*. The firm has been recognized by Vault.com as one of the "20 Best Law Firms to Work For," by Corporate Board Member Magazine as one of the "Best Corporate Law Firms in America," and has received the Minority Corporate Counsel Association's Thomas L. Sager Award for its commitment to diversity.

Gardere Wynne Sewell LLP is an international law firm with offices in Austin, Dallas, Houston and Mexico City. With nearly 300 attorneys, Gardere serves regional, national and international clients. For nearly 100 years Gardere has been regarded as a leading Texas law firm. From beginnings in Dallas in 1909, to Gardere & Wynne's merger with Houston's Sewell & Riggs in 1995, Gardere has expanded its services to meet client needs and to ensure stability and longevity.

Founded in 1980, Susman Godfrey focuses its nationally recognized practice on just one thing: big – stakes commercial litigation. Susman Godfrey ranks among the nation's leading litigation boutique law firms and has offices in Houston, Dallas, Los Angeles, Seattle and New York. Each of the firm's 80 trial attorneys devotes all of his or her time and talent to achieving excellent outcomes within the complex commercial litigation environment. *The American Lawyer* recently recognized Susman Godfrey as one of the top two litigation boutiques in the nation.

Founded in 1995 and headquartered in Irvine, California, New Century Financial Corporation is a real estate investment trust and one of the nation's premier mortgage finance companies, providing mortgage products to borrowers nationwide through its operating subsidiaries, New Century Mortgage Corporation and Home123 Corporation. The company offers a broad range of mortgage products designed to meet the needs of all borrowers. New Century is committed to serving the communities in which it operates with fair and responsible lending practices.