RECENT DEVELOPMENTS

*Amchem Products, Inc. v. Windsor**

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. Indeed, more than a case, this is a saga . . . ."[1]

I. INTRODUCTION

Mass tort litigation has risen exponentially in the last twenty years.[2] Recent cases provide a number of examples: a class of over one million women with injury-causing breast implants,[3] a class of owners of Ford-made all-terrain vehicles that flip-over,[4] a class of owners of GM pickups with exploding gas tanks[5] and a class of people, possibly in the millions, exposed to asbestos.[6] These cases are controversial because they involve devastating injuries—often death—and enormous sums of money.[7] The cases mentioned above were all brought as class actions under Rule 23 of the Federal Rules of Civil Procedure. However, the advisory committee notes to Rule 23 state that mass torts are not appropriate for class actions because significant factual and legal questions may affect individuals in different ways.[8] District courts have seemingly ignored the advice of the

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* 117 S. Ct. 2231 (1997).

[1] Georgine v. Amchem Products, Inc., 83 F.3d 610, 617-618 (3d Cir. 1996) (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos 1-3 (1991)), *aff'd*, Amchem Products, Inc., v. Windsor, 117 S. Ct. 2231 (1997).

[2] *See* MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 6 (1988).

[3] *See In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994).

[4] *See In re* Ford Motor Co. Bronco II Prods. Liab. Litig., CIV. A. MDL-991, 1995 WL 222177, at *1 (E.D. La. Mar. 15, 1995).

[5] *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 769 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995).

[6] *See* Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2234 (1997).

[7] *See* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837 (1995).

[8] *See* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1783

advisory committee and used Rule 23 for resolution of mass torts.[9]

Currently, a Rule 23 class action is a better option than individual suits for resolution of mass tort claims. Individual suits pose a number problems: individual suits are costly in time and money and often exceed the victim's recovery; they frequently end with inconsistent judgments and individual suits severely burden court dockets.[10] Congress has yet to create an administrative system by which injured parties in mass tort cases may receive compensation. A variety of different commentators have offered their suggestions on alternative methods to resolve mass tort claims. These ideas include: (1) modification of procedural rules,[11] (2) reordering priority claims,[12] (3) removal of mass tort claims from the tort system altogether[13] and (4) use of settlement-only class actions.

Recently, district courts have been open to settlement-only class actions for resolution of mass tort claims.[14] However, Rule 23 itself has no specific provisions on settlement. Arguably, district court judges have stretched Rule 23 beyond its intended use. Although not technically sanctioned under Rule 23, settlement-only class actions provide a number of benefits for injured parties, for courts and for defending parties, including, inter alia, a quick remedy for injured parties, low transaction costs and relief for court dockets loaded with mass tort filings.[15] Nevertheless, settlement-only class actions have a number of negative aspects. Many settlement-only class

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(1990).

[9] *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d at 769; *In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1428 (2d. Cir. 1993); *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., 1995 WL 222177, at *1; *In re* Silicone Gel Breast Implant Prods. Liab. Litig., 1994 WL 578353, at *1.

[10] *See* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions"; An Introduction*, 80 CORNELL L. REV. 811, 813-817 (1995).

[11] *See* Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1043 (1986).

[12] *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL'Y 541, 542 (1992).

[13] *See* Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813, 827 (1989).

[14] *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d at 768; *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., 1995 WL 222177, at *1; *In re* Silicone Gel Breast Implant Prods. Liab. Litig., 1994 WL 578353, at *1.

[15] *See, e.g.*, Georgine v. Amchem Products, Inc., 878 F. Supp. 716, 723 (E.D. Pa. 1994).

actions bind future plaintiffs to the agreement, including those plaintiffs who have yet to file a suit and those who have yet to recognize any injury.[16] Therefore, parties, who at the time of the settlement have no interest in the terms of the settlement, are forced years later to take the terms of the agreement or get nothing.[17] Furthermore, giving notice of the class action settlement to future plaintiffs who have not developed injury borders on the impossible. In addition, the attorneys who represent parties in pending litigation are often the same attorneys filing the settlement-only class action on behalf of future plaintiffs.[18] Thus, attorneys settle their existing cases for huge amounts and then bind absent, future plaintiffs for eternity to an administrative mechanism that has caps on damage recoveries.[19] A dilemma exists. Should district courts extend Rule 23 to authorize settlement-only class actions in order to promote efficiency and claims resolution? Or, should district courts force injured parties to sue and settle separately despite long delays, high transaction costs and the possible bankruptcy of defending parties?

This Note focuses on *Amchem Products, Inc. v. Windsor*,[20] which involved a settlement-only class action between certain asbestos makers and people exposed to asbestos-related products but who had not yet filed any lawsuit. To put the asbestos problem into perspective, a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist predicted that asbestos-related diseases will result in as many as 265,000 deaths by the year 2015.[21] Asbestos-related illnesses have led to numerous filings of asbestos-related claims in federal and state courts across the United States. If the predictions about asbestos-related diseases and deaths are anywhere near accurate, even more lawsuits will be filed in the future.

In addition to heavy court dockets, asbestos litigation, as most mass tort litigation, presents a plethora of troublesome issues for parties to the lawsuit. Some of the objectionable aspects of asbestos litigation include: long delays before trial, lengthy trials, repetitive litigation over similar

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[16] *See, e.g.*, Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997).

[17] *See id.*

[18] *See id.*

[19] *See id.* at 2239.

[20] 117 S. Ct. 2231.

[21] *See id.* (citing Report of the Judicial Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991)).

issues, inconsistency in verdicts, high transaction costs that exceed victims' recovery and depletion of defendants' assets, which preclude future plaintiffs from any recovery.[22] Although numerous calls have been made for legislative action for an asbestos-claim administrative mechanism, to date Congress has failed to remedy the situation.[23] In the face of legislative inaction, the federal district courts have endeavored, unsuccessfully, to improve asbestos-related litigation by certifying settlement-only class actions under Rule 23 of the Federal Rules of Civil Procedure.[24]

II. FACTS

In *Amchem Products*, the United States Supreme Court affirmed the Third Circuit's decision to vacate and remand with directions to decertify a global class settlement between persons exposed to asbestos and asbestos products manufacturers who were members of the Center for Claims Resolution (CCR).[25] Amchem Products, Inc. represented one of about twenty of the CCR members.[26] The proposed settlement was initiated after a Judicial Panel on Multidistrict Litigation[27] consolidated in the Eastern District of Pennsylvania all personal injury asbestos lawsuits then pending in the federal courts for pre-trial discovery and settlement talks.[28] After consolidation of the lawsuits, the CCR defendants' and plaintiffs' attorneys began negotiations.[29] The CCR defendants agreed to settle all claims then

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[22] *See id.* at 2–3.

[23] *See id.*

[24] *See* Georgine v. Amchem Products, Inc., 878 F. Supp. 716, 722 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996); *see also In re* Asbestos Litigation, 90 F.3d 963, 974 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997).

[25] *See id.* at 2252. Members of the CCR represent some of the most solvent asbestos product manufacturers. *See* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1163 (1995).

[26] *See Amchem Products*, 117 S. Ct. at 2238 n.2.

[27] 28 U.S.C. § 1407 permits a Judicial Panel on Multidistrict Litigation to consolidate in one federal district civil actions involving one or more common questions of fact that are pending in different districts for purposes of coordinated or consolidated pre-trial proceedings. *See id.*

[28] *See* Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 257 (E.D. Pa. 1994), *order vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 117 S. Ct. 2231 (1997).

[29] *See Amchem Products*, 117 S. Ct. at 2238.

pending in the Eastern District of Pennsylvania so long as the CCR defendants would be protected in the future against potential plaintiffs who had not yet filed lawsuits.[30] After plaintiffs' attorneys and the CCR defendants reached an agreement, the CCR defendants' and plaintiffs' attorneys settled all then-pending lawsuits.[31] Thereafter, in a pre-packaged deal, the CCR defendants' and the same plaintiffs' attorneys attempted to settle all future asbestos claims. The two parties filed a class action complaint, an answer, a proposed settlement agreement and a joint motion for conditional class certification all in the same day.[32] The complaint identified a class comprised of all persons who had not previously sued any of the CCR asbestos manufacturing defendants but who (1) had been occupationally exposed to asbestos products produced by a CCR defendant or (2) was a spouse or family member so exposed.[33] Hundreds of thousands of people, maybe millions, fit the description of the plaintiff class.[34] The complaint identified nine lead plaintiffs; five of the nine plaintiffs alleged exposure to asbestos and a resulting injury, while the other four plaintiffs alleged exposure only without any injury.[35]

The settlement agreement was extensive. The agreement proposed to preclude all class members from pursuing lawsuits not filed prior to the settlement.[36] In addition, the agreement detailed an administrative mechanism that would compensate class members who met certain predefined asbestos exposure requirements and certain medical criteria.[37] Scheduled payments within a specified range of damages were to be made depending on which of the four categories of compensable cancers and nonmalignant conditions the claimant had suffered.[38] The settlement provided for an "opt out" period which allowed class members to opt out of the class and pursue their own individual actions so long as the class members acted within three months after court-approved notice was sent.[39]

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[30] *See Georgine*, 157 F.R.D. at 294.

[31] *See Amchem Products*, 117 S. Ct. at 2239.

[32] *See id.*

[33] *See id.*

[34] *See Georgine*, 83 F.3d at 626 n.11.

[35] *See Amchem Products*, 117 S. Ct. at 2239.

[36] *See id.* at 2240.

[37] *See id.*

[38] *See id.*

[39] *See Georgine*, 878 F. Supp. at 720.

There were also limited opt out provisions allowing a specified number of class members to opt out yearly.[40] However, those members allowed to opt out would forfeit any punitive damages claims or any claims for increased risk of cancer.[41] Despite the constraints on the claimants, the settlement permitted the CCR defendants to completely withdraw from the settlement agreement after ten years.[42]

The settlement had other terms that appeared favorable to the CCR defendants. First, the agreement did not adjust for inflation. Second, the agreement capped the number of claims payable annually for each of the four categories of diseases.[43] Third, the settlement denied certain claims like loss of consortium and enhanced risk of cancer even though otherwise applicable state law recognized those claims.[44] Finally, pleural claimants, who represented more than half of all asbestos-related cases previously filed, were also excluded.[45]

The settlement also provided class members with certain benefits. The settlement tolled the statute of limitations; therefore, any claim not time-barred on the date of filing of the class action could be brought under the settlement.[46] In addition, the settlement agreement provided that the CCR defendants waived all defenses to liability.[47] In the opinion of the district court, the agreement also compensated the sick without long delays, uncertainties and high transaction costs inherent in the tort system.[48] Furthermore, the settlement gave claimants "come-back" rights which allowed certain claimants to file a second claim and receive additional compensation if the claimants proved they suffered a different, more serious asbestos-related disease than the illness upon which their first claim

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[40] *See Amchem Products*, 117 S. Ct. at 2241.

[41] *See id.*

[42] *See id.*

[43] *See id.* at 2240.

[44] *See id.* at 2240-2241.

[45] *See id.* "Pleural claims" are those claims for asbestos-related plaques which develop on the lungs but are not accompanied by any physical impairment. *See Georgine*, 83 F.3d at 620. For a more exhaustive discussion on the large proportion of pleural claims weighing down court dockets, see generally Schuck, *supra* note 12.

[46] *See Amchem Products*, 117 S. Ct. at 2240-2241.

[47] *See id.*

[48] *See Georgine*, 157 F.R.D. at 316.

was based.[49]

III. PROCEDURAL HISTORY

On January 29, 1993, the district court conditionally certified the class under Rule 23(b)(3).[50] The district court then enjoined class members from separately filing any asbestos suits in a federal or state court.[51] Upon appeal to the Third Circuit, the district court's orders were vacated.[52]

Relying on its earlier decision in *In re GM Trucks*,[53] the Third Circuit held that although a class could be formed for settlement only, the certification requirements of Rule 23 had to be met as if the case were going to be litigated.[54] The Third Circuit looked at the language of Rule 23 and held that the settlement did not meet the requirements of the Rule.[55] The Third Circuit found that the settlement in this case did not meet the Rule 23 (b)(3) requirement that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members."[56] The district court had wrongly concluded that the "predominance" requirement was met because all class members had been exposed to asbestos and all class members had a common interest in getting prompt and fair compensation while minimizing transaction costs inherent

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[49] *See Amchem Products*, 117 S. Ct. at 2240-2241.

[50] *See Georgine*, 157 F.R.D at 257.

[51] *See Georgine*, 878 F. Supp. at 724.

[52] *See Georgine*, 83 F.3d at 635.

[53] 55 F.3d 768 (3d Cir. 1995).

[54] *See Georgine*, 83 F.3d at 626.

[55] *See id.* at 624. To maintain a class action it must satisfy the four requisites of Rule 23(a) and at least one of three requisites listed in Rule 23(b). FED. R. CIV. P. 23. The four requirements of Rule 23(a) are: (1) numerosity (joinder of all members is impracticable), (2) commonality (common questions of law or fact), (3) typicality (claims or defenses are typical of the class) and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class). *See id.* In this case, the applicable Rule 23(b) requisite was predominance, which asks whether "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." *Id.* Rule 23(c) requires opt out notices to class members when a class action is maintained under Rule 23(b)(3). *See id.* Furthermore, Rule 23(e) requires court approval after notice for any dismissal or compromise of a class action. *See id.*

[56] *Georgine*, 83 F.3d at 626.

in the asbestos litigation process.[57] The Third Circuit reasoned that class members' claims varied in character because class members "were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods."[58] In addition, each class member had a personal history of smoking which led to factual differences resulting in significant legal differences such as causation, comparative fault and types of damages available to each individual.[59] The CCR defendants petitioned the Supreme Court for review of the Third Circuit's decision and certiorari was granted.[60]

IV. THE UNITED STATES SUPREME COURT'S ANALYSIS

Justice Ginsburg, writing for a six-person majority, held that "settlement is relevant to a class certification,"[61] and therefore courts need not analyze a settlement as if it were going to be litigated. However, the requirements of Rule 23, which are designed to protect absentee class members from overbroad class definitions, "demand heightened attention in the settlement context."[62] Indeed, in a footnote, Justice Ginsburg stated, "proposed settlement classes sometimes warrant more, not less caution on the question of certification."[63]

The majority opinion analyzed the proposed class settlement in accordance with the language of Rule 23. First, the Court dismissed the district court's and the settling parties' contention that fairness of the settlement predominates over diverse legal issues pivotal in litigation but irrelevant as to settlement, thus satisfying Rule 23(b)(3). To the contrary, the majority concluded that the predominance requirement of Rule 23(b)(3) does not bear on whether the settlement benefits are fair; fairness is an

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[57] *See id.*; *see also Georgine*, 157 F.R.D. at 316.

[58] *Georgine*, 83 F.3d at 626.

[59] *See id.*

[60] *See* Amchem Products, Inc. v. Windsor, 117 S. Ct. 379, 379 (1996).

[61] *Amchem Products*, 117 S. Ct. at 2247. A proposed amendment to Rule 23 would authorize certification of settlement even though the requirements of (b)(3) are not met for purposes of going to trial. *See* Proposed Amendment to FED. R. CIV. P. 23(b), 117 S. Ct. No. 1 CXIX, CLIV-CLV (Aug. 1996).

[62] *Amchem Products*, 117 S. Ct. at 2248.

[63] *Id.* at 2248 n.16.

additional, separate question under Rule 23(e).[64] The majority held that the predominance test of Rule 23(b)(3) is not met by the benefits asbestos-exposed persons gain from an administrative compensation scheme; rather, the predominance inquiry contemplates whether the class is "sufficiently cohesive to warrant adjudication by representation."[65]

The Court agreed with the Third Circuit that the class was not similar enough to warrant adjudication by representation. The nature of asbestos exposure differed tremendously for each member: "class members were exposed to different asbestos products, for different amounts of time, in different ways, and over different periods."[66] Further, some members suffered severe cancers or disabling asbestosis while others had yet to suffer any physical impairments.[67] In addition, each member had different histories of cigarette smoking which complicated causation issues.[68] In the end, the district court's certification was held invalid because it misinterpreted the Rule 23(b)(3) predominance requirement.

The Court also found, though not necessary to its holding, that the class did not satisfy the Rule 23(a)(4) requirement that the named parties "will fairly and adequately protect the interests of the class."[69] Relying on its earlier decision in *East Texas Motor Freight System, Inc. v. Rodriguez*,[70] the majority maintained that class representatives must be "part of the class and possess the same interest and suffer the same injury as other class members."[71] Applying an analytical approach similar to the one the Court used to scrutinize the predominance requirement, the majority stated that

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[64] *See id.* at 2249. The Court stated:

> It is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place . . . If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.

Id.

[65] *Id.* (citing 7A CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1797 (2d ed. 1986)).

[66] *Id.* at 2250.

[67] *See id.*

[68] *See id.*

[69] *Id.* at 2250.

[70] 431 U.S. 395, 403 (1977).

[71] *Amchem Products*, 117 S. Ct. at 2250–2251 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).

the class was very diverse. Diversity of the class resulted in conflicts of interests among the class. Those claimants with current injuries would want generous, immediate payoffs.[72] On the other hand, those without an already manifested injury would want an ample, "inflation-protected fund for the future."[73] The settlement did not adjust for inflation; therefore, the settlement favored the currently injured over the exposure-only plaintiffs.[74] In addition, although spouses of persons who were exposed to asbestos-containing products were included in the class definition, loss of consortium claims were precluded under the settlement.[75] Ultimately, the Court found that the global settlement did not provide adequate representation for the diverse members in the class inflicted by asbestos-related injuries; therefore, the settlement did not meet the Rule 23(a)(4) adequacy of representation requirement.[76]

Justice Breyer and Justice Stevens concurred with the majority's basic holding that "settlement is relevant to a class certification";[77] however, both would have remanded to the Third Circuit for review in light of this holding instead of applying the holding to a cold record.[78] Justice Breyer explained,

> [T]he majority reviews what are highly fact-based, complex, and difficult matters, matters inappropriate for initial review before this Court. . . . Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. . . . That [district] court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has 'broad

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[72] *See id.* at 2251.

[73] *See id.*

[74] *See id.* at 2241.

[75] *See id.* at 2240.

[76] *See id.* at 2251. The Court also highlighted that in other cases with diverse class members, the classes were divided into subclasses. *See id.* (quoting *In re* Joint Eastern and Southern Dist. Asbestos Litig., 982 F.2d 721, 742–743 (2d Cir. 1992)). Perhaps if the settling class members had formed subgroups and had been represented as such, the class would have met the Rule 23(a)(4) adequacy of representation test. However, subclass groupings would have fixed only the procedural aspect of adequacy of representation. Had the provisions of the settlement been the same, subclass groupings most likely could not have saved the intra-class conflicts regarding failure to adjust for inflation and preclusion of loss of consortium claims.

[77] *Id.* at 2252 (Breyer, J., concurring in part and dissenting in part).

[78] *See id.* (Breyer, J., concurring in part and dissenting in part).

> power and discretion . . . with respect to matters involving the certification' of class actions.[79]

Justice Breyer would have remanded to the Third Circuit for application of the majority's holding that "settlement is relevant to class certification."[80]

V. DISCUSSION

The Supreme Court's decision in *Amchem Products* crushed any possibility for most, if not all, mass tort class settlements, especially where the class is partially made up of exposure-only members. Hardly any mass tort classes will be able to meet the majority's interpretation of predominance and adequacy of representation. However, the majority did state that class action settlements may meet Rule 23 requirements in some "consumer cases alleging securities fraud or violations of antitrust laws."[81]

The Supreme Court provided some guidance to district courts regarding their roles in certifying a request for class settlement. Settlement is a factor in deciding whether to certify a class; settlement neither weighs in favor of granting certification, nor weighs in favor of denying certification.[82] In addition, district courts should be wary of overbroad class definitions in the settlement context because judges will be unable to adjust the class, as would be possible during litigation pursuant to Rule 23(c) and (d).[83] District courts should decide whether the proposed class is sufficiently cohesive to warrant representative action, be it adjudication or representative settlement.

The Supreme Court declined to answer two troublesome issues inherent in class action settlements similar to that in *Amchem Products*: (1) attorney conflicts of interest and (2) notice to future plaintiffs. In a footnote, the Court stated that the Rule 23(a) adequacy of representation requirement incorporates the adequacy and competency of class counsel.[84] The Court declined to answer both issues because of its holding that other

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[79] *Id.* (Breyer, J., concurring in part and dissenting in part) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979)).

[80] *Id.* at 2258 (Breyer, J., concurring in part and dissenting in part).

[81] *Id.* at 2250.

[82] *See id.* at 2248 n.16.

[83] *See id.* at 2248.

[84] *See id.* at 2251 n.20.

requirements of Rule 23 were not satisfied.

The first unanswered issue, adequacy of counsel, raises a multitude of ethical questions. In *Amchem Products*, plaintiffs' attorneys represented inventory plaintiffs[85] prior to filing the class action on behalf of those who had not yet filed lawsuits. In addition to filing a settlement on behalf of people the plaintiffs' attorneys had never met, the plaintiffs' attorneys were caught between client interests: negotiating a high settlement for those plaintiffs with pending suits and getting a fair settlement for future plaintiffs. In an *Amchem Products*-type situation, defendants may be willing to offer high settlements for plaintiffs with pending claims in exchange for favorable terms in the settlement agreement with future plaintiffs.[86] Plaintiffs' attorneys get money immediately; in exchange, they give up contingency fee contracts on future plaintiffs they may or may not get. On the other side, defendants pay large settlements to a fixed number of known plaintiffs, but are protected from huge judgments awarded to countless numbers of unknown plaintiffs.

Rule 1.7(g) of the Model Rules of Professional Conduct states that when clients have interests that materially limit the lawyer's representation, the lawyer must, based on a reasonable belief, determine that representation of the client will not be adversely affected and obtain consent.[87] In the *Amchem Products* case, plaintiffs' attorneys negotiated settlement of inventory claims concurrent with future claim settlement.[88] During these negotiations, plaintiffs' attorneys represented both classes of plaintiffs. However, the settlement agreements with inventory plaintiffs differed from the settlement agreement reached for future plaintiffs: inventory claimants with pleural thickening received settlement awards but future plaintiffs with pleural thickening had no recourse under the settlement agreement.[89] The district court reconciled differences in settlement terms by citing high

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[85] Inventory plaintiffs are plaintiffs who had filed lawsuits prior to the filing of the class action on behalf of future plaintiffs. *See Amchem Products*, 117 S. Ct. at 2238. The inventory plaintiffs' suits were consolidated in the Eastern District of Pennsylvania. *See Georgine*, 157 F.R.D. at 257.

[86] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373–1374 (1995).

[87] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1993) [hereinafter MODEL RULES].

[88] *See Amchem Products*, 117 S. Ct. at 2239.

[89] *See Georgine*, 157 F.R.D. at 266.

transaction costs that future plaintiffs would not have to endure.[90] Pleural claims make up a large proportion of asbestos claims and often lead to substantial jury awards.[91] It seems that future plaintiffs received an inferior or unequal settlement as compared to the inventory plaintiffs. Practically speaking, plaintiffs' attorneys could not have met the Model Rule 1.7(g) requirement of consent from future plaintiffs. The identity and number of future plaintiffs were unknown by the plaintiffs' attorneys at the time they took on representation. Although the plaintiffs' attorneys did not abide strictly with Model Rule 1.7, maybe more leniency is necessary in special circumstances such as settlement of future claims in mass tort cases, especially considering the fact that consent from unknown plaintiffs is next to impossible.

One commentator has recognized the potential for defendant auctioning of settlement awards to the lowest plaintiffs' attorney bidder in situations similar to that in *Amchem Products*.[92] Teams of plaintiffs' attorneys with then pending inventory claims must rush to settle their inventory claims with the defendants in order to realize any benefits from being named lead counsel in the settlement of future claims.[93] In effect, it is imperative that an individual team of plaintiffs' attorneys act fast and concoct the best deal, or in other words a deal more favorable to the defendants than that of their plaintiffs' attorney competitors. Furthermore, class counsel representing future claimants in a mass tort class action may have an incentive to advise their clients not to opt out even though it would be in the best interest of some clients to pursue their claim individually.[94] The plaintiffs' attorneys in the *Amchem Products* settlement agreed to advise all future plaintiffs to follow the guidelines set forth in the settlement agreement.[95] That agreement flies in the face of Model Rule 5.6(b), which expressly prohibits attorneys from agreeing to restrict their right to practice as a part of a settlement.[96] In addition, plaintiffs' attorneys receive two fees: one fee as

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[90] *See id.*

[91] *See* Schuck, *supra* note 12, at 562–563.

[92] *See* Coffee, *supra* note 86, at 1373.

[93] *See id.* at 1372. In addition, plaintiffs' attorneys must act fast because class actions may be filed in state courts by fellow plaintiffs' attorneys, adjudication of which is binding on absent plaintiffs. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1982).

[94] *See* Coffee, *supra* note 86, at 1375.

[95] *See Georgine*, 157 F.R.D. at 300.

[96] *See* MODEL RULES 5.6(b). For a detailed discussion of MODEL RULE 5.6, see

class counsel and another fee as the representative of the class member filing claims under the compensation scheme of the class action.[97] In *Amchem Products*, plaintiffs' attorneys had ample opportunity to act unethically. The Supreme Court should have given lower courts some guidance on this difficult issue.

Another related issue is whether federal standards of ethics are imposed in federal court or whether state rules governing attorney conduct govern in federal court. Although the Supreme Court has suggested that attorney ethics are governed by state rules,[98] the district court in *Amchem Products* considered ethical conduct in the federal courts to be governed by federal standards.[99] In global class settlements on behalf of future claimants, *Erie* issues may arise in applying ethical rules governing lawyer behavior.[100] Attorney ethics is a difficult issue, especially in the context of the settlement of mass torts.

The other question the Court declined to answer was that of notice.[101] The notice in *Amchem Products* consisted of hundreds of thousands of individual notices, a television and print advertisement campaign and initiatives by domestic and international unions to notify their members of the lawsuit.[102] In dicta, the Supreme Court agreed with the Third Circuit that notice was inadequate because the class definition was so sprawling.[103] Some of the class members may not know they have been exposed to asbestos products.[104] Assuming this to be the case, such people, although receiving technical notice, could not have appreciated the fact that the notice applied to them. Furthermore, future spouses or future family members exposed by their mates or parent to asbestos-containing products would have no reason to understand that they fit the description of a class member mentioned in the notice. The Supreme Court suggested that no

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Menkel-Meadow, *supra* note 25, at 1167.

[97] *See* Coffee, *supra* note 86, at 1375.

[98] *See* Nix v. Whiteside, 475 U.S. 157, 166–167 (1986).

[99] *See Georgine*, 157 F.R.D. at 326.

[100] For a more complete discussion of *Erie* issues, see generally Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995).

[101] *See Amchem Products*, 117 S. Ct. at 2252.

[102] *See id.* at 2257 (Breyer, J., concurring in part and dissenting in part).

[103] *See id.* at 2252.

[104] *See id.*

constitutional notice could be given to a class similar to the *Amchem Products* class.[105]

In addition to notice and attorney ethics, the Supreme Court gave little guidance to district court judges regarding the fairness inquiry of Rule 23(e). Although the Court distinguished the Rule 23(e) fairness inquiry from the Rule 23(b)(3) predominance requirement, the distinction is very difficult to make.[106] According to the Court, Rule 23(e) "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claim."[107] In *Amchem Products*, the Court never said that the fairness test was met. The Court only hinted that "a common interest in a fair compromise" may satisfy the fairness test.[108] Assuming that mass tort class action settlement is possible, how is a district court judge to decide what is fair? Settlement-only class actions are unique because the district court judge is being asked by present parties to certify a class to bind absent parties for the benefit of the present parties making the request.[109]

In the *Amchem Products* case, it was nearly impossible to identify the total number of people who would be inflicted in the future with asbestos-related illnesses; thus, the district court judge bound an unknown number of absent parties to the agreement for the benefit of the CCR defendants and the small number of representative plaintiffs. The *Amchem Products* settlement provided for strict "case flow maximums" that limited the amount of claims payable in a given year. If the number of those stricken with asbestos-related cancers was extremely high in a given year, or in a given span of years, some claimants would then have to wait a long time for recovery. Although long recovery delays are the norm in the tort system,[110] at least the cancer-inflicted plaintiff has a better chance for a higher damages award in litigation. In addition, because the agreement did not adjust for inflation, case flow maximums could effectively reduce the total recovery in real dollars for those plaintiffs who develop injuries well

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[105] *See id.*.

[106] *See id.* at 2249.

[107] *Id.* (quoting 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797 (2d ed. 1986)).

[108] *See id.*

[109] *See* Schwarzer, *supra* note 7, at 840.

[110] *See Georgine*, 83 F.3d at 619.

into the future. There are many such problems that face the district courts in determining fairness; the inability to approximate the total number of people that fit the class description is only one uncertainty that makes a fairness inquiry difficult for a district court judge. The goal of a broad-based settlement of asbestos-related claims is admirable. Under an administrative claims mechanism, those afflicted with asbestos-related injuries are guaranteed some recovery without the risk of having to prove liability. In addition, a settlement like *Amchem Products* provides security that funds will be available into the future. Certainly, the burden of asbestos litigation lifted from the federal dockets would free up valuable time for resolution of other pending cases. Until legislative action, the only way to recognize the merits of a global class settlement is to scrutinize the alternative—individual lawsuits. Individual pursuit of asbestos claims extracts a severe penalty on the parties most in need of a resolution, those inflicted with asbestos-related diseases. Long delays to recovery are routine, trials are exhaustively long, transaction costs exceed victim's recovery by almost two to one and future claimants may get nothing.[111]

VI. CONCLUSION

In *Amchem Products*, the Supreme Court appeared to effectively end any chances that the class action device will be viable in the future for settlement of mass tort claims involving variable exposure to toxic substances. The Supreme Court held that settlement is relevant to certification of a class under Rule 23. However, a class must still be certified for settlement; therefore, certain requirements of Rule 23 demand heightened attention in order to protect the rights of future claimants.

Although the Court's application of Rule 23 to the *Amchem Products* settlement was based on sound reasoning and public policy, the Court failed to provide any solution to the problem. In the body of the Court's opinion, the Court stated that a Judicial Conference of the United States urged Congress to pass an administrative claims procedure similar to the Black Lung legislation, but Congress failed to act.[112] Although the Court struck down the *Amchem Products* settlement as not meeting the requirements of Rule 23, the Court offered no opinion on how the settlement could have

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[111] *See id.*

[112] *See Amchem Products*, 117 S. Ct. at 2238.

been crafted in order to be acceptable.[113] As Justice Breyer suggested, the Court could have given the settlement agreement a chance on remand.[114] The Court found one solution to the asbestos-litigation problem unacceptable; however, the Court did not offer a better solution.

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[113] In September of this year, the Judicial Conference of the United States approved an amendment to Rule 23, Rule 23(f), permitting appeal of a trial court's decision to certify or deny certification. *See Immediate Appeal of Class Action Certification Decision Would Be Allowed Under Proposed Change to Federal Rule 23*, 66 U.S.L.W. 2177, 2177 (U.S. Sept. 30, 1997) (No. 97-12). In addition, a proposed Rule 23(b)(4) which permits certification of class settlements will be discussed by the Judicial Conference this October. *See id.* The draft Advisory Committee Note to the proposed amendment is as follows:

> New subdivision (b)(4) authorizes certification of a (b)(3) class for purposes of settlement. It requires that all of the subdivision (a) prerequisites for class certification be met, and that the predominance and superiority requirements of (b)(3) also be met. But it authorizes evaluation of these prerequisites and requirements from the perspective of settlement. A settlement class may be certified even though the same class would not be certified for purposes of litigation. Although (b)(4) is set out as a separate paragraph, the class is certified under (b)(3) and is subject to the rights of notice and exclusion that apply to all (b)(3) classes. Certification is permitted only on motion by parties to a settlement agreement already reached. The separate subdivision (e) requirements for notice of settlement and court approval continue to apply.

Memorandum from Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee of Rules of Practice and Procedure, Report of the Advisory Comm. of Civil Rules, 117 S. Ct. 329, 331 (May 17, 1996). The Advisory Committee decided to wait until after the Court issued *Amchem Products* in order to continue discussion on the proposed amendment. *See id.* The proposed rule and the Court's decision are strikingly similar.

[114] *See Amchem Products*, 117 S. Ct. at 2258.