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CLASS SETTLEMENT OF MASS TORT CASES

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Mass tort litigation can involve the claims of hundreds or thousands of plaintiffs. Indeed, in some of these matters, claimants number in the millions. Whether the alleged cause of the plaintiffs' injuries is a single pharmaceutical product or other substance widely understood to cause a signature disease, or a "toxic stew" of disparate chemicals seeping into the groundwater from a waste dump or an industrial facility, the defense will invariably contend that individual, plaintiff-specific medical causation must be adjudicated on a case-by-case basis. For this reason, defendants will fight tooth and claw any attempt to certify a class ***for purposes of trial***.

But Rule 23 emits an altogether more pleasing bouquet to defendants if it can be harnessed to settle a mass tort case. The reason is simple: defendants in mass tort cases (especially public company defendants) are generally willing to pay for peace, and sometimes to pay a premium, if all pending claims, ***and all potential claims***, can be resolved for an affordable amount. Settlement of these cases on any other basis is difficult to achieve, because defendants reasonably worry that once they start to pay individual plaintiffs or groups of plaintiffs on a piecemeal basis, others will soon emerge from the woodwork. Defense counsel who have been paying attention to this area for the last two decades can recite the gruesome details of several cases in which companies paid millions of dollars to settle all pending claims, and then were faced with a second wave of plaintiffs. Lawyers lose their jobs when this happens.

Class settlements are likewise appealing to plaintiffs' counsel and the courts, albeit for different reasons. Class resolution assures plaintiffs' counsel a reasonable fee and the prospect of dishing off the nitty gritty details of individual recovery to a special master or settlement fund administrator. From the court's perspective, Rule 23 provides a mechanism for easing docket congestion.

Settling a mass tort case on a class-wide basis was never easy. The challenge has become more daunting in the wake of two decisions by the United States Supreme Court and one from the Second Circuit. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999); *Stephenson v. Dow Chemical Co*., 273 F.3d 249 (2d Cir. 2001), aff'd per curium, 539 U.S. 1111 (2003). Notwithstanding the warning signs raised by these three decisions, class settlements remain doable, but only by lawyers and trial judges who tread carefully the Rule 23 road, which is littered with the carcasses of failed class settlements. Perhaps the best example of how Rule 23 can still yield a defensible class-wide resolution of a mass tort is the Diet Drugs litigation, which was settled in August 2000 and has withstood the test of time and numerous challenges. *See In re Diet Drugs Product Liability Litigation*, 2000 WL 122042 (E.D. Pa. August 28, 2000).

This article is in four parts. Part I summarizes the Supreme Court's 1997 decision in *Amchem*, which sets the table for any class settlement today. Part II discusses several important decisions since then - notably *Ortiz*, *Diet Drugs*, and the Second Circuit's decision in *Stephenson*. Part III touches briefly on recent revisions to Rule 23. Part IV describes a recent class settlement of a mass toxic tort case in South Carolina, and highlights some of the practical considerations and ethical issues presented in that case.

1 The author gratefully acknowledges the invaluable input and assistance of his colleagues D. Alan Rudlin and Raymond A. Starling.

I. *AMCHEM*'S IMPACT ON SETTLEMENT CLASS ACTIONS

The Supreme Court's 1997 *Amchem* ruling was initially thought by some observers (both in the academy and at the bar) to sound the death-knell for Rule 23(b)(3) class action settlements. In that case, the Court affirmed (6-2, with Justice O'Connor not participating) the Third Circuit's reversal of the trial court's approval of a massive and comprehensive effort to settle the claims of:

> hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies.

521 U.S. at 597. The Court found that the "sprawling" settlement class certified by the district court failed both the "predominance" test of Rule 23(b)(3) - that common questions of law or fact predominate over any questions affecting only individual plaintiffs - and the "adequacy" test of Rule 23(a)(4) - that the representative plaintiffs "will fairly and adequately protect the interests of the class."

A. The "Predominance" Requirement

What the Court said on this point is sufficiently important to justify lengthy recitation here:

> No settlement class called to our attention is as sprawling as this one. *Cf. In re Asbestos Litigation*, 90 F.3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations.") Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. *See* Adv. Comm. Notes, 28 U.S.C.App., p. 697; *see also supra*, at 2245-2246. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1996 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways." Adv. Comm. Notes, 28 U.S.C.App., p. 697. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. *Ibid*. But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number. *See* Resnik, From "Cases" to "Litigation," 54 Law & Contemp.Prob. 5, 17-19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design.

Id. at 624-25. This strongly suggests that some cases are simply too large and complex to be settled on a class basis.

B. The "Adequacy" Test

The Court turned next to Rule 23(a)(4)'s "adequacy" requirement, noting that it "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625. Fatal to this settlement was the parties' effort to impose a "one-size-fits-all" solution on a class that was manifestly divided between those who were currently injured and those who could claim exposure only. The Court found this to be unsustainable:

> As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future . . . .
>
> The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.

Id. at 626-27.

C. Notice Requirement

Perhaps concerned that proponents of mass tort class action settlements needed an additional dose of discouragement, the Court concluded its opinion with strong dicta questioning whether it would ever be possible, consistent with the requirements of due process and Rule 23, to fairly notify such a large and diverse class:

> Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. . . . Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. . . .
>
> Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category - future spouses and children of asbestos victims - could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.
>
> Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

Id. at 628 (citations omitted). This cautionary note reflects the Court's skepticism regarding class settlements that push the envelope too far.

II. *AMCHEM*'S PROGENY

A. *Ortiz* - The Other Shoe

Two years later, the Court brought its other foot down on the necks of those trying to find a shortcut, within the parameters of Rule 23, to a global resolution of the asbestos litigation. In *Ortiz*, decided in June 1999, the Court reversed the Fifth Circuit's approval of a Rule 23(b)(1)(B) "limited fund" settlement class.[2] In *Ortiz*, because the settlement vehicle was Rule 23(b)(1) rather than Rule 23(b)(3), class members had no right to "opt out," making it a so-called "mandatory settlement."

2 It was structured as a "limited fund" settlement because the parties agreed that the settlement would be funded almost entirely by the principal defendant's insurance, leaving the company's own assets largely intact. The Court found this artifice out of step with the intention of Rule 23(b)(1)(B) - which addresses cases where there is a genuine concern that the defendant's assets would not be adequate to cover all claims. In *Ortiz*, the Court saw the "limited fund" to be more the product of a creative sleight of hand than a reflection of the real world finances of the principal defendant.

The Court's decision in *Ortiz* is significant because, when considered alongside *Amchem*, it illustrates the Court's willingness to disapprove mass tort settlements that, notwithstanding their objective "fairness" or utility in solving otherwise intractable disputes, fail to meet the strict standards of Rule 23. In this post-*Amchem* environment, therefore, federal court litigants and judges seeking to fashion a Rule 23 settlement must do so with the holdings and dicta of *Amchem* and *Ortiz* firmly in mind.

Among those directives in *Ortiz* that is especially fraught with potential headaches is the Court's commentary regarding the likely necessity for subclasses, each with separate counsel:

> First, it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.

527 U.S. at 856.

Another, more general bit of guidance comes later in the opinion, where the Court noted the following:

> Although, as the dissent notes, . . . the revised text [of Rule 23] adopted in 1966 was understood (somewhat cautiously) to authorize the courts to provide for class treatment of mass tort litigation, it was also the Court's understanding that the Rule's growing edge for that purpose would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B).

Id. at 861-62 (citations omitted). This appears to be intended to steer litigants and courts away from "creative" or clever attempts to use mandatory class actions, rather than the preferred vehicle of subdivision (b)(3), with its "opt-out" escape hatch. The participants in the *Direct Drugs* litigation paid heed.

B. The *Diet Drugs* Settlement

In August 2000, the Eastern District of Pennsylvania approved a combination (b)(2) and (b)(3) settlement of the massive Fen-Phen litigation that developed in the wake of the FDA's and American Home Products' conclusion that two widely prescribed diet medications were not "safe and effective." Millions of people had taken the drugs. Soon after the products were removed from the market in September 1977, countless lawsuits were filed all across the country, in both state and federal court. Thus, this litigation was spawned when the ink was barely dry on the *Amchem* opinion. The initial settlement was reached in the fall of 1999, several months after *Ortiz* was decided.

Judge Bechtle's comprehensive opinion, and the settlement it approves, were very obviously crafted with *Amchem* and *Ortiz* in mind. This case and its most recent chapter from March 2006, discussed *infra*, are "must reading" for anyone undertaking to fashion a class settlement of a mass product liability or toxic tort case.

The settlement was not without its detractors, but they were few in number and their misgivings were found unpersuasive by the court. Though several appeals were noted, and at least one was argued to the Third Circuit (in May 2001), all initial appeals were resolved and dismissed without the necessity for a decision by the Third Circuit.

This is not to say that the Third Circuit has managed to steer completely clear of *Diet Drugs* entanglement. Two post-settlement cases have been heard and resolved by the Court of Appeals. In both, the court fended off attempts to collaterally attack the settlement. *See In re Diet Drugs Products Liability Litigation*, 431 F.3d 141 (2005); *In re Diet Drugs Products Liability Litigation*, 282 F.3d 220 (2002).

To fully appreciate the magnitude of the challenges, and the resourcefulness and determination of counsel on both sides, it is necessary to wade through Judge Bechtle's 62-page opinion approving the settlement. In his description of the fairness hearing, in which 21 witnesses testified in support of the settlement, Judge Bechtle noted that "[n]o academic filed any objection to the settlement." 2000 WL 1222042 at *8. Notable among the witnesses supporting the settlement were Professors John Coffee of Columbia, Arthur Miller of Harvard, and Sam Dash of Georgetown. Professors Coffee and Miller are recognized experts on Rule 23 and class settlements of mass tort cases. Professor Dash testified about the ethical issues that arise in the class settlement context.

Among the many interesting features of Judge Bechtle's opinion is his discussion of the settlement negotiations. In contrast to what had taken place in *Amchem* and *Ortiz* and was sharply criticized by the Supreme Court, Judge Bechtle found that:

> During the negotiations [American Home Products] never offered, and the plaintiffs never requested, payment of a lump sum to resolve the claims of class members. To the contrary, the negotiations were devoted to working out a structure that would appropriately resolve the claims of all individuals who took [the drugs.] Only when that structure was agreed upon did the parties determine the amount of money that would be necessary to fund the structure . . . . Importantly, under the settlement process that was employed, there was no intra-class trading off of benefits . . . . Moreover, the subject of attorneys' fees was not discussed until the end of the negotiations and then only to limit the award of fees that might otherwise be payable . . . .

Id. at *4.

The main features of the Diet Drugs settlement are as follows:

- class-wide counsel;
- 5 discrete subclasses, each with separate counsel, divided according to length of time class members used the medication and whether they were symptomatic;
- medical monitoring and screening until 2015, funded with $1 billion;
- compensation (from a fund of $2.55 billion) for those suffering certain defined symptoms, pursuant to a matrix that takes into account the age of the class member and the severity of the symptoms;
- multiple opt-out opportunities for class members; and
- an "accelerated implementation option" that permits class members, who are satisfied with the settlement and are willing to waive their opt-out rights, to receive the full benefit of the settlement in exchange for a complete release, even if the settlement were ultimately to be disapproved on appeal.[3]

The court found the settlement to pass muster under *Amchem*. Each of the Rule 23(a) and (b) criteria was separately weighed. The court paid particular attention to the "predominance" issue, which is probably the most daunting challenge in the toxic tort context. The court started by noting that: "Common issues need only predominate, not outnumber, individual issues." *Id.* at *41. The court then undertook to explain how that became possible in the mass tort context because the cases were going to be settled, not tried:

3 This is a fascinating innovation, no doubt intended to ensure peace with those class members who were already symptomatic and to cap exposure to damages for their claims. In effect, those selecting this option entered separate binding settlement contracts with the defendant. As of the date of the district court's approval, approximately 160,000 class members had availed themselves of this option. Had the class settlement structure later been found by the Third Circuit or the Supreme Court to be unacceptable, at least these 160,000 claims would have been resolved.

> When taking the settlement into consideration for purposes of determining class certification, individual issues which are normally present in personal injury litigation become irrelevant, allowing the common issues to predominate. For example, differences in state law with regard to contributory negligence and comparative fault, learned intermediary doctrine, medical monitoring, punitive damages and the statute of limitations do not destroy class cohesion because the settlement agreement provides for distribution of benefits based on the objective criteria described herein. Similarly, individual issues relating to causation, injury and damage also disappear because the settlement's objective criteria provide for an objective scheme of compensation. The court notes that this is not the same as finding that the benefits of the settlement itself provide a common issue which satisfies the predominance requirement. Rather, the court finds that the common issues that preexisted this settlement - involving a common product, defendant and course of conduct - when considered in light of the proposed settlement, predominate over any individual issues between class members.

Id. at *43.

Perhaps not surprisingly for such a complex settlement with so many moving parts and so much money in the settlement pot, the "end" of the *Diet Drugs* case in August 2000 was really just the end of the first phase. The most recent chapter opened with a Rule 60(b) motion in November 2004, which sought to eviscerate the settlement four years after its approval and well into its multi-year implementation. The 16,833 movants (all members of the class) asked the court to overturn Judge Bechtle's original order, to require new class-wide notice, and to reopen the opt-out window. The gravamen of the motion was that the movants' due process rights had been trampled in the stampede to settle. By then the yoke had passed to Judge Bartle, who denied the motion on March 8, 2006. *See In re Diet Drugs Products Liability Litigation*, 2006 WL 572691 (E.D. Pa. 2006).

In his opinion, Judge Bartle summarizes the 2000 settlement and describes its implementation, which has not been without difficulty. Problems have ranged from potentially fraudulent claims to inadequate funds. The latter was solved by Wyeth's infusion of an additional $1.275 billion into the settlement trust.

After patient and careful dissection of the movants' various laments, the court denied the motion. In his concluding discussion, Judge Bartle displays a bit of understandable irritation at the movants and some of their counsel. Noting that the settlement has provided over $1.6 billion in payments to hundreds of thousands of class members, the court states that the movants were seeking:

> to undo the bargain made by Wyeth and the Class representatives and sanctioned by this court over five years ago. . . . This is not the first due process attack on the settlement advanced by certain class members and not the first advanced by some of the law firms representing movants here. It is merely the latest effort to sow uncertainty and cause unacceptable delay and confusion to the severe detriment of class members. . . . Whatever judicial or other errors there may have been along the way, no constitutional violations have occurred.

Id. at *18.

C. The Second Circuit's *Stephenson* Decision

Most lawyers and judges of a certain vintage will recall the landmark class settlement of the Agent Orange litigation that was hammered into place in 1984 by Judge Jack Weinstein. This settlement capped several years of hard fought litigation brought by tens of thousands of Vietnam War veterans who claimed to have been exposed to and harmed by the defoliant Agent Orange. The defendants included Dow Chemical, Monsanto, and other manufacturers of the herbicide. *See In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D. N.Y. 1984), *aff'd* 818 F.2d 145

(2d Cir. 1987). For nearly two decades, this settlement was undisturbed. Then came the *Stephenson* decision, which is a potent reminder of the potential of *Amchem* and *Ortiz* to undermine what is thought to be settled precedent.

The Second Circuit's opinion dealt with a collateral attack on the finality of the 1984 Agent Orange class action settlement. Under the global settlement approved in 1984, 1994 was the cut-off date for direct cash payments to veterans.[4] In *Stephenson*, two veterans alleged that they were exposed to Agent Orange while serving in Vietnam, that the exposure led to their contraction of deadly cancers, and that their illnesses did not surface until after 1994. The plaintiffs claimed that they had not been "adequately represented" in the previous class action, and that their claims therefore could not be barred. The Second Circuit agreed.

It did not matter that the Second Circuit had previously approved the 1984 class certification and settlement, and even directed the supervision of the settlement fund. *See Agent Orange V*, 818 F.2d 145, 163-74 (2d Cir. 1987), and *Agent Orange VI*, 818 F.2d 179, 184-86 (2d Cir. 1987). The Second Circuit had also previously affirmed the dismissal of a case filed by individuals who alleged that their injuries had not manifested until after the 1984 settlement was reached (but, importantly, before the cut-off date for payments had passed). *See In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993). In that case, the court concluded that plaintiffs were members of the earlier class and that they were adequately represented in the previous litigation.

In *Stephenson*, the Second Circuit was reviewing the district court's dismissal of the two veterans' attack on the Agent Orange settlement. The district court had rejected the plaintiffs' argument that they were inadequately represented and had concluded that plaintiffs' suit was an impermissible collateral attack on the prior settlement. On appeal, the Second Circuit reversed. It found that the plaintiffs were inadequately represented in the 1984 settlement and that the settlement was therefore not binding on them.[5] The court distinguished the dismissal it had affirmed in 1993 on the grounds that the 1993 case did not involve plaintiffs whose injuries arose after the settlement expired. The court explained that it was troubled by the fact that the 1984 class settlement purported to settle all future claims, but did not provide any recovery for claimants whose death or disability was discovered after 1994. The court concluded that if these plaintiffs were not even provided for in the earlier settlement, they certainly had not been "adequately represented" under the newly minted *Amchem* and *Ortiz* analyses. In a hat tip to the discussion of adequacy of notice found in *Amchem*, the court noted that it was also likely that plaintiffs received "inadequate notice." In *Amchem*, the Supreme Court had suggested that it was unlikely that exposure-only plaintiffs could ever be given effective notice.

The lesson of *Stephenson* is that mass tort class settlements thought to have been concluded may remain vulnerable to collateral attack. Going forward, the practice point appears to be that defendants who wish to settle a class action once and for all must take steps to ensure that claimants who might come out of the woodwork in the future are given some form of protection or "guardian-like" participation in the settlement process.[6] More broadly, *Stephenson* makes clear that regardless of how fair a class settlement may be, or how carefully the parties and court address the issues of numerosity, commonality, or typicality, the settlement is subject to both direct and collateral attack if adequacy determinations are insufficiently or inappropriately addressed. Going forward, trial courts that approve settlement classes must rigorously analyze the adequacy of representation provided to class claimants who may not yet be aware of their injuries, and they must carefully describe that analysis in their orders approving settlement.[7]

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4 According to the settlement approved in 1984, "[n]o payment will be made for death or disability occurring after December 31, 1994." *Stephenson*, 273 F.3d at 253.

5 Note that once the court sided with the plaintiffs on their inadequate representation allegations, there was little work left to be done - any arguments regarding the preclusive effect of the settlement were completely mooted because the settlement could not bind individuals inadequately represented in the course of achieving such a settlement.

6 It may make sense in some cases to create a relatively small pool of funds to address such claimants, and for the court to specifically address the adequacy and fairness of such a pool. Similarly, defendants might consider establishing a series of settlement "cutoff dates," each with corresponding pots of money for plaintiffs whose injuries have not yet manifested themselves. On the other hand, this could also be viewed as an open invitation for a new class of claimants to come forward each time a cutoff date passes. Moreover, there may be convincing reasons why claimants who come forward after a cutoff date has passed should not receive any form of restitution. The point remains, however, that there must be some determination (and evidence of such a determination) that those individuals were adequately represented at the time of settlement.

7 For a more thorough discussion of how litigants and courts should evaluate adequacy of class representation (both counsel and the named plaintiffs), see Mullenix, Linda S., *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 Vand. L. Rev. 1687 (2004). Mullenix argues that courts have consistently paid lip-service to the adequacy inquiry without honestly engaging in the searching analysis required by Rule 23(a)(4). Her commentary should be taken very seriously in the wake of *Stephenson*.

D. *Stephenson* Cited in Attack on *Diet Drugs*

Not long after *Stephenson* was affirmed by an equally divided Supreme Court, litigants who were not satisfied with the settlements reached in *Diet Drugs* emerged to collaterally attack the *Diet Drugs* class settlement. *See In re Diet Drugs*, 431 F.3d 141, 146 (3d Cir. 2005) (cited above). Not surprisingly, they relied heavily on *Stephenson*. Unfortunately for them, however, they were obliged to press their claim in a Circuit less willing than the Second to disturb a settlement with such well established roots.

The Third Circuit acknowledged that class members could challenge a settlement on the grounds that it violated their due process rights. It pointed out, however, that class members could only do so by appealing the class certification itself, pursuing a collateral attack on an already certified class, or by bringing a Rule 60(b) motion. The court made clear that if class members intended to collaterally attack an already certified class, the class members must demonstrate that their procedural rights were not protected during the approval of the settlement agreement. Finally, the court concluded that the district court had carefully examined the adequacy of representation and procedural protections at the fairness hearing, and that the examination covered all the potential scenarios brought forth by the appellants. In other words, the arguments raised by the appellants had already been considered. As such, they did not have adequate grounds on which to challenge the settlement, so their claims were dismissed. *Id*. at 149-50.

E. Other Noteworthy Decisions

There have been a number of other attempted mass tort class settlements since *Amchem* and *Ortiz*, some successful and some not. Several are discussed below.

1. Successful Class Settlements

The pre-*Stephenson* conclusion reached by the Ninth Circuit in *Epstein v. M.C.A., Inc*., 179 F.3d 641 (9th Cir. 1999), was very similar to that reached by the Third Circuit when it considered the collateral attack on the *Diet Drugs* settlement. In *Epstein*, the Ninth Circuit held that due process requires adequate representation at the time of settlement, and not "collateral second-guessing of those determinations and that review." 179 F.3d at 648. In the Ninth Circuit's view, future class members' rights can be protected through the trial court's adoption of appropriate certification procedures. Put differently, a settlement would not be subject to collateral attack unless the plaintiffs mounting the attack could show that the initial class action and settlement was negotiated in the absence of procedural safeguards, regardless of the outcome.

Although the defendants in *Stephenson* cited *Epstein*, the Second Circuit concluded that even under the *Epstein* standard, there was no evidence that plaintiffs whose injuries did not arise until after the settlement expired had been adequately represented. *Stephenson*, 273 F.3d at 258 n.6. Put differently, the *Stephenson* court found that even if it was only evaluating the procedural safeguards in place at the time of settlement, those procedural safeguards were not sufficient to protect claimants whose injuries manifested themselves after the settlement was approved and distributed.

Notwithstanding what could be read to be a directive from the Supreme Court that separate subclasses and separate counsel are necessary whenever there are material differences among class members, at least one Circuit has seen its way clear to avoid these potential handcuffs. In *Petrovic v. Amoco*, 200 F.3d 1140 (8th Cir. 1999), the court upheld a Rule 23(b)(3) class settlement of the claims of more than 5,000 people who sought injunctive and monetary relief from Amoco because of property damage caused by underground oil seepage from one of its refineries. The settlement divided the affected plaintiffs into three groups, with those living directly above or adjacent to the seepage receiving the lion's share of the compensation. The court was unmoved by the objectors' argument that this compensation scheme necessarily created a conflict among class members:

> If the objectors mean to maintain that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that the argument is untenable. It seems to us that almost every settlement will involve different awards for various class members. Indeed, even if every class member were to receive an identical monetary award in settlement, the true compensation would still vary from member to member since risk tolerance varies from person to person (*i.e.*, a more risk-averse class member would place a greater premium on the certainty of a settlement award than a less risk-averse class member would).

Id. at 1146. The last sentence of the quoted passage does not fairly address, let alone resolve, the point urged by the objectors, which was that different treatment of class members was rife with potential for conflict, since class counsel undertook to represent them all.

The Third Circuit recently approved the class settlement of economic damages claims arising out of the sale of the anticoagulant warfarin sodium, which was manufactured by DuPont and sold under the brand name Coumadin. *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3d Cir. 2004). The plaintiffs maintained that DuPont engaged in illegal anticompetitive activities that caused consumers and third party payors to buy higher priced brand name Coumadin instead of lower priced generic warfarin sodium. Several individuals challenged the district court's certification of the class and approval of the settlement, but the Third Circuit concluded that the lower court did not abuse its discretion in certifying the class or in approving the settlement. Although the Third Circuit's opinion actually discusses each of the four "threshold requirements" of Rule 23(a), it is remarkable for how quickly it dispenses with the objectors' argument that the district court should have, at a minimum, certified separate subclasses for consumers and third party payors. The Court pointed out that because all of the potential class members suffered the same injury (overpayment), and sought essentially the same damages (compensation for overpayment), their interests were not in conflict.[8] In short, the Court concluded that there were no conflicts of interest between the members of the class, and that all class members were adequately represented without the use of subclasses.

Admittedly, *Warfarin* involved only claims for economic damages. Query whether any court would ever be able to conclude that separate subclasses are not required when the claim is for personal injury or medical monitoring. The case remains instructive, however, because it reveals that appellate courts will approve large settlement classes without "subclassing" so long as they are satisfied that there is no conflict among class members. As the Fourth Circuit has stated, "to defeat the adequacy requirement of Rule 23, a conflict 'must be more than merely speculative or hypothetical.'" *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (quoting 5 *Moore's Federal Practice* Section 23.25[4][b][ii] (2002)).

Perhaps the most interesting post-*Amchem* class settlement arose out of nationwide litigation against the manufacturers of defective hip and knee replacements, which culminated in a $1 billion dollar settlement in 2001. *See In re Inter-Op Hip Prosthesis Liability Litigation*, 204 F.R.D. 330 (N.D. Ohio 2001). It involved thousands of individuals who were required (or eventually would be required) to undergo surgery to replace defective knee and hip implants. The class was broken into two relatively simple subclasses: implantees who had already undergone revision surgery, and those who might need to undergo revision surgery in the future. Each of these subclasses was represented by separate counsel, and each was treated differently under the terms of the settlement agreement. This was enough for the district court to conclude that the adequacy test had been satisfied.

A novel feature of this settlement was the agreement by the defendants to place liens on virtually all of their assets in favor of the settlement trust, for the purpose of securing the payment obligations of the trust. The liens were not to be released until all of the class settlement payments were made, which was estimated to require six years. *Id.* at 352. Thus, any class members who opted

8 The Court also concluded that variations in state consumer fraud and antitrust law did not defeat predominance. The Court held that the district court was within its discretion in finding that class wide questions predominated over individual ones.

out and prosecuted their individual claims to judgment would be obliged to wait their turn. The court rejected objections that this restriction impermissibly undermined the opt-out right. *Id.* at 353-54. There were fewer than 10 opt-outs from a class of 26,000.[9]

2. Unsuccessful Class Settlements

Although not a mass tort case, the decision in *In re Community Bank*, 418 F.3d 277 (3d Cir. 2005), demonstrates federal courts' increased emphasis on adequacy of class representation. The case involved claims arising from the extension of high-interest mortgage-backed loans to debt-laden homeowners. The Third Circuit found that the lower court's approval of a settlement-only class action was improper or, at best, unsupported by its whole-cloth adoption of the parties' proposed findings and rulings. The Court remanded the case for additional findings regarding the Rule 23 factors, but made clear that it was troubled mainly by the issue of adequacy of class representation. Some of the class members' claims were time barred and some were not. Some were more at risk of dismissal than others. Some required individualized calculations of damages. In sum, the Court suggested that the named plaintiffs did not adequately represent the interests of the entire class, and that the lower court should have considered dividing the class into sub-classes of similarly situated class members.

In *Smith v. Sprint*, 387 F.3d 612 (7th Cir. 2004), yet another class settlement was vacated and remanded on the grounds that the adequacy of representation requirement for class certification was unmet. At bottom, the case involved claims by landowners whose property was subject to railroad rights of way, who argued that telecommunications companies had installed fiber optic cables within the rights of way without the landowners' permission. The objectors to the settlement were parties from Kansas and Tennessee, who were already participating in class action suits within those states. In a short opinion, the Seventh Circuit vacated the class certification because it had already become apparent that no nationwide class would be approved. As such, the settling plaintiffs could not possibly represent adequately the individuals from those states where maintenance of a class action had already been approved and the plaintiffs' counsel had no leverage at the nationwide class settlement bargaining table.

III. REVISIONS TO RULE 23

A. The 2003 Amendments

In 2003, the Supreme Court adopted another round of amendments to Rule 23. Settlement of any class action especially implicates the provisions of Rule 23(e). New subdivision (e)(1)(A) resolved a split among the circuits regarding exactly when the trial court is required to approve the dismissal or compromise of a suit brought as a class action. The old rule read that courts must approve dismissal or compromise of "a class action." The new rule requires that courts approve the dismissal or compromise of "a certified class action." With this change, a defendant's settlement with an individual named plaintiff before certification need not be approved by the court.

The revisions to subsection (e)(3) authorize the court to refuse to approve a settlement unless the settlement affords class members a new opportunity, after settlement terms are known, to request exclusion from a class previously certified under Rule 23(b)(3). In other words, regardless of the scope and effort of any previous opportunity to opt-out, if that opportunity has expired at the time of the proposed settlement, a new opt-out period might be ordered. The rationale supporting this provision is that class members may more carefully consider whether they want to remain in the class once they know the settlement terms. This change will not affect those cases in which class certification does not occur until the time of the settlement.

New Rule 23(e)(4), which provides than an objection to a proposed class settlement may not be withdrawn without the court's approval, is designed to police collusive agreements for the withdrawal of potentially meritorious objections.

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9 This settlement was the subject of a symposium at Cleveland State University. *See A Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation: A Symposium*, 16 J.L. & Heath 169 (2001-02). The transcript of the symposium provides a fascinating behind-the-scenes look at how the lawyers negotiated this settlement and how the able trial judge secured its success.

As part of the 2003 amendments, subsections (g) and (h) were added to govern, respectively, class counsel appointments and attorney fee motions.[10] These newest provisions bolster Rule 23(a)(4), which already calls for scrutiny of proposed class counsel and class representatives. In other words, subsection (g) does not introduce a brand new requirement, but is meant to "guide the court in assessing proposed class counsel as a part of the certification decision." Advisory Committee's Note to 2003 Amendment. The "guidance" is relatively clear. Counsel must be able to pledge allegiance to the entire class. The court must consider work the proposed counsel has already done in the case, counsel's experience in class actions or other complex litigation, knowledge of the applicable law, and the resources available to prosecute the case. The new subsection also outlines an appointment procedure to be used in selecting class counsel when more than one individual applies for the job, but makes clear that even if there is only one candidate, that one candidate must nonetheless satisfy the minimum qualifications set forth in the Rule.

The most interesting part of subdivision (g) is that the court is permitted to ask the class counsel candidates for proposed terms for a potential award of attorney fees. Under subsection (g)(2)(C), the court is also authorized to provide direction about attorney's fees and costs. If class counsel is required to forecast the amount of fees believed to be appropriate in the case (and risk not being appointed if that forecast is viewed as unreasonable), then courts and defendants can presumably later hold class counsel to their earlier representations.

Subsection (h) outlines the procedures and criteria a court must follow in approving or issuing an award of attorneys fees. Even if the parties agree on the proposed fee award, the plaintiffs' counsel must make a motion for fees, and the court must consider objections to the proposed or requested award and make findings of fact and conclusions of law in accordance with Rule 52(a).

B. The Class Action Fairness Act of 2005

Any summary of class action law developments must at least consider the potential impact of CAFA. In short, CAFA expands federal diversity jurisdiction for class actions, facilitates the removal of cases from state to federal courts, and modifies procedures for settling class actions which were filed after February 18, 2005.[11] With regard to the latter of these, CAFA increases judicial scrutiny of class action settlements to ensure that they are "fair and reasonable" to class members.

IV. PRACTICAL CONSIDERATIONS AND ETHICAL ISSUES: A CASE STUDY

In the fall of 2002, Hunton & Williams and its client IMC relied on Rule 23 to settle the separate lawsuits of more than 850 plaintiffs who claimed to have lived near a fertilizer plant operated by IMC from 1911-1986 in Spartanburg, South Carolina. These plaintiffs had originally filed a single lawsuit, which included the claims of another 350 individuals. That case was dismissed, but the court allowed the claims to be refiled as separate, single-plaintiff, actions. The resulting lawsuits each claimed that airborne emissions from the plant had caused a wide array of health problems and property damage. After substantial discovery, United States District Court Judge G. Ross Anderson selected the cases of 30 plaintiffs for separate trials and scheduled them to commence in October 2002. Several weeks before the first trial was to begin, the parties undertook mediation in an effort to settle all of the cases. Even for a relatively small group of plaintiffs, there were numerous practical and ethical obstacles to be overcome.

A. Settlement Architecture

The mediation began with an emotional "town hall" style meeting in which both sides made comprehensive, multimedia presentations of their respective cases to an audience that included hundreds of the plaintiffs. The long and the short of it was that there were some unfortunate facts for IMC, but the plaintiffs' medical causation claims were weak. From the defense perspective, this was a fairly typical mass toxic tort profile.

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10 *See* James Wm. Moore and Kevin Shirley, Moore's Federal Rules Pamphlet Section 23.2[1] (2005).

11 *See* 28 U.S.C. Sections 1332(d), 1453, and 1711-1715 (2005), Reig, Linda P., et al., *The Class Action Fairness of Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 Tort Trial & Ins. Prac. L.J. 1087 (2005).

At the commencement of the lawyer-to-lawyer mediation, we advised the plaintiffs' counsel that IMC would only settle on a class basis. Mindful of the red flags raised by *Amchem* and *Ortiz*, and fully familiar with the successful settlement in *Diet Drugs*, we further advised plaintiffs' counsel that we would not discuss a settlement amount or the question of attorney's fees until the parties had reached an agreement in principle on the architecture of the settlement - that is, ***how*** the funds would be distributed. Our objective was to be able, if we were successful, to represent to the court in our joint motion for approval that the class settlement had been constructed from the "bottom up," with adequate structural protection for all the class members, rather than from the "top down," with the settlement allocation details negotiated after agreement on a lump sum amount.

Our proposal was intended to limit the size of the settlement class sufficiently to assure the existing plaintiffs, and their counsel, that there would not be so many "new" plaintiffs showing up after dissemination of the class notice that the recovery for the existing plaintiffs would be intolerably diluted. Before commencing the discussions, we knew that only 3,745 people lived within one mile of the plant, but that number swelled to 66,000 when the radius was increased to four miles. We therefore proposed a "settlement class" of all persons living within a one mile circle around the plant, with three separate settlement zones ("doughnuts," if you will) extending to the one-half mile, three quarters of a mile, and one mile perimeters. Class members' individual "settlement values" could then be calculated, based on years of "exposure" and location of their residences. We added factors to the equation that had the effect of heavily weighting the results in favor of those class members who lived in the innermost doughnut. It was not a coincidence that nearly all of the existing plaintiffs lived within a half mile of the plant. But this approach had an arguably valid scientific basis, if one were to accept that the likelihood of injury fell off dramatically the further away one lived from the plant.[12]

Compared to the *Diet Drugs* settlement, which involved billions of dollars, millions of potential class members, and a protracted settlement implementation period, our IMC class settlement was relatively straightforward. Nonetheless, there were devils aplenty lurking in the details. For example, for a formula keyed to ***duration*** and ***location*** of exposure, it was necessary to decide how to measure the time a class member "resided" in a particular house. To get credit for a year, was it necessary to live there for 12 months without interruption? Or would some shorter length of time qualify? Suppose someone resided outside the settlement zones but regularly visited or owned property within the zones? Because many of the existing plaintiffs were claiming property damage as well as personal injury, it was necessary for the allocation formula to be sufficiently flexible to account for these variations. How were we going to handle the wrongful death claims? And what about class members who had not yet manifested any symptoms, or who were children? Another fly in the ointment was that 22 of the existing plaintiffs would not qualify for membership in the proposed class. Pushing the perimeter out far enough to capture them would have made the class unacceptably large. And finally, it was essential from IMC's perspective to reserve the unilateral right to back out if "too many" class members opted out of the class.

At the end of the day, it required 17 single spaced pages to memorialize the settlement agreement. The Class Notice was five pages long, single spaced with 9-point typeface and narrow margins. The Proof of Claim and Release filled four similarly compressed pages. Though written by lawyers who did their best to be clear, the Notice and the Proof of Claim were not easily understood, especially by class members who were underprivileged and undereducated. As a result, of the approximately 4,000 Proofs of Claim received by the special master, more than one third were in some respect defective.

Notwithstanding counsel's best efforts to anticipate problems, there were quite a few that could not be resolved by slavish adherence to the settlement documents and therefore required "creative" solutions by the special master. These problems included the following:

12 We toyed with the concept of relying on historical weather data to construct a more rigorous model of airborne dispersal of the plant's emissions. We soon abandoned this idea, for the simple reason that it would have added a substantial lawyer of complexity to the settlement structure without any commensurate value to the plaintiff class, when viewed as a whole. We then held our breath, hoping that the prospective class would not fracture into subgroups fighting over which way the wind had been blowing for seven and a half decades.

- How to treat claims made on behalf of deceased persons, minors, and incapacitated persons where questions arose concerning the authority of the individual making the claim to act on behalf of the estate, minor, or incapacitated person.

- In the case of claims made on behalf of the estates of deceased individuals, how to divide settlement funds between (a) individuals entitled to funds as statutory beneficiaries of "wrongful death" actions, and (b) individuals entitled to funds in the case of "survival" actions.

- How to deal with suspected fraudulent claims.

- How to deal with claims that originally passed muster with the special master but were later found to contain defects (particularly claim forms that identified multiple claimants).

- How to handle non-fraudulent but "competing" claim forms that identified the same multiple secondary claimants (*i.e.*, persons on whose behalf claims were submitted by the authors of the forms).

- How to make use of information submitted by claimants concerning their partial ownership of property upon which some or all of their claims were based (and, relatedly, whether modifications to the existing claimant database format were necessary to accommodate this information).

- How to coordinate information on claim forms and fields in the claimant database regarding the number of years a claimant (a) worked in, and/or (b) lived in a given settlement zone.

- How to deal with the fact that, while the Settlement Agreement defines "one year" (*e.g.*, of residency within a settlement zone, etc.) as at least eight months of a calendar year, most claim forms list only years and do not specify months.

None of these challenges proved to be insurmountable. But they caused numerous headaches for the special master and counsel for both sides. The "take-away" message of our IMC experience is that, no matter how careful the lawyers are in crafting the settlement structure and discussing the implementation mechanism, there are sure to be unanticipated bumps in the road.

B. Ethical Issues

The potential ethical dilemmas that arise in the context of a class settlement of a mass tort or toxic tort case fall predominantly on plaintiffs' counsel. But defense counsel must understand and be sensitive to these problems, if for no other reason than the necessity of helping plaintiffs' counsel avoid obvious pitfalls that could later be seized on by disaffected class members (often aided by new counsel) seeking to derail the settlement. The IMC case illustrates the sort of issues that invariably arise.

1. Threshold Question of Ethical Propriety of Class Settlement

For starters, the lawyers representing the existing plaintiffs had an overarching duty to each separate client. Normally, one might think that this duty would absolutely preclude a class settlement because it could surely be expected that the settlement class would be larger, perhaps substantially so, than the total number of those who had already filed suit. A flood of new plaintiffs into the class in response to the class notice would necessarily dilute the individual recoveries of the existing plaintiffs. How could the plaintiffs' counsel rationalize facilitating this dilution, especially when it was contemplated that they would be appointed class counsel by the court, with the reasonable

expectation that their fees would be paid much sooner under a class-wide resolution than if the existing cases proceeded through traditional trials and appeals, one case at a time?

A purist might argue that plaintiffs' counsel would be completely disabled even from trying to resolve this dilemma, because their self-interest was so inextricably on the line. Because we were not privy to the discussions plaintiffs' counsel had among themselves, we can only speculate about how they worked their way through this. But they were experienced and capable counsel, and we were relatively confident they would work it out. The only assistance we could lend was to advise them convincingly that the ***only way*** IMC would consider settlement was on a class basis. This was in fact the truth, because IMC was wholly unwilling to take the risk of piecemeal settlements. IMC's position enabled the plaintiffs' counsel to advise their clients that they had two choices - support the proposed class settlement and be certain of achieving some recovery for everyone; or reject it and be required to litigate over 850 cases, one at a time.

2. "Inventory Plaintiffs"

Cases that morph into a settlement class from multiple separate actions pose the risk that plaintiffs' counsel will feel some obligation to devise a structure that favors their existing, pre-class, clients. The pressure to do so often comes from some of the plaintiffs themselves, who understandably believe that there should be some "reward" for their having paved the way for the class. These plaintiffs are sometimes referred to as "inventory plaintiffs." *See Diet Drugs*, 2000 WL 1222042 at *45. Any favoritism for such plaintiffs will doom a proposed class settlement, because it requires the lawyers who are about to become class counsel to elevate the interests of their preexisting clients over those of the class.

3. Conflicts Among Subclasses

Among the lessons of *Amchem* and its progeny is that if the lawyers first agree on a settlement total and then set about to deciding how to divide it among disparate subgroups within the broad class, they will have started sliding down an impossibly slippery slope. At this point, the only cure is for each subgroup to have its own counsel, which is a recipe for trouble. It is therefore essential to save until last any genuine negotiations over a total settlement amount. And if there is any doubt about the homogeneity of the class, it is prudent to establish subgroups and designate separate counsel before discussing money.

4. "Orphan" Plaintiffs

As noted above, one of the thorny issues we faced in the IMC case was that 22 of the original plaintiffs would not qualify for membership in the proposed settlement class. Our solution was to carve them out and settle separately with each, for a plaintiff-specific amount. In order to avoid any potential conflict of interest for plaintiffs' counsel, IMC agreed that those 22 separate settlements would "stand on their own feet" and be consummated without regard for the success or failure of the proposed class settlement.

5. "Handcuffs" for Plaintiffs' Counsel

Defendants preparing to pay large sums to settle cases like these naturally tell their outside counsel that: "Of course, plaintiffs' counsel will promise not to take on new clients who may want to sue us for this problem." Responding that the class settlement device will "probably" provide this protection is rarely a satisfactory reply. The problem, of course, is that in many states it is unethical for a lawyer to agree in advance not to take on certain types of cases or not to sue certain companies, especially if such a commitment is part of the express consideration for achieving a settlement. Indeed, in some states it is even unethical for ***defense counsel*** to ask plaintiffs' counsel to tie their hands in this fashion.

Capable counsel resolve this dilemma in a variety of ways. Some plaintiffs' counsel simply refuse even to discuss the subject. We are aware of other instances in which the settling defendants have agreed to retain plaintiffs' counsel for a period of time to provide various services, for a negotiated fee, which could be nominal. They key here is to determine the rules of the road in the relevant jurisdictions.

V. CONCLUSION

Even in a post-*Amchem* world, class settlements still work. But, as DuPont was no doubt surprised to learn in *Stephenson*, sleeping dogs can be stirred from their slumber.