Mass Tort Settlement Class Actions: Five Case Studies

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Foreword

The future of aggregation is uncertain. Recent cases have established limits on class actions as devices for national resolution of mass tort claims. In the evolving world of mass tort litigation, one thing is certain: lawyers and judges have to ensure that the resolution of these cases is fair to individual litigants on both sides. For that reason, Professor Jay Tidmarsh's exploration of five recent settlement class actions will continue to be relevant to mass tort litigation—and to other class-action litigation—no matter what twists and turns the ongoing debate may take.

Professor Tidmarsh uses the raw material of our own experiences as judges to uncover and highlight common questions that these five extraordinarily challenging cases presented to the judiciary. We learn by example how five practiced and innovative district judges approached the amorphous call to review settlement class actions and to direct notice to class members. Should discovery be allowed into arguably secret settlement negotiations when the negotiators represent tens of thousands or even millions of individuals? Should judges conduct proceedings in the nature of trials to review the merits of the proposed settlement? Who should get what kind of notice at whose expense? How should judges assess the adequacy of class representatives and of counsel?

Professor Tidmarsh describes and analyzes five cases that represent a range of judicial experience on these issues and he does not flinch from assessing whether particular decisions were fair or adhered to evolving legal standards. He has framed important issues for judges faced with reviewing all class-action settlements, whether litigation or settlement classes, mass torts or otherwise. The Center presents his assessments, not to endorse them, but to help judges determine how they wish to proceed.

A learning organization is one that consciously looks back at its experiences in order to improve its performance. Faced with dramatic changes in the world of litigation, the judicial branch must behave collectively as a learning organization. These case studies use the benefits of hindsight to enhance our foresight. We are grateful to the judges who faced the challenges of these novel cases and shared with us their individual and collective

wisdom, and we are grateful to Professor Tidmarsh for distilling that wisdom and restating it for us.

Rya W. Zobel
Director, Federal Judicial Center

Acknowledgments

The present monograph arises out of a more detailed study that I conducted regarding the use of settlement class actions in five mass tort cases. I am grateful to a number of people whose efforts laid the foundation both for this monograph and for the underlying study: Linda Mullenix, who developed the concept for the study and accumulated much of the information for it; Tom Willging, who refined the concept, supplied helpful information and direction, and commented on earlier drafts of both the monograph and the underlying study; and the Honorable Jack B. Weinstein, John Aldock, Arthur Bryant, Joe Cecil, Ed Cooper, Elizabeth Runyan Geise, Brian Wolfman, and several additional unnamed reviewers familiar with the litigation, all of whom generously commented on earlier drafts of the study.

I am also grateful to the Office of the Clerk for the Northern District of Illinois and to the Office of the Clerk for the Court of Appeals for the Seventh Circuit for allowing me access, on short notice, to some of the information used in the study.

I am particularly indebted to a group of attorneys whose information and insights on the cases in which they were involved was invaluable: Gary Green, Peter Hoffman, Peter Lockwood, Alan Morrison, Joseph Rice, Brian Wolfman, and two attorneys in the *Ahearn* litigation and the *Factor VIII or IX* litigation that preferred to remain anonymous. The conclusions that I have reached in this monograph are my own; I am sure that most of these attorneys will disagree with some, and some will disagree with all, of the conclusions that I have reached.

I also thank the Federal Judicial Center for the contract that funded the monograph and underlying study. Once again, the views expressed in the monograph and study are my own, not those of the Federal Judicial Center.

Readers should know that I served as lead counsel for the United States in *Wilhoite v. United States*, a case related to *Hagood v. Olin Corporation*, which is discussed briefly in this study. Between 1987 and 1989 I also served as lead counsel for the United States in the Agent Orange litigation, which is also mentioned in the study. The United States did not participate in the settlements in either case, and as counsel for the United States I did not

take any position with regard to the settlements or the propriety of class certification in either litigation. I did, however, oppose the certification of a litigation class action in *Sharkey v. United States*, a related Agent Orange case brought in the Court of Claims. In 1995 I was asked by one of the defendants in the *Factor VIII or IX* litigation, which is one of the case studies in this report, to serve as a legal consultant. After a brief initial conference, I declined. Subsequently, in 1996, I testified before a House Subcommittee regarding certain legal concerns that I had with the Ricky Ray Hemophilia Relief Bill, H.R. 1023 (104th Cong.), a bill supported by numerous members of the *Factor VIII or IX* settlement class. In 1997 I declined a similar request to testify before a Senate subcommittee on a comparable bill.

Executive Summary

This monograph examines five cases in which Rule 23 of the Federal Rules of Civil Procedure has been used to achieve a settlement of a mass tort controversy. After a short introduction, the report sketches the nature and history of mass tort settlement class actions, and briefly analyzes *Amchem Products, Inc. v. Windsor*,[1] in which the Supreme Court entered the debate. The report then undertakes case studies of the five mass torts that employed the settlement class action device in federal court between 1990 and the Court's decision in *Amchem*: *Bowling v. Pfizer, Inc., Georgine v. Amchem Products, Inc.*,[2] *Ahearn v. Fibreboard Corp., In re Silicone Gel Breast Implant Products Liability Litigation,*[3] and *In re Factor VIII or IX Concentrate Blood Products Litigation.*

One conclusion leaps out from the case studies: No two cases were alike. Although some cases had certain features in common, they all differed in one or more important aspects, such as number of parties, maturity of litigation, compensation mechanism, compensation trigger, mandatory or opt-out nature of the suit, timing of opt-out rights, presence of future claims, handling of future claims, amount of notice, procedures for fairness hearings, the likelihood of collusion, the factors used to approve the settlement as fair, and the factors used to certify the class. The following discussion and table highlight some of the essential features of the settlements.

1. Amchem Prods., Inc. v. Windsor, 521 U.S. — , 117 S. Ct. 2231 (1997).

2. In the trial court, *Amchem* was first known as *Carlough v. Amchem Products*. After plaintiff Carlough resigned as class representative, plaintiff Georgine was substituted, and the case took on its more familiar name, *Georgine v. Amchem Products*. It has also been referred to as *Windsor*, named after the objector that was one of the respondents in the Supreme Court. In this report, "*Georgine*" refers to the proceedings in the district court and court of appeals, and "*Amchem*" refers to the Supreme Court's decision.

3. There were two major settlements in the *Silicone Gel* litigation: the original settlement in 1994, and a revised settlement in 1995. This monograph analyzes both settlements.

Maturity

Of the five cases that settled, only two could be regarded as mature—*Georgine* and *Ahearn*. The others were in various stages of growth, with *Bowling* being the least mature in terms of verdicts, and *Bowling* (with regard to emotional distress claims) and *Silicone Gel* being the least mature in terms of settlements.

Class Membership

Size and Scope of Class. The classes ranged in size from 6,000–13,000 in *Factor VIII or IX* to 50,000–100,000 in *Bowling* to hundreds of thousands in *Georgine, Ahearn*, and *Silicone Gel*. All of the classes were nationwide in scope; two of them (*Bowling* and *Silicone Gel*) were also worldwide.

Present and Future Claimants. One of the classes (*Bowling*) involved only future claimants. Four (*Georgine, Ahearn, Silicone Gel*, and *Factor VIII or IX*) mixed together both present and future claimants, although *Factor VIII or IX*'s hinging of compensation on the already-existing fact of HIV contamination made it act like a "present only" class action.

Structural Protections for Future Claimants. None of the cases provided structures specifically designed to protect the interests of future claimants in the settlement process. In two of the cases (*Ahearn* and *Factor VIII or IX*) guardian ad litems were appointed, although in *Factor VIII or IX* the guardian was appointed only to represent the interests of HIV-infected minors, and in *Ahearn* the guardian represented the interests of all class members rather than the particular interests of future class members. In a third case (*Georgine*), a special master performed a comparable function of investigating whether the interests of class members had been adequately represented in relation to the class counsel's present clients, but the investigation was limited in scope. In *Georgine*, the AFL-CIO and a special counsel were also appointed to ensure that the defendants performed their post-approval obligations under the settlement in good faith.

Front-End Opt Outs. Four of the five cases were Rule 23(b)(3) opt-out class actions; *Ahearn* was a mandatory Rule 23(b)(1)(B) class action. In the four opt-out cases, significant numbers—ranging from 560 (out of 6,000) in *Factor VIII or IX* to 87,000 (out of several hundred thousand to several million) in *Georgine*—did opt out. With the exception of the revised settlement in *Silicone Gel*, in which nearly 52,000 of 127,000 class members

opted out, no more than 10% of the class members ultimately opted out in any of the cases.[4]

Back-End Opt Outs. In some fashion or other, four of the settlements permitted claimants a back-end opt-out into the tort system; the revised settlement in *Silicone Gel* and the settlement in *Factor VIII or IX* did not. The most restrictive opt-out right was that of the original settlement in *Silicone Gel*, which authorized opt outs only if the promised compensation was not available in a given year and (for future claims) limited opt-out claimants' claims for damages. The next most restrictive opt-out right was that of *Georgine*, which limited the number of persons that could opt out each year and also required the sacrifice of certain legal rights (such as loss of claims for punitive damages and for fear of cancer).[5] *Ahearn* was next in order; there were no limitations on numbers of opt-outs, although its limitations on legal rights (such as no punitive damages, $500,000 cap, and several liability) were more severe than those in *Georgine.* The least restrictive were *Silicone Gel*'s revised settlement and *Bowling*. In the revised *Silicone Gel* settlement, claimants were not required to exercise their opt-out right until they were told exactly what they would get by way of settlement. *Bowling* allowed future claimants who sustained an injury to exit freely to the tort system, although it did develop a voluntary alternative compensation scheme as an incentive not to do so.

Class Certification Issues

Disputes Concerning Class Certification. Three of the five cases (*Bowling*, *Georgine*, and *Ahearn*) involved serious, sustained challenges to class certification. The other two (*Silicone Gel* and *Factor VIII or IX*) did not.

Adequacy of Class Representatives, Including Separate Classes or Subclasses. The adequacy of the class representatives is a critical issue in class action practice; a class member can be bound by a class settlement or judgment only if his or her interests have been represented by a person with comparable interests. In none of the cases was there a class representative for each relevant "interest group." For instance, in *Georgine*, relevant settlement "interest groups" included persons with mesothelioma, persons with lung cancer, persons with other cancers, persons with asbestosis or bilateral pleural

4. This assumes that the class in *Georgine* numbered 870,000 or more, which seems likely.

5. In *Georgine*, certain benefits, such as the defendants' waiver of most defenses, were received in return for this sacrifice.

thickening, a range of exposed persons not fitting into these categories, and persons able to assert derivative claims. Given the risk of insolvency and the limited protections against inflation, each of these "interest groups" would then have required further subdivision into present, "near future," and "far future" claimants. And then there would likely needed to have been a further subdivision by state, or at least by groups of states with roughly comparable laws on liability and damages. Neither *Georgine* nor any of the other cases contained an adequate number and/or mix of class representatives to assure representation of all points of view.

Of the three cases in which class certification was heavily contested (*Bowling*, *Georgine*, and *Ahearn*), two (*Georgine* and *Ahearn*) involved serious allegations that the representatives had conflicts of interest or too narrow a set of interests to represent adequately the interests of the class.

One way to try to assure adequate representation of different interests is the use of separate classes or subclasses. None of the five cases involved separate classes or subclasses.

Adequacy of Counsel. In every case but *Bowling*, class counsel represented significant numbers of presently injured clients, in addition to their representation of uninjured or unfiled class members. Adequacy of counsel was seriously contested in thbee cases (*Bowling*, *Georgine*, and *Ahearn*). In *Bowling*, the main concern was competence of class counsel, who had never before handled a heart-valve case. In *Georgine* and *Ahearn*, the main concerns were the possible conflicts of class counsel, who represented (either simultaneously or sequentially) present claimants not in the class and future claimants in the class. Only in *Silicone Gel* was separate legal representation provided for differing interest groups within the class, and even in that case, the only interest group for whom a lawyer was appointed was the group of foreign claimants.

Collusion. Related to adequacy of counsel, the issue of collusion was pressed in two cases (*Bowling* and *Georgine*). The issue seems to have fizzled out in *Ahearn*. Both *Bowling* and *Georgine* analyzed the issue in terms of whether class counsel had sought to defraud class members of their legal rights. The other cases, in which collusion was not seriously litigated, mentioned the lack of collusion in passing. These cases treated "arm's-length" or "hard-fought" bargaining as sufficient evidence of the absence of collusion.

Consistency with Amchem. All of the cases in the study were resolved before the Supreme Court's decision in *Amchem*. With the exception of *Factor VIII or IX*, whose discussion regarding class certification was perfunctory, all of the cases contained at least minor, and in some cases major, variations from the holdings, language, or reasoning of *Amchem*.

Class Notice

Procedure. The mechanics of notice varied dramatically from case to case. The most exhaustive, and expensive, notice occurred in *Ahearn*. The next most extensive occurred in *Georgine*. In the remaining cases, notice was considerably less extensive, especially in terms of substituted notice, such as advertising and publication. In three of the cases (*Georgine*, *Ahearn*, and *Silicone Gel*), television advertising was used; in the other two it was not. In two cases (*Silicone Gel* and *Factor VIII or IX*), there was extensive publicity and networking regarding the litigation and settlement. In four of the cases (*Georgine*, *Ahearn*, *Silicone Gel*, and *Factor VIII or IX*), the defendants or their insurers paid for the notice or created a fund from which notice costs were paid. In *Bowling* the defendant paid part of the cost of the notice, and the remainder came out of settlement funds.

All the cases except *Bowling* used toll-free phone numbers. Most used summary devices such as question-and-answer booklets. *Silicone Gel* and *Factor VIII or IX* also used the Internet as a means of providing notice. All five cases also relied on public interest groups or private foundations to help spread the notice.

Content. The content of the forms varied markedly in terms of the simplicity of the language, the user-friendliness, the visual appeal, and the amount of information contained. None of the notices contained information on the likely prospects of a recovery in litigation for a person with a particular disease profile. Only *Ahearn* developed information from which class members could discern potential conflicts of interest between class members and class counsel.

Fairness Hearing

Two of the cases (*Georgine* and *Ahearn*) permitted broad rights of discovery to objecting parties and used trial-like procedures at the fairness hearing. The others did not. The strongest challenges to the settlement occurred in *Georgine* and *Ahearn*, which were the most mature of the mass torts and therefore directly affected many members of the plaintiffs' bar.

Approval of Settlement

In all five cases the settlement was approved by the district court. In four of the cases, the judge to whom the litigation was assigned handled the fairness hearing; in *Georgine* a different judge was assigned. In *Ahearn*, the judge appointed another judge to facilitate the settlement.

All the courts used some variant of a "fair, reasonable, and adequate" test to measure the settlement's fairness. The factors used by the court to flesh out this standard varied. All but *Silicone Gel* listed a group of factors that the court used to guide its decision. For the most part, the factors used by the courts overlapped, although there were some differences on some of the lists. The core factors, however, included the strength of the plaintiffs' case in relation to the settlement, the maturity of the litigation, the complexity of the case, and the objections to the settlement. Collusion was also frequently mentioned. *Bowling* and *Georgine* stated that the "strength of the case" factor was the primary consideration; the other cases did not prioritize the factors.

In none of the cases, in my estimation, did the courts adequately analyze the factors that were identified as being relevant. In only *Bowling* and *Factor VIII or IX* did the courts analyze in detail the likelihood of a plaintiff's recovery in the tort system or compare that recovery to the recovery promised under the settlement. The opinions tended to emphasize factors that favored settlement approval, and downplayed the remainder. For instance, in *Bowling*, in which the litigation was immature, the court essentially dismissed the maturity factor. In *Ahearn*, in which the litigation was mature, the court relied heavily on the maturity factor. Since there was little consistency in the use or weighting of factors across the cases, the factors that were cited as being relevant to approval were fairly poor predictors of the outcome of the trial court's decisions.

Negotiated Changes from Tort System

One of the concerns of mass tort settlements is that they establish, for large numbers of individuals, a type of private tort reform without the standard legislative protections.[6] Although this concern must be tempered by the reality that nearly all tort settlements involve departures from the recoveries available in a tort judgment, the cases under study reflected some common patterns suggesting that the concern is not without foundation.

Consortium and Derivative Claims. In only one of the settlements (*Bowling*) was a separate fund established to compensate consortium claims, and even in this case such a fund was created only after a round of negotiations that was spurred on by the complaints of objectors and the concerns of the

6. For one statement of this concern, see *In re* Asbestos Litig., 90 F.3d 963, 995–96 (5th Cir. 1996) (Smith, J., dissenting).

trial judge. In a second settlement (the original settlement in *Silicone Gel*), the judge indicated that one of the designated funds might be used to pay some particularly compelling consortium claims, but never worked out the details of this proposal. In a third settlement (*Factor VIII or IX*), consortium and other derivative claims were payable from the settlement, but they reduced the amount of money that was available to the primary victim. In neither *Georgine*, *Ahearn*, nor the revised settlement in *Silicone Gel* were consortium or derivative claims compensable.

Emotional Distress and Related Claims. In all five cases, class members had by definition been previously exposed to the allegedly defective product. Some or all of the class members in each of these cases were presently healthy and asymptomatic, but they nonetheless may have been able to assert tort claims for emotional distress, fear of cancer, increased risk of cancer, medical monitoring, or related claims that are gaining increasing recognition in the tort system. Among the settlements, *Bowling*, the revised settlement in *Silicone Gel*, and *Factor VIII or IX* provided some compensation for these claims. In none of these cases, however, was compensation tied to actual emotional distress that was suffered by claimants. Moreover, in *Silicone Gel* this compensation was called an "advance payment," and was deducted from any additional recoveries due to those who suffered additional injuries; in *Factor VIII or IX* the flat $100,000 payment was the same for those presently suffering only emotional distress and for those who were suffering more serious injury or had died. In the three settlements that compensated these claims, the payment seemed more designed as an inducement to class members to remain in the class rather than as a serious effort to award damages for emotional distress.

Physical Injuries. In two of the settlements (*Georgine* and the original settlement in *Silicone Gel*, although the revised *Silicone Gel* settlement would have been subject to the same criticism), there were serious allegations that the settlement did not provide compensation for all of the physical injuries that were compensable in the tort system. Both *Georgine* and the original settlement in *Silicone Gel* contained provisos that permitted "nonscheduled" diseases to be compensated in certain circumstances, although it is not clear how effective these provisos would have been in practice.

Punitive Damages. None of the settlements permitted an award of punitive damages. Back-end opt-outs in *Bowling* and current claimant back-end opt-outs in the original settlement in *Silicone Gel* retained the right to sue for punitive damages; ongoing claimant back-end opt-outs in the original *Silicone Gel* settlement and the back-end opt-outs in *Georgine* and *Ahearn* could not assert punitive damages.

Limitations on Compensatory Damages. Of the four cases permitting back-end opt-outs, only one (*Ahearn*) put a cap (of $500,000) on the amount of compensatory damages recoverable at trial. Likewise, of the three multidefendant cases that permitted back-end opt-outs (*Georgine*, *Ahearn*, and *Silicone Gel*), only *Ahearn* changed the joint and several liability rule that prevails in many states into a several liability rule.

Waiver of Defenses in Back-End Opt-Out Trials. The settlements generally waived the statute of limitations for back-end opt-outs. Only in *Georgine* did the defendants agree to waive significant other defenses that they had; in the other cases, trials were to be fully contested on issues of liability and damage.

Nationalizing Tort Law. Of the five settlements, only *Georgine* and *Ahearn* accounted for state law differentials in the award of damages under the settlement. In neither of these cases, however, was state law a leading determinant of the settlement award; rather the difference in state law was merely one factor that went into the decision about the award. In the remaining cases, differences in state law were not considered in determining the amount of compensation. In the cases permitting back-end opt-out trials, however, state law generally determined the entitlement to and amount of recovery (although in *Georgine* defendants waived many state law defenses and in *Ahearn* doctrinal changes and damage caps imposed limits on recovery under state law).

Alternative Dispute Resolution Procedures. Three of the settlements (*Bowling*, *Georgine*, and *Ahearn*) developed ADR procedures to keep back-end opt-out claims out of the legal system. In *Bowling*, the ADR approaches were optional; in *Georgine* and *Ahearn* they were mandatory prerequisites to filing suit.

Attorneys' Fees

In only one settlement (*Bowling*) was class counsel to be paid from the settlement fund itself. In two of the settlements (the original settlement in *Silicone Gel* and *Factor VIII or IX*), a separate fund was established for the payment of class counsel's fees, although in *Silicone Gel*, no definite amount of money was allocated to the fund. In three of the settlements (*Georgine*, *Ahearn*, and the revised settlement in *Silicone Gel*), defendants agreed to pay class counsel's fees (or at least contribute to a common benefit fund) without the explicit establishment of a fund for the purpose. In two of these latter settlements (*Georgine* and *Ahearn*), recovery was capped at a maximum of 3%, although no floor was established. In the last settlement (the

revised settlement in *Silicone Gel*), a flat amount of 6% was contributed to a common benefit fund.

In each case, individual counsel were also entitled to receive compensation for processing claims through the compensation mechanism established by the settlement. In every case but *Bowling*, caps were imposed on these awards. The cap in the revised settlement in *Silicone Gel* was a sliding scale cap; the cap in the other settlements was a flat cap (typically a maximum of 25%).

Policy Issues

A triumvirate of policy concerns—individual autonomy, extortionate use, and unmanageability—often shape the contours of class-action practice. In theory, the first of these concerns should be heightened in the context of the mass tort settlement class action, while the latter two should be reduced.[7] To the extent that such policy variables are measurable, these intuitions appear true.

Individual Autonomy. Issues of individual autonomy—such as the inadequacy of the representation by named representatives, the inadequacy of the representation by class counsel, the existence of collusion, and the presence of ethical conflicts—were present in all five cases and were seriously pressed in three of them (*Bowling*, *Georgine*, and *Ahearn*). In none of the cases did the trial court find that such concerns required denial of class certification or disapproval of the settlement, although these concerns did ultimately lead to the reversal in *Georgine* and the affirmance of that reversal in *Amchem*. In light of the subsequent *Amchem* decision, it is not clear whether any of the trial court decisions adequately valued the interests in individual autonomy.

Extortionate Use. Concerns with extortionate use seem not to have played a significant role in the cases under study. In three of the cases (*Bowling*, *Georgine*, and *Ahearn*), the defendants' desire for a global resolution led them either to propose a class settlement themselves or at least actively to embrace the idea. In only one of the cases (*Silicone Gel*) was a settlement decision made when a litigation class had already been certified, although this class action did not seem to exert undue influence on the defendants'

7. For an analysis of these policy concerns and their application to mass tort settlement class actions, see Jay Tidmarsh, Mass Tort Settlement Class Actions: Five Case Studies and Their Implications for the Reform of Rule 23 11–23 (unpublished manuscript 1998) (copy on file with Information Services Office, Federal Judicial Center).

decision to settle. In a second case (*Bowling*), a motion to certify a litigation class action was pending when the settlement was agreed upon; although this motion may have influenced the timing of the settlement, there are no external indicia that this motion induced an otherwise unlikely settlement. In *Factor VIII or IX*, the Seventh Circuit had already ruled that a litigation class could not be certified, so that the fear of an extortionate litigation class action in federal court could clearly have not influenced the decision to settle the case. On the other hand, in two of the settlements (*Bowling* and *Factor VIII or IX*), class members tended to fare much better than they had fared in prior litigation.

Unmanageability. Three of the five cases (*Georgine*, *Ahearn*, and *Silicone Gel*) posed significant problems of pretrial, trial, and remedial management that were alleviated by the class settlement; the remaining two (*Bowling* and *Factor VIII or IX*) contained smaller numbers of class members and seemed to be less taxing to the federal judiciary. None of the settlements appeared to pose comparable management problems. In particular, none of the settlements imposed significant post-settlement responsibilities on the court, although in *Bowling*, *Silicone Gel*, and *Factor VIII or IX*, the court was involved as an ultimate arbiter of the claim administrator's decision to deny individual claims. In *Bowling* this role was quite limited; the court became involved only when a class member had been denied eligibility under the explantation benefit.

Summary

The following chart summarizes the main features of each case:[8]

	Bowling	*Georgine/ Amchem*	*Ahearn*	*Silicone Gel* (original)	*Silicone Gel* (revised)	*Factor VIII or IX*
Product	Heart valve	Asbestos	Asbestos	Breast implant	Breast implant	Plasma concentrate
Class type	23(b)(3)	23(b)(3)	23(b)(1)(B)	23(b)(3)	23(b)(3)	23(b)(3)
Number in class (approx.)	55,000	100,000–millions	100,000–millions	450,000	Unknown; at least 130,000	6,500

8. The chart should be read in conjunction with the foregoing synthesis and the ensuing case studies on which the synthesis relies. In the interest of presenting information in a tabular form, some subtleties were omitted.

	Bowling	*Georgine/ Amchem*	*Ahearn*	*Silicone Gel* (original)	*Silicone Gel* (revised)	*Factor VIII or IX*
Citizenship of class members	Worldwide	U.S. only	U.S. only	Worldwide, except for Australia and parts of Canada	Worldwide, except for Australia and parts of Canada	U.S. only
Number of opt outs (approx.)	1,100	87,000	Not applicable	14,300	51,900	550
Subclasses or separate classes	No	No	No	No	No	No
Composition of class	Future plaintiffs only	Present and future plaintiffs	Present and future plaintiffs	Present and future plaintiffs	Present and future plaintiffs	Present and future plaintiffs
Representation by class counsel of present claimants	No, at least by lead class counsel	Yes; present claimants settled separately	Yes; present claimants settled separately	Yes; present claimants included in settlement	Yes; present claimants included in settlement	Yes; present claimants included in settlement
Protection for future plaintiffs	None	Very limited; special master	Limited; guardian ad litem	None	None	Very limited; guardian ad litem for minors
Number of defendants	2	20	1	40	10	9
Maturity of litigation	Relatively immature, although fracture cases more mature	Mature	Mature	Relatively immature	Relatively immature	Relatively immature
Class certified	Yes	Yes	Yes	Yes	Previous class certification still pertained	Yes
Settlement approved	Yes	Yes	Yes	Yes	Yes	Yes
Outcome on appeal	Appeal dismissed due to appellants' failure to intervene	Certification reversed; reversal affirmed on certiorari	Affirmed; vacated and remanded on certiorari; affirmed on remand	Appeal dismissed as moot	Presently on appeal	Appeal dismissed due to settlement with appellants
Consistency of trial court decision with *Amchem*	Some inconsistency	Inconsistent	Some inconsistency, especially in decision of court of appeals	Some inconsistency	Prior certification still pertained; thus, some inconsistency	Unable to determine

	Bowling	*Georgine/ Amchem*	*Ahearn*	*Silicone Gel* (original)	*Silicone Gel* (revised)	*Factor VIII or IX*
Challenge to adequacy of plaintiff representation	Yes	Yes	Yes	Limited; related to lack of foreign representatives	Not applicable	No
Challenge to adequacy of counsel	Yes	Yes	Yes	No	Not applicable	No
Allegations of collusion	Yes	Yes	Yes, though not on appeal	No	Not applicable	No
Nature of fairness hearing	Essentially non-adversarial	Adversarial	Adversarial	Non-adversarial	Not applicable	Non-adversarial
Length of fairness hearing	4 days	18 days	10 days (for three sets of hearings)	3 days	Not applicable	2 days
Nature of discovery	Limited and informal	Broad rights of discovery	Full rights of discovery	Informal	Not applicable	Informal
Standard for approval of settlement	Fair, adequate, and reasonable; four-factor test[9]	Fair, adequate, and reasonable; four-factor test[10]	Fair, adequate, and reasonable; six-factor test[11]	Fair, adequate, and reasonable; no factors used	No test developed	Fair and reasonable; five-factor test[12]
Trust mechanism used	No	No	Yes	No	No	No

9. The factors were strength of plaintiffs' case in relation to amount of relief; presence of collusion; objections from class members; and amount and nature of discovery undertaken in the case.

10. The factors were strength of claims against benefits to class members; stage of proceedings and amount of discovery conducted; reaction of class; and how and by whom settlement was negotiated.

11. The factors were existence of fraud or collusion; complexity, expense, and likely duration of litigation; stage of proceedings and amount of discovery completed; probability of plaintiffs' success on the merits; range of possible recovery; and opinions of class counsel, class representatives, and absent class members.

12. The factors were the strength of the plaintiffs' case on the merits; the stage of the proceedings and the amount of discovery completed; the complexity, length, and expenses of continued proceedings; the absence of collusion and the opinion of competent counsel; and the degree of opposition to the settlement.

	Bowling	*Georgine/ Amchem*	*Ahearn*	*Silicone Gel* (original)	*Silicone Gel* (revised)	*Factor VIII or IX*
Amount of notice by first-class mail (out of total number of class members)	2,350–16,000 (out of 55,000)	320,000 or more[13] (out of 100,000 to millions)	1,400,000 (out of 100,000 to millions)	More than 380,000 (out of 450,000)	None prior to settlement approval; 102,400 notices thereafter (out of 130,000)	Not determined in this study
Other notice methods	Newspaper; magazine; heart valve registry	Newspaper; magazine; television; radio (unpaid); unions; lawyers; toll-free number	Newspaper; magazine; television; radio (unpaid); unions; AARP; lawyers; toll-free number	Newspaper; magazine; television; radio (unpaid); registries and physicians; Internet; toll-free number	None; class already identified from prior submission of claims; toll-free number	Magazine; Internet; hemophilia organization; toll-free number
Cost of notice and source of payment	At least $3.4 million; some from settlement funds, some from defendant	$7 million; defendants	$22 million; insurers	Several million dollars; defendants	Cost and source not determined	Cost not determined; fund established by defendants
Back-end opt-out; limitations on exercise	Yes; no limits on numbers or legal issues	Yes; significant limits on numbers and legal issues	Yes; limits only on legal issues	Yes; limits on numbers and legal issues, especially for ongoing claims	No back-end opt-out right	No back-end opt-out right
Emotional distress claims compensable	Yes	No	No	No	Arguably yes	Yes, although no additional amounts for physical injury
Limits on consortium and derivative claims	Yes; separate fund	No	No	Generally no; separate fund to compensate a few	No	Yes, though these claims reduce award to victim
Limits on claims for physical injury	No	Yes	No	Arguably yes, but science unclear	Arguably yes, but science unclear	No, but physical injury not relevant to award

13. An individual notice or a short description of the notice in the mail. Full notice was mailed to 6.8 million persons. Full notice materials were sent to 320,000 persons.

	Bowling	*Georgine/ Amchem*	*Ahearn*	*Silicone Gel* (original)	*Silicone Gel* (revised)	*Factor VIII or IX*
Limits on numbers of claims that could be asserted against fund	No	No, but limited number compensable each year	No; but spendthrift provisions limited number compensable each year	No; but benefits ratcheted down if excessive claims asserted in given year	No	No
State law differentials accounted for in settlement	No	Yes, in limited way	Yes, in limited way	No	No	No
Source of payment of class counsel's fees	Settlement funds	Defendants	Insurers	Designated portion of settlement fund	Defendants	Separate fund
Amount of class counsel's fees	Not specified in settlement; actual award was 10% of present value of settlement and up to 10% of future contributions; $10.25 million awarded so far	Maximum of 3% specified in settlement; no final award made	Maximum of 3% specified in settlement; more than $38 million awarded	Not specified in settlement; never awarded	6% of amount of settlement proceeds to common benefit fund; not yet awarded	Not specified in settlement; recoverable only from $40 million fund established for various purposes
Limits on awards of individual attorneys' fees	None	25%	25%	None specified in settlement; court limited to maximum of 24%	Sliding scale of 10% of first $10,000; 22.5% of next $40,000; 30% of amounts thereafter	None specified in settlement

Introduction

This monograph examines five cases in which Rule 23 of the Federal Rules of Civil Procedure has been used to achieve a settlement of a mass tort controversy. The reason for studying mass tort settlement class actions is simple: Using class actions for this purpose has been, and is, controversial. The mass tort settlement class action was the subject of a significant decision in the last term of the Supreme Court,[14] and it is also the subject of a proposed amendment to Rule 23 that has been under consideration by the Advisory Committee on the Federal Rules of Civil Procedure.[15] There has been considerable debate both about the idea of settlement class actions in general[16] and about the proposed amendment in particular.[17] There have also been a number of case studies or anecdotal descriptions about mass torts in which settlement classes have been used.[18] Thus far, however, the studies and de-

14. Amchem Prods., Inc. v. Windsor, 521 U.S. — , 117 S. Ct. 2231 (1997).

15. The proposal would add a new Rule 23(b)(4), which provides that a class action can be maintained if "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial." 117 S. Ct. No. 1 CXIX, CLIV to CLV. Certain amendments to Rule 23(b)(3) that would affect the decision to grant the Rule 23(b)(4) request are also pending before the Advisory Committee. *Id.* at CLIII to CLIV.

16. *See, e.g.*, Symposium, *Mass Tortes: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995); Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899 (1996).

17. *See, e.g.*, Letter from Steering Committee to Oppose Proposed Rule 23 (May 28, 1996) (letter signed by 129 law professors) (on file with Information Services Office, Federal Judicial Center).

18. *See* Ronald J. Bacigal, The Limits of Litigation (1990) (Dalkon Shield litigation); Coffee, *supra* note 16, at 1388–1410 (*Amchem* asbestos litigation, *Ahearn* asbestos litigation, *Silicone Gel* breast-implant litigation); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045 (1995) (*Amchem* asbestos litigation); Nagareda, *supra* note 16 (same); Brian Wolfman & Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996) (*Amchem* asbestos litigation, *Silicone Gel* breast implant litigation); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L.

scriptions have been narrowly focused on only one case or on only some of the issues relevant to the propriety of settlement class actions.

The underlying study on which the present monograph is based attempted a more complete analysis of five mass torts in which federal courts have used settlement class actions during the 1990s.[19] The five cases are *Bowling v. Pfizer, Inc.*, which involved allegedly defective heart valves; *Georgine v. Amchem Products, Inc.*, which arose out of the multidistrict asbestos proceedings;[20] *Ahearn v. Fibreboard Corp.*, which involved a settlement against a single asbestos manufacturer in Texas; *In re Silicone Gel Breast Implant Products Liability Litigation*, which involved, obviously, silicone gel breast implants; and *In re Factor VIII or IX Concentrate Blood Products Litigation*, which involved HIV-contaminated blood products used by persons with hemophilia. After an examination of the policy implications and historical background of mass tort settlement class actions, the study analyzed each of the five cases according to a series of general categories: Nature of Litigation and Litigation Maturity; History of the Lawsuit; Party Structure; Attorneys; Settlement Terms; Negotiation History; Handling of Future Claimants; Notice Procedure; Approval and Review Process; Attorneys' Fees; and Modifications in Traditional Adversarial Roles.[21] In each case, information relevant to the categories was fleshed out by reading the settlement agreement(s), notice materials, and reported decisions in the case.[22] Other sources of information included case briefs, pleadings, and exhibits filed by the parties; docket sheets and other court records; newspaper and magazine articles; and academic literature. Although these sources tended to answer many questions, they did not answer all. As a result, lawyers familiar with the cases were contacted, both to obtain new information

Rev. 961 (1993) (*Bowling* heart-valve litigation, *Silicone Gel* breast-implant litigation); Thomas E. Willging, Synopsis and Issues in *Bowling v. Pfizer*: A Mass Tort Settlement Class (unpublished manuscript) (copy on file with Research Division, Federal Judicial Center) (*Bowling* heart-valve litigation). With the exception of the Dalkon Shield litigation, each of the above cases is studied in more detail in this report.

19. *See* Tidmarsh, *supra* note 7. Information for the underlying study and this monograph was accumulated through October 31, 1997. Four of the cases were still active as of that date. Because of time constraints in the preparation of this monograph, however, only a few significant developments that have occurred after October 31, 1997, are noted.

20. On the shift in names used to describe the *Georgine/Amchem* litigation, see *supra* note 2.

21. These categories were developed from a series of issues and questions suggested by the Federal Judicial Center.

22. Including decisions reported on Westlaw and LEXIS.

and to check the accuracy of present information.[23] The study concluded with three chapters, the first of which summarized the findings of the case studies, the second of which developed a set of standards that might be used to consider the future of settlement class actions, and the last of which proposed language for Rule 23 that might implement these standards.

In order to make the basic terms of the debate accessible, the present monograph presents in abbreviated form some of the historical and case study materials. The monograph begins with a short history of mass tort settlement class actions and a review of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*. The five succeeding sections then analyze the five cases, with each section describing one case. The description focuses on the history of the litigation, the basic settlement terms, the method for handling future claims, notice procedures, approval and review process, and modifications in the lawyers' traditional adversarial roles.

As with the underlying study, the focus of this monograph is on the work of the district courts that faced the difficult task of steering in the largely uncharted waters of mass tort settlement class actions.

23. In total, I spoke with eight attorneys: Gary Green (who represented objectors in *Bowling*), Peter Hoffman (who represented a client in *Factor VIII or IX*), Peter Lockwood (who served as counsel to class counsel in *Ahearn*), Alan Morrison (who represented objectors in *Silicone Gel*), Joseph Rice (who served as class counsel in *Amchem* and *Ahearn* and whose firm was involved in *Silicone Gel*), Brian Wolfman (who represented objectors in *Bowling*, *Amchem*, and *Ahearn*), and two attorneys who preferred to remain anonymous. One of the anonymous attorneys represented an insurer in *Ahearn* and another represented a non-settling defendant in the *Factor VIII or IX* litigation. The reviewers to whom a draft of the underlying study was sent were either participants in or intimately familiar with one or more of the cases in the study. Their comments provided additional information and helped to correct factual errors.

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The Nature and History of Mass Tort Settlement Class Actions

This chapter reviews the history and policy dimensions of mass tort settlement class actions. It begins by defining the term "settlement class action." It next describes briefly the history of the mass tort settlement class action, which in turn leads to a more detailed analysis of *Amchem Products, Inc. v. Windsor*.

Distinguishing Between Litigation and Settlement Class Actions

The necessary starting point of this monograph is a definition of "settlement class action." All class actions involve claims filed by or against parties acting as representatives for similarly situated persons. The judgment or settlement in a class action decides not only the claims and factual issues of representatives that bring the suit, but also the claims and factual issues of those persons (usually called class members) whom the representative is entitled to represent.

Although it shares this common bond with its more common cousin, the "litigation class action," the "settlement class action" achieves its binding effect in a different manner. In a litigation class action, the function of the class action is to litigate contested issues on a class-wide basis. With regard to the factual and legal issues still to be resolved in the case, the parties occupy an adversarial relationship. By contrast, a settlement class action is intended not to litigate contested issues but to implement a settlement.[24]

24. Within this general definition of settlement class actions, it is possible to distinguish between lawsuits that were filed expressly for the purpose of giving effect to a settlement previously agreed upon and lawsuits that were filed and litigated as non-class actions but that were subsequently settled on a class-wide basis. Of the five cases in this study, three (*Georgine*, *Lindsey*, and *Walker*) were filed for the purpose of giving effect to a settlement already agreed upon; one (*Ahearn*) was filed for the purpose of giving effect to a settlement

Typically defendant(s) agree to settle with putative class members before the class certification decision is made.[25] Although they may remain adversarial with regard to the underlying factual and legal issues that animated the settlement, the parties do not occupy an adversarial relationship with respect to the critical issues still to be resolved in the case—class certification and settlement approval.[26] Instead, they mutually desire the same outcome—to bind the class representatives and members to the settlement.

A Short History of Mass Tort Settlement Class Actions

"Litigation class actions," as we now would call them, developed a distinct procedural identity during the eighteenth century.[27] Originally class actions were equitable devices designed to ensure that large groups of individuals with united interests would be able to enforce equitable rights or have equitable rights enforced against them;[28] legal claims such as tort actions were excluded. When the Federal Rules of Civil Procedure were adopted in 1938, the original Rule 23 broadened the class action device to include claims for legal relief, but the language of the rule made its use in tort cases problem-

agreed upon in principle; and one (*Bowling*) was filed for litigation purposes. *Bowling* settled before a ruling on the certification of the class for litigation purposes, and was therefore converted into a settlement class action. Nothing in this report hinges on the motivation for filing suit.

25. It is also possible that a court might first certify a class *for settlement purposes only*, with the parties exploring the possibility of settlement and ultimately agreeing to settlement thereafter. None of the cases in this study involved this factual scenario. In *Bowling*, however, the court approved of class counsel's representation of a putative class during settlement negotiations that were being conducted while a motion to certify a litigation class was pending. Similarly, in *Ahearn,* the court appointed counsel to negotiate a class-wide settlement before suit was filed, and the final settlement documents were not signed until after the class action complaint had been filed. *See infra* note 90 and accompanying text, and *infra* text following note 153.

26. Fed. R. Civ. P. 23(e) requires that a court approve all class settlements, after appropriate notice to the members of the class. Of course, in the event that class certification is denied or the settlement is not approved, the parties might well occupy an adversarial relationship on the factual and legal issues surrounding liability and damages.

27. *See* Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 160–96 (1987). Since the concept of the settlement class action was unknown during the eighteenth century, the label "litigation class action" is an anachronism. I use the label merely to emphasize that settlement class actions have a more recent origin.

28. *See* 7A Charles Alan Wright et al., Federal Practice & Procedure § 1751 (1986).

atic.[29] Whatever its precise breadth, however, the class action device was seen as a device for litigating disputed issues, not as a device for settling claims.

The overhaul of Rule 23 in 1966 and the creation of a common question, opt-out class action in Rule 23(b)(3) suggested a greater potential for the use of class actions in mass tort controversies. Nevertheless, in part because of the Advisory Committee's caveat that mass torts are "ordinarily not appropriate" for class treatment,[30] and in part because individual issues of liability, causation, and damage seemed to violate the doctrinal demands of Rules 23(a) and (b), requests to certify mass tort litigation classes were routinely unsuccessful during the first twenty years of the new rule's operation.[31] That lack of success changed during the 1980s, as a series of cases certified litigation classes[32] and as defendants began to appreciate the value of global solutions to mass tort disputes. Although most mass torts today are aggregated by other means (such as Rule 42 intradistrict consolidation or multidistrict transfer), certifying a litigation class in a mass tort is, at least in the right circumstances, no longer unimaginable.

Some of these mass tort litigation class actions ultimately settled. For instance, the Agent Orange litigation, which had been certified as a class action for litigation purposes, ultimately settled on a class-wide basis in 1984.[33] During this same period, a number of courts in consumer rights, securities, and antitrust cases began to certify settlement class actions when the settlement was fair and reasonable.[34] What remained, however, was to

29. *See id.* § 1752; *but see* Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 743 (7th Cir.), *cert. denied*, 344 U.S. 820 (1952) (suggesting that tort cases could fit within the rule).

30. Notes of the Advisory Committee on Rule 23 (1966).

31. *See, e.g.,* Hobbs v. Northeast Airlines, 50 F.R.D. 76 (E.D. Pa. 1970); *In re* Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

32. *In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); *In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986); *In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir.) ("the trend has been for courts to be more receptive to use of the class action in mass tort litigation"), *cert. denied*, 479 U.S. 852 (1986).

33. *See, e.g., In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

34. *See, e.g.*, Mars Steel Corp. v. Illinois Nat'l Bank and Trust Co. of Chicago, 834 F.2d 677 (7th Cir. 1987) (settlement class in consumer rights case); Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982) (settlement class in securities case), *cert. denied*, 464 U.S. 818 (1983); *In*

marry the courts' increased willingness to certify mass tort cases with their increased willingness to use class actions for settlement purposes.

To my knowledge the first mass tort that sought treatment as a settlement class action was the *Bendectin* litigation, which had been consolidated on a multidistrict basis before Judge Carl Rubin of the Southern District of Ohio. A prospective settlement was agreed on during the trial of the consolidated cases during 1984. The settlement called for the creation of a mandatory Rule 23(b)(1) class action comprised of all persons injured by exposure to Bendectin. Judge Rubin, who had previously denied a motion to certify a litigation class action, subdivided the class into two parts (comprised of those persons that had already filed suit and those that had not) and certified the class for settlement purposes. On a petition for a writ of mandamus, the Sixth Circuit vacated Judge Rubin's certification order, holding that Rule 23(b)(1) could not be stretched to fit the facts of the case.[35] But the Sixth Circuit did not entirely dismiss the concept of a settlement class action, noting that "there is precedent for the proposition that a class can be certified for settlement purposes only."[36]

The first successful use of the mass tort settlement class action appears to have occurred in 1986. Olin Corporation, which had seen a prior non-class settlement lead to a second round of 10,000 toxic tort claims filed against it, ultimately agreed to settle the second round of claims for $15 million on one condition: that the settlement occur as a Rule 23(b)(3) class action.[37] Judge U.W. Clemon of the Northern District of Alabama certified the class in *Hagood v. Olin Corp*. The certification decision was never published, and the final judgment never appealed. *Hagood* seems to have gone largely unnoticed in later cases.

re Beef Indus. Antitrust Litig., 607 F.2d 167 (5th Cir. 1979) (settlement class in antitrust case), *cert. denied*, 452 U.S. 905 (1981); *see generally* Herbert Newberg & Alba Conte, Newberg on Class Actions § 11.27 (3d ed. 1992).

35. *See In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 n.11 (6th Cir. 1984).

36. *Id.* at 305 n.11. Because it found that the class action could not be maintained on other grounds, the court did not take a position on Judge Rubin's implicit ruling that "the standards for certifying a class are different depending on whether the class is for settlement or whether it is for trial." *Id.*

37. The case is described in Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, 51 Law & Contemp. Probs. 41 (Autumn 1988), and Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 Law & Contemp. Probs. 61 (Autumn 1990). According to McGovern and Lind, only three persons opted out of the settlement. McGovern & Lind, *supra*, at 49.

The next use of a mass tort settlement class action occurred in 1988, as a part of the A.H. Robins reorganization proceedings. Judge Robert Merhige, Jr. of the Eastern District of Virginia certified a mandatory Rule 23(b)(1) class action of Dalkon Shield victims against Robins' insurer.[38] The objectors to the settlement specifically argued both that mass torts were not susceptible to class action treatment and that the use of Rule 23 to settle a mass tort case was forbidden.[39] Judge Merhige and the court of appeals rejected both propositions, although the rather odd procedural circumstances of the case (claims against an insurer rolled into the insured's Chapter 11 reorganization) and the terms of the settlement itself (providing class members with various payment options, including the ability to proceed to trial when injuries manifested themselves) made Robins sui generis as a precedent.

The idea of the mass tort settlement class action then lay dormant for several more years,[40] until four cases—*Bowling v. Pfizer* in 1992, *Amchem* and *Ahearn* in 1993, and *Silicone Gel* in 1994—employed settlement class actions within the span of two years. After a two-year hiatus, during which the *Silicone Gel* settlement disintegrated and the courts of appeal in *Amchem* and *Ahearn* considered the appropriateness of mass tort settlement class actions, a fifth settlement class action—the *Factor VIII or IX Concentrate* litigation—was certified in 1996. *Bowling, Amchem, Ahearn, Silicone Gel,* and *Factor VIII or IX* form the study group for the present report.

In October 1997, Judge Louis Bechtle approved a settlement class action with respect to certain aspects of an eighth mass tort—*In re Orthopedic Bone Screw Products Liability Litigation*.[41] Unfortunately, the timing of the decision in *Orthopedic Bone Screw* made it impossible to include the case within the present study.

38. *See In re* A.H. Robins Co., 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

39. *Id.* at 727–40.

40. "Dormant" may be a somewhat inaccurate description. During this time period Judge Weinstein used a mandatory class action to restructure the failing Manville Trust, which had been established to resolve Manville's asbestos claims. *See In re* Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710, (E.D.N.Y. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993). Although technically not a mass tort settlement class action, the *Manville* case gave some impetus to later cases in the study. *Manville* was cited, for instance, by the district court, the Third Circuit, and the Supreme Court in *Amchem*. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 319 (E.D. Pa. 1994); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 631 (3d Cir. 1996); *Amchem*, 117 S. Ct. at 2251. It was also cited in *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 520, 522, 526 (E.D. Tex. 1995).

41. *See In re* Orthopedic Bone Screw Prods. Liab. Litig., 176 F.R.D. 158 (E.D. Pa. 1997).

The district court in each of these eight mass torts certified a class and approved the settlement. Three of eight cases (*Robins*, *Ahearn*, and *Orthopedic Bone Screw*) were certified as mandatory class actions;[42] the rest have been opt-out class actions.[43] Five of the cases (*Robins*, *Bowling*, *Amchem*, *Ahearn*, and *Factor VIII or IX*) have been appealed.[44] One (*Robins*) was affirmed on appeal;[45] one (*Amchem*) was reversed on appeal;[46] one (*Ahearn*) was affirmed, vacated and remanded in light of *Amchem*, and affirmed again on remand;[47] the appeal in another (*Walker*) was voluntarily dismissed;[48] and in the last (*Bowling*), the objectors' failure to intervene resulted in dismissal of the appeal.[49]

The impressive track record of settlement class certifications may have been unfairly earned, at least to some degree. When several of the decisions are read in light of the Supreme Court's subsequent opinion in *Amchem*, a number of the district courts appear to have committed a basic legal error: They have assumed that the standard requirements of Rules 23(a) and (b) are somewhat relaxed in the less adversarial, settlement-oriented context of the settlement class action. This assumption, *Amchem* says, is unsound.

42. In a mandatory class action, the class members do not have a right to opt out of the class. *See* Fed. R. Civ. P. 23(b)(1), (b)(2); *cf.* Fed. R. Civ. P. 23(c)(2) (no opt-out right contemplated for Rule 23(b)(1) or (b)(2) class actions). A court may, however, have the discretion to permit a person to opt out of a mandatory class action. *See* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990). Moreover, although no opt-out right is provided for mandatory class actions, a constitutional right to opt out of at least some mandatory class actions may exist. The Supreme Court has twice granted certiorari to consider the issue, but has thus far not resolved it. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994); Adams v. Robertson, — U.S. —, 117 S. Ct. 1028 (1997). *See generally* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

43. As its name implies, an opt-out class action is one in which class members have an opportunity to opt out of the class. *See* Fed. R. Civ. P. 23(b)(3). An adequate notice of the opt-out right must be provided to class members. *See* Fed. R. Civ. P. 23(c)(2).

44. I have not determined if a notice of appeal has been filed in *Orthopedic Bone Screw*.

45. *In re A.H. Robins Co.*, 880 F.2d 709.

46. *Georgine*, 83 F.3d 610, *aff'd, Amchem*, 117 S. Ct. 2231 (1997).

47. *See In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996), *vacated and remanded sub nom.* Flanagan v. Ahearn, 117 S. Ct. 2503 (1997), *and* Ortiz v. Fibreboard Corp., 117 S. Ct. 2503 (1997), *aff'd on remand*, 134 F.3d 668 (5th Cir. 1998).

48. *See* Stipulation to Dismiss, Otis v. Bayer Corp., No. 97-C-2556 (7th Cir., Jul. 21, 1997) (copy on file with court); Order of Dismissal, Otis v. Bayer Corp., No. 97-C-2556 (7th Cir., Jul. 24, 1996) (copy on file with court); personal communication of author with office of the Clerk of the Court for the Seventh Circuit.

49. Bowling v. Pfizer, Inc., 14 F.3d 600 (Table), 1993 WL 533489 (6th Cir. 1993), *cert. denied*, 513 U.S. 916 (1994).

Amchem, which involved the settlement of thousands of asbestos claims by twenty defendants, has established four propositions of importance to mass tort settlement class actions.[50] The first is that class actions can sometimes be used to resolve mass tort controversies. When Rule 23(b)(3) was adopted in 1966, the committee notes to the rule stated that "mass accident" cases presented significant individual issues and were thus "'ordinarily not appropriate' for class treatment."[51] Although acknowledging that courts should continue to exercise "caution when individual stakes are high and disparities among class members great," the Court did recognize that "the text of the rule does not categorically exclude mass tort cases from class certification."[52] Thus, "mass tort cases arising from a common cause or disaster may, depending on the circumstances, satisfy the predominance requirement" of Rule 23(b)(3).[53] Although the view that Rule 23 was unavailable in mass torts has been on the wane since the late 1970s,[54] the Court's acknowledgment and apparent blessing of the modern trend[55] is important.

Unfortunately, the Court stopped well short of articulating the precise significance of the proposition. It did not articulate the "circumstances" under which mass tort class actions might be appropriate. Indeed, its apparent willingness to permit mass tort class actions with respect to a "common cause or disaster" may in fact make it more difficult for mass torts that are not based on a single calamitous event to receive class treatment. Moreover, the Court's apparent approval of mass tort class actions came in the specific context of discussing one of the requirements of Rule 23(b)(3). The Court did not indicate whether other requirements in Rule 23(b)(3), or in Rule 23(a), might still make it impossible to maintain mass tort class actions.

The second proposition that can be derived from *Amchem* is that class actions can sometimes be used to settle litigation. Here again, the Court acknowledged that "the 'settlement only' class has become a stock device" in

50. The decision in *Amchem* was 6–2, with Justice Ginsburg writing the majority decision, Justice Breyer writing a dissent joined by Justice Stevens, and Justice O'Connor not participating in the consideration or decision of the case.

51. *Amchem*, 117 S. Ct. at 2250, *quoting* 1966 Advisory Committee Notes on Rule 23.

52. *Amchem*, 117 S. Ct. at 2250.

53. *Id.*

54. *See supra* note 32 and accompanying text.

55. *See Amchem*, 117 S. Ct. at 2250 (acknowledging that district courts have been certifying mass tort cases "in increasing numbers" since the 1970s).

federal courts.[56] Although the Court made no express holding to this effect, the entire thrust of its opinion is that settlement class actions can be used as long as the case meets the requirements in the text of Rule 23.[57] For instance, as discussed in more detail below, the Court noted that, when "[c]onfronted with a request for settlement-only class certification," a court may disregard some aspects of Rule 23(b)(3), but should give "undiluted, even heightened, attention in the settlement context" to other aspects of Rule 23(b)(3). It would have been unnecessary for the Court to provide this guidance if settlement class actions were per se inappropriate.

Taking the first and second propositions together, it would seem that *Amchem* imposes no absolute barrier to mass tort settlement class actions. That fact is confirmed by the third proposition for which *Amchem* might be read to stand: that a settlement class action such as *Amchem* must meet most, but not all, of the requirements of litigation class actions. A corollary of this proposition is that the fact of settlement is relevant at least in part in determining whether the class-action requirements have been established.[58] In this respect, *Amchem* disagrees with the Third Circuit's prior interpretation of Rule 23, which had been that each of the requirements of Rule 23(a) and 23(b)(3) had to be satisfied "without taking account of the settlement."[59] In particular, the Supreme Court stated that the requirement of Rule 23(b)(3)(D), which suggests that class certification should be denied when a class action would pose insurmountable management problems, had no application in the context of a settlement class action in which the case would not be litigated.[60] Conversely, the Court stressed that the requirements of Rule 23 could not be ignored even when a settlement was substantively fair. This fairness inquiry, which is directed by Rule 23(e), "was designed to function as an additional requirement, not a superseding direction."[61] To read the requirements of Rules 23(a) and (b)(3) out of settlement

56. *Amchem*, 117 S. Ct. at 2247.

57. *See, e.g., id.* at 2248.

58. *Id.* at 2248 ("settlement is relevant to a class certification").

59. *Georgine*, 83 F.3d at 626, *quoting In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 516 U.S. — , 116 S. Ct. 88 (1995). Believing that the Third Circuit did not follow its own interpretation, but rather did consider the settlement in making its ruling on class certification, the Court found no reversible error in the Third Circuit's opinion. *Amchem*, 117 S. Ct. at 2248.

60. *Amchem*, 117 S. Ct. at 2248.

61. *Id.* The Court stressed that "[t]he safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class action context. . . . [T]he standards set for the protection of ab-

class actions would disregard the process for promulgating rules that Congress had established, and might abridge substantive rights in violation of the Rules Enabling Act.[62]

The difficult question in applying this third proposition is deciding exactly which parts of Rule 23(a) and (b) can be de-emphasized in a settlement class action, and which must be strictly complied with. The Court hinted at the answer when it indicated that "other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." Moreover, the Court's own holdings, which found that the settlement in *Amchem* failed to meet the predominance requirement of Rule 23(b)(3) and the adequacy of class representatives under Rule 23(a)(4), suggest that these aspects of Rule 23 are among the provisions that require such "undiluted, even heightened, attention." Likewise, the Court's insistence that a settlement class action should be analyzed in terms "of the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement,"[63] seems to take direct aim at the argument (used by some of the district courts in this study) that the commonality and typicality requirements of Rules 23(a)(2) and (a)(3) are satisfied in the settlement class action context because all class members have a common interest in the settlement. On the other hand, the Court noted that *Amchem* involved "no 'limited fund' capable of supporting class treatment under Rule 23(b)(1)(B)," a point that at least raises a question about whether mandatory settlement class actions might receive somewhat different treatment than opt-out settlement class actions.[64]

The final proposition for which *Amchem* stands is that the decision to certify a settlement class action in *Georgine* was erroneous. The Court found two deficiencies in the *Georgine* class certification: The case failed to satisfy

sent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Id.*

62. *See* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure "shall not . . . abridge any substantive right").

63. *Amchem*, 117 S. Ct. at 2249.

64. *Id.* On remand in *Ahearn*, the Fifth Circuit reaffirmed its original order affirming the trial court's certification and approval decisions. It distinguished *Amchem* on two grounds, one of which was that *Amchem* was not a Rule 23(b)(1) class action. The Fifth Circuit did not analyze what the significance of *Amchem* might be in the Rule 23(b)(1) context. *See Asbestos Litig.*, 134 F.3d 668. Whether any mass tort seeking money damages can be certified as a mandatory class action is equally uncertain. *See supra* note 42.

the predominance requirement of Rule 23(b)(3), and further failed to meet the adequacy of class representation requirement of Rule 23(a)(4). Aside from an observation that the *Georgine* class action was "sprawling," the Court was unclear about exactly why the *Georgine* class failed to meet the predominance requirement.[65] The Court quoted from the Third Circuit's opinion, which the Court stated had "made plain" the reasons that the class failed to meet this requirement.[66] In portions of the Third Circuit's opinion quoted by the Court, the Third Circuit emphasized the differences among the products used and the differences among class members in terms of exposure to asbestos, medical histories, work histories, and contributing causes, such as smoking.[67] In other portions of the Third Circuit's decision not quoted by the Court, the Third Circuit also emphasized the lack of any single event causing the injuries and the fact that "[n]o one operative set of facts establishes liability."[68] Moreover, the upshot of the Third Circuit's decision was that long-term mass torts could never satisfy the predominance requirement unless the case involved "the centrality of a single issue."[69] It is not clear, however, that the Court was accepting these latter portions of the Third Circuit's analysis.

The Court was somewhat clearer about the reasons that the class failed to meet the Rule 23(a)(4) adequacy requirement: In certain regards, the interests of some class representatives and class members conflicted with the interests of other representatives and members. The class in *Georgine* had included both those with present asbestos injuries and those who might have an asbestos injury in the future. Different plaintiffs had been exposed in different ways in different places to different forms of asbestos made by different manufacturers. The Court thought that the "diverse medical conditions" made the task of the class representatives too difficult.[70] The Court also focused on the fact that the settlement made "essential allocation decisions designed to confine compensation and to limit defendants' liability,"[71] a fact that created potential conflicts of interest among class members. For

65. *Amchem*, 117 S. Ct. at 2250.
66. *Id.*
67. *Georgine*, 83 F.3d at 626.
68. *Id.* at 628.
69. *Id.*
70. *Amchem*, 117 S. Ct. at 2251.
71. *Id.*

example, the Court noted that exposure-only (or "future") plaintiffs[72] would want to protect the settlement fund against future inflation, while the presently injured claimants would want large immediate payments. Likewise, the court noted that the settlement made it more difficult for later claimants to seek a trial, and had also eliminated consortium claims.[73] Taken together, these divergent interests made it impossible for the class representatives to represent the class adequately; the settlement contained "no structural assurances of fair and adequate representation for the diverse groups and individuals affected."[74]

Amchem immediately followed this discussion with a quote from a Second Circuit opinion that suggested that subclasses might overcome some of these conflict of interest problems.[75] The Supreme Court did not, however, suggest whether subclasses would necessarily have solved the problems of adequacy of representation, or the exact shape of the subclasses that would have had the best chance of doing so. Nor was it clear that properly substituted subclasses would overcome the Court's other objection to the settlement: the lack of predominance of common issues.

Amchem closed with expressions of concern about the "highly problematic" matter of providing adequate notice to class members, some of whom (such as future spouses and afterborn children) could not even know that they were in the class and others of whom (such as those presently healthy) may have lacked the information to make an intelligent decision to opt out.[76] Although suggesting that the notice in the case may have foundered

72. In this report I use the term "future plaintiffs" to refer to (1) plaintiffs that have not yet suffered an injury that would be compensable when it manifests itself, and (2) spouses, children, parents, and others that could file derivative claims should such an injury be manifested. Under this definition, "future plaintiffs" may possess some present claims—such as emotional distress resulting from fear of injury, increased risk of injury, or medical monitoring—that are valid under state law. If no physical injury has yet occurred, however, they are "future plaintiffs" with respect to their claims for physical injury. Future plaintiffs can be subdivided into two groups: those who have already been exposed to defendants' product or conduct (the "present futures"), and those who have yet to be exposed (the "future futures"). Except with regard to some derivative claimants who may not yet have been born or have married a direct claimant, the settlements in this study involved "present futures"; none involved "future futures," for whom issues such as justiciability and notice are problematic.

73. *Amchem*, 117 S. Ct. at 2251.

74. *Id.*

75. *Id., citing* Joint E. and S. Dist. Asbestos Litig., 982 F.2d at 742–43.

76. *Amchem*, 117 S. Ct. at 2252.

on the requirements of the Constitution and Rule 23, the Court declined to rule on the matter.

Justice Breyer's dissent took the majority to task for failing adequately to defer to the trial court's discretion in deciding to certify the class, for failing adequately to consider the trial court's detailed findings of fact on the adequacy and predominance issues, for failing adequately to consider the trial court's detailed findings of fact on the fairness of the settlement, and for failing to appreciate the unique importance of a settlement that portended an end to a significant portion of the costly and docket-clogging asbestos controversy. The dissent closed with the observations that the issue of the adequacy of notice was also one entrusted in the first instance to the trial court, and that the trial court's favorable finding on adequacy of notice ought not be so "quickly disregarded."[77]

As this monograph will demonstrate, some of the district courts in this study failed to anticipate some of *Amchem*'s analysis, and may therefore have committed (in the retrospective light of *Amchem*) certain legal errors in their decisions certifying the settlement class actions.[78] To suggest that some of the courts may have committed legal error is not, however, the end of the inquiry. With the exception of *Amchem* itself, some or all of the cases might have been amenable to certification under *Amchem*'s more restrictive standards.[79] Moreover, to the extent that *Amchem* precludes certification, legislation or amendments to the Federal Rules[80] could remove all but the constitutional objections to certification.

The critical issues, therefore, are whether settlement class actions are a good idea, and if so, what controls should be placed on them. *Amchem* establishes some of the baseline concerns: adequacy of representation, intraclass conflicts created by the litigation or settlement terms, the possibility of subclasses, the predominance of common issues, and adequacy of notice. The following five case studies are designed to help provide answers to these questions and concerns by examining the workings of mass tort settlement

77. *Id.* at 2258.

78. *See infra* notes 103–08, 145–47, 168–81, 207–09, 224–26 and accompanying text.

79. *See Amchem,* 117 S. Ct. at 2250 (citing *Ahearn* in favorable way); *id.* at 2247 (citing *Ahearn* in generally unfavorable way); *id.* at 2252 (citing *Ahearn* dissent in favorable way).

80. Of course, amendments to the Federal Rules are subject to the limitations of the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) (rules of procedure "shall not abridge, enlarge or modify any substantive right"). *Amchem* raised, but did not resolve, the issue of a settlement class action's consistency with the Rules Enabling Act. 117 S. Ct. at 2244, 2248.

class actions in practice. Along with empirical data[81] and theoretical discussion,[82] the information in this study should provide useful data to those who must chart a course for the future of mass tort settlement class actions. As Judge Edward Becker remarked, "Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving institutional values on the other. [*Amchem*] is such a case."[83]

81. *See*, *e.g.*, Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts (Federal Judicial Center 1996).

82. *See, e.g.*, sources cited *supra* note 16; Symposium, *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. Rev. 1 (1996).

83. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

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Heart Valves: *Bowling v. Pfizer, Inc.*

Introduction[84]

Between 1979 and 1986, Shiley, a wholly owned subsidiary of Pfizer, manufactured two Bjork-Shiley convex/concave heart valves that were intended for implant into persons whose own heart valves were failing.[85] Approximately 85,000 of these valves were implanted worldwide. Allegedly the valves were defective and had an undue tendency to fracture.[86] As of 1992, approximately 450 of these valves had fractured, with approximately 300 of the fractures resulting in death. Pfizer had a policy of confidentially settling all fracture cases.

In addition, many persons with functioning heart valves thought that they should be able to recover for the cost of "explantation" (removal of the Bjork-Shiley valve and replacement with a different valve) and for increased risk of death and/or emotional distress created by the knowledge that the valve might fracture and cause death at any instant. Explantation, however, was a risky procedure for which few were medically eligible. Moreover, as of the date of the settlement's approval in 1992, twenty-seven cases in eleven different jurisdictions had dismissed the emotional distress claims. In the lone exception, a state appellate court in California had reversed a summary judgment in 1990, but the case had not yet gone to trial at the time that the

84. With the exception of clarifying footnotes and citations for direct quotations, no footnotes or other citations to record sources will be used in this case study. Persons interested in the sources for the factual assertions made in this case study should refer to Tidmarsh, *supra* note 7, at 30–61.

85. For the sake of convenience, Shiley and Pfizer will be usually referred to simply as "Pfizer."

86. One of the valves, a 70-degree valve, allegedly had a higher fracture rate than the other valve, a 60-degree valve.

settlement was announced.[87] As the district court said, "no court has *ever* awarded a judgment in favor of a plaintiff with a properly functioning heart valve."[88]

The heart-valve litigation should therefore be regarded as relatively immature. The classic pattern of growth from immaturity to maturity consists of three stages: Early victories for defendants, followed by breakthrough victories for plaintiffs, followed by a fully mature equilibrium.[89] In the heart valve litigation, no fracture cases had yet been taken to verdict, although the prior settlements gave some sense of the value of the fracture claims. The appellate decision in California *might* have been the harbinger of the move of the emotional distress claims to the second stage of breakthrough victories. Whether the litigation would ever have moved through this stage into a mature equilibrium will never be known, for the settlement in *Bowling* effectively ended the controversy.

History of the Lawsuit

Bowling v. Pfizer was filed in the Southern District of Ohio on April 19, 1991, as a litigation class action. On November 19, 1991, while the class certification motion was under advisement, the lawyers for each side met with Judge S. Arthur Spiegel, who presided over the case, to advise him that they were close to settling the suit on a class-wide basis. Judge Spiegel "approved of class counsel's representation of a putative class in the ongoing negotiations."[90]

On January 23, 1992, the parties filed a Joint Motion for Conditional Class Certification for Settlement Purposes, requesting certification under Rule 23(b)(3) of a class comprised of (1) all recipients of either a 60-degree or a 70-degree heart valve worldwide and (2) all spouses of recipients. As finally amended, the complaint in *Bowling* included eight heart valve recipients and seven spouses. The complaint created no subclasses. Thus, implantees and spouses, 60-degree valve implantees and 70-degree valve implan-

87. *See* Khan v. Shiley, 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (1990) (permitting fraud claim for presently uninjured claimant to proceed).

88. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 162 (S.D. Ohio 1992) (emphasis in original).

89. *See generally* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659 (1989).

90. Willging, *supra* note 18, at 3.

tees, and implantees needing reoperation and those never needing such surgery were all represented by the same group of plaintiffs.

On January 23, Judge Spiegel conditionally certified the class, preliminarily approved the settlement, ordered notice to be sent to class members, and set a fairness hearing on the proposed settlement for June 5, 1992.

Prior to the fairness hearing certain objectors sought to obtain discovery from class counsel and Pfizer in order to support their contention that class counsel and Pfizer had colluded in the settlement. Interrogatories and some document production were allowed, but Magistrate Judge Jack Sherman, to whom the objectors' motion to compel was referred, declined to permit depositions—in part because he found no evidence of collusion. That ruling was upheld by Judge Spiegel.[91]

Judge Spiegel conducted three days of fairness hearings on June 5, 8, and 9, 1992. The hearings consisted largely of presentations from plaintiffs' and defendants' counsel, and from two law professors who spoke favorably about the settlement. Limited cross-examination of the professors was permitted; otherwise, objectors were allowed to suggest questions that the court might ask the presenters, but were not allowed to cross-examine the presenters. By the end of the second day, objectors were allowed to present their objections. On the afternoon of the third day, Pfizer's lawyers announced that further negotiations had resulted in certain changes to the settlement generally favorable to the class. At that point, one objecting lawyer, representing 519 opt-outs, withdrew his objections to the settlement.

After rebuttal arguments by proponents of the settlement, Judge Spiegel continued the hearings until July 22. In the interim, on June 16, he wrote a memorandum describing certain ambiguities and difficulties that he perceived in the settlement.[92] When the parties returned to the fairness hearings on July 22, they announced further changes in the settlement, many of which were responsive to Judge Spiegel's concerns. After presentation of the changes, Judge Spiegel took a roll call of objectors. All but the objectors from a putative class in Pennsylvania and from Public Citizen, a public interest organization, had withdrawn their objections.

91. *Bowling*, 143 F.R.D. at 153 & n.10.

92. Bowling v. Pfizer, Inc., 143 F.R.D. 138 (S.D. Ohio 1992). Among the areas of concern identified by Judge Spiegel were the lack of compensation to spouses of implantees, the lack of notice in New Zealand, the handling of foreign claimants, the handling of explantation cases, and the handling of attorneys' fees. In addition, Judge Spiegel requested a two-page summary of the main features of the settlement and the *in camera* production of prior valve fracture settlements.

On August 19, 1992, Judge Spiegel issued the final order certifying the class and approving the settlement.[93]

The Pennsylvania objectors sought valiantly to appeal from this final order, only to discover that their failure formally to intervene in the litigation was fatal to their right to appeal.[94]

Settlement Terms

Class members had, or in the future might have, three distinct sets of claims against Pfizer: (1) claims for emotional distress; (2) claims for reoperation to replace the Bjork-Shiley heart valve; and (3) claims for physical injury or death resulting from valve fracture. In addition, spouses of implantees could assert claims for consortium.

Although the original settlement agreement made no provisions for consortium claims, it sought to address each of the remaining claims through the establishment of two separate funds. The first fund, the Patient Benefit Fund, consisted of $75 million. Approximately half of the fund was to be used for research into diagnostic techniques to identify implantees who may have a significant risk of strut fracture and research into ways of reducing risks for valve replacement surgery; the remainder was to be spent on valve replacement surgeries that met certain guidelines.

The second fund, the Medical and Psychological Consultation Fund, initially consisted of $80 million, and was designed to pay class members for their emotional distress. The parties expected that approximately 20,000 of the 55,000 class members would file a claim against the fund, meaning that each claiming member would receive $4,000. In the event that more than 20,000 claims were received, Pfizer agreed to pay $2,500 per claim for the next 10,000 claims, $1,500 for the next 5,000, $1,200 for the next 5,000, and $750 per claim thereafter. Thus, the total amount of Pfizer's obligations under this fund might have approached or exceeded $130 million. Since the fund was to be divided equally among the claimants, the precise amount available to each claimant was uncertain at the time that class members

93. *Bowling*, 143 F.R.D. 141.

94. *See* Bowling v. Pfizer, Inc., 14 F.3d 600 (Table), 1993 WL 533489 (6th Cir. 1993) (dismissing appeal for lack of standing due to failure to intervene), *cert. denied*, 513 U.S. 916 (1994); *Id.* at 533620 (affirming that trial court had no jurisdiction to entertain motion to intervene while case was on appeal); *Bowling*, 159 F.R.D. 492 (denying post-appeal motion to intervene), *aff'd*, 103 F.3d 128 (Table), 1996 WL 724272 (6th Cir. 1996), *cert. denied*, — U.S. — , 118 S. Ct. 263 (1997).

needed to make their opt-out decision and at the time of the fairness hearing. Moreover, although the ostensible purpose of the fund was to permit class members to obtain medical and psychological consultations, claimants were not required to demonstrate that they had received such counseling or that they were in need of it.

The third type of claim, compensation for injuries resulting from fractures, was handled by means of a novel plan whose heritage lay in the *Robins* settlement. Class members (or their estates) had several options: They could make a claim for immediate payment from Pfizer in accordance with a formula established in the agreement; they could request binding arbitration from a three-member panel; or they could opt out of the alternative compensation mechanisms and proceed with a traditional tort claim. The formula for immediate compensation established compensation levels that ranged between $500,000 and $2,000,000 for American claimants. Foreign claimants were subject to reductions in this basic formula, depending on the determination of a panel established for this purpose. Arbitration awards were to be made for compensatory damages only and were to be based on "historic levels of damages" for a person in the claimant's circumstances.[95] The traditional trial option, sometimes referred to as a "back-end opt out," permitted recovery of all damages, but was subject to nearly all of Pfizer's defenses. No limits on the number of opt outs or on Pfizer's total obligations to fracture victims were imposed.

Pfizer also reserved the right to withdraw from the settlement in the event that an excessive number of claimants excluded themselves from the class during the initial "front-end" opt-out period.

Negotiations during and between the two rounds of fairness hearings led to some significant changes in the terms of the settlement. The Amended Supplement to Agreement of Compromise and Settlement, dated June 9, 1992, included the following changes:

- Clarified that class members whose reoperation claims did not qualify under panel guidelines retained the right to sue for emotional distress, although such a suit destroyed the member's chance to obtain further benefits from the settlement. Qualifying members could also opt out and file suit.

95. Agreement of Compromise and Settlement, Bowling v. Pfizer, Inc., No. C-1-91-256 ¶ 7.4 (S.D. Ohio, Jan. 23, 1992) (copy on file with author).

- Added a lump-sum payment of $38,000 for class members who were entitled to undergo reoperation surgery, as well as $1,500 per week in disability payments.

In the alternative, permitted claimants who died or were disabled during reoperation surgery to make claims for immediate compensation or submit to arbitration on the same terms as fracture victims. The right to file a traditional tort claim was also preserved.

After the conclusion of the first round of fairness hearings and Judge Spiegel's June 16 order, the parties again changed the settlement and entered into the Supplemented Agreement of Compromise and Settlement, dated July 21, 1992. The supplemented agreement made the following additional changes in the settlement:

- Clarified the guidelines for reoperation, so that only objective medical factors and not subjective patient fears would be used to make reoperation eligibility decisions.
- Obligated Pfizer to continue to fund expenses for valve replacements even after it had made its $75 million contribution to the Patient Benefit Fund.
- Added $10 million to the Consultation Fund to be divided equally among spouses of heart valve recipients that claimed against the fund.

The settlement agreement provided that plaintiffs' attorneys' fees were to come from either or both of the two funds created by the settlement. The agreement further contemplated that the award would be based on a percentage of the value of these funds. No percentage was established in the agreement; this was to be left to the court's determination. No provisions were made for attorneys' fees when an attorney helped an individual class member file for benefits from the funds. Pfizer agreed not to contest the plaintiffs' fee application.[96]

96. Class counsel first applied for attorneys' fees on October 9, 1992, about seven weeks after the settlement's final approval. At that time they requested $21.45 million, or 13% of the funds' estimated value of $165 million. In 1995, they increased that request to $33 million (20% of the funds' estimated value), arguing that they had needed to, and in the future would need to, expend additional time and labor. *See* Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1270 (S.D. Ohio), *amended*, 927 F. Supp. 1036 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996). In addition, numerous individual counsel, some of whom had objected to the settlement, requested fees, as did two *amici*. Many of the fee requests were opposed by some class members and by Public Citizen, one of the *amici*.

Judge Nangle, whom Judge Spiegel designated to decide the issue, generally eschewed the use of hourly billing rates augmented by a lodestar calculation. Instead, he awarded plaintiffs'

Shortly after final approval of the class settlement, in November 1992, a group of 333 opt-out plaintiffs settled their claims against Pfizer for $35 million. Individuals received between $40,000 and $300,000 for their emotional distress—considerably more than the amounts awarded to the participating class members. The opt-outs also retained the right to sue Pfizer in the event of a valve fracture—just as the class members had received. On the other hand, these claimants did not obtain the "insurance" provided by the Patient Benefit Fund's payment of reoperation expenses; the no-fault, $500,000-minimum alternative compensation for valve fractures; or the right to arbitration. The group's attorney had been active in heart valve litigation for some time.

Other settlements by Pfizer also ensued. The most significant was a settlement with 259 opt-out plaintiffs—also reportedly for amounts well in excess of the amounts paid to class members for their emotional distress claims.

Handling of Future Claimants

Bowling was a "futures only" class action; although every member of the class had, to the extent that it was legally cognizable, an emotional distress claim, none had suffered physical injury.[97] Two subsets of these claimants were entitled to receive future settlement benefits because of reoperation or valve fracture. It was impossible to know which claimants fell into the two subsets.

The settlement provided a measure of protection to these subsets through its back-end opt-out features. Claimants who thought that they were entitled to reoperation benefits but who were denied coverage retained all tort remedies (in addition to the right to petition the court to obtain eligibility). Even those who were entitled to reoperation benefits had the right to opt out of the settlement's reoperation provisions and sue in tort. Similarly, the claimants that suffered valve fractures retained the right to pursue a tort claim, and also received alternative compensation schemes. No limits on the number of opt-outs, the ability to assert tort claims, or on the damages that could be recovered in tort were imposed.

attorneys 10% of the total settlement, which he valued at $102.5 million. Public Citizen received $105,037.46 in fees (calculated on an hourly basis); all other requests for fees were disallowed.

97. For the definition of "future plaintiffs," see *supra* note 72.

The one difficulty that future claimants encountered was that they were forced to make a decision to opt out of the settlement on May 22, 1992, before a number of clarifying and/or beneficial amendments to the settlement had been made. This fact presented a problem for those that did opt out only to discover that the deal was sweeter than it had seemed to be when the opt-out decision was made. To some extent, this problem has been mitigated; Judge Spiegel has allowed numerous plaintiffs that originally opted out to re-enter the class.

Notice Procedure

The process of notifying the class about the terms of the settlement was less extensive than the process used in the other mass torts under study. Notice was accomplished by mailing (via first-class mail) a legal notice to all class members known to Stanley Chesley, who was class counsel; by Mr. Chesley's provision of 14,000 notices to MedicAlert, which maintained a registry of persons with the Bjork-Shiley heart valve; and by a campaign of newspaper advertising in U.S. and foreign magazines and newspapers. Mr. Chesley's mailing went to 2,349 individuals; it is uncertain how many individuals received the notices supplied to MedicAlert. The total cost of the notice campaign exceeded $3.4 million, with $900,000 paid from the settlement funds and the remainder by Pfizer.

No toll-free phone numbers for further information were listed on either the summary notice or the legal notice. Mr. Chesley's fax number and street address were provided; his telephone number was not.

Approval and Review Process

Bowling required the court to examine the settlement both for procedural impropriety (i.e., collusion) and for substantive insufficiency. The objectors' concern about collusion was hardly fanciful. After years of vigorous litigation, Pfizer suddenly chose to settle with Mr. Chesley, a lawyer known for his class-action settlements, but utterly inexperienced in heart-valve litigation. The case settled before the class counsel conducted any discovery on the merits. A cloud of secrecy hung over the negotiation process. Objecting attorneys dropped their objections, entered into fee-sharing arrangements with class counsel (arrangements never made public), and were appointed special counsel to the class. Pfizer agreed not to oppose class counsel's request for fees. Finally, shortly after the class settlement concluded, other

more experienced attorneys settled large inventories of cases for much greater sums (albeit with a more limited package of benefits).

Once the court had denied discovery into the negotiation process, it became difficult for the objectors to prove collusion as a factual matter. The court indicated that "the proof [of a settlement's fairness] is in the eating"[98]—in other words, a substantively fair and reasonable settlement disproves the existence of collusion. Since the court regarded the settlement as fair, it found no collusion to exist.

In order to determine the substantive fairness of the settlement, the court accepted the standard that a class settlement needs to be "fair, adequate, and reasonable."[99] To give this standard more flesh, the court relied on two presumptions and four factors. The presumptions canceled each other out: the first was that a settlement is presumed fair when it "is recommended by class counsel after arms-length negotiation,"[100] and the other is that a settlement reached prior to class certification requires "a higher level of scrutiny."[101] The four factors were (1) "the strength of the plaintiff's case" in comparison to "the amount and form of relief offered by the settlement"; (2) "the presence of collusion"; (3) "any objections raised by class members"; and (4) "the amount and nature of discovery." The court regarded the first factor as "the key factor."[102]

Among the objectors' arguments was the contention that the class should not have been certified. Their first argument—that settlement class actions are always inappropriate—was rejected by the court. Their second argument—that the requisites of Rule 23 were not established—was also rejected. In the retrospective light of *Amchem*, the court resolved the first argument correctly,[103] and the second argument incorrectly.

With respect to the second argument, the court performed a detailed analysis of the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of both class representatives and counsel. When discussing commonality and typicality, it focused on the plaintiffs' pre-

98. *Bowling*, 143 F.R.D. at 152; *see id.* at 155 ("the taste is in the eating").

99. *See id.*, 143 F.R.D. at 150, 170.

100. *Id.* at 151. "Arms-length negotiation" implies a lack of collusion. Therefore, this presumption further entwines the issues of substantive fairness and collusion, and should have made an inquiry into the collusion issue even more relevant to the decision whether to approve the settlement.

101. *Id.*

102. *Id.*

103. *See Amchem*, 117 S. Ct. at 2248.

settlement legal claims.[104] When discussing adequacy of the plaintiffs as representatives, however, the court focused on the plaintiffs' common interests in the settlement—particularly their interests in achieving compensation for distress, fractures, and reoperations and in having research and development conducted.[105] Although the former analysis is consistent with *Amchem*, the latter appears not to be.[106]

The court's analysis of the Rule 23(b)(3) requirements extended for only one paragraph. The opinion asserted, without further explication, that "common questions as to the Defendant's actions predominate"; and it then held that the equal treatment of class members with low transaction costs made the class action fair.[107] Again, this analysis seems inconsistent with the Court's later decision in *Amchem*.[108]

Modifications in Traditional Adversarial Roles

Lawyers in our legal system are required to act with a high degree of loyalty to their clients' interests and to avoid conflicts of interest. Complex litigation, and class actions in particular, often strain traditional understandings of these ethical responsibilities.

The major allegation of a conflict of interest revolved around Mr. Chesley's alleged collusion with Pfizer. Several other conflicts of interests, however, appear to have been eliminated by the terms of the settlement. For instance, since there were ultimately no caps on Pfizer's agreement to pay for reoperation claims, early "explantees" were not opposed to late "explantees." The same was true of early and late fracture claimants, both of whom were guaranteed that Pfizer would pay the formula amount without limitations on the number of eligible claimants. Likewise, spouses received separate awards, thus preventing a conflict of interest between the married and unmarried.

Some conflicts remained. Because of inflation, early reoperation or fracture claimants received more money (in real dollars) than later claimants. Rich fracture claimants would have been hampered by the $2 million cap;

104. *Bowling*, 143 F.R.D. at 158–59.

105. *Id.* at 159.

106. *See Amchem*, 117 S. Ct. at 2248–50.

107. *See Bowling*, 143 F.R.D. at 160.

108. *See Amchem*, 117 S. Ct. at 2249–50 ("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.").

poor claimants were not handicapped. The 70-degree valve recipients presented a different litigation profile than the 60-degree valve recipients. Nonfracture claimants to whom California law applied were in a better legal position than either those whose cases were to be decided under the laws of states that had already rejected the fraud theory or those whose cases were to be decided under the laws of states that had not yet decided this issue. Simultaneous representation of all of these different interests inevitably generated certain tensions and conflicts. These conflicts were reduced by the back-end arbitration and opt-out provisions, since claimants had opportunities to achieve higher compensation if they chose to accept the opportunity's risk.[109] Nor is it clear that individual class members were in fact harmed by the simultaneous representation; although it is true that some claimants benefited significantly (such as those in states that had rejected a fraud theory), other claimants (such as those in California) may still have received a larger net recovery under the settlement than they would have received in individual litigation.

Irreducible conflicts of interest may have existed, however, with regard to certain aspects of the settlement. Those in immediate need of explantation were unlikely to benefit from the research and development fund, and might well have preferred higher payments for explantation costs. Moreover, although there was, as the court said, "a certain egalitarian fairness" in awarding each member an identical amount from the Consultation Fund,[110] different class members undoubtedly had different emotional reactions to, and different levels of appropriate compensation for, the alleged defect in the Bjork-Shiley valve. No special representation was provided to these groups.

Mr. Chesley did not represent any clients who were already suffering from implant-related injuries, so there was no issue of his divided loyalty between presently injured and future claimants.[111]

109. Early and late claimants could also have been in a conflict situation if the combined assets of Shiley and Pfizer might have been insufficient to fund later claims. Objectors did not seriously contend that insolvency was likely.

110. *See Bowling*, 143 F.R.D. at 160.

111. Some of the special class counsel ultimately brought into the litigation may have had such issues to address.

Assessment

Bowling demonstrated the power of collective action; the class received $80 million in benefits for an emotional distress theory on which no person had been successful at trial. The settlement itself had strengths and weaknesses. The first strength, which reduced conflict of interest concerns and made it difficult to argue that the settlement was unfair, was the back-end opt-out provision. This provision empowered class members to make the decision about using tort or alternative payment schemes at the point when they possessed accurate information about their condition and about the available alternatives. Unlike other settlements we shall study, heart valve claimants were not forced to make opt-out decisions at a time when they were healthy and thus unable to assess accurately their needs for compensation, their preference for risk, and the benefits and drawbacks of tort as opposed to alternative compensation schemes.

A second strength was the court's June 16, 1992, order expressing concerns about the settlement. Since judges cannot usually modify the terms of a class settlement,[112] this vehicle gave the court the chance to engage in a dialogue about the settlement's fairness without the court having to approve or disapprove the settlement. It also left in the parties' hands the decision about whether and how to restructure the settlement. If such a method is to be generally used, however, care must be taken (as the court did in this case) to allow opt-out plaintiffs to re-enter the class after renegotiation makes the deal sweeter.

The settlement also had weaknesses. The first was the limitation on discovery before, as well as the nonadversarial method of presentation during, the fairness hearing. Allegations of collusion and inadequacy of compensation hung over the settlement; in order to assure class members and the public generally about the fairness of the outcome, a fuller opportunity to explore these issues might profitably have been permitted. A second concern was the notice procedure, which relied entirely on individual notice to known claimants and advertisements in large-city newspapers. This process probably did not reach the entire population of potential claimants. Indeed, there appears to be a correlation between the 12,002 claimants who sought

112. At present, courts possess very limited powers to restructure a settlement. *See* Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369 (1995); *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

compensation from the fund[113] and the 14,000–16,000 individual notices mailed out. Given that approximately 40,000 class members were alive when the period for filing claims ended, that the parties anticipated 20,000 claims, and that $2,500 to $4,000 was available virtually for the asking, the low number of actual claimants suggests that the notice program may not have been entirely effective. A third weakness was the lack of subclasses that prevented the full airing of differing interests.

A difficult issue is the distribution of payments from the Consultation Fund. As the court noted, there was an egalitarian fairness to such an equal division, and this division also dramatically reduced transaction costs of implementation. But the plan made no pretense of awarding compensation based on injuries suffered and contributed to a sense that class counsel was representing a hypothetical "average class member" rather than representing the interests of real individuals. But even this egalitarian sense in the distribution of damages was dashed by Pfizer's subsequent settlements with opt outs for six to fifty times as much money. The disparate outcomes for class members and opt outs are, in retrospect, the most haunting feature of this litigation.

113. Of these, 1,680 were disallowed. *See Bowling*, 922 F. Supp. at 1268.

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Asbestos Exposure: *Amchem Products, Inc. v. Windsor [Georgine]*[114]

Introduction[115]

The nature and history of the asbestos litigation is well known.[116] Asbestos litigation followed the classic mass tort pattern to maturity. Manufacturers won the early cases. Plaintiffs adjusted their theories, obtained more and more discovery, and achieved breakthrough verdicts. Defendants fine-tuned their defenses, and plaintiffs fine-tuned their attacks. By the early 1980s, the script for an asbestos trial had essentially been written.

At the same time, the absolute numbers of asbestos cases were rising dramatically. The dockets of state and federal courts whose districts encompassed shipbuilding and other asbestos-using industries became choked with filings. Many cases had at least twenty defendants and created significant case-management problems. Transaction costs to resolve the cases were high.

In 1991, in response to a request from eight federal judges, the Judicial Panel on Multidistrict Litigation agreed to consolidate all federal cases before Judge Charles Weiner of the Eastern District of Pennsylvania. Judge Weiner appointed Gene Locks and Ronald Motley as lead co-counsel of the Plaintiffs' Steering Committee.

After this pretrial consolidation was effected, Messrs. Locks and Motley, along with Mr. Motley's partner Joseph Rice, simultaneously began to ne-

114. In the trial court and court of appeals, the *Amchem* case was known first as *Carlough* and then as *Georgine*. *See supra* note 2.

115. With the exception of clarifying footnotes and citations for direct quotations, no footnotes or other citations to record sources will be used in this case study. Persons interested in the sources for the factual assertions made in this case study should refer to Tidmarsh, *supra* note 7, at 62–93.

116. *See, e.g.*, Paul Brodeur, Outrageous Misconduct (1985); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991).

gotiate a two-prong settlement with the Center for Claims Resolution ("CCR"), a group of twenty like-minded asbestos manufacturers facing 77,000 pending suits nationwide. In the first prong, the CCR agreed to settle for $215 million all of the presently filed claims (the "inventory" claims) being handled by Messrs. Locks, Motley, and Rice and their affiliated counsel.[117] These settlements were concluded in the summer and fall of 1992, and included some claims for pleural changes and some claims that had not yet been filed. In the second prong, the CCR agreed to settle the claims of persons who had not yet filed suit on an opt-out class action basis. The estimated value of this settlement during the first ten years of its existence approached or exceeded $1.2 billion, plus an estimated $317 million in costs. This settlement was concluded on January 15, 1993.

History of the Lawsuit

On the same day, the parties filed a lawsuit, *Carlough v. Amchem Products, Inc.*, to obtain certification of a Rule 23(b)(3) settlement class and approval of the settlement. Simultaneously with the filing of the complaint, the parties moved for conditional certification of the class for the purpose of obtaining approval of the settlement and the appointment of a special master. The class itself, which the Third Circuit described as "a hodgepodge of factually as well as legally different plaintiffs,"[118] included all persons in the United States (or their legal representatives) who (1) had been occupationally exposed to defendants' asbestos products and (2) had not filed suit against the defendants before January 15, 1993. Also included were spouses and other household members who (1) were themselves exposed to asbestos by virtue of their spouses' occupational exposure and (2) had not filed suit before January 15, 1993; as well as unexposed spouses, parents, and children who (1) had derivative claims resulting from a class member's exposure and (2) had not filed suit before January 15, 1993. It was not a requirement of class membership that the member be suffering from any present injury; both presently injured and presently healthy persons were included. No subclasses were created.

The plaintiffs in the case were six individuals who had been exposed to the CCR defendants' asbestos, three representatives of the estates of persons

117. As three of the leading asbestos lawyers in the country, Messrs. Locks, Motley, and Rice represented or were affiliated on more than 14,000 cases nationwide. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 296 (E.D. Pa. 1994).

118. *Georgine*, 83 F.3d at 632.

with such exposure, and three spouses. None of the representatives had yet filed suit against the CCR defendants. Of the nine non-spouse plaintiffs, four of them (or their decedents) had mesothelioma, one had asymptomatic pleural thickening, and four had no symptoms. No asbestosis, lung cancer, or other cancers were represented in the group. No subclasses were created. The size of the class was unknown; it certainly ran into the tens of thousands, and may have run into the millions of persons.

On January 29, 1993, Judge Weiner conditionally certified the class under Rule 23(b)(3), appointed Messrs. Locks, Motley, and Rice as class counsel, and appointed Professor Stephen Burbank as special master. At the same time, Judge Weiner assigned to Judge Lowell Reed of the Eastern District of Pennsylvania the responsibility of conducting the fairness hearings and determining whether to approve the settlement.[119] One of Judge Reed's first tasks was to head off an indirect challenge to the settlement by dissatisfied class members who filed a class action in West Virginia state court. In a decision subsequently affirmed by the Third Circuit, Judge Reed issued on April 15, 1993, a temporary restraining order, later converted into a preliminary injunction, that prevented class members from maintaining or filing related actions while Judge Reed considered the settlement.[120]

Judge Reed then turned to consideration of the settlement. He divided the task into two tracks: a track in which he considered jurisdictional challenges to the settlement and a track in which he considered class certification and settlement approval issues. In the jurisdictional track, which he completed first, Judge Reed rejected all jurisdictional barriers to the settlement.[121] In the certification and approval track, Judge Reed subdivided this task into several stages. First, he conducted a preliminary inquiry into the fairness of the settlement.[122] Relying on proffers, submissions, and oral argument from the settling parties, the objectors, and the amici, Judge Reed preliminarily approved the settlement on October 27, 1993. At the same time, Judge Reed approved, with some modification, the parties' plan for class notice.

119. *Georgine*, 157 F.R.D. at 258. Judge Weiner retained responsibilities with respect to other aspects of the case.

120. *See* Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993).

121. *See* Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437 (E.D. Pa. 1993).

122. *See* Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993). Judge Reed cited the *Manual for Complex Litigation, Second* § 30.41 (1985) in deciding to hold the preliminary hearing. *See Carlough*, 158 F.R.D. at 320.

During this time, the parties, objectors, and amici began preparations for the fairness hearing. Judge Reed accorded parties and others broad discovery rights for the hearing. In a form of mandatory disclosure, Judge Reed first ordered the settling parties to provide objectors with certain information relevant to the settlement. Objectors then were entitled to use traditional means of discovery, such as interrogatories, requests for production, and depositions. But Judge Reed refused to permit depositions of counsel involved in the settlement negotiations; instead, he allowed objectors to depose the named plaintiffs and Michael Rooney, the CCR's chief operating officer, in order to discover why the parties had settled. At the same time, Special Master Burbank was conducting an independent factual inquiry into one aspect of the claim that class counsel had been "bought off" by the CCR. This limited inquiry explored whether class counsel received more for their inventory settlements than they had received in prior settlements with the CCR defendants.[123]

Commencing on February 22, 1994, the fairness hearing lasted eighteen days, spread out over a period of five weeks. A total of twenty-nine witnesses testified; each was subject to direct and cross-examination. Among the witnesses were experts in medicine, finance, and legal ethics. Objectors and amici were given full rights of participation and were given the opportunity to submit post-hearing briefs. A day-long final argument occurred on May 23, 1994.

On August 16, 1994, Judge Reed certified the class action and approved the settlement.[124] On September 21, 1994, he preliminarily enjoined class members who had not opted out from filing suits against the CCR defendants.[125] This injunction was the vehicle for the objectors' appeal to the Third Circuit.

Some additional work still remained in the district court. In the most significant ruling, on February 28, 1995, Judge Reed voided the exclusion requests of the 236,323 persons who had opted out of the settlement during the first opt-out period, and ordered new notices and a new opt-out period for these claimants. The reason was that some objecting attorneys had sent

123. Professor Burbank found that there were some disparities in settlement averages between the prior settlements and the inventory settlements that he examined, although those disparities tended to be small and also tended in some cases to be unfavorable to the inventory settlements. *Georgine*, 157 F.R.D. at 307–08.

124. *Id.* at 246.

125. Georgine v. Amchem Prods., Inc., 878 F. Supp. 716 (E.D. Pa. 1994). Approximately 2,500 class members had filed suit. *Id.* at 721.

to class members misleading communications that might have affected their opt-out decision.[126]

The main battle, however, had shifted to the court of appeals. On May 10, 1996, the Third Circuit vacated the order of the district court certifying the class, vacated a subsequent preliminary injunction against suits by class members, and remanded the case with directions to decertify the class.[127] On June 25, 1997, the Supreme Court affirmed the Third Circuit.[128]

Settlement Terms

The settlement was a complex agreement designed to compensate certain types of asbestos injuries in a predictable fashion. It began by limiting compensation for asbestos exposure to certain types of injuries: mesothelioma; cancers of the lung, larynx, esophagus, stomach, colon, and rectum; and the non-malignant conditions of asbestosis and symptomatic bilateral pleural thickening. It then established specific eligibility criteria, including diagnostic criteria, latency period between first exposure and injury, and necessary duration of exposure for various occupations. As a general matter, class members who did not meet the eligibility criteria were unable to receive compensation.[129] For example, asymptomatic plaintiffs, as well as plaintiffs with pleural thickening that was not bilateral and symptomatic, were unable to make any claims for compensation;[130] they were required to defer their

126. Georgine v. Amchem Prods., Inc., 160 F.R.D. 478 (E.D. Pa. 1995). The second opt-out notice was sent only to those who had opted out in the original opt-out period; those that had originally remained in the class were not allowed to exclude themselves during the second period. *Id.* After this opt-out period, 87,000 class members ultimately chose to opt out. *See* Georgine v. Amchem Prods., Inc., 1995 WL 561297 (E.D. Pa.).

127. *Georgine*, 83 F.3d 610.

128. *Amchem*, 117 S. Ct. 2231.

129. There was one significant exception to this statement: Class members could be selected for compensation as an "Exceptional Medical Claim." *See infra* note 136 and accompanying text.

130. The plaintiffs and the CCR conceded that the eligibility criteria for these plaintiffs were "more stringent than those used by some courts." *Georgine*, 157 F.R.D. at 272. But the court found that the settlement did cover "substantially all persons" with "asbestos-related conditions involving demonstrable impairment," *id.* at 270, and that non-impaired claimants received benefits of "significant value" from the settlement (such as defendants' waiver of liability defenses and statutes of limitation if an impairment ultimately occurred), *id.* at 292. The court did not make findings regarding either the number of impaired class members or the number of non-impaired class members with valid state law claims who were denied compensation by the settlement.

claims until an injury compensable under the settlement manifested itself. Similarly, lung cancer victims who did not meet the eligibility criteria, but who might nonetheless have received compensation in a tort suit, received no compensation.[131]

The second critical concept of the settlement was that certain minimum, maximum, and average compensation levels were established. For a mesothelioma claim, for instance, a minimum payment of $20,000 and a maximum payment of $200,000 were established for qualifying claims.[132] The decision about the actual settlement offer to an individual plaintiff remained within the CCR's discretion, but this discretion was to be informed by two variables. First, the CCR was to take into account such factors as age, dependents, job history, likely forum for the lawsuit, historic settlement values and jury verdicts in comparable cases, and extent of injury. The second variable was an "average" settlement range. At the end of each six-month period, the total amount of the settlements in a particular category of injury, when divided by the total number of cases, was to have fallen within a specified settlement range. For mesothelioma, for example, the average settlement value was $37,000 to $60,000; while the CCR could offer as much as $200,000 or as little as $20,000 in a given case, the aggregate range provided some ultimate upper limit on the CCR's settlement obligations and a lower-end assurance of more than minimal compensation for plaintiffs.[133]

131. One of the objectors' lawyers has estimated that as many as 50% of all lung cancers compensable in the tort system were excluded from the settlement. Memorandum from Brian Wolfman to Tom Willging 4 (Aug. 7, 1997) (copy on file with author). This issue was hotly contested at the fairness hearings. The court ultimately rejected the views of the objectors' experts that significant numbers of these claims were excluded. *Georgine*, 157 F.R.D. at 271, 274. Instead, the court credited the views of the settling parties' experts that the settlement "will fairly include substantially all persons who have asbestos-related malignancies." *Id.* at 270. The court also noted that the "Exceptional Medical Claim" process, *see infra* note 136 and accompanying text, could accommodate some of the remaining lung cancers excluded from the settlement. *Id.* As a result, the court found that "few if any persons with lung cancer . . . would be denied compensation under the Stipulation." *Georgine*, 157 F.R.D. at 274.

132. For lung cancer, the minimum and maximum were $10,000 and $86,000; for other cancer, $5,000 and $32,000; and for non-malignant conditions, $2,500 and $30,000. For specially designated "extraordinary claims," the compensation amounts were higher. *See infra* note 134 and accompanying text.

133. The range for lung cancer was $19,000 to $30,000; for other cancer $9,500 to $12,000; and for non-malignant conditions, $5,800 to $7,500. The figures were capable of being adjusted upwards after ten years, although not by more than 20%. Aside from the

Aside from capping recoveries (both individually and in the aggregate), the settlement established "case flow maximums" which obligated the CCR defendants to pay only a certain number of claims in each category in each year. In the first year, for instance, the CCR agreed to pay no more than 700 mesothelioma claims, 700 lung cancer claims, 200 other cancer claims, and 13,500 non-malignant claims. If more than 700 mesothelioma claims were presented in the first year, the excess claims would take first priority in the year following.

The settlement also gave three other payment options. First, if a person wished an expedited payment, he or she could opt for the minimum compensation for that category. Second, a person could seek "Extraordinary Claim Treatment," for which payouts were somewhat higher, although there were limitations on the numbers of claimants that could use this option.[134] Third, a person unhappy with a CCR offer retained a right to file suit or seek binding arbitration. Unlike the opt-out right in *Bowling*, however, this back-end opt out was limited in three ways. First, those who were deemed ineligible under the settlement's criteria were unable to file suit; their claims were simply barred. Second, only 2% of the mesotheliomas, 2% of the lung cancers, 1% of the other cancers, and 0.5% of the non-malignant conditions could opt out in a given year. If a claimant failed to succeed in opting out in one year, he or she went into a queue, and was able to opt out in some following year.[135] Third, the back-end opt-out right was also hedged in by a requirement that parties first go through a settlement conference before filing suit or seeking arbitration, and by a requirement that no fear of cancer, risk of cancer, or punitive damages could be claimed. Conversely, however, the back-end opt out was more generous than the

CCR's agreement to use certain factors in making settlement awards and the need to account for claimants that accepted the minimal possible award, nothing obliged the CCR to offer more than the minimal average settlement to any individual claimant.

134. Maximum amounts were $300,000 for mesothelioma claims, $125,000 for lung cancer claims, $50,000 for other cancer claims, and $50,000 for non-malignant conditions. No more than 3% of the mesothelioma cases, 3% of the lung cancer cases, 3% of the other cancer cases, and 1% of the non-malignant cases were eligible for treatment as "Extraordinary Medical Claims."

135. For instance, if 10,000 non-malignant claims were filed in 1997, only 50 opt outs were allowed. If 150 persons chose the opt-out route, 50 could file suit in 1997, 50 more in 1998 (assuming 10,000 claims were also filed in 1998), and 50 more in 1999 (assuming 10,000 claims were also filed in 1999). The first 1998 claimant wishing to opt out could not do so until 2000.

right in *Bowling* in one regard: The CCR defendants agreed to waive all defenses or arguments other than causation and damages at an opt-out trial.

The settlement also established dispute resolution mechanisms if the CCR and the claimant disagreed about the claimant's eligibility under the diagnostic, exposure, frequency, or latency criteria. A panel was also created to determine "Exceptional Medical Claims." Under this procedure, claimants whose claims either could not meet the ordinary eligibility criteria or were rejected for payment under these criteria could apply for treatment as an exceptional medical claim. Such claims were to be granted when the panel was convinced that a claimant had "an asbestos-related condition that is substantially comparable to that of [a claimant] who would satisfy the [eligibility] requirements."[136] There were limitations on the total number of exceptional claims that could be deemed eligible each year, and these claims counted toward the case-flow maximums established for each year.[137]

The CCR defendants also collectively reserved the right to withdraw at the outset of the settlement in the event that too many individuals opted out. After the first ten years of the settlement's operation, each CCR defendant could choose either to withdraw from the settlement or to remain in it on a permanent basis. Plaintiffs had no rights of withdrawal.

Finally, the settlement provided that the CCR would pay the class counsel's attorneys' fees. The court was to approve the amount; no formula for compensation was agreed on, nor did the CCR waive its right to object to counsels' fee application. The payment to class counsel was not to be taken from claimants' awards, but was to be paid in addition to such awards. Individual attorneys representing claimants before the CCR were also entitled to receive a fee for their work. This fee, however, was paid from the claimants' recovery, not from the CCR. A maximum contingency fee of 25% was established for such representations.[138]

136. Stipulation of Settlement and Amendment to Stipulation, Carlough v. Amchem Prods., Inc., No. 93-CV-0215 at 45 (E.D. Pa., Sept. 24, 1993) (copy on file with author).

137. For instance, the number of exceptional claims that could be paid at the rate of mesothelioma claims was 5%. The comparable limitations for other disease processes were 20% of the compensable lung cancers, 20% of the other cancers, and 5% of the nonmalignant conditions.

138. No award of attorney's fees was ever made by Judge Reed or Judge Weiner, although the court did authorize the payment of certain expenses by class counsel.

Handling of Future Claimants

Georgine combined in one class action both plaintiffs with present claims and "future plaintiffs."[139] Although a special master was appointed to determine whether the class claimants were being treated differently than prior inventory claimants of class counsel, no special representation of the interests of future claimants was provided during the settlement process.[140]

Notice Procedure

The notice plan adopted in *Georgine* was extensive. Individual first-class notice was mailed to more than 31,000 known class members (or their attorneys) who had filed suit after January 15, 1993. A substituted notice campaign was also conducted. A full-page summary notice was placed in *Parade* magazine and a half-page notice in 292 newspapers in 136 media markets; a second round of advertising occurred in 114 newspapers in the 59 media markets in areas that had high occupational asbestos use. In addition, court-approved "clip art" was supplied to 56 unions and to trade organizations; 35 of these unions then included the notice in publications sent by mail to about 6 million homes. Nine of these unions also mailed individual notices to 400,000 members. Thirty-second television ads were also placed in 80 media markets covering 69% of all households with TVs. Public service announcements and press releases were prepared. A toll-free phone number was established, a question-and-answer book was prepared, and a more complete 40-page notice (including a 14-page appendix) was developed. As a result of these efforts, an additional 325,000 notice packets (or the full Stipulation of Settlement) were mailed to requesting persons.

The total cost of the notice program slightly exceeded $7 million. The costs of the notice program were borne by the CCR defendants.

139. For the definition of "future plaintiffs," see *supra* note 72.

140. The settlement did provide certain protections for future plaintiffs. First, future claimants could bring claims based on conditions that developed subsequent to an earlier compensable injury. Second, the parties agreed in an amendment to the settlement to permit the AFL-CIO to participate in annual audits of the CCR's implementation of the settlement. On Judge Reed's recommendation, Judge Weiner also appointed David Shrager as special class counsel to represent the class's interests in the annual audits.

More than 320,000 persons requested the notice materials. The court estimated that about 6.8 million class members received notice through first-class mail or through other individually delivered notice.[141]

Approval and Review Process

In advance of the fairness hearing, the court accorded broad discovery rights to objectors. In addition to these procedures, the court appointed a special master who conducted an inquiry into aspects of the settlement's fairness. Trial-like procedures, with rights of direct and cross-examination, were used at the fairness hearing.

The *Georgine* case raised serious and sustained challenges on the grounds of collusion and substantive fairness. The collusion claim in *Georgine* was rather different than the one in *Bowling*: In *Georgine*, the objectors claimed that counsel had sold out the class members in return for sweetheart deals on the settlement of their "inventory" claims. The court broke the analysis into two parts: a conflict of interest analysis and a collusion analysis. In the conflict of interest category, the court placed class counsel's contemporaneous efforts to settle present and future claims, as well as class counsel's purported agreement to not represent (or at least to not give advice to sue to) claimants with no present injury. In the collusion category, the court placed the possibility that class counsel had received more for their "inventory" clients than for the class members. The court ultimately found neither a conflict of interest nor collusion, and the Third Circuit did not disturb the district court's findings of fact on these issues.

In order to determine the substantive fairness of the settlement, the court used the standard benchmark: Was the settlement "fair, adequate and reasonable?"[142] The court also broke the analysis of this standard into two parts: first, an analysis of the major provision of the settlement agreement, in which the court considered objections and made individual findings of the fairness of each of the terms; and second, an analysis of the overall fairness of the settlement. In the second inquiry, the court was guided by a group of factors: (1) the strength of the claims against the benefits to class members; (2) the stage of proceedings and the amount of discovery—in other words, the case's maturity; (3) the reaction of the class; and (4) how

141. The number may be inflated, since some recipients of the notice were probably not class members and others may have received double notice.

142. *Georgine*, 157 F.R.D. at 319.

and by whom the settlement was negotiated.[143] The first factor was stated to be primary in the court's analysis.[144]

The retrospective lens of the Third Circuit and Supreme Court opinions have identified the court's legal errors in certifying the settlement class. Of particular interest are the court's conclusions that (1) the Rule 23 requirements "are often more readily satisfied in the settlement context because the issues for resolution by the court are more limited than in the litigation context";[145] and (2) Rule 23(b)(3) was satisfied when there existed a common interest in prompt and fair compensation and a fair overall settlement.[146] Although a piece of the first conclusion was validated in *Amchem*, neither proposition survives *Amchem* unscathed.[147]

Modifications in Traditional Adversarial Roles

Georgine presented class counsel with significant ethical issues. Many of the ethical issues concerning class counsel have already been explored. One set of ethical concerns, however, has only been touched on lightly: the simultaneous representation of potentially conflicting sets of future claimants. The court analyzed this issue not in terms of an attorney's ethical obligation, but rather in terms of the adequacy of the named plaintiffs as representatives of the class. The Third Circuit and the Supreme Court did the same. The ultimate conclusion of the latter two courts was that the interests of various segments of the class (for instance, near and far future claimants, presently injured and presently uninjured claimants, direct claimants and derivative claimants) could not be represented in a single class. This suggests that, under traditional notions of legal ethics, class counsel had irreconcilable conflicts of interest when they attempted to represent all these interests.

There also existed two sets of potential conflicts not explored by these courts: the difference between cancer victims who met the restrictive criteria for compensation and those who did not, and the difference between those asymptomatic or mildly impaired plaintiffs who would have fared better under the tort system and those asymptomatic or mildly impaired claimants who would have fared better under the settlement. Although the district court addressed the issue of whether the settlement provisions were substan-

143. *Id.* at 319–20.
144. *Id.* at 320.
145. *Id.* at 315.
146. *Id.* at 316. For this proposition, the court cited *Bowling*, 143 F.R.D. 141.
147. *See supra* notes 59–63 and accompanying text.

tively fair to these groups, it did not address the distinct question of whether one set of attorneys could ethically represent both groups. As *Amchem* cautions, however, substantive fairness and separate representation for distinct interests are two different questions.

Assessment

The strengths of this case are the procedural protections with which the fairness hearing was conducted and the thoroughness of the district court's analysis of the issues it faced. Unlike *Bowling*, there is no sense that important questions may have been left undiscovered. The process led to a full airing of relevant issues and a well-reasoned (albeit ultimately reversed) opinion.

There were weaknesses as well. The lack of separate classes or subclasses to account for different interests within the class, as well as class counsel's simultaneous representation of inventory claimants and class members, cast a pall over the settlement, and ultimately brought about its demise. The plan for notice was good, but with a class as sprawling as *Georgine*, notice undoubtedly escaped the attention of significant numbers of class members.

The CCR-controlled compensation mechanism—as opposed to a trust or a court-annexed settlement system—was an interesting concept that required various checks, such as minimal settlement amounts and average settlement ranges. It was, however, the existence of these checks, as well as the differences they created between inventory and class claims, that generated some of the intransigent problems in the case. Moreover, the limitations on back-end opt outs deprived most future claimants of the power to make litigation decisions at the time when they possessed the best information, and as a practical matter forced most eligible claimants to use the settlement system. Whether such a system might have worked—or whether it would have created unfair advantages for early-in-the-year or late-in-the-year filings—is an interesting, and now not to be resolved, issue.

Asbestos Exposure Redux: *Ahearn v. Fibreboard Corp.*

Introduction[148]

One of the asbestos defendants that was not part of the Center for Claims Resolution was Fibreboard Corporation. Fibreboard had not been a large player in the asbestos industry, nor was it a particularly wealthy one. As other, larger manufacturers went into bankruptcy, however, joint and several liability made it an increasingly attractive target. One of the reasons it was so attractive was because, during the 1950s, Fibreboard had signed two insurance contracts that arguably gave it complete insurance coverage for all claims of pre-1959 asbestos exposure. The assets of the two insurance companies, Continental Casualty and Pacific Indemnity, were considerable—if they could be tapped by asbestos victims. Fibreboard contended that the insurers' policies required Continental to defend and pay, in unlimited aggregate amounts,[149] all claims in which an asbestos victim had been exposed to Fibreboard asbestos prior to March 16, 1959; Pacific had a similar obligation for all exposures prior to May 5, 1957. At a massive consolidated trial that lasted four years, Fibreboard prevailed on most issues. Continental and Pacific immediately appealed.

In 1992, during the pendency of the appeal, Fibreboard entered into a complete settlement of its dispute with Pacific, in return for which Pacific agreed to pay Fibreboard somewhere between $30 million and $380 million (depending on the outcome of the appeal). Fibreboard also sought to put pressure on Continental by settling cases with asbestos plaintiffs for a nego-

148. With the exception of clarifying footnotes and citations for direct quotations, no footnotes or other citations to record sources will be used in this case study. Persons interested in the sources for the factual assertions made in this case study should refer to Tidmarsh, *supra* note 7, at 94–128.

149. The policies did have $500,000 per person and $1 million per occurrence limits.

tiated amount. In some cases, Fibreboard paid a percentage of the amount in up-front cash, and then entered a "Structured Settlement Program" under which payment of the remainder was deferred until the conclusion of the California coverage case. In other cases Fibreboard put no cash down and assigned to the settling plaintiffs its rights against Continental. Since plaintiffs were accepting a degree of risk in either of these settlements, they often received higher values in settlement than was typical of comparable asbestos settlements. Therefore, Continental was facing the prospect of paying off some rather pricey settlements *if* these "assignment-settlements" were valid and *if* it lost the California coverage case. The first of these conditions came to pass when a California state court ruled that Fibreboard's assignments did not breach its contract with Continental.

At the same time, Fibreboard, like the CCR, was trying to find a global solution to its asbestos crisis. Like the CCR, in 1991 it sought out several plaintiffs' lawyers who had figured prominently in Fibreboard cases, including Joseph Rice[150] and Joseph Cox, from the Ness, Motley firm in South Carolina; Steven Kazan, from a firm in California; and Harry Wartnick, from a different firm in California. The original idea was to reach a global settlement value for all present and future claims and then to assign to the lawyers the right to proceed against Continental. Eventually, in spring 1992, the negotiations broke off.

Soon afterwards, Fibreboard representatives approached Messrs. Rice and Cox to negotiate a settlement of present claims with their firm alone. They achieved a settlement (called the "Initial Ness Motley Agreement"[151]) of 20,000 claims in December 1992. Judge Robert Parker then requested Judge Patrick Higginbotham of the Fifth Circuit to act as settlement facilitator. Sometimes with Judge Higginbotham's intervention, but more frequently in private discussions, the next few months saw a dizzying array of agreements (often interspersed with dead-ends):

- On April 9, 1993, Continental and Fibreboard agreed to work together toward a global solution. Continental also agreed to work with Fibre-

150. Mr. Rice was also one of the class counsel in *Georgine*.

151. This Initial Ness Motley Agreement was later superceded by the "Substitute Ness Motley Agreement." *See infra* note 153 and accompanying text. After conclusion of the Initial Ness Motley Agreement, Fibreboard had agreed to $943 million in assignment-settlements and also owed more than $1.2 billion in deferred payments under its structured settlement program. *Asbestos Litig.*, 90 F.3d at 970. These liabilities far exceeded its assets of approximately $235 million.

board to renegotiate and pay the structured settlement and assignment claims Fibreboard had been settling at a premium.[152]

- On August 5, Fibreboard and Continental modified the Initial Ness Motley Agreement, and agreed to settle 45,000 pending cases with the Ness, Motley firm. The new agreement was called the "Substitute Ness Motley Agreement." Under this agreement, Continental paid "a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement."[153] Ness, Motley also agreed to recommend the settlement of all future claims on the same terms as the Substitute Ness Motley Agreement.
- On August 9, Judge Parker held a hearing on the fairness of the Substitute Ness Motley Agreement and found it fair and reasonable.
- Immediately thereafter, and at Judge Higginbotham's suggestion, Judge Parker appointed Messrs. Rice, Cox, Kazan, and Wartnick to act as negotiating counsel for a mandatory Rule 23(b)(1)(B) class of future claimants.
- On August 27, 1993, an agreement in principle was reached to settle, on a class-wide basis, all unfiled claims against Fibreboard for $1.535 billion. The great bulk of this settlement ($1.525 billion) came from the insurers; the remainder ($10 million) came from Fibreboard.
- At the same time, Fibreboard's insurers agreed to provide Fibreboard with $475 million to be used to defend and pay all `resently filed claims (other than those claims that had previously settled and were being renegotiated). This settlement was contingent on approval of the class settlement.
- Also at the same time, Fibreboard and its insurers agreed to a "back-up" agreement in the event that the settlement of unfiled claims was not approved. This agreement was called the "Trilateral Settlement Agreement," and provided Fibreboard with $2 billion ($1.525 billion plus $475 million) to defend and pay all filed and unfiled claims.

The impetus for the final flurry of negotiations was an appellate argument slated for August 27 in the insurance coverage case. Both Fibreboard

152. The face value of the settlements subject to renegotiation approached or exceeded $2.2 billion. It was estimated that this undertaking to renegotiate was worth at least $1 billion.

153. *Asbestos Litig.*, 90 F.3d at 971 n3. Since Continental agreed to fund some payments under this agreement, however, the Substitute Ness Motley Agreement reduced the level of average compensation paid to claimants from the level in the Initial Ness Motley Agreement.

and its insurers had a great deal to lose if the appellate court found against them, and wished to avoid the all-or-nothing risk of the appellate judgment.

History of the Lawsuit

Ahearn v. Fibreboard Corp. was filed on September 9, 1993. It alleged that the case should be certified as a Rule 23(b)(1)(B) class action. In *Ahearn*, one representative had asbestosis, one had mesothelioma, and one had no present injury. No spouses or legal representatives were named as representatives. The class that the representatives sought to represent included (1) all persons that had been exposed to Fibreboard asbestos prior to August 27, 1993, but as of August 27, 1993, had not filed suit or settled a claim against Fibreboard; and (2) all past, present, and future spouses, children, and others that could assert a derivative claim. No subclasses were established.

On September 9, Judge Parker provisionally certified the class and enjoined further suits against Fibreboard. Subsequently, Fibreboard brought a third-party mandatory defendant class action against all entities that might file contribution or indemnity claims against it. Owens-Illinois was named as the third-party class representative.

The early stages of the litigation focused on structural issues and finalization of the various agreements. Judge Parker granted Continental and Pacific the status of party-intervenors; appointed Messrs. Rice, Cox, Kazan, and Wartnick as class counsel; and appointed Professor Eric Green as guardian ad litem for the class. The Trilateral Settlement Agreement was finalized on October 12, 1993. The underlying Global Settlement Agreement was finalized on December 23, 1993, as was the Third-Party Claimant Class Settlement Agreement.

The parties then began preparing for the fairness hearing. Full rights of discovery were accorded the parties. Objectors filed requests for document production and took numerous depositions. Unlike *Bowling* or *Georgine*, depositions of the settling counsel were permitted.

On June 29, 1994, at the insistence of Continental and Pacific, a separate suit, *Continental Casualty Co. v. Rudd*, was filed seeking declaratory and injunctive relief against two mandatory, non-opt-out classes: the plaintiffs in *Ahearn* and the potential third-party claimants against Fibreboard. The insurers sought a declaration that the back-up Trilateral Settlement Agreement was fair and reasonable, and extinguished the rights of defendant class members against the insurers.

Shortly afterwards, on December 12, 1994, the fairness hearing commenced on the *Ahearn* global settlement. It lasted for eight days, spread over

two weeks in December and January. Standard trial processes—opening and closing statements, as well as direct and cross-examination—were accorded the proponents and objectors to the settlement. Numerous experts testified. In addition, some of the settling counsel (including Mr. Cox and Fibreboard's attorney) were called as witnesses. The guardian ad litem also presented a statement.

On February 13, 1995, a trial was held in *Rudd*. At the end of the trial, the two defendant classes consented to the relief requested by the insurers. After notice, the court held a fairness hearing on May 9, 1995. The hearing lasted one day and incorporated much of the evidence from the *Ahearn* hearing.

On July 27, 1995, the court issued an opinion in which it certified *Ahearn* as a non-opt-out class action under Rule 23(b)(1)(B) and *Rudd* as a non-opt-out class action under Rules 23(b)(1)(A), (b)(1)(B), and (b)(2). The court found the global settlement and the back-up Trilateral Settlement Agreement to be fair and reasonable, and it approved them.[154]

Objectors appealed in both *Ahearn* and *Rudd*. The Fifth Circuit affirmed both cases, with Judge Smith dissenting.[155] Objectors in *Ahearn* petitioned for a writ of certiorari, but objectors in *Rudd* did not. On June 26, 1997, the day after it decided *Amchem*, the Supreme Court vacated *Ahearn* and remanded with instructions to consider the case in light of *Amchem*.[156] On January 27, 1998, the Fifth Circuit again affirmed the judgment in *Ahearn* in a short per curiam decision, with Judge Smith again dissenting. In its operative paragraph, the majority found that "[T]here are two differences between this case and *Amchem*. First, this class action proceeded under Rule 23(b)(1); *Amchem* was a Rule 23(b)(3) case. Second, there was no allocation or difference in award, according to the nature or severity of injury, in the present case as there was in *Amchem*; in the case here all members of the future claimant class are treated alike."[157]

154. Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995). An amended judgment in *Rudd* was submitted on August 31, 1995.

155. *Asbestos Litig.*, 90 F.3d 963. A petition for rehearing with a suggestion for rehearing en banc was denied. *In re* Asbestos Litig., 101 F.3d 368 (5th Cir. 1996). The denial was not without some controversy. Only eleven of the seventeen judges of the Fifth Circuit participated in the decision on the petition. Of these eleven, six voted for rehearing, and five did not. Although the six were a majority of those deciding the issue, they were not a majority of the entire court, thus requiring denial of the petition. *See id.* at 370 (Smith, J. dissenting).

156. *Flanagan*, 117 S. Ct. 2503; *Ortiz*, 117 S. Ct. 2503.

157. *In re* Asbestos Litig., 134 F.3d 668 (5th Cir. 1998).

Since the judgment in *Rudd* is now final, the back-up Trilateral Settlement Agreement is already in place. After the reaffirmance in *Ahearn*, however, parts of the Trilateral Settlement Agreement will be superseded by the Global Settlement Agreement unless *Ahearn*'s judgment is reversed in further proceedings in the Fifth Circuit or the Supreme Court.

Settlement Terms

The terms of the settlements are complex. The easiest way to unpack them is to examine first the insurance settlements with Fibreboard, and then to understand how the moneys provided in that settlement affected class members.

As a result of the April 9, 1993, agreement and the Trilateral Settlement Agreement, several matters were established:

- Continental agreed to renegotiate and pay the claims of all prior cases that Fibreboard had settled (many of which involved an assignment of Fibreboard's rights against Continental). The total value of this undertaking was thought to be in the range of $1 billion.
- Continental and Pacific agreed to pay Fibreboard $475 million, with which Fibreboard could pay unsettled claims filed prior to August 27, 1993, as well as costs of defense in these cases.
- Continental and Pacific agreed to pay Fibreboard $1.525 billion that Fibreboard could use to pay claims and defense costs for all future asbestos claims asserted by victims or third parties.
- Fibreboard released Continental and Pacific from any further responsibility under their policies.

The Trilateral Settlement Agreement, which was negotiated after the Global Settlement Agreement, acted as a back-up in the event that the Global Settlement Agreement failed. The Global Settlement Agreement did not affect the commitment to renegotiate prior settlements or to provide $475 million to settle existing lawsuits. It did, however, propose to settle, on a mandatory class basis, all claims of the future Global Health Claimants and the Third-Party Claimants. Its basic terms were as follows:

- The Global Health Claimant class received $1.535 billion, $1.525 billion of which came from the insurers and $10 million of which came from Fibreboard.
- A trust mechanism was established to distribute proceeds.
- The Third-Party Claimant class received no immediate compensation. Fibreboard agreed not to sue members of the class for contribution or indemnity, and third-party class members agreed not to sue Fibre-

board. Third-party class members were entitled to receive the offset provided by state law for moneys paid a plaintiff by the Fibreboard trust, and if a plaintiff collected from a third-party member before collecting from the Fibreboard trust, the third-party member became entitled to obtain payment from the trust.

- A release of the insurers by the claimants and Fibreboard, and an agreement that the trust would hold the insurers harmless.

Therefore, if the *Ahearn* settlement were approved, Fibreboard's obligation to all plaintiffs with unfiled claims would be capped at $1.535 billion, only $10 million of which came from its own assets. If the settlement were not approved, it bore full exposure for all unfiled claims, but it had a pot of $1.525 billion (plus its own assets) with which to pay off such claims. In either event, as long as the Trilateral Settlement Agreement was approved, the insurers had bought total peace, and had no further obligations for Fibreboard's present or future asbestos claims.

Critical to the *Ahearn* settlement was the distribution plan for the class claims. A trust was established to handle distributions. Payments were made to persons that fell into one of five disease categories: (1) mesothelioma; (2) lung cancer; (3) other cancer (larynx, pharynx, esophagus, stomach, colon, or rectum);[158] (4) asbestosis or else multi-site lung fibrosis consistent with asbestos exposure and not involved with other disease processes;[159] or (5) pleural changes such as plaques or thickening. Like *Georgine*, fear or increased risk of cancer claims were not compensable. Unlike *Georgine*, asymptomatic pleural changes were compensable. Moreover, unlike *Georgine*, there were no restrictive medical, frequency, or duration requirements for eligibility; all that was required was proof of exposure and a diagnosis of a scheduled disease by a qualified physician. And, unlike *Georgine*, persons with other disease processes were able to receive compensation from the trust if the claim was substantially comparable to one of the five scheduled diseases.

After satisfying itself of a claimant's eligibility, the trust was to evaluate the case based on a range of factors (such as age, dependents, income, functional impairment, smoking history, and responsibility of other parties), and then determine the full settlement value of the case. After doing so, it was to determine Fibreboard's share of this settlement value using two

158. *Georgine* did not permit compensation for cancer of the pharynx; otherwise the categories were the same.

159. Again, the *Georgine* criteria were more restrictive.

methods: discounting for non-Fibreboard exposure, and considering historically comparable settlement values. If these two methods agreed, the trust would offer that amount. If the values disagreed, the trust would offer a settlement somewhere between the two values.

Claimants dissatisfied with the trust's offer could either negotiate further or proceed to mediation. If no resolution occurred within thirty days of the mediation, the claimant could submit to either binding or non-binding arbitration. In the event that non-binding arbitration was chosen, a still-dissatisfied claimant could reject the award and seek a mandatory settlement conference with Judge Parker or his successor. The trust was able to make an offer that remained in effect for another thirty days. If still dissatisfied, the claimant could file suit. If a claimant ran this ADR gauntlet and succeeded at trial, the trust paid the judgment.

A trial, however, would have important limitations. First, Fibreboard retained all its defenses. Second, its liability was several; it could be held responsible only for its share of responsibility. Third, no punitive damages could be sought. Fourth, a cap of $500,000 was placed on recovery.[160]

Third-party claims were handled in a similar fashion, although there was no option to file suit.

Although there were no case-flow limitations as there had been in *Georgine*, the trust had certain spendthrift provisions that limited the amount of money that could be paid in a given year to annual earnings of the trust plus a fraction of the principal. If the spendthrift provisions kicked in, more serious claims were paid first. Other claimants were deferred to future years, where they had priority over later-filed claims in the same category (but not over later-filed claims in a higher disease category).

Class attorneys' fees were not to exceed 3% of the settlement, were to be paid by Fibreboard's insurers, and were subject to approval by the court. Counsel that represented claimants before the trust were entitled to costs and a fee not to exceed 25% of the compensation paid (net of costs).[161]

160. To some extent these limitations were more theoretical than real. Fibreboard had never paid a punitive damage award, and had paid more than $500,000 in only a small handful of cases. Since the per-injury limit in the insurance policy was $500,000, the $500,000 cap was the most that plaintiffs could likely have expected in any event.

161. Subsequently fees of approximately $38 million, or slightly less than 3% of the total recovery, were awarded to class counsel and counsel for one intervenor.

Handling of Future Claims

Like *Georgine*, *Ahearn* combined in one class action both plaintiffs with present claims and "future plaintiffs."[162] A guardian ad litem was appointed in order to provide additional protection to class members against the possibility that class counsel's representation of claimants with already-filed cases created a conflict of interest. But no protections or precautions were taken to ensure representation of the special interests of future plaintiffs in the settlement class.

Notice Procedure

An extensive notice campaign—a $22 million effort that was probably the most comprehensive in the history of class action practice—was funded by the insurers. The notice plan, which was developed and implemented by the firm that had also done the *Georgine* notice, was more extensive than *Georgine* in several regards. Individual notice was mailed to every victim whose name was known, as well as to all co-defendants, most major insurers, and most large shipbuilders. Like *Georgine*, extensive notice was provided to trade and union organizations; notice was also provided to various industry groups and to the American Association of Retired Persons. Lawyers who had handled asbestos claims were notified. Complete notice packages were sent to 589,845 class members in *Georgine*, 520,998 persons requesting notice, and 171,669 persons known to have worked at job sites that used Fibreboard products. In total, more than 1.4 million complete notice packages were mailed.

The media campaign was equally extensive. Summary notice was published in *Parade*, *USA Weekend*, and *Business Week*. Advertisements were taken out in 286 newspapers in 151 markets, followed by a second wave of advertising in 171 newspapers in the 72 of these markets that had the highest historic asbestos litigation. Television advertising also occurred in two rounds: national advertising of a 30-second spot in 160 markets that reached 94.2% of American households with televisions an average of 5.1 times, followed by 2,859 repeats of the same spots on cable and local television in the 72 largest markets. Advertising was also placed in 29 Spanish-language newspapers, and in 57 newspapers in 21 foreign countries (involving 10 foreign languages). Television spots were purchased on 46 Spanish-language stations. Promotional and public relations material was also prepared. A

162. For the definition of "future plaintiffs," see *supra* note 72.

toll-free phone number was established, and a question-and-answer booklet was provided with the complete notice package.

Approval and Review Process

Full rights of discovery were accorded to the objecting parties. The hearings utilized standard trial procedures. Experts in a range of fields (legal, ethical, financial, and claims administration) testified. The court also obtained information from a guardian ad litem.

Like *Georgine*, *Ahearn* required the court to examine the case both for procedural impropriety and for substantive insufficiency. The concern for collusion arose from the possibility that the class counsel had sold out the *Ahearn* plaintiffs in return for a better deal on their present claims. Unlike *Georgine*, the objectors were not able to demonstrate a clear disparity in treatment for present and future claimants, since no specific dollar amounts or ranges were assigned to the future claims.[163] Moreover, given that the Substitute Ness Motley Agreement was agreed upon on August 5, 1993, and that the unfiled plaintiffs' settlement negotiations did not begin in earnest until August 9, 1993, it is difficult to find the same external indicia of collusion that were present in *Georgine*.

Some reasons for concern did, however, exist. First, while its insurers paid billions, Fibreboard walked away from the settlement with all but $10 million of its own $235 million in assets intact. Second, half of the amounts payable under the Substitute Ness Motley Agreement to the present clients of Messrs. Rice and Cox was contingent on either a global settlement that provided the insurers with total peace or a judgment for Fibreboard in the coverage litigation. Since the latter contingency was clouded with uncertainty, Messrs. Rice and Cox had an arguable reason to push the class settlement even if it was not in the best interests of the class. Third, Ness, Motley was the same firm of whom collusion had been suspected in *Georgine* (albeit on rather different facts).[164] Fourth, claimants with settled cases, claimants with filed but unsettled cases, and claimants with unfiled claims were all competing for Fibreboard's limited resources (which amounted to $235 million plus the value of the chance of victory in the California coverage litigation). Under the various settlements, these claimants

163. Objectors apparently tried very hard (and very unsuccessfully) to prove a differential in the district court. They essentially abandoned the argument on appeal.

164. This concern was somewhat muted, since the other class counsel in *Ahearn*, Messrs. Kazan and Wartnick, were objecting to the settlement in *Georgine*.

had different levels of risk. Present claimants got full payments, subject to some downward renegotiation. Filed but unsettled claimants ran the risk that $475 million (plus Fibreboard's post-settlement assets) would be insufficient to pay their claims in full. Claimants that had not yet filed (especially those in the far future) ran the risk that the trust's assets would be insufficient to pay their claims. Since class counsel's settled claims fared best, collusion was one (but again only one) explanation for the greater risk levels that the filed but unsettled and unfiled claims assumed.

The court found that none of these concerns demonstrated collusion. The court sought to dispel the idea of collusion by repeatedly stating in its opinion that negotiations were "hard-fought" and "arm's-length."[165]

The court used a "fair, reasonable and adequate" standard as the ultimate test in determining whether to approve the settlement.[166] To guide this decision, the court cited six factors: (1) existence of fraud or collusion; (2) complexity, expense, and likely duration of litigation; (3) stage of proceedings and amount of discovery completed; (4) probability of plaintiffs' success on the merits; (5) range of possible recovery; and (6) opinions of class counsel, class representatives, and absent class members.[167]

Serious questions about the *Ahearn* class's satisfaction of Rules 23(a)(2), (a)(3), and (a)(4) existed. Whether the class satisfied Rule 23(b)(1)(B) was also disputed. In resolving these issues, the court's opinion went through each of the relevant Rule 23 elements separately, and at some length. It began with the observation that some courts had relaxed the Rule 23 standards in the settlement context, but eschewed that approach and assumed (correctly, in retrospective light of *Amchem*) that "Rule 23(a)'s requirements are no different in the settlement context than in the litigation context."[168] The opinion also avoided in part the trap into which *Bowling* and *Georgine* stepped. Rather than focusing on the class's common and typical interest in an expedient settlement, as the earlier two cases had erroneously done,[169] the opinion focused on the class's common and typical interest in reducing the risk from the insurance coverage litigation—which is the type of pre-

165. *See Ahearn*, 162 F.R.D. at 515, 517, 521, 528.

166. *Id.* at 528.

167. *Id.*

168. *Id.* at 523. The Fifth Circuit did not directly address this issue, although it noted (correctly in light of *Amchem*) that the factor of settlement and the evidence adduced at a fairness hearing can be considered in deciding whether Rule 23's elements have been met. *Asbestos Litig.*, 90 F.3d at 975.

169. *See supra* notes 105–06, 146–47 and accompanying text.

settlement interest that *Amchem* permits courts to consider.[170] The court did, however, identify common interests in the settlement as a factor favoring typicality; this, *Amchem*'s subsequent analysis suggests, the court should not have done.[171]

While the Rule 23(a) analysis appropriately identified one common pre-settlement interest, the opinion avoided any inquiry into other pre-settlement interests (such as individual medical and exposure histories and differing state law) that suggested less commonality and typicality among class members.[172] Second, the court's opinion did not address the fact that only those persons exposed to Fibreboard asbestos before 1959 had a direct interest in avoiding the risk of the coverage litigation; post-1959 exposure victims had no legal entitlement to the insurance proceeds, and therefore a somewhat different interest in the resolution of the dispute.[173] How that difference should have played into the analysis was not explored.[174]

The court broke the adequacy of representation issue into two parts: (1) the adequacy of (and conflicts for) class counsel and (2) the adequacy of the named representatives. The former issue has already been explored.[175] With respect to the adequacy of the representatives themselves, the court focused on some of the potential intra-class conflicts (primarily pre-1959 vs. post-1959 and presently injured vs. future plaintiffs), but did not focus on others

170. *See supra* note 63 and accompanying text.

171. *See Amchem*, 117 S. Ct. at 2248–50 (noting that common interest in settlement could not satisfy predominance requirement of Rule 23(b)(3)); *id.* at 2249 n.18 (suggesting link between this requirement and Rule 23(a)(3) typicality requirement). The Fifth Circuit seems to have come closer to contravening *Amchem*'s subsequent analysis since it focused more on common settlement interests and less on common pre-settlement interests. *See Asbestos Litig.*, 90 F.3d at 975–76.

172. In fairness to the court, it had done such an analysis before. *See* Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986). But *Ahearn* was a far more sprawling affair than *Jenkins*.

173. Obviously, post-1959 victims had an interest in a financially healthy Fibreboard, and to the extent that a resolution of the coverage case helped to assure that fact, they too had an interest in its resolution. But that interest is distinct from the interest of those who were arguably entitled to insurance proceeds. Indeed prior to the settlement, post-1959 claimants had tended to receive "substantially lower" payments from Fibreboard in settlement than pre-1959 claimants. Notice of Class Action, Global Settlement and Third Party Claimant Class Settlement and Hearing, Ahearn v. Fibreboard Corp., No. 6:93cv526 at 30 (E.D. Tex.) (copy on file with author).

174. The Fifth Circuit also did not discuss the question. *See Asbestos Litig.*, 90 F.3d at 975–76; *Asbestos Litig.*, 134 F.3d 668.

175. *See supra* note 165 and accompanying text.

(near vs. far futures, direct claimants vs. derivative claimants, claimants who fit within the scheduled diseases criteria vs. claimants who did not). Rather, the court asked whether the class representatives, who were named after the settlement had been essentially agreed to, had an adequate stake in the litigation. It held that they did.[176]

In making its ruling on Rule 23(b)(1)(B), the court focused on the "limited fund" theory that has become increasingly popular in mass tort litigation.[177] The limited fund in the case was the $1.525 billion provided by the insurers and the other assets of Fibreboard. Whether this is an appropriate use of Rule 23(b)(1)(B) is unclear for several reasons;[178] but, on the assumption that this use is permissible, the court's analysis seems generally sound. There was, however, one fact-specific concern, raised by the objectors, about the use of Rule 23(b)(1)(B): Fibreboard paid fewer than all of its assets into the settlement. Whether there can be a "limited fund" class action when less than all of the possible fund is placed before the court is a difficult issue,[179] and could lead to serious consequences if counsel's collusive decision to settle a case for a small pot of dollars then gave the defendant the ability to argue that this pot entitled it to use a non-opt-out class action. The court resolved the problem by stating that fewer than all of a defendant's available assets can constitute a limited fund as long as the underlying settlement is fair.[180] Whether this approach violates *Amchem*'s holding that

176. *Ahearn*, 162 F.R.D. at 525–26; Finding of Facts 279–88, 343–72, Ahearn v. Fibreboard Corp., No. 6:93cv526 (E.D. Tex., July 27, 1995). The Fifth Circuit explored the pre-1959 and post-1959 conflict and the "near vs. far" conflict, but not the others. *Asbestos Litig.*, 90 F.3d at 980–82.

177. *See In re A.H. Robins Co.*, 880 F.2d 709; *Agent Orange*, 100 F.R.D. 718 ("limited fund" certification for punitive damages only). *But see Northern Dist. of Cal. Dalkon Shield*, 693 F.2d 847 (rejecting "limited fund" theory in mass tort case). Because the possibility of a loss in the insurance coverage litigation also threatened to impair the interests of class members, the parties were also able to invoke Rule 23(b)(1)(B) even without using the "limited fund" concept.

178. For some of the possible problems with this use of Rule 23(b)(1)(B), see *Asbestos Litig.*, 90 F.3d at 982–88.

179. An equally difficult issue is whether a limited fund class can be certified when fewer than all the claimants against the fund (in Fibreboard's case, both tort and non-tort creditors) are present in the case.

180. *Ahearn*, 162 F.R.D. at 527.

a settlement's fairness does not override the procedural protection of Rule 23(a) and (b)[181] is uncertain.

Objectors also raised the argument that a mandatory class action in a case seeking money damages was unconstitutional. This argument derives from the Supreme Court's decision in *Shutts*, in which a state class action that provided absent `laintiffs with an opt-out right was held constitutional. Whether such an opt-out right is constitutionally required in cases involving money damages, and whether such a right would apply to federal class actions, were not addressed in *Shutts*; nor has the Supreme Court subsequently resolved the issue.[182] The Fifth Circuit resolved the matter by holding that *Shutts* did not apply to Rule 23(b)(1)(B) class actions.[183]

Modifications in Traditional Adversarial Roles

Ahearn and *Rudd* presented several possible conflicts of interest for the lawyers. The stake that class counsel's present claimants had in a successful settlement of the unsettled and unfiled claims generated certain ethical concerns. Prior to the settlement, post-1959 claimants, who had no possible entitlement to insurance proceeds, had tended to receive substantially lower settlements from Fibreboard than pre-1959 claimants; under the settlement, both groups were treated as near-equals.[184] The failure either to designate a class representative with a consortium claim or to provide any compensation for those claims meant that the derivative rights of these claimants were not fully represented.[185] A potential conflict between already-filed and un-

181. *Amchem* made clear that it was not addressing Rule 23(b)(1)(B) in its discussion. *See* 117 S. Ct. at 2249 n.19. Its recognition that settlement is sometimes, but not always, relevant to satisfaction of Rule 23's criteria, see *id.* at 2248–50, could cut in either direction with respect to this issue.

182. *See Shutts*, 472 U.S. 797, *supra* note 42 and accompanying text.

183. *Asbestos Litig.*, 90 F.3d at 986–87.

184. The only point at which the different positions of pre-1959 and post-1959 claimants might be considered was the trust's consideration, as a factor in making its settlement awards of the historical settlement averages of "similar cases." It is not clear, however, whether pre-1959 or post-1959 status was a relevant factor in deciding "similarity" of cases. Moreover, the use of historical settlement averages was not the only method used to determine the trust's settlement offers. Thus, post-1959 claimants were likely to fare better under the trust than they had in litigation. Pre-1959 claimants did not necessarily fare worse, although the risk that the trust's assets would eventually be exhausted created some tensions between post-1959 claimants and "far" pre-1959 claimants.

185. This problem is particularly acute for "future futures"—future spouses and children not yet born. *See supra* note 72 and accompanying text.

filed claims also existed, although a series of precautions made this concern more hypothetical than real.[186] Since the potential for the insolvency of the trust fund was hardly speculative, near and far claimants also had divergent interests. In this regard, the major conflict lay between the present and near claimants (both of whom were fairly well guaranteed payment for an historical settlement average) on the one hand, and the far claimants (whose payment was less assured) on the other.

Like *Georgine*, significant questions of class counsel's ability ethically to represent both present and future claimants were fully vented at the fairness hearing and in the district court's findings of fact and opinion. Unlike *Bowling* and *Georgine*, however, these issues could not be muted by allowing class members to opt out. Hence, the ethical questions of a single class and simultaneous representation were starkly presented.

Assessment

In many ways, it appears that the lawyers in *Ahearn* went to school on *Georgine*, and tried to craft an even more airtight asbestos settlement. As in *Georgine*, the broad-ranging discovery and exhaustive fairness hearing in *Ahearn* gave a strong sense that the court's ultimate decisions were well-informed and based on credible evidence; in *Ahearn*, however, more discovery was allowed and an even greater sense of confidence in the approval process was engendered. Some of the restrictive criteria for compensation in *Georgine* were removed in *Ahearn*. Separate negotiation periods and the settlement's effort to mimic the tort system reduced some of the intra-class conflicts that infected *Georgine*. As in *Georgine*, the notice campaign was extensive; in *Ahearn* and *Rudd*, however, the campaign was even more comprehensive, and again created a greater sense of confidence. The extensiveness of the campaign is ironic, since, as mandatory class actions, *Ahearn* and *Rudd* were the cases least in need of comprehensive notice. Be that as it may, as a general matter the settlement in *Ahearn* has a sturdier feel that the settlement in *Georgine*.

Given the similarity of the issues in *Georgine* and *Ahearn*, it is surprising, and somewhat troubling, to see the rather significant differences in the two settlements on important matters such as procedures used (opt-out vs. mandatory), compensation mechanisms (defendant-controlled vs. trust

186. The primary protection was the fact that the trust's offers to future claimants were to be consistent with historical settlement patterns in prior claims.

mechanism), compensation levels (scheduled payment ranges vs. replication of tort compensation), eligibility criteria, and limitations on the exercise of back-end opt-out rights. Some of these differences were driven by the *Fibreboard* coverage litigation and the insurers' demands for total peace. Nonetheless, it is undeniable that a person who worked with both Fibreboard products and CCR-defendant products on the same job received two markedly different processes for recovery. This larger issue of fairness and equality was never raised by the parties or the courts in either case.

The insurers' insistence on total peace also made this the most structurally complex of the settlements under study. The posture of the insurance coverage litigation provided *Ahearn* with a flavor and a set of procedural and substantive twists that were present in no other case. The posture of *Ahearn* also created the unique factual hook that the parties and court used to justify the use of a mandatory class action. How useful *Ahearn* can be in other settlement class-action contexts is therefore uncertain.

The questions of commonality, typicality, and adequacy of representation were somewhat different in *Ahearn* than in *Georgine*, but the common issue of how best to conceptualize class interests remained. Divergent interests among class members existed, yet no subclasses or separate classes were established. Clearly, mass tort settlement class actions are raising difficult ethical issues for counsel, and the way in which one conceives of the lawyer's role and resolves these ethical issues may well determine whether settlement class actions can ever be utilized. They also raise different but comparable issues about the judicial role in certification and approval decisions in mass tort settlements.

Ahearn took significant precautions that sought to "perfect" the mass tort settlement class action. Whether even these precautions were adequate is the central question raised by these cases. Indeed, the overarching lesson of *Bowling*, *Georgine*, and *Ahearn* is that it is impossible to decide whether mass tort settlement class actions are a good idea without first clarifying the roles and ethical demands that lawyers and judges in these broad-sweeping social controversies must meet.

Breast Implants: *Lindsey v. Dow Corning Corp.*

Introduction[187]

After silicone gel products became the preferred breast implantation devices in the 1970s, hundreds of thousands of women worldwide received silicone gel implants. Spurred on by two large judgments in the early 1990s and an FDA moratorium on silicone gel breast implants in 1992, the breast implant litigation had the most explosive and meteoric rise among the mass torts under study. Within a few months of the FDA action, hundreds of state and federal suits had been filed; within two years, a global, $4.2 billion class settlement had been engineered; within three years, the settlement had collapsed and a major American corporation had filed for Chapter 11 reorganization.

The rush of filings in the early 1990s led to efforts to consolidate cases. Reacting to the 78 cases already filed in the federal system, the Judicial Panel on Multidistrict Litigation, on June 25, 1992, consolidated the federal cases for pretrial purposes before Judge Sam Pointer, Jr. of the Northern District of Alabama.[188] By September 1994, the number of cases consolidated in the MDL proceedings had risen to nearly 10,000.

In 1993, Judge Pointer appointed a group of five lawyers, selected from the seventeen lawyers on the plaintiffs' steering committee, to serve as negotiating counsel. By the end of 1993, the largest manufacturer of implants, Dow Corning, and two other major defendants had negotiated a settlement

187. With the exception of clarifying footnotes and citations for direct quotations, no footnotes or other citations to record sources will be used in this case study. Persons interested in the sources for the factual assertions made in this case study should refer to Tidmarsh, *supra* note 7, at 129–68.

188. *In re* Silicone Gel Breast Implants Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992). At the time of transfer, Judge Pointer had no breast implant cases pending before him. *Id.* at 1098 n.1.

of their claims for roughly $4 billion. Further rounds of negotiation resolved the divisions of funds among claimants, the precise language of the agreement, and the percentage contributions among defendants. By the time other defendants had signed on, the face value of the settlement had risen to $4.225 billion.[189] It is the largest settlement in this study—and the largest mass tort settlement ever.

That such a large settlement would occur in the *Silicone Gel* litigation is surprising. Although aggressive pretrial discovery had been conducted, there were few verdicts or settlements on which to base appropriate settlement values. The scientific evidence on causation was, and still is, murky.[190] Overall, the *Silicone Gel* litigation was an immature tort.

History of the Lawsuit

On March 23, 1994, the plaintiffs filed *Lindsey v. Dow Corning Corp.*, a class-action complaint designed to give effect to the settlement. The *Lindsey* complaint listed seven plaintiffs, all of whom were women with breast implants. The class they sought to represent included the following: (1) all persons—in the United States and worldwide—who "have or may have in the future (whether filed or unfiled, existing or contingent, and specifically including claims for injuries or damages not yet known or manifest)" any claims arising out of a breast implant manufactured by a settling defendant before June 1, 1993; (2) all children of these class members prior to the date of notice; and (3) spouses, children, parents, and others with claims based on their relationship with implant recipients or their children.[191] There were no subclasses to distinguish women from children, presently injured from presently healthy, "near" future-injured from "far" future-injured, wife from husband, or foreign from domestic.

189. This amount represented the face value of the settlement. Since payments by many of the main defendants were to be made over the course of thirty years, the present value of the settlement was less.

190. In 1996 Judge Pointer appointed a panel of experts to help determine the validity of some of plaintiffs' claims regarding long-term or chronic disease processes. For the original order and updates on the progress of the panel, see <http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm>.

191. After the fairness hearings, the court excluded from the class those persons who lived in Australia, Ontario, and Quebec. These persons were, however, free to affirmatively opt in. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., 1994 WL 578353, at *17 (N.D. Ala.). The court also limited the class of children to those born prior to April 1, 1994. *Id.* at *24–25.

On April 1, 1994, the court entered an order that preliminarily approved the settlement, conditionally granted class certification under Rule 23(b)(3), approved a notice plan, and scheduled a fairness hearing.[192] The preliminary approval precipitated a flood of filings either seeking compensation from the settlement,[193] opting out of the settlement, or objecting to the settlement. No formal discovery was conducted in advance of the hearing, although some information was informally requested and produced.

The fairness hearing was spread out over three days: August 18, 19, and 22, 1994. Didactic presentations were made; there was no testimony, and therefore no direct or cross-examination. No medical or legal experts testified, although two doctors submitted affidavits. The hearings opened with remarks from plaintiffs' counsel, after which persons (some class members, some lawyers) were able to speak for or against the settlement. The hearing closed with remarks from members of the plaintiffs' steering committee.

The court certified the class (with some modifications) and approved the settlement (also with some modifications) on September 1, 1994.[194] Problems began to develop almost immediately. First, 14,300 class members chose to opt out of the settlement. Since the defendants had expressly reserved the right to withdraw if the number of opt outs was excessive, the settlement weathered its first crisis when the defendants decided on September 9 to remain in the settlement. Second, the number of class members that filed claims vastly exceeded expectations; the settlement had been negotiated in the expectation that only 60,000 claims would be submitted, but approximately 440,000 claims were ultimately filed. Since the $4.23 billion fund was the maximum that the defendants had agreed to pay, this number of claims meant that the claimants' recoveries would be severely "ratcheted down" from the original amounts projected in the settlement. Under the agreement, current claimants who had not initially opted out retained a second right to opt out in the event that "ratcheting down" occurred. Although the exact amount of ratcheting down was unknown, the settling defendants faced a hard choice: contribute more (possibly much more) to the settlement or face great numbers of new opt-out claims.

192. *In re* Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926), 1994 WL 114580 (N.D. Ala.).

193. By the time of the fairness hearing in August, more than 90,000 claims had been submitted. The number of claims eventually mushroomed to 440,000.

194. *Silicone Gel*, 1994 WL 578353.

Negotiations to revamp the settlement continued during the next several months. Ultimately, however, an impasse was reached, and on May 15, 1995, Dow Corning, which had originally agreed to fund $2 billion of the settlement, filed a petition in the Eastern District of Michigan for Chapter 11 reorganization. Shortly thereafter, an analysis of the claims suggested that claimants would be able to receive only 5% to 16% of the amount originally promised in the settlement, and that full funding of the settlement at the originally agreed-upon values would require additional contributions of $24 billion. On October 7, 1995, Judge Pointer sounded the death knell of the settlement, stating that there was "no justification for keeping the current settlement in place."[195] He allowed all class members who so desired to opt out of the settlement.

Toward the end of 1995, after the court's continued efforts at mediation, five of the original *Lindsey* defendants proposed a new settlement of claims against them. Class counsel declined to recommend the settlement, and no class representative consented to the proposal.

The court stated that it retained the "reserved general supervisory authority" under the original settlement to approve the revised settlement.[196] Its reasoning was that the original settlement, to which class counsel and class members had consented, had warned of the possibility of "ratcheting down" of benefits, and had stated that a second opt-out opportunity would be provided. The revised settlement provided less severe "ratcheting down" than the original settlement would have done, and provided class members an individual opportunity to opt out after being told of the amount of their revised benefit. Since the revised agreement merely notified claimants about changes in the terms of the original settlement, there was no need for consent prior to the settlement's approval.

The court approved the revised settlement agreement on December 22, 1995.[197] It issued the approval order *sua sponte*—without notice, arguments, briefing, or a fairness hearing. Under the order, a new notice period was established, and *Lindsey* class members were again able to opt out of the

195. 1-16-97 WLN 14603, at 51 (quoting Order No. 26, Lindsey v. Dow Corning Corp., No. 94-CV-11558 (N.D. Ala., Oct. 7, 1995)).

196. *See* Breast Implant Litigation Notice, Lindsey v. Dow Corning Corp., No. CV 94-P-11558-S at 1 (N.D. Ala., Dec. 22, 1995) (copy on file with author).

197. Order No. 27, Lindsey v. Dow Corning Corp., No. 94-CV-11558 at 2 (N.D. Ala., Dec. 22, 1995) (copy on file with author). Final judgment on this order was entered under Fed. R. Civ. P. 54(b).

settlement either before or after receiving notice of the amount that they would receive in settlement.

Settlement Terms

Since *Lindsey* sought to include both persons presently suffering from an implant injury and those who might suffer an injury in the future, the original global settlement was rather complex. The revised, post-Dow Corning bankruptcy settlement was simpler, and considerably different.

1994 Settlement. According to the original agreement, a basic distinction was to be drawn between "Current Claimants" and "Ongoing Claimants." Current claimants were those suffering an injury that was immediately compensable under the terms of the settlement; ongoing claimants were those whose injury was not yet compensable, but might become so at a later date. In order to be eligible for payment, both types of claimants were required to register with a claims office established by the agreement. A claimant who failed to register by the appropriate date would become a "late registrant" whose claim would be paid only if money remained to pay timely filed claims.

After the claims office made a determination of eligibility, a claimant became entitled to compensation. How much compensation was recovered depended on several variables. The first was the fund from which the claimant sought funding. The agreement contemplated the creation of separate funds. One fund, designed for current claimants, constituted 31.6% of all funds, or about $1.3 billion. The fund for ongoing claimants constituted 51.6% of all funds, or about $2.1 billion, but it was payable in yearly increments, so that only so much money would be available each year. The third fund, called the "Designated Funds," constituted 16.8% (or $700 million) of all funds, and was used to establish other programs and pay fees and costs.[198]

198. The designated funds included a reserve fund and discrete funds to reimburse class members' medical diagnosis and evaluation, to compensate for explantations, to compensate ruptures not otherwise compensated under the fund, to pay certain other eligible claimants, and to pay attorneys' fees, costs, and costs of settlement administration.

Ultimately the court decided to set aside 24% of the total settlement for costs of notice, administration, and attorneys' fees. Thus, the net amounts in each fund were $1.2 billion in the current claimant fund, $1.515 billion (payable in increments over thirty years) in the ongoing claimant fund, $75 million in the explantation fund, $220 million in the rupture fund, $75 million in the implant recipient compensation fund, $75 million in the reserve fund, and $1.02 billion in the fund for reimbursing administrative expenses and attorneys' fees.

Once the correct fund was determined, the next step was to determine the appropriate level of compensation. This was a two-step task. The first step was to fit the claimant onto a compensation grid. The grid had two axes: a disease axis and an age axis. The disease axis contained the four disease processes for which compensation was allowed, as well as subcategories based on severity. The age axis broke age into 35 and under, 36–40, 41–45, 46–50, 51–55, and over 56. Once a person's disease and age were known, the grid provided the exact dollar amount of compensation. For instance, an under-35 woman with lupus in the highest severity category received the highest possible award: $2 million. The same-aged woman with the least severe form of lupus received $200,000. A 60-year-old woman with severe lupus received $1.5 million. A 60-year-old woman with mild lupus received the lowest award in the grid: $150,000. Decisions about classification of a claim were subject to appeal to the claims administrator, and ultimately to the district court.

Once the scheduled amount had been determined, the second step of the analysis came into play. Since the defendants provided only so much money, it was possible that there would not be enough money to pay everyone's claims at the scheduled rate. In that event, the agreement required that the payments to eligible claimants be "ratcheted down" by reducing compensation levels according to a predetermined formula. As a general matter, the less severe diseases were ratcheted down first and most severely. Significantly, ongoing claimants were entitled to compensation only at the "ratcheted down" rate actually paid to current claimants, not at the scheduled rate.

Because of this "ratcheting down" effect, the agreement provided class members with a second opt-out right that could be exercised at the time the claimant learned the degree of ratcheting down. But important distinctions existed between current and ongoing claimants with regard to their back-end opt-out rights. First, current claimants who opted out retained "all rights under applicable law that existed prior to the execution and approval of this agreement," including a right to assert claims for punitive damages; while ongoing claimants who opted out at the back end were required first to participate in non-binding mediation and lost the right to assert punitive damages.[199] Second, current claimants could opt out freely if their benefits were ratcheted down, while ongoing claimants could opt out only if they

199. Breast Implant Litigation Settlement Agreement, No. CV-92-P-10000-S at 19, 23–24 (N.D. Ala., Mar. 24, 1994) (copy on file with author).

were scheduled to receive less than the "ratcheted down" level of benefits actually paid to current claimants.

No compensation was provided to children who had allegedly suffered from a direct injury resulting from exposure to silicone. The agreement contemplated, however, that a medical panel could in the future permit such compensation and establish eligibility guidelines. No compensation was provided for derivative injuries. Nor were derivative claimants allowed to opt out if the direct claimant remained in the class.

The settlement made three distinctions between domestic and foreign claimants. First, a maximum of 3% of the current and ongoing compensation funds was set aside for foreign claimants, with the expectation that, as in *Bowling*, compensation guidelines for foreign countries would be developed. Second, foreign claimants could not participate in the six "designated funds." Third, foreign claimants could not become "late registrants"; they were simply barred from participating in the settlement. Finding the first two of these limitations a bit draconian, the court refused to approve them as written, instead stating that it intended to treat the 3% cap as a guaranteed set aside and ordering that 3% of the designated funds also be set aside for foreign claimants. The court did not, however, seek to modify the third restriction.

Each defendant reserved the right to withdraw if an excessive number of opt outs occurred.

Neither an amount nor a method of calculating attorneys' fees was stated in the agreement.

1995 Revised Settlement. The revised settlement was entered into by Bristol-Myers, Baxter, 3M, McGhan, and Union Carbide, and was to run for fifteen years. A current claimant was automatically entitled to an advance payment of $5,000 (to be credited against later payments, if any) just for remaining in the settlement class. Current claimants with implants from one of the settling defendants had two additional options. First, they could elect payment of a sum certain (ranging from $10,000 to $50,000) for various disabilities. The disabilities were rated in categories from A through D, with certain disease processes fitting into each category. If a current claimant chose a sum certain, an additional amount (ranging from $15,000 to $50,000) was also paid for an envelope rupture. Unlike the original settlement, age was not a variable in determining compensation.

Second, a current claimant could gamble on a second option, under which plaintiffs meeting a more restrictive set of medical criteria could be eligible for payments of $75,000 to $225,000. If such a condition did not develop within the fifteen years of the program, the claimant would get

nothing more than a $5,000 advance payment—even if she met the looser criteria for payment under the first option. Conversely, if a claimant took the first option, she could never seek greater compensation under the second option, even if she later met those more restrictive criteria.

Ongoing claimants and late registrants to the *Lindsey* settlement were entitled to participate only in the second option. But ongoing claimants were entitled to an immediate $1,000 payment (to be credited against later payments, if any) if they remained in the class.

In addition to these benefits, a person (other than a late registrant) who underwent explantation was entitled to $3,000 for expenses of surgery.

Because the defendants paid only so much each year, it was possible, as with the original settlement, that claims might be ratcheted down. An opt-out right was extended if that occurred, but no punitive damages could be awarded in an opt-out trial. In addition, the settling defendants imposed a $755 million cap on their obligations to pay under the second, higher-benefit option.

To avoid some of the problems of the 1994 settlement, claimants were first required only to register and submit information (if they had not already done so). They were then to be notified by the claims office about their status and entitlement, if any, to compensation. Only after this notification were they required to decide whether to opt out.

Attorneys' fees for recovery under this settlement were capped at 10% of the first $10,000, 22.5% of the next $40,000, and 30% of all amounts thereafter. Defendants also agreed to pay 6% of all amounts paid under this settlement into a "common benefit" fund that the court had previously established.

The revised program has had some effect. 102,400 notices were sent out, 51,500 of which went to current claimants. 51,934 claimants opted out. Advance payments of either $5,000 or $1,000 have been sent to 79,000 claimants, with additional checks for $5,000 to $95,000 having been sent to 18,300 of these 79,000. 14,600 also received the $3,000 explantation benefit. Total settlement expenditures for the defendants thus far have amounted to $565,593,000.[200]

200. *See* <http://www.fjc.gov/BREIMLIT/mdl926.htm> (updated Mar. 2, 1998). This source does not explain the discrepancy between the 102,400 notices sent out and the more than 130,000 persons that either opted out or received settlement benefits. Moreover, when combined with the $755 million cap on payment under the second option, the $565 million payment under the revised settlement means that the settling defendants will pay no more than $1.4 billion to settle their claims and are unlikely to pay even that much. The same de-

1997–1998 Dow Corning Proposals. As part of its reorganization proceedings, in August 1997 Dow Corning proposed to pay $2.4 billion to breast implant victims. After rejection of that proposal, Dow Corning, in February 1998, increased the proposal by $640 million to approximately $3 billion. Although it is uncertain that this proposal will be approved, some of its features are useful for comparative purposes. Unlike the original settlement, but like the revised settlement, all breast implant recipients who opt for the settlement will receive some cash—a minimum of $1,000. The maximum recovery under the proposal would be $200,000, about 10% of the original settlement amount but comparable to the amounts paid in the revised settlement. Like the revised settlement, a rupture claim would add $15,000 to $50,000 to the base amount. A separate litigation trust was also established to pay for women who preferred to try their cases, but payment from that trust was contingent on a single trial at which a jury would have to determine that the implants caused particular illnesses. Under the revised Dow Corning proposal, foreign women would receive 60% of the amounts due to American women.

Handling of Future Claimants

Silicone Gel involved both presently injured claimants and those presently healthy.[201] Special precautions for the handling of future claims included a medical panel to add future claims to the list of scheduled diseases, a weak inflationary index, and the segregation of the fund from which future claims would be paid. There were, however, problems with these arrangements.

First, and foremost, when the settlement was signed, it was unknown how many present and future claimants there might be, or whether the funds designated for future claimants (which constituted 51.6% of the settlement proceeds) would be adequate. The negotiating parties had no statistical basis for their allocation decision; according to one objecting attorney, the only justification for the allocation decision presented at the fairness hearing was that the allocation was the result of bargaining among the parties. Second, the settlement contained a tension between near and far fu-

fendants had been willing to contribute more than $2 billion to the original settlement. Of course, the companies may have been willing to contribute less to the revised settlement because they anticipated a greater number of opt outs under the revised settlement than they had anticipated under the original settlement. Whether opt-out claims will push the total liability of the companies above $2 billion is not presently known.

201. For the definition of "future plaintiffs," see *supra* note 72.

tures. About half of the defendants' payments were due in the first three years; payments gradually phased down to a trickle of money in year 30. Thus, ongoing (i.e., future) claimants that filed in the first three years were more likely to see full payment (or at least a less severely ratcheted down payment) than those filing in later years. Third, in one scenario some presently injured claimants were able to dip into the future claimants' fund under some scenarios, thus reducing the pot for future claimants.[202] Finally, under the settlement agreement, future claimants sacrificed certain legal claims that present claimants did not.

No procedural protections were provided for future claimants. No subclass for future claimants was established. Every lawyer on the plaintiffs' steering committee represented some presently injured claimants; thus, no counsel exclusively represented the interests of future claimants. No guardian ad litem was appointed.

Notice Procedure

The notice campaign for the 1994 global settlement included the sending of an individual notice to all known implant recipients. Many other recipients became known when they called ordinary and toll-free phone numbers to request information. By September 1, 1994, more than 380,000 individual notice packages had been mailed, with efforts still ongoing.

In addition to individual notice, $2 million was spent on advertising in newspapers, in magazines, and on television. Audiotapes were prepared for use on radio. The settlement was also widely reported on television and radio, and in newspapers. Press kits and promotional materials were also developed, and information was placed on the Internet.

Foreign notice was handled differently. First-class mail was used for 80,000 known claimants, a "short-form" notice was translated into ten languages, and press releases and press kits were prepared. Translated news releases were sent to 1,500 media outlets. National health ministries and medical associations were notified, as were fifty-four American ambassadors. Most of the notice program, however, concentrated on twenty-four countries. No paid advertising occurred outside of the United States. As a result,

202. The scenario involved an American current claimant who failed to register in a timely way, thus becoming a "late registrant." These late registrants were eligible for compensation from the ongoing claimant fund, as long as all eligible ongoing claimants for the year had been paid. Therefore, ongoing claimants in future years might find fewer assets available to pay their claims.

there was a disparity in funding between American and foreign notice: the foreign notice program cost several hundred thousand dollars in comparison to several million spent in the United States.

The notice package consisted of a synopsis, question-and-answer booklet, a 14-page notice, claims forms, and opt-out form.

The notice for the 1995 revised settlement was sent by first-class mail to all persons who had registered during the initial claim submission and opt-out periods, including to those who had earlier opted out. It contained a synopsis of benefits, a question-and-answer booklet, and a full, 14-page notice. In addition, Judge Pointer appeared at numerous regional meetings, on telephone conferences, and on Court TV. Legal assistance hotlines were also set up.

Approval and Review Process

No formal discovery was conducted. Requested information was informally supplied to some objectors. Trial-like procedures to develop evidence were not used at the fairness hearing.

Collusion objections were muted in *Silicone Gel*. The fairness of the settlement was more seriously contested. The ultimate standard used by the court to determine if the settlement should be approved was, once again, whether the settlement was "fair, reasonable, and adequate."[203] Unlike the opinions in *Bowling*, *Georgine*, and *Ahearn*, the opinion did not list any additional factors that would guide the court's decision. The opinion was clearly influenced by the support of class members and by the adequacy of compensation. On the latter point, the opinion did not examine in any detail the strength of plaintiffs' cases in relation to the settlement, which had been cited as an important factor in other cases. Nor did the opinion examine the status of discovery and the maturity of the litigation, which had also been relevant variables in other cases. Although the court thought that the settlement was superior to other means of resolving highly complex disputes, it did not specifically list these considerations as relevant variables, as other courts had done.

In one regard, the court's analysis was prophetic. Some objectors had argued strongly that the settlement was inadequate to fund current claims. The court honestly professed that it did not know whether the settlement

203. *Silicone Gel*, 1994 WL 114580, at *7; *Silicone Gel*, 1994 WL 578353 at *23 (settlement is "fair, reasonable, adequate, and in [plaintiffs'] best interest," and "fair and reasonable" to defendants).

would be adequate to pay the promised levels. Its "guess" was that the settlement was not, and it refused even to "hazard a guess" about whether that inadequacy would trigger so many opt-outs that renegotiation of the deal would be impossible.[204] These concerns could have supplied good grounds to reject the settlement outright. Satisfied that the back-end opt-out period would obviate the problem,[205] the court did not.

The most serious challenge to class certification came from foreign claimants, who questioned the adequacy of the named representatives.[206] The issue of class certification was not, however, a focus of the court's opinion; it occupied only two paragraphs in the final order. The first paragraph noted that the requirements of Rule 23(a) "should not be based on some narrow reading . . . , but on whether the terms of the proposed settlement make fundamentally unfair distinctions among class members or fail to make distinctions that . . . should have been made."[207] Finding that the provisions with regard to foreign claimants were (with some modification[208]) fair, the court overrode the adequacy objection. In the retrospective light of *Amchem*, this finding seems incorrect.[209]

The other paragraph concerned the decision to exclude Australian class members and Canadian class members from Ontario and Quebec. The court noted that 80% of all objections come from these areas,[210] where many suits had been filed. Since Rules 23(b)(3)(A) and (b)(3)(B) required the court to consider the individual interest in retaining control of adjudication and the amount of litigation already commenced, the court decided to exclude these persons from class membership.[211]

204. *Silicone Gel*, 1994 WL 578353, at *7.

205. *Id.* at *7–8.

206. Public Citizen, a public interest group, also argued that class certification was improper, especially for future claimants, but its argument ran for less than one page and cited no cases. *See* Comments and Objections of Public Citizen, Inc. as Amicus Curiae, *In re* Silicone Gel Breast Implants Prods. Liab. Litig., No. CV 92-P-10000-S (N.D. Ala., filed June 16, 1994) (copy on file with author).

207. *Silicone Gel*, 1994 WL 578353 at *12.

208. *See supra* p. 81, ¶ 2.

209. *See supra* note 61–62.

210. *Silicone Gel*, 1994 WL 578353, at *17.

211. The court did, however, allow them to opt in. *See supra* note 191.

Modifications in Traditional Adversarial Roles

In what is by now a familiar refrain, *Silicone Gel* presented the lawyers with a set of serious ethical issues. The case presented numerous problems of simultaneous representation of persons with divergent interests. The first was the representation of both present and future claimants. Given that the total pot was limited, class counsel's decisions to create separate settlement funds for presently injured and presently healthy claimants, and then to negotiate an overall settlement amount, forced class counsel to make an allocational decision about how much money should go into each fund. Obviously, the two sets of claimants had divergent interests, which made it difficult for one set of lawyers to represent both sets. Those problems were compounded in *Silicone Gel* by other provisions of the settlement that suggested a potential for a conflict of interest between the two sets of claimants, such as the ability of some current claimants to dip into the fund set aside for future claimants and the differences between present claimants and future claimants with regard to their back-end opt-out rights. The up-front opt-out right that claimants were provided helped to alleviate, at least to a degree, these conflicts. The problem, however, is that an up-front opt-out right is not always meaningful for a person who is healthy and therefore not yet in the possession of the best information about which form of recourse is best.

Comparable ethical problems arose in the simultaneous representation of "near" and "far" future claimants. Since most of the money flowed into the settlement during the early years, near claimants stood a much better chance of receiving full compensation than far claimants. The back-end opt-out right helped to alleviate this problem, but this right assumed that the companies would at a later date still be financially viable. Moreover, the idea of basing payments on the amount of money in the fund each year made it likely that persons who submitted claims in different years would experience different levels of ratcheting and different awards (or different opt-out rights) that were based entirely on the fortuity of the year in which the claimant's disease manifested itself. Yet no effort was made to segregate the "severely ratcheted" and the "less severely ratcheted," or to determine if the settlement was fair to both groups.

Other conflicts existed as well. Most significantly, class members' claims for consortium were eliminated. No named plaintiff asserted such a claim, and these members were not entitled to opt out if the class member from whom their claim derived remained in the case.

Two other, related conflicts existed: the conflict between foreign and U.S. claimants, and the conflict between persons whose state law was favor-

able to plaintiffs and persons whose state law was less favorable. The allocational decisions made by class counsel—to limit recovery for foreign claimants to 3% of all funds (when they represented as much as 50% of the class) and the decision to pay all claimants from the United States equally regardless of the law that applied to them—suggest a primary loyalty to the hypothetical "average American" class member, rather than to individuals within the class.

These concerns were compounded in the case by the lack of information about numbers of claims, appropriate levels of compensation, or causal connection. The case was immature, and, while the numbers that were put up on the grid looked good, the lawyers had no real sense of the dimension of the problem or of the overwhelming response of the class they represented. The efforts to settle early failed, and a much less lucrative and much less comprehensive settlement has been put in its place. A large part of the case is likely to be tied up in bankruptcy for years. Whether the interests of the class were effectively represented by lawyers seeking an early global solution is a central issue in this litigation.

Assessment

It is easy to suggest that many of the problems of the original settlement in *Silicone Gel* relate to its immature status and the lack of good information about claim numbers, settlement values, and science.[212] But other features might also have played a role. One was the lack of a formal fairness hearing in which some of these problems might have been aired. Another was a lack of subclasses or of a guardian ad litem who might have exposed some of the inherent weaknesses of a class action that was asked to resolve too much. The central players in the litigation wished to bring the matter to a close, perhaps overlooking the signals that it would not work and the significant internal conflicts within the class. Perhaps if the case had slowed down a bit, as *Georgine* and *Ahearn* did, to take a hard look at fairness, legal, and ethical implications, a different result might have occurred. Perhaps not. In any event, *Silicone Gel* stretched the mass tort settlement class action device a little farther than the prior cases, and this time it broke.

But there is also a second and less well-publicized dimension to *Silicone Gel*: the approval of the revised settlement. This settlement performed a measure of damage control, and was widely accepted by class members.

212. Indeed, that suggestion has been made. *See* Coffee, *supra* note 16, at 1408.

Nonetheless, in my estimation it had two flaws. One was procedural: The court's decision to approve as within its "reserved general supervisory powers" a settlement to which no class counsel or representative plaintiff had agreed. Although the court was arguably correct in its statement that it retained general supervisory powers under the first settlement to approve a revised settlement without consent and without another hearing, and although it solicited the views of class members with regard to the revised settlement, the differences in the two settlements suggest that a formal hearing might have been advisable. The other flaw was substantive: The original settlement's promise of generous payouts had been replaced by a somewhat stingier compensation system. These flaws suggest that, at least in some circumstances, defendants may benefit when expectations raised by the original settlement are later dashed. This suggests courts and counsel should hesitate before approving a class-wide settlement at risk for failure.

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Infected Blood: *Walker v. Bayer Corp.*

Introduction[213]

Prior to the initiation of better procedures for blood screening in 1985, the American blood supply had become contaminated by the human immunodeficiency virus (HIV). This contamination posed particular risks to persons with hemophilia, many of whom relied on "factors"—blood proteins that had been concentrated from the blood plasma of many donors by blood product manufacturers known as "fractionators." Before the blood supply was rendered fairly safe in 1985, approximately 63% to 89% of Americans with more severe forms of hemophilia had been infected with the virus. In turn, they unknowingly passed the virus on to spouses and lovers, and then on to their children. Many of those infected have died of AIDS and AIDS-related causes; many others still survive. Although the exact number of infected persons is unknown, it is believed to be as many as 13,000 individuals.

The Judicial Panel on Multidistrict Litigation ordered all federal hemophilia cases (approximately 160) to be consolidated in the Northern District of Illinois for pretrial purposes in 1993. Judge John Grady was the transferee judge. By the time of the final approval of the settlement, tag-along cases had ballooned that number to more than 200.

One of the consolidated cases, *Wadleigh v. Rhone-Poulenc Rorer*, had been filed as a litigation class action on behalf of all infected persons with hemophilia, living or deceased, in the United States. On November 3, 1994,

213. With the exception of clarifying footnotes and citations for direct quotations, no footnotes or other citations to record sources will be used in this case study. Persons interested in the sources for the factual assertions made in this case study should refer to Tidmarsh, *supra* note 7, at 167–92.

Judge Grady certified a Rule 23(b)(3) class in the case.[214] The fractionator defendants immediately filed a petition for a writ of mandamus, and in a highly publicized decision, the Seventh Circuit granted the writ on March 16, 1995.[215]

In August 1996, hemophilia litigation was still a relatively immature tort. There had been only fifteen verdicts and a handful of appellate decisions. Consistent with the standard pattern of growth to maturity, most of these cases had gone the defendants' way, and the plaintiffs were in the process of adjusting strategies and developing alternate theories in order to break through to the second stage. On the other hand, the litigation was not entirely immature; the 100 to 150 settlements provided some basis for determining the value of individual claims, and the MDL proceedings had developed extensive discovery materials.

History of the Lawsuit

On August 13, 1996, plaintiffs filed *Walker v. Bayer Corp.*, and moved for certification as a class action for settlement purposes. The *Walker* complaint was substantially identical to the *Wadleigh* complaint. Only one plaintiff—Susan Walker—was named as a class representative. She was a spouse of a person with hemophilia who had died of AIDS. She had not herself been infected with the virus. The class that Ms. Walker was alleged to represent consisted of all persons with hemophilia that (1) had used the defendants' factor concentrates between 1978 and 1985, (2) had become infected with HIV, and (3) were citizens or permanent residents of the United States. Also included in the class were (1) spouses, monogamous or cohabiting partners of at least two consecutive years, and children who were infected with HIV; (2) all persons with derivative claims for emotional distress, loss of consortium, loss of love and support, or fear of AIDS; (3) parents or guardians of minors or incompetent class members; and (4) the estates and executors, administrators, or representatives of deceased class members. It was not a requirement of class membership that a person have AIDS, or that deceased class members have died of AIDS or AIDS complications. No subclasses were established.

On August 14, without reference to the Seventh Circuit's 1995 opinion, Judge Grady entered an order preliminarily approving the settlement, certi-

214. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994).

215. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

fying the class under Rule 23(b)(3), approving the notice plan, and establishing dates for the fairness hearing.[216] Judge Grady subsequently appointed a guardian ad litem to represent the 360 minors who were part of the class. Approximately 550 persons opted out of the class.

The fairness hearing itself lasted one day. The court heard from lawyers, from individuals who supported the settlement, and from individuals who opposed the settlement. Direct and cross-examination of witnesses was not used; formal rules of evidence were not observed. No experts testified.

When some counsel alleged that intervening discovery had strengthened the plaintiffs' claims, the court ordered a second fairness hearing to be held on May 5, 1997. This hearing again consisted of presentations from the lawyers involved, from other members of the plaintiffs' steering committee, from other attorneys representing class members, and from class members themselves. Once again, trial-like procedures were not employed.

On May 8, 1997, about six weeks before the Supreme Court's decision in *Amchem*, the court affirmed its decision to certify a Rule 23(b)(3) class, held that the notice given to class members was accurate and "the best notice practicable under the circumstances," and, after examining various objections to the settlement, approved the settlement as "fair and reasonable."[217]

On June 6, 1997, eighteen objectors to the settlement filed an appeal from the order approving the settlement. On July 24, 1997, the appeal was dismissed in return for an agreement from the fractionator defendants to permit the objectors to opt out. The settlement is therefore now final, and the process of compensating class members is nearing completion.

Settlement Terms

In some ways, the settlement was the most straightforward of the five under study. The basic idea was this: Each case of HIV infection received a flat $100,000 payment, exclusive of attorneys' fees or costs. There were no caps on the numbers of people who could claim, no cap on the total amount of the settlement, and no "ratcheting down" of benefits in the event that more persons than expected filed claims.

216. Pretrial Order No. 32, *In re* Factor VIII or IX Concentrate Blood Prods. Litig., No. 93-C-7452 (N.D. Ill., Aug. 14, 1996) (copy on file with author).

217. Final Order and Judgment Relating to Settlement, *In re* Factor VIII or IX Concentrate Blood Prods. Litig., No. 93-C-7452 (N.D. Ill., May 8, 1996) [hereinafter *Final Order*] (copy on file with author).

There were, however, some complicating provisions. Perhaps the most important was the limitation that the $100,000 compensation award was tied to an HIV infection, so that $100,000 would be paid for each such infection regardless of the number of persons who might make derivative claims as a result of this infection. Some examples illustrate the concept: (1) If an infected person with hemophilia had no spouse, lover, children, or parents, he would be entitled to $100,000; (2) If an infected person with hemophilia had a spouse whom he infected, but neither had children or parents, husband and wife would collectively be entitled to $100,000 for the husband's infection, and another $100,000 for the wife's infection; (3) If an infected person with hemophilia had an uninfected spouse and children, and also had parents with viable derivative claims, the entire group (husband, wife, children, and parents) would be entitled to $100,000 in total (not each); and (4) If an infected person with hemophilia had an infected spouse, but children and parents of each spouse were uninfected and had only derivative claims, the husband, wife, children, and husband's parents were collectively entitled to one payment of $100,000, and the wife, husband, children, and wife's parents were entitled to a separate payment of $100,000.

Each unit of persons able to claim $100,000 for an HIV infection was referred to in the settlement as a "claimant group." In order to be entitled to $100,000, each member of the claimant group needed to file a claim; if one or more members did not, then no one in the group would be entitled to receive any compensation.[218]

Another important provision of the settlement concerned the submission of claims. All claims for compensation were required to be submitted by October 15, 1996, just two months after the complaint was filed. All requests for exclusion (opt outs) were due the same day. Those who neither filed a claim nor requested exclusion were barred from asserting any fubther claims against the defendants. The decision of one member of a claimant group to opt out did not have the effect of opting out the entire group; if one member of the group opted out and the others did not, the remaining members' claims were barred.

218. Using the fourth hypothetical above, if the husband, wife, children, and husband's parents all agreed to the settlement, they would receive $100,000 for the husband's infection; but if the wife, husband, and children agreed and wife's parents did not agree, the wife, husband, and children would not be able to receive any compensation for the wife's claim. If the wife's parents did not agree to the settlement, the only options for the remaining claimants on the wife's claim were either to opt out or to permit their claims to be barred.

The method by which claims were to be paid was unique. The settlement agreement called for a settlement administrator that received the claims and collected the necessary information in support of the claim. But decisions about whether individual claims were meritorious were to be made jointly by class counsel and the defendants. When all agreed to allow a claim, the settlement administrator paid the claim. When all agreed to disallow the claim, the administrator could not pay the claim, but the disallowed claimant was entitled to have the matter heard, and a decision about allowance made, by a special master appointed for the purpose of resolving claims. In the event that class counsel and defendants disagreed about entitlement to payment, the same recourse to the special master was available to the defendants. Disallowance of claims by the special master did not leave claimants without recourse; rather, claimants were no longer deemed to be class members, and were entitled to pursue their claim against the defendants in litigation.

Each defendant also reserved the right to withdraw in the event that too many class members opted out.

The most significant other provision of the settlement was the establishment of a $40 million fund from which all expenses and attorneys' fees were to be paid. In addition to attorneys' fees and expenses, this fund covered costs of notice, costs of the guardian ad litem, and fees of the settlement administrator and special master. Attorneys' fees for the rendering of individual advice about whether to opt out were not compensable from the fund. The defendants reserved the right to object to payments of costs and fees from the fund, and to seek return of any unexpended portions. But this was a one-way ratchet; the agreement made perfectly clear that the absolute maximum payable from the fund would be $40 million.

Handling of Future Claimants

The class consisted of both presently injured and future claimants. The settlement made no special provisions for the handling of future claimants. In the context of this litigation, future claimants were those class members infected with HIV but presently asymptomatic ("present futures"), or spouses, lovers, or children not yet exposed to HIV ("future futures").[219] Since the class consisted only of those already infected with HIV, "future futures"

219. For definitions of future claimants, "present futures," and "future futures," see *supra* note 72 and accompanying text.

were protected by being excluded from the class. "Present futures" received no special protections, although the settlement's tying of compensation to the fact of HIV infection and the lack of augmented payments for injuries resulting from infection (such as AIDS) made such protections unnecessary.

Notice Procedure

Notice by first-class mail was sent to all persons that could be reasonably identified as class members. In order to generate the mailing list, plaintiffs' and defendants' attorneys pooled names of known plaintiffs in litigation around the country. The National Hemophilia Foundation, a defendant in the MDL litigation, also agreed to mail notice to every person on its mailing list.

Second, a summary notice was published on three separate days (August 20, September 3, and September 6, 1996) in *USA Today*. Although no other newspaper advertising occurred, the parties provided informational material to television, radio, and newspapers around the country, and also put information about the settlement on PR Newswire.

Third, information about the settlement was posted on various Internet sites that might be monitored by persons with hemophilia. Next, information was supplied to other hemophilia-related public interest groups. Finally, a toll-free phone number was established.

Approval and Review Process

Nearly all of the objections to the settlement were of a legal nature or based on an appeal to a sense of justice. Little discovery was therefore required. The docket sheet does not reflect that any discovery was undertaken. At the second fairness hearing, the court asked for information relevant to the allegedly overlooked legal theory, but the information the court sought was generally available in documents or depositions. The fairness hearings did not employ adversarial procedures. No experts, other than a claims administrator, appeared.

No claims concerning collusion were made, but the court nonetheless inquired into the issue as a part of its examination of the settlement's fairness. The court relied for its finding about the absence of collusion on the competence of counsel, the vigor of their representation of their clients, the

court's personal observations during the MDL proceedings, and the "virtually unanimous support of plaintiffs' counsel for the settlement."[220]

The legal standard under which the court reviewed the settlement is the now-familiar "fair and reasonable" standard.[221] To assist in this determination, the opinion used the five-factor test of *Gautreaux v. Pierce*.[222] The five factors were (1) the strength of the plaintiffs' case on the merits; (2) the stage of the proceedings and the amount of discovery completed; (3) the complexity, length, and expenses of continued proceedings; (4) the absence of collusion and the opinion of competent counsel; and (5) the degree of opposition to the settlement.[223]

The court's August 14, 1996, order certifying a settlement class was very brief.[224] Without reference to Rule 23(a) or (b), and without reference to or attempted distinction of the Seventh Circuit's decision, the court ordered certification of a settlement class remarkably similar to the litigation class that the Seventh Circuit had ordered decertified. The order made no inquiry into adequacy of the class representative or of counsel. Indeed, it did not even indicate whether the class was being certified under Rule 23(b)(3), although later parts of the order made that fact clear. The court's Final Order was no more helpful, stating only that "on August 14, 1996, this court certified a Settlement Class"[225] and that "the Settlement Agreement . . . is in accordance with Rule 23."[226] No reference was made to the reasons for the order, to *Rhone-Poulenc Rorer*, or to the pending *Amchem* case.

Given these limitations, it is impossible to analyze the consistency of this class certification with *Amchem*.

220. *Final Order*, *supra* note 217, at 11.

221. *See id.* at 15.

222. 690 F.2d 666 (7th Cir. 1982).

223. *Final Order*, *supra* note 217, at 8–14.

224. In fairness to the court, such an analysis had to some extent been performed in the prior class-action opinions in *Wadleigh*, 157 F.R.D. 410, and *Rhone-Poulenc Rorer*, 51 F.3d 1293. Indeed, in *Rhone-Poulenc Rorer*, the Seventh Circuit opined that the maximum value of the plaintiffs' cases may not have exceeded $125 million. 51 F.3d at 1298. To the extent that the court was writing its opinion for the participants in the litigation, rather than for the public, the brevity of the analysis is understandable. These were issues with which the parties were intimately familiar. Nonetheless, in light of the Seventh Circuit's rejection of that decision, some discussion of the reasons for certification might have been expected.

225. *Final Order*, *supra* note 217, at 2.

226. *Id.* at 15.

Modifications in Traditional Adversarial Roles

The settlement agreement may have created two conflicts of interest for the class counsel. The first relates to the representation of persons with potentially conflicting interests. Under the settlement, all infected persons with hemophilia were treated the same. It should be obvious that the interests of class members with HIV, members whose injury had converted into AIDS, deceased members, and incompetent members might vary greatly; in our legal system, each type of member would likely receive a different level of compensation. Similarly, the interests of those with derivative claims might differ from those with direct claims—derivative claimants might desire independent compensation. Conversely, direct claimants with family members might feel less well compensated than those without family members. Likewise, those with significant subrogation issues or eligibility issues had interests in parts of the settlement that those without such issues did not; those without such issues would presumably have been willing to sacrifice such concerns in return for higher payments.

Seeking to tie compensation to the fact of HIV infection did not remove these conflicts for counsel. Counsel owed clients a duty of vigorous representation on their legal claims, and the fact of infection is not the relevant legal variable—injury is. It is undeniable that different class members were injured in different ways, and that different state laws further fractionalized the class members.

Nor did the opt-out right entirely eliminate such conflicts. A single objecting member of a claimant group could destroy the desire of remaining members (including the HIV-infected person) to receive a settlement award. In this situation, the settlement potentially sacrificed the interests of group members wishing to accept the settlement, forcing them either to opt out or to see their claims fail. Counsel cannot simultaneously represent the interests of those who want to accept the settlement and those who do not.

A second set of ethical dilemmas arose in the context of the dispute resolution procedure, in which class counsel now acted as judge in his or her client's claim. It is doubtful that a lawyer vigorously representing a client can ethically agree, without the client's consent, to disallow the client's claim, yet that is precisely the dilemma into which the settlement agreement placed class counsel. Unless the class counsel is merely to rubber-stamp all claims (which is likely a breach of their good faith contractual obligations), the class counsel will invariably have conflicting responsibilities as the distribution plan proceeds.

Neither of these sets of ethical issues was raised at the fairness hearing, and no special representation was provided to reduce these conflicts.

Assessment

Once again, the class-action device seems to have brought about a settlement that was unlikely to have been achieved in individual cases. It brought a measure of compensation and closure to thousands of innocent persons who had received very little satisfaction in the tort system. At the same time, it brought a measure of peace to defendants that individual litigation would have purchased only after many expensive years. At the substantive level, therefore, it is difficult to criticize the settlement. But some potential weaknesses remain.

The first is whether the settlement was as generous as it appeared to be. Certainly the defendants had been successful in litigation up to that time, but some chinks in their armor were beginning to appear. A $2 million state court verdict had recently been entered, and the companies had been willing to settle their Japanese claims for more than twice the amount that they paid for the American claims.[227] Whether the class action should be settled just as the litigation appeared poised to move into the second stage of maturity and just as the value of the plaintiffs' claims appeared to be on the rise highlights a difficult issue about whether settlement class actions should be permitted in immature mass torts. On the other hand, because of statutes of limitations issues and other defenses, few new claims were being generated; whether the litigation would have ever achieved a significantly more mature status is unclear.

The level of published notice (three days in a single national circulation newspaper) was below the level of published notice in other cases. But the community of persons with hemophilia had galvanized around this issue and was highly networked. It is unlikely that the fact of the settlement escaped the attention of most persons with hemophilia, although it is less cer-

227. In March 1996, the Japanese subsidiaries of the fractionator defendants agreed to settle approximately 455 claims of Japanese citizens with hemophilia for $423,000 apiece, plus a stipend for medical care of $1,400 per month. Approximately half of that money came from the Japanese government, which, along with the defendants, publicly admitted responsibility for the infections. I am not familiar enough with Japanese law or culture, or with the facts of the Japanese litigation, to know whether this differential in payment was justified. The Japanese settlement was not mentioned in the opinions in the *Walker* case as one of the objecting class members' grounds for dissatisfaction.

tain that it reached representatives of deceased class members' estates. The use of the Internet for notice is a development that is likely to become increasingly common.

Again, significant issues of potential conflicts of interest existed. A single class representative could not represent the entire range of injuries and interests. Subclasses should probably have been formed; at a minimum, more class representatives should have been selected.

Class counsel should not have agreed to sit in judgment on the allowance of individual claims. Although complex litigation often requires adjustments to traditional ethical norms, the expectation that counsel be both advocate and judge overshoots by some measure the appropriate bounds of any reasonably defensible "complex litigation" ethic.

Most of these concerns with the settlement are, of course, procedural rather than substantive. The need to deliver some measure of justice to a long-suffering class was patent. But this substantively appealing settlement did not include certain procedural protections for class members with disparate interests. At base, therefore, *Factor VIII or IX* forces us to consider which set of values is most critical in mass tort settlement class actions: procedural justice or substantive justice.

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