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Comment

***793** THE TOWER OF BABEL REVISITED: THE U.S. SUPREME COURT DECERTIFIES ONE OF THE LARGEST MASS TORT CLASSES IN HISTORY

[Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997)]

S. Charles Neill

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I. Introduction

The Tower of Babel is a well-known story of a unified group of people who believed they could build a structure into heaven. The society worked through such uniformity of language that its members believed they could face God and build the tower to meet their lofty goal. Seeing the progress, He struck down the building and took away the ability of the citizens to communicate in a uniform language (hence the word "babble"). [FN1] In similar epic fashion, the Supreme Court strikes down another group whose members believed they were unified in one of the largest class action suits in history in Amchem Products, Inc. v. Windsor . [FN2]

In Amchem, the Supreme Court holds in a 6-2 decision that a settlement- only class must meet all requirements of the Federal Rules of Civil Procedure 23 (Rule 23) [FN3] to be certified, even though the parties do not intend the case be litigated, but merely settled without trial. [FN4] The Court, ruling on the specific facts of Amchem, holds that a settlement-only class of current and future asbestos-related claims failed the class certification requirements of predominance and adequacy of representation. [FN5] The action was brought to settle current and future asbestos-related claims on a global scale against twenty companies who ***794** had previously manufactured asbestos products. [FN6] Because of the speculative nature of injured asbestos claimants who have not yet come forward, ascertaining the exact number of plaintiff members was difficult; however, the Supreme Court surmises, " t he class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals" exposed to asbestos. [FN7]

Certifying such a large class action may seem extreme, but it was prompted by the flood of asbestos-related litigation in the federal courts. [FN8] Part II of this Comment presents an overview of the Amchem case and discusses the appellate briefs filed on both sides of the class certification issue. Part III considers the asbestos-litigation crisis that crippled the federal court system over the past twenty years and the application of class actions to streamline similar cases and preserve judicial resources. Part IV offers a more detailed analysis of the Supreme Court's landmark decision in Amchem . Part V examines the effect of Amchem on the management of a wide-range of class actions in federal and state courts.

II. Case Description

The Amchem case evolved from an effort by asbestos manufacturers and those suffering from asbestos-related injuries to settle their disputes without the burden of individual trials. In 1988, twenty former asbestos manufacturers [FN9] formed the Center for Claims Resolution (CCR) in hopes of settling pending and future asbestos claims. [FN10] These companies faced millions of potential lawsuits and ***795** hoped to find an efficient way to remedy these cases. [FN11] After the Judicial Panel on Multidistrict Litigation (MDL Panel) transferred all pending asbestos cases in the federal court system to the Eastern District of Pennsylvania, the CCR helped the defendants' steering committee to devise a national settlement for present and future claims. [FN12] The plaintiffs' steering committee represented the thousands of plaintiffs with then-pending asbestos claims, a group known as "inventory plaintiffs." [FN13] Discussions between plaintiffs and representatives of the CCR eventually yielded a mass settlement agreement disposing of pending cases from inventory plaintiffs as well as asbestos claims not yet filed. [FN14] In other words, future plaintiffs who had not yet filed suit but were exposed to asbestos without symptoms ("exposure-only" claimants) would be precluded from bringing future individual suits, and would be compensated

under the terms of this settlement. [FN15]

On January 15, 1993, both sides filed a complaint, an answer, a joint motion for class certification and a 106-page stipulation of settlement in the East Pennsylvania District Court. [FN16] On January 29, 1993, the district court conditionally certified the proposed plaintiff class under Rule 23(b)(3) and provided a three-month opt-out period for contemplated plaintiffs to withdraw from the settlement. [FN17]

***796** Petitioners in Amchem are the twenty former asbestos products manufacturers comprising the CCR who settled claims with all future asbestos plaintiffs. [FN18] Following the settlement, respondents (a group of asbestos claimants who had not opted out of the original settlement) sought to bring individual suits against petitioners. [FN19] The CCR companies allege these new claims are barred as the respondents were automatically added to the original settlement class of future and current asbestos claimants because they failed to timely opt out of the class as required by Rule 23(b)(3). [FN20]

The district court granted the injunction under the All-Writs Act [FN21] and Anti-Injunction Act, [FN22] noting that the settlement had been properly approved and petitioners had failed to timely opt out of the settlement class. [FN23] On appeal, the Third Circuit reversed and remanded with instructions to decertify the class for failure to satisfy prerequisites of adequate representation under Rule 23(a)(4), typicality under Rule 23(a)(3), and predominance and superiority under Rule 23(b)(3). [FN24] The Supreme Court granted certiorari to decide if this massive tort case should be maintained as a class action. [FN25]

The matter prompted sixteen separate appellate briefs arguing certification of the settlement-only plaintiff class. [FN26] Six briefs supported class certification. [FN27] Nine briefs opposed the class certification at issue. [FN28] The final brief did not choose a side in the certification debate but argued for the right to a jury trial. [FN29]

The Amchem Court holds: (1) As a matter of law, when a district court considers a settlement-only class certification, it need not examine whether the case, if tried, would present "intractable problems of trial management" but must still find that the class meets the other requirements of Rule 23; [FN30] and (2) As a matter of fact, the class in ***798** Amchem did not meet the predominance requirement or the adequacy of representation requirement of Rule 23. [FN31] Each holding will be addressed in part. [FN32]

III. Background

A. The Asbestos Litigation Crisis: A Multi-Billion Dollar Business

In 1993, more than 100,000 asbestos-related suits were pending in state and federal courts in the United States. [FN33] The legal system had expended seven billion dollars on asbestos litigation in the 1980s and early-1990s, with sixty percent of this total (more than four billion dollars) going to legal fees. [FN34] More recent figures press legal fees to an astounding two-thirds of total asbestos expenditures. [FN35] Court dockets were full, costs were high, and injured parties spent years waiting for trial while the same asbestos-related issues were being relitigated in individual actions. [FN36]

The claims were all based on exposure to asbestos, a product that has not been manufactured by the defendant companies since 1975. [FN37] In fact, asbestos has a long history, starting in the 1890s when it was placed on the market as a miracle product that could "withstand punishing forces of fire, corrosion, and acid." [FN38] The material's eventual applications were widespread, ranging from clothing to rockets and ***799** ships (including U.S. Navy warships during World War II). [FN39] Unfortunately, asbestos-related health problems can have a long latency period, ranging from ten to forty years; such a latency period made the medical community slow to discover the causal connection between asbestos and several respiratory disorders. [FN40] The entrenched public use of asbestos, coupled with the slow reaction of the medical community, allowed the product to be used for eighty years before manufacturers ceased its use. In fact, asbestos was only discontinued after an influx of workers compensation and regulatory reforms in the 1970s. [FN41] Predictions have been made of 200,000 asbestos-related deaths before the year 2000 and upwards of 265,000 by the year 2015. [FN42] Parties exposed to asbestos have sued manufacturers and employers, seeking redress in the court system. [FN43] Despite recommendations from the Judicial Conference Ad Hoc Committee on Asbestos Litigation, Congress has failed to take any action in the face of this asbestos-litigation crisis. [FN44]

This flood of litigation was prompted by the ease in proving an asbestos claim and the recovery of substantial judgments from corporate defendants. The landmark case was Borel v. Fibreboard Paper Products Corp. [FN45] where the Fifth Circuit

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held that asbestos manufacturers could ***800** be held strictly liable for asbestos-related tort claims, effectively ending any causation debate in the federal system. [FN46] Following the Borel decision, asbestos proved to be an "elastic" tort, as a large number of injured claimants had a simple route to win a judgment, creating an overwhelming number of asbestos suits in the state and federal systems. [FN47] The elasticity of asbestos claims is important to understanding the scope of this litigation flow, as the number of asbestos claimants shows no sign of slowing and countless millions of potential claimants have yet to file suit. [FN48]

The judicial system attempted to remedy this litigation explosion through existing procedure. Eight federal judges with experience in asbestos cases urged the MDL Panel [FN49] to streamline all pending ***801** asbestos complaints to a single federal district. [FN50] The MDL Panel accepted the recommendation, transferring all filed and pending asbestos cases in the federal system to the United States District Court for the Eastern District of Pennsylvania for consolidated pretrial proceedings. [FN51] That court was faced with an astounding 30,000 undecided asbestos cases. [FN52] The class action suit would have a chance to end the asbestos litigation crisis.

B. The Class Action Suit: So Many Plaintiffs, So Little Time

Under the Federal Rules of Civil Procedure, certain requirements must be met before a federal court may certify a class in a civil action. [FN53] All four requirements of Rule 23(a) must be satisfied and one of the ***802** three requirements found in Rule 23(b). [FN54] Under Rule 23(a), a class must meet the following four criteria to be certified: (1) Numerosity ("the class is so numerous that joinder of all members is impractical"), (2) Commonality ("there are questions of law or fact common to the class"), (3) Typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"), and (4) Adequate Representation ("the representative parties will fairly and adequately protect the interests of the class"). [FN55]

***803** Rule 23(b) offers three options for the certification of a class. [FN56] Under Rule 23(b)(1), a class is maintainable when separate actions would create the risk of "incompatible standards of conduct for the party opposing the class" or when the separate actions would create a risk of adjudications that would "be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest." [FN57] Rule 23(b)(1) does not apply to the Amchem certification, as no risk of inconsistent adjudications exists in tort settlements. Rule 23(b)(2) is generally used to certify classes in civil rights litigation [FN58] and applies in cases where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." [FN59] The Amchem class at issue does not concern individual rights, so this subsection cannot be used for certification.

To certify a class in the case at bar, only subsection (b)(3) could be applied. Rule 23(b)(3) permits certification in cases where two requirements are met: (1) Predominance ("questions of law or fact common to the members of the class predominate over any questions affecting only individual members"), and (2) Superiority ("a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). [FN60] Predominance is almost identical to the commonality requirement of Rule 23(a)(2) that "questions of law or fact" are common to the class as a whole, but the predominance standard is more difficult to satisfy. [FN61] Predominance also has some ***804** overlap with the typicality inquiry under Rule 23(a)(3) that the representative parties have "claims or defenses" typical of the rest of the class. [FN62] These requirements are more than matters of procedure; they seek to protect absent class members. [FN63]

The Supreme Court has held that class actions serve two important policy goals. [FN64] First, class actions prevent the "unnecessary duplication of actions." [FN65] Second, they save "the resources of both the courts and the parties." [FN66] The Court has also noted the empowering quality of the class action suit:
As concisely recalled in a recent Seventh Circuit opinion: "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." [FN67]

Specifically, subsection (b)(3) was created for "cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." [FN68] The certification of a class under Rule 23(b)(3) is intended to be a final adjudication of all claims, as the decision binds all members of the class unless they choose to "opt out" in a timely manner. [FN69]

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***805** C. The District Court Settlement Proposal

The Eastern District Court of Pennsylvania conditionally certified the Amchem class and the parties presented their settlement proposal for fairness hearings. [FN70] The CCR companies agreed to pay claimants who satisfied certain medical requirements, suffering from four categories of asbestos- related disease. [FN71] Claimants with "exceptional" asbestos-related injuries not expressly included in the settlement categories could qualify for compensation from CCR companies, but the settlement capped the number of such claims the group must cover. [FN72] The settlement also sets compensation ranges for each of the four categories of disease, allowing minimum and maximum payouts. [FN73] Damages may be awarded under the settlement above the maximum amount in a category range if the defendants' committee deems the damages "extraordinary," but the agreement caps the number of "extraordinary" claims that will be paid in a given year. [FN74] The settlement also bans certain claims from compensation. [FN75] The proposal would pay out an estimated $3.2 billion in the first ten years for pending and future claims. [FN76]

For future claimants, the complaint identified nine lead plaintiffs to represent all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of January 15, 1993 and who (1) had been personally exposed (occupationally or through the occupational ***806** exposure of a spouse or household member) to asbestos or asbestos products produced by a CCR company, or (2) "whose spouse or family member had been so exposed." [FN77] The complaint assigned no subclasses for those plaintiffs who had yet to manifest an injury nor for those plaintiffs with "extraordinary claims;" all named plaintiffs were designated representatives of the class as a whole. [FN78] The district court approved a plan to give notice to the expansive plaintiff class and a three-month opt-out period for claimants who chose to be excluded from the settlement. [FN79] The district court certified the class as submitted for settlement, holding that the requirements of Rule 23(a) and (b)(3) had been satisfied. [FN80]

IV. Case Analysis

In Amchem, asbestos manufacturers seek to enjoin new plaintiffs from filing separate suits for asbestos-related injuries because they neglected to opt out of the original settlement class. [FN81] Under the arrangement, manufacturers agreed to compensate current and future plaintiffs for four categories of disease: (1) mesothelioma, (2) lung cancer, (3) other cancers, namely colon-rectal, laryngeal, esophageal, and stomach, and (4) nonmalignant conditions, namely asbestosis and bilateral pleural thickening. [FN82] The settlement expressly denied compensation for loss of consortium as well as exposure-only plaintiffs whose symptoms had not yet developed into one of the compensation categories; these non-symptomatic (excluded) claims were for increased risk of cancer, fear of future asbestos injury, and medical monitoring. [FN83] These exclusions did not bar future claims for exposure- only plaintiffs if they eventually developed asbestos-related disease or cancer. [FN84] The respondents in this case argue the settlement fails to meet the needs of ***807** claimants who do not currently fit into one of the four compensation categories as the settlement fails to adjust for inflation or medical advances in the field of asbestos-related injury. [FN85] In other words, those with future asbestos injuries argue the settlement will not amply compensate them when their diseases manifest. [FN86]

A. The Legal Standards: A Settlement Only Class Must Satisfy the Requirements of Rule 23

The real issue before the Court is whether a class could be certified for a settlement without meeting the requirements of Rule 23 for trial. As John Adlock, attorney for the CCR, said, "We agree that mass-tort cases are too big and too unmanageable to be tried, but that doesn't mean that they can't be settled. There is a strong public policy in favor of fostering settlements where two sides agree." [FN87] Balanced against the public policy and judicial expediency is the individual's right to a fair settlement. [FN88] Susan Koniak, a professor at Boston University Law School, has noted, in the "rush for companies to roll up their liability with this settlement-class thing . . . the justice system has basically gotten twisted out of shape. People's rights are getting sucked in." [FN89]

The Amchem Court begins its holding with two rules of law concerning class certification under Rule 23. First, the Court notes that settlement may be considered as a factor in deciding whether a class should be certified; the Court adds that under Rule 23(b)(3)(D) a district court is not required to decide if the case would present "intractable management problems" if eventually tried, as the goal of the class certification may be settlement with no intention of a trial. [FN90] However, the Court notes in its second rule of law that this permissive section does not lessen the other requirements of Rule 23, writing, "But other specifications of the rule-those designed to protect absentees by blocking unwarranted or overbroad class definition-demand undiluted, ***808** even heightened, attention in the settlement context." [FN91] The Amchem Court believes absent class members who have yet to show injury will not receive fair compensation from a settlement in which they did not actively participate. [FN92]

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Furthermore, the Amchem Court finds a court is more likely to decide a settlement-only class certification based on the fairness of the end result, instead of the binding prerequisites of Rule 23. [FN93] The Court is troubled by the prospect that lower courts may also misread Rule 23(e) to allow certification of a settlement-only class when the court simply approves of the settlement, despite the other conditions of Rule 23. [FN94] Rule 23(e) requires a court to approve the dismissal or compromise of any class action suit pending before it, but has no language eclipsing other subsections of Rule 23. [FN95] This leads the Amchem Court to examine whether the original settlement-only class meets the requirements of Rule 23(a) and (b). [FN96]

***809** B. Applying the Law, Part I: The Amchem Class Certification fails Rule 23(b)(3)'s Predominance Requirement

In applying the above standards to the case at bar, the Amchem Court finds that the plaintiff class failed the predominance requirement of Rule 23(b)(3). [FN97] While the Court acknowledges that all members of the plaintiff class share common experiences of asbestos exposure from the defendant class and all wish to have their claims quickly and fairly adjudicated, it notes that more important legal and factual issues are dominant, including the level of exposure and whether members already suffered from asbestos-related health problems. [FN98] As a result, the district court should not have certified this class because it failed the predominance requirement of Rule 23(b)(3). [FN99] The Court rejects the district court's determination that the plaintiffs' interest in achieving a fair settlement satisfies the predominance standard, proclaiming, "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." [FN100]

The most important rule from Amchem may be the Court's analysis concerning the effect of a settlement on certifying a class. As a matter of prior case law, Rule 23 requirements were more easily met when the proposed class was only intended for settlement. [FN101] While the Court dismisses the notion that settlement alone satisfies the predominance requirement, it holds that settlement is relevant to class certification, reversing the Third Circuit on that point. [FN102] However, the Amchem Court holds that settlement should only be considered under a Rule 23(b)(3)(D) analysis for "intractable management problems" for the class action if litigated. [FN103] The Court also notes that if a fairness inquiry ***810** into the settlement superseded the requirements of Rule 23(a) and (b), then a court would be at a great disadvantage in evaluating the proposed offer. [FN104] Plaintiffs in a settlement-only class would also be at a disadvantage because they lack leverage in negotiations, as two parties to Amchem argued, because plaintiff classes failing Rule 23 requirements (even if certified for settlement) can not threaten a trial. [FN105] Hence, even if a fairness analysis could overshadow Rule 23, the awkward position of plaintiffs' counsel in representing a class that the court would not certify for trial could inhibit a satisfactory settlement.

The Court takes note of the overlap between the commonality criterion of Rule 23(a)(2) and the predominance requirement under Rule 23(b)(3), but notes that predominance is a more stringent standard. [FN106] The Amchem Court agrees with the opinion of the Third Circuit concerning the case at bar, particularly the "disparate questions undermining class cohesion in this case." [FN107] The Third Circuit opinion listed several differences among claimants in the plaintiff class, including length and type of exposure as well as the significant gap between victims who have merely been exposed to asbestos and those who have already displayed injury. [FN108] In addition, the Third Circuit ***811** noted the variations in state tort law would magnify the disparities already inherent in the plaintiff class. [FN109] The Amchem Court also comments on the unprecedented size of the plaintiff class in this case as a factor in evaluating whether common issues are predominant among class members. [FN110] Although these plaintiffs had the common experience of asbestos exposure, they did not have a predominant legal or factual basis for their streamlined claim. [FN111]

C. Applying the Law, Part II: The Plaintiff Class Fails Rule 23(a)(4)'s Requirement of Adequate Representation

Under Rule 23(a)(4), a court may only certify a class if "the representative parties will fairly and adequately protect the interests of the class." [FN112] This inquiry aims to prevent potential disputes between class members, as the Amchem Court writes, "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." [FN113] The Amchem Court holds that the settlement-only class failed this requirement and the named parties did not adequately represent the class as a whole. [FN114] In analysis echoing its determination concerning the predominance standard, the Amchem Court writes, " N amed parties with diverse medical conditions sought to act on behalf of a single giant class rather ***812** than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned." [FN115] The Court concludes that such conflicts of interest within the group make it impossible for the named representatives to protect the interests of all members of the class. [FN116] As the Court asserts, "The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation

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for the diverse groups and individuals affected." [FN117] The "inventory plaintiffs" (those with current injuries) were named as representatives of the class and had an obvious interest in an immediate payout, an interest that would adversely affect those class members who had yet to display a compensable disease under the terms of the settlement. [FN118] By breaking the class into subclasses and appointing separate representatives, the district court may have been able to certify this case within the bounds of Rule 23. [FN119]

***813** D. The Court's Conclusion: Where Do We Go from Here?

The Amchem Court does not rule on a number of arguments presented by parties in the case, as the class certification issues are dispositive. [FN120] The objectors argued based on justiciability, [FN121] subject- matter jurisdiction, [FN122] and adequacy of notice. [FN123] The Court agrees with the Third Circuit that these issues need not be addressed, as they would not exist but for the class certification. [FN124] In its conclusion, the Amchem Court admits the practical advantages of the proposed settlement- only ***814** class (or any other administrative means to process asbestos claims outside of the court system) to "provide the most secure, fair, and efficient means of compensating victims of asbestos exposure." [FN125] However, the Court is constrained to follow the existing rules of civil procedure, rules that were not satisfied in the case at bar. [FN126]

While the Court does not directly address the superiority requirement of Rule 23(b)(3) in its ruling, the Court reasserts the importance of the subsection's predominance requirement. [FN127] The Court notes that predominance seeks to test if class members are adequately cohesive to warrant a settling of actions by representation. [FN128] As the Third Circuit noted in its opinion de-certifying the plaintiff class:
Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma-a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry. [FN129]

Predominance under Rule 23(b)(3) is a much more stringent requirement than mere commonality and it was simply not satisfied by the original petition for certification.

E. Another Opinion: The Asbestos Litigation Crisis Requires Class Certification

Justice Breyer, with whom Justice Stevens joins, files a separate opinion concurring in part and dissenting in part with the Amchem majority. [FN130] Justice Breyer agrees only with the Court's underlying ***815** opinion that the "settlement-only" factor may be considered in certifying a class. [FN131] However, the dissenting portion files five separate arguments for a different outcome in Amchem : (1) The need for settlement of asbestos cases is great, (2) The issues related to settlement should be given greater weight in deciding predominance under Rule 23(b)(3), (3) The Court's adequacy of representation analysis was inappropriate as the issue had not been considered by the circuit court, (4) Uncertainty "about the tenor of an opinion that seems to suggest the settlement is unfair," and (5) The issue of notice should not be considered by this Court until first reviewed by the circuit court. [FN132]

Justice Breyer argues district courts should be given deference during appellate review for decisions on class certification. [FN133] Such findings are inherently fact-based and should not be reversed unless the district court has abused its discretion. [FN134] Justice Breyer then argues the majority opinion has failed to realize the significance of the settlement at bar, given the magnitude of the asbestos litigation crisis. [FN135] He writes, "These lawsuits have taken up more than six percent of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits." [FN136] Justice Breyer argues these practical factors make the settlement of over-riding importance for those suffering with asbestos injuries. [FN137] As such, the Justice would be "reluctant to set aside the District Court's findings without more assurance than I have that they are wrong." [FN138] Justice Breyer extends this deference to the district ***816** court's ruling and applies it to the majority's analysis of predominance, [FN139] subclasses, [FN140] adequate representation, [FN141] and fairness of the settlement agreement. [FN142] Justice Breyer concludes that he would give lower courts the opportunity to rule on the factual disputes in a class certification hearing and, in the case at bar, vacate the judgment and remand the case for future proceedings. [FN143]

Finally, on the relevance of a proposed settlement to the certification of a class, Justice Breyer argues that the majority of courts addressing this issue have held "that settlement is not only relevant, but important" in making this determination.

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[FN144] Justice Breyer would likely ***817** rule in favor of a fair settlement in a class action even if the requirements of Rule 23 had to be relaxed for certification.

V. The Aftermath of Amchem

A. The Risk: Will Old Class-Action Settlements Be Relitigated?

Three months after the Court announced its decision in Amchem, a federal bankruptcy court in Illinois interpreted the landmark case. [FN145] There, on a motion that a class of maritime asbestos claimants should not be certified as a class against a bankrupt asbestos manufacturer, the bankruptcy court noted the Supreme Court has significantly raised the bar for plaintiffs seeking certification under Rule 23(b)(3)'s predominance standard. [FN146] As the court observed, "Plaintiffs rely on a number of cases where 'mass trials' either through a class action or consolidation have been permitted. There are several problems with Plaintiffs' reliance on those decisions . . . . T he viability of all of those cases is brought into question following the Supreme Court's holding in Amchem ." [FN147]

Even before Amchem was decided, interested parties feared the Third Circuit decision to decertify would cause other settlements to come into question. For example, a group of pharmaceutical companies who may be held liable for exposing hemophiliacs to plasma infected with the HIV-virus presented a brief to support the Amchem class certification. [FN148] These parties are currently evaluating a settlement whereby the five companies would pay $600 million to a class of 1,300 hemophiliacs, their relatives, and other representatives. [FN149] In their ***818** amicus curiae brief, the pharmaceutical companies argued that "numerous fair and reasonable settlements- including this $600 million settlement with thousands of HIV-positive hemophiliacs-will be outlawed" if the Third Circuit opinion is adopted. [FN150] The Washington Legal Foundation (WLF), a non-profit organization favoring tort reform, argued the Third Circuit opinion could have equally serious consequences on past settlements; in its amicus curiae brief to the Court, the WLF asserted that affirming the Third Circuit's ruling "might also cause litigants to try to dismantle many of the class settlements that already have been reached." [FN151] Such a re-evaluation of past cases could be extensive, given the long history of future settlement classes under Rule 23, including mass torts like Agent Orange, [FN152] Dalkon Shield, [FN153] heart valves, [FN154] and breast implants. [FN155]

***819** B. The Cases: How District Courts Have Distinguished Facts to Allow Class Certification

After the Court announced the Amchem decision, state and federal courts were faced with a risky proposition: evade the Supreme Court and clear court dockets, or follow the Supreme Court and brace for a backlog of cases. Arguably, the most important ruling on Amchem 's application came early this year in the re-hearing of In re Asbestos Litigation . [FN156] The case was vacated on order of the Supreme Court for a re-hearing consistent with the Court's decision in Amchem . [FN157] In a five-paragraph opinion, the Fifth Circuit affirmed its prior judgment to certify an asbestos class action, claiming the rules proffered by Amchem did not alter the case at bar. [FN158] The Fifth Circuit ruled its case met the settlement-only class requirements as all class members had common interest in the claim, a limited fund class governed by Rule 23(b)(1). [FN159] However, the opinion was balanced by a vigorous and detailed dissenting opinion by Judge Smith, charging the majority had sidestepped the Amchem decision. [FN160] First, Judge Smith argued Rule 23 requirements can not be avoided under a "greatest good for the greatest number" analysis of the settlement. [FN161] Furthermore, the classification of this case as a Rule 23(b)(1) limited fund is erroneous and the court could only certify under Rule 23(b)(3), but as in the Amchem settlement, the class would fail the test for predominance. [FN162] The dissent also challenges the adequacy of representation for the named plaintiff, given the uncommon factors among members and the risk of serious ***820** intraclass conflict. [FN163] Despite the inconsistencies of the Fifth Circuit decision and what appears to be a refusal to follow binding authority, the Supreme Court has not granted certiorari of the case; to the date of this publication, the decision of In re Asbestos Litigation stands.

In sharp contrast, a West Virginia district court in Walker v. Liggett Group, Inc. [FN164] reversed its decision to initially approve a settlement class against a cigarette manufacturer on the grounds such certification was "wholly inappropriate under Amchem ." [FN165] Focusing on the Supreme Court's adequacy of representation analysis, the Walker court held the two named representatives of the plaintiff class could not adequately represent its claimants "numbering potentially in the millions or tens of millions." [FN166] Plaintiffs proposed the class include all U.S. citizens who have used or currently do use defendants' tobacco products (and the users' estates and family members) and those persons who have suffered from second-hand smoke from defendants' products. [FN167] Like the proposed class in Amchem, the named plaintiffs in Walker sought to represent a widely diverse group of claimants, with varying levels of exposure to nicotine, severe to mild injuries,

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separate outside causal factors, and a plethora of other individual differences. [FN168] The plaintiff representatives did not appoint individual delegates for these subclasses but sought to represent the class as a whole. [FN169] In its conclusion, the district court wrote: " T he bedrock similarity between Amchem and the instant case is manifest: 'The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.' " [FN170]

***821** C. The Scope (Present and Future): How Amchem Will Affect Medical Products Liability, Civil Rights Litigation, Settled Cases, and State Cases

The interpretation of Amchem will have a direct impact on a number of pending and resolved mass tort settlement-only class certifications. Some of the largest settlements will likely be seen in two medical products liability cases. The first case concerns diet drugs and has nine pending actions (representing more that 200 separate cases filed in federal court) against manufacturers and distributors of phentermine, fenfluamine, dexfenfluramane (used in the diet drug "fen-phen"); these cases have been consolidated for hearings in the Eastern District of Pennsylvania. [FN171] The second case will likely challenge the $4.23 billion settlement of silicone breast implants under the rules proffered by Amchem, as the settlement agreement is currently under fire in federal court, although parties have yet to argue Rule 23 issues. [FN172] Future litigation of the implant settlement may be especially pressing as the Dow Corning Corporation (which is scheduled to contribute more than one-half of the funds for claimants [FN173]) does not have the assets to meet its obligation under the settlement. [FN174]

However, under the Amchem decision, some cases are prime candidates for classification under the predominance requirement of Rule 23(b)(3). As the Court notes, "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." [FN175] For example, the Eastern District Court of Pennsylvania approved a settlement- only class action under the Amchem ***822** regime in a securities fraud case to allow plaintiffs to recover from a failed foundation. [FN176] In a more publicized case, a New York district court has given preliminary approval to a one-billion dollar settlement agreement for a plaintiff class charging antitrust violations in the purchase of Nasdaq stocks. [FN177] Using the Amchem decision as the foundation of the court's review, the court applied " heightened" scrutiny to a certification by examining each of the subsections under Rule 23 and held a plaintiff class was appropriate for a single suit against defendants charged with conspiracy to fix prices at "supra-competitive levels." [FN178]

It should be noted that fraud cases must still satisfy the requirements of Rule 23(a) to be certified. [FN179] Illustrative of this point is an Illinois district case holding Rule 23(a)(4)'s adequacy of representation requirement had not been satisfied for a proposed nationwide class of persons who held leases with Wells Fargo Leasing Corporation. [FN180] There, the court focused on the named plaintiff's lack of damages compared to the severe damages sustained by other class members, failing the adequacy of representation requirement that a "class representative must be part of the same class and possess the same interest and suffer the same injury as the class members." [FN181]

In a case outside of the mass tort arena, a Florida district court differentiated the facts of Amchem to allow class certification against a ***823** hotel chain charged with violating federal civil rights laws; [FN182] the court held the proposed class members had substantially similar claims and the issues were not as complex as the asbestos claims in Amchem . [FN183] Hence, the impact of Amchem on class actions has been limited by the creative and varied rulings of district judges.

State courts have also weighed in on the impact of Amchem on class actions. The Louisiana Supreme Court, interpreting state rules of civil procedure, held that Federal Rule 23 is contrary to its Louisiana counterpart, so Amchem would not be followed in state mass tort actions. [FN184] States have limited case law on how Amchem should be applied in states with class action provisions more similar to Rule 23. The Alabama Supreme Court briefly mentions Amchem in a recent decision granting a writ a mandamus to vacate a conditional class certification against sellers of credit life insurance under the state class action statute. [FN185] The most on- point state case interpreting class action rules similar to Rule 23 came out of the Missouri Court of Appeals. [FN186] There, the court held that Missouri rules of civil procedure are identical to the requirements of Rule 23 for certifying a class. [FN187] As such, the court relied on Amchem as guiding authority, and ordered the lower court to review preliminary approval of settlement classes under the parameters of the Supreme Court case. [FN188] The court held as a rule that ***824** Missouri courts must determine "probable cause" in conditional certifications that the final settlement is fair and the class will ultimately satisfy the state's equivalent of Federal Rule 23(a) and (b) (3). [FN189] More cases will surely be decided in state courts on this issue as several jurisdictions have adopted rules nearly identical to Rule 23 for certifying a class. [FN190]

D. The Impact: We've Only Just Begun ...

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These cases may only be the tip of the iceberg in evaluating the impact of Amchem . In 1995, a district court in Texas heard arguments for class certification in a case against the manufactures of the Norplant contraceptive device. [FN191] Late last year, a state appellate court certified a class action against New York City officials for the enforcement of lead-based paint safety protocols and attendant health problems for children in public housing. [FN192] Two circuit courts have even heard arguments on penile implants, in both cases rejecting the claims of plaintiffs on procedural grounds. [FN193]

***825** Commentators have suggested that extraordinary mass torts (like asbestos) require equally extraordinary solutions. Before the Court heard arguments in the Amchem case, the Judicial Conference of the United States moved to create Rule 23(b)(4), a section that would allow courts to certify settlement classes without satisfying predominance standards. [FN194] A related (but opposite) amendment to Rule 23 would allow judges to reject class certification upon a finding that individual recoveries would not justify the costs of class action litigation. [FN195] The proposed Rule 23(b)(4) seems to allow settlement-only classes in cases like Amchem and follows the view espoused in Justice Breyer's dissenting opinion. [FN196] However, a legislative solution was proffered by the majority in Amchem, so in that sense, the revision is consistent with the Court's opinion. [FN197] The amendments are set for a vote before the Judicial Conference in December 1998 and then submission to the Supreme Court and Congress for final approval. [FN198]

In addition to procedural modifications, a movement has also begun to use alternative dispute resolution (ADR) to remedy the explosion of mass tort litigation. Supporters of ADR for mass torts argue the practical advantages of avoiding the court system, with lower costs and speedy adjudications. [FN199] Opponents counter that defendants facing multiple claims "effectively are buying res judicata" and avoiding punitive damages. [FN200] Balanced against these concerns is the looming danger of bankrupt defendants leaving empty pockets for injured plaintiffs. [FN201]

***826** VI. Conclusion

It has been observed that the best way to get a law repealed is to strictly enforce it; perhaps the Supreme Court is trying to prove this old legal axiom. The Amchem Court concedes this litigation was formed to compensate a large number of victims who could not find an adequate forum to confront asbestos manufacturers who had caused them injury. In the face of legislative inaction, the parties tried to use the judicial system to create a broad-based settlement that would compensate plaintiffs without the hindrances of litigation.

By de-certifying this class, the Court has disregarded the practical problems facing state and federal courts in addressing the problems of asbestos litigation. For example, the Honorable Hiller B. Zobel, a member of the Massachusetts Superior Court, has 650 asbestos cases on his docket in addition to his regular caseload of 750 suits. [FN202] For Judge Zobel and those suffering from asbestos injuries, the Court's decision is not simply an evaluation of civil procedure; it is a significant act that will affect their everyday lives. The Amchem Court balances these concerns with the growing number of cases where the class action device may force the defendant to settle when the underlying claim is unsubstantiated or where injured claimants could be further injured by an arrangement made without their full consent. [FN203]

This case also exemplifies the necessity for Rule 23 to protect absent class members. Combining hundreds of thousands of plaintiffs into a single class is likely to create conflicts of interest, an issue Rule 23 seeks to manage. When the rules are disregarded or only partially applied, the victims continue to go on without compensation and courts waste their limited resources arguing procedure. However, unlike the ***827** Tower of Babel, class actions have not been destroyed. The Amchem Court has merely ordered the tower be built on a fortified foundation.

[FN1]. Genesis 11:1-9.

[FN2]. Georgine v. Amchem Prods., Inc., 878 F. Supp. 716 (E.D. Pa. 1994), rev'd, 83 F.3d 610 (3d Cir. 1996), aff'd sub nom . Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

[FN3]. See infra note 53 for the full text of Rule 23 of the Federal Rules of Civil Procedure .

[FN4]. Amchem, 117 S. Ct. at 2248. Justice Ginsburg delivered the opinion, in which Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas joined. Id . at 2237. Justice Breyer filed a separate opinion concurring in part and dissenting in part, in which Justice Stevens joined. Id . Justice O'Connor took no part in the consideration or decision of the case. Id .

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[FN5]. Id . at 2250. See also John C. Coffee, Jr., After the High Court Decision in Amchem Products Inc. v. Windsor, Can a Class Action Ever Be Certified Only for the Purpose of Settlement?, Nat'l L.J., July 21, 1997, at B4. Coffee, a professor of law at Columbia University, wrote, " [T]he decision rests on two independent pillars: the 'predominance' requirement of Rule 23(b)(3) and the adequacy-of-representation standard of Rule 23(a)(4)." Id .

[FN6]. Amchem, 117 S. Ct. at 2237. For a list of the 20 former asbestos manufacturers, see infra note 9.

[FN7]. Id .

[FN8]. Id . The Court writes, " ' [This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as forty years for some asbestos related diseases, a continuing stream of claims can be expected .' " Id . (quoting 1991 report of United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in September 1990) (alteration in original) (emphasis added).

[FN9]. Id . at 2238. The Court writes, "The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co." Id . n.2.

[FN10]. John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Action, 95 Colum. L. Rev . 1343, 1388 n.172 (1995) (tracing the history of the CCR to the dissolution of the Asbestos Claims Facility, caused by the bankruptcies of some member companies and an ideological split when certain members advocated "a harder, more adversarial stance toward plaintiffs").

[FN11]. For a detailed (and highly critical) account of the original settlement arrangement and its background, see Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045 (1995). Koniak writes, " [T]wenty companies faced the prospect against millions of legal claims brought in connection with their asbestos products. Many thousands of these cases were already pending. The rest would be filed in years to come. The companies wanted out of this mess, and they found a way." Id . at 1051.

[FN12]. Amchem, 117 S. Ct. at 2238. The Amchem Court adds the transfer order was for pending cases only, as the MDL Panel does not have the power to consolidate future unfiled claims. Id .

[FN13]. Id . at 2239. These members were known as "inventory" plaintiffs as law firms would typically represent a large number of asbestos claimants and defendants would then make settlement offers to resolve a firm's inventory of cases. Koniak, supra note 11, at 1052. Claimants who had not yet filed suit were added at a later date; as the Amchem opinion reads, "CCR indicated in these discussions that it would resist settlement of inventory cases absent 'some kind of protection for the future.' " Amchem, 117 S. Ct. at 2239 (quoting Georgine v. Amchem Prods., Inc ., 157 F.R.D. 246, 294 (E.D. Pa. 1994), the decision originally certifying the class considered in the case at bar).

[FN14]. Amchem, 117 S. Ct. at 2239 (observing that plaintiff attorneys were the only counsel to represent the interests of anticipated asbestos claimants, even though no attorney-client relationship existed).

[FN15]. Id .

[FN16]. Id . See also Coffee, supra note 10, at 1393 (adding " [u]niquely, the case was over before it had begun-a comprehensive settlement without discovery, motions, or preliminary litigation of any kind").

[FN17]. Amchem, 117 S. Ct. at 2241. Rule 23(c) requires that when a class action is certified under Rule 23(b)(3), class representatives must give notice to all members that "the court will exclude the member from the class if the member so requests by a specified date." Fed. R. Civ. P . 23(c)(2)(A).

[FN18]. Amchem, 117 S. Ct. at 2238.

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[FN19]. Id . at 2242.

[FN20]. Id . In a Rule 23(b)(2) class certification, "the judgment, whether favorable or not, will include all members who do not request exclusion." Fed. R. Civ. P. 23(c)(2)(B).

[FN21]. 28 U.S.C. §1651 (1994). The All-Writs Act provides in subsection (a), "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id . §1651(a) (emphasis added).

[FN22]. 28 U.S.C. §2283 (1994). The Anti-Injunction Act reads, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id .

[FN23]. Georgine v. Amchem Prods., Inc., 878 F. Supp. 716, 725-27 (E.D. Pa. 1994) (enjoining all class members from filing individual asbestos-related suits against defendant companies after finding class certification fair and appropriate).

[FN24]. Georgine v. Amchem Prods., Inc., 83 F. 3d 610 (3d Cir. 1996). For the full text of Rule 23, see infra note 53.

[FN25]. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996) (granting request for certiorari).

[FN26]. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2237 (1997). Two of the parties to the suit filed briefs in favor of class certification, while four of the parties were opposed. Id . In addition, ten amicus curiae briefs were filed. Id .

[FN27]. Respondent's Brief for Robert A. Georgine and the Plaintiff Class in Support of Petitioners at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 721635 (Dec. 16, 1996)); Petitioner's Brief at * ii, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 721641 (Dec. 16, 1996)) (arguing on behalf of all twenty CCR companies); Amicus Brief for Rhone-Poulenc Rorer Inc., Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. at *2-3, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 722038 (Dec. 16, 1996)) (arguing on behalf of five pharmaceutical companies that have created a settlement with 1,300 claimants who charge they contracted the HIV-virus because of the companies' processing of plasma for hemophilia therapies); Amicus Brief of the Washington Legal Foundation at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 722039 (Dec. 16, 1996)) (arguing on behalf of "non-profit public interest law and policy center" to promote "economic and civil liberties of individuals and businesses"); Amicus Brief for the Chamber of Commerce of the United States at *1-2, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96- 270) (available at 1996 WL 722040 (Dec. 16, 1996)) (arguing on behalf of over 215,000 member companies who are frequently "made targets of federal class action complaints"); Amicus Brief for the National Association of Securities and Commercial Lawyers at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 744852 (Dec. 24, 1996)) (arguing on behalf of class action attorneys who litigate antitrust, commercial, consumer, employee benefit, and securities fraud claims).

[FN28]. Respondent's Brief for Casimir and Margaret Balonis at *10, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 13204 (Jan. 15, 1997)) (arguing on behalf of asbestos claimants who did not wish to be included in the settlement but did not opt out of the class); Respondent's Brief for White Lung Association of New Jersey, et al. at * ii, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96- 270) (available at 1997 WL 13206 (Jan. 15, 1997)) (arguing on behalf of White Lung Association of New Jersey, the National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, the Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Ron Maher, and Lynn Maher); Respondent's Brief for Aileen Cargile, et al. at *2, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 13207 (Jan. 15, 1997)) (arguing on behalf of six California residents who have either contracted mesothelioma or are at risk); Respondent's Brief for George Windsor, et al. at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 13208 (Jan. 15, 1997)) (challenging class certification on behalf of all absent plaintiff-class members); Amicus Brief for Owens-Illinois, Inc. at *2, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (available at 1997 WL 13567 (Jan. 15, 1997)) (opposing certification on the grounds the agreement will adversely affect former asbestos manufacturers who are not members of the CCR, as they may be held jointly liable for damages not covered by the settlement); Amicus Brief for the Asbestos Victims of America at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 13585 (Jan. 15, 1997)) (arguing for the interests of "asbestos victims and friends" to "preserve the rights of future

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asbestos claimants"); Amicus Brief for the Trial Lawyers for Public Justice, P.C. at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 13596 (Jan. 15, 1997)) (arguing on behalf of the public interest against "efforts by corporate defendants to use the class action device as a tool for capping their liability in mass tort cases and depriving injured victims of their rights"); Amicus Brief of Law Professors at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 13605 (Jan. 15, 1997)) (opposing certification "to ensure that the procedural system facilitates the enjoyment of substantive legal rights fairly, efficiently, and expeditiously"); Amicus Brief for the States of New York, California, Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Virginia and the District of Columbia and the Territory of Guam at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1997 WL 16348 (Jan. 15, 1997)).

[FN29]. Amicus Brief of the Association of Trial Lawyers of America at *1- 2, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270), (available at 1997 WL 14807 (Jan. 15, 1997)).

[FN30]. Amchem, 117 S. Ct. at 2248. See Fed. R. Civ. P . 23(b)(3)(D) (advising a court may consider "difficulties likely to be encountered in the management of a class action" when ruling on certification). Rule 23(b)(3) lists four factors to decide the predominance and superiority criteria of the subsection. See infra note 53. The Amchem Court merely restates the rule that the four factors need not be met to certify a class under Rule 23(b)(3) as they are merely guidelines for a court to consider. Amchem, 117 S. Ct. at 2248.

[FN31]. Amchem, 117 S. Ct. at 2250. The Court writes, "The Court of Appeals' opinion amply demonstrates why-with or without a settlement on the table-the sprawling class the District Court certified does not satisfy Rule 23's requirements." Id . at 2249.

[FN32]. Id. at 2244. The Court notes that Article III issues were also argued by parties, namely ripeness and standing. Id . However, the class certification issues are dispositive of the case at bar and their resolution makes analysis into Article III issues unnecessary. Id .

[FN33]. Christopher F. Edley, Jr. & Paul C. Weiler, Asbestos: a Multi- Billion-Dollar Crisis, 30 Harv. J. on Legis. 383 (1993). See also, W. Kip Vicscusi, Reforming Products Liability 20-22 (1991) (noting in 1989, 61% of all products liability cases in the federal system were asbestos-related, making the "surge in asbestos litigation" a substantial cause of the rising number of products liability suits generally).

[FN34]. Edley & Weiler, supra note 33, at 385.

[FN35]. Hiller B. Zobel, The Crazy Quilt in the Courts, Christian Sci. Monitor, July 1, 1997, at 19. Judge Zobel of the Massachusetts Superior Court writes, "The delay and the cost (67 cents of every dollar available to pay for asbestos injuries goes to legal fees and expenses) condemn the process." Id .

[FN36]. Amchem, 117 S. Ct. at 2237 (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991)). See also Edley & Weiler, supra note 33, at 383-84 (arguing asbestos suits "pose a series of intractable policy problems," chief among them that mortally ill claimants die before suits are resolved, defendant manufacturers have declared bankruptcy in the face of litigation, and Congress has not acted).

[FN37]. Amchem, 117 S. Ct. at 2238 n.2.

[FN38]. Edley & Weiler, supra note 33, at 387.

[FN39]. Id .

[FN40]. Id . at 387-88. On the latency period of asbestos, see supra note 8.

[FN41]. Id . at 390 (attributing the removal of asbestos from the workplace by the early 1970s to workers compensation and health regulations in the workplace, but not as a result of tort claims). See also Barry I. Castleman, Asbestos: Medical and Legal Aspects 787 (1996) (attributing market shifts away from asbestos use in the 1980s to standards mandated by the Environmental Protection Agency and Occupational Safety and Health Administration as well as workers compensation

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awards, products liability cases and public awareness).

[FN42]. Amchem, 117 S. Ct. at 2237 (citing Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991)).

[FN43]. For a textbook example of an asbestos tort case, see Borel v. Fibreboard Paper Products Corp., discussed infra text accompanying notes 45- 46, 48 (affirming jury award under theory of strict liability against insulation company for failure to warn employee of dangers in handling asbestos insulation).

[FN44]. Amchem, 117 S. Ct. at 2238. For a critical view of the response of the federal government to asbestos litigation, see Edley & Weiler, supra note 33. They write:
In the 1990s, the battle over tort reform has shifted to Washington, where the American Tort Reform Association and the American Medical Association are locked in standoff with the American Trial Lawyers Association. During the 1992 presidential election campaign, former President George Bush and former Vice President Dan Quayle-in an unsuccessful effort to divert the public's attention from our declining economic productivity and spiraling health care costs -continually harped on a "litigation crisis" they attributed to personal injury lawyers wearing "tasseled loafers."
Id . at 384 (citations omitted). The authors support the settlement at issue in Amchem, writing, " [W]e firmly endorse the fairness and adequacy of this settlement of future asbestos claims. We also hope that this will be the first step towards comparable relief for every one of the more than 100,000 asbestos claims now pending in federal and state courts." Id . at 407. See, e.g., Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819 (1992).

[FN45]. 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

[FN46]. Id . at 1092. After the Fifth Circuit announced this decision, other circuits took "judicial notice of the causal relationship of asbestos exposure to asbestosis, lung cancer, and mesothelioma and held that causation was established as a matter of law." Gerald Boxton, Toxic Apportionment: A Causation and Risk Contribution Model, 25 Envtl. L. 549, 552 n.7 (1995).

[FN47]. Francis E. McGovern, An Analysis of Mass Torts for Judges, 73 Tex. L. Rev. 1821 (1995). McGovern writes:
[A] tort is elastic to the extent that the number of cases that are filed (demand) rises as the transaction costs associated with each case (price) are reduced and the number of judicial case resolutions increases (supply). . . . The asbestos litigation illustrates an elastic mass tort in which there appears to be larger numbers of filing when the velocity of case resolution is rapid and the transaction costs are low.
Id . at 1827 n.26.

[FN48]. Coffee, supra note 10, at 1384-85. Coffee writes:
Although, like a massive, unending river, asbestos litigation has flowed through the courts, it at least had a definable starting point: the Fifth Circuit's holding in 1973 that asbestos manufacturers could be held strictly liable for injuries resulting from asbestos exposure. By 1992, less than twenty years later, an estimated 200,000 personal injury claims, each typically naming multiple defendants, had been filed or were pending nationwide. Yet, even this number may represent only the tip of the proverbial iceberg. By some estimates, upwards of twenty-one million Americans have been exposed to asbestos in a manner that risks serious health problems, and estimates as high as an additional 250,000 to 500,000 deaths from asbestos exposure have been responsibly made. Nor has the pace of case filings begun to slacken. By 1990, the rate of case filings was increasing at an exponential pace .
Id . (emphasis added) (citations omitted).

[FN49]. Federal law allows for multidistrict litigation as follows:
(a)When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross- claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

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. . . .
(c)Proceedings for the transfer of an action under this section may be initiated by-
(i)the judicial panel on multidistrict litigation upon its own initiative, or
(ii)motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.
<cn>28 U.S.C. §1407 (1994) (emphasis in original).

[FN50]. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2238 (1997).

[FN51]. Id .

[FN52]. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 265 (E.D. Pa. 1994). The court also noted that an estimated sixty-thousand asbestos cases were pending in state courts. Id .

[FN53]. Fed. R. Civ. P. 23. The rule allows a class action when the following conditions are satisfied:
(a)Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(b)Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1)the prosecution of separate actions by or against individual members of the class would create a risk of
(A)inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B)adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2)the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3)the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
(c)Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
(1)As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
(2)In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.
(3)The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.
(4)When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be

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construed and applied accordingly.
(d)Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.
(e)Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
Id.

[FN54]. Amchem, 117 S. Ct. at 2245.

[FN55]. Fed. R. Civ. P. 23(a). See supra note 53 for the full text of Rule 23. See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev . 356, 387 (1967) (referring to the prerequisites of Rule 23(a) as "the well- agreed" proposition of the Advisory Committee that no class action should be permitted unless satisfying these requirements). For the rationale of the requirements of Rule 23(a), see Angelo N. Ancheta, Comment, Defendant Class Actions and Federal Civil Rights Litigation, 33 UCLA L. Rev . 283 (1985). Ancheta writes:
The Rule 23(a) prerequisites serve as reminders, as well as formal requirements, that a class action must foster judicial economy and guarantee due process of law. Numerosity, commonality, typicality, and adequacy of representation-as the four prongs of Rule 23(a) are commonly known-attempt to guarantee that certified classes will be both well defined and well represented.
Id . at 289.

[FN56]. Fed. R. Civ. P. 23(b). See supra note 53 for the full text of Rule 23.

[FN57]. Fed. R. Civ. P. 23(b)(1). Subsection (b)(1) (which is divided into two provisions) consolidates multiple claims into a single adjudication in cases where there would be a risk of inconsistent decisions if multiple individual actions were pursued. Id . Subsection (A) avoids such inconsistencies in cases where "incompatible standards of conduct" for the party opposing the class could be established. Fed. R. Civ. P. 23(b)(1)(A). Subsection (B) is designed to exclude certification that could result in the practical disposition of the interests of third parties or prejudice the interests of persons not involved in the suit. Fed. R. Civ. P . 23(b)(1)(B).

[FN58]. Fed. R. Civ. P. 23(b)(2). The advisory committee's note to Rule 23(b)(2) reads, "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Id . advisory committee's note.

[FN59]. Fed. R. Civ. P. 23(b)(2).

[FN60]. Fed. R. Civ. P. 23(b)(3).

[FN61]. 1 Herbert Newberg & Alba Conte, Newberg on Class Actions §4.22, at 4-78 (3d ed. 1992) (noting overlap between the two requirements and that a class passing the more stringent predominance inquiry also satisfies commonality, although the inverse is not true). See also Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2243 (1997) (agreeing with the Third Circuit's statement of Rule 23 that commonality is "subsumed" by the more demanding predominance requirement).

[FN62]. Amchem, 117 S. Ct. at 2249 n.18. "Claims and defenses" refers to "the kinds of claims or defenses that can be realized in courts of law as part of an actual or impending suit." Diamond v. Charles, 476 U.S. 54, 76- 77 (1986) (O'Connor, J., concurring) (applying the term "claims and defenses" under Rule 24(c) for permissive intervention).

[FN63]. 1 Newberg & Conte, supra note 61, §3.44, at 3-239 to 3-241 (asserting that the "opt out" freedom of class members, adequate representation, and the court's monitoring of these safeguards all serve to protect the rights of absentee members).

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[FN64]. Califano v. Yamasaki, 442 U.S. 682 (1979) (upholding the certification of a plaintiff class of welfare recipients who had been overpaid in monthly stipends and sued the Secretary of the Department of Health, Education, and Welfare for an individual hearing before recoupment hearings).

[FN65]. Id . at 690.

[FN66]. Id . at 701.

[FN67]. Amchem, 117 S. Ct. at 2246 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (upholding district court's decision to deny class certification under the Fair Debt Collection Practices Act)). See also text accompanying infra note 195.

[FN68]. Fed. R. Civ. P. 23(b)(3) advisory committee's note.

[FN69]. Fed. R. Civ. P. 23(c)(2)(B). Hence, unless a claimant actively opts out of the class, he or she is bound by the decision "whether or not favorable to the class" and will not be able to pursue a separate case. Kaplan, supra note 55, at 393.

[FN70]. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 257-58 (E.D. Pa. 1994). Under Rule 23(e), the court must approve the terms of a class action settlement before an action is officially concluded. Fed. R. Civ. P. 23(e).

[FN71]. The settlement listed four categories of compensable disease: (1) mesothelioma, (2) lung cancer, (3) certain other cancers (colon-rectal, laryngeal, esophageal, and stomach cancer), and (4) non-malignant conditions (asbestosis and bilateral pleural thickening). Amchem, 117 S. Ct. at 2240.

[FN72]. Id . Claims that do not fall into the four categories listed in the settlement are defined as "exceptional." Id .

[FN73]. Georgine, 157 F.R.D. at 336-37. The Stipulation of Settlement allowed the following ranges of damages the CCR will award for its four disease categories: Mesothelioma, $20,000 to $200,000; Lung cancer, $10,000 to $86,000; Other cancer, $5,000 to $32,000; Non-malignant conditions, $2,500 to $30,000. Id .

[FN74]. Amchem, 117 S. Ct. at 2240. Of the mesothelioma, lung cancer and other cancer categories, only three percent of qualified claims in a given year may be "extraordinary." Id . n.6. Of the non-malignant condition claimants, only one percent may qualify as "extraordinary." Id . The amount paid for "extraordinary" claims is also capped by calculating average expenditures. Id . The Court illustrates this equation with extraordinary mesothelioma claimants who receive, on average, $300,000. Id .

[FN75]. Id . at 2240. Under the settlement, the following claims will not be paid by CCR companies (even if recognized by state law): (1) Claims by family members for loss of consortium; (2) Claims by "exposure-only" plaintiffs for a higher increased risk of cancer, fear of future asbestos-related injury, and medical monitoring; and (3) Claims for asbestos-related plaques on lungs with no accompanying physical impairment (also known as "pleural" claims). Id . These claimants may eventually qualify for compensation under the settlement if and when they develop a disease under one of the four qualified categories. Id .

[FN76]. Georgine, 157 F.R.D. at 288.

[FN77]. Amchem, 117 S. Ct. at 2239.

[FN78]. Id . at 2240.

[FN79]. Id . at 2241. The district court gave proposed class members from November 1, 1993 to January 24, 1994 to opt out of the class. Georgine, 157 F.R.D. at 259-60.

[FN80]. Georgine, 157 F.R.D. at 315. The district court held the settlement was fair, pursuant to Rule 23(e). Id . at 325.

[FN81]. Amchem, 117 S. Ct. at 2237. The district court granted the injunction requested by CCR companies, holding, "this continued litigation will immediately undermine and defeat the purpose and effect of the Stipulation now approved by this Court." Georgine v. Amchem Prods., Inc., 878 F. Supp. 716, 721 (E.D. Pa. 1994). On binding class members to a settlement

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for failure to opt out of the certification, see supra note 69.

[FN82]. Amchem, 117 S. Ct. at 2240. Mesothelioma is a fatal cancer caused exclusively by exposure to asbestos. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 633 (3d Cir. 1996). It is also unique in that it can be caused from mere incidental exposure to asbestos fibers, in some cases infecting family members of asbestos workers without physical contact. Id .

[FN83]. Amchem, 117 S. Ct. at 2240.

[FN84]. Id .

[FN85]. Id . at 2241.

[FN86]. See generally, Coffee, supra note 10, at 1399. Coffee writes:
[I]n terms of its discrimination against future claimants, the most revealing deficiency in the Georgine settlement was its failure to contain any adjustment for inflation. Under the settlement, the amounts to be received by future claimants are fixed for the first ten years, regardless of increases in the cost of living. Thereafter, payment ranges may be increased in the eleventh year, up to twenty percent, but only if the parties negotiate new values . . . . Historically, however, consumer prices have increased at a much faster rate.
Id .

[FN87]. Edward Felsenthal, Court to Consider Asbestos Settlement, Wall St. J., Nov. 4, 1996, at B11.

[FN88]. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 319 (E.D. Pa. 1994).

[FN89]. Felsenthal, supra note 87, at B11 (omission in original).

[FN90]. Amchem, 117 S. Ct. at 2248.

[FN91]. Id . Prior to Amchem, it was well-settled that the requirements of Rule 23 were more easily satisfied in settlement classes. 2 Newberg & Conte, supra note 61, §11.28, at 11-57. The authors note the typicality and predominance inquiries tend to merge in class action suits and argue:
[T]ypicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement. This is a much simpler proposition than showing typicality in an ongoing litigation context, wherein all elements of liability and damages must be analyzed to determine common questions affecting both the class representative and the class.
Id . at 11-58 (citations omitted). In the supplement to the treatise, Conte asserts that Amchem supports this general rule that a settlement-only class more readily meets the standards of Rule 23. 2 Alba Conte, Newberg on Class Actions, §11.28, at 2S-95 (Supp. 1997). However, the treatise fails to reconcile (although it does mention) the Court's order that requirements of Rule 23 "demand undiluted, even heightened, attention in the settlement context" with its position that settlement makes certification a more simple endeavor. Id . at 2S-95 to 2S-96 (quoting Amchem, 117 S. Ct. at 1248 [sic], should read 117 S. Ct. at 2248). However, the Amchem Court includes a footnote asserting:
Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more, not less caution on the question of certification.
Amchem, 117 S. Ct. at 2248 n.16.

[FN92]. Amchem, 117 S. Ct. at 2248. See also In re Foundation for New Era Philanthropy Litig., Nos. MDL 1127, 96-7035, 96-3554, 96-4271, 1997 WL 490645, at *2 (E.D. Pa. Aug. 13, 1997) (applying Amchem to a multidistrict settlement agreement for a bankrupt foundation by noting "The Supreme Court expressed great concern with the inescapable reality that notice could not effectually be given to the exposure-only future claimants").

[FN93]. Amchem, 117 S. Ct. at 2248 (holding "the standards set for the protection of absent 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").

[FN94]. Id . at 2248-49. Cf . Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-77 (1974) (rejecting argument that adequate

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representation should supersede notice requirements for purposes of due process inquiry as the federal rules require both conditions be satisfied for class certification).

[FN95]. Fed. R. Civ. P. 23(e). For the full text of Rule 23, see supra note 53.

[FN96]. Amchem, 117 S. Ct. at 2249, n.17.

[FN97]. Id . at 2249.

[FN98]. Id . at 2249-50.

[FN99]. Id . at 2249.

[FN100]. Id . at 2249-50.

[FN101]. 2 Newberg & Conte, supra note 61, §11.28, at 11-57 (noting the requirements of Rule 23 are "more readily satisfied in the settlement context, where the circumstances are less complex," than if the class was intended for actual litigation). See also supra note 91.

[FN102]. Amchem, 117 S. Ct. at 2247-48. On the criteria of Rule 23(a) and (b)(3), the Third Circuit held that "each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996). However, the Amchem Court is less than enthusiastic in its support of the settlement factor, merely writing, "We agree with petitioners to this limited extent: settlement is relevant to a class certification." Amchem, 117 S. Ct. at 2248.

[FN103]. Amchem, 117 S. Ct. at 2248. The Amchem decision abrogates the following circuit court decisions: In re Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996) (affirming district court certification of settlement-only class by ruling "in settlement class context, common issues arise from the settlement itself") (citing 2 Newberg & Conte, supra note 61, §11.28 at 11- 58); White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994) (affirming district court certification of settlement class in antitrust action as the adequate representation inquiry is "ultimately determined by the settlement itself"), cert. denied, 515 U.S. 1137 (1995); In re A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989) (affirming district court's decision to certify a Dalkon Shield class action and settlement because " [i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"), cert. denied, 493 U.S. 959 (1989); Malchman v. Davis, 761 F.2d 893, 900 (2d Cir. 1985) (affirming district court certification of an antitrust class action, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U.S. 1143 (1986). Amchem, 117 S. Ct. at 2247.

[FN104]. Amchem, 117 S. Ct. at 2248. The majority argues that a court would have to evaluate a proposed settlement "without benefit of adversarial investigation" if offered without trial or evaluation of Rule 23 safeguards. Id . at 2249. Cf . Kamilewicz v. Bank of Boston Corp., 100 F.3d. 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting) (arguing against a decision to deny rehearing en banc on grounds that parties representing the settlement-only plaintiff class "may be imperfect agents of the other class members-may even put one over on the court, in a staged performance").

[FN105]. Respondent's Brief for Casimir and Margaret Balonis at *25, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (No. 96-270) (available at 1997 WL 13204 (Jan. 15, 1997)) (arguing the real leverage for plaintiffs stems from "a credible threat to stick a defendant with an adverse class-wide judgment, and a fee-related interest in trying the lawsuit unless the defendant offers its expected value in settlement"); Amicus Brief of Law Professors at * 20, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (No. 96-270) (available at 1997 WL 13605 (Jan. 15, 1997)) (arguing attorneys in settlement-only context cannot "extract more money from the defendant" if the lawsuit cannot be tried as a class action). The Court acknowledges, "Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation." Amchem, 117 S. Ct. at 2248- 49 (citations omitted).

[FN106]. Amchem, 117 S. Ct. at 2250. For more discussion of the overlap between the commonality and predominance requirements, see 1 Newberg & Conte, supra note 61, §4.22, at 4-78. See also supra note 61.

[FN107]. Amchem, 117 S. Ct. at 2250.

[FN108]. Georgine v. Amchem Prods., Inc ., 83 F.3d 610, 626 (3d Cir. 1996).

[FN109]. Id . at 627 ("The states have different rules governing the whole range of issues raised by the plaintiffs' claims: viability of futures claims; availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and comparative/contributory negligence."). Cf . Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985) (upholding Kansas rule to apply "law of the forum" in state courts to decide procedural questions in a multistate class action suit).

[FN110]. Amchem, 117 S. Ct. at 2250 ("No settlement class called to our attention is as sprawling as this one."). See also McGovern, supra note 47, at 1838 n.88 (calling the outbreak of asbestos cases an "aberration" and a "mega mass tort").

[FN111]. Amchem, 117 S. Ct. at 2250.

[FN112]. Fed. R. Civ. P. 23(a)(4). For Supreme Court precedent on the adequate representation requirement, the Amchem Court cites the following cases: General Tel. Co. v. Falcon, 457 U.S. 147, 157-58, n.13 (1982) (holding the adequate representation inquiry tends to merge with commonality and typicality, the two requirements of Rule 23(a) that help a court determine whether "maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected"); East Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (holding "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members") (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974) (reversing district court decision on the grounds that plaintiffs had sustained mere abstract injury, requiring the case be dismissed for lack of standing)). Amchem, 117 S. Ct. at 2250-51.

[FN113]. Amchem, 117 S. Ct. at 2250. See also Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.15 (2d Cir. 1978) (holding that class certification "makes the class the attorney's client for all practical purposes" and "it is settled that the attorney is not free to advocate the interests of the named plaintiffs alone"), aff'd, 444 U.S. 472 (1980).

[FN114]. Amchem, 117 S. Ct. at 2250.

[FN115]. Id . at 2251. Cf . General Tel. Co. v. EEOC, 446 U.S. 318, 331 (1980) (applying the principle to a different set of facts, writing, "In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

[FN116]. Amchem, 117 S. Ct. at 2251. The Court again notes the differences among class members, particularly exposure-only plaintiffs compared to those who had already shown injury. Id . The Court holds that the currently injured have an interest in favorable payments to be made immediately, while the exposure only group would want more money set aside for future payouts. Id . Such inherent conflicts among class members would make fair representation difficult without appointing delegates for the subgroups. Id .

[FN117]. Id . The Amchem Court also cites to a Second Circuit case on asbestos class certification, where the court wrote:

[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 743 (2d Cir. 1992), modified on reh'g sub nom . In re Findley, 993 F.2d 7 (2d Cir. 1993). Cf . George L. Priest, Procedural Versus Substantive Controls of Mass Tort Class Actions, 26 J. Legal Stud. 521, 530 (1997) (arguing "the most serious grounds of academic criticism of the modern mass tort class action" may be the conflicts of interest between attorneys and the class as a whole, in cases where an inadequate settlement is preferable for counsel to guarantee attorneys' fees).

[FN118]. Amchem, 117 S. Ct. at 2251. The Amchem Court notes other inequalities in the settlement between currently

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injured plaintiffs and those in the exposure-only categories, including a ban on loss of consortium claims, no adjustment for inflation, and a ceiling on the number of future claimants who can "opt out at the back end" each year to pursue separate suits. Id .

[FN119]. While the Court does not speak directly to the effect subclasses would have had on the ultimate decision in this case, commentators have noted that breaking up a class can be an important safeguard to protect absentee members in Rule 23 actions. See 1 Newberg & Conte, supra note 61, §3.44 at 3-239 to 3-242. They write:
If there is any doubt as to the plaintiff's representative capacity, the court may make class approval conditional on a demonstration of adequate representation, appoint new or additional representatives, or create subclasses if conflicts arise. Normally, no plaintiff should be declared an inadequate representative because of a conflict of interest, if that conflict can be reasonably avoided through one of the safeguards provided by the rule .
Id . at 3-241 to 3-242 (emphasis added) (footnotes omitted).

[FN120]. Amchem, 117 S. Ct. at 2244. Cf . Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1068 (1997) (refusing to decide whether petitioners met the standing requirements to challenge state amendment making English the official language of Arizona because the state employee at issue had resigned, making mootness dispositive of the case as a whole).

[FN121]. Amchem, 117 S. Ct. at 2244. The challengers to certification argued against justiciability under Article III of the U.S. Constitution, namely that the parties who created a settlement between the CCR companies and exposure-only plaintiffs do not have a ripe claim until they manifest asbestos- related injuries. Id . The challengers also argue against justiciability on the grounds of standing, as they have not yet manifested an injury for which they can claim damages. Id . The Amchem Court declines to address the ripeness and standing issues as resolving the challenges to class certification is "logically antecedent to the existence of any Article III issues." Id . See also, Castleman, supra note 41, at 807 (commenting on the district court settlement agreement and writing, " [T]he Constitution limits the courts to resolving 'cases and controversies,' and there is every appearance that the parties in this instance were asking the court to place its approval on a private agreement.").

[FN122]. Amchem, 117 S. Ct. at 2244 (noting objectors' challenge to certification that "exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal- court jurisdiction based upon diversity of citizenship"). The Amchem Court does not directly address the subject-matter jurisdiction argument, but it would likely apply analysis similar to the justiciability inquiry (see supra note 121) as the issue would only exist if the class were certified. Id .

[FN123]. Id . at 2252. While not necessary to the case at bar, the Amchem Court discusses the notice issue in some detail. Id . First, Rule 23 requires "the best notice practicable" to all proposed class members of the pending case and of their right to opt out of the class. Fed. R. Civ. P. 23(c)(2). The Court asserts that notice to future claimants (all of whom would be bound by the settlement) would be "highly problematic" because (1) exposure- only claimants may not know of their injury or understand the significance of notice, (2) the children and future spouses of asbestos victims, who may ultimately have claims for loss of consortium, could not be notified, and (3) the current spouses and children of claimants who have been exposed might not know of the exposure. Amchem, 117 S. Ct. at 2252. In such a case, "we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous" and the inherent difficulty in trying to notify persons in the settlement class with no "perceptible asbestos-related disease at the time of the settlement." Id . However, predominance and adequacy of representation inquiries resolve this case, so the Court need not rule on notice. Id . See Kaplan, supra note 55, at 396 (asserting notice of class action is a constitutional requirement and "if the notice has not been actually fair to the level of due process, the Constitution can be relied on to deny binding force to the judgment"). Cf . Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-76 (1974) (holding the requirement under Rule 23(c)(2) of individual written and mailed notice "to those class members who are identifiable though reasonable efforts" would not be relaxed to "fit the pocketbooks of particular plaintiffs" even in a case of over two million potential class members).

[FN124]. Amchem, 117 S. Ct. at 2242 (agreeing with the Third Circuit's determination in Georgine v. Amchem Prods, Inc., 83 F.3d 610, 623 (1996)).

[FN125]. Id . at 2252.

[FN126]. Id .

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[FN127]. Amchem, 117 S. Ct. at 2249-52. Rule 23(b) orders two requirements for class certification under the subsection: (1) common issues of law or fact predominate over individual differences and, (2) the court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). The Amchem Court does not apply the superiority requirement to the district court's class certification. Amchem, 117 S. Ct. at 2249-52. However, Justice Breyer's dissenting opinion notes the district court's determination on superiority "that 'the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members.' " Id . at 2257 (Breyer, J., dissenting) (quoting Georgine v. Amchem, Prods., Inc., 157 F.R.D. 246, 316 (E.D. Pa. 1994)).

[FN128]. Amchem, 117 S. Ct. at 2249.

[FN129]. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996). The Amchem Court quotes a portion of this section to highlight the differences among class members, failing the predominance inquiry. Amchem, 117 S. Ct. at 2250.

[FN130]. Amchem, 117 S. Ct. at 2252 (Breyer, J., dissenting).

[FN131]. Id . (Breyer, J., dissenting). Justice Breyer cites to the portion of the majority opinion that reads, "We agree with petitioners to this limited extent: settlement is relevant to class certification." Id . at 2248.

[FN132]. Id . at 2252 (Breyer, J., dissenting).

[FN133]. Id . at 2252-53 (Breyer, J., dissenting). Justice Breyer notes the district court in this case considered five weeks of hearings and based class certification on over three hundred independent findings of fact. Id . at 2253 (Breyer, J., dissenting). See Califano v. Yamasaki, 442 U.S. 682, 703 (1979) (committing certification of a nationwide class to the discretion of the district court); see also Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979) (holding district courts are more familiar with legal and factual issues than courts charged with appellate review, so the district courts should have wide discretion in certifying class actions); cf . Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990) (deferring to district court in Rule 11 complaint as the court was "better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard" to fairly decide the case).

[FN134]. Amchem, 117 S. Ct. at 2252-53 (Breyer, J., dissenting).

[FN135]. Id . at 2253 (Breyer, J., dissenting) ("Between 13 and 21 million workers have been exposed to asbestos in the workplace-over the past 40 or 50 years-but the most severe instances of such exposure probably occurred three or four decades ago.").

[FN136]. Id . (Breyer, J., dissenting).

[FN137]. Id . at 2254 (Breyer, J., dissenting) (arguing "the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects").

[FN138]. Id . (Breyer, J., dissenting). The majority opinion acknowledges, "The opinion dissenting in part is a forceful statement of that argument." Id . at 2252 n.21. The Court is referring to Justice Breyer's argument that a nationwide administrative solution to process claims would be the most "secure, fair, and efficient means" to compensate asbestos claimants. Id . at 2252. However, the Amchem Court defers to Congress to create such a solution, as courts are bound by the constraints of Rule 23. Id .

[FN139]. Id . at 2254 (Breyer, J., dissenting). Justice Breyer argues that predominance can not be evaluated in the abstract; a court's best guide to evaluating predominance is to examine the proceedings that will follow a proposed certification. Id . at 2255. Justice Breyer adds, "Rather, the settlement may simply, 'add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint' and courts 'can and should' look to it to enhance the 'ability . . . to make informed certification decisions.' " Id . (quoting In re Asbestos Litigation, 90 F.3d 963, 975 (5th Cir. 1996)). Specifically, Justice Breyer found the settlement showed important factors for predominance, including: (1) the underlying exposure to asbestos, (2) the interest in guaranteed compensation against the strong risk of no award, and (3) the interest in avoiding significant legal fees, transaction costs, and delays. Id . (Breyer, J., dissenting).

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[FN140]. Id . (Breyer, J., dissenting). Justice Breyer suggests subgroups may be appropriate to remedy any differences among class members, but he would once again defer to the judgment of the district court, as it was in the best position to decide the "fact specific Rule 23 determinations." Id . at 2256 (Breyer, J., dissenting).

[FN141]. Id . (Breyer, J., dissenting). Justice Breyer continues to show deference to the district court, writing, " [P]laintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed." Id . (Breyer, J., dissenting).

[FN142]. Id . at 2256-57 (Breyer, J., dissenting). On the fairness of the settlement agreement, Justice Breyer acknowledges some terms may be detrimental to future claimants, given that future benefits are not adjusted for inflation. Id . at 2257 (Breyer, J., dissenting). However, given the highly complex nature of the settlement and its practical necessity, the dissent would once again defer to the district court's determination. Id . (Breyer, J., dissenting). Justice Breyer also takes judicial notice that the AFL-CIO endorsed the settlement agreement and represents a significant number of the claimants in the case. Id . (Breyer, J., dissenting) (citing Georgine v. Amchem Prod., Inc., 157 F.R.D. 246, 325 (E.D. Pa. 1994)).

[FN143]. Id . at 2253, 2258 (Breyer, J., dissenting) (recommending the settlement be viewed as "a reasonably strong factor in favor of class certification" for re-hearing). Justice Breyer also criticizes the Third Circuit's decision in this case as "infected by a legal error." Id . at 2253 (Breyer, J., dissenting). The Third Circuit held the plaintiff class failed to satisfy the requirements of Rule 23 when "considered as a litigation class." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996). As the Third Circuit failed to consider the settlement as a relevant factor for certification, Justice Breyer would hold the issue be reconsidered applying "the correct legal standard" to the specific facts of the case. Amchem, 117 S. Ct. at 2253. Cf . Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491, 1501 (1997) (establishing a rule that evidence of a redistricting plan weakening "the voting power of minorities" may be considered in determining a jurisdiction's intent to discriminate and reserving this determination for a lower court when "it was not squarely addressed by the decision below or in the parties' briefs on appeal").

[FN144]. Amchem, 117 S. Ct. at 2254-55 (Breyer, J., dissenting). For Circuit Court cases using settlement as a strong factor in certifying a class, see supra note 103. See also In re Beef Indus. Antitrust Litig., 607 F.2d 167, 178 (5th Cir. 1979) (affirming district court's approval of antitrust settlement by holding "it is altogether proper and consistent for a court to certify a class for settlement purposes" even when it would be difficult to meet Rule 23's requirements "in a different context"), cert. denied, 452 U.S. 905 (1981).

[FN145]. In re Forty-Eight Insulations, Inc., 212 B.R. 938 (Bankr. N.D. Ill. 1997).

[FN146]. Id . at 943-44. In discussing the settlement class of 500,000 asbestos claimants, the court writes, "Because of the shear [sic] magnitude of such a class, with each member suffering from different levels of exposure for different periods of time, it defies logic to say that 'common issues predominate.' " Id . at 944 (quoting Rule 23(b)(3)). The court makes this observation even though the proposed class is much less inclusive than the one in Amchem, as it does not seek to include exposure-only claimants; the court notes "the same individual issues of exposure and proximate cause" would cause this class to fail the predominance inquiry. Id . n.8. Cf . Mega Life and Health Ins. Co. v. Jacola, 954 S.W.2d 898, 906 (Ark. 1997) (Thornton, J., dissenting) (noting the "importance of rigorously analyzing whether the common issues predominate" in class action against health insurer for negligence, fraud, misrepresentation, and false advertising).

[FN147]. In re Forty-Eight Insulations, Inc., 212 B.R. at 944 (emphasis added).

[FN148]. Amicus Brief for Rhone-Poulenc Rorer Inc., Armour Pharmaceutical Company, Bayer Corporation, Baxter Healthcare Corporation, and Alpha Therapeutic Corporation at *1, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 722038 (Dec. 16, 1996)).

[FN149]. Id . at *1-2. See In re Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632 (1996) (declining to rule on preliminary issues of discovery for lack of authority in consolidated cases against Baxter Healthcare Corporation, Bayer Corporation, Alpha Therapeutic Corporation, and Armour Pharmaceutical Company for negligence in distributing and testing blood plasma). See also In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (decertifying a nationwide class of hemophiliacs infected with the HIV-virus by the defendant's blood products on the grounds that class members had substantial claims, the value of which was not readily discernible given the small number of prior trials). The Seventh Circuit also noted in certification of mass asbestos classes, "The number of asbestos cases was so great as to exert a well-nigh

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irresistible pressure to bend the normal rules. No comparable pressure is exerted by the HIV-hemophilia litigation." Id . at 1304.

[FN150]. Amicus Brief for Rhone-Poulenc Rorer Inc., Armour Pharmaceutical Company, Bayer Corporation, Baxter Healthcare Corporation, and Alpha Therapeutic Corporation at *6, Amchem (No. 96-270).

[FN151]. Amicus Brief for the Washington Legal Foundation at *28, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (No. 96-270) (available at 1996 WL 722039 (Dec. 16, 1996)) (warning that "collateral litigation" would be a likely result of the Third Circuit's decision).

[FN152]. For a summary of Agent Orange litigation, see Hercules Inc. v. United States, 116 S. Ct. 981, 983-84 (1996). While the case addresses an action by two manufacturers to recoup money paid in the litigation and settlement of Agent Orange claims from the federal government for its role in creating the product, it includes a brief history of the litigation. Id . In 1980, Vietnam veterans and their families were certified as a class to sue for damages caused by dioxin found in Agent Orange. Id . at 984. In May 1984, "hours before the start of trial" the nine Agent Orange manufacturers (defendants in the case) settled with the plaintiff class for a $180 million settlement fund. Id .

[FN153]. In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989) (affirming district court decision to certify a class action suit for settlement against the manufacturer of Dalkon Shield, a birth control device that caused birth defects, septic abortions, and personal injury to users).

[FN154]. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 148 (S.D. Ohio 1992) (approving a settlement of a nationwide class action for heart-valve claimants and family members against a manufacturer for "funds totalling from $165 million to $215 million" as well as an uncapped fund for future injuries and medical care).

[FN155]. In re Silicone Gel Breast Implants Prods. Liab. Litig., No. CIV 92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994) (approving a settlement for $4,225,070,000 for present and future breast implant claimants against eight manufacturers). For the scientific bases of these suits and a comprehensive history of silicone breast implants, see Marcia Angell, Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case (1996).

[FN156]. No. 95-40635, 1998 WL 30259 (5th Cir. Jan. 27, 1998).

[FN157]. 117 S. Ct. 2503 (1997).

[FN158]. In re Asbestos Litig ., 1998 WL 30259, at *1.

[FN159]. Id . In its short opinion, the court asserted that the defendants in the case operated under a Rule 23(b)(1) limited fund designation and satisfied the commonality requirement, making the Amchem analysis into (b)(3) predominance inapplicable. Id .

[FN160]. Id . at *2-15 (Smith, J., dissenting).

[FN161]. Id . at *2 (Smith, J., dissenting). Judge Smith also quotes the Supreme Court's holding that Rule 23 inquiries should prevent "class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." Id . (Smith, J., dissenting) (quoting Amchem Prods., Inc., v. Windsor, 117 S. Ct. 2231, 2248 (1997)).

[FN162]. Id . at *3 (Smith, J., dissenting). Judge Smith argues that defendants are not operating out of a "limited fund" as required by Rule 23(b)(1) to meet the inconsistent or dispositive adjudication requirements. Id . (Smith, J., dissenting). Rather, a limited fund requires a preexisting (before suit was filed) interest in a fixed asset or property. Id . at *4 (Smith, J., dissenting) (citing 1 Newberg & Conte, supra note 61, §4.09 at 4- 33). In the case at bar, the plaintiffs have claims against a corporate defendant, failing the limited fund requirement. Id . (Smith, J., dissenting). On the predominance inquiry, the only common factors among class members cited by the majority are "harm from asbestos exposure and seeking equitable distribution of compensation from limited funds." Id . at *1. These factors fail the predominance test as explained in Amchem, as a "common interest in a fair compromise" is never sufficient for that requirement. Amchem, 117 S. Ct. at 2249-50.

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[FN163]. In re Asbestos Litig ., 1998 WL 30259, at *6-7 (Smith, J., dissenting). In this inquiry, Judge Smith focuses on the named parties and not on the competence of counsel. Id . at *7 (Smith, J., dissenting). The dissent also suggests subclasses should be created to meet the adequate representation requirement. Id . at *9 (Smith, J., dissenting).

[FN164]. 175 F.R.D. 226 (S.D. W. Va. 1997).

[FN165]. Id . at 228.

[FN166]. Id . at 232. The original complaint named just one representative for the plaintiff class, claimant Earl W. Walker, Jr. Id . A second representative was only proposed in the plaintiff's amended complaint. Id . Both of the representatives have contracted serious forms of cancer related to "prolonged cigarette smoking." Id .

[FN167]. Id . at 229. The actual complaint cites and explains six groups of potential plaintiff class members, but for purposes of the court discussion relating to Amchem, it is only necessary to understand the wide variety of potential claimants including those who have present and future injuries. Id . The defendant class is comprised of the Liggett Group, Inc., Liggett & Meyers, Inc., and Brooke Group Limited (the parent company of the Liggett Group, Inc.). Id . at 228.

[FN168]. Id . at 232. The district court also wrote, "The various combinations of subclasses within this gargantuan assembly of plaintiffs would appear to defy definition, much less division." Id .

[FN169]. Id .

[FN170]. Id . at 233 (quoting Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2251 (1997)).

[FN171]. In re Diet Drugs Prods. Liab. Litig., No. 1203, 1998 WL 12070, at *1-2 (J.P.M.L. Jan. 6, 1998). The exposure of defendant companies could be tremendous, as six million people used fen-phen and the drug has been linked to heart-valve damage and a fatal lung disease. Richard B. Schmitt, Thinning the Ranks: Diet-Pill Litigation Finds Courts Frowning on Mass Settlements, Wall St. J., Jan. 8, 1998, at A1.

[FN172]. In re Dow Corning Corp., 211 B.R. 545, 581 (Bankr. E.D. Mich. 1997). The court notes that "parties are apparently disinclined to resort to Rule 23" even though the predominance requirement of Rule 23(b)(3) would be "particularly problematic" for the settlement class to satisfy after Amchem . Id .

[FN173]. The settlement agreement provided that Dow Corning Corporation would contribute $2,018,740,000 to the total recovery fund of $4,225,070,000. In re Silicone Gel Breast Implants Prods. Liab. Litig., No. CIV 92-P-10000- S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at *24 (N.D. Ala. Sept. 1, 1994).

[FN174]. In re Silicone Gel Breast Implants Prods. Liab. Litig., 837 F. Supp. 1128, 1138 (N.D. Ala. 1993) (refusing to "pierce the corporate veil" of the Dow Corning Corporation so plaintiffs could recover from the two parent companies, Dow Chemical Company and Corning Incorporated). Dow Corning Corporation is currently under Chapter 11 bankruptcy protection. In re Dow Corning Corp., 221 B.R. at 553. The ability of the settling defendants to meet the terms of the agreement was raised in the original settlement hearings. In re Silicone Gel Breast Implants, 1994 WL 578353, at *27 n.2 (approving the settlement as parties had stipulated that the defendants had made "adequate financial assurances" as to "their ability to make these payments").

[FN175]. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2250 (1997).

[FN176]. In re Foundation for New Era Philanthropy Litig., Nos. MDL 1127, 96-7035, 96-3554, 96-4271, 1997 WL 490645. (E.D. Pa. Aug. 13, 1997). In light of Amchem, the court held the certification requirements under Rule 23(a) and (b)(1) were satisfied in a multidistrict class action. Id . at *2. The court noted securities fraud allegations satisfy the predominance inquiry under Rule 23(b)(3). Id . Furthermore, the district court held the varying injuries in the Amchem class were not present in the New Era case as the only allegations were of economic losses from the foundation. Id .

[FN177]. In re Nasdaq Market-Makers Antitrust Litig., No. 94 CIV. 3996(RWS), 1997 WL 805062 (S.D.N.Y. Dec. 31, 1997). The settlement required defendants pay $25,000,000 in cash up-front and then $884,867,925 in U.S. Treasury securities by September 30, 1998. Id . at *8. Combining this figure with approximately $100,000,000 in current settlements

brought this settlement to $1,010,000,000. Id .

[FN178]. Id . at *4-6. The court also notes that defendants in this case vigorously opposed the class certification of this case, unlike the parties in Amchem who presented a joint motion for certification without any intention of an actual trial. Id . at *3. The court argues such an adversarial proceeding insures a more fair settlement for absent class members as class representatives took full advantage of discovery and the threat of trial. Id . On the leverage value of an impending trial, see supra note 105.

[FN179]. Fed. R. Civ. P. 23(a). For the full text of Rule 23, see supra note 53.

[FN180]. Laughman v. Wells Fargo Leasing Corp., No. 96 C 925, 1997 WL 567800 (N.D. Ill. Sept. 2, 1997).

[FN181]. Id . at *5 (quoting Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2250-51 (1997)) (emphasis added) (citations omitted). See also East Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977), discussed supra note 112. The Illinois court also held predominance had not been satisfied, as state law allowed varying claims for members of the proposed class. Laughman, 1997 WL 567800, at *4.

[FN182]. Jackson v. Motel 6 Multipurposes, Inc., No. 96-72-CIV-FTM-17D, 96-115-CIV-FTM-17D, 1997 WL 724429, at *5 (M.D. Fla. Nov. 6, 1997) (claiming defendants denied lodging to African-Americans, Native-Americans, and other non-white persons or, in some cases, gave those patrons substandard accommodations because of race, violating 42 U.S.C. §1981 and the Civil Rights Act of 1964 at 42 U.S.C. §2000(a)).

[FN183]. Id . at *3. The district court allowed the class to include future claimants (those injured by defendants after the date of certification) as "the class members' legal theory of discrimination will be the same regardless of the date of injury." Id . Further, the court noted the "complex issues of causation and latent injuries" that dominated Amchem do not exist in the present case, making the appointment of subclasses unnecessary. Id .

[FN184]. Ford v. Murphy Oil U.S.A., Inc., Nos. 96-C-2913, 96-C-2917, 96- C-2929, 1997 WL 559888, at *3 (La. Sept. 9, 1997) (noting Louisiana adopted provisions similar to Federal Rule 23 in 1961, before revisions to subsection (b)(3) in 1966).

[FN185]. Ex parte First Nat'l Bank of Jasper, No. 1961542, 1997 WL 773364 (Ala. Dec. 16, 1997). Alabama Rule 23 has the same requirements as Federal Rule 23 for class certification. Id . at *15 n.4 (See, J., concurring). The majority only mentions Amchem as part of a case citation for another decision. Id . at *3. However, a concurring opinion gives Amchem a great deal of attention. Id . at *14-15 (See, J., concurring). Justice See argues Amchem mandates a "rigorous analysis" by the court into class certification. Id . at *14 (See, J., concurring). The Justice further argues " [A]ny agreement between the class representative plaintiffs and the defendant offers the potential for settlements that through collusion or simple inadvertence give inadequate protection to certain class members who are not fully represented by the named plaintiffs." Id . (See, J., concurring). The risk of "collusive or unrepresentative settlement" requires the court conduct a serious Rule 23 examination. Id . at *15 (See, J., concurring).

[FN186]. State v. Chadwick, 956 S.W.2d 369 (Mo. Ct. App. 1997).

[FN187]. Id . at 378. The court writes, "Missouri's Rule 52.08 is identical to Federal Rule 23, and we have previously held that interpretations of Rule 23 are considered by this Court in interpreting Rule 52.08." Id .

[FN188]. Id . at 388-89.

[FN189]. Id . at 389. The court writes, " [T]he trial court has the discretion to hold a limited hearing to obtain additional evidence if it finds it necessary to its decision." Id . at 389. The court also adopted the position advanced by Amchem that a court shall "give heightened scrutiny to those portions of the Rule designed to protect absent class members, and should ensure that the proposed class meets all relevant requirements of Rule 52.08(a) and (b)(3) in making a final determination whether to certify the class for purposes of settlement." Id . Missouri Rule 52.08(a) is identical to Federal Rule 23(a) and Missouri Rule 52.08(b)(3) is identical to Federal Rule 23(b)(3). See supra note 187.

[FN190]. For example, Kansas has identical language governing class actions under state law. Kan. Stat. Ann. §60-223 (1996). The statute sets forth the four requirements of numerosity, commonality, typicality, and adequate representation in its

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subsection (a) as well as the same subsection (b) requirements found in Rule 23. Id .

[FN191]. In re Norplant Contraceptive Prods. Liab. Litig., 907 F. Supp. 244 (E.D. Tex. 1995) (granting motion to reurge the issue of amount in controversy to satisfy federal jurisdiction on diversity grounds). At the date of this publication, none of the Norplant cases have been tried to decide "whether the surgically implanted device caused an array of maladies, including depression, hair loss, carpal tunnel syndrome, headaches and vomiting." John Gibeaut, At the Crossroads, 84 A.B.A. J. 60-61 (1998).

[FN192]. New York City Coalition to End Lead Poisoning v. Giuliani, 1997 WL 755639 (N.Y.A.D. 1 Dept. Dec. 9, 1997) (mem. decision).

[FN193]. English v. Mentor, Corp., 67 F.3d 477 (3d Cir. 1995), vacated and remanded, 116 S. Ct. 2575 (1996); In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996). In English, the circuit court allowed a single plaintiff's claim for breach of express warranty (and a related loss of consortium claim) for an inflatable penile implant manufactured by the defendant. English, 67 F.3d at 480-81. However, the court also held that state claims for implied warranty, negligence, and strict liability were preempted by federal law. Id . at 483. The American Medical court reversed a district court class certification of " [a]ll persons residing in the United States, who have had inflatable penile prostheses developed, manufactured and/or sold" by the defendant corporation. American Medical, 75 F.3d at 1077. The court ruled the district court had failed to conduct a "rigorous analysis" of class action requirements under Rule 23, requiring reversal of the certification as the plaintiffs had not met their burden. Id . at 1078- 79 (citing General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)), 1090.

[FN194]. Joel Seligman & Lindsey Hunter, Symposium, Rule 23: Class Actions at the Crossroads, 39 Ariz. L. Rev. 407, 410 (1997). The proposal has been criticized, as it could "lead to collusion between plaintiffs lawyers seeking fast fees and to defense lawyers seeking protection from future claims." Henry J. Reske, Making Class Distinctions, 83 A.B.A. J. 22 (1997).

[FN195]. Reske, supra note 194, at 22.

[FN196]. Amchem Prods., Inc., v. Windsor, 117 S. Ct. 2231, 2254 (1997) (Breyer, J., dissenting) (arguing in favor of district court's analysis outside of Rule 23 in determining class certification based on benefits to the parties).

[FN197]. Id . at 2249 ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration.").

[FN198]. Reske, supra note 194, at 22.

[FN199]. Gibeaut, supra note 191, at 61. The article notes that individual trials can squander "millions of dollars on legal bills and other costs that could go into plaintiffs' pockets." Id . Furthermore, " [a]n individual ADR resolution may take less than a day, while even getting a court date can take years." Id . at 63.

[FN200]. Id . at 61.

[FN201]. Id . at 63. The article cites the Fifth Circuit's decision in In re Asbestos Litigation, 90 F.3d. 963 (5th Cir. 1996) as an example of a settlement that saved an asbestos manufacturer from bankruptcy. Id . It should be noted that In re Asbestos Litigation survived re-hearing under the Amchem regime. In re Asbestos Litig., No. 95-40635, 1998 WL 30259 (5th Cir. Jan. 27, 1998). For an analysis of this case, see supra notes 156-63.

[FN202]. Zobel, supra note 35, at 19.

[FN203]. For a more detailed analysis of the power of class certification as a means to reach a settlement in favor of mass tort plaintiff classes, see Priest, supra note 117, at 521. Priest, a Professor of Law and Economics at Yale Law School, writes:
THE single most salient feature of the modern mass tort class action is the extraordinary power that derives from certification of a class alone. This power stems from the prospect that the tort claims of a large-numbered class might reach a jury that might render a large aggregate judgment. Three legal elements conjoin to create this great power: first, the relatively undemanding procedural requirements for class certification; second, the vastly looser substantive standards of pleading introduced by the Federal Rules increasing the prospect that any claim might reach a jury; and, third, the expansion of

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standards of tort liability and the restriction of available tort defenses since the 1960s increasing the prospect of an adverse judgment.
Id . For the risk of an adverse settlement being forced on a large plaintiff class, see Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2241 (1997) (noting that the settlement at issue was "intolerably low" compared to jury awards in similar asbestos claims and the payments to exposure-only claimants were lower than the money offered to inventory plaintiffs).

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