CLASS ACTIONS
AND
MASS TORTS

BARRY R. OSTRAGER AND JOSEPH M. MCLAUGHLIN*
SIMPSON THACHER & BARTLETT LLP

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* Barry R. Ostrager is co-head of the litigation department at Simpson Thacher & Bartlett, and Joseph M. McLaughlin is a litigation partner at the firm. The Authors gratefully acknowledge the assistance of Ronald M. Neumann, Tanya Monestier, Christopher LaVigne and Jonathan Cogan in the preparation of this article.

CLASS ACTIONS AND MASS TORTS

I. OVERVIEW

Complex mass tort lawsuits continue to test the capacity of state and federal courts across the nation. The proliferation of purported class actions in the mass tort area has continued largely unabated in the wake of Supreme Court pronouncements in Amchem and Ortiz signaling a new era of enhanced judicial scrutiny for class certification and settlement. The recent experience in the tobacco litigation and other mass torts, however, has for the most part fortified Amchem's reaffirmance of the traditional view that long-term mass tort cases are inappropriate for class certification, and that the integrity of the class action procedure should not yield to interests of expedience or efficiency, particularly where the rights of future claimants are involved. This article will examine recent cases and trends in mass tort class action litigation, emphasizing how courts are resolving the critical issues on which mass tort class certification motions have recently turned.

A. Rule 23 of the Federal Rules of Civil Procedure

Class actions were designed to offer individual claimants with small claims the opportunity to assert claims without having to bear the expense of a costly lawsuit. The Supreme Court recently reaffirmed this principle by stating that the primary purpose of class actions is the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)). In addition, class actions (1) promote judicial economy by avoiding multiple suits; and (2) avoid inconsistent results by ensuring that a defendant's liability will be determined in one proceeding. Rule 23 of the Federal Rules of Civil Procedure governs class action suits in federal courts, and most states have adopted a substantially similar provision for class actions. See, e.g., Mass. R. Civ. P. 23.

1. Rule 23(a): In order for a class to be certified, the plaintiff has the burden of establishing that:

- the putative class is so numerous that one trial with multiple plaintiffs is not practical (the "numerosity requirement");
- there are common questions of law and fact (the "commonality requirement");
- the claims or the defenses of the representatives are typical of the claims or defenses of the class (the "typicality requirement");

- the representatives will fairly and adequately protect the interests of the class (the "adequacy of representation" requirement).

"[A] class 'may only be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner & Smith, Inc., 903 F.2d 176, 180 (2nd Cir. 1990) (quoting General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)).

2. Rule 23(b): "In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2) or (3)." Amchem, 521 U.S. at 614.

(a) Rule 23(b)(1)**:** Certification under this Rule is proper where "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." Fed R. Civ. P. 23(b)(1).

(b) Rule 23(b)(2): Rule 23(b)(2) may be used when a defendant "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." Id. Fed. R. Civ. P. 23(b)(2).

Courts consistently have held that actions primarily seeking money damages do not qualify for Rule 23(b)(1) or (b)(2) certification. See, e.g., In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987). Rule 23(b)(3) is the appropriate subsection for claims predominantly seeking money damages. See, e.g., Hammons v. Folger Coffee Co., 87 F.R.D. 600, 602 (W.D. Mo. 1980) ("Where final relief relates exclusively or predominantly to money damages, a class action is appropriately brought under Rule 23(b)(3).").

(c) Rule 23(b)(3): Rule 23(b)(3) certification is appropriate when common questions of law or fact predominate over individual issues and a class action is superior to other methods of adjudication. In assessing whether these predominance and superiority requirements are met, a court will consider:

- class members' interest in individually controlling the litigation

- any litigation already initiated by or against members of the class
- the desirability of centralizing the litigation in a particular forum
- any difficulties likely to arise in managing the class action

As this list of factors is not exhaustive, courts have broad discretion to determine whether a class action is a superior alternative to an individual adjudicated claim. See Fed. R. Civ. P. 23(b)(3) Advisory Committee's Note (1966 Amendment); John Starnes, Class Certification in Mass Product Liability Litigation: Argument for a Pragmatic Approach, 31 U. Mem. L. Rev. 175, 183 (Fall 2000). Class certification under Rule 23(b)(3) has typically been the preferred choice for classes of plaintiffs in mass tort litigation and other cases in which money damages are the principal relief sought. The burden of proof to demonstrate that a class action should be certified rests on the plaintiff. Rex v. Owens ex rel. State of Oklahoma, 585 F.2d 432, 435 (10th Cir. 1978); Albertson's Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463 (10th Cir. 1974).

II. PRODUCT LIABILITY/MASS TORT CASES

In the 1980s and 1990s, plaintiffs with potentially larger claims in the mass tort and product liability arenas sought to use the class action mechanism to resolve disputes. Mass tort cases typically involve widespread personal injuries caused by a single event or product such as asbestos, herbicides, pharmaceuticals or silicone breast implants. According to one plaintiffs' attorney, "[i]n the closing years of the twentieth century, class actions … [became] the vehicle of choice for the redress of consumer and personal injury claims." Elizabeth Cabraser, et al., The Legacy of Asbestos Litigation: Challenges and Complications in the Certification and Settlement of Product Liability Class Actions, SF10 ALI-ABA 33, 35 (2000).

Because of the predominance of individual issues, courts have been reluctant to certify mass tort class actions. In denying motions for class certification in tort cases involving widespread personal injuries, most courts have reasoned that issues of reliance, causation and damages (which may include, for example, dates, length and nature of exposure, type of disease, severity of injury, reliance and assumption of risk) must be adjudicated on an individual basis, rendering class-wide treatment of these factual issues inappropriate.[1]

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[1] The Advisory Committee's Note to Rule 23 acknowledged the inappropriateness of mass tort claims for class treatment:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of

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Some courts, however, have expressed concern that adjudicating mass tort claims on an individual basis would create courtroom gridlock. For example, the Fourth Circuit Court of Appeals, in a product liability case involving an intrauterine contraceptive device, maintained that if such claims proceeded individually, the litigants' rights to a judicial determination might be compromised by an overburdened court system. See In re A.H. Robins Co., 880 F.2d 709, 725-26 (4th Cir.), cert. denied, 493 U.S. 959 (1989). Expressing concern about the prospect of numerous, repetitious trials, the court suggested class actions provided as an alternative for resolving disputes in a "manifestly fair and expeditious procedure." Id. at 727. Despite the efficiencies of class actions, courts have consistently highlighted numerous problems associated with certification in the mass tort context. See, e.g., Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1123 (Cal. 1988) ("mass-tort actions for personal injury most often are not appropriate for class action certification"). While the outcome of class certification motions in mass tort and products liability cases has been mixed, the growing trend continues to be toward rejecting certification.

Cases distinguish between two types of "mass torts" that are polar opposites in their suitability to class treatment. The first type – the single event or mass accident case – might be certified because liability turns on a single event and there are few individual issues. But courts generally grant class certification only in cases in which all of the claimants have been affected in a similar manner by a defendant's conduct. See, e.g., Long v. Trans World Airlines, Inc., 761 F. Supp. 1320, 1327-28 (N.D. Ill. 1991) ("the class members were all subjected to exactly the same conduct, and the individual issues concerning damages [did] not predominate").

The second type of case involves "long-term mass torts . . . which do not arise out of a single accident." Georgine v. Amchem, 83 F.3d 610, 628 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (ordering asbestos settlement class decertified and discussing trends in mass certification proceedings). In such cases, class treatment is not permissible because "the individualized issues can become overwhelming." Id.[2] Thus, "long-tail" mass tort cases traditionally have been held to be inappropriate for class

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liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed. R. Civ. P. 23 Advisory Committees Notes, 39 F.R.D. 69, 103 (1966). See Insolia v. Philip Morris, Inc., 186 F.R.D. 535, 546 (W.D. Wis. 1998) ("Although not categorically excluded by this [predominance requirement], mass tort cases are ordinarily inappropriate for class treatment . . . ."); but see In re Telectronics Pacing Sys., Inc, 164 F.R.D. 222, 227 (S.D. Ohio 1995) (quoting Professor Charles Alan Wright, an ex officio member of the Advisory Committee, as repudiating this view in light of the effect of mass torts on the judicial system).

[2] But see In re Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1467-68 (D. Haw. 1995) (certifying class of nearly 10,000 victims of human rights violations), aff'd, 95 F.3d 848 (9th Cir. 1996).

treatment. See, e.g., Glen O. Robinson & Kenneth S. Abraham, Collective Justice in Tort Law, 78 Va. L. Rev. 1481, 1489 (1992) ("Traditionally there has been resistance to the use of class actions in mass accident cases on the premise that each claim involves distinctive questions of causation and damages that can only be fairly treated in individualized adjudication."); Samuel Issacharoff, Administering Damage Awards in Mass-Tort Litigation, 10 Rev. Litig. 463, 469 (1991) ("Any use of class-action mechanisms to resolve mass-tort claims threatens to do violence to the fundamental concept of individual and particularized justice.") (footnote omitted).

Several well reasoned decisions by federal courts of appeal strongly reaffirm the inappropriateness of certifying classes in long-tail mass tort cases because of the predominance of individual issues. For example, in In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996), the Sixth Circuit granted a writ of mandamus directing the district court to decertify a class in a products liability action involving allegedly defective prostheses. Id. at 1090. In explaining how the class failed to satisfy the Rule 23(b)(3) requirement that common issues predominate, the court stated:

> In products liability actions, . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

Id. at 1084-85 (citation omitted). The court specifically noted that issues of reliance, causation and damages would require individualized testimony for each plaintiff. Id. at 1081; see also Thomas v. FAG Bearings Corp., Inc., 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (holding toxic tort case inappropriate for class treatment because individual issues of causation and damages would necessitate thousands of mini-trials); Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1123, 751 P.2d 923, 936, 245 Cal. Rptr. 658, 670 (1988) (en banc):

> The major elements in tort actions for personal injury – liability, causation, and damages – may vary greatly from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, … comparative fault … [and] assumption of the risk … .

Id. at 1123.[3]

III. THE TOBACCO SAGA

Courts generally have held that tobacco-related purported class actions are not single event cases appropriate for unitary adjudication – rather, they are the quintessential, long-tail, products liability mass tort. Putative tobacco classes have asserted several causes of action against many defendants and encompass thousands or millions of persons who began smoking at different times over a 50-year period for different reasons; had different knowledge regarding the risks of smoking obtained from a wide variety of sources; had different motivation and desire to quit smoking; read or heard different advertisements and statements by different defendants; smoked different amounts of hundreds of different cigarette products that had different designs and nicotine yields at different times; and had different medical histories and different exposures to different risk factors for many different diseases. A determination of liability to a particular plaintiff, therefore, will not determine liability for any absent class member because the proofs for the key elements of each plaintiff's causes of action will not apply to anyone else. On the most basic level, this type of case does not meet the requirements of Rule 23.

A. Castano: Fifth Circuit Decertifies Nationwide Tobacco Class

Consideration of tobacco class actions must begin with Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996), in which a U.S. district court had certified what the Court of Appeals characterized as "what may be the largest class action ever attempted in federal court" – a nationwide class of all current, former and deceased "nicotine-dependant persons … who have purchased and smoked cigarettes manufactured by the defendants" since 1943. The plaintiff class alleged nine causes of action and sought compensation "solely for the

[3] See also Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 110-11 (E.D. Va. 1980) (refusing to certify class of plaintiffs employed in seafood industry on issue of damages resulting from pollution of waterways where "the issues relevant to liability, i.e., injury and damages, may vary from class member to class member"); In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906, 909-10 (J.P.M.L. 1977) (noting that, in asbestos cases, "[t]he question of causation is an individual issue"); Herbert B. Newberg & Alba Conte, 3 Newberg on Class Actions, § 17.24 at 17-75 (3d ed. 1992) (noting that, in mass tort class action cases, "[d]irect proximate cause, by definition, is an individual question that as a general rule must be proved separately by class members before they will be able to recover"); cf. In re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993) (vacating district court's order consolidating repetitive stress injury cases where plaintiff suffered from various ailments and noting that each plaintiff's "individual health conditions and problems" might be relevant to the claimed injuries); Korren v. Eli Lilly & Co., 150 Misc. 2d 429, 431-32, 568 N.Y.S.2d 670, 672-73 (Sup. Ct. 1990) (refusing to join over 400 DES actions where circumstances surrounding each mother's use of, and complaints regarding, the drug rendered consolidation impractical).

injury of nicotine addiction." Id. The proposed class sued for compensatory and punitive damages, as well as equitable relief for fraud and deceit, negligent misrepresentation, violation of consumer protection statutes and breach of warranty.[4]

Identifying multiple and insurmountable obstacles to class certification, the Fifth Circuit decertified a nationwide class action and dismissed the complaint. The courts of appeals held that the district court erred in two distinct ways. First, it failed to consider how variations in state law affect predominance and superiority. Second, its predominance inquiry did not include consideration of how a trial on the merits would be conducted. Following a long line of authority, the Fifth Circuit held that "a fraud class action cannot be certified when individual reliance will be an issue," id. and that allowing class treatment of addiction claims would "write the predominance requirement out of [Rule 23]." Id. at 745. The Fifth Circuit also concluded that, among other things, severe manageability problems, the present lack of a judicial crisis caused by tobacco litigation, the feasibility of individual suits and the "insurmountable pressure on defendants to settle" exerted by class certification individually and collectively justified the conclusion that class treatment of alleged "nicotine addiction" claims is not superior to individual lawsuits. Noting the novelty and unprecedented nature of the plaintiffs' alleged "nicotine addiction" claims, the court concluded that "[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury." Id. at 752. The Fifth Circuit repeatedly emphasized that individual cases, not class actions, are necessary to evaluate what is called the "novel and uncontested theory" of "addiction as injury." 84 F.3d at 737, 747 n.24, 747-50.

At the federal level, Castano and its progeny have apparently eliminated any chance for a nationwide class of smoker-plaintiffs.[5]

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[4] The equitable remedies sought included: (i) a declaration that defendants were financially responsible for notifying all class members of nicotine's addictive nature; (ii) a declaration that the defendants willfully manipulated the nicotine content in cigarettes in order to sustain addiction of class members, and (iii) an order requiring defendants to disgorge any profits earned from the sale of cigarettes, to reimburse class members for money spent on cigarettes and to establish a medical monitoring fund.

[5] Following Castano, at least 10 federal courts – every federal court to have decided the issue – have declined to certify state-wide or multi-state classes comprised of smokers. See infra at **XX**. Only in the Eastern District of New York has a federal court entertained the certification of a nationwide class of smokers (as well as entities purporting to sue on behalf of smokers or by reason of alleged smoking-caused injuries). See Simon v. Philip Morris Inc., No. 99 CV 1988 (JBW), 2000 WL 1658337 (E.D.N.Y. Nov. 6, 2000), at *1 ("Simon I") ("Even though Simon I is a viable class action, the motion for certification in Simon I is denied because it would better preserve court resources to certify the broader Simon II class for trial") (emphasis added). "Simon II" was a putative nationwide class of smokers and third-party payors with injuries allegedly caused by smoking seeking punitive and compensatory damages from cigarette

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B. Beyond Castano: The Single-State or Several-State Class Action

After the Castano decertification, plaintiffs' counsel fastened onto the Fifth Circuit's statement that among the more difficult problems that a national class action would encounter is the potential conflict among the laws of numerous jurisdictions.[6] The Castano court indicated that it would make more sense to allow state courts to develop and apply their own law on a case-by-case basis. Castano, 84 F.3d at 746. Arguing that variations in state laws were the only impediment to certification in Castano, tobacco plaintiffs rushed to file single state or several-state class actions across the country. See generally, Kearns, Decertification, 74 N.Y.U. L. Rev. at 1336 (discussing Castano offspring lawsuits). Federal courts, however, have uniformly refused to certify single-state putative class actions suits brought against tobacco manufacturers. Most state courts have similarly denied certification of tobacco class actions, with a smattering of exceptions, notably in Florida, Louisiana and West Virginia. See R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (certifying a class of Florida residents alleging physical injury caused by nicotine addiction), review denied, 682 So. 2d 1100 (Fla. 1996); Scott v. American Tobacco Co., 725 So. 2d 10 (La. Ct. App. 1998) (affirming certification of medical monitoring class of Louisiana residents), writ denied, 731 So. 2d 189 (La. 1999); In re Tobacco Litigation, CIV No. 00-C-6000 (commonly referred to as "Blankenship") (certifying a medical monitoring class of smokers residing in West Virginia).

1. The General Trend: Denial of Class Certification

(a) Arch v. American Tobacco Co. (affirmed as Barnes v. American Tobacco Co.)

Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997), aff'd sub nom. Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999) typifies the Castano offspring or "mini-Castano" lawsuits spawned by the Castano decertification. The plaintiffs in Barnes alleged that the defendant tobacco companies fraudulently concealed knowledge regarding the addictive nature of nicotine and manipulated the level of nicotine in cigarettes in order to induce addiction. The federal district court refused to certify a proposed medical monitoring class of "[a]ll current residents of Pennsylvania who [were] cigarette smokers as of December 1, 1996, and who began smoking before age 19, while

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manufacturers and related parties. See Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 49-50 (E.D.N.Y. 2000) ("Simon II") ("It is appropriate to deal with the issue of class certification in Simon II rather than Simon I."). The class certification motion in Simon II is pending. See Simon II, No. 00-CV-5332, slip op. at 7 (E.D.N.Y. March 15, 2001) ("An immediate [certification] decision is not contemplated."). For further discussion of the Simon cases, see infra at XX.

[6] The Castano court pointed out that a purported class of allegedly addicted smokers also may not satisfy the predominance and superiority requirements of Federal Rule of Civil Procedure 23(b)(3) in the context of a nationwide class because of variations in state substantive law. See Castano, 84 F.3d at 740-43.

they were residents of Pennsylvania." Id., 175 F.R.D. at 475. The Court of Appeals affirmed the denial of class certification. See Barnes, 161 F.3d 127.

The district court systematically analyzed the Rule 23 requirements and concluded that individual questions of causation, defenses and damages "overwhelm[ed]" common issues of law and fact, making class certification irreconcilable with the predominance element of Rule 23(b)(3)." Arch, 175 F.R.D. at 486 (for example, the assumption of risk defense rests on "facts peculiar to each plaintiff's case."). The plaintiffs, by failing to offer an effective case management solution, also failed to satisfy the superiority and predominance requirements under Rule 23. Id. at 492-94. The Arch court further expressed concern about potential violations of due process rights, including a right to a jury trial. Id. at 489 n.21. Finally, the court discussed the plaintiff's "novel" addiction theory of liability, which mirrored that of Castano[7], and concluded that the absence of "a prior track record of trials" in such cases made "it practically impossible to draw information necessary to make the superiority analysis." Id. at 494. However, the court in Arch disagreed with Castano "[t]o the extent that [it] concludes that a finding of superiority can *never* be reached when the case implicates an immature tort." (emphasis added). Id. at 495 n. 27.

(b) *Recent Federal Decisions*

Every federal district and appellate court since Castano that has decided a class certification motion in a mass tobacco tort case has declined to certify the class. In Aksamit v. Brown & Williamson Tobacco Corp., No. 6:97-3636-24, 2000 U.S. Dist. LEXIS 18880 (D.S.C. Dec. 29, 2000), a district court followed Castano and denied certification to a group of smokers in South Carolina, stating that "[i]ndividual questions of reliance, causation, and physical injury greatly would complicate a trial of this action. When individual rather than common issues predominate, the economy and efficiency of class action treatments are lost and the need for judicial supervision and the risk of confusion are magnified." Id. at *27.

A Northern District of Illinois court recently refused to certify a class of "Illinois residents who smoke or smoked cigarettes manufactured by Defendants, who started smoking while [minors], who purchased cigarettes in Illinois and who desire to participate in a program designed to assist them in the cessation of smoking and/or monitor their medical condition to promote early detection of disease caused by, contributed, or exacerbated by cigarette smoking." Guillory v. American Tobacco Co., No. 97 C 8641, 2001 WL 290603, at *1 (N.D. Ill. Mar. 20, 2001). In addition to expressing reservations over the definition of the class (see id. at *3), the court found that the predominance requirement was not satisfied. See id. at *8

[7] The "addiction theory" alleged that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature. See Castano, 84 F.3d at 737.

("individual causation issues … prevent a finding that common issues predominate."). The court also found that the typicality and the superiority requirements were not met, and thus rejected certification under Rule 23. Id. at *5, *9. In summing up its reasons for denying certification, the court stated, "[i]n this case, the proposed class is unmanageable… . [T]he plaintiffs' claims, the elements of proof to establish those claims, and affirmative [ ] defenses available each require analysis of numerous individual issues. It is impossible to comprehend how a court could supervise such broad inquiries." Id. at *9.

In National Asbestos Workers Medical Fund v. Philip Morris, Inc., No. 98 CV 1492, 2000 WL 1364358 (E.D.N.Y. Sept. 20, 2000), Judge Weinstein denied certification of a nationwide class that would have included multiple building trade funds suing to recover medical funds expended to treat smoking-related illnesses of union members because "[p]laintiffs ha[d] not met their obligation of showing that the case [was] manageable as a class action." Id. at *1.

Class certification was also denied in the following post-Castano federal tobacco cases: Chamberlain v. American Tobacco Co., Case No. 1:96 CV 2005, 1999 U.S. Dist. LEXIS 5843 (N.D. Ohio April 12, 1999); Clay v. American Tobacco Co., 188 F.R.D. 483 (S.D. Ill. 1999); Hansen v. American Tobacco Co., No. LR-C-96-881, 1999 U.S. Dist. LEXIS 11277 (E.D. Ark. July 21, 1999); Thompson v. American Tobacco Co., 189 F.R.D. 544 (D. Minn. 1999) (lack of adequacy of representation); Emig v. American Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998) (lack of predominance and superiority); Insolia v. Philip Morris, Inc., 186 F.R.D. 535, 545 (W.D. Wisc. 1998) (lack of predominance); Ruiz v. American Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998) (based on Castano rationale); Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W.V. 1997) (after Amchem, refusing to certify national settlement limited fund class citing, inter alia, lack of adequate representation); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997) (lack of commonality, typicality and adequacy of representation).[8]

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[8] In non-tobacco products liability cases, many federal courts have either denied certification or decertified an existing class. See, e.g., Fisher v. Bristol-Myers Squibb Co., No. 97 C 5983, 1998 WL 299798 (N.D. Ill. May 28, 1998) (denying class certification to national class of plaintiffs who allegedly became addicted to a powerful prescription drug because of variance in tort law throughout country); In re Ford Motor Co. Ignition Switch Prod. Liab. Litig., MDL No. 1112, Civil. No. 96-3125, slip op. (D.N.J. Aug. 28, 1997) (denying plaintiffs' motion for class certification); Gamaldi v. Monsanto Co., No. 1:CV-97-0068, slip op. (M.D. Pa. Mar. 11, 1997) (dismissing class complaint); Lyons v. Medtronic, Inc., Civ. A. No. 950198 (E.D. Ky. Mar. 7, 1997) (denying plaintiffs' motion for class certification); In re Ford Motor Co. Bronco II Product Liability Litigation, No. Civ. A. MDL 991, 1997 WL 86337 (E.D. La. Feb. 27, 1997) (denying plaintiffs' motion for class certification); In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417 (E.D. La. 1997) (denying plaintiffs' motion for class certification); Haley v. Medtronic, Inc., 169 F.R.D. 643 (C.D. Cal. 1996) (denying plaintiffs' class certification motion); Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613 (S.D. Ohio 1996) (granting defendants' motion to decertify class); In re Norplant Contraceptive Prod. Liab. Litig., 168 F.R.D. 577 (E.D. Tex. 1996) (denying plaintiffs' motion for reconsideration of class certification

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(c) *Recent State Court Decisions*

In Philip Morris Inc. v. Angeletti, 752 A.2d 200, 206 (Md. 2000) ("Angeletti"), the Maryland Court of Appeals issued a writ of mandamus vacating the certification of a class of "Maryland residents (a) who have suffered or continue to suffer from physical injuries or disease caused by smoking cigarettes or using smokeless tobacco products, and/or (b) who are nicotine dependent and plead addiction as an injury." Maryland's highest court held that individual issues predominated over common ones, thus precluding class certification. It noted the almost universal reluctance to certify smokers' class actions in the face of the many individualized, significant issues in smokers' cases. See also, Brown v. Brown & Williamson Tobacco Corp., No. 711400 (San Diego Sup. Ct. Apr. 10, 2000) (rejecting certification of smokers' claims, finding it "almost textbook law" that individual claims predominate in tobacco cases).

A Pennsylvania court ruled in Oliver v. R.J. Reynolds Tobacco Co., No. 9803-0268 (Pa. Ct. C.P., Phila. County. Feb. 19, 2000), that members of a proposed class of plaintiffs who smoked light cigarettes manufactured by R.J. Reynolds Tobacco Company seeking reimbursement of money paid to purchase cigarettes did not meet the typicality and commonality requirements of Rule 23. See 29 No. 3 Prod. Safety & Liab. Rptr. 63, Pennsylvania Trial Court Denies Class Status in Light Cigarette Case (Jan. 15, 2001); 14 No. 17 Mealey's Lit. Rep.: Tobacco 5, Pa. Judge Denies Class Cert In 'Light' Smoking Case (Jan. 15, 2001). In rejecting the application for certification, the court emphasized the highly individualized nature of the inquiries. 14 No. 17 Mealey's Lit. Rep.: Tobacco 5, Pa. Judge Denies Class Cert In 'Light' Smoking Case (Jan. 15, 2001) ("courts have consistently held that claims based on alleged addiction require individual proofs for each purported class member, thus precluding class certification").

In 1999, the New York Court of Appeals affirmed an Appellate Division decision decertifying classes of "New York residents who, on or after June 19, 1980, became or continued to be nicotine dependent as a result of buying and smoking cigarettes in New York that were manufactured by defendants." Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 51 (N.Y. 1999). The proposed class sought "reimbursement of the purchase cost of cigarettes that they claim they would not have bought, but for defendants' fraudulent and deceptive practices." Id. The State's highest court agreed with the Appellate Division that since the proposed class would consist of over one million members, individual issues of damages and reliance would predominate and render the class action unmanageable. See id. at 53-54.

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denial); Hayes v. Playtex Family Prods. Corp., 168 F.R.D. 292 (D. Kan. 1996) (denying plaintiffs' motion for reconsideration of class certification denial); Harding v. Tambrands, Inc., 168 F.R.D. 290 (D. Kan. 1996) (denying plaintiffs' motion for reconsideration of denial of class certification); Harding v. Tambrands, Inc., 165 F.R.D. 623 (D. Kan. 1996) (denying plaintiffs' motion for class certification).

Other state court decisions denying certification to classes in tobacco litigation include: Reed v. Philip Morris, Inc., No. 96-5070, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997); Taylor v. American Tobacco Co., No. 97715975, slip op. (Mich. Cir. Ct. Jan. 20, 2000); Cosentino v. Philip Morris, Inc., No. MID-L-5135-97 slip op. (N.J. Sup. Ct. Oct. 26, 1998). State courts denying class certification of tobacco claims recognize that the problems associated with a nationwide Castano-style tobacco class also pervade single-state class actions due to the inherently individual nature of the claims and the unmanageable magnitude of the class.

2. The Anomalies: State Courts Granting Class Certification

(a) *Engle*

In R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) ("Engle"), a Miami circuit court certified a class of all U.S. citizens who presently or in the past have suffered or died from smoking-related diseases caused by their alleged cigarette addiction. On appeal, the court affirmed the certification, but restricted the class to Florida residents and citizens in order to address manageability concerns. Id. at 42. The Court of Appeals held that "[a]lthough certain individual issues will have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class will clearly predominate over the individual issues." Id. at 41. The Florida Supreme Court denied review. R.J. Reynolds Tobacco Co. v. Engle, 682 So. 2d 1100 (Fla. 1996).

The jury in Engle awarded compensatory damages to three representative class action plaintiffs in the amount of $12.7 million (Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 CA-22 (Fla. Cir. Ct., 11th Jud. Cir. Apr. 7, 2000)) and punitive damages in the record amount of $145 billion (Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 CA-22 (Fla. Cir. Ct., 11th Jud. Cir. July 14, 2000)). The Engle punitive damages award was the largest ever in a United States product liability trial. See 11 No. 5 Andrews Consumer Prod. Litig. Rep. 3, Tobacco Companies Ordered to Pay $145 Billion in Punitive Damages (Aug. 2000).

Engle has been criticized as being a "lone ebb[] against the countervailing flow of class certification denials." Angeletti, 752 A.2d at 244 n.35 (2000). In Angeletti, the court found Engle's reasoning "unpersuasive" as it contained "no analysis of why common issues predominated over individual issues." Id. The Maryland court also approved the Arch court's characterization of the Engle opinion as "devoid of a thorough analysis of the requirements which must be satisfied before a class is certified." Id. (citing Arch, 175 F.R.D. at 485 n.12).

(b) *Other State Court Certification Decisions*

In Scott v. The American Tobacco Co., No. 96-8461 (April 16, 1997), a Louisiana trial court ruled that a medical monitoring tobacco injury case could proceed as a class action. The court certified a class consisting of "all Louisiana residents who are or who were smokers on or before May 24, 1996, of cigarettes manufactured by the defendants, who desire to participate in a program designed to assist them in the cessation of smoking and/or to monitor

the medical conditions of class members…." Scott, 725 So. 2d 10, 11 (La. Ct. App. 1998). The Court of Appeals, in upholding the decision of the trial court, found that the instant case differed from Castano because the remedy was manageable, as it was limited to *Louisiana* residents seeking medical monitoring not compensatory or punitive damages. Id. at 13. Furthermore, it noted that the plaintiffs were not advancing a "novel legal theory." Id. at 13 (citing Ford v. Murphy Oil U.S.A, Inc., 703 So. 2d 542 (La. 1997)). While the court acknowledged that there were obviously individual issues, this did not bar a class action when the "predominant liability issues are common to the class." Id. at 15.

Similarly, in Re: Tobacco Case II and Devin Daniels v. Philip Morris Companies Inc., No. 4042, a California trial court ruled that a tobacco class action involving more than 1.5 million Californians could proceed as an opt-out class. See 14 No. 23 Mealey's Litig. Rep.: Tobacco 8, California Court Allows Tobacco Class Action to Proceed as Opt-Out Case (Apr. 9, 2001). In granting certification to a class that included every Californian who had purchased cigarettes, the Superior Court judge acknowledged that the decision ran counter to the trend in tobacco cases, but distinguished the case as being based on statute, as opposed to common law. See 7 No. 11 Andrews Mass Tort Litig. Rep. 14, Court Certifies Class of 1.5 Million Smokers in California Suit (Feb. 2001).

In February 2001, an Illinois trial judge certified a class of all state residents who smoked certain brands of light cigarettes, but had no injury claims between the date of purchase of the cigarettes and the certification order. The proposed plaintiff class sought restitution of the purchase price of light cigarettes. Susan Miles v. Philip Morris Cos. Inc., No 00-L-112 (Ill. Cir., Madison Co. 2001) cited in 14 No. 19 Mealey's Litig. Rep.: Tobacco, Illinois Judge Certifies Light Smokers Class (Feb. 14, 2001). The court specified that "claims for personal injury and/or addiction [were] not and could not be included in [the] action." Id.

3. Certification Decisions Pending

(a) *Simon I and II*

In Simon v. Philip Morris Inc., No. 99 CV 1988, 2000 WL 1658337 (E.D.N.Y. Nov. 6, 2000) ("Simon I"), the proposed plaintiff nationwide class sought (a) punitive damages and (b) compensatory damages for class members who developed cancer. The court denied certification of a nationwide class of smokers claiming smoking-related injuries because, "though Simon I is a viable class action, the motion for certification is denied because it would better preserve court resources to certify the broader Simon II class for trial." Id. at *1.

Simon II plaintiffs are currently seeking certification of an opt-out class for compensatory damages and a mandatory class for punitive damages. See In re Simon (II) Litigation, No. 00-CV-5332, 2000 WL 1252182 (E.D.N.Y. Sept. 6, 2000) ("Simon II"). Plaintiffs are

attempting to certify eight punitive damages subclasses, encompassing all individuals who have smoked the defendants' cigarettes since 1920, as well as government, non-government and asbestos-related entities.[9] The enormous proposed classes exclude the plaintiffs who sued tobacco companies in Falise v. American Tobacco Co., 1998 WL 372401 (E.D.N.Y. Jul. 2, 1998) and Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., No. 98-CV-3287, 199 F.R.D. 484 (E.D. N.Y. 2001), which were brought by the Johns Manville Trust and various Blue Cross and Blue Shield entities and proceeded to trial in 2000-2001.

Judge Weinstein issued an opinion in November 2000 addressing one of the primary obstacles to certification of a nationwide smokers class identified in Castano: choice of law. See Simon v. Philip Morris, Inc. ("Simon II"), 00-CV-5332, 2000 WL 1745265 (E.D.N.Y. Nov. 16, 2000). The district court reasoned that New York law could be applied to the multitude of claims of smokers from the fifty states based on the application of an "interests analysis" rather than the law of the place of the wrong (lex loci delecti) which would compel the application of the laws of the individual states where the plaintiffs allegedly suffered harm. The court held that New York's interest outweighs the interests "of any other single state … in

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[9] The subclasses include:

(1) all people in the United States who have smoked defendants' cigarettes from 1920 until the date of class notice and who have been diagnosed with certain smoking-related diseases

(2) the estates or personal representatives of smokers who have died due to smoking-related illnesses

(3) all people who have smoked defendant tobacco company's cigarettes at any time from 1920 until the date of class notice but who are not as of that date suffering from a smoking-related disease

(4) any smoker who has received medical treatment for smoking-related diseases, the cost of which was paid by the U.S. Medicare Administration,

(5) all people with pending civil actions which have not proceeded to final judgment

(6) all multi-employer health benefit plans established under the Labor Management Relations Act that, as of Sept. 6, 2000, have paid to detect, diagnose or treat certain smoking-related diseases

(7) all other non-governmental entities in the United States who have asserted claims on behalf of themselves or others

(8) certain asbestos entities and related trusts, including all manufacturers, distributors, and asbestos producers, and all asbestos entities that are bankrupt."

In re Simon (II) Litigation, No. 00-CV-5332 (E.D.N.Y. Sept. 6, 2000) Complaint ¶ 31. See also 14 No. 22 Mealey's Lit. Rep. Tobacco 3, New York Federal Judge Hears Class Certification Hearing in Punitive Damages Action (March 26, 2001).

determining *general* compensatory liability issues since, like punitive damages, they may bear directly on the regulation of dangerous conduct within its borders." (emphasis in original). Id. at *26.

(b) *Duncan v. Northwest Airlines Inc.*

A former flight attendant alleging physical injuries from exposure to second-hand smoke in airline cabins recently sued Northwest Airlines. The plaintiff is seeking to certify a medical monitoring class of plaintiffs that includes flight attendants who were exposed to second-hand smoke on Northwest Airlines. A Western District of Washington judge granted summary judgment to Northwest Airlines, the Ninth Circuit reversed and ruled that the action was not preempted by federal legislation and therefore could proceed. Duncan v. Northwest Airlines, 208 F.3d 1112, 1116 (9th Cir. 2000) cert. denied 531 U.S. 1058 (2000); see also 16 No. 14 Andrews Tobacco Indus. Litig. Rep. 5, Flight Attendant Seeks Class Certification of Secondhand Smoke Case (June 2001). Northwest's petition for review was denied by the U.S. Supreme Court and the case was remanded to the Western District of Washington. See Duncan, 208 F.3d at 1116.

IV. ASBESTOS

A. Overview

In 1973, the Fifth Circuit held that asbestos manufacturers could be held strictly liable for injuries sustained due to exposure to asbestos. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). Since this pivotal decision, there has been a "flood" of approximately 250,000 lawsuits involving claimants seeking damages from asbestos exposure. Matthew C. Stiegler, The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After Ortiz v. Fireboard Corp., 78 N.C. L. Rev. 856, 857 (March 2000); see also Coffee, Jr., Class Wars, 95 Colum. L. Rev. 1343, 1385 (Oct. 1995) (arguing that prior and ongoing suits may be "the tip of the proverbial iceberg" since twenty-one million Americans have allegedly been exposed to health-threatening levels of asbestos).

Courts have been poorly equipped to deal with this body of asbestos-related litigation, which the United States Supreme Court has described as "elephantine." Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). Though the courts have attempted to aggregate

cases under the Federal Rules of Civil Procedure[10] or under Chapter 11 of the Bankruptcy Code,[11] court dockets continue to swell with asbestos-related claims.

B. Legislative Developments

The class action mechanism was initially seen as an appropriate vehicle for redress in asbestos-related litigation. The Supreme Court, however, recently rejected two proposed asbestos class action settlements in Amchem, 521 U.S. 591 (1997) (a 23(b)(3) class) and Ortiz, 527 U.S. 815 (1999) (a limited fund class), "prompting many judges and scholars to call for a national [legislative] solution to the asbestos crisis." Gallegos, Frustration, 15 St. John's J. Legal Comment. at 61.

Courts and commentators have consistently urged a legislative resolution of the asbestos mass tort litigation crisis. See, e.g., Ortiz, 527 U.S. at 865 (Rehnquist, J. concurring); Gallegos, Frustration, 15 St. John's J. Legal Comment. at 61. Congress responded to the decision in Ortiz by drafting The Fairness in Asbestos Compensation Act, H.R. 1283, 106th Cong. (1999):

> "The provisions of this act would create the Asbestos Resolution Corporation (ARC) whose primary function would be to establish medical standards for evaluating asbestos related claims and to facilitate settlement of individual claims through utilization of various alternative dispute resolution (ADR) techniques. Under the proposed statutory framework, all asbestos-related personal injury claims not yet settled or adjudicated would be bound to this mechanism."

Gallegos, Frustration, 15 St. John's J. Legal Comment. at 62-63. The proposed legislation seeks to strike a delicate balance between the public interest in providing compensation for those injured by asbestos products and the social necessity of preserving financial resources for future claimants. Id. at 74-75. A Report on the Fairness in Asbestos Compensation Act was filed by the House Committee on the Judiciary on July 24, 2000. There has not been any legislative activity on the bill since that date. 2001 Congressional Information Service, Inc. Bill Tracking Report.

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[10] Cases may be aggregated either through the use of the Fed. R. Civ. P. 42 consolidation or Rule 23 class action provisions.

[11] "Beginning in the early 1980s, a number of asbestos producers, including Johns-Manville Corporation, the industry's largest firm, sought the protection of bankruptcy to obtain relief from cascading asbestos claims. [In fact]…eleven out of the twenty-five major asbestos manufacturers had sought bankruptcy protection by 1991." Coffee, Jr., Class Wars, 95 Colum. L. Rev. 1386.

C. Amchem and Rule 23 Certification

Four years ago, the United States Supreme Court issued its ruling in Amchem, generally approving the Third Circuit's decision in Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), reversing the district court's approval of an opt-out class settlement of future asbestos injury claims.[12] The Supreme Court in Amchem approved the decertification of the class for not satisfying Rule 23(b)(3) requirements. See 521 U.S. at 619-20. Perhaps most importantly, the Court noted significant problems in reconciling the interests of currently injured plaintiffs requiring immediate compensation competing with asbestos-exposed plaintiffs with potential future claims. See id. at 626 ("… the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.")

The Court also held that the predominance requirement was not satisfied "[g]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions." Id. at 624. The Court quoted approvingly from the Third Circuit decision in Georgine, 83 F.3d 610:

> 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…

Amchem, 521 U.S. at 624. Differences in state law only served to compound these disparities. See id.

Amchem is also significant for its holding that a settlement class must satisfy all of the Rule 23 requirements for class certification, except trial manageability. The Court analyzed each of the applicable Rule 23(a) and Rule 23(b) criteria to reach the ultimate conclusion that the Amchem settlement class could not be certified. The Court first stated with respect to the predominance inquiry that: "Rule 23(b)(3) … tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. at 623. It warned that while the predominance test is usually readily satisfied in a consumer, antitrust or securities fraud context, courts must be wary of allowing too expansive an interpretation in mass tort cases where "individual stakes are high and disparities among class members great." Id. at 625

[12] For a discussion of Amchem in the context of settlement class actions, see infra.

(noting the concerns of the Advisory Committee for the 1966 revision of Rule 23). The Supreme Court also examined Rule 23(a)'s representation requirement,[13] stating that it "serves to uncover conflicts of interest between named parties and the class they seek to represent." Id. at 625. Thus, even though Amchem involved a settlement class action, the Court's discussion regarding the "applicability of the Rule 23 requirements to the certification of a proposed nationwide class of future asbestos claimants … offered several important guidelines that may be pertinent for other nationwide products liability class suits as well." 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1805 – Products Liability Class Actions (2001).

D. Asbestos Class Actions Post-Amchem

The Supreme Court amplified its holding in Amchem two years later when it handed down a decision in Ortiz, 527 U.S. 815 (1999). Ortiz rejected a global limited fund settlement of claims against the manufacturer of asbestos-containing products under Rule 23(b)(1)(B). The Supreme Court found the settlement inconsistent with a threshold requirement of limited fund settlements, i.e., fund exhaustion."[14] Rather than exhausting available funds, Fibreboard proposed to retain all but $500,000 of its net worth. Although the Court did not decide whether this fact, by itself, could defeat approval of a mandatory class action settlement, the Court observed that it seemed irreconcilable with mandatory treatment. Id. at 863 ("a limited fund rationale for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving the maximum fund").[15]

While some have predicted that "[t]he U.S. Supreme Court is not likely to allow class actions to play a significant role in resolving asbestos disputes in the wake of the court's rejection of the [Amchem and Ortiz] global class settlements," asbestos class actions continue to flood state courts. 14 No. 17 Mealey's Litig. Rep. Asbestos 13, Class Actions No Longer A Viable Solution, Say Judges, Conference Speakers (Oct. 8, 1999). See, e.g., Sturms v. University of West Virginia Board of Trustees, W. Va. Cir. Kanawha Co. (April 2000) (class action complaint filed in state court by a group of West Virginia University employees seeking damages and medical monitoring for asbestos exposure); Barbanti v. W.R. Grace & Co., No.

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[13] The Court noted that the "adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining 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 in their absence'." Id. at 626 n.20 (citations omitted).

[14] According to the Supreme Court, the historical model comprises three elements: inadequacy of the fund, equity among members of the class, and exhaustion of the fund.

[15] See Ortiz, 527 U.S. at 863 (noting that accepting a limited fund settlement could result in a significant loss to class members).

00201756-6, complaint filed (Wash. Super. Ct., Spokane County March 24, 2000) (lawsuit filed on behalf of all owners of homes in Washington state containing Zonolite insulation, seeking compensatory and punitive damages); Susan Grenfell v. W.R. Grace & Co., No. CV-00-35-M-DWM (Mont. Dist. Missoula Div. Feb. 22, 2000) (class action brought on behalf of present and former residents of Libby, Montana and similarly situated workers and their families at a vermiculite processing plant seeking medical monitoring and long-term diagnostic care); see generally In re Zonolite Attic Insulation Products Liability Litigation, MDL No. 1376 (motion filed D. Mass., Jan. 23, 2001) (motion filed by plaintiffs who live in homes with Zonolite attic insulation to certify a class of individuals in every state who could have similar claims for asbestos exposure. Plaintiffs contend that this is a suitable case for a class action because the "class representatives … are adequate and their claims are typical, common legal and factual issues predominate, and injunctive relief and punitive damages applicable to the whole class is sought.") discussed in 8 No. 1 Andrews Mass Tort Litig. Rep. 3, Plaintiffs Move to Certify Class in Zonolite Insulation Action (April 2001).

V. DRUGS AND MEDICAL DEVICES

A. Overview

Numerous drugs and medical devices have been the subject of attempts to certify a class action. See, e.g., Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) (epilepsy drug); In re AMS, 75 F.3d 1069 (6th Cir. 1996) (penile implants); In re Dalkon Shield, 693 F.2d 847 (9th Cir. 1982) (intrauterine devices); In re Orthopedic Bone Screw Prods. Liab. Litig., No. CIV A.93-7074, 1995 WL 273597 (E.D. Pa. Feb. 22, 1995) (pedicle bone screws); Bradshaw v. Pfizer, Inc., No. 93-CV-1619 (N.D. Ohio Oct. 31, 1997) (hip implants); Hayley v. Medtronic, Inc., 169 F.R.D. 643 (C.D. Cal. 1996) (pacemakers); Martin v. American Med. Sys., Inc., No. IP 94-2067-C-H/G, 1995 WL 680630 (S.D. Ind. Oct. 25, 1995) (penile prosthesis); Kurczi v. Eli Lilly & Co., 160 F.R.D. 667 (N.D. Ohio 1995) (drug diethylstilbestrol (DES)); In re Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985) (antibiotics); Payton v. Abbott Labs., 100 F.R.D. 336 (D. Mass. 1983) (diethylstilbestrol); In re Silicone Gel Breast Implants Prods. Liab. Litig., 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (breast implants).

In a leading case, the Sixth Circuit Court of Appeals emphasized the importance of strictly adhering to the rules governing class certification "in products liability cases involving drug or medical products which require FDA approval." In re AMS, 75 F.3d 1069, 1089 (6th Cir. 1996). In re AMS, as one commentator noted, "seems to echo the majority reluctance of most federal courts to certify a class when dealing with products liability class actions involving drugs or medical devices." Martin L.C. Feldman, Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?, 74 Tul. L. Rev. 1621, 1627 (June 2000). In fact, numerous federal decisions have denied class certification in drug and medical device cases, principally due to case management problems and a predominance of individual issues.

B. Leading Cases

1. In re American Medical Systems

In In re AMS, 75 F.3d 1069 (6th Cir. 1996), the United States Court of Appeals for the Sixth Circuit decertified a class of plaintiffs who had sued manufacturers for defective penile implants. The Sixth Circuit unanimously held that the class failed to satisfy the requirements of Rule 23(b)(3), as common issues did not predominate. The court examined issues of both factual and legal variation, noting that:

> [E]ach plaintiff has a unique complaint, and each receives different information and assurances from his treating physician. … In this situation, the economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff. … Thus, even assuming common questions of law or fact, it cannot be said that these issues predominate, and that class treatment would be superior to other methods of litigation.

Id. at 1085.

Further, expressing concern about the practicality of applying the governing law, the court stated, "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on relevant law." Id. The court in In re AMS cautioned about the need to adhere rigorously to the rules for class certification in cases involving drugs or medical devices. See id. at 1089.

2. In re Telectronics

In In re Telectronics Pacing Systems, Inc., 164 F.R.D. 222 (S.D. Ohio 1995), the district court originally certified a worldwide class of pacemaker recipients pursuant to Rule 23(b)(3). On reconsideration, the court decertified the class as to foreign plaintiffs and limited it to domestic plaintiffs. See In re Telectronics Pacing Systems, Inc., 168 F.R.D. 203, 206 (S.D. Ohio 1996). In light of the In re AMS decision, the defendant manufacturer filed a motion for reconsideration of any class certification. The court granted the motion and decertified the class, holding that although the commonality element was satisfied, the typicality, adequacy of representation and superiority elements of Rule 23 were not met. See id. at 214, 219, 221. The court also discussed the variation in state negligence laws, which could potentially render a class action unmanageable. See id. at 221. In order to certify the class, the court stated that the plaintiffs would need to demonstrate how a class could be managed given these variations. See id.

The plaintiffs filed a new motion for class certification, proposing various subclasses. The district court held that the proposal fit within the parameters of Rule 23, and

thus granted certification. See In re Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 294 (S.D. Ohio 1997). The class representatives were awarded a total recovery of $7.75 million by a summary jury; no punitive damages were awarded. See In re Telectronics Pacing Systems, Inc., 186 F.R.D. 459 (S.D. Ohio 1999) (discussion of summary jury trial). After the summary jury trial, settlement discussions were initiated by the parties. In 1999, a Southern District of Ohio court approved the first settlement agreement. See id. at 486. The decision was reversed by the Sixth Circuit on appeal, holding that the trial court abused its discretion when it certified a mandatory, non-opt-out class and approved the limited fund settlement. See In re Telectronics Pacing Systems, Inc., 221 F.3d 870 (6th Cir. 2000). A second settlement was eventually reached and approved as "fair, adequate and reasonable" by the district court. In re Telectronics Pacing Systems, Inc., 137 F. Supp. 2d 985, 1027 (S.D. Ohio Mar. 8, 2001). The court found that the new settlement was appropriate considering the significant risks for the class, the potential depletion of funds through continued litigation and the difficulty of enforcement against foreign defendants. See id. at 1027-29. The approved agreement would ensure that class members received immediate benefits for their injuries and allowed adjustment in remedies for individual claimants. See id. at 1009. Finally, in addition to allowing an "opt-out" option, the settlement provided for a holdback provision to guarantee adequate compensation of all class members, including future claimants. See id. at 1025.

C. Recent Cases

1. Certification Denied

In Zinser v. Accufix Research Institute Inc., 253 F.3d 1180, 1185 (9th Cir. 2001), the Ninth Circuit Court of Appeals upheld the district court's decision not to certify a class composed of "all persons domiciled or residing in the United States of America and its territories, possessions, and the District of Columbia, who had implanted in their bodies an ENCOR … [pacemaker lead]." The court held that certification could not be granted under Federal Rule 23 as the plaintiffs failed to establish that common questions of law and fact predominated and that a class action was superior to other methods of adjudicating the claim. See id. at 1192. The court stated: "[i]n view of the formidable complexities inherent in trying claims of negligence, products liability, and medical monitoring with differing state laws, Zinser does not persuade us that class treatment is superior to individual adjudication." Id. at 1192.

Approximately one year earlier, the Supreme Court of Arkansas refused to reverse the decision of a trial court that denied certification to two proposed subclasses of plaintiffs who had used certain brands of diet drugs. Baker v. Wyeth-Ayerst Labs. Div., 992 S.W.2d 797 (Ark. 1999). The Supreme Court of Arkansas agreed with the trial court that the predominance and superiority requirements mandated by the Arkansas Rules of Civil Procedure were not satisfied. The court held "that class certification is improper in this case because the numerous and complex individual issues predominate over the common issues." Id. at 801.

In Cheminova Am. Corp. v. Corker, 779 So. 2d 1175 (Ala. 2000), the Supreme Court of Alabama upheld the order of the trial court rejecting class treatment of claims for personal injuries resulting from the use of Skin Cap, an over-the-counter medication allegedly containing zinc pyrithione, and allowed class certification for the recovery of economic damages. The Supreme Court of Alabama agreed with the trial court's reasoning that "plaintiff's product liability [claim] … and the fraud [claim, are] not sufficiently common for class treatment. Variations in state law will overcome commonality as to those theories and will prevent certification." Id. at 1178. The trial court had also noted that "plaintiffs' claims for personal injuries as opposed to those seeking refund of the purchase price involve issues of damages which overcome the predominance of the fact of injury." Id. (quoting trial court).

2. Certification Granted

State courts have recently certified a series of medical monitoring classes involving the diet drug combination Phentermine/Fenfluramine/Dexfenfluramine ("fen-phen") in the In re Diet Drugs Prods. Liab. Litig., No. 98-20626, 1999 U.S. Dist. LEXIS 13228 (E.D. Pa. Aug. 26, 1999). On August 26, 1999, Judge Bechtle presiding in In re Diet Drugs, issued an order conditionally certifying an essentially nationwide medical monitoring plaintiff class, and excluding members of state court-certified classes and residents of those states in which present injury is required for entitlement to medical monitoring. See id.. See, e.g., Elizabeth Cabraser, Class Action Update 2001: Mass Tort Trends; Choice of Law, Rule 23(f), Appeals and Proposed Amendments to Rule 23, SF42 ALI-ABA 757, 801 (Feb. 2001) (listing cases).

In Rivera v. Wyeth-Ayerst Labs., 197 F.R.D. 584 (S.D. Tex 2000), a Texas federal court certified a national cost-recovery class of individuals who had purchased the pain killer Duract and who exhibited no signs of physical injury from the drug, as well as group of health insurers who provided funds to subscribers to purchase Duract. The court held that Rule 23(a) requirements were easily satisfied, and agreed that both the superiority and the predominance requirements of Rule 23(b)(3) were met. See id. at 592-93.

Another medical monitoring case involving a class of individuals who had taken the drug Propulsid was certified in Tennessee in February, 2001. J.C. Jackson v. Johnson & Johnson, No. CT-004628-00, (Tenn. Cir., 30th Jud. Dist., Shelby Co. 2001).

3. Class Actions Filed

On April 5, 2001, a California plaintiff filed a class action suit on behalf of any person or entity who purchased asthma inhalers produced by Schering-Plough or one of its subsidiaries from Sept. 30, 1997 through Sept. 30, 1999 and did not receive a replacement or refund. MacGregor v. Schering-Plough Corp., No. BC248041 (Cal. Super. Ct., filed April 5, 2001). The plaintiff class is seeking both compensatory as well as punitive damages from the manufacturer, alleging that the "inhalers in question were 'useless' to asthma sufferers, and that the manufacturers 'actively concealed' that fact from doctors and pharmacies." See 29 No. 17

Prod. Safety & Liab. Rptr. 391, Asthma Inhalers: National Class Suit Against Schering-Plough Seeks Compensation for Defective Inhalers (April 23, 2001).

A plaintiff filed a lawsuit in an Eastern District of Louisiana court seeking to represent a class of "all U.S. citizens and their spouses who have used medication containing PPA, and who have sustained any injury or damage, who may suffer injury or damage ..., and who have a justifiable fear of future PPA-related injury." 29 No. 13 Prod. Safety & Liab. Rptr. 299, Nasal Decongestants: Woman Files Class Action Against Makers of Cold, Flu Remedies Containing PPA (March 26, 2001). Phenylpropanolamine (PPA) is a medication contained in certain cold remedies and decongestants, which has been linked to hemorrahagic strokes. See Michael A. Riccardi, Plaintiff's Bar is Gearing Up for Drug Suits, 225 N.Y.L.J. 112 (June 12, 2001).

In June, 2001, a California resident filed a national class action complaint against Sulzer Orthopedics Inc., the manufacturer of a knee implant. Richard Crow v. Sulzer Orthopedics Inc., No. GN1-01685, (Texas Dist., Travis Co. June, 2001). The proposed class consists of all people who were injured by the knee implant, as well as a "serious injury subclass" of individuals who have developed or will develop injury or die as a result of the allegedly defective medical device. See 6 No. 11 Mealey's Emerging Drugs & Devices, First Complaint Filed Over Sulzer Knee Implant; National Class Sought (June 7, 2001).

Several plaintiffs in a number of southeastern states have recently brought class action lawsuits against Purdue Pharma L.P., the maker of the pain relief drug Oxycontin. These lawsuits, which allege that Purdue marketed the drug deceptively by failing to inform doctors, pharmacists and potential users of the risks of addiction and serious injury or death from use or misuse of the drug, seek to define several classes of plaintiffs: (1) those prescribed the drug and who became addicted or risk becoming addicted from its use; (2) those prescribed the drug who suffered physical, mental or emotional harm or death or loss of a loved one as a result of its use; and (3) those who were not prescribed the drug but who suffered effects similar to those suffered by persons in the other two groups. See, e.g., Rob Modic, Oxycontin Class-Action Suit Filed, Dayton Daily News, July 20, 2001 at 1B, available at 2001 WL 21269393. Plaintiffs seek money damages and injunctive relief, including requiring Purdue to establish or pay for treatment facilities for injured users. See, e.g., Debra Rosenberg, Profits vs. Pain relief; Does Its Maker Push Oxycontin Too Hard?" Newsweek, July 2, 2001 at 49, available at 2001 WL 19504950.

VI. CERTIFICATION DENIED: WHY COURTS ARE RELUCTANT TO CERTIFY MASS TORT CLASSES UNDER FEDERAL RULE 23

With Amchem, the Supreme Court has confirmed that a class action is a procedural device to be used only in cases that "are sufficiently cohesive to warrant adjudication by representation" and that "'mass accident' cases are likely to present 'significant questions, not only of damages, but of liability and defenses of liability, … affecting the individuals in different ways.'" Amchem, 521 U.S. at 625 (citation omitted); see also Ortiz v. Fibreboard Corp., 527 U.S. at 843-45. Indeed, the Second Circuit has recognized that in

Amchem, the Supreme Court "made clear that its skepticism regarding certain types of class actions was based on concerns going beyond the narrow context of settlement class actions. In particular, the Court's analysis sharply curtailed the ability to certify a class action pursuant to Rule 23(b)(3) in the mass tort context." Blyden v. Marcusi, 186 F.3d 252, 270 (2d Cir. 1999).[16] The Supreme Court also emphasized that the class-action device cannot be used either to expand or dilute substantive law. Amchem, 521 U.S. at 613, 629. Two years later, the Supreme Court re-emphasized this point and held that if "exigent" circumstances were an excuse to reduce the "level of Rule 23 scrutiny," there would soon be "enough exigencies to take the law back before Amchem …." Ortiz, 527 U.S. at 863. In short, both Amchem and Ortiz demonstrate that the text of Rule 23 "limits judicial inventiveness." Amchem, 521 U.S. at 620. The courts are "bound to follow Rule 23 as we understood it upon its adoption, and we are not free to alter it …" Ortiz, 527 U.S. at 861.

Several recurring themes have emerged to support denial of class certification in products liability/mass tort claims:

A. The Predominance Inquiry: Common Issues Do Not Outnumber Individual Issues

Under Rule 23(b)(3), certification may be granted only when common questions of law or fact *predominate* over individual issues. In most products liability class actions, courts have determined that this requirement is not satisfied, as such cases are fraught with legal and factual variation. In decertifying a nationwide class of smokers, the Castano court held that the "class action is permeated with individual issues, such as proximate causation, comparative negligence, reliance and compensatory damages." Castano, 84 F.3d 734, 750 (5th Cir. 1996). See also Barnes v. American Tobacco Co. 176 F.R.D. 479, 491, 500 (E.D. Pa. 1997) (the issues of addiction, causation, damages and defenses were "inherently individual inquir[ies]"), aff'd sub nom. Barnes, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999); Aksamit, No. 6:97-3636-24, 2000 U.S. Dist. LEXIS 18880, at *27 (D.S.C. Dec. 29, 2000) ("[i]ndividual questions of reliance, causation, and physical injury greatly would complicate a trial of this action. When individual rather than common issues predominate, the economy and efficiency of class action treatments are lost."); Guillory, 2001 WL 290603, at *8 (N.D. Ill. Mar. 20, 2001) ("[i]ndividual causation issues … prevent a finding that common issues predominate).

In non-tobacco cases as well, federal and state courts consistently have refused to certify plaintiff classes on the ground that individual issues regarding the proximate cause of individuals' injuries predominate. See, e.g., Zinser, 253 F.3d 1180, 1189 (9th Cir 2001) ("to determine causation and damages for each of the three claims asserted … it is inescapable that

[16] A decade earlier, the Second Circuit expressed its "skepticism over the usefulness of class actions in so-called mass tort cases…" In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 164 (2d Cir. 1987).

many individualized issues may be presented"); Baker, 992 S.W.2d 797, 801 (Ark. 1999) ("class certification is improper in this case because the numerous and complex individual issues predominate over the common issues"); Hurd v. Monsanto, 164 F.R.D. 234, 240 (S.D. Ind. 1995) (denying class certification in case involving exposure to PCBs and noting that the issue of causation would be different in the case of each plaintiff based on among other things, length of exposure, notice and preexisting medical conditions); Chichonski v. American Inventors Corp., Civ. A. No. 95-4079, 1995 WL 657107, at *4 (E.D. Pa. Nov. 3, 1995) (refusing to certify plaintiff class in RICO action because individual issues regarding causation predominated); Puerto Rico v. M/V Emily S, 158 F.R.D. 9, 15 (D.P.R. 1994) (denying certification in personal injury case arising out of oil spill because individual issues of injury-in-fact and causation predominated); Brown v. Southeastern Penn. Transp. Auth., Civ. A. Nos. 86-2229, 86-4037, 86-5886, 1987 WL 9273, at *10 (E.D. Pa. Apr. 9, 1987) (denying motion for class certification in case involving exposure to PCBs because any determination of causation would require primarily individual inquiries); Kuhn v. Skyline Corp., Civ. A. No. 83-0942, 1984 WL 62775, at *5 (M.D. Pa. Aug. 3, 1984) (refusing to certify plaintiff class allegedly exposed to formaldehyde in mobile homes manufactured by defendants because of, among other things, individual issues regarding causation); Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 233 (D.S.C. 1979) (denying class certification in DES case where the issue of proximate cause would require proof from each member of the proposed class based on factors including length of exposure, reason for the drug's use, specific chemical formulation of the drug and state of the art at the time of consumption); Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 571-72 (E.D. Tex. 1974) (denying certification in asbestos case because of, among other things, individual issues regarding proximate cause); see also In re Asbestos and Asbestos Insulation Mat. Prod. Liab. Litig., 431 F. Supp. 906, 909-10 (J.P.M.L. 1977) (in asbestos cases, "[t]he question of causation is an individual issue"); Korren v. Eli Lilly & Co., 150 Misc. 2d 429, 431-32 (N.Y. Sup. Ct. 1990) (refusing to join over 400 DES actions where circumstances surrounding each mother's use of, and complaints regarding, the drug rendered consolidation impractical); In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983) (individual issues of liability predominated because each plaintiff was required to prove that defendants' breach of duty proximately caused her particular injury); Newberg, supra, § 17.24 at 17-75 (noting that, in mass tort class action cases, "[d]irect proximate cause, by definition, is an individual question that as a general rule must be proved separately by class members before they will be able to recover").

B. Attempts to Use Aggregate Proof and Novel Legal Theories to Overcome Predominant Individual Issues

Plaintiffs have devised several strategies in an to attempt to overcome the plethora of individual issues involving causation, reliance and economic damages that have prompted courts to decline to certify or to decertify classes pursuant to Rule 23(b)(3).

1. Use of Aggregate Proof to Establish Causation

Courts have generally rejected attempts to use aggregate proof to establish a kind of "general causation" without reference to individualized proof of proximate cause. For

example, in In re Agent Orange Prod. Liab. Litig. MDL No. 381, 818 F.2d 145 (2d Cir. 1987), cert. denied sub nom. Pinkney v. Dow Chem. Co., 484 U.S. 1004 (1988), while the Second Circuit affirmed the district court's certification of the class of plaintiffs on other grounds,[17] the court noted that "[t]he present litigation justifies the prevalent skepticism over the usefulness of class actions in so-called mass tort cases and, in particular, claims for injuries resulting from toxic exposure." Id. at 164. The court went on to explain its reasons for doubting the appropriateness of class action treatment of the issue of causation:

> The relevant question . . . is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it did cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (e.g. state of health, lifestyle) and the nature of their exposure to Agent Orange. Although generic causation and individual circumstances concerning each plaintiff and his or her exposure to Agent Orange thus appear to be inextricably intertwined, the class action would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure.

Id. at 165 (emphasis added); see generally In re Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990) (group aggregation procedure improperly submerged individual claims and defenses; Cimino v. Raymark Indus., Inc., 151 F.3d 297, 313 (5th Cir. 1998) (causation and damages must be determined as to "individuals, not groups"); Mattoon v. City of Pittsfield, 128 F.R.D. 17, 21 (D.Mass.1989) (denying certification and noting that individual proof of proximate cause was required in case involving water contamination); Thomas v. FAG Bearings Corp. Inc., 846 F. Supp.1400, 1404 (W.D.Mo.1994) (toxic tort case inappropriate for class treatment due to, among other things, individual issues of causation); Hurd v. Monsanto Co., 164 F.R.D. 234, 240 (S.D. Ind.1995) (declining to certify class of plaintiffs exposed to PCBs because "even if a jury could make a class-wide finding of fact regarding the general health risks posed by PCBs, resolution of liability would still require an individual inquiry into the circumstances involving each class member's exposure and susceptibility"); Brown v. Southeastern Penn. Transp. Auth., Civ. A. Nos. 86-2229, 86-4037, 86-5886, 1987 WL 9273, at *11 (E.D. Va. Apr. 9, 1987) (rejecting plaintiffs' request to certify class exposed to PCBs to determine "general causation" and noting that the "nebulous" theory of general causation has been questioned by other courts); cf. In re AMS, 75 F.3d at 1084-85 (directing district court to decertify class in mass tort case because of, among other things, individual issues of causation).

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[17] The court found that certification was "justified under Rule 23(b)(3) because of the centrality of the military contractor defense" which all of the defendants had asserted. In re Agent Orange, 818 F.2d at 166.

Because each product liability claimant must prove that the defendant's product, in fact, caused his or her injury, courts have had to decide what is acceptable proof of individual causation and what role epidemiological (statistical) evidence plays in answering that question. Two distinct issues arise in determining the role of epidemiological evidence in proving individual causation: (1) the admissibility of epidemiological evidence; and (2) the sufficiency of such evidence to prove causation. See, e.g., Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068, 1071-73 (6th Cir. 1993) (finding that epidemiological evidence was admissible but affirming grant of summary judgment for defendants because such evidence failed to establish causation of injury).

The admissibility of a scientific theory or technique is governed in most jurisdictions by some adaptation of the Federal Rules of Evidence which permit opinion testimony by experts when the witness is "qualified as an expert by knowledge, skill, experience, training, or education," and "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue." Fed. R. Evid. 702. Causation can be proven by expert testimony. See, e.g., McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995). Indeed, expert testimony on this issue may be required. See, e.g., Grant v. Lewis/Boyle, Inc., 557 N.E.2d 1136, 1140 (Mass. 1990). Admissibility issues arise when an expert seeks to base an opinion on novel or unorthodox techniques that do not meet the five-fold Daubert test. Daubert v. Merrell Dow Pharm. Corp., 509 U.S. 579 (1993).[18]

Numerous courts have admitted epidemiological evidence under standards governing the receipt of expert testimony. See, e.g., DeLuca by DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 954 (3rd Cir. 1990) ("The reliability of expert testimony

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[18] The five-fold Daubert test examines (1) whether the theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) its known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the relevant scientific community. Daubert, 509 U.S. at 593. On remand, the Ninth Circuit in Daubert added another factor for the trial court to consider: whether the expert's research was "legitimate, preexisting research unrelated to the litigation" or prepared in anticipation of litigation. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317-18 (9th Cir.) ("If the proffered expert testimony is not based on independent research, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on 'scientifically valid priciples.'"), cert. denied, 516 U.S. 869 (1995). Following Daubert, lower courts have excluded expert testimony for numerous reasons. See, e.g., O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1106-07 (7th Cir.) (expert employed purely subjective approach violating the rule that the scientific method be an objective one), cert. denied, 512 U.S. 1222 (1994); Cavallo v. Star Enter., 892 F. Supp. 756, 773 (E.D. Va. 1995) (expert opinion on causation was founded primarily on temporal connection between exposure and injury, as well as subjective belief), cert. denied, 118 S. Ct. 684 (1998); Chikovsky v. Orthos Pharm. Corp., 832 F. Supp. 341, 345-46 (S.D. Fla. 1993) (rejecting expert's reliance on scientific studies that did not conform to the facts of the case).

founded on reasoning from epidemiological data is generally a fit subject for judicial notice; epidemiology is a well established branch of science and medicine, and epidemiological evidence has been accepted in numerous cases."); Ellis v. International Playtex, Inc., 745 F.2d 292, 303 (4th Cir. 1984) (admitting epidemiological evidence despite criticism of methodology). The admissibility of statistical models, however, is vulnerable to challenge under Daubert for several reasons. The model may be found to be unreliable – prepared for litigation based upon faulty or biased assumptions or models – or simply not sufficiently probative of the issues in controversy.

Courts are divided regarding whether statistical evidence and expert testimony, by themselves, are sufficient to prove causation of an individual's injury or disease by a preponderance of the evidence. See In re Agent Orange Prod. Liab. Litig., 996 F.2d at 1437 ("Even if appellants were to . . . provide satisfactory epidemiological evidence on the issue of general causation, and demonstrate with sufficient accuracy their levels of personal exposure to Agent Orange, they still would face the difficult task of demonstrating individual causation, i.e., that Agent Orange exposure caused the particular illnesses upon which they base their claims."). Traditionally, courts have held such evidence is insufficient to prove causation. See, e.g., Sorensen ex rel. Dunbar v. Shaklee Corp., 31 F.3d 638, 643 n.8 (8th Cir. 1994) ("[E]pidemiological . . . studies may only report an association between an injury or disease and a specific exposure, which is not necessarily one of cause and effect. '[I]n an individual case, epidemiology cannot conclusively prove causation; at best, it can establish only a certain probability that a randomly selected case of disease was one that would not have occurred absent exposure.'") (quoting Steve Gold, Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence, 96 Yale L.J. 376, 380 (1986)); Smith v. Ortho Pharm. Corp., 770 F. Supp. 1561, 1576 (N.D. Ga. 1991) ("[I]n an individual case, epidemiology cannot conclusively prove causation; at best, it can establish only a certain probability that a randomly selected case of birth defect was one that would not have occurred absent exposure."); Johnston v. United States, 597 F. Supp. 374, 412 (D. Kan. 1984) (where state law requires that "causation must be proven to a reasonable degree of medical certainty … [a] statistical method which shows a greater than 50% probability does not rise to the required level of proof") (citations omitted); Sulesky v. United States, 545 F. Supp. 426, 430 (S.D. W.Va. 1982) (finding epidemiological studies valuable but not determinative to establish causation or lack thereof); Cottle v. Superior Court, 3 Cal. App. 4th 1367, 1386, 5 Cal. Rptr. 2d 882, 893 (Ct. App. 1992) (finding plaintiff failed to make prima facie showing of causation in toxic tort action where expert could not testify that specific chemicals had caused specific injuries to specific individuals); Money v. Manville Corp. Asbestos Disease Compensation Trust Fund, 596 A.2d 1372, 1377 (Del. Super. Ct. 1991) (to make a prima facie showing with respect to the cause of an

asbestos-related disease a plaintiff must introduce direct competent expert medical testimony that a defendant's asbestos product was a proximate cause of the plaintiff's injury).[19]

In Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994), a purported class action arising out of defendants' alleged contamination of the groundwater with TCE, the court held that a class action was inappropriate because "plaintiff's proof of causation … will require individualized proof for each plaintiff." Id. at 1404. In opposition to defendant's motion for summary judgment on plaintiff's claim for increased risk of cancer, the plaintiff relied on an epidemiological study that purported to establish that a population of potential class members suffered statistically significant abnormalities and adverse health effects. See id. at 1409. However, the court rejected this evidence as inadmissible and irrelevant to prove injury of any particular individual, where "the medical records of the subjects were not consulted, no clinical evaluations . . . were done, and [the author] acknowledged that his epidemiological study was not determinative of any individual's condition." Id. The court observed:

> Allowing proof of group harm to substitute for individual harm would not serve any notion of justice. Uninjured plaintiffs would receive windfalls, while plaintiffs who have now, or later develop, actual injuries would be undercompensated. Therefore, proof of individual injury is necessary. To the extent [the study] is not evidence of individual harm, it is not relevant and not admissible.

Id. (citation omitted).

A number of courts have accepted the argument that, because a relative risk of 2.0 implies a fifty percent likelihood that a specific individual's disease was caused by a particular agent, a relative risk greater than 2.0 will permit an inference that an individual plaintiff's disease was more likely than not caused by the relevant agent. See DeLuca, 911 F.2d at 959 (if state law requires proof of causation by a preponderance of the evidence "[a] relative risk greater than '2' means that the disease was more likely than not caused by the event"); Marder v. G.D. Searle & Co., 630 F. Supp. 1087, 1092 (D. Md. 1986) ("[I]n epidemiological terms,

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[19] See also Reference Manual on Scientific Evidence 96 (Fed. Judicial Center 1994) (noting that "[a] failure by experts to consider medical records and personal history could lead a court to conclude that the expert was failing to consider evidence on which experts customarily rely and that the proffered opinion failed to satisfy Rule 703"); In re Joint E. & S. Dist. Asbestos Litig., 758 F. Supp. 199, 202 (S.D.N.Y. 1991) (noting that epidemiological evidence is useful in "recognizing increased affliction in different groups of individuals, rather than to identify the cause of a disease in a particular individual" because "[a]t most, an epidemiologist can calculate the likelihood that an individual will contract a particular disease"), rev'd on other grounds, 964 F.2d 92 (2d Cir. 1992).

a two-fold increase in risk is an important showing for plaintiffs to make because it is the equivalent of the required legal burden of proof -- a showing of causation by the preponderance of the evidence or in other words a probability of greater than 50%."), aff'd sub nom. Wheelan v. G.D. Searle & Co., 814 F.2d 655 (4th Cir. 1987); Landrigan v. Celotex Corp., 605 A.2d 1079, 1087 (N.J. 1992) (relative risk greater than 2.0 "support[s] an inference that the exposure was the probable cause of the disease in a specific member of the exposed population"); Daubert, 43 F.3d at 1321 (affirming grant of summary judgment because "[a] relative risk of less than 2 . . . actually tends to disprove legal causation as it shows that Bendectin does not double the likelihood of birth defects"); In re Joint E. & S. Dist. Asbestos Litig., 758 F. Supp. 199, 202-05 (S.D.N.Y. 1991) (granting summary judgment for the defendant on the ground that the plaintiff could not establish that her husband's colon cancer was caused by exposure to asbestos because relative risk was less than two), rev'd on other grounds, 964 F.2d 92 (2d Cir. 1992).

However, courts holding that a relative risk factor of greater than 2.0 may support recovery recognize that defendants are entitled to introduce additional evidence bearing on causation to rebut plaintiff's prima facie evidentiary showing. For example, to rebut epidemiological evidence proffered to prove causation, defendants may seek to show exposure to other known causes of disease, family history of disease, conflicting diagnoses and any other evidence that modifies a probability based solely on epidemiological evidence. See, e.g., Allen v. United States, 588 F. Supp. 247, 429-43 (D. Utah 1984), rev'd on other grounds, 816 F.2d 1417 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988); Manko v. United States, 636 F. Supp. 1419, 1437 (W.D. Mo. 1986), aff'd, 830 F.2d 831 (8th Cir. 1987).

The acceptance of statistical evidence alone by one court in the mass tort context was based on the practical impossibility of establishing causation in such cases on an individualized basis. See Blue Cross & Blue Shield, 113 F. Supp. 2d 345, 379 (E.D.N.Y. 2000) (approving "the use of statistical proof rather than compelling individualized showings as to hundreds-of-thousands of claims"); id. at 372 ("The use of statistical evidence and methods in the American justice system to establish liability and damages is appropriate, particularly in mass injury cases such as this one."); id.; 36 F. Supp. 2d 560, 574 (The aggregation of millions of alleged injuries in the instant suit can be expected to yield more accurate results with respect to the causation issue since projections based upon a large statistical base will be available, thus reducing the size of the possible error); see also Gold, 96 Yale L.J. at 377 ("The basic impossibility of proving individual causation distinguishes toxic tort cases from ordinary personal injury suits."). In Blue Cross & Blue Shield, the court allowed plaintiffs to establish reliance and injury on an aggregate rather than individualized basis. Id., 133 F. Supp. 2d 162, 172 ("Here it would be enough for [plaintiff] to show that proportions of its subscriber population relied and were damaged even if it does not identify particular persons who relied and who were damaged.").

2. Use of Survey Evidence to Establish Reliance

In Blue Cross & Blue Shield plaintiffs were permitted to convert depositions of a sample population representing the membership of a regional medical insurer into a survey offered as evidence of reliance and proximate cause. See id., 113 F. Supp. 2d at 374 ("The parties have been permitted to take depositions and conduct discovery of a sufficient sample of [plaintiff's] plan members who suffered smoking-related injuries to yield statistically significant conclusions."). The court rejected defendants' constitutional challenges to plaintiffs' reliance on statistical evidence. Id. at 373 ("the use of statistical evidence violates neither the constitutional guarantee of due process nor the constitutional right to a jury trial").

The determination to allow use of statistical proof involves consideration of the methodology and evaluation of expert testimony. See, e.g., In re Chevron, 109 F.3d 1016, 1020 (5th Cir. 1997) (statistical extrapolation must be "based on competent, scientific, statistical evidence that identifies the variable involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole."); Hilao v. Estate of Marcos, 103 F.3d 767, 788 (9th Cir.1996) (Rymer, J., dissenting) ("I cannot believe that a summary review of transcripts of a selected sample of victims who were able to be deposed for the purpose of inferring the type of abuse, by whom it was inflicted, and the amount of damages proximately caused thereby, comports with fundamental notions of due process.").

3. Fraud on the Market Theory to Avoid Proving Individual Reliance

The fraud-on-the-market theory in a federal securities case provides a rebuttable presumption of reliance on alleged misrepresentations and omissions of material fact that were publicly disclosed when the security at issue was traded on a free, efficient and well-developed securities market. See Basic Inc. v. Levinson, 485 U.S. 224, 241-42, 246 (1988); see also In re Bank of Boston Corp. Sec. Litig., 762 F. Supp. 1525, 1536 (D. Mass. 1991).[20] Courts have, however, consistently recognized that consumer markets are diverse and multi-faceted, and thus are not analogous to the highly regulated market for publicly traded securities. Courts therefore have typically refused to extend the fraud-on-the-market theory to consumer markets. See e.g., Rosenstein v. CPC Int'l, Inc., Civ. A. No. 90-4970, 1991 WL 1783, at *1 (E.D. Pa. Jan. 8, 1991).

[20] The fraud-on-the-market theory is premised on the hypothesis that in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. See Basic, 485 U.S. at 241. In such circumstances, a shareholder is entitled to rely on the efficacy of the market to properly process and evaluate all material information that is then reflected in the market price of stock. See id. at 244-45.

Rosenstein involved causes of action brought under the federal RICO statute, state consumer protection statutes, and common law fraud, negligent misrepresentation and breach of warranty theories, alleging that a distributor of corn oil and margarine falsely claimed that its product would reduce the consumer's existing serum cholesterol levels. Plaintiffs in Rosenstein argued that proof of reliance could be established on a class-wide basis through marketing surveys combined with expert testimony to provide the jury with sufficient evidence to conclude that a readily identifiable portion of the purported class was induced by the alleged fraudulent scheme to purchase defendant's corn oil and margarine. See id. at *4. The court declined to extend the fraud-on-the-market theory to a consumer market because it could not identify the particular plaintiffs who actually suffered injury and thus could not eliminate the possibility that a non-injured class member would recover:

> [P]laintiffs attempt to draw an analogy to securities fraud cases where courts have utilized various devices of presuming reliance . . . . This [fraud-on-the-market] theory, however, has been generally limited to the securities law context where courts can presume "that there is a nearly perfect market in information." Such presumptions cannot be made with respect to "non-perfect" markets, such as the consumer market.

Id. (citations omitted).

Similarly, in Maguire v. Sandy Mac, Inc., 138 F.R.D. 444 (D.N.J. 1991), vacated on other grounds, 145 F.R.D. 50 (D.N.J. 1992), the court refused to certify a class of plaintiffs alleging fraud in connection with the defendants' sale of ham products that did not meet U.S.D.A. standards. See id. at 451. The court explained:

> As to the fraud claims, each member of the proposed class would have to show his or her individual reliance and injury or a violation of a statute and resultant injury. Although the Third Circuit has accepted the "fraud on the market" theory, allowing the court to presume reliance in certain instances, this theory has generally been limited to the securities market where the courts can presume "a nearly perfect market in information." The consumer market has been found to be a "non-perfect" market.

Id. at 451 (citations omitted) (emphasis added); see also Securities Investor Protection Corp. v. BDO Seidman, LLP, 2000 WL 713909, at *8 (2d Cir. June 5, 2000) ("[C]ommon law fraud claims require a different analysis than those brought under the federal securities regulation scheme. Relying on this distinction, federal courts repeatedly have refused to apply the fraud on the market theory to state common law cases despite its wide acceptance in the federal securities context); Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank, 850 F. Supp. 1199, 1221-22 (S.D.N.Y. 1994) (plaintiff alleging fraudulent inducement related to its purchase of

a participation interest in a real estate loan may not rely on fraud-on-the-market but must show that it actually relied on the information being disclosed and that such reliance was reasonable), aff'd, 57 F.3d 146 (2d Cir. 1995); Elliot v. ITT Corp., 150 F.R.D. 569, 583 (N.D. Ill. 1992) (refusing to certify class for consumer fraud claim because "individual questions of reliance are more likely to predominate [in such an action] than in an action under the fraud on the market theory"); Wells v. HBO & Co., 813 F. Supp. 1561, 1569-70 (N.D. Ga. 1992) (refusing to extend fraud on the market theory to common law fraud claims in securities case and noting that, outside of the securities context, permitting such a presumption would have wide-reaching and controversial repercussions); Strauss v. Long Island Sports, Inc., 60 A.D.2d 501, 510, 401 N.Y.S.2d 233, 237 (2d Dep't 1978) (noting that a distinction "can and should be made" between securities fraud cases, where the fraud on the market theory can be applied to presume reliance, and a case brought by the purchaser of basketball tickets on behalf of a putative class based on the alleged misrepresentations by the defendant in newspaper advertisements).

Only one court has adopted the fraud on the market theory – which it characterized as "a scheme to distort the body of public knowledge" – to establish allegations of fraud in mass tort cases:

> Where such broad-based fraudulent schemes are alleged and sufficient evidence is proffered at the summary judgment stage, a plaintiff may show reliance by establishing (1) that the RICO defendants intentionally engaged in a scheme to distort the body of public knowledge, (2) that the defendants were successful in doing so (e.g., a substantial factor in causing the distortion), (3) that there was detrimental reliance on this distorted information by an intended and foreseeable class of victims, (4) that such reliance was reasonable in the totality of the circumstances, and (5) that the plaintiff was proximately injured by this reliance.

Blue Cross Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 470 (E.D.N.Y. 2000) (citing the court's similar holding in a prior case, Falise, 94 F. Supp. 2d at 335).

4. Use of Economic Models to Establish Damages

As with issues of reliance and causation, numerous courts have held that the determination of damages in class action cases is not susceptible to aggregate proof. For example, in Kurczi v. Eli Lilly & Co., 160 F.R.D. 667 (N.D. Ohio 1995), the court explained:

> Determinations regarding the appropriate measure of damages and the manner in which those damages will be assessed and administered are questions which will necessarily turn on the individual facts of an individual plaintiff's case. As with the required showing of injury, every tort case will necessarily pose a question regarding the proper assessment and administration of

> damages. There is nothing common about this determination as to these plaintiffs which is not common to plaintiffs in tort actions.

Id. at 675; see also In re Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1995 WL 273597, at *10 (E.D. Pa. 1995) (denying motion to certify Rule 23(b)(3) class in case alleging injuries suffered as a result of surgical implantation of spinal fixation devices where injuries had manifested in some individuals but not others and some had the devices removed and others had not: "the measure of damages will be dependent almost exclusively on individual factors"); Thomas, 846 F. Supp. at 1404 (denying motion to certify Rule 23(b)(3) in toxic exposure case where measure of damages was "dependent almost exclusively on individual factors"); Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 110-11 (E.D. Va. 1980) (refusing to certify class of plaintiffs employed in seafood industry on issue of damages resulting from pollution of waterways where "the issues relevant to liability, i.e. injury and damages, may vary from class member to class member").[21]

Other courts certifying class actions in the mass tort context have recognized the requirement that issues relating to damages must be tried individually. See, e.g., In re Copley Pharm., Inc., 158 F.R.D. 485, 491 (D. Wyo. 1995) (after trial on common issues, class members may pursue individual cases to determine if they suffered an injury and, if so, the measure of damages); Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 384 (D. Colo. 1993) (certifying medical monitoring and property classes in toxic tort case, but noting that individual class members will be required to submit evidence of damages); cf. Margaret Hall Found., Inc. v. Atlantic Fin. Management, Inc., No. CIV. A. 82-2534-T, 1987 WL 15884, at *4 (D. Mass. July 30, 1987) ("individual proof of damages will not defeat class certification"); Rental Car of N.H., Inc. v. Westinghouse Elec. Corp., 496 F. Supp. 373, 381 (D. Mass. 1980) ("Where the common issue of fact of injury can be established class wide, the fact that the quantum of damages would need be determined on an individual basis will not preclude class action certification.").

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[21] Cf. Newberg, supra, §17.25 at 17-81:

> When common issues relating to violation or breach of duty and general causation have been adjudicated in a mass tort class suit, individual proximate cause and individual damages issues remain. It is by no means required that each of these individual claims with their separate issues be litigated in a minitrial, complete with live testimony before a jury. Especially when small or moderate-sized claims are involved, the court can delegate initial determination responsibilities by setting up a mechanism that will permit claimants to prove their individual claims in a simple, efficient, and economical way that preserves appropriate protections for all the parties and remains under the ultimate review of the trial court. When substantial claims are involved, the parties are probably entitled to full protection of formal adversary, jury trial proceedings to resolve their individual claims.
>
> Id. (emphasis added) (footnotes omitted).

Blue Cross & Blue Shield permitted plaintiffs to prove damages not on a claimant-by-claimant basis but rather through the use of a statistical model that presented a hypothetical "counter-factual" world devoid of defendants' alleged misconduct, with damages calculated as the differential between the counter-factual model and the real world:

> [Plaintiff's expert] will present models quantifying that portion of smoking related costs attributable to defendants. He uses a "counter factual" world to calculate a "conduct attributable fraction" (CAF) for each year, representing the portion of medical costs due to smoking related illnesses resulting from defendants' alleged fraud. The smoking attributable fraction (SAF) and costs 'found' by other experts are also utilized to determine damages on a per annum basis. He will be allowed to testify. It is defendant's view that [the expert's model] model is 'an antitrust model not a RICO model.' The model may well present insights useful to the jury. The fact that [the expert] is a medical doctor and not an economist is not critical in view of his extensive involvement in cigarette issues. The fact that there is some disagreement among plaintiffs' experts does not disqualify them. Daubert is not violated. The motion to exclude is denied.

Id., 2000 WL 1738338 (E.D.N.Y Nov. 1, 2000), at *2 (citations to transcript omitted).

The proposed used of aggregate damages proof raises significant constitutional issues. In Fibreboard, the Fifth Circuit questioned whether the district court's plan to use aggregate techniques to determine damages in a mass tort case violated defendants jury trial right as required by the United States Constitution:

> We are . . . uncomfortable with the suggestion that a move from one-on-one "traditional" modes [of adversarial engagement] is little more than a move to modernity. Such traditional ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial and the case and controversy requirement of Article III.

Fibreboard, 893 F.2d at 710-11(emphasis added); see generally Watson v. Shell Oil Co., 979 F.2d 1014, 1018-19 (5th Cir. 1992) ("[B]ecause the proceeding was to ascertain damages for a group of claimants who suffered widely divergent injuries essentially on the basis of a statistical profile, the plan failed to qualify as a 'trial' in the sense contemplated by Article III of the Constitution, and was thus beyond the authority of an Article III court."); Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir.) (Posner, J.) ("The right to a jury trial in federal civil actions, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact."), cert. denied sub

nom. Grady v. Rhone-Poulenc Rorer Inc., 516 U.S. 867 (1995); Leverance v. PFS Corp., 193 Wis.2d 317, 532 N.W.2d 735, 740 (1995) ("the right to a jury trial guaranteed by . . . the Wisconsin Constitution is not contingent upon (a) the amount of damages at stake in a given case or (b) the burden the litigation might place upon the court system"); but see Marcos, 103 F.3d at 769 (determining damages on behalf of a class of almost 10,000 victims of human rights violations on the basis of evidence relating to a random sample of 137 claimants held not to violate defendant's jury trial right: "the jury did determine the facts of the case, as the substance of the action was presented to the jury").

5. Third Party Payor Cases: Plaintiffs Resort to Non-Rule 23 or "Quasi Class Actions"

Plaintiffs in the tobacco litigation have attempted to overcome the predominance/superiority barriers to class certification under Rule 23 by bringing "recoupment" cases on behalf of third-party entities such as unions, trust funds and insurers (including Blue Cross/Blue Shield) seeking reimbursement of medical expenses paid on behalf of their members. These actions by third-party payors can be viewed as non-Rule 23 or "quasi class actions" because they attempted to aggregate multiple individual claims against the same defendants based on identical legal theories and many identical or overlapping factual contentions without seeking formal class certification or attempting to satisfy the elements of Rule 23. See Blue Cross & Blue Shield, 133 F. Supp. 2d at 178 (referring to the aggregated cases as a "quasi-class action").

Courts have been nearly unanimous in dismissing these lawsuits under the remoteness doctrine, because of a lack of direct injury to the plaintiff:

- "[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by [smokers] and therefore too remote as a matter of law for them to have standing to sue defendants." Laborers Local v. Philip Morris, 191 F.3d 229, 244 (2d Cir. 1999), cert. denied, 528 U.S. 1080 (2000).

- Plaintiffs' claims "necessarily fail for being too remotely connected in the causal chain from nay wrongdoing on defendants' part." Steamfitters v. Philip Morris, 171 F.3d 912, 928 (3d Cir. 1999), cert. denied, 528 U.S. 1105 (2000).

- "[T]he loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the [plaintiffs] . . . ." Texas Carpenters v. Philip Morris, 199 F.3d 788, 789-90 (5th Cir. 2000).

- "[P]laintiffs' RICO and antitrust claims are 'too remote' from defendants' alleged wrongdoing to allow recovery." Oregon Laborers v. Philip Morris, 185 F.3d 957, 964 (9th Cir.), cert. denied, 528 U.S. 1075 (2000).

See also International Bhd. Of Teamsters v. Philip Morris, 196 F.3d 818, 825-26 (7th Cir. 1999) ("The injury for which the plaintiffs seek compensation is remote indeed"); Lyons v. Philip Morris, 225 F.3d 909, 914 (8th Cir. 2000); United Food & Commercial Workers Unions v. Philip Morris, 223 F.3d 1271, 1273 (11th Cir. 2000). See generally Holmes v. SIPC, 503 U.S. 258, 268-69 (1992) ("plaintiff who complains[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover").

C. The Superiority Requirement: Class Actions Are Not Superior To Other Methods of Adjudication

The superiority requirement in Rule 23(b)(3) is inextricably linked to the predominance inquiry. See Zinser, 253 F.3d 1192 (9th Cir. 2001) ("when the complexities of class action treatment outweigh the benefits of considering common issues in one trial, class action treatment is not the 'superior' method of adjudication"). Courts have identified several factors bearing on the superiority requirement of Rule 23:

1. Manageability

In Castano, the court expressed concern that "difficult choice of law determinations, subclassing of eight claims with variations in state law … notice to millions of class members, further subclassing to take account of transient plaintiffs and the difficult procedure for determining who is nicotine-dependent" rendered a nationwide class action unmanageable. Id. 84 F.3d at 747. This sentiment has been echoed by numerous courts. See, e.g., Guillory, 2001 WL 290603, at *3 (N.D. Ill. Mar. 20, 2001) (the "potential for a massive quantity of future members in this class makes it unmanageable"); National Asbestos, 2000 WL 1364358, at *1 (E.D.N.Y. Sept. 20, 2000) ("[p]laintiffs have not met their obligation of showing that the case is manageable as a class action."); Aksamit, 2000 U.S. Dist. LEXIS 18880, at *27 ("… the myriad of issues related to the individual Plaintiffs create insurmountable management problems."); Insolia, 186 F.R.D. at 586 (plethora of causation-related individual issues would convert the litigation to an unmanageable "series of 12-week trials at which the claims of 90 class members would be disposed of one trial at a time until the entire process would end, at least five years and at least 1000 plaintiffs later"); Ruiz, 1998 U.S. Dist. LEXIS 4755, at *7 (citing "unimaginable difficulties in terms of notification and determination of class membership … [m]anaging such a fluid class would undoubtedly overwhelm this district court").

2. Choice of Law

In Castano and other federal cases, the complexity of the choice of law inquiry has precluded certification of a nationwide class of plaintiffs. Variations in legal standards among states often renders a nationwide class action unmanageable. An effective management solution (usually encompassing subclasses) is a prerequisite for court class certification approval. See, e.g., In re Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 278 (S.D. Ohio 1997).

Typically, "[t]he choice of law problem … poses less of an obstacle in statewide class actions, although the discrepancies in the applicable law magnify manageability concerns and accentuate the factual differences that already undermine the cohesiveness of a … class." Kearns, Decertification, 74 N.Y.U. L. Rev. at 1372. See Castano, 84 F.3d at 734, 742-43 n.15 (finding it "difficult to fathom how common issues could predominate" where "[v]ariations in state law magnify the [substantial factual] differences").[22] Restricting the class to residents of a particular jurisdiction does not inevitably eliminate the choice of law problem, since a transient population may have been exposed to defendant's product in a variety of locations.

The difficulty of fashioning comprehensible juror instructions in multi-state or national class actions may defeat certification. In In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995), the Court of Appeals stated that if the case were to proceed as a class action "a jury [would] receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia … The assumption is that the common law of the 50 states and the District of Columbia … is basically uniform and can be abstracted in a single instruction." In fact, the court stated that mere differences in "nuance" would render jury instruction an insurmountable feat. Id. This concern over jury instruction was reiterated in In re AMS, where the court said, "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law." In re AMS, 75 F.3d 1069, 1085 (6th Cir. 1996). But see Simon II, 2000 WL 1745265, at * 30 (approving application of New York law to putative nationwide class in tobacco litigation).

D. "Novel" Claims: The Immaturity of Certain Tort Class Actions

The Castano court characterized the case before it as "a novel claim involving eight causes of action, multiple jurisdictions, millions of plaintiffs, eight defendants, and over fifty years of alleged wrongful conduct." 84 F.3d at 744. The court was therefore reluctant to certify a class in an untested and immature nationwide tobacco tort case. Id. at 747. ("Our specific concern is that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by Rule 23.").

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[22] Cf. Mullen v. Treasure Chest Casinos, LLC., 186 F.3d 620, 623 (5th Cir. 1999). In Mullen, the court affirmed certification of a class consisting of "all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness" caused or exacerbated by an allegedly defective ventilation system on board the vessel. The court distinguished Castano and held that particular issues common to the class could be resolved on a classwide basis because there were no complex choice of law problems (the claim was brought under the federal Jones Act) and the class was limited to only 100-150 members, all of whom claim injury "from the same defective ventilation system over the same general period of time." Id. at 627.

VII. BIFURCATION AND PRODUCT LIABILITY CLASS ACTIONS

Federal Rule of Civil Procedure 42(b) permits the separation of a civil trial into two or more stages to promote convenience, fairness and economy of judicial proceedings. The separate components of the trial are then litigated successively. The party moving for bifurcation has the burden of proving that at least one of the aforementioned conditions of Rule 42(b) apply. Courts will usually reject bifurcation where issues of liability and damages are closely intertwined. See Meiring de Villiers, A Legal and Policy Analysis of Bifurcated Litigation, Colum. Bus. L. Rev. at 156 (2000). Further, expedience should never outweigh a party's paramount right to a fair and impartial trial. Id. at 156-57. Courts are often hesitant to permit bifurcated proceedings in a class action for fear that they may be inconsistent with a party's Seventh Amendment rights. See generally Castano, 84 F.3d at 750.

In Rhone-Poulenc, the Seventh Circuit decertified a class of hemophiliacs infected with the AIDS virus. See id., 51 F.3d at 1304. The court found that the lower court's decision to bifurcate the proceedings was an improper use of the court's authority and infringed on the defendants' jury trial rights because it presumed that one legal standard governing the negligence theories could be fashioned when in fact the laws of the 50 states widely vary, and because if liability were established separate juries necessarily would reexamine prior jury findings in the course of deciding remaining liability issues.

The Fifth Circuit in Castano echoed Rhone-Poulenc's reasoning, when it reversed the trial court's certification of a nationwide class of nicotine-dependent persons under Rule 23(b)(3). The trial judge had identified certain principal issues to be tried on a classwide basis and had severed the remaining issues for later individual trials. The Fifth Circuit noted that there was a serious risk that a bifurcated proceeding would violate the Seventh Amendment, as it would require a second jury to reexamine findings of a prior jury. Castano, 84 F.3d at 750.[23] Similar concerns contributed to the Fifth Circuit's decision to reverse the district court's trial plan involving consolidation of some claims and class actions for others in Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998). See In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 426 (E.D. La. 1997) (rejecting plaintiffs' proposal to divide the action into a "core liability" trial followed by mini-trials on individual issues such as reliance, causation and comparative fault, reasoning that fragmenting the issues in such a manner would "defeat the purported economies of class action treatment" and bifurcation of the manufacturer's conduct and comparative negligence would also violate defendant's constitutional right to have interrelated liability questions determined by the same jury); but see

[23] Numerous decisions have recognized that class-action trial plans that would present interrelated issues to separate juries present substantial Seventh Amendment problems. See, e.g., Aksamit, 2000 U.S. Dist. LEXIS 18880, at *28-29; Arch, 175 F.R.D. at 491-94; Smith, 174 F.R.D. at 96-98; Angeletti, 752 A.2d at 245 n.36; Reed, 1997 WL 538921, at *12, *16.

Mullen v. Treasure Chest Casinos, LLC, 186 F.3d 620, 628 (5th Cir. 1999) (holding that bifurcation of the class action did not impinge upon the Seventh Amendment because the issues were structured to preclude reexamination by different juries.).

VIII. MASS TORT CERTIFICATION DECISIONS IN FEDERAL COURT ARE RIPE FOR APPELLATE REVIEW

A 1998 amendment to the Federal Rules of Civil Procedure allows either side to seek an interlocutory appeal from the district court decision to grant or deny class certification (i) without the requiring the deciding federal judge to find that the prerequisites of 28 U.S.C. 1292(b) have been met or (ii) satisfying the clear abuse of discretion standard necessary to obtain mandamus.[24] Federal Rule 23(f) allows immediate appeal of a class certification decision in federal court. The appeal of a class certification decision does not stay the trial court proceedings unless so ordered by the district court or Court of Appeals.

Rule 23(f) of the Federal Rules of Civil Procedure, which requires that the appeal be filed within ten days after entry of the order on class certification, provides no specific criteria for the appellate court's exercise of its discretion to hear an appeal. Appellate courts have formulated three grounds for exercising interlocutory review:

a) if the claims, after denial of certification are too small economically to justify continued litigation by plaintiff, and denial of certification would thus be the "death-knell" of the litigation; or

b) if the grant of class certification would place considerable economic pressure on defendants to settle where the merits of the claim are weak and the certification is questionable; or

c) the appeal would resolve an important unsettled legal issue that otherwise might not get resolved if left to the end of the litigation.

See Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834-35 (7th Cir. 1999); see also Waste Mgt. Holdings, Inc. v. Mowbray, 208 F. 3d 288, 293 (1st Cir. 2000); Prado-Steiman v. Bush, 221 F.3d 1266, 1274 (11th Cir. 2000).

[24] Section 1292(b) allows a federal judge to certify an order – not otherwise appealable – for appellate review when "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Recently, in Sumitomo v. Credit Lyonnais, 262 F.3d 134 (2d Cir. 2001), defendants had sought interlocutory review of a district court's order that certified a class of copper futures contracts traders who alleged that they were defrauded by defendants. In denying interlocutory review, the United States Court of Appeals for the Second Circuit noted that "[w]e anticipate . . . that the standards of Rule 23(f) will rarely be met. This approach will prevent the needless erosion of the final judgment rule and the policy values it ensures, including efficiency and deference." Id. at 140. The court reasoned that even if the district court did commit an error of law, interlocutory review was not required where the error did not affect the class certification issue and the error could be corrected on appeal from a final judgment. Id. at 142.

In sum, Rule 23(f) review of class certification decisions, while more liberal than the previous interlocutory appellate avenues, is likely to continue to be sparingly granted. See Michael E. Solimine and Christine Oliver Hines, Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531(May 2000).

The intersection of Rule 23(f) and statute of limitations tolling for class members is emerging as an area of controversy. Filing a class action tolls the applicable statute of limitations as to all claims asserted on behalf of the entire putative class. Traditionally, cases have held that the tolling is not indefinite, and only continues as long as reliance on the pendency of the class action is reasonable. The great majority of cases have held that it ceases to be reasonable to rely on the class action as a tolling device after a district court denies class certification. At that moment, the named class representative no longer has a duty to advance the absent members' interests, so they must bring their own cases to protect their interests. Particularly in cases where the statute of limitations is short, absent members' claims could be in jeopardy, particularly if any significant delay preceded the filing of the class action. The enactment of Rule 23(f) raises the question of whether taking an appeal from a denial of certification extends class action tolling for putative class members.

Rule 23(f) is silent on the question. The signals from courts thus far have been that, at least in cases where the case is stayed entirely while the class issue is resolved on appeal, the tolling of the statute of limitations will continue even after the district court denies class certification. Judge Weinstein so held in a recent tobacco case, as has the 11th Circuit Court of Appeals in dicta. See National Asbestos Workers Med. Fund v. Philip Morris, Inc., No. 98 CV 1492 (JBW), 2000 WL 1424931, at *1 (E.D.N.Y. Sept. 26, 2000) (Weinstein, J.) ("The policies undergirding the adoption of Rule 23(f) suggest, however, that the statute of limitations should be tolled where a party files an interlocutory appeal and the district court grants a stay"); Armstrong v. Martin Marietta Corp.,138 F.3d 1374,1390 (11th Cir. 1998) (decided prior to adoption of Rule 23(f) but noting that it "might for instance allow continued tolling of statutes of limitations during the pendency of an appeal under the new rule"); see also Scarvey v. First Federal Savs.& Loan Ass'n, 2001 WL 1001009, at * 6 (N.C. App. Sept. 4, 2001) ("if an interlocutory appeal is taken from the denial of certification, tolling continues during the

pendency of the appeal"). The rationale is that a reversal on an interlocutory appeal could promptly revive the class action, so in order to discourage a flood of individual claims after the district court denies class certification, the tolling should continue until the Court of Appeals speaks on the certification issue.

IX. MEDICAL MONITORING OVERVIEW

Medical monitoring is a judicially-created means to allow a presently uninjured (or asymptomatic) plaintiff who has had some exposure to a potentially harmful substance, to recover the costs of medical examinations, diagnostic tests, and other medical procedures designed to detect the potential occurrence of a future illness or disease that is related to the exposure. In a typical medical monitoring fact pattern, the plaintiff takes a prescription drug, is exposed to an environmental toxin, or has a medical device implanted. The drug, toxin, or device has allegedly been shown to have caused physical injury to others. While the plaintiff presently exhibits no injury or physical symptoms, he seeks reimbursement for the potentially significant costs of ongoing medical examinations to detect the onset of injury. [25]

Medical monitoring is one response to the host of problems caused by the issue of *latency* – the lengthy dormancy or gestation period following exposure during which the plaintiff appears to be healthy. The problems that can arise during the latency period include: (i) running of the applicable statute of limitations; (ii) insolvency of defendant; (iii) problems of establishing causation due to intervening factors; and (iv) loss of evidence/witnesses.

Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) is an early case approving medical monitoring class action relief. The plaintiffs were Vietnamese war orphans who survived a plane crash and sought the costs of future ongoing testing to determine whether they had suffered residual brain dysfunction from the rapid cabin depressurization. The plaintiffs in Friends for All Children undeniably had suffered a physical trauma prior to initiating the litigation.

A few years later in Ayres v. Township of Jackson, 525 A.2d 287 (N.J. 1987), plaintiffs were exposed to a potentially harmful toxic substance in their groundwater. Although at the time of the suit they did not show any sign of physical injury, the court held that "the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, [makes] such surveillance to monitor the effect of exposure to toxic chemicals [] reasonable and necessary." Id. at 312.

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[25] In certain states, as will be discussed below, the plaintiffs must prove that they are presently injured to prevail on a medical monitoring claim.

Medical monitoring has evolved into a controversial and hotly contested area of mass tort litigation. Courts are split over whether, and to what degree, the medical monitoring cause of action or the underlying tort on which medical monitoring relief is based, implicate individual issues. The majority of courts have concluded that these individual issues defeat the predominance and superiority requirements of Rule 23(b)(3). Some courts have also reasoned that these individual issues defeat the implicit cohesiveness requirements of Rule 23(b)(2). A minority of courts have determined that Rule 23(b)(3) class certification of medical monitoring is appropriate.

Because the majority of courts reject class certification of medical monitoring claims under Rule 23(b)(3), most plaintiffs seek certification under Rule 23(b)(2). However, courts differ over the proper characterization of medical monitoring – whether it is injunctive relief or a disguised suit for damages.

Far fewer courts have considered the application of Rule 23(b)(1)(A) to claims for medical monitoring. However, those that have ruled on the issue have not been unanimous. The majority of courts have determined that defendants would not be subject to "incompatible standards of conduct" by the prosecution of separate actions.

X. THE ELEMENTS OF MEDICAL MONITORING

The precise elements that plaintiffs must establish to cover for medical monitoring differ among jurisdictions. However, plaintiffs must generally prove the following factors to recover under a medical monitoring theory:

(1) exposure to greater than normal background levels;

(2) of a proven hazardous substance;

(3) caused by the defendant's negligence;

(4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease;

(5) a monitoring procedure exists that makes the early detection of the disease possible;

(6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and

(7) the prescribed monitoring procedure is reasonably necessary according to contemporary scientific principles.

See, e.g., Redland Soccer Club, Inc. v. Department of the Army and Department of Defense of the United States, 696 A.2d 137, 145-46 (Pa. 1997). While some states require that treatment for the plaintiff's ailment exist, certain states, such as West Virginia and Pennsylvania, have explicitly eliminated the requirement. See Redland, 696 A.2d at 146 n.8 (requiring treatment to exist would unfairly prevent a plaintiff from taking advantage of advances in science); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 434 (W. Va. 1999) ("[i]n this age of rapidly advancing medical science, we are hesitant to impose such a static requirement"). See also Denham, Jr., Challenging Tradition With 'New Torts', 4 No. 1 Mealey's Litig. Rep.: Fen-Phen/Redux 23; James M. Garner, et al., Medical Monitoring: The Evolution of a Cause of Action, 30 Envtl. L. Rep. 10024 (Jan. 2000).

There is also no uniformity among the jurisdictions regarding whether a plaintiff must demonstrate that he suffered a personal injury in order to recover medical monitoring costs. The majority of jurisdictions that have considered the issue do not require that plaintiffs exhibit present physical injuries. Id.; see, e.g., Petito v. A.H. Robins Co., 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999); Bower, 522 S.E.2d at 430; Redland, 696 A.2d at 145-46; Potter v. Firestone Tire & Rubber, 863 P.2d 795, 824 (Cal. 1993); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 n.9 (Utah 1993); Burns v. Jaquays Mining Corp., 752 P.2d 28, 33 (Ariz. Ct. App. 1987); Ayers, 525 A.2d 287, 312-13 (N.J. 1987); Askey v. Occidental Chem. Corp., 477 N.Y.S.2d 242, 247 (App. Div. 4th Dep't. 1984). In addition, numerous federal courts have interpreted state law to permit medical monitoring claims without requiring the manifestation of physical injury. See, e.g., Carey v. Kerr-McGee Chem. Corp., 999 F. Supp. 1109, 1119 (N.D. Ill. 1998); Patton v. General Signal Corp., 984 F. Supp. 666, 673 (W.D.N.Y. 1997); Day v. NLO, 851 F. Supp. 869, 878 (S.D. Ohio 1994); Bocook v. Ashland Oil, Inc., 819 F. Supp. 530, 537 (S.D. W.Va. 1993); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991).

A minority of courts, however, has required plaintiffs to show the existence of physical harm. See, e.g., Trimble v. Asarco, Inc., 232 F.3d 946, 963 (8th Cir. 2000); Bowerman v. United Illuminating, No. X04CV 940115436S, 1998 WL 910271, at *10 (Conn. Super. Ct. Dec. 15, 1998); Witherspoon v. Philip Morris, Inc., 964 F. Supp. 455, 467 (D.D.C. 1997); Thomas v. Fag Bearings Corp., Inc., 846 F. Supp. 1400, 1410 (W.D. Mo. 1994); Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (4th Cir. 1991) (holding plaintiffs must demonstrate physical injury to recover under West Virginia or Virginia law; subsequently the West Virginia Supreme Court of Appeals in Bower held that plaintiffs need not show present physical injury to recover medical monitoring expenses); Mergenthaler v. Asbestos Corp., 480 A.2d 647, 651 (Del. 1984).[26] Consequently,

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[26] Louisiana was previously among those jurisdictions that did not require plaintiffs to have sustained a physical injury. In Bourgeois v. A.P. Green Industries, Inc., the Louisiana Supreme Court determined that a plaintiff could recover future medical monitoring costs, notwithstanding the fact that he did not suffer a physical injury. 716 So. 2d 355, 360-61 (La. 1998). However, in July 1999, the Louisiana legislature effectively overruled this decision with the passage of Act 989. See Medical Monitoring Prohibition Not

(continued...)

whether a jurisdiction requires physical injury becomes a threshold issue. See, e.g., Bowerman, 1998 WL 910271, at *10; Thomas, 846 F. Supp. at 1410-11; Ball, 958 F.2d at 39; Mergenthaler, 480 A.2d at 651.

XI. IS MEDICAL MONITORING AN INDEPENDENT CAUSE OF ACTION OR PURELY A REMEDIAL MEASURE?

Courts also disagree on whether medical monitoring is an independent cause of action, or simply a means of recovery once liability is otherwise established. More often, courts recognize medical monitoring as a remedy for an underlying cause of action. See, e.g., Badillo v. American Brands, Inc., 16 P.3d 435, 437 (Nev. 2001); Anello v. Shaw Ind., Inc., No. 95-30234-FHF, 2000 WL 1609831, at *7 (D. Mass. March 31, 2000); Bourgeois, 716 So. 2d at 362; Potter, 863 P.2d at 578; Ball v. Joy Techs., Inc., 958 F.2d 36, 38 (4th Cir. 1991) (holding "[a] claim for medical surveillance costs is simply a claim for future damages," and affirming the lower court's ruling precluding recovery of these costs under applicable state law), cert. denied, 502 U.S. 1033 (1992); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1523 (D. Kan. 1995) (dismissing plaintiff's medical monitoring claim against tobacco company for peripheral vascular disease and its effects because these damages could be recovered through plaintiff's other claims, and did not constitute a separate medical monitoring claim); see also McClenathan v. Rhone-Poulenc, Inc., 926 F. Supp. 1272, 1281 (S.D. W.Va. 1996) (holding that "there is no basis in West Virginia law for a separate cause of action for medical monitoring."); Metro-North Commuter R.R. v. Buckley, 521 U.S. 424 (1997) (holding that under the Federal Employers' Liability Act, no separate cause of action is available to allow an asymptomatic plaintiff to recover lump-sum medical monitoring costs).

Some state and federal courts however, have held that medical monitoring is an independent cause of action. See, e.g., Bower, 522 S.E.2d at 428, 431; Redland 696 A.2d at 145; Gibbs v. E.I. DuPont De Nemours & Co., Inc., 876 F. Supp. 475, 479 (W.D. N.Y. 1995).

This distinction between recognizing medical monitoring as an independent cause of action and allowing it solely as a remedial measure has practical consequences. If medical monitoring is not an independent cause of action, then the plaintiff must establish all elements of an independent basis of recovery, and presumably the defendants may utilize all affirmative defenses. See Badillo v. American Tobacco Co., No. CV-S-98-1764PMP (PAL), 2001 WL 945846, at *3 (D. Nev. July 2, 2001); Badillo 16 P.3d at 440. However, the elements of proof

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Retroactive, 49 La. B.J. 56, 56 (June 2001). This legislation explicitly stated that plaintiffs may only recover damages for future medical treatment if they suffered a physical or mental injury. See id. The Louisiana Supreme Court recently held that this legislation may not be retroactively applied to medical monitoring claims that accrued before the date of its passage. See Bourgeois v. A.P. Green Industries, Inc., 783 So. 2d 1251, 1261 n.11 (La. 2001).

for medical monitoring as a cause of action and as a remedy remain the same and must be established by plaintiffs.

XII. WHAT TYPE OF AWARDS ARE APPROPRIATE FOR MEDICAL MONITORING?

In Day v. NLO, Inc., 144 F.R.D. 330, 335-36 (S.D. Ohio 1992), rev'd on other grounds, 5 F.3d 154 (6th Cir. 1993), a federal district court stated that in granting medical monitoring relief, a court may order the defendant to (i) pay the plaintiffs a lump sum of money, (ii) directly pay the plaintiffs' future medical expenses, or (iii) establish a medical monitoring program, managed by court-appointed, court-supervised trustees. Some courts have granted lump sum damages to plaintiffs for medical monitoring. See, e.g., Ayers, 525 A.2d 287, 315 (N.J. 1987) (although noting that in the future, a court administered fund would be the appropriate remedy for medical monitoring). However, plaintiffs often seek recovery in the form of the creation of a medical monitoring fund, rather than lump sum damages, in order to qualify for class certification under Rule 23(b)(2).[27] The current judicial consensus that payment to a court-administered fund is the preferable approach.

The Supreme Court addressed the availability of medial monitoring under federal law in Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997). In that case, plaintiff was exposed to asbestos, had not suffered a physical injury, yet sought to recover damages under the Federal Employer's Liability Act (FELA) for negligent infliction of emotional distress and the cost of future medical checkups. Id. at 427. The Court held that an award of lump sum damages was inappropriate for several reasons: (1) medical monitoring costs are hard to quantify; (2) lump sum damages could precipitate a flood of litigation since millions of people have been exposed to toxic substances; and (3) lump sum damages would ignore alternative sources of recovery, such as employer monitoring. Id. at 441-44. Buckley has arguably eliminated the ability to recover a lump sum damages award under federal common law.

Courts have also found lump sum damages inappropriate because they may not be used for their intended purpose. A court-administered fund, on the other hand, ensures that plaintiffs use the money for medical surveillance, which could ultimately reduce defendants' liability if monitoring ameliorates future illness. In addition, the use of a court-administered fund permits a defendant to be credited with payments to plaintiff from collateral sources, such as health insurance and allows any left-over amount to be remitted to the defendant.

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[27] In order to be certified as a class under Rule 23(b)(2), plaintiffs must primarily seek injunctive relief. Fed. R. Civ. P. 23(b)(2).

XIII. MEDICAL MONITORING AND CLASS ACTIONS

A. Medical Monitoring as a 23(b)(1)(A) Class Action

Although plaintiffs generally seek to certify medical monitoring claims under Rules 23(b)(2) or 23(b)(3), class certification under Rule 23(b)(1)(A) may be sought when the prosecution of separate actions could result in separate adjudications that would "establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). However, the party opposing certification is not subject to "incompatible standards of conduct" if defendant is simply required to pay different damage awards to different plaintiffs. Rather, defendant must show that it is unable to pursue a uniform, continuing course of conduct. Courts differ over whether medical monitoring claims may be certified under this subsection of Rule 23.

1. Courts Holding that Medical Monitoring Claims May Be Certified under Rule 23(b)(1)(A)

In Telectronics, plaintiffs sued the manufacturer of heart pacemakers containing the Accufix Atrial "J" pacemaker leads, as well as the manufacturer's parent corporations. 172 F.R.D. 271, 276 (S.D. Ohio 1997). The plaintiffs requested class certification for their negligence, strict liability, and punitive damages claims. See id. at 278. The plaintiffs also sought a medical monitoring program to provide diagnostic testing for class members and to research better methods of detection and safer means of removal of fractured leads. See id.

The court first noted that the defendants had already instituted a research program similar to the one requested by plaintiffs. See id. at 285. The defendants contended that their research program was an adequate means of addressing the problem, and pointed out that it was subject to FDA approval. See id. The court determined that class certification was appropriate since separate adjudications would impair the defendants' ability to pursue a single, unified program. See id. Furthermore, "separate judicial orders pertaining to medical monitoring could require [the defendant] to institute differing types of monitoring programs which [the defendant] would have to reconcile." Id. See also Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D. Ohio 1991) (if multiple courts addressed plaintiffs' claims, which included medical monitoring, "they could well order defendants to take actions that could not be performed consistently with each other, thus forcing defendants to choose which orders to obey and which to disregard under threat of contempt").

The plaintiffs in Telectronics further asserted that if the judicial and executive branches promulgated inconsistent monitoring requirements, defendants would be placed in an impossible position. See 172 F.R.D. at 285. The court agreed, stating that if 23(b)(1)(A) certification were not granted, the defendants could face "multiple and conflicting orders rendered from different courts regarding the scope and necessity of a medical monitoring program which may also conflict with FDA imposed requirements." Id.

2. Courts Holding that Medical Monitoring Claims May Not Be Certified under Rule 23(b)(1)(a)

In Zinser, plaintiffs sued the manufacturer of heart pacemakers containing the ENCOR Bipolar Passive Fixation Pacing Lead and the manufacturer's parent corporations. 253 F.3d 1180, 1183 (9th Cir. 2001). The plaintiffs sought certification of negligence, products liability and medical monitoring causes of action pursuant to Rule 23(b)(1)(A). See id. at 1185. Citing Telectronics, the plaintiffs contended that allowing separate actions to proceed would subject the defendants to incompatible monitoring requirements. See id. at 1193. The court distinguished Telectronics by pointing out that the plaintiffs in that action actually sought a medical monitoring *program*, whereas the plaintiffs in Zinser sought compensatory damages, punitive damages, and the creation of a fund to notify class members of the dangerous nature of the leads, monitor class members' health, pay class members' future medical expenses and research alternate methods of treatment. See id. at 1194. The Zinser court stated that Rule 23(b)(1)(A) certification was not appropriate in suits for damages since defendants did not face the possibility of being subject to incompatible standards of conduct and therefore denied certification. See id. at 1193. The Zinser court further declared that Rule 23(b)(1)(A) should be invoked only when the defendant cannot legally pursue two different courses of conduct. See id. at 1194. Consequently, "any administrative difficulty [defendant] potentially might face from slightly different medical monitoring programs required by different courts for differently situated potential claimants does not rise to the level of requiring of [defendant] inconsistent courses of conduct." Id. See also O'Connor v. Boeing N. Am., Inc., 180 F.R.D. 359, 377 (C.D. Cal. 1997) (defendants will not be subject to inconsistent standards when individual issues will determine whether plaintiffs are entitled to medical monitoring); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 99 (W.D. Mo. 1997) (medical monitoring is an element of damages and "there is nothing inconsistent in saying one smoker is entitled to damages for medical monitoring while another is not"); Yslava v. Hughes Aircraft Co., 845 F. Supp. 705, 713 (D. Ariz. 1993).

B. Medical Monitoring Claims as 23(b)(2) Class Action

A class action is maintainable under Rule 23(b)(2) when "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." Fed. R. Civ. P. 23(b)(2). Subsection (b)(2) class actions are "limited to those class actions seeking primarily injunctive or corresponding declaratory relief." 1 Newberg on Class Actions § 4.11, at 4-39.

Courts are divided over whether medical monitoring claims may be certified as a class action under Rule 23(b)(2). See Wilson v. Brush Wellman, Inc., 2002 WL 31320323 (Ohio App. 8 Dist. Oct. 17, 2002); Elliot v. Chicago Hous. Auth., No. 98 C 6308, 2000 WL 263730, at *14 (N.D. Ill. Feb. 28, 2000).

1. Determining Whether the Claims for Medical Monitoring Are Cohesive

Certain courts require that the class members' claims be "cohesive" – such that individual issues of the class members do not render mass adjudication unfair – in order to qualify for class certification under Rule 23(b)(2). See, e.g., Barnes, 161 F.3d 127, 143 (3d Cir. 1998); Thompson, 189 F.R.D. 544, 557 (D. Minn. 1999). Although the text of Rule 23(b)(2) does not make cohesiveness a prerequisite, many courts nonetheless have analyzed whether "individual issues exist among class members which would destroy the 'cohesive nature' of the class claims." See In re Diet Drugs, 1999 U.S. Dist. LEXIS 13228, at *25; see also Barnes, 161 F.3d at 143; Thompson, 189 F.R.D. at 557; Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 529 (N.D. Ill. 1998); see also O'Connor v. Boeing N. Am. Inc., 197 F.R.D. 404, 412 (C.D. Cal. 2000) (Rule 23(b)(2) does not require that common issues predominate over individual issues; class is "cohesive" if the class satisfies Rule 23(a) requirements).

Two policy arguments support the cohesiveness requirement of Rule 23(b)(2). First, a (b)(2) class may require more cohesiveness than a (b)(3) class because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out. Barnes, 161 F.3d at 143. "'Thus, the court must ensure that significant individual issues do not pervade the entire action because it would be unjust to bind absent class members to a negative decision where the class representatives's claims present different individual issues than the claims of the absent members present.'" Id. (citation omitted). Second, a non-cohesive class may not be manageable. See id.

(a) *Lack of Cohesion Prevents Certification*

In Barnes, the court denied Rule 23(b)(2) certification to a class seeking a court-supervised fund that would pay for medical examinations designed to detect latent diseases allegedly caused by smoking. See id. at 132. The court held that the putative class lacked cohesion because the issues of addiction, causation, defenses of comparative and contributory negligence, plaintiffs' need for medical monitoring, and the statute of limitations defense presented too many individualized inquiries. Id. at 143. The Barnes court also noted that some of the named plaintiffs could not establish that their proposed medical monitoring programs differed from the medical attention normally recommended in the absence of exposure to harm-producing substances. See id. at 146; see also Thompson, 189 F.R.D. at 556-57; Dhamer, 183 F.R.D. at 529.

(b) *Courts Holding That a Medical Monitoring Class Can Be Cohesive*

Plaintiffs sued the seller of the appetite suppressants Pondimin and Redux, seeking certification of a medical monitoring class for all individuals who had taken the fen-phen diet drug combination for at least thirty days and had not filed a personal injury claim pursuant to Rule 23(b)(2). See In re Diet Drugs, 1999 U.S. Dist. LEXIS 13228, at *12-13. Plaintiffs

sought a comprehensive medical monitoring program that would notify users of harmful side effects, perform diagnostic examinations for class members, gather and analyze data from testing the class members, and publish and disseminate such information to the class members. See id. at *15-16. The defendants opposed class certification, contending that individual factual issues among the class members rendered the class non-cohesive. See id. at *28. While the court agreed that there were factual differences among the class members, it held that these differences could be addressed through exclusion of certain class members or through the development of subclasses. See id. at *30. For example, the court noted that the dates and duration of use and whether the drugs were used in combination with other drugs could be confirmed by fact sheets and medical records, and hence would be susceptible to subclass treatment. See id. at *34-35. The court distinguished Barnes by noting that the tobacco case involved numerous defendants who manufactured hundreds of brands of cigarettes, all of which contained multiple ingredients. See id. at *33. By contrast, the Diet Drugs plaintiffs consumed only two chemical compounds that were sold as two brands. See id. Moreover, Diet Drugs did not raise the individualized question of addiction. See id. at *34.

The Diet Drugs defendants also contended that the national class was not cohesive because not all states recognize medical monitoring, and those states that do recognize medical monitoring have established different elements for the claim. See id. at *37. However, the court held that state law variance could be overcome through the establishment of subclasses. See id. at *43. The court noted that asymptomatic plaintiffs whose claims arose in jurisdictions that require an injury for a tort claim to proceed would have to be excluded from the class. See id. at *45.

2. Does Medical Monitoring Qualify as Injunctive Relief?

Courts must "closely scrutinize[]" plaintiff's requested medical monitoring relief to determine whether it is injunctive and thus satisfies the threshold for Rule 23(b)(2) certification. Arch, 175 F.R.D. 469, 484 (E.D. Pa. 1997). Certification will hinge on whether the court regards the plaintiffs' claim as injunctive relief or simply as "a disguised request for compensatory damages." Id. at 483.

(a) *Many Courts Hold That Medical Monitoring Is Not Injunctive Relief*

A number of courts have recently refused to certify medical monitoring class actions under Rule 23(b)(2). A federal district court in Colorado refused class certification to plaintiffs seeking the establishment of a medical monitoring program to monitor plaintiffs for their exposure to radioactive substances and use the data for group studies. See Cook v. Rockwell Int'l Corp., 181 F.R.D. 473, 478 (D. Colo. 1998). The court had initially determined the plaintiffs' claim was for injunctive relief and certified the class under Rule 23(b)(2). See id. at 478-79. However, the Tenth Circuit, albeit not in a class certification context, subsequently characterized an action seeking a similar court-administered medical monitoring program as "essentially a suit for damages against private defendants as a remedy for past misconduct."

Building & Constr. Dept. v. Rockwell Int'l Corp., 7 F.3d 1487, 1492 (10th Cir. 1993). Consequently, the Cook court reversed its earlier decision and concluded that class certification under Rule 23(b)(2) was improper. 181 F.R.D. at 480; see also Werlein v. U.S., 746 F. Supp. 887, 895 (D. Minn. 1990), vacated on other grounds by 793 F. Supp. 898 (D. Minn. 1992) (forcing the defendants to pay a lump sum into a fund to be used by plaintiffs for diagnostic testing is not injunctive relief; however this reasoning does not apply when the funds are also used to establish information sharing mechanisms).

Courts have also refused Rule 23(b)(2) certification where the medical monitoring claim sought expenses for future medical treatment, rather than simply for diagnostic testing. In Arch, the plaintiffs brought an action against tobacco companies seeking class certification under Rule 23(b)(2) to provide, among other relief, a court supervised program of medical monitoring. See 175 F.R.D. at 485. The court noted that under the proposed medical monitoring program, the plaintiffs would undergo periodic medical examinations to promote the early detection of disease, which was "the paradigmatic request for injunctive relief under a medical monitoring claim." Id. However, the court added that the plaintiffs' requested relief under their medical monitoring claim included the creation of a fund for future treatment and the initiation of smoking cessation programs. See id. The court held that this relief was identical to a traditional damage claim for personal injuries – the only difference being that the defendants would pay an intermediary rather than the plaintiffs directly. See id. The court concluded that the plaintiffs "cannot transform a legal claim into an equitable one merely by using a fund as a repository for money damages." Id. at 484; see also Zinser, 253 F.3d at 1194; Angeletti, 752 A.2d 200, 252 (Md. 2000) (interpreting state statute analogous to that of Rule 23(b)(2)); Dhamer, 183 F.R.D. 520, 529 (N.D. Ill. 1998); Reed, No. 96-5070, 1997 WL 538921, at *17 (D.C. Super. Aug. 18, 1997); Thomas, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994).

Courts also analyze the appropriateness of certification under Rule 23(b)(2) by comparing the cost of the requested injunctive relief to the damage claim as a whole. The Arch court stressed that the approximately $2,000 annual cost per class member for the monitoring relief plaintiffs sought constituted only a small portion of the total relief requested. 175 F.R.D. at 484. This amount "pale[d]" in comparison to the cost of treating the disease and to plaintiffs' other requested relief – reimbursement expenses for the past purchases of cigarettes ($350,000 per smoker) as well as punitive damages ($350,000 per smoker). Id. at 485. Consequently, the court concluded that plaintiffs' suit was a "thinly disguised claim for future damages" and certification under Rule 23(b)(2) was inappropriate. Id. at 484; see also Zinser, 253 F.3d at 1196; Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir. 1995); Angeletti, 752 A.2d at 252; Harding v. Tambrands, Inc., 165 F.R.D. 623, 632 (D. Kan. 1996); In re Copley Pharmaceutical, Inc., 158 F.R.D. 485, 490-91 (D. Wyoming 1994).

(b) *Some Court-Supervised Programs Or Funds Have Qualified For Rule 23(b)(2) Certification*

In Wilson v. Brush Wellman, Inc., 2002 WL 31320323 (Ohio App. 8 Dist. Oct. 17, 2002), a divided court recently certified a 23(b)(2) class of employees exposed to beryllium over a 46-year period "to compel Defendant by compensatory relief of equitable relief to establish a fund for medical surveillance and screening." Id. at *2. The Court ruled that even though plaintiffs "also seek monetary damages, their primary interest in establishing a fund to provide the members with necessary medical surveillance and screening . . . is injunctive in nature." Id. The dissent disagreed that the establishment of a fund designed to redress past wrongdoing constitutes primarily equitable relief, asserting that "an award establishing a medical monitoring fund for past harms allegedly suffered is monetary in nature and not injunctive." Id. at *3 (Corrigan, P.J., dissenting). Properly construed, the dissent contended, an injunction is "essentially a preventive remedy, designed to guard against future injury rather than to afford redress for wrongs already suffered." Id. at 4.

In Day v. NLO, Inc., 144 F.R.D. 330, 335-36 (S.D. Ohio 1992), the court outlined the three types of relief plaintiffs may seek for medical monitoring (lump sum, direct payment, or court-supervised program). The Day court noted that neither paying the plaintiff a lump sum of money nor directly paying the plaintiffs' future medical expenses constituted injunctive relief, and hence 23(b)(2) certification would be improper. See id. However, Day stated that a medical monitoring program – managed by court-appointed, court-supervised trustees – would constitute injunctive relief, as required by Rule 23(b)(2). See id. at 336. Under such a program financed by defendants, plaintiffs would be monitored by particular physicians and the medical data would be utilized for group studies. See id. Since this was the relief the plaintiffs "primarily" sought in Day, the court certified the class under Rule 23(b)(2). See id.

Similarly, in Gibbs, plaintiffs sought "a court-administered fund paid for by defendants that would cover the reasonably anticipated costs of a medical monitoring program for bladder cancer for the lifetime of the class members." Gibbs, 876 F. Supp. 475, 477 (W.D.N.Y. 1995). The defendants, like those in Day, urged the court not to characterize the plaintiff's relief as injunctive simply because they were paying money into a fund that would be administered by the court. See id. at 481. Defendants protested that in reality, plaintiffs were seeking monetary damages. See id. Although the Gibbs court did not rule on certification, it held that when a court-administered fund establishes pooled resources for the early detection of the disease and advances in treatment for the disease, the requested relief is injunctive in nature. See id.

Plaintiffs in German v. Federal Home Loan Mortgage Co., 885 F. Supp. 537, 559 (S.D.N.Y. 1995), sought the creation of a fund to conduct medical monitoring allegedly necessitated by their exposure to lead paint. Plaintiffs also sought other forms of relief, such as requiring the defendants to warn their tenants about the hazards of lead paint, producing all reports concerning the presence of lead paint in their properties, and submitting all communications with their insurer concerning lead paint hazards. See, German, 885 F. Supp. at

559 n.8. The court held that the requested relief "complemented" the other forms of injunctive relief sought, making Rule 23(b)(2) certification appropriate. Id. at 560; see also Elliot, 2000 WL 263730, at *15; Yslava, 845 F. Supp. 705, 713 (D. Ariz. 1993).

C. Medical Monitoring Claims Generally Are Not Certified Under Rule 23(b)(3)

Class certification under Rule 23(b)(3) is permitted only when common questions of law or fact predominate over individual issues and when a class action is superior to other forms of adjudication. Fed. R. Civ. P. 23(b)(3). Medical monitoring claims usually do not fulfill the "predominance" requirement of Rule 23(b)(3) because of the existence of numerous individualized issues.

1. Most Courts Hold That Class Certification of Medical Monitoring Claims Under Rule 23(b)(3) Is Not Appropriate

Courts generally base their rejection of class certification of medical monitoring claims under Rule 23(b)(3) on two grounds. First, medical monitoring requires an individualized, plaintiff-by-plaintiff inquiry that defeats the predominance requirement of Rule 23(b)(3). Second, because standards for medical monitoring differ among the states, neither the predominance nor superiority requirement of Rule 23(b)(3) can be met.

(a) *Class Certification Under Rule 23(b)(3) is Inappropriate Because Medical Monitoring Requires an Individualized Inquiry of Plaintiff*

In Guillory, plaintiffs seeking medical monitoring contended that defendants' tobacco products were dangerous, defective, and addictive, and that such information was fraudulently concealed from plaintiffs. No. 97 C 8641, 2001 WL 290603, at *1, *10 (N.D. Ill. March 20, 2001). The federal district court determined that the addictive nature of nicotine was the predominant issue surrounding defendants' alleged deceit, which formed the basis of the plaintiffs' claims. See id. at *7. The court stated that addiction involved a highly individualized inquiry, requiring an examination of psychological and biological evidence unique to each plaintiff. See id. The court also noted that affirmative defenses, such as assumption of risk and the statute of limitations also required individualized inquiries and concluded that class certification was improper. See id. at *9,[28] see also Baker, 992 S.W.2d 797, 801-02 (Ark. 1999)

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[28] The court preliminarily held that class certification was improper because the plaintiffs failed to fulfill the requirements of Rule 23(a)(3). Guillory, 2001 WL 290603, at *5. The court reasoned that to recover, plaintiffs must prove that defendants' deceptive advertising caused them to smoke. See id. Since class members were subject to differing and unequal amounts of advertising, the court determined that the class representatives' claims could not be typical of the class as a whole. See id. Notwithstanding this finding, the court proceeded to evaluate and reject Rule 23(b)(3) certification for a medical monitoring class. See id.

(continued...)

(applying state statute analogous to Rule 23(b)(3)); Thompson, 189 F.R.D. at 555, 557; Arch, 175 F.R.D. at 487-89, 490-91; Smith, 174 F.R.D. at 96-97; Hurd v. Monsanto Co., 164 F.R.D. 234, 240-41 (S.D. Ind. 1995).

In Arch, the plaintiffs also sought a medical monitoring class certification under Rule 23(b)(3). 175 F.R.D. at 485. The court noted that to prevail on a medical monitoring claim, the plaintiff must demonstrate that a reasonable physician would prescribe a monitoring regime different than one that would have been prescribed in the absence of the plaintiff's exposure. Id. at 489. The court stated that "this factor alone would require an individual, plaintiff-by-plaintiff comparison" – thus defeating the predominance requirement of Rule 23(b)(3). Id. Further, determining the type of monitoring program needed for each plaintiff requires an individualized inquiry that is not appropriate for class treatment. See id.; see also Reed, 1997 WL 538921 at *17 ("individual issues of exposure, risk and types of monitoring needed predominate over common issues of the putative class"); Smith, 174 F.R.D. at 97 (finding of "increased risk" of health problems "depends upon an individualized showing of future risk, making resolution of this issue inappropriate for class-wide resolution").

(b) *Courts Deny Nationwide Class Certification Under Rule 23(b)(3) Because States Have Different Requirements for Medical Monitoring*

Some states recognize claims for medical monitoring, while others do not. Courts in some states have not even addressed the issue. In those jurisdictions that recognize medical monitoring, courts differ over the elements of the cause of action or remedy. This variance among states has lead some courts to refuse to certify nationwide or multistate class actions seeking medical monitoring under Rule 23(b)(3).

In Zinser, plaintiffs sought class certification under Rule 23(b)(3) as well as (b)(2). See id. 253 F.3d at 1186. The court stated that to determine causation and damages for each of the claims would require numerous individualized inquiries. See id. at 1189. The court added that "the complexity of the trial would be further exacerbated to the extent that the laws of forty-eight states must be consulted to answer such questions." Id. at 1190. Further, variations in the state requirements for medical monitoring were not easily resolved through subclasses because some states viewed medical monitoring as an independent cause of action while others considered it as an element of damages. See id. at 1192 n.8. Thus, the court concluded that the complexities of trying claims of medical monitoring with different state laws defeated predominance of common over individual issues and superiority to individual adjudications. See id. at 1190, 1192.

Other courts have also found that plaintiffs seeking certification of medical monitoring claims failed to meet the requirements of Rule 23(a)(3). See, e.g., O'Connor, 197 F.R.D. 404, 412 (C.D. Cal. 2000); Hurd, 164 F.3d at 239.

In Dhamer, plaintiffs sued the seller of the drug Stadol NS and sought class certification under Rule 23(b)(3) on behalf of all individuals who had used the drug and become addicted. See 183 F.R.D. at 527. The plaintiffs sought a court-supervised fund to notify all users of the drug, identify users addicted to the drug and fund studies, research, and treatment of addicts. Id. at 527. The court first noted that the issues of addiction and misrepresentation involved individualized inquiries. See id. at 532. The court then observed that while the legal issues were the same for class members, "the legal standards governing them are not the same throughout the country." Id. Citing Telectronics, plaintiffs contended that these state law variations could be solved through the creation of two subclasses, based on whether or not the states require plaintiffs to show physical injuries before recovering medical monitoring relief. See id. at 533. The court rejected this contention, noting that "the *elements* a plaintiff must prove to establish a right to medical monitoring differ among the states." Id. (emphasis added). The court concluded that "variations in state law in this case will combine with factual variations to overwhelm any common issues." Id. at 534. See also Smith, 174 F.R.D. at 96.

2. Some Courts Have Found Class Certification of Medical Monitoring Claims Appropriate Under Rule 23(b)(3)

In Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112, 115 (Pa. Commw. Ct. 2000), plaintiffs alleged that they were exposed to PCBs by living near a railroad yard. The trial court granted medical monitoring class certification to the plaintiffs under a state statute analogous to Rule 23(b)(3). See id. at 115, 117. The defendants appealed the order, maintaining that "the elements of a cause of action for medical monitoring 'implicate inherently idiosyncratic questions of exposure, increased risk, proximate causation and the efficacy and necessity of monitoring.'" Id. at 119. However, the appellate court determined that plaintiffs' claims all stemmed from the same course of conduct by the defendants, and hence common issues predominated over individual ones. See id. at 120. The appellate court noted that where individual issues may arise, such as "length and extent of exposure, age, gender, medical history, family history, lifestyle, preexisting conditions, intervening factors . . . these items will be addressed when and if a medical monitoring program is created." Id. at 121. The appellate court also based its decision on the ground that without utilizing the class action, asymptomatic plaintiffs would be unable to recover medical monitoring expenses. See id.

In Josephat v. St. Croix Alumina, L.L.C., plaintiffs contended they were harmed by defendants' failure to properly store red bauxite and by-products from their plant. No. Civ.1999-0036, 2000 WL 1679502, at *1 (D. Virgin Islands Aug. 7, 2000). The plaintiffs proposed subclasses for medical monitoring, property damage, personal injury, and punitive damages. See id. The court certified the medical monitoring subclass under Rule 23(b)(3). See id. at *12. The Josephat court, like Foust, determined that individual issues would not interfere with plaintiffs' ability to show that: bauxite is a hazardous substance; plaintiffs' exposure to this substance was the result of defendants' negligence; as a result of the defendants' negligence, plaintiffs were at a significant risk for contracting a latent disease; medical testing was available at a reasonable cost; and a physician would prescribe each class member a monitoring regime

different than what would have been prescribed in the absence of exposure. See id. at *11. The court concluded that the defendants' liability, based on whether they failed to properly store red bauxite dust, predominated over any individual issues that may arise and the class action was superior to other methods of adjudication because it was not financially feasible for plaintiffs to bring individual suits. See id. at *9. The court also found that the class was manageable and certification would prevent the court from hearing redundant evidence concerning the defendants' actions. See id. See also Gasperoni v. Metabolife Int'l Inc., No. 00-71255, 2000 WL 33365948, at *7 (E.D. Mich. Sept. 27, 2000); Yslava, 845 F. Supp. at 713; Boggs, 141 F.R.D. at 67.

In In re Telectronics the court also held that class certification under Rule 23(b)(3) was appropriate for the plaintiffs' proposed medical monitoring subclass. See 172 F.R.D. at 286. The court determined that since all plaintiffs faced the same defense – that the defendants' medical monitoring program had been approved by the FDA and was the best program available – common issues predominated over individual ones. See id. The Telectronics court also held that the class action method was superior to other devices because if class certification were not granted, it was highly unlikely individual plaintiffs would pursue individual claims for medical monitoring. See id. at 287. The court noted that the critical issue was whether medical monitoring was required and whether the defendants' program was adequate. See id. The court rejected defendants' contention that medical monitoring was unmanageable in light of variations in state law. See id. In response, the court created two subclasses, based on whether or not the states required the plaintiffs to manifest a physical injury in order to prevail on a medical monitoring claim. See id.

In Scott, a state court granted class certification to a class of smokers seeking medical monitoring. 725 So. 2d 10, 11 (La. Ct. App. 1999). The court determined that there was one primary question in the case – whether a cigarette that contains nicotine is a defective product. See id. at 12. While the court noted the presence of individual issues in proving the elements of medical monitoring, the court concluded that the common issue of the addictive quality of cigarettes made class certification appropriate. See id. at 13-14.[29] The Scott court, like the Telectronics and Foust courts, placed great weight on the fact that there was no economically feasible alternative method of pursuing this litigation aside from a class action. See id. at 15.

[29] Other courts have held that addiction is too individualized an inquiry to be suitable for class action treatment. See, e.g., Barnes, 161 F.3d at 143.

XIV. ARE DEFENDANTS ENTITLED TO JURY TRIALS WHEN SEEKING MEDICAL MONITORING?

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. Amend. VII.[30] In Barnes v. American Tobacco Co., plaintiffs seeking the creation of a medical monitoring fund requested that the case be tried to the court, arguing that they were seeking only injunctive relief. See 989 F. Supp. 661, 663 (E.D. Pa. 1997). In response, defendants filed a motion to enforce their demand for a jury trial. See id. The court first determined that while there was no common law cause of action for medical monitoring in 1791, the underlying theory of medical monitoring is negligence, which was an action at law in 1791.[31] See id. at 664. Thus, the first prong of the court's Seventh Amendment analysis weighed in favor of granting the defendants a jury trial. See id. at 665.

The defendants contended that plaintiffs were seeking legal – not equitable – relief, since defendants would ultimately have to pay for the creation of a medical monitoring fund. See id. Referring to its earlier opinion in Arch, 175 F.R.D. at 483, the court determined that the creation of a medical monitoring fund was an exercise of the court's equitable powers. See Barnes, 989 F. Supp. at 666. Thus, the second prong of the court's Seventh Amendment analysis weighed against the defendants' right to a jury trial. However, the court concluded that the defendants were entitled to a jury trial because "a plaintiff . . . cannot invoke the powers of equity when there is an adequate remedy at law." Id. at 667. The court reasoned that the plaintiffs had an adequate remedy at law, since they could have requested lump sum damages. See id. The plaintiffs' unilateral decision to forego this remedy could not deprive the defendants of their right to a jury trial. See id. at 667-68.

Finally, the Barnes court explained that the standard for demonstrating an action is legal for Seventh Amendment purposes is lower than for Rule 23(b)(2) purposes. See id. An action may be certified under Rule 23(b)(2) if the relief requested is not primarily for money damages. See id. However, the Seventh Amendment right to jury trial must be upheld even if the legal issues are incidental to equitable issues. See id. Thus, a court may certify a medical monitoring class under Rule 23(b)(2) and still rule that defendants are entitled to a jury trial.

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[30] Suits at common law refer to suits where legal rights, as opposed to equitable rights, are asserted.

[31] In determining whether a plaintiff seeks legal rights, the court must consider the nature of the issues involved (by comparing the present action with those brought before the merger of the courts of law and equity in 1791) and the nature of the remedy sought.

XV. HOW THE RULES ENABLING ACT AFFECTS CLASS CERTIFICATION

The Rules Enabling Act provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2001). See Amchem, 521 U.S. at 612. This statute prevents the federal rules from granting plaintiffs legal rights that would be unavailable to them under state law.

The Rules Enabling Act poses a potential barrier to class certification of a national medical monitoring class. Because not all states recognize medical monitoring, a national class would allow certain plaintiffs relief under the federal rules that they could not obtain under their state own law. In In re Diet Drugs, the court ultimately certified a national class of persons who took certain appetite suppressants for a specified period of time, notwithstanding that "a given class member's claim arises in a jurisdiction which does not recognize such a legal theory absent injury." 1999 U.S. Dist. LEXIS 13228, at *38. The court held that such potential violations of the Rules Enabling Act could be avoided through the establishment of subclasses and the exclusion from the class of asymptomatic plaintiffs residing in states that require physical injuries for tort claims to proceed. See id. at *45.

XVI. DO CLAIM-SPLITTING PROHIBITIONS BAR PLAINTIFFS WHO OBTAIN MEDICAL MONITORING FROM LATER BRINGING SUIT FOR ACTUAL INJURY?

Claim preclusion (res judicata) prevents the subsequent litigation of a claim that arises from the same transaction or occurrence of a prior litigation in which final judgment was entered. Claim-splitting concerns arise in medical monitoring cases where asymptomatic plaintiffs initially seek medical monitoring and then attempt to sue again when an actual injury manifests. Few courts have applied a claim-splitting preclusion to medical monitoring litigation. The courts that have addressed this issue have rejected claim preclusion because no claim for physical injury existed when the plaintiffs sought medical monitoring. See, e.g., Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 320 (5th Cir. 1986) ("in the toxic chemical or asbestos cases, the disease of cancer should be treated as a separate cause of action for all purposes"); Gasperoni, 2000 WL 33365948, at *4 ("any personal injuries that develop in class members after the present suit will not be subject to res judicata"); Petito, 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) ("plaintiffs in medical monitoring cases will not be precluded by the rule against splitting causes of action from bringing claims for whatever physical injuries they suffer if and when they arise"); Burns, 752 P.2d at 31 (later suit for damages is not precluded "even though there has been prior litigation between the parties on different claims based on the same tortious conduct"); Ayers, 525 A.2d at 300 (same).

XVII. APPLICATION OF THE AMOUNT IN CONTROVERSY REQUIREMENT OF DIVERSITY LITIGATION TO MEDICAL MONITORING

Defendants generally prefer to litigate class action cases in federal court where the requirements of Rule 23 are strictly interpreted following the Supreme Court's decision in Amchem. When plaintiffs file class action suits in state courts, defendants frequently seek removal to federal court based on diversity jurisdiction. Subject matter jurisdiction in federal diversity cases requires that the matter in controversy exceed $75,000, exclusive of interest and costs. 28 U.S.C. § 1332 (2001). Federal courts must dismiss a case for lack of subject matter jurisdiction if it appears to a legal certainty that the plaintiff's claim is for less than the jurisdictional amount. See 14B Charles Alan Wright, et al., Federal Practice and Procedure § 3702 (1998). The amount in controversy refers to the pecuniary value of the right the plaintiff seeks to protect or enforce, or the value of the object that is the subject matter of the suit. See id. at § 3702.

A split in authority exists regarding whether all members of a class must satisfy the amount in controversy requirement or whether 28 U.S.C. § 1367 allows only the class representatives to satisfy the jurisdictional requirements. See Wright, Federal Practice and Procedure § 3704 (citing cases); compare, e.g., Doe v. Interstate Brands Corp., No. 98 C 1075, 1998 WL 196456, at *1 (N.D. Ill. April 17, 1998) with Briggs v. Goodyear Tire & Rubber Co., 79 F. Supp. 2d 228, 234 (W.D.N.Y. 1999). Courts employ different approaches in determining the "value" of the litigation.

A. The Claims of Individual Class Members – Including Punitive Damages and Attorneys' Fees – May Not Be Aggregated to Meet the Jurisdictional Requirement

In class actions, the claims of the individual class members – including punitive damages and attorneys' fees – generally may not be aggregated or combined to satisfy the amount in controversy requirement of 28 U.S.C. § 1332. See e.g., Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 765-66(8th Cir. 2001). One exception to this rule exists when two or more plaintiffs' claims are based on a common, undivided interest in the subject matter of the litigation.

In Pohl v. NGK Metals Corp., plaintiffs alleged that the defendants negligently released particles into the environment, causing disease to those residing nearby. See 117 F. Supp.2d 474, 475-76 (E.D. Pa. 2000). Plaintiffs requested that the court "create a trust fund, paid for by defendants, under Court supervision, to finance medical monitoring services, including, but not limited to, testing, preventative screening, care and treatment of conditions resulting from, or potentially resulting from, exposure to beryllium dust and particulates." Id. at 476. The defendants removed the case to federal court and the plaintiffs moved to remand, asserting that their claims did not fulfill the amount in controversy requirement. See id.

Both parties stipulated that the *aggregate* amount of "damages" sought was more than $75,000 and the amount of damages *per plaintiff* was less than $75,000. See id. The defendants contended that the amount in controversy should be the total size of the fund. The court determined that each plaintiff had suffered a distinct harm from the defendant's negligence and that the plaintiffs had simply united for convenience and economy. See id. at 477. Thus, since it was stipulated that none of the plaintiffs' individual claims exceeded $75,000, the court held that the amount in controversy was not met and remanded the plaintiffs' case to state court. See id. at 478; see also, Briggs, 79 F. Supp. 2d 228, 235-36 (W.D.N.Y. 1999) (plaintiffs may not aggregate their claims; amount in controversy was thus not met when the value of medical monitoring to each individual plaintiff was $160 per year and "the issue of how much [defendant] must spend to administer the [p]rogram is irrelevant").

In Gianopolous v. Interstate Brand Corp., the plaintiffs brought a class action suit in state court against the manufacturers of certain food products. No. 98 C 1073, 1998 WL 171695, at *1 (N.D. Ill. April 10, 1998). The plaintiffs contended that they consumed the defendants' food products, which were contaminated with asbestos. See id. Following removal to federal court, the court granted plaintiffs' motion to remand. See id. The court first discounted the defendants' contention that the medical monitoring relief sought, in and of itself, fulfilled the jurisdictional amount of $75,000. See id. at 2. The court noted that even if, as the defendants contended, the medical monitoring program would cost $950 per plaintiff, a plaintiff would need 75 years of monitoring for the jurisdictional amount to be fulfilled. See id. Since the youngest plaintiff was nine, and had a life *expectancy* of 75 years, the medical monitoring program did not fulfill the jurisdictional requirement. See id. The plaintiffs also sought treatment for any diseases they acquired, which the court noted could easily exceed $75,000. See id. However, since no named plaintiff had suffered an injury, the court determined that under Illinois law the plaintiffs could not recover for future medical damages. See id. The defendants further contended that the plaintiffs may be entitled to punitive damages and to damages for pain and suffering. See id. As the plaintiffs did not seek this relief, however, the court could not consider it for jurisdictional purposes. See id. The court also refused to add the total amount of attorney fees sought to all of the plaintiffs' claims. See id. The court reasoned that each plaintiff was entitled to a pro rata share of attorneys fees. See id. Because the court's calculation of damages per plaintiff did not exceed $75,000, the court granted the plaintiffs' motion to remand to state court. See id.; see also Johnson v. Cytec Inds., Inc., No. CIV. A.99-0363, 1999 WL 212753, at *1 (E.D. La. April 13, 1999); Doe, No. 98 C 1075, 1998 WL 196456, at *1 (N.D. Ill. April 17, 1998).

B. Courts Holding That the Amount in Controversy Requirement Was Satisfied

In Katz v. Warner-Lambert Co., 9 F. Supp.2d 363, 364 (S.D.N.Y 1998), plaintiffs sued the manufacturer of a diabetes drug in state court, contending that the drug exposed plaintiffs to serious health risks. The defendants removed the case to federal court, and plaintiffs moved to remand. See id. The court first determined that the plaintiffs' requested relief was injunctive. See id. The court then computed the amount in controversy based upon

the value of the fund to the individual plaintiffs. See id. The court noted the difficulty in computing this amount, but determined that the relevant inquiry was "the cost to defendant of creating such a fund, or at least the research portion of it." Id. at 365. The court reasoned that "without such research expenditure, no plaintiff would be likely to receive any research benefit." Id. Since the cost of creating the research fund exceeded the $75,000 threshold, the court determined that the amount in controversy requirement was fulfilled and denied plaintiffs' motion to remand. See also In re Diet Drugs, 1999 U.S. Dist. LEXIS 13228, at *18 ("the value of the litigation to each class member in obtaining the benefits of diagnostic testing and medical research is reasonably likely to exceed $75,000"); Gibbs, 876 F. Supp. 475, 479 (W.D.N.Y. 1995) (medical monitoring program sought by plaintiffs was injunctive relief and easily exceeded the statutory limit).

In Walls v. American Tobacco Co., No. 97-CV-0218-H, 1997 WL 1121361, at *1 (N.D. Okla. July 10, 1997), plaintiffs brought an action in state court on behalf of a class of smokers seeking compensatory and punitive damages, disgorgement of profits, creation of a medical monitoring fund and attorneys' fees. The defendants removed the case to federal court and plaintiffs responded with a motion to remand, arguing that the requisite amount in controversy was insufficient for federal diversity jurisdiction. See id. The court determined "the amount in controversy unquestionably exceeds $75,000." Id.; see also In re: Products Liability Litigation – Hampton v. American Home Products Corp., Nos. MDL 1203, Civ.A. 99-20248, 2000 WL 1781966, at *1-2 (E.D. Pa. Nov. 7, 2000) (each plaintiff could receive damages for treatment of injuries detected by medical monitoring that could reasonably exceed $75,000); In re: Products Liability Litigation – Winn v. American Home Products Corp., No. 1203, Civ. 98-20488, 1999 WL 551933, at *2 (E.D. Pa. June 24, 1999) (plaintiffs' claims for medical monitoring costs were vague and indefinite, and it thus did not appear to legal certainty that plaintiffs could not recover $75,000).

XVIII. MEDICAL MONITORING DEFENSES

Wholly aside from the arguments advanced to defeat class certification in medical monitoring actions, defendants may show that plaintiffs have failed to establish the requisite elements of a medical monitoring claim because:

- The plaintiffs' proposed testing is not beneficial or reasonably necessary, since the proposed monitoring will not substantially improve health conditions. See Redland Soccer Club, 696 A.2d at 145-46.

- The plaintiffs' proposed monitoring is no different from what is normally recommended in the absence of the exposure. See id.; Barnes, 984 F. Supp. at 871.

- Plaintiff has failed to prove that a treatment currently exists for the disease that is the subject of medical monitoring, an element required by several courts. See Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993).

- The plaintiffs' proposed tests that would be used for medical monitoring do not meet contemporary scientific principles. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-95 (1993).

- The expert scientific opinions required to support the proposed medical monitoring program do not meet the admissibility requirements under the established rules of evidence. See id.

- The plaintiffs' experts have not assessed the medical condition of any plaintiff and therefore cannot give opinions as to whether monitoring is actually necessary. Barnes, 984 F. Supp. at 870.

- The plaintiffs' suit is time-barred because they were aware of the risks of exposure and failed to ameliorate their risk. See id. at 853.

- The affirmative defenses of contributory negligence, assumption of risk or comparative fault bar recovery. Cf. id. at 863.

Defendants retain all of their traditional product liability defenses to medical monitoring claims in the event that a class is certified.

XIX. SETTLEMENT OF MASS TORT CLASS ACTIONS

A. Introduction

Mass torts engender a vast number of lawsuits, many of them in class action form. Settlement of these class actions may, at some point in the litigation, be a desirable option for defendants because of the enormous costs involved in litigating these cases, and the risk of loss at trial. Settlement negotiations in mass tort class actions frequently call for parties to modify their traditional litigation positions. On the one hand, defendants – who initially opposed the certification of broad classes for *trial* – will wish to promote certification of the broadest possible class *for settlement purposes*.[32] On the other hand, many plaintiffs, especially those with particularly compelling cases, may not wish to pursue or settle their claims in a class

[32] See Matsushita Elec. Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996).

action format. Because defendants have little incentive to settle with a narrowly-defined settlement class, courts have historically eased this tension somewhat by certifying broad settlement classes.[33]

Courts have certified settlement classes in two ways under the Federal Rules of Civil Procedure. First, courts have certified Rule 23(b)(3) opt-out classes in accordance with the requirements of Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). If sufficient numbers of plaintiffs decline to opt-out of the class, it will be economically advantageous for the defendant to settle. Alternatively, courts have certified under a limited fund theory Rule 23(b)(1)(B) mandatory, non opt-out classes in which plaintiffs do not have the right to opt-out of the class to pursue individual tort claims.

In the past five years, the Supreme Court has twice refused to certify broad classes under Rule 23 for settlement purposes in the mass tort context. In Amchem, 521 U.S. 591, 619 (1997), the Court affirmed the Third Circuit's decertification of a Rule 23(b)(3) opt-out settlement class. Two years later, in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), the Court overturned the Fifth Circuit's certification of a broad, Rule 23(b)(1)(B) limited fund settlement class. While no clear consensus has emerged regarding the decisions' practical significance, the combined effect of the decisions has certainly cast a pall over settlement classes in long-tail, mass tort cases, and sharply restricted the use of limited fund settlements in such cases.

B. Amchem Products, Inc. v. Windsor:

Amchem involved a class action settlement of a staggering number of present and future asbestos-related personal injury claims alleged against a consortium of 20 companies known as the Center for Claims Resolution ("CCR"). The CCR consisted of producers of asbestos or asbestos-containing products. The CCR defendants had been named in more than 180,000 asbestos personal injury claims in the 15 years preceding the settlement. After several unsuccessful attempts to resolve the asbestos litigation crisis, including the efforts of two Federal Judicial Center conferences, the appointment by Chief Justice William H. Rehnquist of a panel of federal judges known as the *Ad Hoc* Committee on Asbestos Litigation, consolidation by the Judicial Panel on Multidistrict Litigation of tens of thousands of cases for pretrial proceedings before Judge Weiner in the United States District Court for the Eastern District of Pennsylvania and many rounds of fruitless negotiations between plaintiffs' and defendants' litigation steering committees, the CCR independently approached two of the leading firms handling plaintiffs' asbestos claims to explore a global settlement of all present and future asbestos-related personal injury claims.

[33] The term "settlement class action" refers to a class that is certified for settlement rather than trial purposes.

Following a year of negotiations, the parties reached a global settlement of all pending and future claims, with the defendants committing $1.289 billion (plus $317 million in costs) over ten years to resolve future claims, plus an additional $1.626 billion over four years to settle the inventory of pending claims. To effectuate the proposed settlement, several purported class representatives on January 15, 1993, filed a purported class action complaint in the Eastern District of Pennsylvania on behalf of (i) "all persons exposed occupationally or through the occupational exposure of a . . . household member to asbestos-containing products" who as of January 15, 1993 had not filed an asbestos-related action against a CCR defendant and (ii) the family members of such persons who as of January 15, 1993 had not filed an asbestos-related action against a CCR defendant. On the same day, the CCR defendants answered the complaint and the parties jointly filed a 106-page stipulation of settlement. The parties also concurrently filed a joint motion for conditional certification of an opt-out class pursuant to Rule 23(b)(3) for purposes of seeking approval of the settlement. Certain groups of plaintiffs and *amici* objected to the settlement.

The district court conditionally certified the opt-out class proposed by the parties. After extensive discovery and motion practice, the district court conducted a fairness hearing involving the testimony of 29 witnesses during 18 hearing days. Following extensive post-hearing submissions and oral argument, the district court issued an opinion and order (comprising 92 pages of the federal reporter) permanently certifying the class and approving the settlement as fair and reasonable. As a measure to protect the settlement, the district court also issued a preliminary injunction restraining class members from pursuing asbestos-related personal injury claims against the CCR defendants pending issuance of a final judgment. Certain objectors to the settlement appealed this order.

The Third Circuit's Decision

Although the Amchem appeal arose from the district court's issuance of the preliminary injunction, the Third Circuit concluded that "[t]o give full effect to the appellants' right to review of the injunction, we must reach class certification." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624 (3d Cir. 1996). Because the Supreme Court affirmed the Third Circuit's ruling and it remains widely cited, it is worthwhile to recount the Third Circuit's decision in some detail. Writing for a unanimous panel, Judge Edward Becker began the Court's analysis by observing that "[e]very decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case." Id. at 617. The Court emphatically rejected the suggestion that the urgency of the asbestos litigation crisis could justify any relaxation of the requirements for class certification set forth in Fed. R. Civ. P. 23. The Third Circuit's decision in Amchem was an extension of its decision one year earlier in General Motors Corp. Pick-Up Truck Fuel Tank Prods.Liab.Litig., which held that class actions certified for settlement purposes only must satisfy the same Rule 23(a) requirements applicable to "litigation" classes. Id. at 624. While GM Trucks did not reach the question of whether the fact of settlement may be considered as a factor in weighing the Rule 23(b)(3) requirements, the

Amchem Court squarely held that because "[t]he Rule 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements," the requirements under Rule 23(b)(3) cannot be relaxed in the settlement context. Id. at 617.

Against this background, the Third Circuit "express[ed] doubts that anything less than statutory revisions effecting wholesale changes in the law of mass torts could justify certification of *this* humongous class." Id. at 635. Addressing the commonality requirement of Rule 23(a) together with Rule 23(b)(3)'s requirement that issues common to class members predominate over individual issues, the Court canvassed the caselaw and concluded that most courts have held that mass tort cases are inappropriate for class action treatment unless the case arises out of a single accident. While the Third Circuit acknowledged the presence of several issues common to all class members in Amchem (including whether asbestos is capable of causing injury and certain issues relating to defendants' conduct), it concluded that "beyond these broad issues, the class members' claims vary widely in character." Id. at 626. These individual issues included the identity of products to which the class members were exposed, length of exposure, disease type and the extent and type of medical expenses required. The Court noted that these factual differences translated into significant legal differences leading to differing applications of legal rules, including matters of causation, comparative fault and the types of damages available to each plaintiff. See id. at 627. These distinctions are "compounded exponentially" by the individualized choice-of-law analysis applicable to each purported class member's claims. Id.

The Supreme Court Decision

The Supreme Court affirmed the Third Circuit's decertification of the settlement class, ruling that the proposed class failed to meet the adequacy and predominance requirements of Rule 23(b)(3). It also stated that a court may not substitute an analysis of the fairness or appropriateness of the *settlement* for the requisite determination of whether the Rule 23(a) and (b) criteria had been satisfied.[34]

The Court held that a judge need not consider whether a settlement class action would "present intractable management problems" under Rule 23(b)(3)(D) since a settlement, by its nature, precludes the need for a trial. See id. at 620. The Court emphasized that all other Rule 23 requirements "demand undiluted, even heightened, attention in the settlement context" because the court will not have the opportunity to adjust the class definition as a case progresses. Id. Applying this "undiluted" scrutiny, the Court found that the Amchem class failed to satisfy Rule 23's requirements in two pivotal respects:

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[34] See id. at 621-22. The Court noted that considerations regarding the benefits that class members may ultimately receive "from a grand scale compensation scheme," while suitable for legislative consideration, are not relevant to the predominance inquiry. Id. at 622-23.

1. Rule 23(b)(3) Predominance: The district court had concluded that the Rule 23(b)(3) predominance requirement was satisfied as all class members were exposed to asbestos and shared a common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process…." Amchem, 521 U.S. at 622.

The Supreme Court disagreed with the district court, concluding that *even if* the fact that all class members had been exposed to asbestos could satisfy Rule 23(a)'s commonality requirement, it could not satisfy Rule 23(b)(3)'s more onerous predominance requirement. The Court pointed to the many uncommon questions that predominated in Amchem to bolster its decision to uphold the decertification:

> 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 … Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories."

Id. at 624. Relying on these differences, the Supreme Court suggested that a class as "sprawling" as asbestos-exposed plaintiffs would not likely ever satisfy the predominance requirement. Id. at 625.

2. Rule 23(a)(4) Adequacy of Representation: Rule 23(a)(4) requires that the named parties "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy of representation inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625. The Supreme Court pointed to an inherent conflict between the interests of the various members of the putative class in Amchem: while those who already manifested physical injury sought "generous, immediate payments," the exposure-only plaintiffs wished to ensure an "ample, inflation-protected fund for the future." Id. at 595. As these competing goals are fundamentally

incongruent, the Court considered it impossible for a named plaintiff in Amchem to adequately represent such divergent interests. See id. at 626.[35]

Though the Supreme Court based its reasoning primarily on Rule 23(b)(3) and 23(a)(4), the Court also expressed concern about whether or not adequate notice could ever be given to class members in the "exposure-only" category. Many of these individuals, the Court noted, "may not even know of their exposure, or realize the extent of the harm they may incur." Id. at 628.

Finally, relying extensively on the Report of the Advisory Committee for the 1966 amendments to Rule 23, the Court expressed skepticism about the propriety of using Rule 23 class actions to resolve mass torts such as asbestos claims. The Court explained:

> [w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'

Id. at 617.

While conceding that Rule 23 may be appropriate for certain mass disasters, the Court warned that "mass accident cases are likely to present significant questions, not only of damages but of liability and defenses of liability, … affecting the individuals in different ways… [and] are ordinarily not appropriate for class treatment." Id. at 625 (citations omitted).

C. Ortiz v. Fibreboard Corp.

Like Amchem, Ortiz involved the certification of a settlement-only class in a case involving injuries caused by asbestos exposure. The proposed class consisted of three groups – claimants who had not yet sued Fibreboard,[36] individuals who had retained the right to sue in the future, and relatives of class members. See Ortiz, 527 U.S. at 825-26. The district court in Ortiz certified a mandatory, non-opt out class under Rule 23(b)(1)(B). Ahearn v. Fibreborad Corp., 162 F.R.D. 505 (E.D. Tex. 1955). The Fifth Circuit Court of Appeals affirmed the decision. In re Asbestos Litig., 134 F.3d 668, 670 (5th Cir. 1998). The Supreme Court, however, concluded

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[35] The Court critically reviewed the terms of the settlement and found that there was no structural assurance of fair and adequate representation for the diverse groups and individuals affected. See Amchem, 521 U.S. at 627.

[36] The approximately 45,000 claimants who had already filed suit were excluded.

that the Fifth Circuit, which had affirmed the certification after the Amchem decision was handed down, "fell short in its attention to Amchem's explanation of the governing legal standards." Ortiz, 527 U.S. at 831. The Supreme Court also expressed concern over the district court's failure to provisionally certify subclasses in order to address potential conflicts of interest. See id. at 831-32.

1. The Rule 23(b)(1)(B) Limited Fund Class Action

The limited fund class action, which aggregates "claims … made by numerous persons against a fund insufficient to satisfy all claims," is one type of suit brought under Rule 21(b)(1)(B). Id. at 834. Prior to Ortiz, mandatory limited fund settlements facilitated (1) the preservation and equitable distribution of finite assets among competing claimants, thereby preventing the depletion of available funds on a race-to-judgment basis; (2) saving substantial legal fees and other transaction costs arising from successive individual actions, thus increasing the funds available to compensate claimants; and (3) settlement by assuring defendants that the settlement will foreclose subsequent litigation. Traditionally, to qualify as a limited fund "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, [must] demonstrate the inadequacy of the fund to pay all claims." Id. at 838. In Ortiz, however, the Supreme Court refused to uphold the certification of a settlement class, as it disapproved of "uncritical adoption by both the District Court and the Court of Appeals of figures agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy." Id. at 848.

The fund in Ortiz consisted of both the general assets of Fibreboard augmented by insurance recovery. The Court found that the district court and Fifth Circuit's estimate of the value of Fibreboard's assets at $235 million, while conservative, at least constituted an "independent finding." Id. at 818. No such independent finding, however, was made with respect to the value of the disputed insurance recovery. The Court explained that insurance assets would be limited in the traditional sense upon a showing that the total in claims would render the insurance companies insolvent. However, the $2 billion insurance recovery figure agreed to in the settlement did not represent insolvency for the insurance companies. Instead, according to the Court, the figure was the "product of potentially unlimited policy coverage discounted by the risk that Fibreboard would eventually lose the coverage dispute litigation." Id. at 851. Instead of independently evaluating the amount of potential available insurance funds to determine the limits of the insurance companies' obligations, the lower courts simply accepted the $2 billion dollar figure.

In rejecting the lower courts' acceptance of the negotiated settlement value without an independent evaluation, the Court explained, "[o]ne may take a settlement amount as good evidence of the maximum available if one can assume that … [those negotiating are] unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." Id. at 852. The Court ruled that such an assumption could not be made in Ortiz because certain lawyers who represented the class also represented the 45,000

excluded claimants, whose separate settlement agreement (and the corresponding lawyers' fees) were contingent upon the successful resolution of the class action. "The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in Amchem resulting from the divergent interests of the presently injured and the future claimants." Id. at 853.

Though the Court conceded that the plain language of 23(b)(1)(B) appears to permit a "more lenient limited fund concept," it maintained there is good reason to adhere to the stricter approach set forth above. The Court pointed out that it is "implausible" that the Advisory Committee intended that Rule 23(b)(1)(B) would ever be used to aggregate mass tort claims on a limited fund rationale. Also, the Court indicated that the Rules Enabling Act "underscores the need for caution." Id. at 845. That is, the tension between a "pro rata distribution in equity and the rights of individual tort victims at law . . . is best kept within tolerable limits by keeping limited fund practice under 23(b)(1)(B) close to the . . . [traditional] practice." Id. Finally, the Court indicated that certification of a mandatory class followed by settlement clearly gives rise to Seventh Amendment and due process concerns, especially with respect to absent class members. See id. at 845-46.

D. Settlement Classes After Amchem and Ortiz

The Amchem and Ortiz decisions are a clear statement by the Supreme Court of its unwavering insistence that the requirements of Rule 23 must be satisfied before a settlement class may be certified. Although the tenor of both decisions casts doubt on whether certification could ever be achieved in long-tail mass tort cases such as asbestos, the Court declined to enunciate a *per se* prohibition on certification in such cases. The requirements set forth in Amchem and Ortiz, however, increase the underlying tension in settlement negotiations in mass tort cases between defendants' need for a broad release and the Court's strict adherence to the Rule 23 criteria. The Court's insistence that Rule 23(a)(4)'s adequacy of representation and Rule 23(b)(3)'s predominance requirements be strictly enforced renders it difficult to conceptualize a class broad enough to make settlement worthwhile for defendants, while also satisfying the Rule 23 requirements. While lower courts have certified settlement class actions notwithstanding the Supreme Court's rulings in Amchem and Ortiz, courts generally have exercised greater caution in certifying mass tort cases in both the settlement and non-settlement context.

1. In re Diet Drugs

In 1997, researchers observed a correlation between the use of the diet drug fen-phen and a particular type of valvular heart disease. A year later, when fen-phen was no longer on the market in the United States, the causal relationship between the diet drug and the disease was confirmed by several noted epidemiological studies. In the wake of this discovery, thousands of people sued American Home Products, the only company that marketed the drug in the United States since 1989, to recover for personal injuries sustained by using the drug. In addition, over one hundred plaintiffs sought the creation of an equitable fund to (a) provide

medical monitoring and; (b) recover the amounts expended to purchase the drug. The cases brought in federal court were consolidated for pre-trial proceedings in the Eastern District of Pennsylvania. After discovery and settlement negotiations, the parties reached a settlement agreement for which they sought certification under Rule 23(b)(3). Finding that the proposed class satisfied Rule 23's requirements and that the settlement was fair, the district court certified the class and approved the settlement. See In re Diet Drugs, Nos. 1203, 99-20593, 2000 WL 1222042 (E.D.Pa. 2000). Aware of the rigorous standards enunciated in Amchem and Ortiz, the district court attempted to distinguish the drug case from the asbestos litigation on several grounds:

(a) Notice: The Diet Drugs court noted that, unlike asbestos litigation where there are potential plaintiffs who may be unaware of their exposure, "no class members [are] unwittingly exposed to diet drugs, which are available only through a doctor's prescription and [have] to be consciously ingested." In re Diet Drugs, 2000 WL 1222042, at *39.

(b) Predominance: In concluding that common questions predominated over individual issues in the fen-phen litigation, the court found that the diet drugs at issue were "essentially a single product … marketed by a single manufacturer," unlike the case with the multiple asbestos manufacturers. Id. at *41. Furthermore, class members only used the drugs for a short period of time, and there is a "common body of science" to link use of this drug to the injury, which was limited to damage to the heart valve. In addition, all of the plaintiffs' claims "stem from allegations involving a common course of conduct followed by [defendant]." Id. at *42. All of these common questions, the court found, confirmed that this class was cohesive in a manner that the "sprawling" asbestos classes were not.

(c) Adequacy of Representation: The court found that, unlike Amchem, where a named class representative could not fairly represent the divergent interests of all class members, the interests of the named class representative in the In re Diet Drugs case "are closely aligned with those of the class." Id. at *45. This class cohesion resulted from the fact that the "futures" or latency problem, prevalent in asbestos litigation, was virtually non-existent in In re Diet Drugs. Finally, despite the cohesiveness of the class, subclasses were created and subclass counsel was hired as a structural safeguard so that all members of the class would have their interests adequately represented if a conflict arose. See id. at *46-47.

(d) Settlement of Latent Claims: While the Amchem court expressed concern about the ability of those without current illness to intelligently decide whether to stay in or opt-out of the class, the Diet Drugs court found that the settlement

agreement adequately addressed this problem by providing "intermediate" and "back-end" opt-out rights as well as medical monitoring. Id. at *49.

2. In re Orthopedic Bone Screw Products Liability Litigation

In 1993, shortly after a televised broadcast about the dangers of orthopedic bone screws, thousands of people who had undergone spinal fusion therapy involving the screws sued manufacturers. In 1994, the cases brought in federal court were consolidated for pre-trial purposes. After the discovery phase, the parties entered into settlement negotiations. The court certified a Rule 23(b)(1)(B) class under a limited fund theory and approved the settlement.

In finding that the class satisfied the commonality requirement, the court distinguished this class from the one in Amchem in two respects. First, the court found that the Bone Screw class was "defined" and "congruous" compared to the "sprawling" class in Amchem. Second, the court noted that there was no "futures" problem in this case. The court also found that the adequacy requirement had been satisfied since there were no intra-class conflicts in the absence of a "futures" problem. See Bone Screw Litig., 176 F.R.D. at 176.

3. In re Telectronics Pacing Systems, Inc.

In 1994, it was determined that the defendant manufacturer's pacemaker leads were defective and had a tendency to break, causing injury to the heart and blood vessels of plaintiffs in whom they were implanted. A deluge of lawsuits followed disclosure of the defect. The cases filed in federal court were consolidated and settlement negotiations were commenced shortly thereafter. In 1998, the parties reached an agreement, and the district court certified a Rule 23(b)(1)(B) mandatory, non-opt-out class under a limited fund theory. On appeal, the Sixth Circuit reversed the decision, holding that Ortiz precluded certification under 23(b)(1)(B). See In re Telectronics Pacing Systems, Inc., 221 F.3d 870 (6th Cir. 2000).

The Sixth Circuit reasoned that the primary problem with the proposed Telectronics settlement was that the purportedly limited fund failed to meet the traditional requirements articulated in Ortiz. As in Ortiz, there were no liquidated claims in the case. Thus, the parties were forced to estimate the total potential liability. While it was clear that the defendant did not have adequate funds to satisfy the potential judgments against it, the court expressed concern over an agreement in which the defendant's parent companies gained a release from liability for $10 million. The defendant claimed that it would not be able to settle unless its parent companies were released. The district court, concerned that the entire settlement was in peril if it did not approve this aspect of the settlement, granted approval and reasoned that the potential loss of the settlement constituted a "risk" under 23(b)(1)(B). That is, the lack of a settlement created the risk that if the parent companies were found not liable, some members of the class would not be compensated for their injuries. See id. at 878.

The Sixth Circuit criticized the district court for not "undertak[ing] an independent risk analysis," and instead accepting the $10 million figure agreed to by the parties

as being the maximum amount the parent companies would be required to pay. Id. at 880. The uncritical acceptance of this type of agreement, according to the court of appeals, was "plainly improper." Id.

In addition to insisting that Ortiz requires that the limited nature of the fund must be proven independently from the agreement of the parties, the Sixth Circuit expressed doubt that the "value discounted by risk" theory could ever be used to support a finding that a fund is limited. Though the Supreme Court declined to reach such a blanket conclusion in Ortiz, the court of appeals explained that the risk analysis theory is improper since "there is always risk inherent in litigation." Id.

On remand, after the settlement agreement was adjusted to allow for claimants to opt out, the district court approved the settlement agreement and certified the class under Rule 23(b)(3) rather than under 23(b)(1)(B).[37]

4. In re Prudential Ins. Co.

In re Prudential, 148 F.3d 283 (3rd Cir. 1998), although not a mass tort action, is pertinent because it reflects a judicial willingness to approve inventive solutions to the problems posed by trying to consensually resolve class action litigation after Amchem and Ortiz. In Prudential, the Third Circuit affirmed the District of New Jersey's certification of a nationwide class of life insurance policyholders and approved a global settlement resolving claims that Prudential engaged in deceptive sales practices. The settlement is particularly noteworthy for including an alternative dispute resolution ("ADR") mechanism that could be adopted by claimants to determine the kind and amount of relief granted. See id. at 289.

The Prudential settlement gives policyholders two options: (1) to pursue their claims through an ADR procedure; or (2) to elect basic claim relief. See id. at 294. Under the ADR process, class members who believed they had been misled could file a claim with Prudential. This claim form contained questions designed to elicit information regarding what type of claim, if any existed. Once a claim is filed, a four tier review process begins. At the first level, the claim is examined by a member of the Claim Evaluation Staff, who are employees of

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[37] See In re Telectronics Pacing Systems, Inc., 137 F. Supp. 2d 985 (S.D.Ohio 2001). In certifying the class under Rule 23(b)(3), the court explained that, since it had already found that the Rule 23(a) requirements had been satisfied when it initially certified the 23(b)(1)(B) class, it did not need to review them again in this case. "Our task is to determine whether certification of this Class, pursuant to Rule 23(b)(3), is appropriate in this case." Id. at 1007. According to Rule 23(b)(3) and the court's decision in Amchem, such an undertaking requires the court to make a determination that common questions predominate over questions that affect individual members of the group. Although the district court recognized the requirements of Rule 23(b)(3), it certified the class without articulating a predominance analysis.

Prudential, and is assigned a score from zero to three for each claim.[38] Id. at 295. Any claim not receiving a score of three is automatically reviewed by a team of independent claim evaluators selected by class counsel and representatives of the state regulators. Id. Their recommendation is further examined by a member of the Claim Review Staff, who are also Prudential employees. The decision of the Claim Review Staff cannot be appealed by Prudential; however the claimant may appeal the decision to a fourth level, the Appeals Committee. Similar to the independent claim evaluators, the Appeals Committee is selected by class counsel and representatives of the state regulators from a list agreed upon by class counsel, the state regulators and Prudential. Id.

Once this process is completed, the relief afforded a claimant will depend on the final score of his claim. Id. at 296. Claims given a score of zero are afforded no relief; those with a score of one may only obtain relief through basic claim relief; and claims given a score of two or three are entitled to compensatory relief.[39]

The Third Circuit ruled that the terms of the settlement benefited the class enormously, emphasizing the "uncapped nature of the relief, the fairness of the ADR process, and the availability of Basic Claim Relief to those class members who either elect not to participate in the ADR process or who cannot demonstrate they have a compensable claim." Id. at 317. The court further remarked that "[t]he ADR process provides an efficient and individually tailored approach to the remediation of claims." Id. at 328.

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[38] Basic claim relief allows the claimant to obtain one or more of the following forms of relief without having to show liability on Prudential's part: "(1) low interest loans to help policy holders make premium payments on existing policies; (2) enhanced value policies which allow members to purchase new policies with additional coverage paid for by Prudential; (3) deferred annuities enhanced by contributions from Prudential; and (4) the opportunity to purchase shares in designated mutual funds enhanced by a contribution from Prudential." 148 F.3d at 296.

[39] The following relief is available based on the category of the claim proven:

(1) "financed leverage - the policyholder may obtain a refund of the loans, dividends, or values improperly used . . .

(2) abbreviated payment - the policyholder may be permitted to cancel the policy and obtain a refund of some or all of the premiums paid . . .

(3) investment product - the policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid . . . . Alternatively, the policyholder may be able to exchange the policy for an annuity . . .

(4) other claims - if a policyholder was misled in some other way, the policyholder may be allowed to cancel the policy and obtain a refund of some or all of the premiums paid . . . or may be able to use the refund to purchase another policy." 148 F.3d at 296.

E. Implications for the Future

1. Settlements Involving Non-Opt-Out Classes

The Supreme Court's decision in Ortiz provides practitioners with additional guidance regarding non-opt-out classes in general and Rule 23(b)(1)(B) in particular. The Court made clear that lower courts must give greater scrutiny to the assets dedicated to the settlement before approving it as a "limited fund." The Ortiz Court was particularly critical of the district court's and Fifth Circuit's "uncritical adoption" of the settlement figures proposed by the parties. In addition, the Court reiterated the need for lower courts to pay close attention to potential conflicts of interest among class members in light of Amchem. The Court's emphatic statements on this point should be strong warning to any class action practitioners seeking to certify an undifferentiated class of both present and future claimants.

Ortiz also left open certain questions, leaving the exact contours of the limited fund class an issue for continued exploration. For example, the Court specifically refused to decide "how close to insolvency a limited fund defendant must be brought as a condition for class certification." 527 U.S. at 860 n.34. The Court nonetheless expressed serious doubts about the proposal before it, noting that Fibreboard was entitled to retain all but $500,000 of its supposed entire net worth. Id. at 859-60. While the Court's guidance is theoretically helpful as a roadmap for future litigants seeking approval of a limited fund settlement, the Court expressed skepticism about such experimental settlements in the mass tort context. The Ortiz Court observed that "if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale." Id. at 845. The Court ultimately stated that "the burden of justification rests on the proponent of any departure from the traditional norm," indicating that sponsors of future limited fund settlements may expect a high level of scrutiny in the lower federal courts. Id. at 842.

2. Increased Focus on Subclasses

In both Ortiz and Amchem, the Supreme Court focused on the need for lower courts to evaluate potential conflicts among class members and to use subclasses to address disparate interests. After Ortiz, there can be no question that a class divided between present and future claimants now requires division into "homogeneous subclasses" to eliminate counsel conflicts of interest among counsel. Id. at 856. Lower courts are likely to extend this reasoning to other groups as well. For example, in the remand proceedings in Matsushita, Judge Thomas issued a dissent premised largely on his perception that the Delaware class of shareholders consisted of individuals with different types of claims based on whether they traded on the open market, tendered their shares, or received spin-off shares. See 179 F.3d at 652. Judge Thomas also believed that class members were entitled to different damages based on whether they held valid securities claims or were time-barred from litigating such claims. See id. He therefore concluded that in light of Amchem (which was decided four years after the Delaware

court's settlement approval), "these structural conflicts should have actuated an inquiry by the Delaware Vice-Chancellor, and should have resulted in the creation of sub-classes [sic] to assure the adequate representation of absent class members." Id. at 652-53. The plaintiffs had not raised this argument in their briefs and the majority decision did not consider it. Other potential subclass divisions may occur based on the governing law, with courts overseeing nationwide classes choosing to separate claimants into smaller blocks based on the similarity of their states' laws.

The increased focus on subclasses will likely increase litigation costs as multiple counsel are engaged to represent disparate interests. On the other hand, the legal community may see "repeat pairings" of plaintiffs' firms that coordinate to handle the varying interests of a diverse class. It may be expected that widespread adoption of subclasses will make global settlements more difficult, forcing negotiations not only between plaintiffs and defendants, but among the different plaintiff groups themselves. In addition, the possibility of certifying large nationwide classes appears to have decreased, since defendants will highlight the differences among states laws and manageability factors as weighing heavily against class certification. Ultimately, practitioners and lower courts must give careful consideration to the Supreme Court's teachings regarding diverse class interests or, as in the Ortiz case, risk protracted settlement approval proceedings only to face reversal on appeal.

3. Alternative Resolution Strategies

The Prudential settlement showcases a new and innovative way for class action attorneys to resolve nationwide claims through experimental solutions. The alternative dispute resolution method agreed to by the parties avoided endless years of protracted litigation by essentially bypassing the adversarial court process. The New Jersey district court and Third Circuit approved the settlement in part because it placed no cap on the potential recovery by class claimants. In addition, the settlement avoided potential conflicts among class members by giving independent analysis and review to each member's particular claim. Prudential likewise benefited by retaining an active role in the claim review process and funding a settlement that compensates the vast majority of class members with in-kind services or products, thus creating the likelihood of continued and increased business from past customers. Industry analysts will closely monitor the execution of the Prudential settlement, with large corporate defendants' willingness to consider similar types of alternative settlement strategies in the future based on a final analysis of Prudential's ultimate costs.

F. Settlement Class Actions in State Courts

Not surprisingly, the Supreme Court's rejection of the proposed settlement classes in Amchem and Ortiz has precipitated an increase in state court class actions filings.[40] State courts are not a plaintiffs' panacea, of course, since most states follow the federal courts' recent Rule 23 jurisprudence. However, state courts in certain Gulf States – Alabama, Florida, Louisiana, Mississippi, and Texas – have been flooded by class action filings in the past several years, reflecting a perceived willingness to certify classes for settlement or trial that federal courts and other state courts would not.[41] Indeed, as the tobacco-related class actions suggest, class action jurisprudence in Florida and Louisiana appears to be unaffected by the Supreme Court's restrictive decisions in Amchem and Ortiz.[42] The appellate courts of other "magnet forums," however, have begun to adopt the Supreme Court's conservative approach to certification in mass tort cases.[43] Recent decisions indicate that some of the Gulf Coast state courts are beginning to follow the Supreme Court's lead with respect to the certification of settlement and litigation classes.[44]

CONCLUSION

The present areas of dispute in class action law present significant issues for the utility of the class action device in the future. Ortiz will no doubt make it more difficult for practitioners seeking approval of limited fund settlements, while Amchem will lead federal courts and most state courts to give increased scrutiny to potential conflicts among class

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[40] See, e.g., Howard M. Erichson, Mass Tort Litigation and Inquisitorial Justice, 87 Geo. L. J. 1983, 2000 (June 1999) ("To whatever extent Amchem may make certain class actions more difficult in federal court, some parties will take their class actions to state court.").

[41] See Linda S. Mullenix, Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?, 74 Tul. L. Rev. 1709, 1709 ("[T]he Gulf States have earned the reputation as 'magnet forums' for class action litigation.").

[42] Each State has cited to Amchem only once, and neither has cited to Ortiz. WESTLAW Search, Florida and Mississippi State Cases Database (Aug. 2001).

[43] Mullenix, Gulf Waters, 74 Tul. L. Rev. at 1753 (noting that the federal court's conservative class action jurisprudence has begun to slowly "trickle down" to the Gulf States).

[44] See, e.g., Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425 (Tex. 2000) (relying on Amchem's predominance analysis to decertify class); Murphy Oil, 703 So. 2d 542 (La. 1997) (citing Amchem in rejecting class certification); White v. General Motors Corp., 718 So. 2d 480 (La. App. 1998) (rejecting certification of a settlement class action); Ex Parte Russell Corp., 703 So. 2d 953 (Ala. 1997) (using adequacy analysis from Amchem to strike to class certification).

members. Greater use of subclasses may be expected, resulting in increased costs associated with multiple plaintiffs' counsel representing the diverse groups.