The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation after Ortiz v. Fibreboard Corp.

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When a body possessed of the institutional unflappability of the United States Supreme Court is moved to describe a body of litigation as "elephantine,"[1] it is safe to assume the problem is real. The pachyderm that sparked the Court's alarm is asbestos litigation.[2] Asbestos is a fire-resistant insulator that also happens to be one of the most dangerous materials ever introduced into widespread use.[3] By

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1. Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2302 (1999).

2. The staggering scope of the asbestos litigation crisis seems to invite such creative metaphor. It has been described as a "rising tide," *id.*, a "flood," REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991) [hereinafter 1991 REPORT], a "torrent," Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 181 (4th Cir. 1993), a "tidal wave," David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693, 1698 (1986) (book review), an "avalanche," Jenkins v. Raymark Indus., 782 F.2d 468, 470 (5th Cir. 1986), a "massive, unending river," John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384 (1995), an "odyssey" of "aimless wandering through the legal wilderness," Cimino v. Raymark Indus., 751 F. Supp. 649, 650 (E.D. Tex. 1990), *rev'd and remanded in part, vacated and remanded in part, rev'd and rendered in part*, 151 F.3d 297 (5th Cir. 1998), and a "cauldron[] of sticky, bubbly, and ill-smelling trouble[]," Greg M. Zipes, *After* Amchem *and* Ahearn*: The Rise of Bankruptcy Over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality?*, 1998 DET. C.L. REV. 7, 8 (1998). Perhaps no court or commentator has outdone the Maryland Court of Special Appeals, which began an opinion as follows:

> In this, the last decade of the 20th Century, our judicial system faces an apocalypse in the guise of asbestos cases. As did the "Apocalyptic beast," asbestos rose up "as from the depths of the sea," after having lain dormant for decades, to plague our industries initially and our judicial system consequentially.

Eagle-Picher Indus. v. Balbos, 578 A.2d 228, 231 (Md. Ct. Spec. App. 1990) (quoting VICENTE BLASCO IBANEZ, THE FOUR HORSEMEN OF THE APOCALYPSE 172 (Charlotte Brewster Jordan trans., 1918)), *aff'd in part and rev'd in part*, 604 A.2d 445 (Md. 1992).

3. *See* 1991 REPORT, *supra* note 2, at 4–7. Asbestos is a naturally occurring fibrous mineral, mined primarily for its noncombustability and its insulative properties. *See* 1 SOURCEBOOK ON ASBESTOS DISEASES: MEDICAL, LEGAL, AND ENGINEERING ASPECTS A1–A7 (George A. Peters & Barbara J. Peters eds., 1980). The first known English language report on the health dangers posed by asbestos was issued in 1898, *see* Morris Greenberg, *Knowledge of the Health Hazards of Asbestos (The First 60 Years)*, *in* 10 SOURCEBOOK ON ASBESTOS DISEASES: CURRENT ASBESTOS LEGAL, MEDICAL AND TECHNICAL RESEARCH 145, 149 (George A. Peters & Barbara J. Peters eds., 1994), and these dangers were first scientifically demonstrated in the United States in 1935, *see* 1991 REPORT, *supra* note 2, at 5. Although asbestos exposure remains a major public health problem in many countries, it has been substantially reduced in the United States. *See* BARRY I. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 787–95, 854–55 (4th

the middle of the next century, as many as 500,000 Americans will have died as a result of asbestos exposure.[4] As a committee of federal judges dramatically reported in 1991, "[i]t is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s."[5]

That flood of lawsuits—approximately 250,000 to date—has swollen into a well-documented legal catastrophe on par with its public health predicate.[6] The sheer volume of claims brought by those exposed to asbestos has made it increasingly difficult for courts to provide, as the Federal Rules of Civil Procedure mandate, "the just, speedy,[7] and inexpensive[8] determination of every action."[9] As

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ed. 1996). *But see* Rebecca Renner, *Asbestos in the Air*, SCI. AM., Feb. 2000, at 34, 34 (reporting that a recent housing boom in California is exposing residents to dangerous levels of naturally occurring asbestos).

4. *See* Coffee, *supra* note 2, at 1384–85. One study has projected that cancer caused by asbestos exposure will result in one American death every hour until 2025. *See* CASTLEMAN, *supra* note 3, at 784. The most serious disease caused by asbestos exposure is mesothelioma, a particularly virulent cancer generally thought to be caused only by asbestos. *See* Federal Judicial Ctr., *Individual Characteristics of Mass Torts Case Congregations*, *in* REPORT ON MASS TORT LITIGATION, app. D at 16 (1999) [hereinafter MASS TORT LITIGATION]. Some recent medical research suggests that a virus that contaminated the polio vaccine administered to nearly 100 million Americans in the 1950s and 1960s plays a role in triggering mesothelioma. *See* Joseph R. Testa et al., *A Multi-Institutional Study Confirms the Presence and Expression of Simian Virus 40 in Human Malignant Mesotheliomas*, 58 CANCER RES. 4505, 4505–09 (1998); Debbie Bookchin & Jim Schumacher, *The Virus and the Vaccine*, ATLANTIC MONTHLY, Feb. 2000, at 68, 75. Monkey kidneys used to culture the vaccine are the apparent source of the viral contamination. *See* Bookchin & Schumacher, *supra*, at 68. The Testa study and others like it remain controversial. *See id.* at 71–72, 76–80.

5. 1991 REPORT, *supra* note 2, at 2–3.

6. *See generally, e.g.*, *Ortiz*, 119 S. Ct. at 2324–25 (Breyer, J., dissenting) (detailing problems posed by the volume of asbestos litigation); 1991 REPORT, *supra* note 2, at 1–3, 7–14 (describing the volume, delay, and costs of asbestos litigation); Coffee, *supra* note 2, at 1384–1404 (tracing the evolution of asbestos litigation); Federal Judicial Ctr., *supra* note 4, app. D at 14–17 (summarizing past and present asbestos litigation); *Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts* [hereinafter *1999 Report*], *in* MASS TORT LITIGATION, *supra* note 4, at 28–47 (describing difficulties presented by mass tort litigation generally). The magnitude of asbestos litigation is illustrated by the fact that 60% of the increase in federal civil filings from 1976 to 1986 was attributable to asbestos cases. *See* Mary J. Davis, *Mass Tort Litigation: Congress's Silent, but Deadly, Reform Effort*, 64 TENN. L. REV. 913, 918 (1997). The volume of asbestos cases has been so great, one court observed, "as to exert a well-nigh irresistible pressure to bend the normal rules." *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995).

7. *See, e.g.*, *1999 Report*, *supra* note 6, at 31 (noting that the delays that have characterized the resolution of asbestos cases "raise legitimate concerns about whether some plaintiffs are de facto denied any meaningful access to court"). Such delay can exact a tragic price: during one asbestos class action, nearly one-sixth of the class members died

one trial judge illustrated the problem in a 1990 opinion approving an asbestos class action: "If the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases."[10] For the tens of thousands whose injuries will become manifest in the decades ahead, there is a very real risk that recovery will be denied altogether.[11]

To make matters worse, asbestos is not the only elephant in the stampede. Indeed, asbestos exposure is only the first, and so far the worst,[12] of what have come to be termed "mass torts."[13] One recent study has documented two dozen subsequent mass torts,[14] and there is little optimism that mass torts are headed the way of the woolly

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waiting for their cases to be heard. *See Cimino*, 751 F. Supp. at 651–52. As a committee of judges appointed to study the asbestos crisis grimly noted, "[u]nder these circumstances, the principle of 'justice delayed is justice denied' has added meaning." 1991 REPORT, *supra* note 2, at 12.

8. Perhaps the most oft-cited statistic in the literature of mass torts comes from a 1984 Rand Corporation study which found that only 39 cents of each asbestos litigation dollar actually went to asbestos victims. *See* 1991 REPORT, *supra* note 2, at 13. Such inefficiency is far less shocking when viewed in light of evidence from a subsequent Rand report indicating that the average plaintiff in non-automobile tort litigation receives only 43% of each litigation dollar. *See* Thomas E. Willging, *Mass Tort Problems & Proposals: A Report to the Mass Torts Working Group*, *in* MASS TORT LITIGATION, *supra* note 4, app. C at 3.

9. FED. R. CIV. P. 1; *see also Ortiz*, 119 S. Ct. at 2325 (Breyer, J., dissenting) (asserting that the costs and delays of asbestos litigation may deny most victims recovery unless courts are given maximum discretion to aggregate claims).

10. *Cimino*, 751 F. Supp. at 652 (Parker, C.J.).

11. The latency period for mesothelioma, the most serious asbestos-related disease, is 15 to 40 years or more. *See* Federal Judicial Ctr., *supra* note 4, app. D at 17. Such a long and variable latency period increases the likelihood that, absent claim aggregation, an asbestos manufacturer's assets will be exhausted by prior claims before other victims have manifested injuries.

12. *See* Willging, *supra* note 8, app. C at 25. One state court judge recently suggested that " '[t]obacco litigation has every likelihood of dwarfing the horrendous asbestos situation.' " Richard B. Schmitt, *Alabama Judge Rejects Settlement by Liggett Group on Smoking Claims*, WALL ST. J., July 23, 1999, at B6 (quoting Alabama Circuit Court Judge Robert Kendall).

13. Notwithstanding Professor McGovern's observation that "[m]ass torts have been defined in a number of ways, none of which is particularly helpful," Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 597 (1997), several such efforts have been made. *See, e.g.*, Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965–69 (1993) (defining mass torts as litigation characterized by a large number of related claims, commonality of issues, and interdependent value of claims); *1999 Report*, *supra* note 6, at 8–9 (discussing different definitions). For a general overview of the mass tort phenomenon and the judicial problems that it poses, see *1999 Report*, *supra* note 6, at 9–47.

14. *See* Federal Judicial Ctr., *supra* note 4, *passim*.

mammoth in the near future.[15]

There is near-universal acknowledgment that mass torts pose grave problems[16] for a legal system designed to mete out justice case by case,[17] problems that can be addressed only through some form of aggregated adjudication.[18] What procedural tool accomplishes that aggregation most appropriately and efficiently? This question is the central issue in mass tort jurisprudence, and no consensus answer has emerged.[19] Opt-out class actions[20] under Rule 23(b)(3) of the Federal

15. *See 1999 Report*, *supra* note 6, at 9 (stating that "mass tort litigation is probably here to stay"); Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on* Schuck *and* Siliciano, 80 CORNELL L. REV. 1022, 1025–27 (1995) (examining institutional factors that perpetuate mass tort litigation). Indeed, by providing the mass tort plaintiffs' bar with the funds to invest in new mega-cases, the success of asbestos litigation has been a direct factor in perpetuating mass tort litigation. *See* Marianne Lavelle & Angie Cannon, *The Reign of the Tort Kings*, U.S. NEWS & WORLD REP., Nov. 1, 1999, at 36, 38 (quoting a leading plaintiffs' lawyer as saying, "[a]sbestos gave us a war chest for tobacco").

16. *See, e.g.*, *Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (1999), *available in* 1999 WL 796232 (statement of Professor Christopher Edley, Jr., Harvard Law School) (arguing that "the asbestos litigation crisis not only remains with us, but has in important respects grown worse in the late 1990s"); *1999 Report*, *supra* note 6, at 19 (concluding that mass torts "impose extraordinary demands on the judicial system, which currently does not possess all the mechanisms necessary to address them"); Coffee, *supra* note 2, at 1347 (identifying a consensus on the existence of a crisis requiring a radical remedy); Willging, *supra* note 8, at 5 (noting that those who argue that the legal system can evolve to handle mass torts satisfactorily are a definite minority). *But see Finding Solutions to the Asbestos Litigation Problem: Hearings on S. 758 Before the Senate Judiciary Subcomm. on Admin. Oversight and the Courts*, 106th Cong. (1999), *available in* 1999 WL 796237 (statement of Richard Middleton, Jr., President, Association of Trial Lawyers of America) (arguing that, with only 55 asbestos trials in 1998, no asbestos litigation crisis exists); Willging, *supra* note 8, at 3–5 (describing arguments that the current system is working).

17. *See 1999 Report*, *supra* note 6, at 15.

18. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 1–3 (1995); *1999 Report*, *supra* note 6, at 28–29. *But see* Willging, *supra* note 8, at 5–6 (noting some negative consequences of aggregation, primarily the concern that increased efficiency encourages filings).

19. *See* Anne E. Cohen, *Mass Tort Litigation After* Amchem, SC57 ALI-ABA 269, 274, 277–78 (1998), *available in* WL, ALI-ABA database; Kenneth R. Feinberg, *Reporting from the Front Line—One Mediator's Experience with Mass Torts*, 31 LOY. L.A. L. REV. 359, 363–45 (1998); McGovern, *supra* note 13, at 595–96 (noting the development of a "cottage industry of suggestions for various forms of aggregative treatment of mass torts"); Kevin H. Hudson, Comment, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 EMORY L.J. 665, 665–69 (1991).

20. A brief overview of class actions procedure may be helpful here. Federal class action practice is governed by Rule 23 of the Federal Rules of Civil Procedure. A class action allows individual plaintiffs to sue, not only for themselves, but also on behalf of a class of those alleging like claims. FED. R. CIV. P. 23(a). To sue on behalf of others, individual plaintiffs must obtain permission from the court, known as class certification. *See id.* 23(c). A class may be certified if it satisfies all four prerequisites of 23(a)—

Rules of Civil Procedure[21] and reorganizations under Chapter 11 of the Bankruptcy Code[22] have been the tools most commonly used to

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numerosity, commonality, typicality, and adequacy of representation—and satisfies the conditions of one of the four types of class actions under 23(b). *See id.* 23(b). Of these four types of class actions, two are of particular relevance in resolving mass torts: opt-out classes under 23(b)(3), *see infra* note 21, and mandatory classes under 23(b)(1)(B), *see infra* note 26; *see also* Zipes, *supra* note 2, at 17–18 (noting that (b)(1)(B) and (b)(3) are the most important class action provisions for mass torts).

Going beyond the text of Rule 23, an additional wrinkle to class certification has emerged in recent years: class certification for settlement only. *See In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 n.10 (6th Cir. 1984) (tracing the precedent for settlement-only classes back to a 1979 Fifth Circuit case, *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979)); *infra* note 87 and accompanying text (noting the Supreme Court's recent approval of settlement classes). Settlement-only classes owe their existence to two realities: defendants want to be able to negotiate class settlements without risking a "bet-the-company" trial if negotiations break down, and judges want to be able to approve a class settlement even if the class would be too unwieldy to go to trial.

When settlement is used to resolve a class action, the district court must go beyond the class certification analysis to find that the terms of the settlement are fair; this fairness inquiry is derived from 23(e)'s requirement of court approval before a case may be dismissed. FED. R. CIV. P. 23(e); *see also* 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.41, at 11-87 & n.222 (3d ed. 1992) (discussing the 23(e) fairness test); 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797, at 340–41, 356–58 (2d ed. 1986) (same).

To summarize, all class actions must be certified by the court. Certification demands that all of the prerequisites of 23(a) and one of the requirements of 23(b) be satisfied. If the parties are seeking approval of a class settlement, the court also must find that the settlement terms are fair.

21. Rule 23(b)(3) opt-out classes are those in which absent class members have the right to choose to exclude themselves from the class, even after the class is certified. Such self-exclusion typically is done in order to pursue individual litigation. Classes without an express opt-out right are known as "mandatory classes." The opt-out class has been used widely to aggregate mass tort claims because it is the broadest of the class action provisions, allowing class certification in circumstances not permitted by the other Rule 23 provisions. FED. R. CIV. P. 23(b)(3) advisory committee's note. Opt-out classes may be certified if, in addition to the general 23(a) prerequisites, *see supra* note 20, questions common to the class predominate over uncommon questions, and class treatment is superior to other means of adjudication. *See* FED. R. CIV. P. 23(b)(3).

22. 11 U.S.C. §§ 1101–1146 (1994). Many of the largest individual mass tort defendants have resorted to bankruptcy reorganization. *See, e.g., In re* A.H. Robins Co., 880 F.2d 694, 697 (4th Cir. 1989) (involving the bankruptcy of a corporation valued at over $2 billion triggered by litigation over its manufacture of the Dalkon Shield); *In re* Dow Corning Corp., 237 B.R. 380, 384 (Bankr. E.D. Mich. 1999) (involving the bankruptcy of a multi-billion dollar corporation resulting from litigation over its manufacture of silicone breast implants); *see also infra* note 44 (listing nine major asbestos manufacturers who have declared bankruptcy). For general background on the bankruptcy reorganization process, see DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 55–75, 230–54 (1992) (describing Chapter 11); 7 WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY ¶ 1100.01, at 1100-3 to -6 (Lawrence P. King ed., 15th ed. rev. 1999) (summarizing the core policies of bankruptcy reorganization); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 850–56 (1984) (describing the basic principles of bankruptcy and their application in mass tort cases).

aggregate mass tort claims,[23] but from the perspective of a defendant seeking a global solution that will allow it to continue its business, both have serious limitations.[24] As a result, in recent years[25] such defendants have turned to a third option, the limited fund class action settlement,[26] a mandatory settlement from which claimants have no express right to opt out.[27]

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23. Many other aggregative options exist, but "each has been found wanting, whether in efficiency, legitimacy or both." Cohen, *supra* note 19, at 274 (listing multidistrict consolidation, Rule 42 consolidation, specialized courts, private case management consortia, collateral estoppel, docket control, lobbying and legislative efforts, and specialized trial structures); *see also* 1991 REPORT, *supra* note 2, at 15–26 (discussing various aggregation options); WEINSTEIN, *supra* note 18, at 23–32 (same).

24. Rule 23(b)(3) opt-out classes are unappealing to defendants seeking total peace for two primary reasons. First, they allow class members to opt out, thus unpredictably increasing total liability. *See, e.g.*, Coffee, *supra* note 2, at 1382; Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 506 (1995). Second, they have become more difficult to implement in light of recent case law. *See, e.g.*, *1999 Report*, *supra* note 6, at 41; Alex Raskolnikov, Note, *Is There a Future for Future Claimants After* Amchem Products, Inc. v. Windsor*?*, 107 YALE L.J. 2545, 2561 (1998). Bankruptcy, meanwhile, is unappealing to defendants primarily because plaintiffs may emerge in control of the company. *See, e.g.*, *In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986) (detailing a bankruptcy plan pursuant to which tort claimants took control of the reorganized company).

25. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 820 n.45 (1997) (noting that, from 1986 to 1990, only six class actions were certified under Rule 23(b)(1)(B)).

26. A limited fund exists when several parties hold claims against a single fund, and the sum of the claims exceeds the value of the fund available. *See Limited-Fund Classes*, *in* MASS TORT LITIGATION, *supra* note 4, app. F-9 at 1–2 (defining "limited fund"). For example, a limited fund would exist in a case in which a bus crash injures 100 people, causing $10,000 in injuries to each one for a total of $1,000,000 in claims, and the only asset available to compensate them is a $500,000 insurance policy. Limited fund cases are certifiable as class actions under Rule 23(b)(1)(B), *see* FED. R. CIV. P. 23 advisory committee's note, although the text of (b)(1)(B) does not limit its use to limited fund situations, *see infra* note 175 (discussing use of (b)(1)(B) in non-limited fund cases). To be certified under (b)(1)(B), a class must satisfy the general prerequisites established in 23(a). *See supra* note 20. In addition, the class must show that individual litigation of the claims would risk "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). To return to the bus crash example above, individual litigation would mean that the first 50 claimants get a full recovery, while the last 50 get nothing. In such a situation, individual litigation plainly would risk impairment of the ability of some class members to protect their interests.

27. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan II"), 134 F.3d 668, 669–70 (5th Cir. 1998) (per curiam) (reaffirming a limited fund settlement class certification), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999); Keene Corp. v. Fiorelli (*In re* Joint E. & S. Dist. Asbestos Litig.), 14 F.3d 726, 733 (2d Cir. 1993) (reversing a limited fund settlement class certification); Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721, 750–51 (2d Cir. 1992) (reversing a limited fund

Lower federal courts struggled for over a decade to assess the appropriateness of the various mass tort aggregation options, until the Supreme Court finally agreed to hear its first mass tort case in 1997.[28]

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settlement class certification), *modified*, 993 F.2d 7 (2d Cir. 1993); *In re* A.H. Robins Co., 880 F.2d 709, 710 (4th Cir. 1989) (affirming a limited fund settlement class certification); *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305–07 (6th Cir. 1984) (granting mandamus and vacating a limited fund settlement class certification); Abed v. A.H. Robins Co. (*In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.), 693 F.2d 847, 857 (9th Cir. 1982) (reversing a limited fund settlement class certification); Wish v. Interneuron Pharms., Inc. (*In re* Diet Drugs Prods. Liab. Litig.), No. MDL 1203, CIV. A. 98-20594, 1999 WL 782560, at *1 (E.D. Pa. Sept 27, 1999) (rejecting a limited fund settlement class certification); *In re* Cincinnati Radiation Litig., 187 F.R.D. 549, 555 (S.D. Ohio 1999) (rejecting certification under 23(b)(1)(B), but approving it under 23(b)(2)); *In re* Telectronics Pacing Sys., Inc., 186 F.R.D. 459, 462 (S.D. Ohio 1999) (certifying a limited fund settlement class); Fanning v. AcroMed Corp. (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 165 (E.D. Pa. 1997) (certifying a limited fund settlement class); Walker v. Liggett Group, Inc., 175 F.R.D. 226, 233 (S.D. W. Va. 1997) (rejecting a limited fund settlement class); *In re* Rio Hair Naturalizer Prods. Liab. Litig., No. MDL 1055, 1996 WL 780512, at *21 (E.D. Mich. Dec. 20, 1996) (certifying a limited fund settlement class); Butler v. Mentor Corp. (*In re* Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV 92-P-10000-S, at 3–4 (N.D. Ala. Sept. 10, 1993) (approving and certifying the Mentor settlement class and granting final judgment as to claims against Mentor).

28. *See* Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?*, 29 SETON HALL L. REV. 213, 213 (1998) (noting that, until *Amchem*, the Supreme Court never had heard a mass tort case). Cases that the Supreme Court declined to hear include *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liability Litigation*, 55 F.3d 768, 777 (3d Cir. 1995) (side-mounted fuel tanks class action), *cert. denied sub nom.* General Motors Corp. v. French, 516 U.S. 824 (1995), *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995) (HIV-tainted blood class action), *cert. denied sub nom.* Grady v. Rhone-Poulenc Rorer Inc., 516 U.S. 867 (1995), *In re UNR Industries*, 20 F.3d 766, 768 (7th Cir. 1994) (asbestos bankruptcy), *cert. denied sub nom.* UNARCO Bloomington Factory Workers v. UNR Indus., 513 U.S. 999 (1994), *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1282 (1990) (consolidated asbestos cases), *cert. denied*, 498 U.S. 920 (1990), *In re A.H. Robins Co.*, 880 F.2d at 710 (Dalkon Shield class action), *cert. denied sub nom.* Anderson v. Aetna Cas. & Sur. Co., 493 U.S. 959 (1989), *In re A.H. Robins Co.*, 880 F.2d 694, 696 (4th Cir. 1989) (Dalkon Shield bankruptcy), *cert. denied sub nom.* Menard-Sanford v. A.H. Robins Co., 493 U.S. 959 (1989), *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 148 (2d Cir. 1987) (Agent Orange class action), *cert. denied*, 484 U.S. 1004 (1988), *School District of Lancaster v. Lake Asbestos of Quebec, Ltd.* (*In re* School Asbestos Litig.), 789 F.2d 996, 998 (3d Cir. 1986) (asbestos property damage class action), *cert. denied sub nom.* Celotex Corp. v. School Dist. of Lancaster, 479 U.S. 852 (1986), *and cert. denied sub nom.* National Gypsum Co. v. School Dist., 479 U.S. 915 (1986), and *Abed*, 693 F.2d at 848 (Dalkon Shield class action), *cert. denied sub nom.* A.H. Robins Co., Inc. v. Abed, 459 U.S. 1171 (1983). *Cf.* Elizabeth J. Cabraser, *Trends and Developments in Mass Torts and Class Actions in Year One of the Post-*Amchem *Era*, SD15S ALI-ABA 77, 83 (1998), *available in* WL, ALI-ABA database (noting that "the Supreme Court deigns to entertain class-related matters only a few times each decade"); Francis E. McGovern, *Judicial Centralization and Devolution in Mass* Torts, 95 MICH. L. REV. 2077, 2077 (1997) (book review) (noting the rarity of Supreme Court review of tort cases). *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986), arose from an individual suit against an asbestos manufacturer. The question before the Court involved general standards for summary judgment,

In that case, *Amchem Products, Inc. v. Windsor*,[29] the Court sharply circumscribed the use of opt-out classes in mass tort litigation.[30] Last term, in *Ortiz v. Fibreboard Corp.*,[31] the Court turned its attention to the other significant mass tort class action tool, the limited fund settlement class. In *Ortiz*, a decision already described as "monumentally important for class action jurisprudence and the future of settlement classes,"[32] the Court rejected a limited fund settlement arising out of asbestos litigation.[33] In so doing, the Court has cast doubt upon future mass tort limited fund settlements, stopping just short of barring such settlements altogether.[34]

This Note begins by detailing the facts of *Ortiz* and summarizing its disposition by the Supreme Court.[35] It then assesses the continuing availability of the limited fund settlement as a tool for resolving mass tort claims.[36] Looking beyond the announced holding to the practical impact of the Court's opinion, this Note concludes that the limited fund settlement in its present form essentially has been foreclosed. This foreclosure becomes evident upon examination of the Court's treatment of the role of settlement in class certification,[37] the types of intra-class conflicts that require creation of subclasses,[38] and a host of serious questions raised and left unresolved in *Ortiz*.[39] This Note next explores questions likely to emerge in post-*Ortiz* limited fund

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however, so it cannot be considered a mass tort case.

29. 521 U.S. 591 (1997).

30. *See id.* at 612 (holding that a proposed class action designed to reach a global settlement of current and future asbestos claims failed to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure); *see also supra* note 24 (noting that *Amchem* made opt-out classes more difficult to certify); *infra* notes 84–87 and accompanying text (discussing *Amchem*).

31. 119 S. Ct. 2295 (1999).

32. Linda S. Mullenix, *Court Nixes Latest Settlement Class*, NAT'L L.J., Aug. 16, 1999, at B12. Professor Mullenix, author of LINDA S. MULLENIX, MASS TORT LITIGATION: CASES AND MATERIALS (1996), predicted that *Ortiz* "will immediately be cycled into the casebooks." Mullenix, *supra*, at B12. The significance of *Ortiz* was apparent long before the Court handed down its decision. *See, e.g.*, *Flanagan II*, 134 F.3d at 670 (Smith, J., dissenting) (describing the case as "immensely important"). For contemporary media analysis of the *Ortiz* opinion, see Mullenix, *supra*, at B12; Sharon Walsh, *High Court Overturns Asbestos Settlement; Ruling Limits Firms' Options in Class Actions*, WASH. POST, June 24, 1999, at A1; Henry Weinstein, *Supreme Court Voids Settlement in Asbestos Suit*, L.A. TIMES, June 24, 1999, at A1.

33. *See Ortiz*, 119 S. Ct. at 2323; *see also infra* notes 91–123 (discussing the Court's disposition of the case).

34. *See infra* notes 132–74 (discussing the impact of *Ortiz*).

35. *See infra* notes 44–131 and accompanying text.

36. *See infra* notes 132–74 and accompanying text.

37. *See infra* notes 139–51 and accompanying text.

38. *See infra* notes 152–66 and accompanying text.

39. *See infra* notes 167–74 and accompanying text.

settlement class litigation, considering the implications of the Court's opinion viewed from the cutting edge of limited fund jurisprudence in the lower federal courts.[40] The discussion examines one form of limited fund settlement that *Ortiz* unfortunately may encourage—the no-allocation settlement[41]—and another form that *Ortiz* unfortunately may prohibit—the going concern settlement.[42] The Note closes with a closer look at the question of whether defendants should be permitted to capture the transactional savings made available by a limited fund settlement.[43]

By 1990, asbestos litigation already had forced many of the wealthiest asbestos producing companies into bankruptcy.[44] Fibreboard had survived to that point at least in part because it was a relatively minor player, both in terms of its asbestos market share and in terms of its corporate wealth.[45] But as the volume of claims rose and the number of other defendants shrank, time was decidedly not on Fibreboard's side.[46]

The only hope for the company was a pair of insurance policies

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40. *See infra* notes 175–250 and accompanying text.

41. *See infra* notes 176–210 and accompanying text.

42. *See infra* notes 211–35 and accompanying text.

43. *See infra* notes 236–50 and accompanying text.

44. *See* Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 509 (E.D. Tex. 1995) (listing the bankruptcies of Unarco Industries, Johns-Manville, Inc., Celotex Corporation, Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc.), *aff'd sub nom.* Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999); *see also* Coffee, *supra* note 2, at 1386 (noting that 11 of the 25 major asbestos manufacturers had filed for bankruptcy by 1991).

45. *See* JAY TIDMARSH, FEDERAL JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 59 (1998). Although Fibreboard was primarily a timber company, it produced asbestos from 1920 to 1971. *See Ortiz*, 119 S. Ct. at 2303. During much of that period, it was a wholly owned subsidiary of Louisiana Pacific Corporation, which spun it off in 1988. *See* Coffee, *supra* note 2, at 1399–1400. In 1995, Fibreboard was valued by a federal district court at $235 million. *See Ahearn*, 162 F.R.D. at 529. *But see Ortiz*, 119 S. Ct. at 2317 n.28 (noting that Fibreboard was acquired in 1997 for $600 million in cash and assumed debt). By comparison, the largest asbestos company, Johns-Manville, had over $2.25 billion in assets. *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 751 (E.D.N.Y., S.D.N.Y., & Bankr. S.D.N.Y. 1991), *vacated and remanded*, 982 F.2d 721, 739 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

Although Fibreboard has been a relatively minor defendant in asbestos litigation, it was the named defendant in the case generally acknowledged to have opened the floodgates for asbestos litigation. *See* Hensler & Peterson, *supra* note 13, at 1003 (discussing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1092 (5th Cir. 1973), which held that asbestos product manufacturers could be held strictly liable for injuries resulting from asbestos exposure).

46. *See* Coffee, *supra* note 2, at 1400 (noting Fibreboard's urgency to achieve a global settlement, given that its unpaid commitments exceeded $1 billion).

that Fibreboard had taken out for a few years in the 1950s.[47] Fibreboard maintained that these policies provided virtually unlimited coverage for all asbestos claims that preceded policy expiration, and after a massive four-year trial, a California state court agreed.[48] While the insurers appealed, the fate of all concerned hung in the balance.[49] If the insurers lost, they faced billions of dollars in liability.[50] If Fibreboard lost, it faced certain bankruptcy, while the asbestos victims' prospects for meaningful recovery would evaporate.[51]

With such astronomical stakes, Fibreboard decided that the time was ripe to negotiate a class action settlement with both victims and insurers.[52] The insurers demanded that any settlement bring total peace,[53] including resolution of all future claims; accordingly, negotiations focused on mandatory class settlement.[54] These negotiations eventually produced three separate agreements: the inventory settlement, the global settlement, and the trilateral settlement.[55]

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47. *See Ortiz*, 119 S. Ct. at 2303. Continental Casualty Company and Pacific Indemnity Company issued the insurance policies. *See id.* The Continental policy was in effect from 1957 to 1959, and the Pacific policy was in effect from 1956 to 1957. *See id.* Both were comprehensive general liability insurance policies with per occurrence limits, but with no overall cap on how much the insurers would pay out under the policies. *See id.* Fibreboard did not argue that claims resulting from exposure after the 1959 expiration of the insurance policies were indemnified. *See id.* Thus, in 1993, claims alleging pre-1959 exposure settled for an average of $12,000, while post-1959 asbestos exposure claims settled for only $4000. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 1013 n.49 (5th Cir. 1996) (Smith, J., dissenting), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

48. *See Ortiz*, 119 S. Ct. at 2303. This coverage litigation was described later as a "death struggle." United States Supreme Court Official Transcript at *29, *Ortiz* (No. 97-1704), *available in* 1998 WL 849388 (oral argument of Elihu Inselbuch on behalf of settlement proponents). It was "one of the largest and most complex proceedings in the history of American civil jurisprudence." *Ahearn*, 162 F.R.D. at 511.

49. *See Flanagan I*, 90 F.3d at 971.

50. *See id.*

51. *See id.*

52. *See id.* at 970–71.

53. As the term is used generally, a global peace resolution includes all possible claimants, including future claimants, and all possible defendants, including parent corporations and insurers. *See generally* Georgene M. Vairo, Georgine, *the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 127–29 (1997) (describing total peace resolutions generally and the Dalkon Shield bankruptcy specifically).

54. *See Ortiz*, 119 S. Ct. at 2304.

55. *See Flanagan I*, 90 F.3d at 971–73; *see also* TIDMARSH, *supra* note 45, at 60–61 (describing the settlement negotiation history). Of these three settlements, only the global settlement was before the Supreme Court in *Ortiz*.

The inventory settlement, negotiated first, settled the claims of victims who were represented personally by class counsel.[56] Settlement values were higher than average, but full payment was contingent on a subsequent resolution of future claims.[57] The global settlement came next.[58] It proposed a mandatory class composed of substantially all Fibreboard asbestos victims who had not yet filed claims.[59] This class was not divided into subclasses.[60] Class members would bring their claims through a trust, funded by $1.525 billion from the insurers and $10 million from Fibreboard; all but $500,000 of Fibreboard's share came from other insurance.[61] Finally, the day after reaching the global settlement, the parties negotiated the trilateral settlement.[62] The trilateral settlement provided that, should the global settlement fail to secure court approval, the insurers would pay Fibreboard $2 billion for a complete settlement of their liability.[63]

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56. *See Flanagan I*, 90 F.3d at 971. Two of the four class counsel were partners in the South Carolina firm Ness, Motley, Loadholt, Richardson & Poole. The inventory settlement resolved that firm's entire inventory of pending cases. *See id.* Interestingly, Ness, Motley partners had also served as class counsel in the settlement struck down in *Amchem*. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 599 (1997). *Ortiz* was something of a grudge match in this respect, because Baron & Budd, the law firm representing those class members challenging the Fibreboard settlement, was the same firm that successfully challenged the *Amchem* settlement. *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 615 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). The leaders of both firms were singled out as "tort kings" in a 1999 article in *U.S. News & World Report* discussing the influence of elite trial lawyers over the behavior of corporations and politicians. *See* Lavelle & Cannon, *supra* note 15, at 38.

57. *See Flanagan I*, 90 F.3d at 971 n.3; *id.* at 1010–11 (Smith, J., dissenting). Such arrangements have been identified by some commentators as a red flag suggesting collusion, because they may suggest that class counsel has received a premium for its cases in exchange for acting contrary to the interests of the class. *See, e.g.*, Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV 811, 825 (1995); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1064 (1995).

58. The negotiating attorneys reached the settlement at a chance midnight meeting at a coffee shop in Tyler, Texas. *See Flanagan I*, 90 F.3d at 971.

59. *See Ortiz*, 119 S. Ct. at 2305 & n.5.

60. *See id.* at 2308.

61. *See id.* at 2304.

62. *See id.*

63. *See id.* The Supreme Court understood this $2 billion figure to be consistent with the insurers' absolute refusal to pay more through the trilateral settlement than they had agreed to pay under the global settlement. *See id.* at 2322. The trilateral settlement amount was higher because it covered more claimants; in addition to the global future claimants, it resolved the insurers' liability as to all pending or reserved claims. *See* Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 521 (E.D. Tex. 1995), *aff'd sub nom.* Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). Due to the transaction costs associated with

With the settlement negotiated by the lawyers, all that remained was to secure court approval of the class and of the settlement terms.[64] Accordingly, the plaintiffs filed *Ahearn v. Fibreboard Corp.*[65] in the federal district court for the Eastern District of Texas before Chief Judge Robert M. Parker, an innovative veteran of asbestos litigation.[66] Chief Judge Parker appointed a guardian ad litem to report on the settlement's fairness[67] and held an eight-day fairness hearing, at which several objecting class members testified.[68] The objectors challenged the global settlement, alleging conflicts of

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individual litigation, the trilateral settlement was expected to provide a smaller recovery for claimants than they would have received under the global settlement. *See Ahearn*, 162 F.R.D. at 527.

64. *See generally supra* note 20 (discussing procedure for court approval of class settlements).

65. 162 F.R.D. 505 (E.D. Tex. 1995), *aff'd sub nom.* Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

66. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660–67 (1989) [hereinafter McGovern, *Mature Mass Torts*] (detailing Chief Judge Parker's history of procedural innovation in asbestos litigation); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1862 (1997) (describing Chief Judge Parker as "a staunch advocate of more radical solutions to resolving asbestos cases"). Chief Judge Parker was one of the six judges on the Judicial Conference Ad Hoc Committee on Asbestos Litigation. *See* 1991 REPORT, *supra* note 2, at 39. While the *Ahearn* appeal was pending before the Fifth Circuit Court of Appeals, he was appointed to that court from the U.S. District Court for the Eastern District of Texas. The Fifth Circuit panel that heard the appeal of *Ahearn* was thus in the somewhat awkward position of reviewing a judge who had since become a colleague. Indeed, they actually were reviewing the work of two colleagues, as then-Chief Judge Parker had appointed Fifth Circuit Judge Patrick E. Higginbotham to serve as facilitator during the Fibreboard settlement negotiations. *See Ahearn*, 162 F.R.D. at 515. In fact, Judge Higginbotham had made the suggestion to negotiate the inventory and global settlements separately. *See Ortiz*, 119 S. Ct. at 2330 (Breyer, J., dissenting); *see also infra* note 111 and accompanying text (describing the *Ortiz* Court's holding that this procedure was impermissible).

67. Professor Eric Green was the guardian ad litem. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 972 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). This appointment was striking because Professor Green, as a vocal supporter of class action settlement, by his own account stood contrary to "the overwhelming majority of the scholarly community . . . led by the most highly respected scholars in their fields." Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1787 (1997). On the other hand, one commentator highlighted Chief Judge Parker's appointment of a guardian ad litem and his holding of lengthy fairness hearings as a model of responsible judicial inquiry. *See* Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2003–04, 2009 (1999).

68. *See Ortiz*, 119 S. Ct. at 2305–06.

interest of class counsel resulting from the inventory settlement,[69] inadequate procedural protections in light of conflicting interests among class members,[70] and the absence of a limited fund.[71] Over these objections, Chief Judge Parker certified the mandatory class under Rule 23(b)(1)(B) and approved the settlement as "fair, reasonable, and adequate."[72]

The objectors in *Ahearn* appealed to the Fifth Circuit,[73] where a divided panel affirmed.[74] The majority noted that the fact of settlement should be considered when deciding whether to certify a class action.[75] After concluding that there were no fatal conflicts within the class or between the class and the inventory settlers,[76] the court upheld certification of the mandatory class under a limited fund theory.[77] The majority held that Fibreboard's retention of most of its assets was permissible because the class was receiving a larger recovery as a result of the settlement.[78]

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69. *See Ahearn*, 162 F.R.D. at 525; *see also supra* note 57 and accompanying text (discussing the argument that lucrative inventory settlements are used to persuade class counsel to reach a class settlement on terms that favor the defendant).

70. *See Ahearn*, 162 F.R.D. at 525.

71. *See id.* at 527. Without a limited fund, the objectors argued, certification of the class under Rule 23(b)(1)(B) was improper. *See id.* *See generally supra* note 26 (discussing the limited fund concept).

72. *Ahearn*, 162 F.R.D. at 528.

73. As inevitably happens in a settlement class action that is appealed, the party structure (and thus the caption of the case) shifted on appeal. The original parties—Gerald Ahearn, four other named plaintiffs, and the defendant—were united in defense of the settlement, while James Flanagan, Esteban Yanez Ortiz, and other objectors stood in opposition to the agreement. Thus, *Ahearn v. Fibreboard Corp.* became *Flanagan v. Ahearn* on appeal to the Fifth Circuit. Finally, when Flanagan dropped out, the case became *Ortiz v. Fibreboard Corp.* on appeal to the Supreme Court. *See supra* note 44 (citing the complete procedural history of the case).

74. Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 968–93 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). Judge W. Eugene Davis wrote the panel's opinion. *See id.* Judge Jerry E. Smith dissented. *See id.* at 993 (Smith, J., dissenting).

75. *See id.* at 975. Chief Judge Parker had assumed that certification standards for settlement classes and trial classes were the same. *See Ahearn*, 162 F.R.D. at 523. The issue of relaxing certification standards for settlement classes is discussed *infra* at notes 139–51 and accompanying text.

76. *See Flanagan I*, 90 F.3d at 978–82.

77. *See id.* at 988.

78. *See id.* at 985. The court also rejected the objectors' other challenges. First, the majority found that the Article III "case or controversy" requirement was satisfied. *See id.* at 988. It also rejected the argument that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), recognized a due process right to opt out of even mandatory classes. *See Flanagan I*, 90 F.3d at 986. The court noted that the holding in *Shutts* had been limited to cases predominantly for money damages, 472 U.S. at 811 n.3, while a limited fund class action's pro rata reduction of all claims made such actions equitable in nature. *See Flanagan I*, 90

Dissenting "vehemently,"[79] Judge Jerry E. Smith decried the majority's approval of "the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved."[80] Disagreeing with essentially all of the majority's holdings, he also questioned the underlying justice of the settlement: "Fibreboard hand-picked a class that was uniquely vulnerable to exploitation, class counsel who were widely reported to have sold out a similar class, and a court with a reputation for favoring a global settlement."[81]

While appeal of the Fifth Circuit decision in *Ahearn* was pending, the Supreme Court handed down *Amchem Products, Inc. v. Windsor*.[82] The Court granted certiorari in the Fibreboard case and immediately vacated and remanded it to the Fifth Circuit for reconsideration in light of *Amchem*.[83]

Amchem, like *Ortiz*, involved a massive settlement of future asbestos claims, but with one major procedural difference: *Amchem* had been certified as a Rule 23(b)(3) opt-out class, not a limited fund

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F.3d at 986. For more on due process opt-out rights, see Leslie W. O'Leary, *Mass Tort Class Actions: Will* Amchem *Spawn Creative Solutions?*, 65 DEF. COUNS. J. 469, 469–89 (1998). *See generally* Linda S. Mullenix, *Getting to* Shutts, 46 U. KAN. L. REV. 727 (1998) (describing the Court's ill-fated efforts to reach the issue left open by *Shutts* regarding whether due process requires opt-out rights in mandatory suits seeking equitable relief). A distinct question that also has caused disagreement involves the discretion (rather than the due process obligation) of trial judges to allow class members to opt out of mandatory classes. *See, e.g.*, Eubanks v. Billington, 110 F.3d 87, 93–94 (D.C. Cir. 1997) (joining the Second, Fifth, Seventh, Ninth, and Eleventh Circuits in allowing discretion to permit opt-out from a mandatory class); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 272, 287 (1996) (arguing against allowing mandatory class members to opt out); Steven T. O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 481 (1998) (arguing for a "robust right to opt out" of mandatory classes).

79. *Flanagan I*, 90 F.3d at 993 (Smith, J., dissenting). For example, Judge Smith asked, "How could well-intentioned judges sanction—indeed, compel—such an untoward result?" *Id.* (Smith, J., dissenting). Later, he charged that "[e]ven rudimentary constitutional protections ... would have prevented ... this unfortunate miscarriage of justice." *Id.* at 995 (Smith, J., dissenting).

80. *Id.* at 993 (Smith, J., dissenting).

81. *Id.* at 994 (Smith, J., dissenting). The "widely reported" class counsel sell-out refers to Ness, Motley's representation of the plaintiff class that was ultimately rejected by the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997). *See* Coffee, *supra* note 2, at 1397–99 (arguing that the *Amchem* class counsel acted collusively); *supra* note 56.

82. 521 U.S. at 591. *Amchem* and its underlying facts have been analyzed thoroughly by scholars. *See, e.g.*, TIDMARSH, *supra* note 45, at 25–31, 47–58; Koniak, *supra* note 57, at 1045–1138; O'Leary, *supra* note 78, at 469–89.

83. *See* Flanagan v. Ahearn, 521 U.S. 1114, 1114 (1997) (granting certiorari and vacating and remanding for further consideration in light of *Amchem*), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

(b)(1)(B) mandatory class.[84] As a result, the degree to which the *Amchem* holding applied to limited fund classes such as the one in the Fibreboard settlement was uncertain.[85] *Amchem*'s central, ambiguous holding was that settlement should be considered by a court in deciding whether to certify a settlement class, although such consideration did not in all respects weigh in favor of the proposed class.[86] *Amchem* also established that both settlement class actions and mass tort class actions are permissible.[87]

On remand, the Fifth Circuit took only five paragraphs to distinguish *Amchem* and again affirm the settlement.[88] The court stated that *Amchem* involved an opt-out class under 23(b)(3) that allocated recoveries based on the type or severity of the injury, while the present case was a 23(b)(1)(B) mandatory class that treated all claimants alike.[89] For the second time, the Supreme Court granted certiorari to hear *Ortiz v. Fibreboard Corp.*[90]

In an opinion written by Justice Souter, the Supreme Court reversed the Fifth Circuit.[91] The Court began by noting that the heart

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84. *See Amchem*, 521 U.S. at 622. *See generally supra* notes 21, 26 (describing opt-out and limited fund classes).

85. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan II"), 134 F.3d 668, 669–70 (5th Cir. 1998) (per curiam), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999); Cohen, *supra* note 19, at 286; Green, *supra* note 67, at 1778–79. The Third Circuit's discussion in *Amchem* emphasized that its intent to rein in class action practice analysis did not apply to limited fund classes. *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

86. *See Amchem*, 521 U.S. at 619–21. This holding is discussed more thoroughly *infra* at notes 139–43 and accompanying text.

87. *See Amchem*, 521 U.S. at 618, 625. Both points had been in doubt. *See, e.g.*, 7B WRIGHT ET AL., *supra* note 20, § 1783, at 76 (noting that "allowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule"); Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 HARV. L. REV. 828, 830–31 (1996) (arguing that settlement classes are forbidden by Rule 23).

88. *See Flanagan II*, 134 F.3d at 669–70. Judge Smith again wrote in forceful dissent. *See id.* at 683 (Smith, J., dissenting) ("The panel majority ... casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements.").

89. *See id.* at 669–70 (Smith, J., dissenting).

90. 524 U.S. 936 (1998).

91. *See Ortiz*, 119 S. Ct. at 2323. Justice Souter's opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Thomas, and Ginsburg. *See id.* at 2302. Chief Justice Rehnquist wrote a brief concurrence, in which Justices Scalia and Kennedy joined. *See id.* at 2323–24 (Rehnquist, J., concurring). Justice Breyer dissented, joined by Justice Stevens. *See id.* at 2324–33 (Breyer, J., dissenting). For media reaction to the decision, see *supra* note 32 (listing articles). Because the trilateral settlement was not appealed to the Supreme Court, it is final, and the money that Fibreboard received is available to pay individual claims. *See* Weinstein, *supra* note 32, at A22.

of the case was "the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B)."[92] The language of the Rule itself is quite broad;[93] the Court concluded that if the only hurdles to the certification of limited fund settlement classes were those imposed by the text, then (b)(1)(B) might well be used in ways that violated the Rules Enabling Act,[94] the Seventh Amendment,[95] and constitutional due process.[96] In need of a limiting construction of (b)(1)(B),[97] the Court explored the history of limited fund class action cases from the vantage point of the drafters of the 1966 amendment that codified modern Rule 23(b).[98] Distilling these cases to their essence, the Court developed a limited fund class action "historical model."[99] According to the Court, the historical model of limited fund class actions is composed of three elements: inadequacy of the fund, equity among members of the class, and exhaustion of the fund.[100] The Court held that in a limited

92. *Ortiz*, 119 S. Ct. at 2302; *see also supra* note 26 (quoting the text of Rule 23(b)(1)(B)).

93. *See Ortiz*, 119 S. Ct. at 2312–13; *see also supra* note 21 (discussing Rule 23(b)(3)).

94. 28 U.S.C. § 2072 (1994) (stating that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"); *see Ortiz*, 119 S. Ct. at 2314.

95. U.S. CONST. amend. VII (stating that "[i]n suits at common law . . . the right of trial by jury shall be preserved"); *see Ortiz*, 119 S. Ct. at 2314.

96. U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law"); *see Ortiz*, 119 S. Ct. at 2314–15.

97. The lower courts took a different approach. Chief Judge Parker opted for a "plain meaning" interpretation of Rule 23(b)(1)(B). *See* Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 526 (E.D. Tex. 1995), *aff'd sub nom.* Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). The Fifth Circuit followed his lead. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 983 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

98. *See Ortiz*, 119 S. Ct. at 2308–10. Professor Mullenix described the Court's analysis as "parsimonious and constipated." Mullenix, *supra* note 32, at B12. The Advisory Committee notes accompanying amended Rule 23 state that mass torts arising from accidents such as plane crashes are "ordinarily not appropriate for a class action." FED. R. CIV. P. 23 advisory committee's note. The Committee did not even contemplate the use of mandatory classes under Rule 23(b)(1)(B) in such cases. *See 1999 Report*, *supra* note 6, at 38. Nor did it anticipate use of any provision of Rule 23 to resolve any mass torts that, like asbestos, did not arise from a single accident. *See id. See generally* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998) (describing the historical evolution of class litigation); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356 (1967) (discussing the 1966 amendments in an article written by the reporter to the Advisory Committee on Civil Rules).

99. *Ortiz*, 119 S. Ct. at 2300.

100. *See id.* at 2311–12.

fund settlement class action, fund inadequacy and class equity are required, and fund exhaustion is at least presumptively necessary.[101] Applying the historical model to the settlement class before it, the Court concluded that none of the three elements was satisfied.

To show inadequacy, the Court stated, it is not enough that the settling parties agree that the fund is limited to a particular amount.[102] The parties to the settlement must present evidence—and the trial judge must make specific findings of fact—establishing with sufficient precision[103] both the value of the available fund and its insufficiency to satisfy all claims.[104] In the Fibreboard settlement, the fund consisted of the defendant's assets plus its available insurance

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101. *See id.* at 2312 (stating that all three elements of the historical model are *presumptively* necessary); *id.* at 2321 (declining to reach the question of whether exhaustion is a required element); *id.* at 2323 (holding that inadequacy and equity are required). The Court's careful reservation of the question of whether exhaustion is an absolute requirement has been overlooked by two early *Ortiz* interpreters. *See* Cullen v. Whitman Med. Corp., 188 F.R.D. 226, 236 (E.D. Pa. 1999) (stating that all three elements of the *Ortiz* historical model are required); *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 309–10 (1999) [hereinafter *Leading Cases*] (same).

Similarly, a state court has apparently already concluded that non-exhaustion alone is a sufficient basis for rejecting a limited fund settlement. *See* Schmitt, *supra* note 12, at B6. The court valued the settlement at $75 million and the defendant at $200 million, and as a result, " 'this court cannot and does not find that the exhaustion requirement identified in *Ortiz* has been met.' " *Id.* (quoting Alabama Circuit Court Judge Robert Kendall).

102. *See Ortiz*, 119 S. Ct. at 2316.

103. *See id.* (noting the requirement of "a sufficiently reliable determination of the probable total"); *see also infra* note 174 and accompanying text (discussing the implications of the requirement of precise valuation of claims); *infra* notes 211–35 and accompanying text (discussing the implications of the requirement of precise valuation of defendant).

104. *See Ortiz*, 119 S. Ct. at 2316–17. The Court further requires that the trial judge's factual findings follow a hearing in which the settling parties' evidence is subject to challenge. *See id.* The Court implicitly acknowledged that even the protections it required might be inadequate; it observed that, after presentation of evidence and findings of fact, the district court valued Fibreboard at $235 million, yet it was sold shortly afterward for $600 million. *See id.* at 2317 n.28; *see also* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. (forthcoming 2000) (manuscript at 12, on file with the *North Carolina Law Review*) (noting the difficulty of valuing the assets and liabilities of a large corporate defendant).

Another recent limited fund class settlement case illustrates even more vividly concerns about the effectiveness of the Court's inadequacy standard. In *Fanning v. AcroMed Corp.* (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158 (E.D. Pa. 1997), the settling parties valued the limited fund (the defendant company) at $104 million. *See id.* at 168. After hearing expert testimony from the settlement proponents, the trial court accepted this valuation. *See id.* at 170. Around the same time that all appeals to the settlement were dropped, the defendant was purchased for $325 million. *See* S. Elizabeth Gibson, *Mass Torts Limited Fund & Bankruptcy Reorganization Settlements: Four Case Studies*, *in* MASS TORT LITIGATION, *supra* note 4, app. E at 70 (1999).

coverage.[105] The Court held that the district court erred by uncritically accepting the parties' negotiated valuation of that fund.[106] With titanic attorneys' fees riding on the class counsels' willingness to reach a settlement, the class members could not have relied upon counsel to have negotiated a maximized value.[107]

Equity within the class, the second element of the Court's historical model, encompasses two distinct inquiries: inclusiveness of the class and fairness of the fund distribution. The former asks how far the "natural class,"[108]—that is, "everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery,"[109]—has been reduced by prior dispositions to form the settlement class.[110] The settlement class here failed because class counsel agreed to exclude some 100,000 present claimants, roughly a third of the natural class, many of whom counsel represented directly.[111] The Court left open the possibility that such class

105. *See Ortiz*, 119 S. Ct. at 2317. Of course, if Fibreboard won the coverage litigation, the fund would have been limited only by the assets of the insurance companies. The Court here assumed without deciding that a limited fund could be established by "a value discounted by risk," the more or less unlimited value of the insurance fund discounted by the risk that the insurers would prevail in the coverage litigation. *Id.*

106. *See id.* at 2316.

107. *See id.* at 2317–18; *see also* Coffee, *supra* note 2, at 1401 & n.227 (estimating attorneys' fees for the inventory settlement to be $167 million).

108. *Ortiz*, 119 S. Ct. at 2319.

109. *Id.* at 2311.

110. *See id.* Reduction of the natural class occurs when the definition of the class is drawn to exclude natural class members. Such exclusions are apt to be particularly invidious when all present claimants are gerrymandered out of the class, because present claimants are more likely to monitor the performance of class counsel. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 999–1000 (5th Cir. 1996) (Smith, J., dissenting), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

One post-*Ortiz* federal court has announced that *any* proposed limited fund class (including the non-settlement class before it) that does not include all potential class members cannot be certified. *See* Cullen v. Whitman Med. Corp., 188 F.R.D. 226, 236–37 (E.D. Pa. 1999) ("I decline to certify the class under 23(b)(1)(B) because the putative class members do not include all potential claimants." (citing School Dist. of Lancaster v. Lake Asbestos of Quebec, Ltd. (*In re* School Asbestos Litig.), 789 F.2d 996, 1005 (3d. Cir 1986))). This holding, which did not cite *Ortiz* as authority for the court's conclusion, substantially extends the *Ortiz* "natural class" idea. In *Ortiz*, the Court stated that "*[i]t is a fair question* how far a natural class may be depleted *by prior dispositions* of claims and still qualify as a mandatory limited fund class." 119 S. Ct. at 2319 (emphasis added). The *Cullen* court's requirement that all natural class members be included in all limited fund classes goes beyond each of the italicized phrases.

111. *See Ortiz*, 119 S. Ct. at 2318–19. The Court noted that excluded natural class claims (that is, other Fibreboard asbestos injury claims) included 45,000 settled present claims, an estimated 53,000 unsettled present claims, and an uncertain number of reserved claims, leaving an estimated 186,000 future claims in the class. *See id.*

exclusions might be acceptable if all natural class members received demonstrably comparable benefits, but it concluded that in this case the class members fared worse than the settled inventory claims.[112]

On the second equity issue, fairness of the fund distribution, the Court held the settlement to be deficient.[113] When a settlement class covers both unliquidated present claims and unaccrued future claims, the fairness element requires, at a minimum, the procedural protection of separately represented subclasses to address class members' conflicting interests.[114] The Court held that the district court erred in failing to appoint subclasses to address two sets of conflicts within the class: those between present and future claimants and those between pre- and post-1959 claimants.[115] Neither the provision of equal allocation to such disparate claimants[116] nor the urgency of their collective interest in securing a settlement of the coverage litigation[117] could obviate the need for procedural protections.[118]

Finally, the Court found the settlement plainly at odds with the third element of the limited fund historical model, fund exhaustion.[119] Far from devoting the entire fund to the claims,[120] Fibreboard retained all but $500,000 of its net worth.[121] Although it did not reach the question of whether such an arrangement alone would be

112. *See id.* at 2319.

113. *See id.*

114. *See id.*

115. *See id.* at 2319–20. The Court acknowledged that "at some point there must be an end to reclassification with separate counsel, [but that] these two instances of conflict are well within the requirement of structural protection." *Id.* at 2320. Recall that pre-1959 claims arguably were covered by substantial insurance, while those arising after 1959 were not. *See supra* note 47 and accompanying text.

116. *See Ortiz*, 119 S. Ct. at 2320. *But see infra* note 195 (explaining that the Fibreboard settlement did not involve equal allocations).

117. *See Ortiz*, 119 S. Ct. at 2320 ("Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the pre-certification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense.").

118. *See id.*

119. *See id.* at 2321.

120. *See id.*

121. For examples of dubious non-exhaustion limited fund settlements approved before *Ortiz*, see *In re Telectronics Pacing Systems, Inc.*, 186 F.R.D. 459, 462 (S.D. Ohio 1999) (approving a limited settlement that released class members' claims against three companies, only one of whose assets were used to determine the limits of the fund), and *In re Rio Hair Naturalizer Products Liability Litigation*, No. MDL 1055, 1996 WL 780512, at *21 (E.D. Mich. Dec. 20, 1996) (approving a limited fund settlement that required payment of only 75% of available insurance and no contribution from the defendant corporation, while plaintiffs' counsel received 20% of the fund in fees).

sufficient to defeat approval of a mandatory class action settlement,[122] the Court did note that it "seem[ed] irreconcilable" with mandatory treatment.[123]

In his two-paragraph concurrence, Chief Justice Rehnquist pointedly underlined the majority's call[124] for a congressional solution to asbestos litigation.[125] He noted that "the 'elephantine mass of asbestos cases' cries out for a legislative solution."[126]

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122. *See Ortiz*, 119 S. Ct. at 2321; *see also supra* note 101 (noting that the Court did not hold that exhaustion is required).

123. *Ortiz*, 119 S. Ct. at 2331.

124. *See id.* at 2302 & n.1.

125. *See id.* at 2324 (Rehnquist, C.J., concurring).

126. *Id.* (Rehnquist, C.J., concurring) (quoting *id.* at 2302). The *Amchem* Court made a similar plea for a legislative response to the asbestos crisis. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997). Many unsuccessful attempts have been made since the late 1970s to address asbestos issues legislatively. *See* Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 163 n.28 (1998) (citing hearings on four separate congressional bills); *cf.* Maria Gabriela Bianchini, Comment, *The Tobacco Agreement That Went up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 718–19 n.79 (1999) (citing five congressional efforts to legislate general mass tort reform since 1992). After *Amchem*, six asbestos defendants hired a lobbying firm to renew efforts to achieve a legislated solution, *see* Erichson, *supra* note 67, at 2019, but threats of " 'nuclear war' " from plaintiffs' lawyers convinced all but one to withdraw their support. Holman W. Jenkins Jr., *Now on Video: America's Scariest Special Interest*, WALL ST. J., Apr. 21, 1999, at A23 (quoting attorney Joseph F. Rice). Nonetheless, in March 1999, the Fairness in Asbestos Compensation Act of 1999 was introduced in both the House and the Senate to create an Asbestos Resolution Corporation to resolve all claims. *See* S. 758, 106th Cong. (1999) (Sup. Docs. No. Y 1.4/1.106-1-758); H.R. 1283, 106th Cong. (1999) (Sup. Docs. No. Y 1.4/6:106-1-1283); *see also* Michael Barone, *Money Talks, as It Should*, U.S. NEWS & WORLD REP., Nov. 15, 1999, at 37, 37 (supporting and describing the bill). This bill generally is supported by business interests and is opposed by the Association of Trial Lawyers of America and the AFL-CIO. *See Congress Considers a New ADR Agency for Asbestos Suits*, 17 ALTERNATIVES TO THE HIGH COSTS OF LITIGATION 137, 137 (CPR Inst. for Dispute Resolution 1999). While several commentators have expressed skepticism regarding the likelihood of congressional action, *see* Coffee, *supra* note 2, at 1463; Erichson, *supra* note 67, at 2019–20, 2024; Feinberg, *supra* note 19, at 365; Zipes, *supra* note 2, at 9 & n.6; Raskolnikov, *supra* note 24, at 2546 & n.18, a House subcommittee held hearings on the bill one week after *Ortiz* was decided. *See Congress Considers a New ADR Agency for Asbestos Suits*, *supra*, at 138. The bill's sponsor pointed to *Ortiz* as the latest stone in a " 'procedural wall' " preventing class resolution of asbestos litigation. *Id.* (quoting Rep. Henry J. Hyde).

Congressional reluctance to intervene in the asbestos arena may be in part the result of "harsh and sustained criticism from many quarters" of a similar foray into mass compensation—the federal Black Lung program. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 969 (1995); *see also* 30 U.S.C. §§ 901–945 (1994) (creating the Black Lung program). Congress established a trust for the compensation of afflicted coal miners in 1969, but by the time the law was substantially amended in 1981, the trust was $1.4 billion in debt, with a projected debt of $19.2 billion by 1995. *See* John S. Lopatto III, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 678 (1983). *See generally* Peter H. Schuck, *The Worst*

In dissent, Justice Breyer[127] accepted the majority's limited fund historical model as a basis for analysis, but argued that the settlement substantially met each element.[128] He argued that district courts should aggressively seek out efficient ways to resolve asbestos cases,[129] while appellate courts should draw upon district courts' greater experience with, and appreciation of, the problems posed by mass tort litigation.[130] In an asbestos settlement, he said, "I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides."[131]

This Note has suggested that the fundamental question in the

Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541, 552 n.46 (1992) (citing studies reviewing the Black Lung program).

A recent comment analyzes the $368.5 billion tobacco settlement negotiated by the tobacco industry and 40 state attorneys general that Congress rejected in 1998. *See* Bianchini, *supra*, at 705. The author observed that the settlement negotiators essentially had agreed to a mass tort class action settlement that they had submitted to Congress rather than to a court. *See id.* The settlement likely would have run afoul of Rule 23 had the negotiators chosen to file the settlement in court as a class action, the author determined, *see id.* at 726–35, but if Congress had passed the settlement as legislation it would have survived any subsequent legal challenge, *see id.* at 735–43. The author concluded that Congress, and not the judiciary, is in a position to resolve mass tort litigation efficiently, but cautioned that a legislative solution heightens the dangers of collusion and special interest influence. *See id.* at 748–50.

127. An interesting aspect of recent mass tort jurisprudence is the extent to which the cases have divided otherwise like-thinking judges. *See* McGovern, *supra* note 13, at 596. In the Supreme Court, the schism has divided the liberal end of the court, with Justices Souter and Ginsburg writing the majority opinions in *Ortiz* and *Amchem* and Justices Stevens and Breyer dissenting. In the Fifth Circuit, the battle raged in *Flanagan I* and *II* between Judges Davis and Smith, both conservative judges. *See Fifth Circuit*, 2 ALMANAC OF THE FEDERAL JUDICIARY 6, 18–19 (Megan Chase ed., 1998). Professor McGovern discusses various explanations for this phenomenon in an article written before *Amchem* was handed down. *See* McGovern, *supra* note 13, at 595–97, 602–14.

128. *See Ortiz*, 119 S. Ct. at 2332 (Breyer, J., dissenting).

129. *See id.* at 2325 (Breyer, J., dissenting).

130. *See id.* (Breyer, J., dissenting). Justice Breyer quoted Chief Judge Parker's opinion in *Cimino v. Raymark Industries* in lamenting " 'a disparity of appreciation for the magnitude of the problem.' " *Id.* (Breyer, J., dissenting) (quoting Cimino v. Raymark Indus., 751 F. Supp. 649, 651 (E.D. Tex. 1990), *rev'd and remanded in part, vacated and remanded in part, rev'd and rendered in part*, 151 F.3d 297 (5th Cir. 1998)); *see also In re* A.H. Robins Co., 880 F.2d 709, 734 & n.32 (4th Cir. 1989) (noting criticism of appellate courts for failing to recognize and respond to the problems posed by mass torts). *But see* Coffee, *supra* note 2, at 1463 (arguing that such detachment is a virtue because it insulates appellate judges from the ethical conflicts resulting from a trial judge's desire to avoid the "mind-numbing tedium" of massive numbers of monotonous asbestos cases).

131. *Ortiz*, 119 S. Ct. at 2325 (Breyer, J., dissenting) (citations omitted). Noting that "[t]he judiciary cannot treat the problem as entirely one of legislative failure, as if it were caused, say, by a poorly drafted statute," Justice Breyer suggested that "when 'calls for national legislation' go unanswered, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice." *Id.* (Breyer, J., dissenting) (quoting *id.* at 2302).

evolution of mass tort law asks which tool or tools may be used to resolve mass tort claims.[132] Before *Ortiz*, the limited fund mandatory settlement class action was one of the primary choices. The essential question, then, is whether limited fund settlement classes survive *Ortiz*.

On a formal level, at least, *Ortiz* provides no definitive answer to that question. No fewer than three times, the Court raised, without resolving, the "ultimate question" of whether Rule 23(b)(1)(B) settlement classes ever may be used to aggregate tort claims.[133] It might be noted as a preliminary matter that the fact that the Court posed the question so insistently hardly suggests sympathy with those who advocate mandatory settlement classes for mass tort resolution. At a minimum, the Court has created a new level of uncertainty for mass tort litigants; before *Ortiz*, no federal court had held, or indeed even seriously considered, the possibility that limited fund classes were off limits to mass tort litigants.[134]

Going beyond the Court's formal holdings sheds further light on the continuing viability of the mandatory mass tort settlement class.

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132. *See supra* note 19 and accompanying text.

133. *Ortiz*, 119 S. Ct. at 2312, 2314; *see also id.* at 2323 (raising the issue without calling it the "ultimate question"). The subtle differences among the iterations of the question bear noting. One poses "the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment." *Id.* at 2312. Another asks if Rule 23(b)(1)(B) can ever be used in a plan that resolves both present and future claims. *See id.* at 2323. In its broadest formulation, the Court poses "the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims." *Id.* at 2314.

134. *See, e.g.*, Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721, 739 (2d Cir. 1992) (vacating the certification of a mass tort limited fund class, but noting that such a class would have been permissible with proper subclasses), *modified*, 993 F.2d 7 (2d Cir. 1993); Abed v. A.H. Robins Co. (*In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.), 693 F.2d 847, 856–57 (9th Cir. 1982) (decertifying a mass tort limited fund class, but leaving open the possibility that such classes could be certified). The only reported decision that even approaches saying that (b)(1)(B) is unavailable in mass tort cases is *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226, 233 (S.D. W. Va. 1997). In that case, the court rejected a limited fund settlement class composed of tens of millions of smoking victims, a class "so uniquely expansive" that it "appear[ed] to defy" necessary division into subclasses. *Id.* at 232–33. Such language, of course, is far from holding that limited fund resolution of mass torts is per se forbidden. Likewise, commentators have not argued for such a rule. *But cf.* Issacharoff, *supra* note 25, at 809–11, 832 (arguing that Rule 23(b)(1) should be eliminated and that in the meantime proposed (b)(1) classes—mass tort and otherwise—should face a strong presumption against certification); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 877–88 (1995) (arguing that limited fund classes should be available rarely, if ever, in mass torts). Indeed, it appears that the suggestion that (b)(1)(B) would be unavailable to mass tort litigants specifically only arose during oral argument of *Ortiz*. *See* United States Supreme Court Official Transcript at *9, *Ortiz* (No. 97-1704), *available in* 1998 WL 849388 (oral argument of Laurence H. Tribe on behalf of settlement objectors).

A close reading of *Ortiz* strongly suggests that this issue, ostensibly unresolved by the Court, has been decided for all practical purposes.[135] To see how, it is useful to look closely at three aspects of the opinion that the Court itself did not emphasize, but that, when viewed in light of existing case law, send an unmistakably negative message to those considering mass limited fund settlements in the future. First, *Ortiz* resolved an ambiguity in the case law regarding whether the fact of settlement should weigh for or against certification, holding that limited fund classes demand more scrutiny when certification is for settlement only.[136] Second, the Court declined the obvious opportunity to endorse the consensus developing among lower courts that subclasses are required only when the conflicts within a class are substantial.[137] Finally, *Ortiz* left several crucial issues unresolved, creating a level of uncertainty sure to be discouraging to those considering negotiating a major limited fund settlement.[138] Taken together, these three aspects of *Ortiz* will force litigants to look elsewhere for a means to aggregate and resolve mass tort claims.

The most fundamental way that the Court can influence the viability of the limited fund settlement is by changing the standard of scrutiny applied to such settlements' certification. Heightened scrutiny of settlement classes obviously would make limited fund classes more difficult to certify, while a more deferential standard would encourage their use. The Court granted certiorari to hear *Amchem* in 1997 precisely to resolve a split among courts regarding whether the fact of settlement could itself be a factor weighing in favor of class certification.[139] As it happened, however, *Amchem* only

135. *See* Steven Glickstein et al., *Product Liability Class Actions*, *in* NON-FEDERAL QUESTION CLASS ACTIONS: PROSECUTION & DEFENSE STRATEGY 1999, at 317, 340 (PLI Litig. & Admin. Practice Course Handbook Series No. Ho-0068, 1999) (arguing that *Ortiz* "severely restricted, if not entirely eliminated, the use of 'limited fund' class actions in mass torts by imposing [the historical model]"); *see also* Richard B. Schmitt & Laura Johannes, *Judge Rejects Interneuron's Proposed Class-Action Settlement over Diet Pill*, WALL ST. J., Sept. 28, 1999, at B15 (quoting Arnold Levin, an attorney who helped negotiate a limited fund settlement rejected in light of *Ortiz*, as saying, " 'I think the weight of the Supreme Court decision was just too great to overcome' "). *But see* Mullenix, *supra* note 32, at B12 (predicting that "[l]awyers are not going to give up on limited-fund settlement classes after *Ortiz*," but also stating that "Justice Souter single-handedly rendered the class action rule a quaint museum piece").

136. *See infra* notes 139–51 and accompanying text.

137. *See infra* notes 152–66 and accompanying text.

138. *See infra* notes 167–74 and accompanying text.

139. *See* Cramton, *supra* note 57, at 824 (noting the openness of the question). *Compare In re* A.H. Robins Co., 880 F.2d 709, 738, 740 (4th Cir. 1989) ("[T]he promotion of settlement may well be a factor in resolving the issue of certification .... If not a

muddied the waters.

Amchem expressly rejected the Third Circuit's holding that settlement classes must be held to the same certification standard as litigation classes, noting that "settlement is relevant to a class certification" and that "settlement is a factor in the calculus."[140] The Court specifically held that, in a proposed opt-out class, the court need not weigh trial manageability as a factor in its certification decision.[141] Taken in isolation, such language seems to hold settlement classes to a lower standard than trial classes. Yet, *Amchem* went on to hold that "other" provisions of Rule 23—"those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context."[142] This language, again read in isolation, seemed to go beyond the Third Circuit's holding by setting higher standards for settlement classes, at least as to certain unidentified provisions of Rule 23. In a footnote, the Court explained rather mysteriously that "[s]ettlement, though a relevant factor, does not *inevitably* signal that class action certification should be granted more readily than it would were the case to be litigated.... [P]roposed settlement classes *sometimes* warrant more, not less caution on the question of certification."[143]

Such mixed signals on the central holding of the case[144]

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ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification."), *and* 2 NEWBERG & CONTE, *supra* note 20, § 11.28, at 11-57 (stating that "Rule 23 class requirements are more readily satisfied in the settlement context"), *with* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 625 (3d Cir. 1996) ("[T]he rule in this circuit is that settlement class certification is not permissible unless the case would have been 'triable in class form.' ") (citation omitted), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). Professor McGovern has suggested that adoption of the Third Circuit's view would have contributed to the virtual elimination of the use of class actions in mass tort litigation. *See* McGovern, *supra* note 13, at 603.

140. *Amchem*, 521 U.S. at 619, 622.

141. *See id.* at 620 ("[A] district court need not inquire whether the case, if tried, would present intractable management problems, see FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial."). Rule 23(b)(3)(D) provides that, in certifying an opt-out class, "[t]he matters pertinent to the findings [of predominance and superiority] include:... the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D). Note that (b)(3)(D) is not relevant to the certification of a mandatory class.

142. *Amchem*, 521 U.S. at 620; *see also id.* at 620 n.16 ("For reasons the Third Circuit aired, see 83 F.3d 610, 626–35 (1996), proposed settlement classes sometimes warrant more, not less, caution on the question of certification.").

143. *Id.* at 620 n.16 (emphasis added).

144. *See* Walker v. Liggett Group, Inc., 175 F.R.D. 226, 230 (S.D. W. Va. 1997) ("The precise question faced in *Amchem* was the role settlement may play under *Rule* 23 in

predictably spawned confusion.[145] Some courts and commentators read *Amchem* to set a lower standard for settlement classes than trial classes.[146] Others concluded just the opposite,[147] with some courts decertifying classes that they previously had granted preliminary certification.[148] Still others viewed the two standards as equal in all respects but trial manageability.[149]

In *Ortiz*, the Court resolved the question of settlement's role in certification firmly in favor of those who read *Amchem* to raise the bar for settlement class actions, at least as to mandatory classes.[150] Without even referring to *Amchem*'s holding that settlement is a factor, the *Ortiz* Court transformed what originally served as a shield

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judging the propriety of class certification.").

145. *See* TIDMARSH, *supra* note 45, at 27 ("The difficult question . . . is deciding exactly which parts of Rule 23(a) and (b) can be de-emphasized in a settlement class action, and which must be strictly complied with."); *cf.* Cabraser, *supra* note 28, at 84 (observing that decisions after *Amchem* appear to use *Amchem* as authority to support whatever decision—for or against certification—the court seems predisposed to make).

146. *See* San Antonio Hispanic Police Officers' Org., Inc., v. City of San Antonio, 188 F.R.D. 433, 441, 453 (W.D. Tex. 1999); *In re* Telectronics Pacing Sys., Inc., 186 F.R.D. 459, 472–76 (S.D. Ohio 1999); Fanning v. AcroMed Corp. (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 172 (E.D. Pa. 1997); *see also* TIDMARSH, *supra* note 45, at 69 n.168 ("The Fifth Circuit [in *Flanagan I*] . . . noted (correctly in light of *Amchem*) that the factor of settlement . . . can be considered in deciding whether Rule 23's elements have been met."); Cabraser, *supra* note 28, at 87 ("*Amchem* indicates that the fact of settlement weighs strongly in favor of class certification . . . ."); Herbert E. Milstein & Gary E. Mason, *The Reaction to Class Action*, N.J. L.J., Aug. 18, 1997, at S-12, S-12 ("National settlements of [class action] cases may actually become more likely since the courts must now expressly consider the settlement itself when deciding whether to certify the settlement class.").

147. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998); Krell v. Prudential Ins. Co. of Am. (*In re* Prudential Ins. Co. of Am. Sales Practices Litig.), 148 F.3d 283, 308 (3d Cir. 1998), *cert. denied sub nom.* Johnson v. Prudential Ins. Co. of Am., 525 U.S. 1114 (1999); Barboza v. Ford Consumer Serv. Co., No. CIV. A. 94-12352-GAO, 1998 WL 148832, at *3 (D. Mass. Jan. 30, 1998); Clement v. American Honda Fin. Corp., 176 F.R.D. 15, 21 (D. Conn. 1997); *Walker*, 175 F.R.D. at 230–31; NATIONAL BANKR. REVIEW COMM'N, FINAL REPORT: BANKRUPTCY: THE NEXT TWENTY YEARS 337 (photo. reprint 1999) (1997), *reprinted in* MASS TORT LITIGATION, *supra* note 4, app. F-4; *1999 Report*, *supra* note 6, at 41; Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1174 (1998).

148. *See Clement*, 176 F.R.D. at 32; Laughman v. Wells Fargo Leasing Corp., No. 965925, 1997 WL 567800, at *5 (N.D. Ill. Sept. 2, 1997); *Walker*, 175 F.R.D. at 233.

149. *See* Blyden v. Mancusi, 186 F.3d 252, 270 (2d Cir. 1999); *In re* Cincinnati Radiation Litig., 187 F.R.D. 549, 551–52 (S.D. Ohio 1999); Cohen, *supra* note 19, at 285; *cf.* Cabraser, *supra* note 28, at 83, 85, 125 (arguing that *Amchem* has a narrow holding that should have a limited impact on class action jurisprudence).

150. Whether this heightened scrutiny applies to non-mandatory classes, in which the right to opt out of the settlement affords claimants at least a measure of protection not present in limited fund classes, is open to question.

protecting settlement classes into a weapon that courts must use against them. The Court held that, when class certification is for settlement only, "the moment of certification requires 'heightene[d] attention' to the justifications for binding the class members.... [A] fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees,' among them subdivision (b)(1)(B)."[151] By conspicuously omitting all *Amchem* language that had suggested relaxed or even equal scrutiny for settlement classes, *Ortiz* makes it clear that the certification standard has been tightened substantially for proposed mandatory settlement classes. Such heightened scrutiny, taken alone, may not prove invariably fatal to future limited fund settlements, but it sends a clear signal to litigants and lower courts that alternatives to such settlements should be considered.

Ortiz landed a second, more telling blow to limited fund settlements with its treatment of conflicts within the proposed class and the requirement of appointing separately represented subclasses to address them.[152] Here, too, the *Ortiz* holding must be viewed in light of *Amchem*'s holding and the division in the lower courts that ensued. *Amchem* had suggested that subclasses were required when, "[i]n significant respects, the interests of those within the single class are not aligned."[153] Some, including Judge Smith of the Fifth Circuit,[154] concluded that *Amchem* required that any conflict within

151. *Ortiz*, 119 S. Ct. at 2316 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997)) (alterations in original). In *Petrovic v. Amoco Oil Co.*, a case decided after *Ortiz*, the Eighth Circuit held that the heightened scrutiny of class certification that had been mandated by *Amchem* and *Ortiz* did not apply when over three years of discovery preceded the settlement and when the settlement was reached several months after class certification. Petrovic v. Amoco Oil Co., Nos. 98-3816, 99-1334, 1999 U.S. App. LEXIS 34295, at *5–6, *17–18 (8th Cir. Dec. 30, 1999). The court asserted that because of the extensive pretrial activity, the danger of collusion between the defendant and the class counsel was "not present here." *Id.* at *6. Applying a "deferential" abuse of discretion standard of review, the court upheld certification of the class. *Id.* at *2, *5, *6.

152. *Ortiz*, 119 S. Ct. at 2319–20.

153. *Amchem*, 521 U.S. at 626. *But see* TIDMARSH, *supra* note 45, at 29 ("The [*Amchem*] Court did not, however, suggest whether subclasses would necessarily have solved the problems of adequacy of representation."); Cohen, *supra* note 19, at 315–16 (stating that *Amchem* did not resolve the issue of whether every subclass must have its own representative or its own counsel); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1489 (1998) (observing that *Amchem* does not explicitly require separately represented subclasses for conflicts in the proposed class).

154. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan II"), 134 F.3d 668, 677 (5th Cir. 1998) (Smith, J., dissenting) (arguing that "any real conflict, even if minor when compared to interests held in common, will render the representation inadequate"), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

the class, no matter how minor, result in the appointment of subclasses.[155] A clear majority of courts, however, concluded that only substantial conflicts require subclasses.[156]

Given the sharp debate in the lower federal courts and in the academic literature, the Court must have been aware that an issue existed whether the obligation to create subclasses was limited to intra-class conflicts that were deemed substantial.[157] Thus, when the Court discussed the conflicts that required subclasses in *Ortiz*, the absence of any language limiting that requirement to substantial conflicts, or even noting that the conflicts in *Ortiz* were substantial, strongly suggests that no such limit exists.[158] The Court established

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155. *See id.* at 670; John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products*—Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1543, 1550–54 (1998); Silver & Baker, *supra* note 153, at 1491–1500.

156. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998) (finding no need to create subclasses in a nationwide class when variations in state law were "not sufficiently substantial" and differences in damages and potential remedies were "relatively small"); Krell v. Prudential Ins. Co. of Am. (*In re* Prudential Ins. Co. of Am. Sales Practices Litig.), 148 F.3d 283, 313 (3d Cir. 1998) (holding that when class members share an interest in establishing the same "crux" issue, adequacy of representation is satisfied), *cert. denied sub nom.* Johnson v. Prudential Ins. Co. of Am., 525 U.S. 1114 (1999); Martens v. Smith Barney, Inc., 181 F.R.D. 243, 259 (S.D.N.Y. 1998) (explaining that " 'only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status' " (quoting Krueger v. New York Tel. Co., 163 F.R.D. 433, 443 (S.D.N.Y. 1995) (internal quote marks and citations omitted)); Fanning v. AcroMed Corp. (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 176 (E.D. Pa. 1997) (finding subclasses unnecessary "[b]ecause there are no great divergent conflicts" in the class); *In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 292 (S.D. Ohio 1997) (noting that "the [c]ourt must make an evaluation to determine which variances are important or substantial enough to ... require subclasses"); *see also* Coffee, *supra* note 155, at 1553 (noting that "it is far from clear that *Amchem Products* will be extended so as to require subclasses (or, in any event, separate counsel) for every material difference among class members").

157. *Cf.* Silver & Baker, *supra* note 153, at 1486 (writing before *Ortiz* was handed down that the issue of whether all class conflicts necessitated separately represented subclasses was before the *Ortiz* Court).

158. The significance of the Court's refusal to limit the subclass obligation to substantial conflicts seems particularly clear in light of the fact that evidence of the substantiality of the conflicts in *Ortiz* was readily available. *See, e.g.*, Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 1013 n.49 (5th Cir. 1996) (Smith, J., dissenting) (noting that pre-1959 claims had been settling for three times the value of post-1959 claims), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). Note that an argument could be made that the strict obligation to create subclasses enunciated in *Ortiz* does not apply outside the limited fund context, because the historical model created the obligation, not Rule 23(a)(4). *But see Ortiz*, 119 S. Ct. at 2320 (noting that the failure to create subclasses for present and future claimants in *Ortiz* was "*as contrary to* the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule

the need for subclasses on the bare statements that the class was "divided between present and future claims"[159] and "[p]re-1959 claimants accordingly had more valuable claims than post-1959 claimants."[160] Such conflicts created "disparate interests" among class members that fell "well within" the requirement to create subclasses.[161] The Court may have stopped short of the position that no conflict is de minimis, noting that "at *some point* there must be an end to reclassification with separate counsel."[162] Even this concession, however, seems a deliberate retreat from the language in *Amchem* suggesting that subclasses were required only when the interests of claimants clashed "[i]n significant respects."[163] In short, whether any broad discretion to exempt insubstantial conflicts survives *Ortiz* is open to question.[164]

23(a)(4)" (emphasis added)); Glickstein et al., *supra* note 135, at 319 (reading the stricter obligation to create subclasses established by *Ortiz* to apply to opt-out classes as well).

159. *Ortiz*, 119 S. Ct. at 2319. The Court elaborated only to note that " 'for the currently injured, the critical goal is generous immediate payments,' but '[t]hat goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.' " *Id.* at 2319–20 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997)). Here again, the Court appears deliberately to avoid any suggestion that the conflicts within the class need to be substantial before subclasses are required.

160. *Id.* at 2320 (citation omitted).

161. *Id.*

162. *Id.* (emphasis added).

163. *Amchem*, 521 U.S. at 626. *But see Ortiz*, 119 S. Ct. at 2331 (Breyer, J., dissenting) (interpreting the majority's "at some point" language to oblige courts to balance the advantages and disadvantages of increasing the number of attorneys involved in the litigation).

164. In *Petrovic v. Amoco Oil Co.*, Nos. 98-3816, 99-1334, 1999 U.S. App. LEXIS 34295 (8th Cir. Dec. 30, 1999), a case decided on December 30, 1999, the Eighth Circuit reached a profoundly different conclusion, one that only can be described as not reconciled easily with *Amchem* and *Ortiz*. In *Petrovic*, a group of property owners brought suit for property damage against the defendant oil company. *See id.* at *1. The suit was certified as a class action under Rule 23(b)(3). *See id.* at *5–6. The parties then negotiated a settlement that divided class members into three groups. *See id.* at *2. Under the terms of the settlement, the class members in the first group received compensation equal to 54% of the value of their property. *See id.* at *3. Those in the second group received a guaranteed payment of $1300. *See id.* Class members in the third group received no guaranteed compensation at all, despite the fact that the settlement granted the defendant easements on their properties to clean up the oil spill. *See id.* at *3, *27. The Eighth Circuit panel upheld the district court's refusal to appoint any subclasses. *See id.* at *7. Despite the glaring disparity in the allocation formula applied to groups within the class, *see id.* at *3, and despite evidence that the underground oil was migrating such that future claimants might be left uncompensated for their injuries by the settlement, *see id.* at *9, the panel concluded that the "stark conflicts of interest that the Supreme Court discerned in *Amchem* and *Ortiz* are [not] present here." *Id.* at *8. This conclusion was based in part on the court's observation that intra-class conflicts were minimized because all class members stood to gain from the settlement. *See id.* at *12. In *Amchem* and again in *Ortiz*, the Court emphatically rejected the argument that the common interest of class members

Unquestionably, the strict standard regarding subclasses imposed by *Ortiz* will discourage the use of the limited fund settlement in mass torts. Professor Green has remarked vividly that "in a mature litigation in which the landscape is littered with the bankrupt bodies of many major defendants, the balkanization of a large class of toxic tort victims into several subclasses seems to be a prescription for heightened conflict as opposed to efficient resolution."[165] Moreover, Professors Silver and Baker have argued that intra-class conflicts are so pervasive that "a firm 'no-conflicts' line . . . means the end of class actions."[166] In the aftermath of *Ortiz*, the accuracy of that prediction will be tested.

The difficulty of certifying limited fund settlement classes after *Ortiz* does not depend simply on those questions that the Court answered in its opinion. Uncertain law can be just as strong a deterrent to litigation as unfavorable law,[167] and *Ortiz* leaves a great deal of uncertainty in its wake. The Court left unresolved a substantial number of questions, the negative answer to any one of which could scuttle certification of limited fund mass tort classes.[168]

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in securing a settlement could paper over intra-class conflicts. *See Ortiz*, 119 S. Ct. at 2320–21; *Amchem*, 521 U.S. at 622–23; *see also supra* note 151 and *infra* note 207 (discussing other aspects of the *Petrovic* decision).

165. Green, *supra* note 67, at 1778; *see also* Coffee, *supra* note 155, at 1553 (explaining that "the result is to balkanize the class into an unmanageable assortment of small subclasses that cannot easily act in concert"); Cohen, *supra* note 19, at 315–16 ("It is possible to certify so many subclasses that the efficiencies of the class device are lost."). Furthermore, observers writing after *Ortiz* have predicted that the burden of managing a more cumbersome class structure will deter trial judges from certifying class actions. *See* Glickstein et al., *supra* note 135, at 320.

166. Silver & Baker, *supra* note 153, at 1493; *see also* Coffee, *supra* note 2, at 1444 (acknowledging the argument that mass tort class settlement would be impossible if any allocations within a class were suspect). Others, striking a less apocalyptic tone, have suggested that increasing the number of subclasses may increase the fairness of the process. One leading plaintiffs' attorney has suggested that more rigorous subclass creation "may complicate and prolong the procedures by which a class action settles, or a settlement class is created or approved, [but] it does not invalidate such procedures, and in the long run may ensure that these mechanisms worked to the greater benefit of class members." Elizabeth J. Cabraser, *Recent Developments in Nationwide Products Liability Litigation: The Phenomenon of Non-Injury Products Cases, the Impact of* Amchem *and the Trend Toward State Court Adjudication, and the Continued Viability of Carefully Constructured Nationwide Classes in the Federal Courts*, SC33 ALI-ABA 1, 26 (1998), *available in* WL, ALI-ABA database; *see also* Marcus, *supra* note 134, at 897 (arguing that increasing the difficulty of reaching settlement is good because "settlement should not be achieved at the expense of discernable subgroups who lack separate representation").

167. The deterrent effect of uncertain law is likely to be particularly powerful in the mass tort context, in which "[n]egotiating is expensive, and parties are reluctant to invest in negotiations that are bound to fail." Silver & Baker, *supra* note 153, at 1473.

168. *See* Mullenix, *supra* note 32, at B12 (suggesting that *Ortiz* left critical issues unresolved "that are destined to cause mischief in the lower federal courts").

The net effect of such uncertainty will be to leave limited fund settlement classes looking like a poor gamble indeed.

Among the critical questions left open are the following:

- Can unmanifested injuries satisfy the Article III injury-in-fact test for standing, and can future claimants satisfy the case or controversy requirement?[169]
- To what extent is notice required in a mandatory class, and can it ever be adequate to class members, such as mass tort future claimants, who are unaware of their injuries?[170]
- Do settlements that involve interstate classes with claims under non-identical state laws comport with the Rules Enabling Act if claimants are not divided into subclasses by state?[171]
- Do settlements involving damage claims that abridge claimants' access to individual trials violate their Seventh Amendment right to a jury trial?[172]
- Is it sufficient for the proponents of a limited fund settlement

169. *See Ortiz*, 119 S. Ct. at 2307. *See generally* Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215, 224–58 (1998) (discussing standing for future claimants and proposing that claimants without manifested injury be denied standing); *Leading Cases*, *supra* note 101, at 313 (asserting that had the Court opted to address the issue, it probably would have concluded that future claimants do not meet the constitutional requirements for standing). The author of the latter piece argued that the *Ortiz* Court should have seized the opportunity to hold that future claimants lack standing, thus forcing Congress's hand to enact a statutory solution to asbestos litigation. *See Leading Cases*, *supra* note 101, at 314; *see also supra* note 126 (discussing potential congressional asbestos legislation).

170. *See Ortiz*, 119 S. Ct. at 2312 n.19; *see also* MANUAL FOR COMPLEX LITIGATION, THIRD § 30.45 (1995) (stating that future claimants "cannot be given meaningful notice"); Cramton, *supra* note 57, at 835 (arguing that notice to future claimants cannot satisfy due process); Rutherglen, *supra* note 78, at 271–77 (arguing that the Federal Rules should be amended to require that the necessary level of notice be determined on a case-by-case basis); Todd W. Latz, Note, *Who Can Tell the Futures? Protecting Settlement Class Action Members Without Notice*, 85 VA. L. REV. 531, 532–68 (1999) (arguing that closer scrutiny of the adequacy of class representation can overcome lack of notice to future claimants).

171. *See Ortiz*, 119 S. Ct. at 2314; *see also* Wish v. Interneuron Pharms., Inc. (*In re* Diet Drugs Prods. Liab. Litig.), No. MDL 1203, CIV. A. 98-20594, 1999 WL 782560, at *13 (E.D. Pa. Sept. 27, 1999) (rejecting, on Rules Enabling Act grounds, a settlement that failed to account for different state law remedies available to different class members); *cf. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300–02 (7th Cir. 1995) (discussing the problem of different state laws in nationwide classes). One commentator also has suggested that the supplantation of bankruptcy by limited fund class actions may be found to violate the Rules Enabling Act. *See* Resnick, *supra* note 104 (manuscript at 8 n.9).

172. *See Ortiz*, 119 S. Ct. at 2314–15; *see also* Amicus Curiae Brief of Association of Trial Lawyers of America in Support of the Petitioners at *13–18, *Ortiz* (No. 97-1704), *available in* 1998 WL 464927 (arguing that the *Ortiz* settlement violated the Seventh Amendment by shifting claims to a non-jury tribunal without a valid waiver of the class members' rights).

to show a substantial probability that individual claims would compromise the rights of other claimants, rather than an inescapable certainty of such compromise?[173]

- Are any mass torts mature enough to provide a court with an adequate basis for valuation of unliquidated claims?[174]

In leaving so many unanswered questions in the path of future limited fund settlers, the Court may achieve through discouragement what it is reluctant to decree forthrightly—the abandonment of the limited fund settlement as a tool for resolving mass tort litigation.

To review, this Note has argued that *Ortiz* has rendered limited fund settlements so difficult to achieve that future litigants will be unable to continue to view them as a viable option for resolving mass tort cases. That is not to suggest, however, that such settlements will vanish altogether. It is therefore worth exploring the ways in which *Ortiz* permits or encourages innovation in structuring future limited fund settlements and considering whether such innovations are desirable. Looking primarily to recent limited fund cases in federal district courts, the discussion below anticipates three innovations that

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173. *See Ortiz*, 119 S. Ct. at 2316 n.26; *see also* Hudson, *supra* note 19, at 698–703 (arguing for a more flexible alternative to the inescapably compromises standard). Hudson describes such a standard as "perhaps the quintessential example of the 'Catch-22.' " Hudson, *supra* note 19, at 699.

174. *See Ortiz*, 119 S. Ct. at 2316–17 (assuming without deciding that the litigation history of asbestos, the most mature of all mass torts, provided a sufficient basis for valuing aggregate claim value). Mature mass torts are those that have reasonably complete discovery and an adequate number of cases resolved by verdict and settlement. *See* McGovern, *Mature Mass Torts*, *supra* note 66, at 659. *See generally 1999 Report*, *supra* note 6, at 22–25 (defining maturity and explaining its significance). The first court to apply *Ortiz* to a limited fund certification decision held that, due to the immaturity of the tort (fen-phen diet drug litigation), the court had an insufficient basis for calculating the total value of claims against the limited fund. *See Wish*, 1999 WL 782560, at *7; *cf.* Feinberg, *supra* note 19, at 366–67 (describing the difficulty of negotiating claim values in settlements of immature torts); Marcus, *supra* note 134, at 878–79 (noting the extreme difficulty of computing prospective tort claim values). *See generally* Drucker, *supra* note 28, at 215, 229–34 (arguing that class actions arising from immature torts should be forbidden).

Judicial estimation of mass tort liability has not been an unqualified success. *See* Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 368–69 (1994) (noting that claim estimation has been a "vexing" problem that has "haunted" recent mass tort cases). Two major mass tort settlements have foundered after the value of claims brought against settlement trusts vastly exceeded projections. *See* Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721, 726 (2d Cir. 1992) (observing that, as a consequence of an unexpectedly high volume of claims, the multi-billion dollar Johns-Manville trust was virtually penniless after less than two years of operation), *modified*, 993 F.2d 7 (2d Cir. 1993); TIDMARSH, *supra* note 45, at 77–78 (discussing the failure of a $4.23 billion multi-defendant settlement of breast implant claims caused by a massive underestimation of claim volume).

may arise in the jurisprudence spawned by *Ortiz*.[175] First, *Ortiz* likely will encourage limited fund settlement negotiators to attempt to sidestep the obligation to create subclasses simply by postponing allocation decisions until after settlement. Second, *Ortiz* may be read to discourage parties from negotiating settlements that measure the limited fund by the value of the defendant as a going concern. Finally, *Ortiz* may encourage limited fund defendants to insist upon retaining some or all of the savings in litigation costs made available by the settlement. Each of these three possible readings of *Ortiz* would undermine the Court's insistence on fairness for absent class members.

The Court in *Ortiz* appears to reinforce the position that even minor conflicts within a proposed class require creation of subclasses.[176] As discussed above, this subclass requirement will prove deeply problematic to future settling parties.[177] Having placed such a formidable obstacle in the path to certification, however, *Ortiz* may have left open a questionable means to avoid that obstacle: the no-allocation settlement.

The basic rationale for creating subclasses is that class members with conflicting interests must be represented separately when allocations of the fund are negotiated.[178] In other words, counsel to a class cannot make allocation decisions among competing interests within the class that they represent. That concern is never triggered, however, if the settlement itself makes no allocation decisions.[179]

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175. At least two other responses, not discussed in the text of this Note, also may be anticipated after *Ortiz*. One is certification of mandatory (b)(1)(B) classes on rationales other than the existence of a limited fund. The text of (b)(1)(B) includes no express requirement of a limited fund. *See* FED. R. CIV. P. 23(b)(1)(B). *Ortiz* recognized that non-limited fund (b)(1)(B) rationales could be argued, but did not reach the issue of whether such rationales are proper. *See Ortiz*, 119 S. Ct. at 2321 n.33. Non-limited fund (b)(1)(b) classes have been certified. *See In re* Telectronics Pacing Sys., Inc., 186 F.R.D. 459, 474 (S.D. Ohio 1999); White v. National Football League, 822 F. Supp. 1389, 1411 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994). The objectors in *Ortiz*, however, argued that (b)(1)(B) classes based upon claims exclusively for damages must show a limited fund. *See* Brief for Petitioner at *24 n.20, *Ortiz* (No. 97-1704), *available in* 1998 WL 464933. The settlement proponents did not agree. *See* Brief of Respondents Continental Casualty Co. at *24–30, *Ortiz* (No. 97-1704), *available in* 1998 WL 601118.

Another response that can be anticipated after *Ortiz* is that litigants will turn to state courts to file their limited fund settlements. A trend to state courts has already been well identified. *See, e.g.*, Erichson, *supra* note 67, at 2000–01 & n.106.

176. *See supra* notes 157–64 and accompanying text.

177. *See supra* notes 165–66 and accompanying text.

178. *See Ortiz*, 119 S. Ct. at 2319; Silver & Baker, *supra* note 153, at 1467, 1496.

179. It is important to distinguish between what this Note terms a "no-allocation settlement" and what might be called an "equal-allocation settlement." In a no-allocation settlement, all allocation decisions are postponed until after class certification and final

Because all claimants share an interest in maximizing the settlement fund, no conflicts materialize until allocation of the fund begins.[180] Historically, settlement negotiations have encompassed both the overall size of the fund and its allocation, but no reason has yet been articulated why they must.[181] Allocation decisions can be deferred until after certification and settlement approval, at which time either the court or a designated claims administrator allocates the money.[182]

Almost unnoticed, no-allocation settlements already have begun to appear. In the 1993 case *Butler v. Mentor Corp.*,[183] a federal district court certified a limited fund mandatory class of breast implant recipients and approved a $25.8 million settlement.[184] No subclasses were created, and all allocations were left for a court-appointed fund administration committee.[185] Four years later, another district court approved a $104 million settlement of orthopedic bone screw claims in *Fanning v. AcroMed Corp.*,[186] certifying a mandatory class without subclasses on a limited fund theory.[187] A claims administrator was appointed to make all allocation decisions.[188] In holding that there were no conflicts that required subclasses, the *Fanning* court pointed to the fact that all allocation decisions had been postponed.[189] In both cases, objectors to the settlements unsuccessfully challenged the fairness of binding class members without giving them any

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settlement approval. In an equal-allocation settlement, by contrast, the allocation is determined prior to final approval, and the allocation scheme chosen is one of equal payments to all class members. *Ortiz* rejected the argument that equal-allocation settlements cure conflicts within the class. *See Ortiz*, 119 S. Ct. at 2320. For an argument that equal-allocation settlements are appropriate when all claims have a negative net expected value—that is, when litigation costs exceed expected recovery—, see Coffee, *supra* note 155, at 1555–56.

180. *But see* Silver & Baker, *supra* note 153, at 1509 (arguing that conflicts are also inherent to earlier phases of the litigation).

181. Indeed, it is somewhat surprising that the no-allocation settlement has not become popular earlier, given that neither party to settlement negotiations has a financial incentive to negotiate the often complex allocation. *See* NEWBERG & CONTE, *supra* note 20, § 9.72, at 9-195; Coffee, *supra* note 155, at 1549–50.

182. *See infra* notes 183–91 and accompanying text (describing the use of such procedures in two recent cases).

183. Butler v. Mentor Corp. (*In re* Silicone Gel Breast Implant Prods. Liab. Litig.), No. CV 92-P-10000-S (N.D. Ala. Sept. 10, 1993) (order approving Mentor settlement class, certifying Mentor settlement class, and issuing final judgment as to claims against Mentor).

184. *See id.*

185. *See id.*

186. Fanning v. AcroMed Corp. (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158 (E.D. Pa. 1997).

187. *See id.* at 165.

188. *See id.* at 176.

189. *See id.*

information regarding allocation.[190] Neither case, however, was appealed.[191]

The theory that no-allocation settlements can be used to circumvent the obligation to create subclasses largely has been overlooked by commentators; the fact that such settlements are already occurring seems nearly to have escaped scholarly notice altogether. Among the suddenly voluminous literature on mass torts,[192] only one article directly discusses the use of no-allocation settlements to avoid subclasses.[193] While the November 1998 article by Professor John C. Coffee, Jr.[194] inaccurately identifies *Ortiz* (and only *Ortiz*) as a no-allocation settlement,[195] his comments nonetheless bear careful attention. A no-allocation settlement, he wrote, "denies class members any information about what they will receive as of the time the settlement is approved; instead, they are forced to buy the

190. *See* Gibson, *supra* note 104, app. E at 58, 79.

191. *See id.* at 57, 83. The fact that neither case was appealed probably helps to explain their relative obscurity. Both cases were examined recently in *id.* at 46–86.

192. For example, as of February 7, 2000, there were 218 articles in the Westlaw JLR database with "mass tort" in their titles; more than half were written in the past five years. *Cf.* McGovern, *supra* note 13, at 613–14 (suggesting that, in *Amchem*, both the Supreme Court and the counsel for the parties had evident difficulty with the steep learning curve for mass tort law).

193. In 1997, Professor Resnik, without mentioning subclasses, expressed her opinion that allocation decisions should not be postponed until after settlement approval. *See* Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 858–59 & n.88 (1997). Professor Resnik argued that judges asked to approve settlements "must be provided with information about their facets.... [Q]uestions of inter-class equity should not be postponed to some fictive later stage: disclosure of methods of allocation of funds or other remedial forms must be provided prior to the approval of a settlement." *Id.* at 858–59. Two other sources discuss the related idea that class counsel may avoid ethical missteps by passing off allocation decisions to a neutral party. *See* Feinberg, *supra* note 19, at 370–71; Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395, 406–07 (1998). Whereas Professor Feinberg endorses the practice, Professor Rheingold is critical: "While this technique sounds soothing because there is a judge or equivalent in the picture, in fact much of the vice of aggregate settlement still exists." Rheingold, *supra*, at 406.

194. *See* Coffee, *supra* note 155, *passim*.

195. *See id.* at 1554 n.23. As the Court in *Ortiz* noted, the decision to treat equally the unequal claims of those exposed before and after 1959 was itself an allocation decision. *See Ortiz*, 119 S. Ct. at 2320. The limits on recovery and longer payment terms for claimants who opted to try their claims also effected an allocation, *see id.* at 2319, as did provisions that prioritized payment of more seriously injured claimants. *See id.* at 2326 (Breyer, J., dissenting). Nevertheless, the Fifth Circuit appears to have believed that the settlement was a no-allocation settlement. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan II"), 134 F.3d 668, 669–70 (5th Cir. 1998) (per curiam) (holding that a "controlling difference[]" from *Amchem* was that here "there was no allocation or difference in award"), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

proverbial 'pig in a poke,' and await the subsequent claims resolution process."[196] Despite these fairness concerns, Professor Coffee anticipated general judicial approval of the no-allocation settlement device.[197] He predicted that such settlements would become increasingly popular as a means of avoiding the need for separate counsel during settlement negotiations.[198] Requiring separate representation at the time of allocation, he concluded, "creates an unfortunate incentive to employ [no-allocation settlements] in order to avoid intraclass allocations of the settlement fund (and, perhaps more importantly, the obligation to share the fee award with the counsel for these other subclasses)."[199]

Judicial approval of no-allocation settlements may not be quite so foregone a conclusion as Professor Coffee suggests, however. Perhaps the strongest vehicle for challenging the no-allocation settlement is a court's obligation under Rule 23(e) to find that a class settlement is fair before approving it.[200] The law in this area is largely uncharted, but at least one court has held that specifics regarding fund distribution are "truly critical considerations for certification,"[201] and another has found a proposed settlement unfair for the sole reason that it was insufficiently specific about how settlement funds actually would be spent.[202] These cases sound an appropriate note of caution. No-allocation settlements force trial judges to approve deals that they do not understand satisfactorily.

In addition to a fairness challenge, a settlement's failure to detail allocations within the class also could be challenged as inadequate

196. Coffee, *supra* note 155, at 1554.

197. *See id.*

198. *See id.*

199. *Id.*

200. Rule 23(e) provides: "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e). This language is understood to require courts to assess the fairness of any settlement. *See supra* note 20 (discussing the 23(e) fairness test).

201. Walker v. Liggett Group, Inc., 175 F.R.D. 226, 231 n.8 (S.D. W. Va. 1997).

202. *See* Martens v. Smith Barney, Inc., 181 F.R.D. 243, 268 (S.D.N.Y. 1998) ("The settlement leaves unclear both what new programs it will fund and to what extent existing Smith Barney expenditures can qualify .... The proposed programs are nowhere delineated or defined."). The court implied, however, that the specificity problem in the settlement might be cured simply by allowing the court to retain jurisdiction over disputes arising after settlement approval. *See id.* Issues regarding the fairness of no-allocation agreements also have arisen in the bankruptcy context. *See* RICHARD B. SOBOL, BENDING THE LAW 230 (1991) (noting an unsuccessful challenge to the failure to provide information about projected recoveries in disclosure to claimants arising out of the bankruptcy of the Dalkon Shield's manufacturer).

notice. Notice is an issue in class actions because it is one of the fundamental justifications for an exception to the general rule that claimants are only bound by adjudications to which they are a party.[203] Rule 23 requires that class members in opt-out classes under (b)(3) receive the "best notice practicable," but it imposes no equivalent notice obligation for mandatory class members under (b)(1).[204] In both types of classes, however, some form of notice is required before a court may approve a class settlement, in order to provide class members with an opportunity to offer objections to the settlement.[205] *Ortiz* expressly left open the question of the degree to which due process requires notice to mandatory class members.[206] It is not clear, then, whether failure to include allocation information would render notice to a mandatory class inadequate. The Second Circuit, in a 23(b)(3) settlement of Agent Orange litigation, has stated that there is no absolute requirement to detail a distribution plan in notice to class members.[207]

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203. *See, e.g.*, Rutherglen, *supra* note 78, at 264–68.

204. FED. R. CIV. P. 23(c)(2).

205. *See id.* 23(e) (requiring "notice of the proposed dismissal or compromise . . . to all members of the class in such manner as the court directs"); *see also* Rutherglen, *supra* note 78, at 272 (explaining the importance of such notice in mandatory classes). *See generally* 7B WRIGHT ET AL., *supra* note 20, § 1797, at 359–78 (discussing the 23(e) notice requirement). Rule 23(e)'s notice requirement can be quite demanding: the $18 million worldwide notice campaign in *Ortiz* was described by the settlement proponents as the most extensive ever undertaken in a class action. *See* Brief of Respondents Continental Casualty Co. at *47, *Ortiz* (No. 97-1704), *available in* 1998 WL 601118; *see also* TIDMARSH, *supra* note 45, at 67–68 (describing the *Ortiz* notice effort); Gibson, *supra* note 104, at 42–43, 55–56, 75–76 (describing the notice campaigns employed in three limited fund settlements).

206. *See supra* note 170 and accompanying text (noting the Court's non-resolution of the applicability of notice to mandatory classes). *See generally* Rutherglen, *supra* note 78, at 271–77 (suggesting that current law largely leaves the extent and form of notice for mandatory classes to the discretion of the trial court and proposing that extensive, individual notice be required when practical).

207. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 170 (2d Cir. 1987) (indicating that an absolute requirement would unduly "overburden" the parties and the court). The Eighth Circuit went considerably beyond *Agent Orange* in *Petrovic v. Amoco Oil Co.*, a post-*Ortiz* decision. Petrovic v. Amoco Oil Co., Nos. 98-3816, 99-1334, 1999 U.S. App. LEXIS 34295, at *29–32 (8th Cir. Dec. 30, 1999). In *Petrovic*, all settlement allocation decisions had already been made before notice of the settlement was undertaken. *See id.* at *30–32. The settling parties nonetheless chose to include only the aggregate settlement amount in the notice to class members, offering no information regarding individual recoveries, *see id.* at *29, despite the simplicity of the allocation provisions, *see id.* at *2–3 (describing the essential compensation terms in three sentences totaling under 100 words), and despite the fact that the overwhelming majority of class members were to be denied any monetary recovery, *see id.* at *3 (observing that "approximately 5,000" of the "more than 5,000" class members "receive no guaranteed compensation"). The Eighth Circuit panel concluded that the notice was adequate,

As Professor Coffee's "pig in a poke" observation illustrates,[208] however, notice that is silent on the issue that each class member would be expected to care about most—the amount that each will recover—seems anything but adequate.[209] A class member's right to object to a class settlement before it is approved is drained of its vitality if the fact most likely to trigger that objection is simply omitted. At the time when they have a chance to object to the settlement, all that class members know is that the total amount—in millions or billions of dollars—sounds like a considerable amount of money. If the plan actually undervalues the worth of the defendant, the class members will have little reason to undertake the difficult task of valuing the defendant independently. Class members, no less than trial judges,[210] are entitled to know the details of allocation before the approval of a settlement.

A second important post-*Ortiz* issue involves the means available to calculate the value of the limited fund defendant. Defendant valuation is critical to both the inadequacy element and the exhaustion element of *Ortiz*'s historical model.[211] Without a firm grasp on how much the defendant is worth, it may be impossible to meaningfully establish either the value of the limited fund or its exhaustion.[212] Accurately calculating how much the defendant is worth, however, is often more complicated than merely totaling up

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observing that a telephone number was provided in the notice that class members could have called to ask for data on potential awards. *See id.* at *32. Other aspects of this questionable decision are discussed *supra* at notes 151, 164.

208. *See supra* note 196 and accompanying text.

209. *See* 2 NEWBERG & CONTE, *supra* note 20, § 8.32, at 8-106 (explaining that notice under 23(e) generally should include the formula by which settlement funds will be distributed); Howard M. Downs, *Federal Class Actions: Diminished Protections for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 692 (1994) ("The failure to give adequate notice of a settlement plan of distributions . . . contributes to the egregious lack of protection afforded to class members."); Latz, *supra* note 170, at 556 (arguing that notice to class members should include a means of calculating individual recoveries). *But see* MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.212 (1995) (urging that notice should explain allocation procedures and clearly set out differences in relief, but noting with apparent approval the practice of postponing allocation decisions until after settlement approval); 7B WRIGHT ET AL., *supra* note 20, § 1787, at 220–21 (stating that settlement notice "may" include information on allocation).

210. *See supra* notes 200–02 and accompanying text.

211. *See supra* notes 102–23 and accompanying text (describing the limited fund historical model enunciated in *Ortiz*).

212. *See supra* notes 100–23 and accompanying text. At least hypothetically, exhaustion could be established without an accurate valuation of the defendant, if the settlement simply transferred total ownership of the defendant corporation to the class. In reality, however, it is hard to see how a settlement effecting such complete surrender could ever be in a defendant's interest.

the sum of its assets.[213] A going concern valuation, because it takes account of a defendant's projected future earnings as well as its present assets, will, at least in theory, often result in a substantially larger fund.[214] Just as a college student may have few tangible assets but considerable future earning potential, the value of a defendant company's future earning capacity may greatly exceed the sum of its present assets.

The Supreme Court has long recognized going concern analysis as the appropriate means for corporate valuation, at least in the bankruptcy context.[215] In *Consolidated Rock Products Co. v. Du Bois*,[216] the Court noted that " 'the commercial value of property consists in the expectation of income from it.' "[217] The Court

213. *See* Marcus, *supra* note 134, at 879 (explaining that calculating a mass tort defendant's assets "is much more complicated than obtaining a simple net worth figure from the defendant's books").

214. *See In re* Mobile Freezers, 146 B.R. 1000, 1002 (S.D. Ala. 1992) (observing that bankruptcy reorganization envisions that "the continued operation of the debtor will result in a stream of earnings . . . whose present value is greater than the liquidation value of the firm"), *aff'd per curiam sub nom.* Mobile Freezers, Inc. v. United States, 14 F.3d 57 (11th Cir. 1994) (mem.); Donald S. Bernstein & Nancy L. Sanborn, *The Going Concern in Chapter 11*, *in* CHAPTER 11 BUSINESS REORGANIZATION 1993, at 157, 159 (PLI Com. Law & Practice Course Handbook Series No. A647, 1993) (describing bankruptcy policy of rehabilitating and preserving troubled business "if continuity of its operations and management—i.e., *maintaining the business as a going concern rather than liquidating*—would maximize recoveries by creditors and shareholders"). *See generally* 7 COLLIER, *supra* note 22, ¶ 1129.06[2], at 1129-153 to -170 (describing going concern value and various methods for calculating it); MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY 741–60 (1996) (same); Peter V. Pantaleo & Barry W. Ridings, *Reorganization Value*, 51 BUS. LAW. 419, 420–36 (1996) (same). Theoretically, a limited fund settlement based on a going concern valuation could be structured in at least three different ways: an initial lump sum payment to plaintiffs with money borrowed against the defendants' future earning potential, *see, e.g.*, Fanning v. AcroMed Corp. (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 169 (E.D. Pa. 1997), installment payments, *see, e.g.*, Wish v. Interneuron Pharms., Inc. (*In re* Diet Drugs Prods. Liab. Litig.), No. MDL 1203, CIV. A. 98-20594, 1999 WL 782560, at *4 (E.D. Pa. Sept. 27, 1999), or transfer of some fraction of the company's stock to plaintiffs, *see, e.g.*, Gibson, *supra* note 104, app. E at 34 (describing *Eagle-Picher* bankruptcy reorganization terms).

215. *See* 7 COLLIER, *supra* note 22, ¶ 1129.06[2][a], at 1129-155. Similarly, when the value of a corporation must be calculated to determine dissenters' rights in a corporate acquisition, it is "well settled in case law . . . that fair value is based on going concern value and not on the liquidation value of the corporation." Rutheford B Campbell, Jr., *Fair Value and Fair Price in Corporate Acquisitions*, 78 N.C. L. REV. 101, 118 (1999). Professor Campbell notes that "[f]undamentally, under modern finance theory, the present value for any company . . . is determined by discounting the expected cash flows to be derived from the company in the future." *Id.* at 151.

216. 312 U.S. 510 (1941).

217. *Id.* at 526 (quoting Harrisburg & San Antonio Ry. v. Texas, 210 U.S. 217, 226 (1908)); *see also* Protective Comm. v. Anderson, 390 U.S. 414, 442 n.20 (1968) (defining reorganization value as the "present worth of *future* anticipated earnings" (citing Jerome

recognized, however, that such valuation was necessarily inexact: "Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."[218] That recognized imprecision,[219] however, contributes to making going concern valuation an uneasy fit under the historical model analysis. Can such "an estimate, as distinguished from mathematical certitude," satisfy the *Ortiz* requirement that the size of the fund be "set definitely at [its] maximum[]"?[220]

One federal court has already applied *Ortiz* in rejecting a going-concern-valued limited fund settlement, noting "[t]he difficulty in identifying, with any certainty, the scope of the fund."[221] The same court had approved a limited fund settlement based on a going concern valuation two years earlier.[222] Another district court rejected a going concern settlement in 1997, noting that "a limited-fund finding would have been facilitated greatly by the presence of a discrete, identifiable *res* rather than the amorphous corporate entity proffered by the parties."[223] With many courts already outside their expertise when asked to assess conventional corporate valuation,[224] and with *Ortiz* mandating heightened scrutiny of limited fund settlements,[225] the going concern settlement may be doomed by its imprecision.[226]

Frank, *Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act*, 18 N.Y.U. L. REV. 317, 342 n.68 (1941))).

218. *Consolidated Rock Prods. Co.*, 312 U.S. at 526 (citations omitted).

219. *Accord In re* Pullman Constr. Indus., 107 B.R. 909, 932 (Bankr. N.D. Ill. 1989) (describing going concern valuations as "only educated estimates"); 7 COLLIER, *supra* note 22, ¶ 1129.06[2][c], at 1129-69 (noting that going concern valuation is "much like 'a guess compounded by an estimate' " (quoting Peter Coogan, *Confirmation of a Plan Under the Bankruptcy Code*, 32 CASE W. RES. L. REV. 301, 313 n.62 (1982))); Pantaleo & Ridings, *supra* note 214, at 436–40 (explaining the difficulty that courts have faced in accurately valuing corporations).

220. *Ortiz*, 119 S. Ct. at 2311.

221. Wish v. Interneuron Pharms., Inc. (*In re* Diet Drugs Prods. Liab. Litig.), No. MDL 1203, CIV. A. 98-20594, 1999 WL 782560, at *8–9 (E.D. Pa. Sept. 27, 1999).

222. *See* Fanning v. AcroMed Corp. (*In re* Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 168–70 (E.D. Pa. 1997).

223. Walker v. Liggett Group, Inc., 175 F.R.D. 226, 233 n.11 (S.D. W. Va. 1997); *see also* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan II"), 134 F.3d 668, 670–71 (1998) (Smith, J., dissenting) (asserting that a corporation valued as a going concern cannot constitute a limited fund), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

224. *See* Campbell, *supra* note 215, at 104 (noting that cases involving corporate valuation "can be puzzling for courts unaccustomed to the world of corporate finance").

225. *See supra* notes 150–51 and accompanying text.

226. *See supra* notes 218–20 and *infra* note 234 and accompanying text.

As if the difficulty of establishing inadequacy were not enough, the exhaustion element of the historical model increases the complexity of the court's calculation exponentially. *Ortiz* noted that exhaustion traditionally requires that "the whole of the inadequate fund . . . be devoted to the overwhelming claims."[227] That formulation is fundamentally at odds with going concern settlements, in which the whole point is to allow the defendant to keep assets sufficient to continue earning money.[228] Even if exhaustion is understood more broadly so as to require simply that "the class as a whole [be] given the best deal,"[229] the exhaustion element would still present a nearly insurmountable obstacle if interpreted strictly. The calculation demanded is inherently nebulous: have the parties perfectly balanced the need for a maximized payment with the need to leave the defendant with assets sufficient to maximize its income and, thus, maximize its payments?[230] Considering both the fact that the settling parties are before the court in a non-adversarial posture and the ever-present danger in mass tort settlements that class counsel has "sold out" the class,[231] the court's ability to make such a post-hoc judgment independently is quite uncertain.[232]

If *Ortiz* is so interpreted, rejection of settlements based on a limited fund valued as a going concern may be an unfortunate development. Particularly in cases involving smaller defendants, going concern valuations have the potential to produce superior resolutions for all concerned, creating the largest possible recovery fund while allowing the defendant to survive intact. On the other

227. *Ortiz*, 119 S. Ct. at 2311.

228. *See supra* note 214 and accompanying text.

229. *Ortiz*, 119 S. Ct. at 2311.

230. *See* Wish v. Interneuron Pharms., Inc. (*In re* Diet Drugs Prods. Liab. Litig.), No. MDL 1203, CIV. A 98-20594, 1999 WL 782560, at *9 (E.D. Pa. Sept. 27, 1999) (holding that a proposed limited fund settlement violated the *Ortiz* exhaustion element because the defendant corporation was allowed to retain a portion of its assets in order to continue in business while the class members received a debt instrument to be paid back from the future earnings of the company). Despite the *Wish* settlement proponents' argument that the proposed payment structure represented the best deal possible, *id.* at *8, the court stated that " [t]he *Wish* class's participation in Interneuron's future . . . is fraught with risk, including . . . the risks found in financial markets as a whole. Those risks are better shouldered by Wall Street investors than the members of a compulsory class under Rule 23." *Id.*

231. *See Ortiz*, 119 S. Ct. at 2317–18; 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.84[1] (Matthew Bender 3d ed. 1999); Coffee, *supra* note 2, at 1373–83.

232. *Cf.* 7 COLLIER, *supra* note 22, ¶ 1129.06[2][c], at 1129-70 (noting the risks inherent to going concern valuation, because " 'formulas, like trained animals, perform according to what they are fed' " (quoting *In re* Consul Restaurant Corp., 146 B.R. 979, 986 n.15 (Bankr. D. Minn. 1992))).

hand, the Court in *Ortiz* betrays a basic skepticism about the integrity of mass tort class counsel and the ability of trial judges to ensure that integrity.[233] The benefits that going concern valuation theoretically makes possible could, in reality, be swallowed up by the absence of clear and reasonably ascertainable standards.[234] Yet, to reject the potential benefits of going concern settlements on these grounds is to declare the inability of the American adversarial system to produce just results in mass tort litigation. More sophisticated judicial scrutiny of corporate valuation in settlements, rather than a blanket rejection of going concern settlements, appears to be the sounder course.[235]

A third issue likely to arise in post-*Ortiz* litigation involves interpretation of the exhaustion element of the historical model. When a defendant faces tens of thousands of separate tort claims, it is far less expensive to negotiate a single settlement than to litigate each case separately. In mass tort cases, the savings can be in the hundreds of millions of dollars.[236] Thus, it is hardly surprising that a defendant in a limited fund case would seek to retain for itself the money that, absent settlement, it would have spent on defense costs. The question after *Ortiz* is whether allowing a limited fund defendant to emerge from settlement with the saved litigation costs comports with the exhaustion element of the historical model.

Because mass tort defendants are not, as a rule, motivated by a strong sense of charity,[237] they are likely to enter into limited fund

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233. *See supra* note 107 and accompanying text (noting the Supreme Court's explicit concern about the danger of collusion in mass tort settlements).

234. *Cf.* H.R. REP. NO. 95-595, at 222 (1977), *reprinted in* 13 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY (1979) (observing that because of its inherent uncertainty, going concern valuation is often "a method of fudging a result that will support the plan that has been proposed").

235. *Cf.* Campbell, *supra* note 215, at 104 (noting that courts in jurisdictions that frequently handle cases requiring complex corporate valuations "in recent years have done much better in dealing with such issues"); Erichson, *supra* note 67, *passim* (discussing the emerging importance of careful independent judicial scrutiny of class action settlements).

236. *See, e.g.*, Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 529 (E.D. Tex. 1995), *aff'd sub nom.* Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). To understand what is at stake, consider a simple hypothetical mass tort defendant. This defendant has total assets of $100 million available to spend on defense costs, and it faces tort liability that exceeds that amount. If the defendant litigates each claim individually, it will pay out $60 million in settlements and judgments and spend the other $40 million on litigation expenses. If, instead, the defendant negotiates a limited fund class settlement, it will spend only $5 million on litigation expenses, thus freeing up $35 million.

237. *See, e.g.*, SOBOL, *supra* note 202, at 13, 172 (describing a mass tort defendant's apparent effort to discourage claims by interrogating plaintiffs about details of their sexual

settlements only if they expect better economic outcomes than they could get through bankruptcy or other forms of aggregated litigation. Whether the limited fund mandatory class settlement should provide that better economic outcome remains an open question. Both the Fifth Circuit and Chief Judge Parker squarely held that limited fund settlements need not equal what defendants would have paid through individual litigation.[238] *Ortiz* expressly left the question unanswered,[239] although several parts of the opinion cast serious doubt on the Court's openness to a plan that allows a settling defendant to retain a portion of its limited fund.[240]

Which standard is appropriate? Should exhaustion focus on the benefit to the plaintiffs or the cost to the defendant? A plaintiff-

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histories).

238. *See* Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 985 (5th Cir. 1996) ("To the extent intervenors are arguing that certification is improper because Fibreboard fares better under the class action settlement than under a bankruptcy proceeding, we find their focus misplaced. The inquiry instead should be whether the class is better served by avoiding impairment of their interests."), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999); *Ahearn*, 162 F.R.D. at 527 ("[A] rule [requiring that a settlement exhaust a defendant's resources] would make no sense, would discourage settlements and has been rejected. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all." (citations omitted)).

239. 119 S. Ct. at 2322 ("If a settlement thus saves transaction costs . . . may a credit for some of the savings be recognized . . . as an incentive to settlement? It is at least a legitimate question, which we leave for another day.").

A related issue, more complicated than the reduced transaction costs issue addressed by the Court, arises from the fact that the settlement itself could affect the value of the corporation. For example, in *Ortiz*, Fibreboard's stock value rose nearly 300% on announcement of the settlement. *See* Coffee, *supra* note 2, at 1402. Because the mere fact of settlement can have a major impact on the defendant's value as a corporation, would exhaustion require that the parties attempt to anticipate this impact? *Cf.* Campbell, *supra* note 215, at 112–16, 122–27, 129–33 (noting that in corporate acquisition cases that require courts to calculate corporate value in order to determine the rights of takeover dissenters—when the acquisition itself creates value—courts are inconsistent in factoring that new value into their calculations of the corporate value). In the corporate acquisition context, the term for the added value created by the very act that triggers the need to calculate corporate value is "synergy." *Id.* at 112.

240. The Court noted that traditional "limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a *defendant* a better deal than *seriatim* litigation would have produced." *Ortiz*, 119 S. Ct. at 2311 (emphasis added). The Court went on to state that a limited fund settlement "requires assurance that claimants are receiving the maximum fund, not a potentially significant fraction less." *Id.* at 2323. The Court expressly rejected the dissent's argument that allowing Fibreboard to retain nearly all of its assets was permissible because the settlement made more money available than any likely alternative because "even if we could be certain that this evaluation were true, this is to reargue *Amchem*: the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b)." *Id.*

benefit standard would require only that the settling plaintiffs receive as much as they would have through individual litigation. Under a plaintiff-benefit standard, the defendant could retain some or all of the litigation cost savings resulting from the settlement. The defendant-cost standard, on the other hand, would require that the defendant's total payments under the settlement equal what their total payments would have been absent settlement. Thus, a defendant-cost standard would ensure that the saved defense costs would go to the settling plaintiffs.

There is much to be said for allowing a defendant to retain some portion of the transactional cost savings under a plaintiff-benefit standard. Defendants would be encouraged to settle and resolve their claims, thus hastening compensation to victims and relieving docket congestion.[241] Likewise, economically valuable businesses could retain assets sufficient to remain afloat.[242] Additionally, a plaintiff-benefit standard arguably promotes fairness by providing victims with just as much compensation as they would have received had all claims been litigated individually. Such a standard ensures that some money is left over to pay commercial creditors.[243] Finally, an argument can be made that a plaintiff-benefit standard serves to counterbalance an "overclaiming" effect attributed to mass tort litigation.[244]

Nevertheless, the arguments for a defendant-cost standard may be more compelling. There is a basic disconsonance in using a limited fund to force all claimants to accept a diminished share of their damages, while allowing a defendant to retain a substantial portion of that fund. Until all plaintiffs receive undiscounted compensation, the defendant should not recover.[245] A plaintiff-benefit standard also

241. *See Ahearn*, 162 F.R.D. at 527 (concluding that a defendant-cost standard would discourage settlement); Green, *supra* note 67, at 1798–99 (arguing that encouraging settlement would produce outcomes that are more efficient and remunerative for asbestos victims).

242. *See Ortiz*, 119 S. Ct. at 2332 (Breyer, J., dissenting) (praising the Fibreboard settlement for allowing the company to remain in business, a result "far better for Fibreboard, its employees, its creditors, and the communities where it is located").

243. *See* Hudson, *supra* note 19, at 690–97.

244. McGovern, *supra* note 15, at 1022–23 (suggesting that while in general less than 20% of potential tort claims are pursued, in mature mass torts more than 100% of viable claims are brought); *see also 1999 Report*, *supra* note 6, at 16–17 (same); *cf.* Drucker, *supra* note 28, at 219–20 (arguing that class actions attract so many plaintiffs that they are unfair to defendants). *But see* Resnik, *supra* note 193, at 844 (suggesting that the limited participation of victims in individual tort litigation "is not an appealing alternative"); Schuck, *supra* note 126, at 961–62 (arguing that the benefits of the higher claim rate in mass torts outweigh the negative features of "junk claims").

245. This argument is analogous to the absolute priority rule established by the

could allow corporate wrongdoers to profit at the expense of those innocent victims who would have received full compensation through individual litigation. Finally, on a practical level, a plaintiff-benefit standard would appear to create incentives for defendants to under-insure and over-defend.[246]

Ultimately, deciding which standard to use in measuring exhaustion (like many of the issues considered in this Note) may, practically speaking, turn on one's views regarding the relative merits of bankruptcy and limited fund settlements as mass tort resolution tools. The choice between bankruptcy and class action is a matter on which courts and commentators are deeply divided,[247] with an

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Bankruptcy Code. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (1994). Under the absolute priority rule, a debtor's shareholders cannot receive any money from the debtor's estate until all unsecured creditors have been paid in full. *See id*; *see also* 7 COLLIER, *supra* note 22, ¶ 1129.04[4][a], at 1129-82 to -89 (describing the absolute priority rule). The Court in *Ortiz* noted its concern about procedural innovations that would undermine the structural protections provided to creditors in bankruptcy. *See Ortiz*, 119 S. Ct. at 2321 n.34.

246. Because ample insurance would serve to raise the bar for establishing a limited fund, it would make it more difficult for a defendant to capture the savings available through a plaintiff-benefit standard limited fund class settlement. Similarly, it might be in a defendant's economic interest to increase unnecessarily its defense costs, when such an increase would allow the defendant to establish the existence of a limited fund and thus capture the transactional savings of an aggregated solution.

247. Perhaps a majority of courts and commentators favor class actions over bankruptcy, pointing to concerns such as expense, delay, and stigma. *See, e.g.*, Flanagan v. Ahearn (*In re* Asbestos Litig.) ("Flanagan I"), 90 F.3d 963, 985 (5th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997), *reaff'd per curiam*, 134 F.3d 668 (5th Cir. 1998), *rev'd and remanded sub nom.* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999); *In re* Telectronics Pacing Sys., Inc., 186 F.R.D. 459, 475 (S.D. Ohio 1999); Cimino v. Raymark Indus., 751 F. Supp 649, 652 (E.D. Tex. 1990), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998); Cohen, *supra* note 19, at 320–22; Erichson, *supra* note 67, at 2016; Feinberg, *supra* note 19, at 364–65; Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405 *passim* (1999); Raskolnikov, *supra* note 24, at 2578–82; *see also* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1722 (1998) (noting concerns about bankruptcy as a tool for resolving future claims in mass tort). A substantial and perhaps growing group of bankruptcy partisans exists. *See, e.g.*, Keene v. Fiorelli (*In re* Joint E. & S. Dist. Asbestos Litig.), 14 F.3d 726, 732 (2d Cir. 1993); NATIONAL BANKR. REVIEW COMM'N, *supra* note 147, at 334–41; Coffee, *supra* note 2, at 1457–61; Issacharoff, *supra* note 25, at 823–24; Mabey & Zisser, *supra* note 24, at 494; Marcus, *supra* note 134, at 881; William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995); *cf.* Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451 *passim* (1998) (discussing favorable aspects of bankruptcy for defendants); Resnick, *supra* note 104 (manuscript at 4–5) (suggesting that bankruptcy is an appropriate tool to be used in conjunction with others to aggregate mass torts). For a balanced discussion of the advantages and shortcomings of both options, see Willging, *supra* note 8, app. C at 81–84; Zipes, *supra* note 2, *passim*.

unfortunate dearth of careful research to inform the debate.[248] For present purposes, it is enough to recognize that *Ortiz* has made limited fund class certification substantially, perhaps prohibitively, more difficult and uncertain. A probable consequence is that, barring congressional intervention,[249] more mass torts will be resolved through bankruptcy.[250]

In 1935, the link between asbestos and cancer was reported for the first time.[251] In 1974, the first asbestos class action was attempted.[252] To the dismay and, one senses, the astonishment of most observers, the American justice system stands no more ready today to address meaningfully the continuing misery of the victims of asbestos than it did in decades past.[253] Through that failure, it has become itself one of those victims.

In his opinion in the case that would become *Amchem*, then-Judge Edward Becker wrote, "Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other."[254] Judge Becker chose institutional values, and in *Ortiz*, the Supreme Court did the same. A generation from now the correctness or incorrectness of that choice may be more apparent. One thing is clear today: the elephants are still thundering closer, and there may well be one less weapon available to bring them down.

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248. *See* Jones, *supra* note 247, at 1722 ("More rigorous scholarship from both the bankruptcy and civil procedure communities is urgently needed."). One of the few valuable comparisons of bankruptcy and class actions is a collection of case studies examining the use of each tool that was published as an appendix to the report of the Working Group on Mass Torts. *See* Gibson, *supra* note 104, app. E.

249. *See supra* note 126 (discussing proposals and prospects for asbestos legislation).

250. Bankruptcy is not open to all mass torts litigants either, however. *See, e.g., In re* SGL Carbon Corp., Nos. 99-5319, 99-5382, 1999 WL 1268082, at *7, *14 (3d Cir. Dec. 29, 1999) (ordering dismissal of corporation's Chapter 11 bankruptcy petition because of a lack of good faith, on the grounds that the corporation remained free of serious financial danger at filing).

251. *See* 1991 REPORT, *supra* note 2, at 5; CASTLEMAN, *supra* note 3, at 50. Professor Castleman details the extensive evidence of industry knowledge of the harmful effects of asbestos. *See id.* at 1–158, 581–697.

252. *See* Yandle v. PPG Indus., 65 F.R.D. 566, 567 (E.D. Tex. 1974).

253. Professor Resnik aptly described this dismay when she wrote that "a good many judges, lawyers, and other participants . . . are struggling with misery that they see around them and are trying, in a world of second-best responses, to do something useful in the face of huge problems." Resnik, *supra* note 193, at 860.

254. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 616 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).