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Feasting While the Widow Weeps: Georgine v. Amchem Products Inc.

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FEASTING WHILE THE WIDOW WEEPS: *GEORGINE v. AMCHEM PRODUCTS, INC.*

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† Professor of Law, Boston University Law School. I served as an expert witness on the ethics of class counsel in this matter, testifying for the objectors to the settlement. I worked many hours on this case, reading stacks of documents, reviewing case law, writing a report with Professor Roger Cramton, and testifying both in a deposition and at the fairness hearing. I was paid for those hours and made what for me is a great deal of money.

I did not want to be involved in this case. It felt like volunteering to stand in front of a moving train. As I saw it, 20 major corporations, leaders of the plaintiffs' bar, the AFL-CIO, and the judiciary, were all lined up on the other side, rooting for this settlement to go through. I had testified in court as an expert witness only once before. My dearest friend, colleague, and coauthor, Geoffrey C. Hazard, Jr., a person whom I respect deeply, was testifying for the settling parties, and while we sometimes disagree, I had little taste for taking a stand in opposition to him on such an important and hotly contested matter. In short, I expected that serving as an expert witness in this matter would be extremely unpleasant, and, even before I was subpoenaed in front of my criminal law class, it was apparent that I was right.

I agreed to be involved for one reason: I believed that what the settling parties had done was wrong and that someone had to stand up and say so. In an effort to impeach my testimony the settling parties suggested that I was motivated not by money but by passion. They got at least that one thing right. Passion is indeed what motivated me to speak out against what they had done. With their questions the settling parties implied I should be embarrassed by my obvious passion. I was not and am not. Being passionate does not mean one is simpleminded or that one's position is not sound. It does not preclude being right or being effective at communicating that one is right. Aside from a modest honorarium from Cornell for my participation in this symposium, I have not received any payment to write this Article. Like my involvement in this case, however, this work is filled with my passion about the wrong that was done here by class counsel, by the lawyers for the defendants, and by the court. I trust that it stands as a testament to the fact that passion does not rule out reason.

I would like to thank Bob Bone, George Cohen, Roger Cramton, Jack Londen, Rhonda Wasserman, David Wilkins, and Brian Wolfman for their thoughtful comments on this piece and all the participants in the Boston University Law School faculty workshop. Special thanks are due to four friends—Robert Cushman, Henry Howe, Michael Robinson, and Tom Ross—who pitched in to help me rework parts of this Article, particularly Michael who helped me edit this work into the wee hours of two mornings. Finally, thanks go to Bruce Matzkin, Boston University Law '96, for his valuable research assistance and good cheer, and to Robert Mueller, Boston University Law '94, for donating his time and providing detailed research memoranda on various aspects of this work.

I
BEARING WITNESS[1]

This Article tells the story of *Georgine v. Amchem Products, Inc.*,[2] a class action involving asbestos-related personal injury claims. *Georgine* was filed in federal district court on January 15, 1993.[3] On the same day, class counsel and the lawyers for the defendants filed a proposed settlement with the court.[4] The court authorized notice to the class, allowed a period for opt-outs,[5] recognized objectors to the settlement,

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1 *See* Austin Sarat, Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment (July 1994) (unpublished manuscript, on file with author) (describing the important role death penalty lawyers play in witnessing, recording, and remembering the violent administration of the criminal laws).

2 157 F.R.D. 246 (E.D. Pa. 1994).

3 *Id.* at 257.

4 *Id.*

5 Class members had 12 weeks from the time the notice period began in which to find out about the class action, decide whether to opt out, and mail their requests for exclusion. *Id.* at 311-12. The court denied motions to extend the opt-out period and refused to accept requests for exclusion that were signed by attorneys on behalf of their clients. *Id.* at 312. Over 13,000 requests for exclusion were denied because they arrived after the opt-out deadline, and another 14,879 requests were denied because they were signed by the clients' lawyers. Apart from these 28,652 unsuccessful attempts to opt out, there were some 235,000 requests for exclusion. *Id.*

Six months after approving the settlement, the court granted the request of class counsel and the defendants to void the remaining 235,000 opt-outs. Georgine v. Amchem Prods., Inc., 160 F.R.D. 478 (E.D. Pa. 1995). The court found that counsel opposed to the settlement had made misleading statements, which may have deceived people into opting out. *Id.* at 485, 498. For that reason, the court held that to be excluded from the class the 235,000 people who had signed exclusion requests before the original deadline would have to repeat that process. *Id.* at 502. These people would first be notified by the court that the court had found the settlement to be fair and reasonable. *Id.* at 509. People who had not previously opted out and those who had their opt-out requests voided by the court's earlier action would not be provided with a new opportunity to opt out. *Id.* at 503; *see also* Georgine v. Amchem Prods., Inc., No. 93-0215, 1995 U.S. Dist. LEXIS 5593 (E.D. Pa. Apr. 24, 1995) (denying the requests of people who had missed the original opt-out deadline for additional time to opt out.).

ordered discovery proceedings, held a fairness hearing, and, in August 1994, approved the settlement. The objectors to the settlement retained me to testify as an expert witness on the ethics of class counsel.[6]

The *Georgine* defendants were nineteen financially viable companies and one company now in bankruptcy.[7] The class action was brought on behalf of all people who had *not* filed suit against the twenty corporate defendants by January 15, 1993, and who had been occupationally exposed to the asbestos products of the defendants or who had been exposed to asbestos from those products through the occupational exposure of a family member.[8] The class thus included all the people who are well now but may someday get sick from their past exposure to the defendants' products and *some* of the people who are sick now from that exposure—that is, the sick people who did not file suit by January 15, 1993.[9]

It is a huge class. Although no one knows precisely how large the class is,[10] this suit may be one of the largest mass tort class actions ever filed. *Georgine* is an important case for that reason alone, but it is espe-

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6 *See supra* note †.

7 The 19 financially viable defendants were: Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certainteed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Chemicals and Plastics Co.; and United States Gypsum Co. The Asbestos Claims Management Corp., formerly the National Gypsum Company, is the entity subject to the bankruptcy court's jurisdiction. It is also currently seeking to withdraw from *Georgine*. *See Other News*, L.A. TIMES, Nov. 26, 1994, at D2. For the implications of this development, see *infra* note 30.

As to the financial viability of the 19 companies, see the court's discussion of the testimony offered on their insurance coverage and their ability to fulfill their uninsured obligations under the settlement. *Georgine*, 157 F.R.D. at 288-91. On whether these companies would have remained viable had *Georgine* or some comparable settlement not been approved, see *infra* notes 252-55 and accompanying text (detailing concerns of the *Georgine* class representatives, members of the plaintiffs' bar, the settling parties, and the court that without *Georgine* or its equivalent, the defendant companies might not remain financially viable).

8 *See Georgine*, 157 F.R.D. at 257 (defining class).

9 Consider, for example, Mervin Baylis. *See* Georgine v. Amchem Prods., No. 93-0215, 1994 WL 637404 (E.D. Pa. Nov. 10, 1994). Mr. Baylis first started feeling ill in October 1993. *Id.* at *6. Between January 3, 1993, and January 13, 1994, he was hospitalized and diagnosed with mesothelioma. *Id.* After release, he found a suitable physician to treat him on January 24, 1994, the day that the two week opt-out period in *Georgine* ended. *Id.* Mr. Baylis did not receive actual notice of the class suit, was busy seeking treatment for his fatal disease during the entire opt-out period, and is now considered a member of the *Georgine* class. *Id.* at *7. The court denied his request to opt out on the ground that he filed it after the opt-out period was closed. *Id.*

10 157 F.R.D. at 261 (conceding that no one knows exactly how large the class is, but acknowledging that it includes "tens of thousands"). *See also id.* at 325 (noting that objectors have estimated that the class consists of between 20 and 30 million people, so as to suggest that 235,000 opt-outs does not signify broad class dissatisfaction).

cially important because it is already serving as a model for other class actions,[11] and the model is fundamentally flawed. *Georgine* is important because it is big, because it is being copied, and because it is wrong.

I write to bear witness to what went wrong in this case: the collusion between class counsel and the defendants;[12] the district court's willingness to turn a blind eye to the facts[13] and neglect the law;[14] the spectacle of lawyers telling contradictory stories about their actions to a tribunal that didn't seem to care which story the lawyers told or how often the story changed;[15] the presentation and admission of testimony at the fairness hearing on what result other federal judges might like to see in this case;[16] and the mistreatment of the widows who served as named representatives for the class—people whose experiences illustrate how the interests of class members were subordinated to the interests of persons not parties to this suit.[17] I also write to expose the serious defects in the *Georgine* model, a model that invites defendants who harm large groups of people to pay a premium to the first victims who file claims in exchange for lower and more limited liability to all future claimants.[18]

I also make several proposals and suggest some new areas of academic and judicial inquiry. For example, I propose that underinclusive class definitions, now mentioned by courts only as a problem that might plague defendants,[19] be considered by courts as a sign of collusion.[20] I argue that courts should replace ad hoc review of the adequacy of class counsel with more general prohibitions, such as a ban on simultaneous representation of two classes against a common defendant.[21] I propose that the ethics rules be read to require an increased duty of candor to the court on the part of lawyers presenting

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11 *See infra* text accompanying notes 89-91. *See also CCR Asbestos Settlement—Victory?*, WORLD INS. REP., Aug. 26, 1994 ("CCR has already been approached by several asbestos descendants [sic] interested in joining a 'second wave' Georgine II settlement").

12 I believe the word collusion is a fair way to characterize the facts set forth in part II of this Article. I am not using the word to imply that I know of additional facts not explicitly stated in this Article about the interaction between class counsel and defendants.

13 *See infra* part II.

14 *See infra* part III.

15 *See infra* part IV.

16 *See infra* notes 465-75 and accompanying text.

17 *See infra* part V.

18 *See infra* part II.

19 *See, e.g.*, McCarther v. Camelot Inn, 513 F. Supp. 355, 356 n.1 (E.D. Ark. 1981) (underinclusive class denied defendant the benefit of prevailing in a class action, to which the defendant would be entitled under FED. R. CIV. P. 23); Escamilla-Montoya v. Palmer, No. 79-C-3874 (N.D. Ill. May 26, 1981) (LEXIS, Genfed library, Dist. file) (rejecting as disingenuous argument that underinclusive class may subject the defendants to inconsistent requirements).

20 *See infra* part II.B.

21 *See infra* text accompanying notes 362-70.

settlements that require court approval, and that before granting approval, courts should demand forthright responses from the settling lawyers on matters within their personal knowledge.[22] I also question what role, if any, malpractice suits against class counsel might play in assuring counsel's fidelity to the class, a possibility that the law and economics crowd might fruitfully examine.[23] However, my primary goal in this Article is not to make proposals, but to point out abuse in the hope of inspiring others to make proposals[24] or to rethink proposals already made.

I write neither to condemn nor praise the efficiency arguments that might be made to justify the use of class actions to resolve mass tort claims.[25] I do not urge that class actions never be used to resolve mass tort claims,[26] nor do I denounce all class actions that are filed and settled on the same day (known as "settlement class actions").[27] I do not condemn all uses of class actions to resolve the claims of those who have not yet manifested injury.[28] Finally, I do not write to propose some macro solution to the ethical problems that plague class action suits.[29] Instead, I write to describe how empty the following safeguards proved to be in one case: adequacy of representation, class

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22 *See infra* text accompanying notes 371-80, 416-19.

23 *See infra* text accompanying notes 457-64.

24 *See, e.g.*, William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995) (proposing amending FED. R. CIV. P. 23(e) to provide courts with guidelines for approval of class action settlements).

25 For an interesting discussion of the efficiency of the class action form as a method of resolving mass torts, see PETER H. SCHUCK, AGENT ORANGE ON TRIAL 277-97 (1986). On the "efficiency" of *Georgine* itself, see *infra* text accompanying notes 187-88.

26 *See, e.g., infra* text accompanying notes 298-302 (providing a favorable picture of the class action settlement of the tort claims of heart valve recipients).

27 I share the concerns expressed by several courts that such settlements provide fertile ground for collusion. *See infra* notes 67, 337-40 and accompanying text (noting need for careful court scrutiny of settlement process). However, I stop short of calling for a prohibition on such settlements, arguing instead that courts should take their oversight responsibilities more seriously. *See infra* notes 347-49 and accompanying text (same).

28 *See infra* text accompanying notes 298-302 (generally approving of the settlement in the heart valve case, which included the claims of those whose valves had not yet malfunctioned). On the other hand, I express serious concerns about class actions that purport to resolve the claims of people whom I call "unknowing," i.e., people who are not presently ill, who cannot be individually identified by the parties, and who may not even know that they have been exposed to the defendants' dangerous product. *See infra* text accompanying notes 203-05.

29 For an example of such an effort, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 551 (1994) (arguing that the positive law embodied in traditional ethics rules does not function well in mass tort cases and attempting to construct new ethical standards for such cases based on the concepts embodied in communitarian and communicatarian ethics). Unlike Judge Weinstein, I neither survey the various types of ethical problems that plague class suits nor suggest how courts and lawyers might resolve each of them. I do advocate that courts adopt some general standards to assess the adequacy of class counsel's performance and that courts use such standards to supplement the ad hoc review of adequacy that now takes place. *See infra* text accompanying notes 361-70.

counsel's ethical obligations, and the court's duty to review class action settlements. I write to challenge the academics and judges who justify their positions by leaning on one or more of those supposed safeguards. I write to draw attention to the failure of these safeguards and to stimulate new thought on how more meaningful protections might be substituted for empty promises.

This Article is long and detailed. It must be. I claim that the defendants bought off class counsel and other plaintiffs' lawyers and that the district court deliberately turned a blind eye to what was plain for all to see.[30] I simply could not say that without crossing all my "t"s

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Indeed, in one sense my approach in this Article is the mirror image of Judge Weinstein's approach. Judge Weinstein concentrates on ethical obligations, which he culls from ethical sources, and he uses those obligations to rebuild and reshape the responsibilities of lawyers and, even more dramatically, the responsibilities of courts. Weinstein, *supra*, at 485-93. I concentrate on legal obligations, which I find in the constitutional requirement of due process as interpreted by the courts and other legal obligations articulated in cases and rules. I use these obligations to critique, debunk, and label "unethical," the actual practices of lawyers and of courts. I believe there is more than irony in a judge resting so heavily on "ethics," and an ethics professor resting so heavily on "law," but I have neither the space nor the energy to explore that here.

30 My claim is that the factual situation described *infra*, in part II, deserves to be characterized as buying off class counsel. I do not claim to know any facts that are not explicitly set forth in this Article. I do not claim or mean to imply, for example, that class counsel received any payment or benefit other than what is described *infra* in part II.C. My evidence and arguments are stated fully here, and while one may agree or disagree with my opinion, the reader must not infer that I am making assertions of fact that are not expressly stated.

Given how much class counsel, the defendants, and the class members have at stake, I owe them and my readers a fairly full presentation of the arguments presented by the other side, which I provide along with my response to those arguments. Because it was necessary to cover in depth the matters I do discuss, I was unable to address all the problems I see in *Georgine*. First, I am quite troubled by the relatively short opt-out period and the court's ruling disallowing exclusion requests signed by lawyers. I find it more than disingenuous that this court balked at recoguizing the power of attorney expressed by lawyers signing exclusion forms when it was otherwise so accepting of the power of attorneys to control the lives of people—even people like all the absentee class members who had not retained any lawyers. *See infra* note 79.

Second, in a settlement designed to bind class members in perpetuity, class counsel did not negotiate provisions that would allow the medical criteria specified in the agreement to be adjusted based on new scientific developments or that would adjust recoveries based on inflation. *See* Transcript of Fairness Hearing at 176-79, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Mar. 17, 1994) [hereinafter Fairness Hearing] (testimony of Susan P. Koniak). Third, while class members are bound in perpetuity, CCR members are not. If one CCR defendant withdraws, as National Gypsum is now seeking to do, *see supra* note 7, class members may sue that member, but their *Georgine* recovery is reduced by the percentage of that member's contribution. *See Georgine*, 157 F.R.D. at 284-85. National Gypsum's contribution is 10.2%. *See CCR Asbestos Settlement—Victory?*, *supra* note 11.

Fourth, I testified that counsel's lack of concern for the class was also evident in the small role class counsel apparently played in overseeing notice to the class and in the way class counsel encouraged the class representatives to treat CCR's counsel as co-counsel, having CCR's lawyers sit in on the preparation of class representative testimony. Fairness Hearing, *supra*, at 196-97. Fifth, I also find it troubling that class counsel joined the de-

and dotting all my "i"s. Detail was also required to present an effective existential challenge to the current solutions to class action abuse, solutions that may be theoretically sound but that are woefully inadequate in practice.

By plunging deep into the morass of *Georgine*, I learned a great deal about what can go wrong in a class action settlement. I encourage you to stay with me through the detail; there are some lessons about the forest that can only be learned through a careful examination of a tree.

II
GERRYMANDERING A CLASS FOR PROFIT

A. Two Deals

Once upon a time, not so long ago, twenty companies faced the prospect of defending against millions of legal claims brought in connection with their asbestos products. Many thousands of these cases were already pending.[31] The rest would be filed in years to come. The companies wanted out of this mess, and they found a way. They settled almost all of these claims—most of those that were pending and almost all of those that had not yet been filed. The key was to craft two deals: a class action and another deal. Two deals to cover so many claims may sound like a triumph of efficiency, but it was one deal too many, and therein lies the tale.

These twenty companies formed the Center for Claims Resolution (CCR)[32] to coordinate their legal response. In 1992 the CCR lawyers from Shea & Gardner approached plaintiffs' lawyers Gene Locks, Ronald L. Motley, and Joseph Rice,[33] and suggested working

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fendants in a motion to require those who opted out to opt out a second time and were willing to argue for the abridgement of speech between plaintiffs' lawyers and their clients in an effort to ensure that the opt-outs do not opt out again. *See* Court Order, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Oct. 14, 1994) (seeking additional argument on court's power to stop "misleading" communication). Finally, I am concerned that the settlement gives CCR so much discretion to decide on the awards granted class members. *See infra* note 303 (describing how the alternative dispute resolution process *Georgine* put in place will give the defendants complete discretion in the vast majority of cases to determine what recovery amount, within a negotiated range, each class member will receive).

31 Approximately 77,000 cases were pending against the defendants in *Georgine* when the class action was filed. *Georgine*, 157 F.R.D. at 305. It is unclear whether this figure includes the approximately 24,000 cases settled once these defendants became confident *Georgine* would be filed. *Id.* at 295-96.

32 As the court explained, "CCR is a not-for-profit corporation maintained by the defendant companies for the processing of asbestos-related claims." *Id.* at 257 n.3. Two CCR executives offered testimony on the settlement process in *Georgine*: Lawrence Fitzpatrick, President and Chief Executive Officer of CCR, and Michael F. Rooney, Chief Operating Officer of CCR.

33 *Id.* at 329 (noting the "fact" that CCR approached Messrs. Lock, Motley, and Rice to begin the negotiations that led to *Georgine*).

out a deal to resolve the CCR defendants' asbestos liability.[34] Mr. Locks practiced in the firm Greitzer and Locks; Mr. Motley and Mr. Rice were partners in Ness, Motley, Loadholt, Richardson & Poole. These firms together represented over 14,000 asbestos claimants.[35]

The lawyers sat down and worked out two deals: the class action settlement that became *Georgine* and another deal. Both deals covered people with a wide range of diseases caused by asbestos: mesothelioma,[36] lung cancer, and the full range of nonmalignant asbestos diseases—from disease that seriously affects one's ability to breathe to disease that leaves marks on the lungs but does not result in severe breathing impairment. Although the deals covered the same sorts of people with the same sorts of diseases, the deals had different terms.[37] For example, it appears that the people covered by the class action got considerably less money than the people with the same diseases who were covered by the other deal.[38]

Who ended up outside the class—with the other deal? Messrs. Locks, Motley, and Rice designed a class that excluded over fourteen thousand of their clients and many, if not most, of the clients of other asbestos lawyers.[39] These clients—and their lawyers—got the deal with more money.

Before *Georgine*, the CCR companies saw no end to potential lawsuits against them. In the first years of its existence, CCR made "inventory settlements." An inventory settlement is an agreement with a plaintiffs' law firm to settle the firm's inventory of cases according to specified terms.[40] These settlements typically involved large blocks of cases, but as soon as one inventory was settled, the plaintiffs' law firm would start building another inventory of cases.[41] CCR thus changed its settlement strategy in 1991. Although it was willing to settle the relatively small number of asbestos cases that could get scheduled for trial,[42] it now refused to settle the bulk of the existing cases without some guarantee about the future.[43] The CCR companies did not want to continue paying people who had marks on their lungs caused by asbestos but who had no significant breathing impairment—the so-

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34 *Id.* at 295.

35 *Id.* at 295-96.

36 Mesothelioma is "a form of cancer of the lining of the lung or abdomen." *Id.* at 269.

37 For a more detailed discussion of the different terms, see discussion *infra* part II.C.

38 *See infra* notes 103-09, 114-16 and accompanying text.

39 *See infra* part II.B for discussion of the odd shape of the *Georgine* class.

40 Technically, these settlements are offers to settle because the individual clients are presumably free to reject the offered terms, but most clients follow their lawyers' advice on settlement.

41 *Georgine*, 157 F.R.D. at 294.

42 *Id.*

43 *Id.*

called pleural plaintiffs.[44] They also wanted control over the number of cases they would face each year and, preferably, control over how much money they would have to pay out each year.[45] They determined that the best way to get what they wanted was through a "settlement class action"—a class action put together solely for the purpose of achieving settlement.[46] CCR approached Messrs. Locks, Motley, and Rice, who agreed to serve as class counsel in such an action.[47]

Messrs. Locks, Motley, and Rice wanted their existing inventory of cases settled, but apparently not on the terms proposed by CCR for the class. They agreed that pleural class members would receive no cash,[48] but they disassociated their own pleural clients from the class and got cash for them.[49] This would assure Messrs. Locks, Motley, and Rice a return of thirty-three percent of their pleural clients' awards, instead of some percentage of nothing on their pleural clients' claims. Acting as counsel for the class, they agreed to require class members with lung cancer to establish by objective evidence that their cancer was caused by asbestos,[50] while their own clients did not have to pro-

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44 Throughout the fairness hearing, the settling parties used this term to refer to people with "pleural thickening or pleural plaques" who do not show "interstitial or parenchymal fibrosis on x-ray or on pathological tissue analysis and [who have] normal pulmonary function test results." Settling Parties' Proposed Findings of Fact at 60, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. May 16, 1994) [hereinafter Proposed Findings of Fact]. In some states, such a person has a cause of action for injury caused by exposure to asbestos. *Id.* at 59. In its opinion, the court referred to such people as "non-impaired pleural claimants." *See, e.g., Georgine*, 157 F.R.D. at 266.

45 The *Georgine* settlement gives the defendants these benefits, limiting the number of claimants in each disease category that CCR is obliged to pay each year and setting negotiated average ranges for payments that act as caps on the total dollar amount CCR has to pay each year. Uncertainty over potential liability adversely affects the financial condition of companies in a number of ways. It diminishes access to capital markets, makes it more difficult to raise debt in equity, puts companies at a disadvantage in attracting personnel, and generally affects the ability of companies to compete in the marketplace. *See Georgine*, 157 F.R.D. at 291 (quoting testimony of John H. Laeri, Jr. of Meadowcroft Associates, a consulting firm retained by class counsel to advise on the ability of the CCR defendants to meet the obligations class counsel and CCR's lawyers had agreed to in the *Georgine* settlement).

46 While the evidence that the class action was CCR's idea is a little fuzzy, this conclusion seems a logical inference from the sequence of events described by the settling parties. *See infra* text accompanying notes 158-70.

47 *Georgine*, 157 F.R.D. at 329.

48 *Id.* at 297 (pleural class members do not receive cash unless and until they develop some more serious form of asbestos disease). *See infra* text accompanying note 72 for discussion of the "package of benefits" pleural class members receive instead of the cash given to the pleural clients.

49 *Georgine*, 157 F.R.D. at 298 ("pleural claimants in the inventory settlements received immediate cash compensation").

50 *See generally id.* at 274-75 (discussing requirements in class settlement for qualifying for compensation for lung cancer). The settling parties summarized the proof necessary to recover for lung cancer thus:

> [O]ne may qualify for compensation . . . by showing evidence of asbestosis . . . . Alternatively, one may produce evidence of exposure to asbestos suffi-

duce that proof.[51] By disassociating all their lung cancer clients from the class and insisting that CCR pay them without objective evidence of causation, more of class counsel's lung cancer patients would be paid money than might be paid under the class settlement.

Class counsel also agreed with CCR that under the class settlement the average payment made to class members each year must fall within a negotiated range for each disease category.[52] By disassociating their clients from the class and insisting that the class ranges not be used to settle their clients' claims, class counsel could make a lot more money overall than they would make if their clients were treated as class members.[53] These are reasons to keep as many of one's own clients out of the class as possible, and that's what class counsel did.[54] Class counsel accomplished all this by carefully drafting the class definition. They gerrymandered the class for profit.[55]

Why did CCR agree to treat class counsel's clients and the clients of other asbestos lawyers more generously than the class?[56] This gen-

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> cient to cause both extensive bilateral pleural thickening and functional impairment, or evidence of substantial occupational exposure to asbestos based on the number of years in particular asbestos-related occupations, accompanied by bilateral pleural thickening or plaques. Finally, one may qualify by another, more general, route by persuading the Exceptional Claims Panel that, given all the circumstances, the lung cancer should be attributable to asbestos exposure.

Proposed Findings of Fact, *supra* note 44, at 65-66.

51 Ness, Motley's client settlement agreements provided:

> For each case submitted, Ness, Motley shall immediately make available to the CCR, appropriate medical verification from a licensed physician upon whom Ness, Motley relies, to demonstrate that the plaintiff has contracted the asbestos-related disease claimed . . . . For the purpose of meeting this requirement, a medical record or report from a licensed physician providing a diagnosis of an asbestos-related injury as alleged by the plaintiff shall be sufficient. *A record establishing the existence of a primary lung cancer or a mesothelioma shall be sufficient in and of itself.*

Inventory Settlement at 4.b(2), Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Mar. 17, 1994) [hereinafter Inventory Settlement] (emphasis added). Class members have to establish the existence of a primary lung cancer plus produce objective evidence that the cancer was caused by asbestos. *See id.* V.B.2.

52 *Georgine*, 157 F.R.D. at 276.

53 *See infra* text accompanying notes 103-16.

54 *See infra* notes 77-79 and accompanying text (discussing how class counsel managed to keep as many of their clients out of the class as possible).

55 *See* discussion *infra* part II.B, regarding the odd shape of the class. *See infra* part II.C for a detailed discussion of the more generous terms provided to class counsel's clients. "Gerrymandered" is, I believe, a fair characterization of the way the class definition drew odd boundaries between members of the class and class-counsel's clients. I do not use the term to imply any facts other than those discussed explicitly *infra*, in part II.B. That this was for profit is my conclusion based on the facts stated, with citations to sources, in part II.C. I do not mean to imply that I know any other facts, that class counsel received any profit other than the fees described in this Article, or that I know more than is stated here about the motivations or the state of mind of class counsel.

56 The precise terms offered to clients represented by asbestos lawyers other than class counsel are not available in the record, but there is testimony that suggests that other

erosity was simply part of the price CCR had to pay to get the class settlement it wanted. CCR needed two deals to accomplish its goal because plaintiffs' lawyers, including class counsel, would not accept for their own clients the terms CCR was prepared to offer the largest group of asbestos victims, the future claimants.[57]

Why would class counsel and CCR define a class that excluded the clients of *other* asbestos lawyers? Because by offering more generous terms to the clients of other asbestos lawyers CCR could buy third-party support for the settlement among the asbestos bar.[58] The more members of the asbestos bar who supported the class settlement, the better CCR's chances would be of getting the resolution it wanted.[59] The gerrymandered class, the separate client settlements, and the substantial differences between the class settlement and the inventory settlements can all be explained in this way: CCR paid class counsel on the side, by which I mean outside the class action proceeding through the client settlements, for agreeing to support the class settlement.[60] Or to put it even more bluntly, CCR bought off the class lawyers.

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lawyers who were supportive of *Georgine*'s basic framework received better deals for their clients than would be available for class members under *Georgine*. Fairness Hearing, *supra* note 30, at 96 (Mar. 18, 1994) (testimony of Robert R. Hatten); *see infra* note 58.

57 *See infra* text accompanying notes 72-76.

58 For example, Robert R. Hatten, a plaintiffs' asbestos lawyer, who testified on behalf of the settling parties in support of the settlement, had a written "gentleman's agreement" with CCR, *see* Fairness Hearing, *supra* note 30, at 67 (Mar. 18, 1994) (testimony of Robert R. Hatten), under which he agreed to file cases only if those cases met certain medical criteria, *id.* at 68-70. The criteria were similar to those contained in the *Georgine* agreement, and CCR agreed to pay Mr. Hatten's clients amounts that were higher than the negotiated averages under *Georgine*. *Id.* at 95-96. These amounts would ostensibly reflect what Mr. Hatten had historically collected from CCR. *Id.* at 68-69.

It appears that CCR used a carrot and stick approach to get plaintiffs' lawyers to sign on to the basic structure of *Georgine*, giving sweet settlement terms to those who agreed that pleural claims should no longer receive cash compensation (the foundational point in the *Georgine* deal, *see infra* note 74 and accompanying text) and no inventory settlements to those who did not agree. Fairness Hearing, *supra* note 30, at 21, 25 (Mar. 30, 1994) (testimony of Mark H. Iola); *see infra* note 178 and accompanying text.

59 If class counsel and CCR were not worried about support from other asbestos lawyers, defining the class to exclude all present clients would still have been the wisest move, assuming the aim of exempting class counsel's clients. No plausible reason could be offered for a class definition that excluded only class counsel's clients. Nor could class counsel define the class to include everyone's clients and then opt out over 14,000 of its own clients, without sacrificing the whole settlement. The settling parties suggest that class counsel could do this and that the shape of the *Georgine* class is therefore irrelevant. However, opting out 14,000 people would be too blatant an admission of what class counsel really thought of the settlement they were proposing. Would a court actually approve such a settlement in those circumstances? In a sense this is exactly what the *Georgine* court did approve, but excising the clients from the class at the beginning helped to obscure this fact.

60 To the extent CCR gave preferential treatment to the clients of other asbestos lawyers, the simplest explanation is that they thus quelled potential opposition to the settlement. *See supra* note 59. Again, I claim that the facts stated here are enough to deserve condemnation as a buy-off of class counsel. I do not imply that I know facts in addition to

Why would a district court accept such a tainted settlement on behalf of so many absent class members? To help rid the court system of the terrible burden imposed by what appears to be interminable asbestos litigation.[61] To accomplish this end, the court deliberately closed its eyes to the evidence that CCR and the lawyers for the putative class had colluded.[62] The court also ignored other serious legal problems with this tainted deal.[63] That the court would approve such a deal, despite its obligation to protect the interests of class members who were not present to protect themselves, is shameful. Without the court's blessing, the lawyers for the settling parties could not have affected the rights of the class members. Responsibility for this corruption of justice must therefore rest, in the end, with the court.[64]

My claim that CCR paid class counsel on the side in the form of the client settlements to support the class action is a strong one. Is it true? Is the shape of the class really odd? Was the class defined to exclude the clients of other asbestos lawyers? Did class counsel negotiate separate deals for their clients? Did those deals contain different terms than those provided for the class? Were the terms negotiated for class counsel's clients more generous than those negotiated for the class? Why were there two different deals with two sets of terms, if it was not to buy off class counsel and other plaintiffs' lawyers? And what did the settling parties (CCR and the putative class) and the court have to say about all this?

I turn next to these questions, but first a preliminary matter: throughout this Article, I use "class counsel's clients" to refer to the over 14,000 people represented by class counsel and excluded from the class. This phrase may seem ill chosen in that it implies that the class was not also a client of class counsel, which seems absurd. How-

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those stated in this Article, and I do not claim there were any other payments or benefits given to class counsel other than those provided for by the settlements as described in part II.C.

61 *See Georgine*, 157 F.R.D. at 263 (discussing how "asbestos dockets across the country were growing exponentially"). More specifically, see text accompanying notes 465-75 (discussing testimony offered at fairness hearing about federal judiciary's concern with growing number of asbestos cases).

62 I discuss that evidence in the remainder of this section of the paper.

63 *See generally infra* part III.

64 The district court issued its opinion in this case on August 16, 1994. The district court opinion in large part adopts verbatim the settling parties' Proposed Findings of Fact, *supra* note 44, and the Settling Parties' Proposed Conclusions of Law at 60, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Mar. 17, 1994) [hereinafter Proposed Conclusions of Law]. Such wholesale adoption of the parties' findings can be problematic. Kelson v. United States, 503 F.2d 1291, 1294 (10th Cir. 1974) ("[t]he mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges"). *But see* Anderson v. Bessemer City, 470 U.S. 564, 572-73 (1985) (rejecting challenge of judge's adoption of parties' findings). For an interesting discussion of the issues involved in court review of consent decrees and class action settlements, see Judith Resnik, *Judging Consent*, 1987 U. CHI. L. FORUM 43.

ever, during the *Georgine* negotiations—the critical period of time—the class was not technically a client of Messrs. Locks, Motley, and Rice. As the settling parties and the district court put it: "At the time that class counsel negotiated what became the *Georgine* settlement, there was no attorney-client relationship between class counsel and the unformed *Georgine* class."[65] The settling parties and the court used this point to imply that it might be appropriate to hold class counsel to a slightly lesser standard of faithfulness to the class during the negotiations.[66] They did not, however, go so far as to argue outright that a lesser standard applies. And how could they, given that this lesser standard would be one any lawyer could elect by negotiating a settlement before requesting that a court officially recognize a class? To demand less of lawyers when no court is overseeing the process leading to a class settlement than one would when a court is in place as guardian for the class is nonsensical and runs counter to the judiciary's warnings of the potential for abuse in settlement class actions.[67] Although the settling parties' and the court's reason for insisting that, during the negotiations, the class was not a client is thus suspect, they are technically correct, and I am happy to adopt their language.

B. The Shape of the Class

The class has an odd shape. It includes all people exposed to the asbestos products of the twenty defendant corporations except those who had filed suit against the companies by January 15, 1993.[68] This was the date the settling parties filed the class action and a proposed settlement with the court. I contend that the definition of the class was designed to exclude from the class most of class counsel's clients and many of the clients of other asbestos lawyers. But before we get to the direct evidence that supports my claim, consider the shape itself. The shape is suspicious because it is not related to the common issues of law and fact put forth by the settling parties and adopted by the

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65 *Georgine*, 157 F.R.D. at 327.

66 After making the "not a client" point, they conclude: "Thus, whether or not Model Rule 1.7(b) technically applies to this Court's determination . . . the general principles of loyalty and due care are applicable here." *Id.*

67 *See, e.g.*, Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (noting that settlements reached before asking a court to certify the class must be scrutinized more closely than other class settlements because of the increased possibility of collusion), *cert. denied*, 464 U.S. 818 (1983); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615 (9th Cir. 1982) (noting that both the class action device and class action settlements are susceptible to abuse and carry certain structural risks), *cert. denied*, 459 U.S. 1217 (1983); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971) ("[W]hen the settlement is not negotiated by a court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class.").

68 *Georgine*, 157 F.R.D. at 257-58.

court to justify the class action form. The court and the settling parties described the questions of law and fact common to the class as follows:

> The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.[69]

If that is the reason for having a class, the *Georgine* class definition is underinclusive. People whose cases were filed before January 15, 1993, have as much in common with this group as any member of the class. "Present claimants" have been exposed to the asbestos products of the defendants just like class members and have an interest in minimizing the risks of the tort system at least equal to that of class members. They also have an interest in minimizing transaction costs.[70] When the line drawn to define a group does not match the reason put forth to justify the group, the shape of the group is suspicious and needs further justification.

One need not, however, wonder long about why the class was shaped as it was. The story told by the settling parties and accepted by the court makes clear what the shape of the class was designed to accomplish. In July 1991, the Judicial Panel for Multidistrict Litigation issued an order transferring all federal personal injury asbestos litigation to one judge in the United States District Court for the Eastern District of Pennsylvania, with the hope that this transfer might foster global settlement of the "asbestos mess."[71] According to the settling parties, after the cases were transferred, there were settlement talks between the Plaintiffs' and Defendants' Steering Committees to "craft a national settlement."[72] These negotiations eventually broke down. But out of those discussions, "one possible concept emerged . . . *as a starting point* for further negotiation."[73] That concept was that

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69 *Id.* at 316.

70 Even if some or most present claimants already have incurred some transaction costs, they still have an interest in reducing additional transaction costs. The chief transaction cost is the lawyer's fee. Under the class settlement, this fee is capped at 25%. *See infra* note 111. Generally, asbestos plaintiffs' lawyers charge between 33% and 40%. *Georgine*, 157 F.R.D. at 277 n.23.

71 *Georgine*, 157 F.R.D. at 265 (citing *In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991) (order transferring cases to Judge Weiner)). On January 29, 1993, Judge Weiner conditionally certified the class in *Georgine* and conditionally approved the appointment of Messrs. Locks, Motley, and Rice as class counsel. *Id.* at 257-58. He also granted the settling parties' motion to have Professor Stephen B. Burbank appointed as a special master to examine the side settlements made for class counsel's clients. *Id.* at 258. Finally, Judge Weiner assigned Judge Reed the task of conducting a fairness hearing on the settlement. *Id.*

72 *Id.* at 266.

73 *Id.* (emphasis added).

> pleural claimants in the *future* should receive some package of insurance-like benefits, including a waiver of the statute of limitations, and some reasonable assurance that there would be money, among other things, in return for deferring their receipt of cash compensation unless and until their condition worsened and they suffered some actual impairment.[74]

CCR thus knew that some, or even most, lawyers on the Plaintiffs' Steering Committee were willing to accept this insurance package for future claimants, but not for their present clients. According to the court, "CCR therefore determined to, and did, continue the discussions with . . . two of the most respected and active firms in the asbestos litigation, Ness, Motley and Greitzer and Locks."[75] Those separate negotiations, which excluded all other plaintiffs and defendants, resulted in *Georgine*.[76]

This chronology demonstrates that when the settling parties began their negotiations, CCR understood that current clients of asbestos lawyers would have to be given terms different from those CCR was prepared to give future claimants. It thus supports my assertion that from the beginning of the negotiations between class counsel and CCR, the settling parties intended to accord different treatment to the class than to the current clients of asbestos lawyers, including class counsel's clients.

From the time *Georgine* was filed, the settling parties have been careful to call the nonclass members "present claimants" and not "current clients." But this distinction is meaningless. To be a "present claimant" and, therefore, excluded from the class, a person need only have filed a lawsuit against the defendants before the class suit was filed. Because the lawyers determined when the class action was to be filed, class counsel could transform as many mere "clients" into "present claimants" as CCR would agree to compensate outside the class action.

There is evidence that class counsel took steps to ensure that their existing clients were transformed into "present claimants." In the months before the class action was filed, lawyers from Ness, Motley advised their affiliated counsel and some other asbestos lawyers to file all the cases they could.[77] CCR was even generous enough to allow

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74 *Id.* As is clear from the chronology detailing CCR's negotiating posture, *see infra* text accompanying notes 161-70, "no immediate cash" for pleural claimants was the *sine qua non* for CCR.

75 *Georgine*, 157 F.R.D. at 266.

76 *Id.*

77 First, in a memo dated August 21, 1992, from Mr. Motley written on Ness, Motley stationery to "All Asbestos Personal Injury Co-Counsel," Mr. Motley urged his co-counsel "to serve and file as many of your unfiled cases as soon as possible" as a means of having those cases "considered present claims." Memorandum of Ronald L. Motley and Charles W. Patrick, Jr. (Aug. 21, 1992), Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa.

class counsel to include some clients whose cases had not yet been filed in the "present claimant" settlements,[78] making it clear that the line between "present claimants" and "clients" was illusory.[79]

Mar. 17, 1994) (Exhibit O-16). Second, Mark H. Iola, a plaintiffs' asbestos lawyer called by the objectors to the *Georgine* settlement, testified that in late 1992 at a meeting of Ness, Motley's co-counsel and some other asbestos lawyers in Miami, Mr. Rice and Mr. Locks briefed the group on the "futures claimants" deal that would soon become *Georgine*. Mr. Iola testified that he "specifically recall[ed] Joe Rice saying, that the terms as to certain . . . nonmalignant people in the futures deal [the pleurals], are going to be worse than the terms for those people in the present system and he encouraged people to get their cases on file." Fairness Hearing, *supra* note 30, at 68 (Mar. 30, 1994) (testimony of Mark H. Iola).

The settling parties claimed that the August memo did not tend to show that Ness, Motley was filing all the cases it could to avoid *Georgine*. They emphasized that the memo specifically stated that the reason to get cases on file was to avoid a settlement agreement like "the New England Agreement" that "would establish minimum medical criteria for payment of future claims," but would leave "[p]resent claims . . . not . . . [similarly] burdened." Proposed Findings of Fact, *supra* note 44, at 192 (quoting August memo). The New England model differed somewhat from *Georgine*, *see infra* text accompanying notes 161-65, but it was the same in that it provided no immediate cash compensation to future pleural claimants. It is reasonable to assume that no immediate recovery was what "burdened" future claims in the eyes of lawyers entitled to a percentage of such recoveries. Thus, the fact that in other respects the New England deal differed from *Georgine* seems of little import.

More important, the day before the Augnst memo was written, Gene Locks, Motley's partner in the *Georgine* negotiations, entered into inventory settlements with CCR covering the clients of the firm of Greitzer and Locks in eight states. According to the settling parties, these settlements were stimulated by the fact that CCR was confident *Georgine* would soon be filed. *See infra* text accompanying notes 157, 170, 177-81 (quoting settling parties' submission to the court and witness testimony). Mr. Motley was apparently not actively engaged in the *Georgine* settlements at this time, having taken a hiatus from the negotiations to try a large block of cases against CCR in Maryland. *See Georgine*, 157 F.R.D. at 295. It is not, however, unreasonable to assume that Mr. Motley knew of the Locks settlements and understood that they meant *Georgine* was on track, particularly given that he had been involved in the *Georgine* settlement talks prior to his Maryland hiatus. Because the August memo came one day after the Locks settlements, it seems fair to read it as an effort by Ness, Motley to ensure that its co-counsel transformed as many clients as possible into "present claimants" to avoid *Georgine*.

78 Other asbestos lawyers who supported the terms contained in the *Georgine* settlement (as demonstrated by their willingness to sign "futures provisions," *see infra* text accompanying notes 176-79) were also apparently permitted to include unfiled cases in settlements made outside *Georgine*. For example, Mr. Hatten, a plaintiffs' lawyer who testified in support of the settlement, was allowed to settle cases under a deal that guaranteed him higher payments than those contained in the negotiated averages in *Georgine*, *see supra* note 58, until December 1993, without regard to whether those cases were filed. Fairness Hearing, *supra* note 30, at 69, 74, 181-82 (Mar. 18, 1994) (testimony of Robert R. Hatten). Moreover, he apparently filed and settled cases with CCR after January 15, 1993. *Id.* at 74.

79 It is undisputed that CCR allowed class counsel to include some unfiled cases in the inventory settlements. *Georgine*, 157 F.R.D. at 309 ("Class Counsel's inventory settlements with CCR in 1992-1993 included a small percentage of unfiled cases, in accordance with CCR's historical practice [of settling a small number of unfiled cases].") The court's emphasis on CCR's historical practice of settling cases that "were ready for filing, with the medical work completed and some product identification established," *id.*, only emphasizes the suspicious nature of the class definition. It highlights that many within the class—all those with nearly ready but unfiled cases as of January 15, 1993—were similarly situated to those outside the class who were given a different deal.

There were moments when the settling parties dropped the "present claimant" fig leaf. For example, the settling parties stated and the court opinion repeated: "Present *clients* in the tort system are not identically situated to future claimants."[80] Given the actual practices of class counsel and CCR, it appears that they consider people to be "in the tort system" even before suit is filed.[81] The phrase "clients in the tort system" is thus redundant. In sum, "present claimants" is a euphemism for "clients," and, for the settling parties, "future claimants" or class members means something like "those strangers out there and clients who arrived at class counsel's offices after CCR refused to pay any more people outside the class framework."[82]

The settling parties would have denied that the shape of the class was odd, if they had thought the shape of the class was an issue worthy of serious attention. But they did not. The settling parties asserted

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Moreover, there is no proof that the unfiled cases that class counsel settled were indeed "ready to be filed." Professor Hazard testified that treating "ready to be filed" cases like filed cases did not alter his opinion that no conflict of interest arose, but did not state the basis for his surmise that class counsel's unfiled cases were indeed "ready to be filed." Fairness Hearing, *supra* note 30, at 47-49 (Feb. 25, 1994) (testimony of Geoffrey C. Hazard). The other CCR witnesses implied that the unfiled cases class counsel settled were ready to be filed, but the basis for their apparent belief in this fact was not stated. *See id.* at 207-08 (Feb. 28, 1994) (testimony of Michael F. Rooney). Class counsel who could testify on this matter based on personal knowledge did not testify under oath in a deposition or at the fairness hearing. The record thus contains no evidence on the "readiness to be filed" of the unfiled cases settled by class counsel outside *Georgine*.

Finally, CCR's Chief Operating Officer reported that after January 15, 1993, CCR continued to settle Ness, Motley claims that were filed *after* January 15, 1993, outside the *Georgine* framework, treating those claims as akin to opt-outs from the class without having to meet the formal requirements for opting out. *Id.* at 117-19 (Mar. 3, 1994) (testimony of Michael F. Rooney). Contrast with this how finicky the settling parties were about other class members meeting the formal requirements in order to be considered opt-outs. *See, e.g., Georgine*, 157 F.R.D. at 312 (explaining how court on settling parties' motion disallowed opt-outs that were signed by lawyers on behalf of their clients).

80 *Georgine*, 157 F.R.D. at 329. I will return later to the substance of this half-hearted attempt to suggest some legitimate reason to distinguish present clients from class members with whom they are "not identical." *See infra* text accompanying notes 145-54. Here the point is to notice the misuse of the word "client" and the fact that the new fig leaf "in the tort system" adds nothing to that word.

81 As to the word, "present," there are two points I would like to make. First, "present" implies some fixed point in time. But the date the class action was filed and the date thus "fixed" as "present" was in the hands of the settling parties. How many clients were "present clients" was something that CCR and class counsel could determine.

Second, "present clients" implies a corollary phrase, "future clients," which is a phrase the settling parties used to suggest that lawyers have some right to contract with third parties in ways that affect people who might seek their advice in the future because those people are some form of "client," albeit only a "future client." *See* text accompanying note 392 (arguing that attorneys agreeing as part of a settlement to restrict the representation they provide "future clients" is a violation of the ethics rules). I avoid the word "present client" because I believe the settling parties use it to imply this corollary proposition.

82 This latter group includes the class representatives, Anna Baumgartner, Nafssica Kekrides, and LaVerne Winbun. I will return to the question of class counsel's treatment of the class representatives later. *See infra* text accompanying notes 429-56.

that this was a "futures class," as if the name conferred legitimacy on the shape. It does not.[83]

In a small number of cases, courts have approved the use of a class action to resolve the tort claims of all people who are or might become ill from a defendant's product.[84] To the extent such cases include the "futures" and thus approve the resolution of tort claims of those who are not yet ill, they express a position that is hardly well established.[85] More important, the classes in those cases were not shaped like the *Georgine* class. The class actions in those cases included all those presently ill and all those who would get sick in the future, and none of those cases excluded all people who had filed a

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83 For example, the settling parties responded to my testimony on the shape of the class as follows:

> She . . . testified that, in her opinion, the definition of the class, with a cut-off date for inclusion in the class, similarly created a conflict. Professor Koniak's opinion, if credited, would mean that there could not be a *futures class*, negotiated by any counsel experienced in asbestos litigation since they would always be subject to the charge of divided loyalties to present and future claimants.

Proposed Findings of Fact, *supra* note 44, at 175 (citations omitted). On the contrary, I do not and did not claim that the definition "created" a conflict. My position is that the strangely defined class is strong evidence that there *was* a conflict. Thus, my opinion, "if credited," would mean that class counsel who walks in with a class defined this way has a lot of explaining to do and unless there is convincing evidence that the class definition is tied to the issues common to class members alleged in the complaint, and not to class counsel's financial interests in making different deals for his "current clients," the class should not be certified in the form presented.

84 *See, e.g.*, Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed without opinion*, 995 F.2d 1066 (6th Cir. 1993), *and appeal dismissed*, 1993 U.S. App. LEXIS 33691 (6th Cir. Dec. 21, 1993) (class of all those who had heart valve implanted); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (class of all persons who were exposed to Agent Orange in Vietnam), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Whether it makes sense to describe those cases as examples of "future class" actions is questionable, given that they include all presently ill people along with all people who might get ill in the future.

85 *See, e.g.*, Scott v. University of Del., 601 F.2d 76 (3d Cir. 1979), *cert. denied*, 444 U.S. 931 (1979) ("[W]e do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class which [the plaintiff] seeks to represent."); Foster v. Bechtel Power Corp., 89 F.R.D. 624, 626-27 (E.D. Ark. 1981) (to allow the inclusion of futures would ignore due process considerations); Moore v. Western Pa. Water Co., 73 F.R.D. 450, 453 (W.D. Pa. 1977) (describing futures as "an amorphous, phantom group, incapable of identification" and refusing to include them within the class); Freeman v. Moster Convoy, Inc., 68 F.R.D. 196, 200 (N.D. Ga. 1974) (denying inclusion of futures because of concerns with protecting the interests of these unnamed people); *see also* Elizabeth R. Kaczynski, Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Action*, 85 COLUM. L. REV. 397, 397 (1985) ("the inclusion of future members in class actions is inconsistent with both the explicit requirements and the theoretical underpinnings of Rule 23, thus posing a serious threat to the due process rights of future members"). Although Ms. Kaczynski focuses on the inclusion of futures in actions under Federal Rule of Civil Procedure 23(b)(2), most of her arguments apply equally, if not more forcefully, to actions under Rule 23(b)(3). As to Rule 23(b)(3) actions, she states that futures cannot be included. *Id.* at 398 n.7.

tort suit. The class definitions in those cases were tied to the common issues of law and fact alleged in the respective complaints.[86] Those classes, in other words, looked like they were designed to meet the common interests of class members—the way that a class is supposed to be shaped[87]—rather than the financial interests of the lawyers and their present clients. Trying to camouflage the shape of the *Georgine* class with an ill-fitting name does nothing to explain why the class definition does not match the reasons put forth to justify the class action form.

The district court offered a different explanation for the shape of the *Georgine* class, diverging from the text written by the settling parties. The court found that the shape did not "create" a conflict of interest because "[a]ny class for future claimants must necessarily be defined with a cut-off date which is a logical method of identifying a class in mass tort litigation."[88] The point, however, is not that the shape created a conflict, but that it is evidence of a conflict. The shape strongly suggests that class counsel had some interest in mind other than the interest of the class when they put forth this class for certification and settlement. The court's "cut-off date" explanation assumes that because it may be legitimate to have a class that includes only those people whose claims have not yet arisen, any class like this is legitimate. But this is no answer to the question of why the class definition does not jibe with the reasons set forth in the opinion for having a class. In discussing the shape of the class, the court simply ignored that the definition served to dissociate class counsel's clients from the class.

Because no mass tort class action before *Georgine* had been shaped like *Georgine*, the court had no real authority for its suggestion that the class shape in *Georgine* was legitimate. It relied circularly on *Ahearn v. Fibreboard Corp.*,[89] a pending class action filed *after*—and modeled on—*Georgine*. The *Ahearn* class's suspicious shape, like that

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86 For example, see *infra* note 192, giving the definition of the class in the Agent Orange litigation, a class whose common interests in speedy and certain compensation for injuries associated with exposure to Agent Orange precisely tracks the class definition.

87 As Judge Weinstein wrote in Dolgow v. Anderson:

> Once the court has decided that a class action is superior to other available procedural devices, the crucial prerequisite for the maintenance of a class action under subdivision (b)(3) is the requirement that there be "questions of law or fact common to the members of the class" and that such questions must "predominate over any questions affecting only individual members." *The predominance of these common questions, in turn, furnishes the basis for defining the class or classes involved to the acceptable degree of precision.*

43 F.R.D. 472, 488 (E.D.N.Y. 1968) (emphasis added).

88 *Georgine*, 157 F.R.D. at 305.

89 *Id.* (citing Order Provisionally Certifying Class for Settlement Purposes, Ahearn v. Fibreboard Corp., No. 93-526 (E.D. Tex. Sept. 9, 1993) [hereinafter *Ahearn* Certification Order]).

of the class in *Georgine*, excludes the clients of asbestos lawyers. It too presents a class definition that is unrelated to the common questions of law and fact invoked to justify the class action form.[90]

Ahearn is not the only offspring of *Georgine*, which appears to be a fast breeder. Soon after the court issued the *Georgine* opinion, another huge class action was filed with a *Georgine*-like class definition.[91] *Georgine* invites companies facing mass tort claims to minimize their liability for future claims by paying a little extra to the first few claimants who sue.[92] That is what makes *Georgine* such an important and dangerous case.

C. The More Generous Terms Provided to Clients

The settling parties admitted and the court acknowledged that CCR and class counsel settled over 14,000 asbestos cases outside the class framework while they were negotiating the *Georgine* class action.[93] Thus there is no question that the client settlements were made alongside *Georgine*.[94]

The settling parties conceded that the terms negotiated for clients were different from the terms negotiated for the class, and the court acknowledged this to be true. The settling parties conceded that class members with only "pleural thickening or pleural plaques"[95] would be ineligible for cash compensation unless and until they de-

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90 The class in that case is defined to exclude all people with pending claims against Fibreboard that were brought before August 27, 1993. *See Ahearn* Certification Order, *supra* note 89.

91 Beeman v. Shell Oil Co., No. 93-047363 (Harris County, Tex. Nov. 1994) (settlement defining class of persons who had not filed suit by a certain date and who owned homes or would one day own homes that were fitted with allegedly defective plumbing). By order dated February 16, 1995, the court denied the parties' joint motion for preliminary approval of the class action settlement. Beeman v. Shell Oil Co., No. 93-047363 (Harris County, Tex. Feb. 16, 1995). Notices of appeal have been filed. Beeman v. Shell Oil Co., No. 93-047363 (Harris County, Tex. Mar. 8, 1995). Lawyers for the plaintiffs in *Beeman* say that the class definition in *Beeman* serves the class's interest. Letter from Arthur H. Bryant, Executive Director, Trial Lawyers for Public Justice, to author (Mar. 27, 1995) (on file with author). My position is that the shape is suspicious and that the court should demand convincing proof that the shape meets the reasons set forth to justify the class action form. While in general I am doubtful that this showing can be made, if it is, then the shape would no longer be suspicious.

92 *See* John C. Coffee, Jr., *The Corruption of the Class Action*, WALL ST. J., Sept. 7, 1994, at A15.

93 *Georgine*, 157 F.R.D. at 295-96.

94 The public record contains only redacted versions of those agreements. Complete versions were provided to a Special Master, Professor Stephen Burbank, whom the court appointed to review them. *See id.* at 307. Objectors were provided with redacted versions of the agreement. *Id.* at 260 n.9. *See supra* note 71 for details on the appointment of the special master.

95 *Georgine*, 157 F.R.D. at 273.

velop a more serious condition.[96] On the other hand, class counsel's pleural clients received "immediate cash compensation."[97] Class members with lung cancer would have to produce evidence of exposure to asbestos, evidence of lung cancer, and "objective evidence" that asbestos was a substantial contributing cause of their cancer. On the other hand, class counsel's lung cancer clients had to show evidence of asbestos exposure and lung cancer, but not causation.[98] The class settlement provides that in any six-month period the average amount offered to persons electing individualized payment procedures[99] in each compensable medical category must fall within the negotiated average value range for that category.[100] But the payments made to class counsel's 14,000 clients did not have to fall within those ranges.[101] Thus, the settlement terms were different.

The settling parties argued that the terms in the client settlements were not more generous than those in the class settlement, and the court apparently accepted some of their arguments. I believe that

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96 *See id.* at 272; *see also id.* at 273 (referring to the "exclusion" of "claims for pleural changes alone").

97 The court accepted the testimony of Professor John P. Freeman, one of the ethics experts testifying for the settling parties, that

> *the fact* that non-impaired pleural claimants in the inventory settlements received *immediate cash compensation*, where similarly situated claimants under *Georgine* would receive a different bundle of rights, with no immediate cash payment, was not evidence that Class Counsel were burdened by an impermissible conflict of interest.

Id. at 298 (emphasis added). The court accepted the settling parties' argument that this difference did not demonstrate that pleural clients received more generous terms, *see* discussion *infra* text accompanying notes 142-44, but here my only point is that there *is* a difference, which the court accepted.

98 *See supra* notes 50-51 and accompanying text (discussing difference in treatment of people with lung cancer).

99 Under the settlement, a qualifying claimant can elect a "simplified payment procedure," which will provide the claimant with payment of the minimum value for the claim in a short period of time, or the "individualized payment procedure," which provides the claimant with payment somewhere between the minimum and maximum value for the claim based on various factors and which takes somewhat longer than the simplified procedure. *Georgine*, 157 F.R.D. at 276.

The settlement also provides for a third method of payment, the "extraordinary" claims procedure. Each year a small percentage of claims, no more than three percent of the qualifying claims in each disease category for that year, will be eligible for extraordinary treatment. There is no ceiling on the amount of money that might be paid any one extraordinary claim, but the total amount of money available for such claims is capped for each year. *Id.* Finally, a small number of people each year will have the option of exiting to the tort system or binding arbitration. *Id.* at 281; *see also* Amendment to Stipulation of Settlement of January 15, 1993, between the Class of Claimants and Defendants Represented by the Center for Claims Resolution at 7, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Sept. 24, 1993) (providing the following percentages: for mesothelioma and lung cancer 2%; for other cancer 1%; and for non-malignant conditions .05%). The *Georgine* compensation schedule is reproduced *infra* note 189.

100 Stipulation of Settlement at 59, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 15, 1993) [hereinafter Stipulation of Settlement].

101 *See infra* notes 103-09 and accompanying text.

the differences just described speak for themselves. However, given my claim that the more generous client terms show that the class was sold out, it is important to respond to the parties' arguments that the terms were substantially equivalent. First, a caveat: it is not precisely accurate to state that the settling parties disputed that the terms were more generous. Neither they nor the court addressed the different treatment of lung cancer victims. This is not surprising because requiring less proof is more generous by definition.[102]

It is difficult to prove that the effect of not being bound by negotiated averages in the class settlement was a boon to class counsel's clients because the settling parties did not disclose the averages actually paid to class counsel's clients. The strenuous objections of the settling parties to any comparison between the average settlement amount paid to class counsel's clients and the negotiated averages for the class might lead one to suspect that the clients did better than class members will. However, there is more than mere suspicion to rely on.[103] Professor Coffee produced a chart of the information that was available on class counsel's client settlements: the total amount to be paid to the clients of each of the two class counsel law firms and the number of clients in each of the disease categories. That chart shows what the total amount paid by CCR to each of the two law firms

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102 I do not, however, mean to suggest that this obvious fact would have prevented the settling parties from offering some argument about the different treatment of lung cancer victims had they been pressed on this point; they generally were quite creative at disputing the obvious. They might well have disputed that requiring less proof of class counsel's clients is "more generous" or they might have admitted that it was "more generous" and tried to explain how that treatment was deserved. Given that the difference so obviously prefers class counsel's clients, I suspect they would have taken the latter route, arguing something like: "Class counsel's reputation in the asbestos field made proof of causation unnecessary." For a similar argument made by the settling parties, see *infra* text accompanying notes 137-39.

Then again, they might have argued that the explicit language of the Ness, Motley agreements, stating that lung cancer and asbestos exposure suffice to qualify the client for compensation, does not reflect what they really agreed to or what they really did. In other words, they might have argued that despite the contractual language, CCR actually would not pay any of Ness, Motley's lung cancer clients without proof of causation similar to that required of class members and that, despite the contractual language, Ness, Motley complied with this extra-contractual provision in every single case involving lung cancer. For a similar argument made by the settling parties, see *infra* text accompanying notes 412-15. How would one prove any different?

But this is all speculation. The fact is that neither the settling parties nor the court addressed the import of the two different levels of proof required of lung cancer victims under the two deals.

103 Professor John C. Coffee of Columbia Law School testified for the objectors to this settlement. He accepted no payment for the time and effort he devoted to this case. *See* Fairness Hearing, *supra* note 30, at 21 (Mar. 29, 1994) (testimony of John C. Coffee).

would have been, had their clients been required to comply with the negotiated averages.[104]

According to this information, Ness, Motley settled its clients' cases for $138,077,100.[105] If each of those clients had received the *maximum* average payment for a class member with that person's disease, Ness, Motley's clients would have been paid a total of $89,660,000.[106] Meanwhile, Greitzer and Locks settled its clients' cases for $77,417,000.[107] If each of those clients had received the *maximum* average payment, they would have been paid $44,907,500.[108] Thus, Ness, Motley negotiated payments for its clients that were fifty-four percent better than those it negotiated for the class, and Greitzer

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104 The chart, Exhibit O-170, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. 1994), is reproduced below. Note that the chart assumes (see Column [B] below) that *each* of class counsel's clients would have received the maximum value of the values that define the negotiated average range. That assumption undoubtedly results in overstating how well class counsel's clients would have done under *Georgine* and consequently results in understating how much better the clients and lawyers did by keeping the clients out of *Georgine*.

COMPARISON OF NESS, MOTLEY INVENTORY SETTLEMENTS WITH *GEORGINE* NEGOTIATED AVERAGE VALUE RANGE

DISEASE CATEGORY	[A] NUMBER OF INV. CASES	[B] *GEORGINE* NEG. AVG. VALUE RANGE [HIGH-END]	[A X B]
Mesothelioma	97	$60,000	$ 5,820,000
Lung Cancer	315	$30,000	$ 9,450,000
Other Cancer	85	$12,500	$ 1,062,500
Non-Malignant	9,777	$ 7,500	$ 73,327,500
		Total [C]:	$ 89,660,000
	Total Actually Paid Ness, Motley Inventory Claimants . . . [D]:		$138,077,100
		DIFFERENCE [D-C]:	$ 48,417,100

COMPARISON OF GREITZER & LOCKS INVENTORY SETTLEMENTS WITH *GEORGINE* NEGOTIATED AVERAGE VALUE RANGE

DISEASE CATEGORY	[A] NUMBER OF INV. CASES	[B] *GEORGINE* NEG. AVG. VALUE RANGE [HIGH-END]	[A X B]
Mesothelioma	174	$60,000	$ 10,440,000
Lung Cancer	271	$30,000	$ 8,130,000
Other Cancer	52	$12,500	$ 650,000
Non-Malignant	3,425	$ 7,500	$ 25,687,500
		Total [C]:	$ 44,907,500
	Total Actually Paid Grietzer & Locks Inventory Claimants . . . [D]:		$ 77,417,000
		DIFFERENCE [D-C]:	$ 32,509,500

105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*

and Locks negotiated payments for its clients that were seventy-two percent better.[109]

Moreover, class counsel apparently charged their clients at least thirty-three percent as a fee.[110] Had those clients been in the class, they would have been charged no more than twenty-five percent and perhaps as little as twenty percent.[111] Class counsel's interest in collecting the fees from their clients that the clients had contracted to pay is a questionable justification for paying clients more than class members.[112] However, even if it were a legitimate reason to pay clients more, it would not explain a fifty to seventy percent larger payment to the clients.[113]

By keeping its clients out of *Georgine*, Ness, Motley ensured that, after attorney's fees, its clients collected[114] at least sixteen percent

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109 According to the settling parties, Greitzer and Locks agreed to the basic structure of *Georgine* before Ness, Motley did. Fairness Hearing, *supra* note 30, at 76-77 (Mar. 1, 1994) (testimony of Michael F. Rooney). An economist would thus not find it difficult to explain the fact that Greitzer and Locks received a larger premium: Ness, Motley's agreement was worth less to CCR because CCR already had at least one reputable plaintiffs' firm on board.

110 *Georgine*, 157 F.R.D. at 309 (finding no reason to expect that class counsel would have reduced their contingency fees in settling the present client cases); *id.* at 277 (finding that asbestos plaintiffs' lawyers generally charge a contingency fee between 33% and 40%).

111 Under the settlement, the fee that may be charged by an attorney is limited to 25% of the compensation award received by the claimant and 20% of any amount above the maximum value for the relevant disease category, which is received by a claimant whose claim is selected for "extraordinary" treatment. *Id.* at 285. For a description of the various payment procedures available under the settlement, see *supra* note 99.

112 Class counsel's interest in seeing to it that other plaintiffs' lawyers could charge more than the 25% fee cap in *Georgine* would allow is no better a justification.

113 At most the difference in lawyers' fees would account for a 33% overpayment to clients. That figure assumes that class counsel might have charged its clients 40% and would have charged class members only 20%. It is determined in the following way: a client would receive 60% of X to equal 80% of $1.00; solving for X, one gets $1.33.

114 This statement is not precisely accurate, given that the client settlements provided that clients would receive their payment over time. The settling parties tried to use the fact that the payments would be made over time to their advantage by arguing that this devalued the actual payments made to clients in comparison to those that would he made to the class. *See* Fairness Hearing, *supra* note 30, at 271-72 (Mar. 29, 1994) (cross-examining Professor Coffee on how his chart did not take into account that some client settlements were to be paid out over time). The settling parties' argument, however, plays fast and loose with the facts. The redacted client settlement agreements omit the details on what percentage of the total recovery is to be paid in any installment, and some of the settlements lack any information on when the installment payments will be made.

But the information that is available from the redacted documents shows that at least 7000 of class counsel's clients will have been paid in full by the end of 1995, which is probably the earliest date on which any class member will see payment. *See* Settling Parties' Exhibits 302A, 302B, 302C, 303 [hereinafter SP Exhibits]. An additional 2602 clients will have been paid in full by the end of 1996, with 14 of the 16 installment payments due those clients having been made by the end of 1995. *See* SP Exhibits 302C, *supra*, (Greitzer and Locks' Pennsylvania settlement). The latest installment dates revealed by the client settlements involve 3891 West Virginia cases to be paid in seven installments: two in 1993, two in 1994, and one each in 1995, 1996, and 1997. *See* SP Exhibits 302A, 302B, *supra*. While

more than they would have collected had they been subject to *Georgine's* negotiated averages.[115] Similarly, Greitzer and Locks ensured that, after attorney's fees, its clients made at least twenty-nine percent more.[116] More important, by keeping its clients out of the class, Ness, Motley may have increased the fees it collected from 103% to 208%.[117] And Greitzer and Locks may have increased its fees by 128% to 245%.[118]

The settling parties disputed that Professor Coffee's chart demonstrated that class counsel's clients did much better outside *Georgine*.[119] First, they argued that the real issue was whether the client settlements were more favorable to their clients than past inventory settlements

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these last two settlements show that some number of clients will not receive all their money until 1996 or 1997, given the number of installments in earlier years it is reasonable to assume that the percentage of the recovery to be paid in those years is relatively small. More important, the existence of these West Virginia late payments is outweighed by the fact that at least 1500 of class counsel's clients will have been paid in full by the end of 1994 before any class member is likely to have received a dime.

115 The 16% figure assumes that Ness, Motley charged a fee of 40% to its clients and that it would have charged only 20% if those clients had been in the class. With those assumptions, Ness, Motley's clients made $11,166,260 more than they would have made had they been paid the high-end of the negotiated averages set by *Georgine*. Of course, class counsel might have charged 33% to their inventory clients and 25% to those in the class, which would mean that the clients made $25,311,657 more than they would have under *Georgine's* negotiated averages. Under this latter, more realistic, scenario, class counsel's clients did 38% better outside the class. It should be noted that most of Ness, Motley's client settlements were made in association with affiliated counsel, so that Ness, Motley itself did not retain all the money it collected in fees, whatever that amount was. *See* SP Exhibits 302A, 302B, *supra* note 114. That fact does not change the basic point being made in the text.

116 The 29% figure assumes that Greitzer and Locks charged a fee of 40% to its clients and that it would have charged only 20% if those clients had been in the class. With those assumptions, Greitzer and Locks's clients made $10,524,200 more than they would have made had they been paid the high-end of the negotiated averages set by *Georgine*. Again, however, it is even more likely that Greitzer would have charged 33% to its clients and 25% had they been in the class, which would mean that the clients made $18,188,765 more than they would have made under *Georgine*'s negotiated averages—54% better.

117 If Ness, Motley charged 33% to its clients and would have charged 25% under *Georgine*, Ness, Motley made $23,165,443 more in fees by avoiding *Georgine*, a 103% bonus. If Ness, Motley charged 40% to its clients and would have charged 20% under *Georgine*, then the bonus is $37,310,840 or 208%. If Ness, Motley had discounted its fees for its clients to the fee they would have charged under *Georgine*, say 25%, then Ness, Motley would have made only 54% more in fees by avoiding the class. But that still amounts to $12,119,275, a substantial sum.

118 If Greitzer and Locks charged 33% to its clients and would have charged 25% under *Georgine*, Greitzer and Locks made $14,320,735 more in fees by avoiding *Georgine*, a 128% bonus. If Greitzer and Locks charged 40% to its clients and would have charged 20% under *Georgine*, then the bonus is $21,985,300 or 245%. If Greitzer and Locks had discounted its fees for its clients to the fee they would have charged under *Georgine*, say 25%, then Greitzer and Locks would have made only 72% more in fees by avoiding the class. But that still amounts to $8,127,375. Moreover, the record supports the conclusion that neither Ness, Motley nor Greitzer and Locks reduced the fees it charged its clients. *See supra* note 110.

119 Proposed Findings of Fact, *supra* note 44, at 190-92.

between CCR and class counsel. The court appointed Professor Burbank[120] to compare the details of the client settlements and to determine whether they were like the settlements made between class counsel and CCR from 1988 to 1992.[121] Professor Burbank reported that the client settlements roughly matched the historical settlement averages of class counsel.[122] The settling parties and the court relied on this study to show that CCR did not pay a premium to class counsel in the client settlements.[123]

However, the study fails to explain how or why the class appears to have done so much worse. As discussed below, the settling parties' and the court's attempts to explain this are extremely weak.[124] On the other hand, if the client settlements matched past settlements, it does seem to support the settling parties' claim that the settlements were not "payoffs" to class counsel. Except, there is a strong reason to believe that the settlement value of cases in 1993, the year of the client settlements, was dramatically lower than the settlement value of similar cases in prior years. If so, CCR's payment of historical value for class counsel's cases demonstrates that CCR paid a premium.

Why would the settlement value be dramatically lower in 1993 than it was from 1988 to 1990, three of the five years included in Professor Burbank's analysis as a base for comparison? According to CCR's own witnesses, the world had changed: CCR's settlement philosophy was quite different between 1988 and 1990.[125] After 1991, CCR refused to settle large blocks of cases and would generally make

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120 This appointment was actually made by Judge Weiner, who first had jurisdiction over this matter. *See supra* note 71. The objectors alleged that Judge Weiner had so involved himself in pushing for some sort of global solution to the asbestos litigation that he should recuse himself from the case. Judge Weiner refused. Carlough et al. v. Amchem Prods., Inc., No. 93-0215, slip op. at 22, 10-22 (E.D. Pa. filed Apr. 15, 1993) (mem.) (order denying motion to recuse). Nonetheless, he turned the job of presiding over the fairness hearing to Judge Reed. *Georgine*, 157 F.R.D. at 245, 258. Judge Reed wrote the opinion approving the *Georgine* settlement that I criticize in this Article.

121 *Georgine*, 157 F.R.D. at 307.

122 For a complete description of Professor Burbank's methodology and results, see *id.* at 308. In short, Professor Burbank analyzed the inventory settlements for four states, as a representative sample: the home states of class counsel's law firms, South Carolina and Pennsylvania, and two states designated by counsel for the objectors—Illinois and New Jersey. For all four states Professor Burbank received historical data on the settlements between class counsel and the CCR defendants for the years 1988-1992. He then calculated the dollar and percentage differences between the historical averages and the inventory settlements made alongside *Georgine*. Professor Burbank found that the inventory settlements in the home states were generally lower than the historical averages for each firm in its home state, ranging from 3-14% lower. In the objector-designated jurisdictions, the results were a little more mixed. For most disease categories in Illinois and New Jersey, the inventory settlements were lower than historical averages, but the mesothelioma inventory settlements tended to be higher than historical averages—from 7-30% higher.

123 *Id.* at 309-10.

124 *See infra* text accompanying notes 137-56.

125 *Georgine*, 157 F.R.D. at 294. *See also infra* text accompanying notes 159-66.

only settlements that were trial driven.[126] Federal asbestos cases were no longer going to trial because the Judicial Panel for Multidistrict Litigation had transferred all federal personal injury asbestos litigation to the district court in Philadelphia (the MDL).[127] Thus, the settlement value in 1993 of federal cases was not what it was in 1988, 1989, and 1990. Moreover, CCR's witnesses testified that CCR made almost no inventory settlements in 1991 and 1992—aside, that is, from the client settlements negotiated in tandem with *Georgine*.[128]

To this, the settling parties and the court responded that most of the cases in the client settlements negotiated by class counsel at the same time as *Georgine* were state cases and were thus unaffected by the MDL transfer.[129] But block settlements of "stuck" federal cases and "unimpeded" state cases should still reflect a lower average amount than settlements involving unimpeded cases (that is, settlements that took place prior to the MDL).[130] The settling parties denied this too, relying on testimony by CCR witnesses that CCR would never have offered a lower average amount for a mixed package of state and federal cases merely because the federal cases were worth less.[131] The court credited this testimony without so much as remarking on CCR's dubious assertion that it would have ignored the effects of the MDL.[132] The court could have taken judicial notice of facts that supported the objectors' claim that the settlement value of cases in 1993 was lower than that in the 1988 to 1990 period.[133] Instead, it credited

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126 *Georgine*, 157 F.R.D. at 294.

127 Fairness Hearing, *supra* note 30, at 135-38 (Mar. 18, 1994) (testimony of Robert R. Hatten) (testifying on concerns of plaintiffs' lawyers that federal cases were not being remanded for trial); *id.* at 48 (Mar. 30, 1994) (testimony of Mark H. Iola) (describing "black hole" of MDL where federal cases disappeared and could not get to trial); *id.* at 68-69 (Mar. 29, 1994) (testimony of John C. Coffee) (describing Judge Weiner's April 15, 1993, order stating that no cases would be remanded for trial "except in extreme instances where the plaintiff was near death and all [settlement avenues] had been exhausted").

128 *Id.* at 147-48, 191-92 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick) (stating that from 1991 on, CCR would settle only trial-driven cases and, at first, the inventories of lawyers who recommended pleural registries, and later, after CCR was confident that a *Georgine* deal would be struck, the inventories of lawyers who signed "futures provisions" that accepted the basic criteria in *Georgine*).

129 *See Georgine*, 157 F.R.D. at 309.

130 Fairness Hearing, *supra* note 30, at 70-72 (Mar. 29, 1994) (testimony of John C. Coffee) (quoting from a letter written by Mr. Motley on June 25, 1992 that describes how, after the MDL was instituted, at least one "major defendant" was offering X for state cases and X divided by two for federal cases).

131 *Id.* at 226 (Feb. 28, 1994) (testimony of Michael F. Rooney); *id.* at 24 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick).

132 *Georgine*, 157 F.R.D. at 308-09.

133 The court knew that plaintiffs' lawyers were having great difficulty getting cases remanded for trial because it was the very court that was refusing to remand the cases. Moreover, every judge knows that this lowers the settlement value of a case. Finally, the record in *Georgine* is clear on CCR's settlement posture post-1991, i.e., no block settlements without "protection for the future." And every judge must know that the only way CCR

CCR's self-serving testimony that it would not have considered the MDL in settling cases and refused to admit evidence that tended to show that the value of federal cases was one-half or less after the MDL.[134]

Acceptance of the Burbank analysis does not, however, solve all the problems raised by Professor Coffee's chart. The chart still seems to show that clients were paid more money than they would have been paid had they been in the class. If the client settlements did not reflect a premium, why was the class not paid an equivalent amount? Alternatively, if the class was paid a "fair amount" and the clients received more, it strongly supports the objectors' arguments that the MDL reduced the value of claims in 1993, that CCR paid class counsel a premium, and that class members would have received more had their counsel not been seeking to maximize other interests while representing the class.

Untroubled by these questions, the court relied heavily on the Burbank study to demonstrate that the class was not "sold out." It concluded that the client settlements were based on historical averages and that "[t]his would be so whether or not *Georgine* were approved."[135] The court's assertion that the client settlements would have been made regardless of *Georgine* is not supported by the record.

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could afford to take such a posture was that fewer cases were trial-driven because of the MDL. Thus, the court had ample reason to question the "proof" offered to show no premium was paid because that proof was based on settlements paid in years when the world was different.

134 The court's dismissal of the common sense and economically sound conclusion that the MDL reduced the settlement value of cases is worth quoting at length:

> [T]his Court finds that the CCR defendants never had a policy to seek a discount for the settlement of federal cases based upon the MDL stay order, and never offered less than historical averages for the settlement of pending federal cases as a result of the MDL. Rooney 2/28/94 Tr. at 226; Fitzpatrick 2/23/94 Tr. at 24. A portion of the evidence upon which Professor Coffee relied [to conclude that the MDL depressed settlement value] was excluded as inadmissible hearsay (Coffee 3/29/94 Tr. at 79, 80-81). The rest of the evidence upon which Professor Coffee relied either did not implicate the settlement policy of CCR or was not credible to the Court. *See* Exhibit 0-15 and Rooney 3/1/94 Tr. at 107-08 (in letter, Mr. Motley referred to the settlement policy of an asbestos defendant [to pay less because of the MDL] that was not one of the CCR defendants); Iola 3/30/94 (plaintiff attorney's testimony that cases are "stuck" in the MDL not credible because [he] has historically settled only thirty cases with CCR). *See also* Hatten 3/18/94 Tr. at 55 (values in federal court cases were not depressed in 1992 because of the MDL).

Georgine, 157 F.R.D. at 308-09. Mr. Rooney and Mr. Fitzpatrick were witnesses for CCR. Mr. Iola was an Objector's witness; his testimony was not found credible. Mr. Hatten was a witness for the settling parties; the court accepted his testimony. Moreover, the court's assessment of Mr. Hatten's credibility was not affected by the fact that he admitted that CCR continued until December 1994 to settle Mr. Hatten's cases, outside *Georgine*, at his "historic" rate, whether or not those clients cases had been filed by January 15, 1993. *See supra* note 78.

135 *See Georgine*, 157 F.R.D. at 310.

It ignores the uncontradicted testimony of CCR's principals that, had they not been confident *Georgine* would be filed, they would not have made the client settlements on CCR's behalf.[136]

Although the settling parties relied heavily on the Burbank study, they did attempt to address the Coffee chart directly. First, they argued that class counsel's clients might have received the same amount under *Georgine* that they received under the side-settlements. The settling parties listed a jumble of factors that supposedly explained how CCR could legitimately pay class counsel's clients a total amount fifty to seventy percent greater than the best CCR would provide class members under the negotiated averages.[137] Basically, the settling parties' argument rested on one fact: they had negotiated a class settlement that made a claimant's recovery dependent, in part, on the identity of the lawyer the claimant retains to process her claim through the dispute resolution mechanism established by the class settlement. If the claimant hires a lawyer who has historically received

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136 *See, e.g., infra* text accompanying note 170 (quoting testimony).

137 Illustrative of the jumble:

> [Professor Coffee's chart] does not reflect Class Counsel's historical settlement averages; it does not reflect settlement amounts that would actually be offered to any *Georgine* class member; and does not provide sufficient information to support the conclusion reached by Professor Coffee that had the inventory claimants' cases been resolved under *Georgine*, they would not have received comparable compensation. Professor Coffee did not consider the value of extraordinary claims in his analysis. He did not consider it possible for certain Class Counsel's settlements to exceed the negotiated average range and still be considerably less than the "maximum value" in the Compensation Schedule (Exhibit B) to the Stipulation. Professor Coffee testified that he understood that, for any particular period, there could be low settlement values that would bring down the overall average, but he did not consider that there could be a sufficient mix of cases, with low enough settlement value, to balance Class Counsel's cases.
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> . . . .
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> In reaching his conclusion, Professor Coffee did not review or consider lower settlement averages in other jurisdictions. He did not have any actual data showing that Class Counsel's clients would not have received comparable compensation under *Georgine*. He relied instead on what he called "statistical knowledge." Applying his statistical test, Professor Coffee testified that the odds were against *all* non-malignant cases coming up in the upper quadrant, but he did not consider the impact on his analysis if some, but not *all*, of these cases, and the cases in the other disease categories, were settled above the "negotiated average value range," with the remaining settled cases at or below the average. Professor Coffee's analysis assumed that the Ness, Motley and Greitzer and Locks inventory settlements could not have exceeded the high point of the average range if settled under *Georgine* over some period of time, but there is no evidence in the record to support this assumption or to support Professor Coffee's theory of collusion.

Proposed Findings of Fact, *supra* note 44, at 191-92 (citations omitted) (emphasis in original). The above two paragraphs are the only part of the settling parties' Proposed Findings of Fact that deal directly with Professor Coffee's chart.

high settlement values from CCR—like class counsel[138]—she will be offered more money.[139]

If this is true, it means that class counsel negotiated a settlement ensuring that their future clients would do fifty to seventy percent better than everyone else.[140] This is not a ringing endorsement of class counsel's faithfulness to the class's interests. What possible interest could class members have in a settlement that ensured that a class member who stumbled into the wrong lawyer's office would receive considerably less than if she had had the good sense to hire class counsel?[141]

The court was apparently unimpressed with the jumble of factors argument, because it made another of its relatively rare digressions from the settling parties' text. The court found that the Coffee chart "[lacks] sufficient information to support a finding" that the clients did better than the class.[142] The court also suggested that the clients

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138 *See* Fairness Hearing, *supra* note 30, at 88 (Feb. 24, 1994) (testimony of Lawrence Fitzpatrick) (referring to Exhibit 0-28 and explaining that it showed that in every disease category Greitzer and Locks had a higher historical settlement average than the average law firm); *id.* at 241-43 (Mar. 29, 1994) (questioning of Professor Coffee by Mr. Motley implying that Coffee's chart was flawed because it failed to consider that Ness, Motley's firm might receive higher than average settlements from CCR based on the firm's past record).

139 *See infra* notes 303-16 and accompanying text (explaining how identity of counsel affects recoveries under *Georgine*).

140 They would have accomplished this, according to their story, in large part by ensuring that under *Georgine* the lawyer's historical settlement averages would play a substantial factor in determining a class member's recovery. *See supra* note 137. In an effort to counter Coffee's evidence, the settling parties thus stressed the important role that the identity of one's counsel would play under *Georgine*. *See infra* text accompanying notes 303-09 (discussing provision in the settlement that provides that a class member gets more money depending on who his lawyer is). Elsewhere, the court had to minimize the importance of this factor. *See infra* text accompanying note 315.

141 The argument that this mirrors the tort system will not wash. *See* Proposed Findings of Fact, *supra* note 44, at 102 (making this argument). In the tort system, although a law firm's past performance undoubtedly influences the settlement figures that firm can command, if a law firm begins to do shoddy work, then the settlements that the firm can demand of defendants will ultimately decrease in value. As a result, that firm presumably will get fewer high-quality cases over time. Thus, for a law firm's historical settlement record to be taken into account by defendants generally can be said to benefit client-consumers because it encourages law firms to stay sharp.

On the other hand, under *Georgine*, a law firm's historical settlement averages are frozen into consideration as a factor. Thus, there is little incentive for a firm to improve its services or even to maintain past levels of service. Firms can rest on their laurels. For this reason, the provision in *Georgine* that builds in historical averages as a factor of recovery may be subject to antitrust challenge as an illegal attempt to divide a market and freeze out new entrants. *See infra* note 306 and accompanying text. The "identity" provision of the settlement and related provisions that also serve the interests of lawyers, not class members, are discussed later. *See infra* text accompanying notes 303-26.

142 The court wrote:

> Having reviewed Exhibit O-170, the Court finds that it does not provide sufficient information to support a finding that the claimants in the inventory settlement would not have fared as well under the Stipulation.

did not necessarily get a better deal even if they received more money.[143] This argument has no evidentiary basis and is inherently implausible. The class members and the clients are similarly situated.[144] If more money merely makes the client deals *look* better, why do similarly situated clients get such different looking deals? This question is particularly important because ultimately neither the settling parties nor the court can demonstrate that the "more money" deal is equal to the "less money plus fringe benefit" deal, and the settling parties are supposed to bear the burden of proving "fairness" and "adequacy of counsel."

One might presume that settling parties and the court, unable to demonstrate the deals were equal, at least spent some energy demonstrating that clients were not similarly situated to class members. They did not. They spent some time asserting that there were differences, but not with a good deal of commitment. The settling parties and the

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Georgine, 157 F.R.D. at 310.

Professor Coffee's chart is not based on the best evidence, *see supra* note 104, but that is the court's own doing. More important, the evidence it is based on is unduly favorable to the settling parties. The chart would have been even stronger as a piece of evidence had Professor Coffee been able to compare what the average mesothelioma client received to *Georgine's* negotiated averages for mesothelioma class members and then done the same for each medical category recognized by *Georgine*. But the court refused to order the settling parties to disclose that information. By limiting the information available to the objectors, the settling parties and the court in effect forced Professor Coffee to understate how much more money was paid to class counsel's clients by keeping them out of *Georgine*.

This is true because it is undisputed that some number of class counsel's clients would have received no cash under *Georgine*, either because they were pleural clients or lung cancer clients who could not satisfy *Georgine's* standards of proof. But Professor Coffee had no way of knowing how many of class counsel's clients would be in the no-cash category because the client settlements did not identify pleural clients or give details about the lung cancer cases. Professor Coffee's chart, therefore, assumes that every one of the clients would receive the high-end of the negotiated average under *Georgine*. This is counterfactual and results in a significant understatement of how much more the clients actually made by being kept out of the class. It is hardly persuasive then for the court to reject Professor Coffee's chart on the ground that it is based on insufficient information. Sufficient information only would have made the overpayment to clients seem worse.

143 The Court wrote:

> This Court has also found that, during the course of the settlement negotiations in this class action, there were reasons for decreasing the values in the compensation schedules in the Stipulation from CCR's historical averages. These reasons included the fact that the Stipulation involves a waiver of defenses to qualifying claimants by the CCR defendants; that payments under the Stipulation should, in most cases, be made faster than under the tort system at considerably lower transaction costs, including attorneys' fees; and finally, that qualifying claimants with non-malignant conditions will be able to receive additional compensation if and when they contract cancer. Professor Coffee's inquiry into how well the inventory claimants would have fared under the Stipulation ignored these reasons, and thus the Court finds his opinion on this issue unpersuasive.

Georgine, 157 F.R.D. at 310-11.

144 *See infra* text accompanying notes 145-55 (discussing attempts of court and settling parties to distinguish clients from class members).

court said this: The two groups were "not identically situated."[145] This weak assertion is hardly adequate to explain why the two groups got such different looking deals. The question the court and the settling parties had to answer is: how are the clients different from the class members in a way that might justify the different treatment they received?

According to the court and the settling parties, the two groups are "not identical" because the clients, or "present claimants" as the settling parties prefer to call them, have "transaction costs" that differentiate them from the class.[146] First, this explanation is unsupported by any evidence in the record. It is an assertion and nothing more.[147] Second, even if we assume that clients had additional transaction costs associated with filing suit (or getting ready to file suit), these are not the only, nor indeed the most costly, transaction costs that someone exposed to asbestos might have. Some pleural class members might have incurred costs prior to January 15, 1993, or might later incur costs associated with their exposure, such as the cost of medical monitoring.

Finally, the transaction costs may very well have been trivial for many, if not most, of class counsel's clients. To be eligible for inclusion in an inventory settlement, a client need not have filed a deposition, hired medical experts, or incurred any costs specifically associated with the lawsuit.[148] Moreover, lawyers typically pay any such litigation transaction costs, not clients.[149] The only "transaction

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145 *Georgine*, 157 F.R.D. at 298. Of course, one might ask: Who is "identically situated"? Surely not the various members of the *Georgine* class, some of whom are dying, *see supra* note 9, and some of whom never will be very ill at all (those future pleural claimants who never will get a more serious disease) but all of whom were handled under one deal.

146 *Georgine*, 157 F.R.D. at 298 (relying on testimony of Professor Hazard).

147 The court cites Professor Hazard's testimony on behalf of the settling parties for the proposition that the clients had already incurred some transaction costs. *Id.* Professor Hazard was, however, merely an expert witness on the ethics of class counsel and the absence of collusion between the settling parties. He had no personal knowledge of whether the clients in the inventory settlement had incurred transaction costs, and his testimony could only be speculation on what might account for the different treatment of the two groups.

148 To collect under an inventory settlement, clients only needed a doctor's report testifying to their condition and some proof of exposure to the defendants' products. *See* SP Exhibits 302A, 302B, *supra* note 114. No deposition testimony and no discovery was necessary.

149 Model Rule 1.8(e)(1) allows a lawyer to advance court costs and the expenses of litigation, even when repayment is contingent on the outcome of the litigation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1) (1994). Under the Model Code DR 5-103(B), the lawyer could only advance costs when the client remained ultimately liable for the expenses. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1980). Even under the Code's regime, plaintiffs' lawyers typically advance such costs and expenses without demanding repayment of clients whose claims were unsuccessful. *See* County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1414-16 (E.D.N.Y. 1989) (criticizing DR 5-103(B) as outmoded), *aff'd*, 907 F.2d 1295, 1414-16 (2d Cir. 1990).

cost" the clients had that most class members did not was the expense of bus fare, cab fare, or gasoline necessary to get to a lawyer's office to sign a retainer. In sum, the fifty to seventy percent difference between payments to clients and to class members is too great to be explained by transaction costs.

Perhaps embarrassed by the emptiness of the "transaction cost" argument, the settling parties relied on, and the court adopted, a second argument that might be called the "expectation" distinction.[150] The settling parties argned that class counsel's clients "had a realistic expectation that their cases were going to be resolved in the tort system,"[151] while the class had "different expectations."[152]

Like the transaction cost distinction, the expectation distinction is not supported by any evidence.[153] Indeed, the expectation distinction is so ephemeral that it is hard to imagine what evidence might support it. Regardless, the court concluded: "Present clients in the tort system are not identically situated to future claimants. They already have engaged a lawyer, they already have made or committed to expenditures, have a place in the trial queue and have expectations of a certain course of proceedings."[154]

This is nonsense. Contacting a lawyer does not get one a "place in the trial queue" or mean that one has "made" or even "committed to expenditures," unless commitments that one is not called on to repay are to count. Even if a "place in the trial queue" had been taken or "commitments to expenditures" had been made, why should those things lead to more money? Moreover, if class members expect different proceedings and no cash, it is only because class counsel negotiated *Georgine*'s provisions for them and made those provisions different from the provisions negotiated for clients. How can class members' different "expectations" then be offered to prove that the negotiation of the dissimilar terms was justified?

There is, however, one obvious way in which clients are not similarly situated to class members: Class counsel's clients and the clients of other asbestos lawyers already had lawyers who expected compensation directly proportional to the amount of money their clients received. By contrast, the class has lawyers who get paid through a court award, whether or not the pleural class members get money or the

150 *Georgine*, 157 F.R.D. at 299.

151 *Id.* at 298 (quoting Professor Freeman's testimony).

152 *Id.* (citing Professor Freeman's testimony).

153 For this proposition the Court cited the testimony of another one of the settling parties' expert witnesses, Professor John P. Freeman. *Id.* There is no evidence in the record that Professor Freeman had any personal knowledge of the "expectations" of clients or class members. He was merely offering his ideas on how one might account for the different treatment of clients.

154 *Id.* at 329.

lung cancer class members have higher hurdles of proof. Thus *class counsel's* "expectations" and "transaction costs" provide a much more plausible explanation for the cash paid to the pleural clients and for all the other differences between the two deals than the feeble arguments offered by the settling parties and accepted by the court. By disassociating their clients from the class, class counsel could achieve a result they could not have achieved through the settlement.

What court would approve a settlement that provided that class members who had not already engaged lawyers got "insurance" or "had to prove more to qualify for recovery," while class members who had engaged lawyers got cash or had to prove less? But that is precisely the type of settlement that the district court approved by blessing *Georgine*, which excluded clients to make them eligible for separate deals.[155] In sum, the clients did better than the class members, and even if some did not, their lawyers profited by keeping them out of the class.[156]

Unlike class counsel, CCR appears to have done worse by excluding the clients from the class, agreeing to pay the pleural clients, easing standards of proof for the lung cancer clients, and paying much more money overall in the client settlements than they would have reasonably expected to pay under *Georgine*. CCR did worse—unless it could not get *Georgine* any other way.

D. Were the Client Settlements Made in Exchange for *Georgine*?

The settling parties deny that the client settlements were made in exchange for *Georgine*. Although they acknowledge that there was a connection between the client settlements and *Georgine*, they deny that the connection was an exchange. A proffer submitted on behalf of CCR some months before the fairness hearing explained the settling parties' position:

> [T]he prospect that the [*Georgine*] settlement will provide the CCR defendants with certain assurances for the future has stimulated these recent [client] settlement efforts. Nevertheless, the terms of the [client] settlements recently reached by the CCR defendants with [class] counsel [and other asbestos lawyers] . . . and the terms of the [*Georgine*] settlement are otherwise wholly independent of

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155 Only the settlement in *Georgine* is worse because no showing of substantial "transaction costs" must be shown before a lawyer's present clients are eligible for the better deal.

156 If the "insurance" provided pleural class members would have been better for some clients than cash, then it is interesting to note that apparently none of them demanded it. Perhaps this is because class counsel never asked their clients whether they would prefer the class deal. In any event, whether the class deal would have been better for some pleural clients, the lawyers made more money by keeping all pleural clients out of the class and thus eligible for immediate cash compensation.

> each other, and neither has served as consideration for the other.[157]

This is false. First, the evidence showed that class counsel's agreement to the basic structure of *Georgine* "stimulated" the client settlements by giving CCR enough of the price it was asking in exchange for those client settlements for CCR to make the client deals. "Stimulation," in other words, is nothing but a euphemism for "consideration." Second, the "terms" of the two deals are not "wholly independent."

As the settling parties explained, in 1989 and 1990 it was CCR's "settlement philosophy . . . to settle large numbers of pending claims" through "block or 'inventory' settlements."[158] CCR found, however, that this policy was "not diminishing the number of pending claims."[159] Consequently, in 1991 it "determined [as a general matter] . . . to make inventory settlements only if it could obtain some kind of protection for the future."[160] In other words, CCR set the price of an inventory settlement as "protection for the future."

At first, the future protection CCR demanded in exchange for an inventory deal was support for the establishment of pleural registries.[161] A pleural registry is a docket set up by a court to defer the claims of people who have pleural changes due to asbestos exposure but do not meet the registry's criteria for impairment. The pleural claimant's case is deferred until the person's condition worsens enough, if ever, to meet the registry's impairment criteria; in exchange, the statute of limitation is tolled as to illnesses that meet the registry's criteria.[162]

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157 CCR Proffer at 17, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. 1994) [hereinafter CCR Proffer] (citations omitted).

158 *Georgine*, 157 F.R.D. at 294.

159 *Id.*

160 *Id.*; *see also* Proposed Findings of Fact, *supra* note 44, at 150.

161 "During the period of the MDL global settlement negotiations in 1991, CCR's position was that it was not prepared to agree to 'inventory settlements,' unless the plaintiffs' bar was willing to work with CCR and the courts for the establishment of pleural registries." *Georgine*, 157 F.R.D. at 294 (citing Fairness Hearing, *supra* note 30, at 146, 161, 191-92 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick)).

162 *Id.* at 294 n.41. *Georgine*'s provisions for pleural class members could be characterized as setting up a mandatory national pleural registry. The settling parties dispute this, arguing that pleural registries do not provide claimants with any assurance that the defendants will be around and able to pay when and if a more serious illness develops, whereas *Georgine* does provide some such assurance. *Georgine* does not, however, require the defendants to set aside money now to assure that deferred claimants who get sicker will be paid. The "assurance" that *Georgine* offers is not, therefore, terribly concrete: it is an assurance based on the notion that *Georgine* will guarantee the financial viability of the defendants, preventing bankruptcy. I am therefore skeptical about how much different *Georgine* is from a national pleural registry, at least from the viewpoint of a pleural class member.

The settling parties emphasize the difference largely to explain that class counsel's advice to its affiliated counsel to file cases to avoid the possibility of pleural registries had nothing to do with *Georgine*. *See supra* note 77. I am equally skeptical of this explanation. Some people might also dispute my characterization of *Georgine* as a mandatory pleural

A group of lawyers representing asbestos victims in New England accepted CCR's price, agreeing to urge their courts to adopt mandatory pleural registries. In exchange, CCR agreed to inventory settlements for their cases.[163] In general, however, plaintiffs' lawyers were not jumping to accept this exchange.[164] And, for their part, the defendants were not entirely satisfied with the deal because "[u]nless there was a national pleural registry, one could simply go to an adjoining state, if one wanted to and file the claim and avoid the pleural registry."[165] Consequently, CCR adopted a new settlement posture.[166]

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registry as opposed to a voluntary one because *Georgine* is an opt-out class. But given that many in the *Georgine* class may not have had actual notice of their right to opt out, this criticism is not well-founded. On *Georgine* being the equivalent of a non-opt-out class for many class members, see *infra* notes 193-97.

For an article advocating the use of pleural registries, see Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992). My response to the supposed equity of mandatory pleural registries is: if it is fair to make less injured people defer their claims forever so that the claims of sicker people get to court first and faster, why shouldn't most whiplash claimants wait behind the pleural people and people who only have broken bones wait behind all people who are dying? Why, in other words, limit this principle of "justice" to those suffering from asbestos exposure?

Courts do not have a deferral docket for people with hurt feelings, as one might characterize those bringing claims for emotional distress. If the court set up such a docket, we would all be able to see that it was a way of changing the substantive law on what counted as a legal wrong without taking responsibility for doing so, without explaining why "hurt feelings" was no longer recognized by the courts as a wrong. Pleural registries are similarly a method for courts to treat people whom the law continues to acknowledge as injured as if they were not injured without having to explain why. Could it be that if one harms enough people, those one harms the least don't count anymore? Is this the principle of "justice" that underlies pleural registries?

163 *Georgine*, 157 F.R.D. at 295. ("In August of 1992 . . . a regional settlement of the asbestos cases pending in New England was reached and, as part of that settlement, the plaintiffs' counsel agreed to support the entry of mandatory pleural registries in the applicable jurisdictions.") (citing Fairness Hearing, *supra* note 30, at 128 (Feb. 22, 1994) (testimony of Lawrence Fitzpatrick)). For those with any doubt that this means the inventories settlements were made in exchange for the plaintiffs' counsel agreeing to support pleural registries, consider the following testimony from Mr. Fitzpatrick elicited by Mr. Baron on cross-examination:

> Q: [D]id you get — the New England deal, was that in exchange for the agreement to do a pleural registry?
> A: The New England settlement agreement included a commitment by the plaintiffs attorneys to move for a pleural registry in their jurisdiction.
> Q: Was that the quid pro quo?
> A: It was among the items of quid pro quo, yes.

Fairness Hearing, *supra* note 30, at 167-68 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick).

164 Fairness Hearing, *supra* note 30, at 65-66 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick); *see also Georgine*, 157 F.R.D. at 294-95 (citing opposition to pleural registries).

165 Fairness Hearing, *supra* note 30, at 124 (Feb. 22, 1994) (testimony of Lawrence Fitzpatrick); *see also Georgine*, 157 F.R.D. at 295 (court adopting Fitzpatrick testimony).

166 Or, as the settling parties put it:

> CCR . . . reached the conclusion that its concerns about the filing of pleural claims, by persons with little or no impairment, could not be successfully addressed by pursuing pleural registries. First, there was opposition in

At this point, the settling parties' story gets a little fuzzy. In their Proposed Findings of Fact, after admitting that CCR had decided it would not make inventory settlements without "protection for the future"[167] and that pleural registries were inadequate,[168] the settling parties did not forthrightly explain what CCR now sought as the price for an inventory settlement. Instead, the settling parties' documents and the court opinion jump to the point in time when the settling parties had reached agreement on the basic structure of a class settlement.

> CCR negotiators came to believe that the class action settlement negotiations were likely to result in an agreement.
>
> . . .
>
> [They had] communicated to [class counsel] that once the CCR defendants "believed that there was some rational way of dealing with the future [claims], that [they] were prepared to address the settlement of pending cases." This Court finds that, indeed, once it was probable to the CCR negotiators that the negotiations would be successfully concluded for a class action settlement, CCR began to negotiate inventory settlements without a pleural registry.[169]

The above language was carefully drafted to avoid a forthright statement of what is plain from the context, content, and sequence of events—the new price for inventory settlements was agreement to support *Georgine*. Mr. Fitzpatrick admitted this in testimony that neither the settling parties nor the court quoted:

> Without a degree of confidence that the *Georgine* discussions would be successful, we would not have done the present inventory settlements with Ness, Motley, with Greitzer and Locks, or the other nu-

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> many quarters from the [plaintiffs'] attorneys to such pleural registries. The opposition was based in part on the desire to receive immediate cash compensation and in part on the lack of funding for the registries to ensure that companies would still be viable if and when a pleural claimant . . . moved off the registry. In addition, this Court finds that CCR reasonably concluded that pleural registries were unsatisfactory unless a national pleural registry could be established, because it would be difficult for plaintiffs in one state to defer their claims if plaintiffs in other states would not be subject to deferral.

Georgine, 157 F.R.D. at 295 (citations omitted). Notice that the last sentence suggests that the CCR's concern was somehow for the well-being of plaintiffs who would find it "difficult." The testimony relied on, which I have quoted in the text, makes it clear that CCR's concern was for its own sake. *See supra* text accompanying note 165. There is nothing wrong with that, but the settling parties were not forthright even about this. Thus, they drafted the misleading language quoted in this footnote, *see* Proposed Findings of Fact, *supra* note 44, at 151, and the court with minor changes repeated their language.

167 Proposed Findings of Fact, *supra* note 44, at 150.

168 *Id.* at 151.

169 *See Georgine*, 157 F.R.D. at 295 (citations omitted) (quoting Mr. Rooney and citing testimony of Mr. Fitzpatrick).

merous unaffiliated [plaintiffs'] firms [that] we did inventory deals with, that is correct.[170]

Mr. Fitzpatrick's admission emphasized that other law firms were given inventory settlements as if that proved that support for *Georgine* was not the new quid pro quo for class counsel's inventory settlements. Of course, CCR could use all the support for *Georgine* it could get.

To prove that the class action was not consideration for the client settlements, the settling parties argued that the terms of the two deals were independent. However, the terms themselves show otherwise. The client settlements that *Georgine* "stimulated" and that class counsel and other asbestos lawyers[171] signed included what the settling parties called "futures provisions."[172] These provided that the siguing lawyer would not handle or file future asbestos cases against the CCR defendants unless those cases met certain medical criteria.[173] Before the fairness hearing began, the settling parties modified these provisions in an attempt to avoid charges that the provisions violated Model Rule 5.6's prohibition of agreements to restrict one's practice.[174]

Although I believe both versions violated Model Rule 5.6(b), that is not my point here.[175] Rather my point is that every lawyer who wanted a *Georgine*-stimulated client settlement had to accept a futures provision. As Mr. Fitzpatrick testified: "There became a point in time in 1992 when we became reasonably confident that the *Georgine* negotiations would become successful. We then changed our position from not doing inventory settlements without pleural registries, to doing inventory settlements in exchange for commitments on the fu-

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170 Fairness Hearing, *supra* note 30, at 193-94 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick).

171 *Id.* at 192 (other lawyers signed settlements with futures provisions).

172 *Georgine*, 157 F.R.D. at 299.

173 *Id.*; *see also infra* note 382.

174 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) (1994) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."); *see also infra* quotation accompanying note 401.

175 For an explanation of my opinion on the violation of Model Rule 5.6(b), see *infra* text accompanying notes 382-97. The court concluded that neither version violated Model Rule 5.6(b), *see Georgine*, 157 F.R.D. at 303, and that, even if either did, it was irrelevant to the issues before the court because the "futures provisions did not have any adverse or improper impact on the *Georgine* class . . . and they did not create an impermissible conflict of interest." *Id.* at 330. It is interesting to note that the ABA Committee on Ethics and Professional Responsibility assumed the opposite: "[W]e assume that a settlement offer of this sort is in the interest of some, and perhaps even most, of the lawyer's present clients. Indeed, it may be that part of the reason these present clients are able to obtain particularly favorable terms is the fact that the defendant is willing to offer more consideration than it might otherwise offer in order to secure the covenant from the attorney not to represent other present [or] future claimants." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 371 (1993) [hereinafter ABA Formal Op. 371].

ture."[176] In other words, to get a *Georgine*-stimulated client settlement, the plaintiffs' lawyer had to make some kind of commitment as to the future, memorialized in the futures provision.

The court understood these provisions to mean "commitment to the concept of the deferral of claims that did not meet the medical criteria in the [*Georgine*] Stipulation."[177] In essence, the futures provisions were commitments to the core of the *Georgine* settlement: no immediate cash compensation for future pleural claimants who do not meet *Georgine*'s criteria. Through the "futures provisions," CCR exchanged inventory settlements for support for *Georgine* by class counsel and other asbestos lawyers. In other words, no commitment to *Georgine* meant no client settlements.[178]

The settling parties and the court stated that the inventory settlements were "not conditioned upon an agreement being finally reached in *Georgine*."[179] Although this may be technically true, the settling parties' witnesses testified that CCR would not agree to these inventory settlements until it was confident that an agreement on the terms of Georgine *would be reached*.[180] CCR did not sign Ness, Motley's settlements until January 14, 1993, one day before *Georgine* was filed.[181]

The court found that the futures provisions did not violate Model Rule 5.6(b).[182] While I disagree with this conclusion, I do agree with the court's alternative finding that a violation of the rule is not in itself reason enough to reject a class settlement.[183] On the other hand, the client settlements in this case *are* sufficient reason because they demonstrate that CCR compensated class counsel through the client settlements for their support of *Georgine* and because the futures provi-

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176 Fairness Hearing, *supra* note 30, at 192 (Feb. 23, 1994) (testimony of Lawrence Fitzpatrick).

177 *Georgine*, 157 F.R.D. at 300 (citing testimony of Mr. Rooney).

178 For example, Mark H. Iola, a plaintiffs' lawyer testifying on behalf of the objectors, stated that CCR told him that if he was "unwilling to do the futures deal, that they're going to put me at the back of the [settlement] line and that they'll get to me at some point. . . . I've never received a single real dollar offer." Fairness Hearing, *supra* note 30, at 25 (Mar. 30, 1994) (testimony of Mark H. Iola). Thus, the terms of the client settlements were not "independent" of *Georgine*. Moreover, the *Georgine* settlement itself refers to the settlement of present client cases. *See* Stipulation of Settlement, *supra* note 100, Preamble, at 3 ("There are approximately 77,000 asbestos . . . claims currently pending against the CCR defendants in the state and federal courts. The goal and intent of the CCR Defendants is to resolve all these presently pending claims over the next five years.").

179 *Georgine*, 157 F.R.D. at 296.

180 *See, e.g.*, *supra* text accompanying note 170 (quotation from testimony).

181 *See* SP Exhibits 302A, 302B, *supra* note 114.

182 *Georgine*, 157 F.R.D. at 303.

183 *Id.* at 330 ("This Court need not decide, however, whether or not a state bar disciplinary board would conclude that these provisions technically violated Rule 5.6, since that issue is not before this Court in determining the adequacy of counsel.").

sions affect the class.[184] The class has a right to faithful representation, and that right is abused when its lawyers make separate deals for class counsel's individual clients in exchange for class counsel's work for the class. The class is affected when premiums are paid to non-class members to secure class counsel's support for the settlement—money that otherwise might have gone to the class. The settlement is tainted when defendants seek to circumvent court process designed to ensure that a class settlement is fair by offering plaintiffs' lawyers a benefit (that is, inventory settlements) in return for the lawyers' agreement to abide by a core provision of the class settlement regardless of whether the court finds the settlement fair.

The more complicated reasons the court and the settling parties offered to explain why clients were dissociated from the class and given separate deals are sophistry. The simpler explanation I offered at the beginning of this Article is much more plausible. The court and the settling parties had no real justification or authority for the shape of this class. Their assertion that clients are "not identical" to class members simply cannot explain the separate treatment of clients or the different and much more generous-looking terms offered class counsel's clients. In substance, they admit that the client settlements were conditioned on class counsel's support for *Georgine*. Their testimony shows that they tried to nail down this support with futures provisions, even at the risk that someone would accurately describe these provisions as violations of an explicit ethics rule. Buried in the pages of the settling parties' submissions and the court's opinion, and supported by the record, is the same story with which I began: CCR bought off class counsel and other plaintiffs' lawyers.

As I have explained, I believe the evidence demonstrates that this is what happened. That CCR, by signing the inventory settlements before *Georgine* was filed, took some risk that class counsel would not go through with their part of the bargain does not prove there was no bargain. It only proves that CCR took a calculated risk. Someone had to. If class counsel had filed *Georgine* before CCR signed the inventory settlements, class counsel would have assumed the risk because CCR might not have then delivered the more generous terms for the clients. Instead, CCR assumed the risk,[185] but sought to minimize it with futures provisions designed to hold class counsel to the *Georgine* crite-

184 The court reached the opposite conclusion: "What is significant for this proceeding is that the futures provisions did not have any adverse or improper impact on the *Georgine* class." *Id.*

185 *See* Fairness Hearing, *supra* note 30, at 102-03 (Mar. 1, 1994) (testimony of Michael F. Rooney) ("Whether or not the stipulation of settlement was ever filed, had no bearing on whether these [inventory] settlement agreements were in full effect. . . . The CCR basically took the risk at some point in time based on their anticipation that . . . we would be successful in our negotiations [to get *Georgine* filed].").

ria regardless of whether class counsel filed the settlement action and regardless of whether the court approved it. Moreover, Ness, Motley's client settlements were not finalized until the day before *Georgine* was filed, suggesting that CCR was not interested in taking on unnecessary risk.

The class definition was an integral part of the scheme. Class counsel could not plan to opt out over 14,000 people, almost all of its clients, yet remain credible on the fairness of *Georgine*. With CCR apparently unwilling to settle Ness, Motley's cases until *Georgine* was typed and ready to be filed at the courthouse and with CCR's interest in avoiding too much opposition from other plaintiffs' lawyers whose cases they had not settled before *Georgine*, the class definition had to exclude present clients. The account I have presented is the most plausible explanation of the evidence contained in the record of *Georgine*. Indeed, I believe that the evidence clearly and convincingly demonstrates that CCR paid class counsel on the side in exchange for the *Georgine* class action, and, for myself, I have no reasonable doubt.

No one likes to say such harsh words. I say them because I believe them to be true and because I believe that it is wrong to hem and haw in the interest of politeness or professional courtesy or one's own career when doing so helps injustice flourish. If, as I firmly believe, the client settlements were made in exchange for class counsel's agreement to support the terms in the *Georgine* settlement and included sweet terms for clients as part of the bargain for supporting *Georgine*, the settlement is collusive and should not stand.[186]

To those who would argue that *Georgine* is "efficient" because it reduces the backlog of asbestos cases, I would point out that there is no conflict between efficiency and equity if one can redistribute money without cost.[187] Had the court insisted that any "futures deal" include "present claimants" on equal terms with "future claimants,"[188] given the realities of the MDL, a more equitable and no less efficient deal might well have been reached. The lawyers bet that the courts would be eager enough to get rid of the asbestos mess that they would not balk over the disproportionate payments to present claimants and their lawyers. So far, the lawyers' gamble has paid off.

If you believe that the evidence I have described is subject to a more innocent and equally plausible explanation or that the settling parties' behavior, while troubling, is beside the point so long as class

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186 *See infra* text accompanying notes 328-70.

187 *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 9 (1989).

188 *See generally infra* text accompanying notes 215, 222-25 (discussing importance of even-handed treatment in assessing whether due process has been afforded future claimants).

members receive a reasonably fair recovery,[189] there are nonetheless strong reasons to reject the court's approval of the settlement.[190] We now turn to those reasons.

III
BUILDING A DUE PROCESS ON FAITH

A. *Ivy* and Adequacy Plus

Mass tort class actions are new and controversial.[191] But *Georgine* is not your run-of-the-mill mass tort class action. It is atypical because it involves a class composed largely of persons who could not be identified by the parties, who had not yet manifested injury at the time the action was brought, and who might not have known then or now that they had been exposed to the hazardous product. I will call such people "unknowing," in contrast with people I will call "unknown." Unknown people would readily recognize they were members of the class if information about the suit reached them through some means, but

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189 Under *Georgine*'s compensation schedule, these are the minimum value, negotiated average value range, maximum value, and negotiated average value for the small percentage of extraordinary cases each year. *See supra* note 99 (discussing the methods of recovery available under *Georgine*).

Disease	*Minimum Value*	*Negotiated Average Value*	*Maximum*
Mesothelioma	20,000	37,000-60,000	200,000
Lung Cancer	10,000	19,000-30,000	86,000
Other Cancer	5,000	9,500-12,500	32,000
Non-Malignant	2,500	5,800-7,500	30,000

Georgine, 157 F.R.D. at 337 (Exhibit B). For mesothelioma, the negotiated average value for extraordinary claims is $300,000 and 3% of the claims each year are eligible; for lung cancer, $125,000 and 3% eligible; for other cancer, $50,000 and 3% eligible; and for non-malignant, $50,000 and 1% eligible. *Id.*

For a discussion of how wide a range of settlements might be considered fair in any one case, see Geoffrey C. Hazard, The Settlement Black Box (unpublished manuscript, on file with author). That reality only emphasizes how important procedural checks are in any class action in which the plaintiffs' consent is not actually obtained. The next part of this Article is devoted to the importance of such procedural checks.

190 In other words, the Third Circuit need not repeat or accept the story I have told in order to overturn the district court decision.

191 *See, e.g.*, FED. R. CIV. P. 23 advisory committee's note (frowning on use of class actions to resolve mass tort cases); HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 17.4 (3d ed. 1992) ("Class actions in the mass tort field are in dynamic evolution."); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 289 ("In recent years an increasing number of district courts have been forced to move beyond the Advisory Committee's notes . . . to certify classes in mass torts."). *See generally* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993) (discussing the strain mass torts have placed on legal system and describing efforts to use class actions to address mass torts); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1043, 1049 (1986) (noting the push to use class actions to resolve mass tort cases and the resistance of many judges).

the parties cannot mail notice to them because the parties do not know who they are.

Before *Georgine*, the only other settlement involving a class composed largely of unknowing plaintiffs was the Agent Orange class settlement.[192] Most, if not all, unknown people can, in theory, be provided notice of a class action and the opportunity to opt out through, for example, television, radio, and newspaper announcements. But how does one provide notice and the opportunity to opt out to the unknowing? It cannot be done, if notice means apprising those people that an action is pending that affects them. By definition, unknowing persons have not manifested an injury and may be unsure whether they have been exposed to the product.[193] Therefore, those class members cannot *know* in any meaningful sense that they are members of the class.

In *Phillips Petroleum Co. v. Shutts*,[194] the Supreme Court held that in class actions brought for money damages (such as the Agent Orange and *Georgine* cases), due process requires that absent class members receive notice and the opportunity to opt out, at least when the class action form is used as a matter of efficiency—that is, when the

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192 The class in *In re Agent Orange* was defined to include all persons who were in the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 and who, while in or near Vietnam, were exposed to Agent Orange or other phenoxy herbicides, even if no illnesses were yet manifest from the exposure. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 154 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

193 For example, two of the three widows who served as class representatives testified that they were unaware that their husbands had been exposed to asbestos until shortly before they died of mesothelioma. Deposition of Nafssica Kekrides at 13-14, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 12, 1994) [hereinafter Deposition of Nafssica Kekrides] (asserting that before her husband was diagnosed with mesothelioma in July 1992, less than a year before his death, she did not know what asbestos was or that he had been exposed to it); Deposition of LaVerne Winbun at 13-14, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 6, 1994) [hereinafter Deposition of LaVerne Winbun] (asserting that up to the time of her husband's death from mesothelioma she had no idea that he had been exposed to asbestos). *But see* Deposition of Anna Baumgartner at 13-15, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 6, 1994) (asserting that her husband told her of his exposure to asbestos prior to his developing mesothelioma).

194 472 U.S. 797 (1985). While *Shutts* involved a class action in state court that included class members outside the state, courts have read its discussion of individual notice as applying to federal class actions as well. *See, e.g.*, Carlough [now Georgine] v. Amchem Prods., 10 F.3d 189, 200-01 (3d Cir. 1993) (applying *Shutts* to the *Georgine* federal class action in deciding whether prior to notice and the opt-out period class members the federal court could enjoin suits filed by *Georgine* class members in state court without offending due process); *see also infra* text accompanying notes 197-202 (discussing the Second Circuit's application of *Shutts* in a federal class action).

class action form is permissive, not mandatory.[195] They must also be provided with adequate representation.[196]

In *Ivy v. Diamond Shamrock Chemical Co.*,[197] the Second Circuit considered a collateral attack on the Agent Orange settlement. The *Ivy* court read *Shutts* as permitting class actions composed largely of the unknowing, people who, by definition, could not receive notice or exercise their right to opt out.[198] The court relied on a footnote from *Shutts*: "Our holding today is limited to those class actions which seek to bind *known plaintiffs* concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief."[199]

Shutts thus left open the question of whether notice and opt-out rights were required in all class actions. The Second Circuit read the *Shutts* footnote to mean that a class composed largely of unknown or even unknowing plaintiffs purportedly seeking money damages might be properly certified under the Federal Rule of Civil Procedure 23(b)(3) for permissive class actions, and that the due process rights of those people might be met through means other than notice or the opportunity to opt out.[200] *Ivy* held that in a class action that includes countless unidentified victims who are unaware that they have been

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195 *Id.* at 812. There are three subdivisions to Federal Rule of Civil Procedure 23: The first two subdivisions, (b)(1) and (b)(2), detail the requirements for certification of so-called mandatory class actions, or those in which members of the class do not have a right to opt out. Section (b)(1) allows a mandatory class action to be maintained if either (1) the prosecution of separate actions would create a risk of inconsistent rulings establishing "incompatible standards of conduct for the party opposing the class," or (2) separate adjudication would, "as a practical matter," dispose of the interests of nonparticipating potential class members or impair their ability to protect these interests. FED. R. CIV. P. 23(b)(1). Subsection (b)(2) provides for class actions that seek injunctive or declaratory relief. This type of mandatory class action is maintainable if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . to the class as a whole." FED. R. CIV. P. 23(b)(2). Finally, Rule 23(b)(3) provides for what might be called permissive class actions, class actions designed to promote efficiency and fairness in cases where common questions of law or fact "predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

196 472 U.S. at 812 (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940)).

197 Ivy v. Diamond Shamrock Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

198 *Ivy*, 996 F.2d at 1435 ("*Shutts* does not apply directly to classes of unknown plaintiffs."). In an earlier Agent Orange appeal, the Second Circuit had ruled similarly. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

199 *Shutts*, 472 U.S. at 811 n.3 (emphasis added by *Ivy* court); *see also Ivy*, 996 F.2d at 1435 (quoting *Shutts*). Holding that opt-out rights were required in all class actions would have doomed class actions brought under Federal Rule of Civil Procedure 23(b)(1). The question of whether due process requires notice in class actions brought under Rule 23(b)(1) or (b)(2) was also left open.

200 *Ivy*, 996 F.2d at 1435 (stating that "*Shutts* does not apply directly to classes of unknown plaintiffs" and declining to extend it to such classes).

injured, due process does not lie in notice or the opportunity to opt out; in fact, "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."[201] The *Ivy* court instead found that due process is satisfied by "requiring fair and just recovery procedures" and "ensuring . . . vigorous and faithful vicarious representation."[202]

Ivy's holding that the Constitution permits a court to bind unknowing persons to a class action settlement of their tort claims is troubling.[203] First, there is the question of basic fairness. Most people consider personal injury claims to be just that—*personal.* How do we convince people who discover five years from now that they are sick from exposure to some product that it was fair to have disposed of their claim years earlier without their knowledge?

Second, Article III of the Constitution limits the judicial power to "cases" or "controversies."[204] Unknowing victims do not have a present controversy with anyone, and for the courts to entertain their "claims" may violate Article III. Aside from the separation of powers problems implicit in the case or controversy question, the Agent Orange settlement and *Georgine* present further separation of powers problems because they require judges to craft, or at least approve, far-reaching settlements that resemble legislation. Yet no justification for this stretch of the judicial function is offered other than the courts' burgeoning dockets and Congress's failure to act.[205] These are all

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201 *Id.*

202 *Id.*

203 *See generally* Petition for Writ of Certiorari at 26-27, Ivy v. Diamond Shamrock Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994) (No. 93-860) (arguing that binding the unknowing is fundamentally unfair).

204 U.S. CONST. art. III, § 2.

205 Those who argue that *Ivy* and *Georgine* are analogous to the civil rights injunction cases in which unknowing "futures" are routinely bound without notice or an opportunity to opt out, *see, e.g.*, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995), are overlooking several critical distinctions between injunction cases and damages cases. By definition, injunctions are projections of the court's vision of justice into the future. The fact that such a move is an extraordinary exercise of court power accounts for the existence of various principles that restrain the court's power, ensure that the court remains accountable for the power it has exercised, and allow those affected by the injunction in the future to appeal to the court to change its decree. None of these principles are replicated in class action suits for damages.

First, injunctions will not be issued unless there is no remedy at law, e.g., damages, that will correct the harm being inflicted or threatened. *See generally* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981). Second, a court retains jurisdiction over the subject matter in controversy in any case in which an injunction is issued. *See, e.g.*, System Fed'n No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 647 (1961) ("An injunction often requires continuing supervision by the issuing court and always a continued willinguess to apply its powers and processes on behalf of the party who obtained that equitable relief."). Third, an injunction may be modified or lifted on request of those affected by the injunction provided that they make an appropriate

strong reasons for rejecting both *Ivy* and *Georgine*. *Ivy*, however, bothers with constitutional concerns in a way *Georgine* does not, making *Georgine* the worst of the two "unknowing" decisions.

The Second Circuit did not assert that adequate representation alone was sufficient to satisfy due process for unknowing class members. How could it? *Shutts* makes clear that in class actions for money damages involving primarily knowing class members, the class members are entitled to adequate representation plus notice and the opt-out right. Moreover, in *Mullane v. Central Hanover Bank & Trust Co.*,[206] relied on in *Shutts*,[207] the Court held that unknown class members should receive some notice, even if only by publication.[208] In *Mullane*, the Court concluded that publication notice to the unknown, however unlikely to be effectual, satisfied due process, at least when the unknown were a small part of the class and when all class members had "identical" interests; moreover, a guardian was appointed whose sole function was to ensure that the interests of the unknown were adequately protected.[209] The identity of interests, the large group of known class members, and the presence of a guardian ensured that there would be enough reliable monitors of the litigation to guarantee the faithful representation of the interests of the unknown.[210] *Shutts* and *Mullane* strongly suggest that if a money damages class action involving primarily unknowing plaintiffs could ever pass constitutional muster, there would have to be something more than merely adequate representation to ensure the due process rights of class members. The Second Circuit got the message.

In *Ivy*, the Second Circuit implicitly established a "more than adequate" standard for the representation due unknowing plaintiffs, or

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showing. *See, e.g.*, Board of Educ. v. Dowell, 498 U.S. 237, 247-50 (1991) (holding that in school desegregation cases, injunctions are designed as temporary measures and should he lifted upon a sufficient showing that the school board has complied with the injunction in good faith and that the vestiges of past discrimination bave been eliminated to the extent practicable).

As for institutional consent decrees, they may be modified or lifted under an even more modest showing. *See, e.g.*, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) (holding that a party seeking modification of an institutional reform consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances). The lenient standard articulated in *Rufo* and *Dowell* for modifying consent decrees and injunctions has already been extended to injunction cases that do not involve government entities. *See, e.g.*, Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 38 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 58 (1994); *In re* Hendrix, 986 F.2d 195, 198 (7th Cir. 1993). None of these protections are present in a class action for money damages brought under Federal Rule of Civil Procedure 23(b)(3).

206 339 U.S. 306 (1950).

207 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807-11 (1985).

208 *Mullane*, 339 U.S. at 319.

209 *Id.* at 317.

210 *Id.*

what one could call "an adequate representation plus" standard for class actions involving unknowing plaintiffs. The court first analyzed whether the unknowing claimants—whom the *Ivy* court referred to as "unidentified" or "future" claimants—had received representation that would be adequate in an ordinary class action, using the test set out by the Second Circuit in *Eisen v. Carlisle & Jacquelin*:[211]

> [A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.[212]

Eisen did not involve a class made up largely of "future" or otherwise unknowing claimants. Indeed, the Supreme Court later found that some two and a quarter million members of the *Eisen* class were identifiable by name and address with reasonable effort and held that they were thus entitled to individualized notice. The Court specifically rejected the argument that under Federal Rule of Civil Procedure 23 adequate representation could be substituted for notice in a class with identifiable members.[213]

Heeding the Supreme Court's rulings in *Shutts*, *Mullane*, and *Eisen*, the *Ivy* court did not end its due process inquiry with the conclusion that class counsel had been adequate. Indeed, the court expressed concern that its analysis might be read to "denigrate the importance of qualified and faithful class representation" in an action involving "future" (unknowing) claimants, where "quality and fidelity of counsel are of paramount importance."[214] It thus continued:

> [W]e ordinarily would anticipate the appointment of a guardian to represent the interests of absent claimants, particularly those with questionable injuries. In the instant case, however, we are not writing on a clean slate. The unique circumstances surrounding *Agent Orange I*—in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now—rendered additional protections unnecessary.[215]

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211 391 F.2d 555 (2d Cir. 1968).

212 Ivy v. Diamond Shamrock Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425, 1435 (2d Cir. 1993) (quoting *Eisen*, 391 F.2d at 562), *cert. denied*, 114 S. Ct. 1125 (1994). I do not think class counsel in *Georgine* meet this test because the evidence shows at least as strong a likelihood that they colluded with the defendants. This is not, however, my point here.

213 *See Eisen*, 417 U.S. at 175-77 ("2,250,000 class members are easily ascertainable.").

214 *Ivy*, 996 F.2d at 1437.

215 *Id.* at 1437 (emphasis added).

The *Ivy* "adequate representation plus" standard for class actions involving unknowing plaintiffs is reflected in the court's emphasis on the "paramount importance" of vigor and faithfulness in class actions involving unknowing plaintiffs, in its statement that "ordinarily" a guardian would be required,[216] and in its explanation of the "unique" circumstances that made more protection unnecessary in that case.[217] The two unique circumstances mentioned by the court strongly support this reading. First, "even-handed treatment of both identified and unidentified legitimate claimants" provided objective evidence that class counsel did not prefer "knowing" plaintiffs to the more vulnerable and less protected "unknowing." Second, "the dim prospects of success" was not offered to demonstrate how vigorous or faithful counsel had been, but rather to explain that less process was due—that is, less faithfulness and vigor—in the case before the court than in most cases involving "future" claimants. In general, less process is

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216 The requirement of a guardian, when notice is impossible, is also supported by *Mullane*, where the interests of the unknown, who could not receive actual notice, were represented by a guardian "with the sole duty of representing those interests." *See* Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1019 (1993) (discussing *Mullane*). Professor Laycock's article provides a thorough analysis of the requirements of due process in complex class action proceedings. He concludes that individual notice is the general rule, the essence of due process, and that adequate representation is available as a second-best solution when individual notice is impractical. *Id.* at 1026.

217 It is my position that the *Ivy* court articulated a standard of "adequacy plus" to justify its holding that the unknowing could he bound consistent with due process. It is not, however, my position that the *Ivy* court actually applied the standard it articulated. Many of the plaintiffs' lawyers who negotiated the Agent Orange settlement had a conflict of interest that could have influenced the settlement terms accepted on behalf of the class. *See* SCHUCK, *supra* note 25, at 192-206 (discussing fee agreement among plaintiffs' lawyers and how it might affect their approach to the settlement). The Second Circuit had earlier been troubled enough by this conflict to undo the agreement among plaintiffs' lawyers as to how they would divide the fees awarded by the court, but not concerned enough to undo the settlement. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 224-26 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). This conflict was not discussed by the *Ivy* court in applying its "adequacy plus" standard.

In law, however, a court may articulate a new principle in a case that demonstrates little commitment to the principle without dooming the principle to an apologist role in later cases. Perhaps the most famous example of this phenomenon is the strict scrutiny test developed in Korematsu v. United States, 323 U.S. 214 (1944). First used as an apology, the test later became a formidable constitutional barrier. A less well-known example is Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962), in which a standard for holding lawyers liable to third parties for negligence was first articulated and applied without rigor. The standard has been taken more seriously thereafter. *See, e.g.*, Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104 (Cal. Ct. App. 1976) (citing *Lucas* and holding that a third party could sue a law firm which rendered a legal opinion on which the third party relied and which failed to reveal critical facts that argued against the firm's legal conclusion, notwithstanding that the legal conclusion might well have been correct).

due when there are "dim prospects of success" because less process is due when the interests at stake are not substantial.[218]

Compare *Georgine.* Unlike the *Ivy* court, which was considering a collateral attack on a settlement that the district court approved eight years earlier and that the appellate court upheld six years earlier, the *Georgine* court was writing on a clean slate. Yet it put in place no "additional protections" to ensure that the representation of the "futures class," as the settling parties called it, was "faithful" enough to guarantee the due process rights of the hundreds of thousands of people in the class for whom notice and opt-out rights would do "little good." The court ignored *Ivy*'s admonition that a guardian should ordinarily be appointed to guarantee that the interests of the absent (unknowing) victims are faithfully represented, failing to appoint a guardian even for those class members with "questionable injuries"—the future pleural claimants—whose interests are most likely to be disfavored out of concern for the more seriously ill.[219] This, however, understates the lack of due process protection in *Georgine.* The court not only failed to appoint a guardian, it allowed the defendants to select class counsel for the unknowing claimants.[220]

More important, neither of the two unique circumstances that the Second Circuit relied on in *Ivy* is present in *Georgine.* In *Georgine,* the interests of unknowing class members are substantial. Some unknowing class members will suffer painful and prolonged suffering because of their exposure to the defendants' products. Although the future pleural claimants have less at stake now, they might later de-

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218 The *Ivy* court relied on *Matthews v. Eldridge* in holding that due process could be satisfied when notice and opt-out rights were meaningless. *Ivy,* 996 F.2d at 1435 (citing Matthews v. Eldridge, 424 U.S. 319, 334 (1976)). The *Matthews* court set out three factors to be weighed in deciding what process is due. The first is "the private interest that will be affected" or "the potential deprivation" at stake. *Matthews,* 424 U.S. at 334, 341. If a claim is very weak, the private interest at stake is not substantial. The "dim prospects of success" for claims brought by Agent Orange victims was the other unique circumstance that justified the Second Circuit's holding that the due process rights of "future" claimants were satisfied without "additional protections." *Ivy,* 996 F.2d at 1437. This is in accord with *Matthews* in that less process is due when the interest at stake is not substantial.

219 Note the *Ahearn* court's appointment of a guardian. *See* Report of Guardian Ad Litem, Eric D. Green, Ahearn v. Fibreboard Corp., No. 6:93-526 (E.D. Tex. Feb. 9, 1995). By referring to the *Ahearn* court's appointment of a guardian, I do not mean thereby to imply that the existence of a guardian cures the unequal treatment of present and future claimants that the shape of the *Ahearn* class suggests. I am not sure that a guardian appointed to review a settlement already negotiated, as was the case in *Ahearn,* can ever substitute for even-handed treatment as a guarantee of due process. What is the role of such a guardian? How does she perform her task when confronted with a take-it-or-leave-it proposition? It seems to me that when a class is shaped like *Georgine* or *Ahearn,* a guardian appointed after a settlement has been reached is an insufficient guarantee that the class was not "sold out."

220 *Georgine,* 157 F.R.D. at 294 ("CCR commenced negotiations with Class Counsel based on their reputation and experience in the asbestos litigation.").

velop a more serious illness. Moreover, many unknowing claimants would have little difficulty establishing that the defendants were liable for their substantial injuries.[221] Thus, unlike the "future" claims in *Ivy*, the "future claims" settled in *Georgine* involved substantial private interests.

Even more damning, the *Georgine* court did not demand even-handed treatment of identified and unidentified claimants as an indication of class counsel's fidelity to the unidentified. The court was satisfied with class counsel who had negotiated one set of terms for "identified" claimants, whom the settling parties call "present claimants," and another set of terms for "unidentified" claimants, called "future claimants." The court did not adopt the settling parties' position that the deals made for these two groups *were* equal. Instead, it said that there was insufficient evidence to tell whether the terms were even-handed or not, and that it did not matter either way.[222] This is a far cry from the approach taken by the Second Circuit. If the *Georgine* court had understood the problem as one of due process, not merely "ethics,"[223] it might have understood, as the Second Circuit did, that whether unknowing claimants were treated the same as identified claimants mattered a great deal.

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221 There is more than a little irony in the Agent Orange case leading to *Georgine*. The procedural irregularities in the Agent Orange case were justified in no small measure by emphasizing the weakness of the plaintiffs' claims, suggesting that courts would tolerate such irregularities in the future only in cases involving similarly weak, near frivolous, mass tort claims. *See, e.g., Ivy*, 996 F.2d at 1437 (stating that "the dim prospects of success" was one of two factors that made additional protections of the due process rights of the unknowing "unnecessary"). In *Georgine*, the uniqueness of the case was again invoked, if somewhat indirectly, as a means to jusify the court's acceptance of the settlement. For example, the *Georgine* opinion opens with a background section on the history of asbestos litigation, *Georgine*, 157 F.R.D. at 257-61, and concludes with some thoughts on the unique problems in asbestos litigation. *Id.* at 334-36. But the uniqueness of asbestos claims is not their weakness but their strength: they are knock-down winners for the plaintiffs. For example, in CCR's history, it has settled about 128,000 asbestos claims and tried only 196 claims to verdict. *See* Fairness Hearing, *supra* note 30, at 131-32 (Feb. 22, 1994) (testimony of Lawrence Fitzpatrick). Of the 196 cases tried to verdict, CCR prevailed only 107 times. *Id.* at 132. Courts, it seems, are equally besieged by meritorious and frivolous cases and are willing to justify dispensing with procedural regularity to rid themselves of either burden.

222 Consider the court's conclusion of law:

> The fact that the inventory settlements included terms that differed from the terms of the *Georgine* settlement also does not reveal an impermissible conflict of interest. . . . The relevant question is not whether the terms of the *Georgine* settlement are identical to the terms of settlements in the *past*, but whether, given all the circumstances, the terms of *Georgine* are fair and reasonable.

Georgine, 157 F.R.D. at 329 (emphasis added). The court's use of the word "past" to describe the client settlements that were negotiated *simultaneously* with *Georgine* is misleading.

223 The court's conclusion of law on the importance of the differing terms appears under the heading "Conflict of Interest." *Id.* at 327-30. The court's omnibus conclusions state that due process was satisfied by notice and mention adequacy of representation as if it were only a question under Federal Rule of Civil Procedure 23. *Id.* at 334.

Instead of objective evidence that class counsel had treated the class and their clients in an even-handed fashion, the *Georgine* court had before it objective evidence of dissimilar treatment. Yet it did not require class counsel to explain the segregation of the two groups. And although in a class action, the burden of proving adequacy ordinarily rests with the settling parties,[224] the *Georgine* court demanded that the *objectors* prove that the terms were not equal.[225] In a class action involving unknowing plaintiffs, the burden should not only remain on the settling parties, but should be harder to meet.

B. *Georgine*'s Shaky Legal Foundations

The *Georgine* court did not attempt to reconcile its holding that the different treatment accorded identified and unidentified claimants does not matter with the holding in *Ivy*. It cited just one case in support of its position: *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*.[226] *Berenson* involved a class action settlement that divided the class into three groups for purposes of determining what relief would be awarded class members.[227] None of the groups in *Berenson* were composed of unknowing claimants.[228] Thus, *Berenson* did not implicate the same due process concerns as *Ivy* or *Georgine*.

Moreover, the notice to the class in *Berenson* fully disclosed that different segments of the class were to be treated differently.[229] Although separate lawyers had not been appointed to represent the different class segments, the court found that the class had received adequate representation because it judged that the notice to class members was evidence that "the class [members] judged retrospectively for [themselves] that [their] interests [had] been adequately represented,"[230] and because it found that class members could have opted out "if . . . in their view . . . the proposed settlement unfairly

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224 Pilots Against Illegal Dues (Paid) v. Air Line Pilots Ass'n, 938 F.2d 1123, 1134 (10th Cir. 1991) (burden of showing adequacy of representation on plaintiffs); United Independent Flight Officers v. United Air Lines, Inc., 756 F.2d 1274, 1284 (7th Cir. 1985) (burden of showing adequacy rests with plaintiffs); Rex v. Owens *ex rel.* State of Okla., 585 F.2d 432, 435 (10th Cir. 1978) (party seeking to certify a class required to show that all requirements of Federal Rule of Civil Procedure 23 are met).

225 *See supra* note 142 and accompanying text.

226 671 F. Supp. 819 (D. Mass. 1987).

227 *Id.* at 824.

228 The *Berenson* court noted that the entire plaintiff class consisted of readily identifiable parties, namely all present and former retail tenants of Fanueil Hall Marketplace and Fanueil Gallery. *Id.* at 821. In addition, the court stated that notice of the fairness hearing was sent to all of the plaintiffs and that they all had an opportunity to opt out after being notified of the settlement, because no prior notice of class certification had been sent. *Id.* at 822.

229 *Id.* at 824.

230 *Id.* at 824 (citing *In re* Four Seasons Sec. Laws Litig., 502 F.2d 834, 843 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974)).

favored present tenants."[231] In sum, the *Berenson* court relied heavily on notice to ensure that the rights of absent class members were protected in a situation in which a settlement provided differing terms for groups not independently represented.

But *Ivy* teaches that notice cannot be depended on to protect the due process rights of "future" claimants. If the *Georgine* court had at least ordered that the notice disclose that present clients were getting a different deal, it might have provided some protection for a small segment of the class—those presently ill people, who were nobody's clients (the unknown). But it did not even do that.[232] Thus, *Berenson* simply does not support approval of *Georgine*.[233]

The *Georgine* court cited the 1987 district court opinion in *Holden v. Burlington Northern, Inc.*[234] to support its conclusion that simultaneous negotiations of different group settlements against a common defendant was not evidence of inadequacy of counsel. *Holden* was an employment discrimination class action brought under Federal Rule of Civil Procedure 23(b)(2), in which the plaintiffs alleged that the defendants had engaged in sexually discriminatory employment practices.[235] While negotiating the *Holden* settlement, class counsel also negotiated settlements of six other cases they were litigating against the same defendant.[236]

I believe that *Holden* was wrongly decided and that class counsel should not be allowed to negotiate with the defendant on behalf of third parties, while negotiating for the class.[237] But even if *Holden* was

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231 *Id.* at 825.

232 *See* Carlough [now Georgine] v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993) (describing notice). The notice made no mention of simultaneous representation or inventory settlements. *Id.* The notice did disclose that within the class, recoveries would differ depending on what disease a class member contracted. Notice of Rule 23(b)(3) Class Certification for Settlement Purposes Only, of Proposed Settlement, and of Hearing on Proposed Settlement, Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993) (No. 93-CV-0215) app. at A-4 to A-5. So the small subgroup of the class that was identifiable and identified received notice of intra-class differences, but not of the different treatment accorded present claimants.

233 The *Georgine* court's citation to *Berenson* does, however, betray something important about its understanding of the case. The citation shows that the *Georgine* court understood that the question of whether to approve the settlement could be analyzed as if the clients had been included in the class and been given better terms than everyone else. Of course, *Berenson* does not support the approval of a class settlement in which the clients of lawyers got better terms than all the absent class members. That such a class settlement could be approved as fair or consistent with due process, particularly absent notice of the differing terms, seems ludicrous.

234 665 F. Supp. 1398 (D. Minn. 1987).

235 *Id.* at 1401.

236 *Id.* at 1425. The six cases involved four "race, sex or national origin discrimination actions either brought by or about to be brought by" class counsel and two matters springing from a multi-district employment discrimination action against the railroad company and its unions, in which class counsel served as co-lead counsel. *Id.*

237 *See infra* text accompanying note 367.

worthy precedent, it would still fall short of supporting the *Georgine* settlement. Unlike *Georgine*, the *Holden* class was not composed largely of unknowing people. It was not composed largely of "future claimants"; people who had not yet experienced any ill effects from the "injury" the defendants caused.[238] The *Holden* court, therefore, could and did rely on notice to provide some protection for the due process rights of almost all class members.

The *Georgine* court did not mention that the *Holden* court had ordered that class counsel's representation of competing classes be "disclosed to the class members in the mailed notice sent to them regarding the proposed [settlement]."[239] Moreover, the *Holden* court took seriously the objectors' allegations that the class was sold out, stating that it was a matter "going . . . to the heart of the fairness, reasonableness, and adequacy of the proposed settlement."[240] To address these allegations, the *Holden* court ordered depositions of both the lead class counsel and the negotiating counsel for the defendant.[241] The *Georgine* court, on the other hand, refused to order depositions of the counsel who conducted the *Georgine* negotiations,

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238 Unlike *Georgine*, *Holden* was tried for four months before a settlement was reached. For purposes of the trial the class was certified to include "over 7,800 women who were employed by [the railroad] . . . after July 27, 1977, and whose claims of discrimination arose after that date." *Holden*, 665 F. Supp. at 1401. The settlement expanded the class to include women employed or denied employment after March 3, 1970, and who "*as a result of present policies or practices*" were or would have been discriminated against. *Id.* at 1404 (emphasis added). Although the *Holden* class may appear to include many "future claimants," the emphasized restriction demonstrates that it does not. It is nonetheless true that the expansion to include those denied employment does introduce some plaintiffs into the class who will not receive individual notice—depending on what kind of records the railroad kept on applicants—but those people are not as likely to ignore other notice reasonably calculated to inform them of the settlement as would the people in *Ivy* or *Georgine*. These *Holden* unknowns have already received all the injury they will receive from the defendant, unlike the people in *Ivy* or *Georgine* who were unidentifiable, not just to the parties and the court, but also to themselves. This last fact is what caused the *Ivy* court to state that for those people notice and opt-out rights would "probably do little good." Ivy v. Diamond Shamrock Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

239 *Holden*, 665 F. Supp. at 1426. The *Georgine* court pointed out that in *Georgine*, "as in *Holden*, the CCR defendants' settlement posture was well-known to the plaintiffs' and defense bars and the courts," but omitted any reference to *Holden*'s notice to the class. *Georgine*, 157 F.R.D. at 328. Moreover, the words "settlement posture" in the above quotation are carefully chosen. The settlement posture of the railroad in *Holden* was not the same as that of CCR. The railroad in *Holden* may have said "no settlement for the *Holden* class unless we settle all these other matters," but it did not say "no settlement for one group until you agree to support a class action that will guarantee that we are never haled into court on like claims again."

240 *Holden*, 665 F. Supp. at 1424.

241 *Id.* at 1425.

leaving the objectors to question only witnesses whose knowledge of the negotiations was largely secondhand.[242]

In sum, the *Holden* court took steps to provide some additional protections of the due process rights of the class when the adequacy of counsel was put in question by the settling parties' simultaneous settlement of other matters. The court relied on notice that disclosed the existence of the side-settlements, and on the sworn testimony of the settling parties' counsel, as additional protections of the due process rights of class members. In any event, the *Holden* class was less vulnerable than the *Georgine* class because the *Holden* class was not composed largely of "future claimants." Finally, nothing about the definition of the class in *Holden* suggested that it was created to serve the interest of some group not before the court.[243] For all those reasons, the support *Holden* gives *Georgine* is minimal.

But there is more. Other courts have ruled on the propriety of class counsel representing competing groups against a common defendant. Some have held that class counsel may not represent the class while negotiating for others against a common defendant;[244] others permitted class counsel to proceed only with certain procedural safeguards in place, safeguards that were absent in *Georgine*.[245] While these cases are often characterized as turning on the defendants' limited assets,[246] in almost all of them the "fact" that the defen-

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242 The *Georgine* court maintained that it gave objectors the "opportunity to probe into facts surrounding the proposed settlement through depositions of relevant persons." *Georgine*, 157 F.R.D. at 260 n.9. It did not mention that it refused to order the depositions of the most "relevant" individuals, class counsel and the lawyers for CCR. The two CCR witnesses whom the objectors were allowed to depose and who testified at trial were Mr. Fitzpatrick, President and CEO of CCR, and Mr. Rooney, CCR's Chief Operating Officer. Mr. Rooney testified, however, that while he actively participated in the negotiations, he did not become involved in the negotiations until after the parties had reached "basic conceptual agreements . . . such as the concept of deferral of unimpaired cases." Fairness Hearing, *supra* note 30, at 175-77 (Feb. 28, 1994) (testimony of Michael F. Rooney). More important, he testified that the "principal negotiators" for the CCR defendants were the lawyers from Shea & Gardner, not himself or Mr. Fitzpatrick. *Id.* at 176. Mr. Fitzpatrick continually pleaded ignorance as to the details of the negotiation, stating in response to a number of questions that he was "not a party to the negotiations." *See, e.g., id.* at 90, 113 (Feb. 24, 1994) (testimony of Lawrence Fitzpatrick). Similarly, Mr. Rooney denied specific knowledge of the inventory settlements negotiated with class counsel because he did not negotiate them. *Id.* at 118 (Mar. 3, 1994) (testimony of Michael F. Rooney).

243 *See supra* note 238 (discussing scope of the *Holden* class).

244 *See infra* text accompanying notes 257-60, 268-71.

245 *See infra* text accompanying notes 261-66.

246 *See, e.g., In re* Joint E. and S. Dist. Asbestos Litig. (*In re* Eagle-Pitcher), 133 F.R.D. 425, 432 (E.D. & S.D.N.Y. 1990) ("All the cases [on parallel representation of other classes] relied upon by the parties involved counsel that continued concurrent representation on behalf of classes of plaintiffs potentially competing for funds from defendants with limited resources."). *Eagle-Pitcher* involved a bankrupt defendant and thus the "limited fund" point was particularly important.

dant's assets were limited is founded on no more evidence than was present in *Georgine.*

For instance, in *Kuper v. Quantum Chemical Corp.*,[247] proof that the defendants' assets were "limited" consisted of no more than *allegations in the plaintiffs' complaint* that the defendant was "denude[d] . . . of its liquid assets and net worth" and that the value of the plaintiffs' shares was "jeopardized by the resulting decline in Quantum's value."[248] Quoting *Jackshaw Pontiac, Inc. v. Cleveland Press Publishing Co.*,[249] one of the earliest cases to address parallel representation in class actions, the *Kuper* court found that "it is '*not inconceivable* that the amount sought by [the other group] and the proposed [class] here will exceed the total assets'"[250] of the defendants. This is hardly a tough standard to meet.[251]

To judge whether the *Georgine* class was competing with the present clients for limited funds, one must assess the financial situation of the defendants *before* settlement because that is when such competition might have affected the strategy of the lawyers conducting the simultaneous negotiations. No matter how likely it is that the defendants can meet their obligations to the class and the clients under *Georgine,* before the deal was struck no one was, nor could have been, certain that the CCR defendants could satisfy all class claims, including those of future pleural claimants, and remain viable. The class representatives did not think so;[252] the plaintiffs' bar was not convinced;[253] the defendants admit to worrying about their viability ab-

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247 145 F.R.D. 80 (S.D. Ohio 1992).

248 *Id.* at 83 (brackets in original).

249 102 F.R.D. 183 (N.D. Ohio 1984).

250 *Kuper,* 145 F.R.D. at 83 (quoting *Jackshaw,* 102 F.R.D. at 192) (emphasis added).

251 *See also Jackshaw,* 102 F.R.D. at 192 (stating that it was "not inconceivable" that the amount the plaintiffs sought would exceed the total assets of defendants); Sullivan v. Chase Inv. Servs. of Boston, 79 F.R.D. 246, 258 (N.D. Cal. 1978) ("The possibility that assets and insurance of the defendants who may have committed fraud against the plaintiffs [in a parallel suit] will be insufficient to satisfy an alleged liability to the class of over $20 million is great enough to influence litigation strategy.").

252 *See, e.g.,* Fairness Hearing, *supra* note 30, at 245-46 (Feb. 24, 1994) (testimony of Ty T. Annas) (quoting from letter Mr. Annas, a class representative, wrote to the *Wall Street Journal,* expressing his concern that without *Georgine* the defendants would in time go bankrupt because they cannot pay out on all the claims that are being filed against them); *id.* at 169 (testimony of Ambrose J. Vogt, Jr.) (affirming that he agreed to be a class representative, even though he was not now seeking money damages, because he "wanted the assurance that there would be some money left over" if he got sick in the future).

253 *Id.* at 123-24 (Feb. 22, 1994) (testimony of Lawrence Fitzpatrick) (testifying that the plaintiffs' bar was opposed to CCR's proposal of pleural registries, in part because registries were not funded and the companies might not be viable by the time a claimant moved off the registry); *id.* at 174-75 (Mar. 18, 1994) (testimony of plaintiffs' lawyer Robert R. Hatten on behalf of the settling parties) (agreeing that one of the "serious benefits of the class" in *Georgine* is that by limiting the kinds of claims that can be filed it reduces the risk that the CCR defendants will be driven into bankruptcy).

sent the *Georgine* settlement;[254] and the *Georgine* court itself voiced concern that these now viable companies might face bankruptcy due to future asbestos claims if the settlement was not approved.[255] This is much more proof that the two groups were competing for limited funds during the negotiation period than was present in *Kuper* or its antecedents.[256]

The holdings of the "limited fund" cases fall into two categories. First, cases such as *Kuper*, *Jackshaw*, and *Sullivan v. Chase Investment Services*[257] hold that counsel who attempt to represent simultaneously the class and another group against a common defendant are inadequate representatives of the class. The decision in *Kuper* is particularly instructive. Although the court found that there was no direct conflict between the class and the other group,[258] and the would-be class counsel maintained that any potential conflict was "speculative" because the defendant might very well be able to satisfy judgments against it by both groups,[259] the *Kuper* court nonetheless refused to certify the class because of the lawyer's divided loyalties.[260]

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254 *See* Proposed Conclusions of Law, *supra* note 64, at 29-30 (mentioning that over a dozen companies have filed for bankruptcy as a result of the ashestos litigation and that the MDL Panel was concerned with "exhaustion of assets"); *see also supra* note 166 (explaining how the protection *Georgine* allegedly provides future pleural claimants, which is not provided by pleural registries, amounts to nothing more than an assurance that the defendants will remain financially viable).

255 *Georgine*, 157 F.R.D. at 335:

> It might appear, as the objectors argue, that the financial stability and potential future profitability of the settling defendants in this case would augur against the need for, or approval of, any group settlement of the future claims of the asbestos victims exposed to their products. This Court has concluded to the contrary because of the series of bankruptcies of similarly viable companies which have succumbed to the onslaught of asbestos claims. The time to prevent bankruptcies is before they occur.

256 *See supra* notes 247-51 and accompanying text. One other point is important in assessing the relevance of these cases: None of the so-called limited fund cases involved classes whose shape suggests that some group was cut out for separate treatment. To the extent that these cases turned on the possibility that the defendants' assets would be insufficient to meet the demands of both groups, they demonstrate that class counsel were representing groups whose interests *might* at some point have diverged. When CCR insisted that it would not settle inventory cases until it received protection from the "futures," that settlement posture created at least as much potential as would a limited fund that the interests of the two groups might diverge down the road. That settlement posture gave the clients a strong interest in a solution on the "futures," no matter what that solution was, whereas the interest of the "futures" in a futures solution was limited to a good solution.

Thus, whether one believes, as I do, that the groups in *Georgine* competed for funds in the same way as the groups in *Kuper* or most of the other cases in this group, the holdings in the so-called limited fund cases are relevant because the interests of "present and future claimants" were potentially in conflict for other reasons.

257 79 F.R.D. 246 (N.D. Cal. 1978).

258 *Kuper*, 145 F.R.D. at 82-83.

259 *Id.* at 83.

260 *Id.* The court concluded:

A different result was reached in three other limited fund cases: *Ross v. BankSouth*,[261] *Sheftelman v. Jones*,[262] and *Anderson v. Bank of the South*.[263] In those cases, the courts emphasized that the dual representation might never actually harm the class, and allowed class counsel to proceed.[264] However, in each of those cases, the court based its decision on the existence of three procedural safeguards designed to ensure that the class would receive adequate representation: first, the presence of at least one lawyer serving as class counsel who was "untainted by [the] alleged conflict";[265] second, notice to the class disclosing the alleged conflict; and third, court approval of the final settlement.[266] Only the court approval safeguard was present in *Georgine*,[267] and it can hardly qualify as an "additional safeguard" under *Ivy*, given that it is necessary for the resolution of every class action.

In addition to the so-called limited fund cases, there is *Fiandaca v. Cunningham*.[268] In *Fiandaca*, legal services lawyers simultaneously represented a class of women prisoners seeking improved prison facilities and, in separate litigation, a class of mentally retarded persons seeking improvements in the state institution charged with their care.[269] The state offered a settlement in the prison class action: temporary housing of the women prisoners at the state home for the mentally retarded.[270]

> Although few reported cases appear to address the propriety of simultaneously representing potentially competing classes, numerous decisions have held that an attorney cannot act as both a class representative and counsel to the class.... The rationale for those holdings—that class counsel should not be subjected to divided loyalties—applies equally to the competing interests of separate classes vying for relief from the same limited source.

261 Nos. CV85-PT-044-S, CV85-PT-044-S, 1986 WL 2702 (N.D. Ala. Feb. 25, 1986).

262 667 F. Supp. 859, 865 (N.D. Ga. 1987).

263 118 F.R.D. 136, 149 (M.D. Fla. 1987).

264 The courts thus called the conflict "speculative." *See Sheftelman*, 667 F. Supp. at 865; *Anderson*, 118 F.R.D. at 149; *see also Ross*, 1986 WL 2702, at *2 ("[A]ny possible conflicts involving attorney Stotsenberg could be covered by the 'opt out' notices, through proper court management and through the influence of attorneys Shutts and Cleveland.").

265 *Sheftelman*, 667 F. Supp. at 865.

266 *See id.*; *Anderson*, 118 F.R.D. at 149; *Ross*, 1986 WL 2702, at *2.

267 Only two of the three safeguards were present in *Holden*, which may in part explain why it was the only case cited by the settling parties and the *Georgine* court. I say "in part" because, in fairness to the court and the settling parties, it is also true that *Holden* made no mention of the defendant's limited assets. But in fairness to the reader, neither does *Ross*, which was the case that first mentioned the three safeguards, nor does *Fiandaca*, which may most closely parallel the facts in *Georgine*. *See infra* text accompanying notes 268-71. *But see Georgine*, 157 F.R.D. at 329 (distinguishing *Fiandaca*). Moreover, as I have argued, it is far from clear that *Georgine* is any less a "limited fund" case than most of these other cases, and the possibility that the defendant's funds are limited is not the only reason to insist on additional procedural safeguards in this situation.

268 827 F.2d 825 (1st Cir. 1987).

269 *Id.* at 826.

270 *Id.* at 827.

The court held that this settlement posture created an impermissible conflict of interest for the lawyers.[271] The conflict was disqualifying not because the state's assets were limited, but because the state had linked the two cases in its settlement offer, tempting counsel to favor the prisoner class over the mentally retarded class. Similarly, CCR's settlement posture in *Georgine*—refusing to settle present cases without an agreement to defer future pleural claims—created a conflict between the interests of class counsel and the interests of the future claimants.

The *Georgine* court distinguished *Fiandaca* as involving a "direct conflict of interest," because "[i]t *was not in the interest* of the second class for the female inmates to inhabit [the facility for the mentally retarded]."[272] The problem with this distinction is that it was the *Fiandaca* class counsel who concluded that the offer of temporary housing was against the interests of their mentally retarded clients. If, as in *Georgine*, the *Fiandaca* counsel had instead accepted the linked deal and proclaimed it acceptable to the vulnerable, unknowing class of mentally retarded people, the conflict would have appeared to be "indirect." Thus the *Georgine*'s court's distinction is illusory, because counsel's judgment cannot itself be enough to eliminate the conflict.

With the sole exception of *Fiandaca*, none of the cases involving competing groups include "future" or otherwise unknowing classes represented by class counsel who simultaneously represent a class of identified claimants. Yet they all, including *Holden*,[273] provide more protection for the due process rights of class members than *Georgine*, either by forbidding the lawyer from proceeding or by insisting that the class be given notice of the lawyer's dual obligations. Moreover, the cases that allow counsel to proceed, with the exception of *Holden*, also require that the class have at least one lawyer of undivided loyalty to monitor what the other lawyers do.[274] *Holden* adopted another safeguard: examination under oath of class counsel and the lawyer negotiating for the defendants. The *Georgine* court ignored the admonitions of *Ivy* and extended less protection for the due process rights of future claimants than other courts have demanded in ordinary class actions.

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271 *Id.* at 829.

272 *Georgine*, 157 F.R.D. at 329. It is true that the *Fiandaca* court at one point describes the conflict as "direct." *See Fiandaca*, 827 F.2d at 828. But that court did not analyze the conflict under Model Rule 1.7(a), which deals with "direct" conflicts; instead, it analyzed the problem as one governed by Model Rule 1.7(b), which governs conflicts between clients whose interests are not directly adverse. *Id.* at 829 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1994)).

273 *See supra* notes 239-42 and accompanying text.

274 *See supra* note 265 and accompanying text.

Moreover, the *Georgine* court misused *Ivy*, citing it twice[275] for the proposition that subclasses are not required to protect the interests of "present and future claimants against [a] settlement fund" because those interests are not antagonistic.[276] *Ivy* did "[affirm the] district court's rejection of separate subclasses for present and future claimants."[277] However, the *Ivy* court "agree[d] with the district court that designation of a subclass of future claimants and appointment of a guardian to represent their interests was unnecessary '*because of the way [the settlement] was structured to cover future claimants.*'"[278]

As *Ivy* makes abundantly clear, the "structure" that guarantees due process—in the absence of subclasses with separate representation or a guardian—is the "even-handed treatment of both identified and unidentified . . . claimants."[279] Yet, even-handed treatment is precisely the element missing in *Georgine*. In citing *Ivy*, the *Georgine* court pretended that the class before it, like the class in *Ivy*, included all present and future claimants; that the class did not have an unusual shape; and that the separate client settlements that class counsel negotiated simultaneously with *Georgine* did not contain different terms from those in the settlement for the unidentified class members.

It pretended that most identified plaintiffs were in the class and were treated equally with unidentified plaintiffs. But, with the exception of the class representatives and other unlucky people who retained lawyers after CCR had turned off the client settlement spigot[280] or who were too sick to go to a lawyer, most identifiable claimants were outside the class and received different deals, not even-handed treatment. Nevertheless, as its use of *Berenson* shows,[281] the *Georgine* court understood that the "conflict" question before it was no different from the question that would have been presented if the separate

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275 The *Georgine* court cited *Ivy* only twice. However, it also cited its earlier decision in this case, where it gave *Ivy* a different reading from the one I offer here. *See Georgine*, 157 F.R.D. at 259 (citing Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437 (E.D. Pa. 1993)). In *Carlough*, the court said that *Ivy* did "not dispense with notice requirements." That is true, although the implication that *Ivy* relied on notice to guarantee due process is not. In *Ivy*, the Second Circuit stated that its view that notice was adequate had "not changed," but it went on to admit that notice and opt-out rights were not likely to do any good in this situation and proceeded to the "adequate representation" analysis that I have described. *See Ivy*, 996 F.2d at 1435.

276 *Georgine*, 157 F.R.D. at 318 (citing *Ivy*, 996 F.2d at 1435-36). The *Georgine* court described *Ivy* as holding that the interests of present and future claimants against the settlement fund were not antagonistic and that no subclasses were required. *Id.*

277 *Id.* at 318-19 (describing *Ivy*).

278 *Ivy*, 996 F.2d at 1436 (quoting the lower court opinion in *Ivy*, 781 F. Supp. 902, 919 (E.D.N.Y. 1992)) (emphasis added) (brackets in original)

279 *Id.* at 1437.

280 Proposed Findings of Fact, *supra* note 44, at 153 ("Once the inventory settlements were concluded, no new additional cases were added to the settlements.") (citing Fairness Hearing, *supra* note 30, at 208 (Feb. 28, 1994) (testimony of Michael F. Rooney)).

281 *See supra* note 233 and text accompanying notes 226-28.

client deals had been a subset of an overall settlement submitted to the court for approval.

The *Georgine* court distorted the holding in *Ivy* to support its conclusion that the "interests of present and future claimants . . . [are] not antagonistic."[282] *Ivy* actually said that the even-handed treatment of present and future claimants dispelled most of that court's concern about whether the due process rights of the future claimants were violated when their lawyers simultaneously negotiated terms for present claimants.[283] The *Georgine* court's use of *Ivy* perverts the meaning of that decision. *Ivy* alone gave the *Georgine* court good reason to pay more attention to the definition of the so-called "futures" class. It gave the court reason to ask sua sponte what treatment the pending "present claimant" cases would receive. Moreover, *Ivy* dictates that the court should have rejected the settlement as soon as it found out that class counsel simultaneously negotiated different terms for the "present claimants." Forget the competing ethics experts. *Ivy* says that what the settling parties did denied the class due process.

C. The Importance of Fair and Just Recovery Procedures

In *Ivy*, the Second Circuit said that due process for the unknowing lies not only in more than adequate representation, but also in requiring "fair and just recovery procedures."[284] The Second Circuit did not, however, elaborate on what it meant by the latter phrase. The *Ivy* court's emphasis on even-handed treatment may have been intended to guarantee that the recovery procedures for the "futures" were fair and just. Whether similarly situated people are treated equally is, after all, an important test of whether a process is "fair and just." But the Second Circuit ultimately seemed to rely on the "more than adequate representation" standard as a guarantee of due process rather than the fairness of the recovery procedures.[285]

However, in a case raising due process questions similar to those in *Ivy* and *Georgine*, the Fourth Circuit did take the "fair and just" recovery procedure approach. *In re A.H. Robins Co., Inc.*[286] involved a Federal Rule of Civil Procedure 23(b)(1) class action brought against

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282 *Georgine*, 157 F.R.D. at 318. The *Georgine* court's only other mention of *Ivy* is a citation of that case for the proposition that "subclasses for present and future claimants" are not necessary. *Id.* at 319.

283 Ivy v. Diamond Shamrock Chem. Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425, 1435-36 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

284 *Id.*

285 While the Second Circuit mentioned "fair and just recovery procedures," it never elaborated on what it meant by this phrase other than to emphasize the equal treatment of present and future claimants, which might be considered an allusion to the fairness of the recovery procedures.

286 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Robins's insurer, Aetna, on behalf of those injured by the Dalkon Shield, which was a Robins product. The class alleged a "common undivided interest" in Aetna's insurance policy with Robins and sought to vitiate an agreement between Robins and Aetna that changed Aetna's obligation to pay the plaintiffs.[287] The plaintiffs also sought damages from Aetna as a joint tortfeasor with Robins.

A settlement was filed with the court and approved.[288] Unlike *Georgine* and *Ivy*, *Robins* did not involve a class composed largely of unknowing plaintiffs.[289] Nevertheless, the right to opt out was unavailable because the court certified the class as a mandatory class under Federal Rule of Civil Procedure 23(b)(1).

On appeal, the Fourth Circuit faced the question raised by *Shutts*: Does this mandatory class action suit for money damages, brought under Rule 23(b)(1), violate the due process rights of claimants because they were denied the right to opt out? The court held that even if *Shutts* applied, due process was nonetheless satisfied because the settlement provided that any class member dissatisfied with the offer made by the Trust in settlement of the claim could back out of the deal and proceed to trial.[290]

Robins is not all it pretends to be.[291] First, Aetna, not the bankrupt Robins, was the defendant.[292] Aetna wanted its liability as a joint tortfeasor determined once and for all by this mandatory, non-opt-out class action. Whether Aetna's interest, combined with the class members' interest in a uniform resolution of the liability issue, justified the court's approval of a non-opt-out class is open to serious question.[293]

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287 *Id.* at 717.

288 *Id.* at 719.

289 *Id.* at 723, 741 (noting that class consisted of approximately 300,000 unnamed women who had used the Dalkon Shield).

290 *Id.* at 745:

> The [Settlement] Plan gives every . . . class member [with a viable claim for damages] the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such right is required under due process.

The back-end opt-out was limited to Class A claimants and not provided to Class B claimants. Class A consisted of "those claimants who had complied with all the requirements for proof as a claimant in the Robins bankruptcy proceedings." *Id.* at 717. Class B claimants were "those who had failed to so comply." *Id.* Thus, given the Fourth Circuit's reasonable assumption that the bankruptcy proceedings complied with due process, it was arguable that the claims of Class B members against the insurer for damages as a joint tortfeasor were waived, resolved, or otherwise no longer viable because of prior judicial action, and thus their rights to due process were not violated by the lack of a back-end opt-out.

291 *See generally* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991) (describing the litigation against and the reorganization of A.H. Robins Co.).

292 *See supra* text accompanying notes 286-87 (discussing the background of *Robins*).

293 The appellate court in *Robins* spent considerable time and energy—20 pages in the federal reports—justifying its "liberal" approach to the use of Federal Rule of Civil Proce-

Second, the back-end opt-out provision is not all that the court claimed: plaintiffs who back out cannot recover punitive damages,[294] and may be limited to $10,000 until all others are paid in full.[295]

Although *Robins* may be seriously flawed,[296] the idea that a full back-out option might serve to guarantee the due process rights of unknowing class members seems sound.[297] It was the route taken in *Bowling v. Pfizer, Inc.*,[298] a class action settlement concerning a defective heart valve that had already killed hundreds of people and remained within tens of thousands of others who have not yet manifested injury.[299] The *Bowling* settlement paid cash to all class members for their claims for emotional distress and devised a system of compensation for future injury and wrongful death claims.[300] A class member who is injured by the valve in the future is entitled to reject the compensation scheme and go to binding arbitration or

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dure 23 to resolve mass tort claims and to the use of a non-opt-out class to resolve damage claims against a financially viable company like Aetna. *Robins*, 880 F.2d at 727-48. For criticism of the use of Rule 23(b)(1) in class actions for money damages against nonbankrupt entities, see *In re* Dennis Greenman Secs. Litig., 829 F.2d 1539, 1546 (11th Cir. 1987) (noting that existence of "receivership fund" and mere risk of bankruptcy were not adequate bases for certification under Rule 23(b)(1)(B), absent specific findings of defendant's financial status); McDonnell Douglas Corp. v. United States Dist. Court for Cent. Dist. of Cal., 523 F.2d 1083, 1085 (9th Cir. 1975) (holding that neither subdivisions (b)(1)(A) nor (b)(1)(B) permit certifications of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages), *cert. denied*, 425 U.S. 911 (1976); *In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 789-90 (E.D.N.Y. 1980) (refusing to certify claims under Rule 23(b)(1)(B) because there was no evidence of defendant's insolvency), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 465 U.S. 1067 (1984); Payton v. Abbott Labs, 83 F.R.D. 382, 389 (D. Mass 1979) (denying certification under Rule 23(b)(1)(B) because plaintiffs offered no evidence of the possible insolvency of the defendant), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983).

294 Telephone Interview with Brian Wolfman, Staff Attorney, Public Citizen, Washington, D.C. (Apr. 11, 1995) (attorney at firm that represented objectors in *Robins*). Punitive damages would be available in a front-end opt-out under Rule 23(b)(3). *Id.*

295 *See In re* A.H. Robins Co., Inc. (Anderson v. Dalkon Shield Claimants Trust), 42 F.3d 870, 872-73 (4th Cir. 1994). The $10,000 limit was not an explicit part of the original deal but was made clear only after appellate approval of the settlement.

296 Despite the flaws of the back-end option, *Robins* had other protections not present in *Georgine*. *Robins* involved a class of people who knew they had been exposed to the allegedly defective product, and notice was provided to all claimants, although no front-end opt-out right was provided. Furthermore, the claimants in *Robins* voted on the settlement in accordance with procedures applicable to bankruptcies, although the class action was technically not controlled by bankruptcy law. Almost 95% of Class A claimants voted in favor of the settlement, and 98% of Class B claimants voted in favor of the settlement. *See Robins*, 880 F.2d at 747. For definitions of Class A and B claimants, see *supra* note 290.

297 *Robins* itself was not a class of unknowing plaintiffs, like the classes in *Georgine* and *Ivy*. *See supra* text accompanying note 289.

298 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed*, 995 F.2d 1066 (6th Cir. 1993).

299 *Id.* at 147. Those tens of thousands were not quite as unknowing as the plaintiffs in *Georgine* or *Ivy* because they at least knew of their exposure to the product.

300 *Id.* at 149-50.

trial,[301] just as any person who opted out of the class action at the front end would be entitled to sue or seek binding arbitration.

The due process protection in *Bowling* and even in *Robins* was much greater than that provided to the *Georgine* "futures" claimants. The *Georgine* settlement provides that the maximum number of class members who may back out of the deal and proceed to trial each year shall not exceed approximately one percent of the maximum number of qualifying claims CCR is obligated to pay each year.[302] This is far from the less-than-perfect back-out option provided the largely knowing (and voting) class in *Robins* and very far from the back-out option provided the uninjured but otherwise identifiable class members in *Bowling*.

D. The Unfair Recovery Procedures in *Georgine*

Just as the representation in *Georgine* fails to meet the "more than adequate" test and even the test of adequacy used in ordinary class actions, there are also aspects of the recovery procedures in *Georgine* that fail to meet even a minimalist view of fairness. Specifically, several provisions in the *Georgine* settlement make the size of a claimant's recovery dependent on the *identity* of his lawyer, not on the lawyer's performance. In addition, the settlement contemplates that class counsel will have continuing responsibilities to the entire class and will be allowed at the same time, to handle individual claims in the *Georgine* recovery system.

The *Georgine* settlement provides that one of the factors to be considered by CCR's claims evaluators in making what in most cases will be the final recovery determination[303] is the identity of the claimant's

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301 *Id.* at 150, 166.

302 *Georgine*, 157 F.R.D. at 281 n.27. For the precise percentages that apply to back-outs, see *supra* note 99.

303 The settlement uses the term "offer" and provides that "[a]ny claimant . . . who decides not to accept a settlement offer . . . may elect to resolve the Claim either through the tort system or through binding arbitration." Stipulation of Settlement, *supra* note 100, at 67. But the settlement provides that less than two percent of the maximum number of claims CCR is obligated to pay each year can be resolved through the tort system or binding arbitration in a single year. *See supra* note 99. Before any claimant can try to squeeze into the small group allowed to opt out, he must request the court to conduct a mandatory settlement conference conducted by the court or a neutral third party. *See* Stipulation of Settlement, *supra* note 100, at 68-69. The "offer" is thus a final determination for over 98% of the people each year, if CCR decides not to modify it much, or at all, on the mere urging of a neutral third party. There is little incentive for CCR to modify its offers, of course, because less than two percent of the people in these conferences each year will have any option but to accept the offer.

The fact that CCR's claim evaluator, not a neutral party, has what amounts to the final say on what recovery a class member will receive can hardly be described as "fair and just recovery procedures." What saves this procedure from itself being enough to make it incumbent on a court to reject *Georgine* is that each year the recoveries must fall within the negotiated average range, which the *Georgine* court determined was a fair range. That does

lawyer.[304] The other factors to be considered are the type of claim, the nature and extent of injury, evidence on causation, disability, age, number and age of dependents, special damages, pain and suffering, amount and likelihood of exposure to the asbestos products of the defendants, job history, location of forum in which the claimant could maintain a claim, and historical recoveries in comparable cases in that jurisdiction, type of release to be given by the claimant, and any other relevant criteria used in the settlement of litigated cases.[305]

I have listed these other factors in detail for a reason. The "identity of counsel" factor does not mean that a person's selection of a lawyer may affect the recovery received because one lawyer may be more skillful than another in presenting evidence on the factors to be considered by the evaluator or may be more skillful at arguing that one or more of these factors are particularly important and should outweigh others. If this were so, there would be no need to consider the identity factor separately; it would be built into the consideration of the other factors. Instead, the "identity of counsel" factor means the lawyer's *record of settlement* with CCR.[306] A claimant who inadvertently chooses a lawyer with a low or nonexistent settlement average with CCR will do worse than a claimant whose lawyer has a high settlement average.[307]

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not prevent the possibility of individual injustice for some claimants who may receive far below the negotiated average range merely on the say-so of CCR, which is not a neutral figure. However, this deal has too many problems for me to concentrate individually on all of them. *See supra* note 30.

304 While the settlement does not use these words, it is clear from the testimony of CCR's witnesses that the factor expressed in the settlement as "judgments in comparable cases involving various plaintiffs' counsel," *Georgine*, 157 F.R.D. at 277, means the historical settlement record of the claimant's lawyer, or as the CCR witnesses put it, "identity of counsel." *See, e.g.*, Fairness Hearing, *supra* note 30, at 120 (Feb. 24, 1994) (testimony of Lawrence Fitzpatrick) ("The identity of the plaintiff's firm is a factor [under the settlement] that CCR is to take into account in evaluating claims. Mr. Baron's firm [for example] would probably receive a higher offer, all other things being equal."); *id.* at 125-38 (explaining that the identity of the law firm is to be taken into account, although if the law firm's reputation slips over time the "identity" factor would be adjusted); Fairness Hearing, *supra* note 30, at 129-32 (Mar. 3, 1994) (testimony of Michael F. Rooney) (testifying that the identity of the lawyer is a factor and that, all other things being equal, claimants who go to law firms with historically high settlement averages would get more money than claimants who go to other law firms).

305 Stipulation of Settlement, *supra* note 100, at 57.

306 *See, e.g.*, Fairness Hearing, *supra* note 30, at 131 (Mar. 3, 1994) (testimony of Michael F. Rooney) (responding that if two lawyers submitted identical claims, the only difference being the historical settlement averages of the lawyers submitting the claims, there would be a difference in the recovery offered). Mr. Fitzpatrick testified to the same effect. Fairness Hearing, *supra* note 30, at 86-87 (Feb. 24, 1994) (testimony of Lawrence Fitzpatrick) (affirming that under *Georgine* if two class members with identical claims walk into two different law firms, one firm with asbestos experience, and one without, the class members could receive different settlement offers).

307 *See* Fairness Hearing, *supra* note 30, at 86-87 (Feb. 24, 1994) (testimony of Lawrence Fitzpatrick); *see also id.* at 120 (affirming that a class member who went to Baron &

This provision does not benefit the class, but it does benefit law firms with historically high settlement averages, such as class counsel's law firms.[308] Rewarding excellent performance in a particular case benefits class members because it gives lawyers an incentive to perform well. Outside the class-settlement context, paying higher settlement awards to clients who choose lawyers with historically high settlement awards presumably reflects what the parties believe would happen if the case went to trial. What people believe would happen at trial depends not just on objective factors but on the lawyer's ability to marshal and present the facts.

Because the class settlement removes the trial contingency, there is no reason to try to assess what might happen at trial. As a general proposition, a lawyer's past trial record or reputation for success at trial should not matter at all in assessing how large a recovery to offer in the individualized payment process because in only one percent of the cases can people back out and proceed to trial. Accounting for a law firm's past settlement record only freezes in place a firm's past trial performance and amounts to a method for established asbestos lawyers to hold on to their share of the asbestos plaintiff market. The settlement eliminates the need for firms to demonstrate they are still worth premium awards and denies new entrants to the asbestos bar the opportunity to show they are just as good or better. This harms consumers because it does not encourage continued excellence and it deters competition over price or performance.

CCR's witnesses claimed that CCR would adjust the "identity factor" every so often to account for poor performance in cases against non-CCR defendants.[309] However, this is at odds with all of the other testimony on "historical averages,"[310] and there is no guarantee that CCR will operate this way. CCR has no incentive to go to the expense of collecting information on performance by counsel in non-CCR cases because the settlement caps CCR's yearly maximum liability.

The "identity factor" makes entry into the asbestos-lawyering market difficult and, thus, tends to keep fees up to the twenty-five percent ceiling the settlement sets.[311] While I am not an expert on antitrust

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Budd, one of the law firms representing the objectors, would automatically get more money because of Baron & Budd's past record in the asbestos field).

308 *See supra* note 138.

309 Fairness Hearing, *supra* note 30, at 137 (Feb. 24, 1994) (testimony of Lawrence Fitzpatrick).

310 *See* testimony cited *supra* notes 304, 306 (describing how historical averages would be used in assessing recoveries).

311 *See* Fairness Hearing, *supra* note 30, at 32-35, 168 (Mar. 18, 1994) (testimony of Robert R. Hatten) (expressing concern about how new lawyers, by forcing defendants into bankruptcy and clogging the courts, were ruining the value of asbestos claims brought by the more established asbestos bar); *see also supra* note 111 (explaining fee caps in the settlement agreement).

law, the "identity factor" provision of the settlement seems to raise serious antitrust problems.[312] Most important, under the present analysis, it cannot be characterized as a "fair and just" procedure. The *Georgine* court "infer[red] from the record that the 'identity of counsel' factor means that the claim evaluator for CCR will consider the *demonstrated* skill, ability, talent and experience of a claimant's counsel."[313] But if "demonstrated" means "demonstrated in the case under consideration," there is no need for an "identity factor"; and if it means "demonstrated in past cases," it is subject to all the criticisms I have raised.[314]

The court, apparently understanding this problem, offered two additional reasons not to worry about the identity factor: There was no evidence that the identity factor will "dominate" other factors and, as only one of many factors, it is of "minor significance."[315] But there is evidence in the record that the factor will play a "significant" role in the payments to class members under *Georgine*.[316] Moreover, regard-

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312 Those who are experts in antitrust might be interested in the testimony of Robert Hatten, a plaintiffs' lawyer testifying on behalf of the settling parties. On direct examination, Mr. Hatten testified to his concern over the "new lawyers [who] were getting into the asbestos litigation, feeding on the success of the original plaintiffs bar," and how that concern led plaintiffs' lawyers to begin "consolidating trials" and "fil[ing] class actions." Fairness Hearing, *supra* note 30, at 32-35 (Mar. 18, 1994) (testimony of Robert R. Hatten). He reiterated these concerns on cross-examination. *Id.* at 168 (affirming his concern that these new lawyers would "kill the goose that was laying the golden egg"). Equally, if not more interesting, is the testimony of Mr. Rooney, CCR's Chief Operating Officer, asserting that the provisions that allow for ordering of plaintiffs' claims based on the identity of the class members' lawyer, were "negotiated [at the request of class counsel] after a report [from] . . . many plaintiffs' counsel." Fairness Hearing, *supra* note 30, at 133 (Mar. 3, 1994) (testimony of Michael F. Rooney).

313 *Georgine*, 157 F.R.D. at 281 (emphasis added). Thus, it is clear that these settlement provisions were the product of an agreement among competitors.

314 It should also be noted that CCR's witnesses repeatedly affirmed that it was the firm's identity, not the individual lawyer's identity that mattered, and thus the court's reference to "counsel" should be read as counsel's firm, not the individual lawyer. *See* Fairness Hearing, *supra* note 30, at 86-87, 120 (Feb. 24, 1994) (testimony of Laurence Fitzpatrick) (affirming that the firm's average would be considered). *See also infra* note 316 (discussing the questions posed to Professor Coffee).

315 *Georgine*, 157 F.R.D. at 281.

316 The court said that "[t]here is no suggestion that the identity of counsel factor will dominate substantive factors." *Id.* One should hope not. However, there actually is more than a mere "suggestion" of this in the record and in the settling parties' Proposed Findings of Fact that the factor will play a substantial role in determining what class members receive under *Georgine*. For example, Mr. Hatten, a plaintiffs' lawyer testifying on behalf of the settlement, stated that he had been assured by CCR's Chief Operating Officer that his historical averages would be "a significant factor" in the payment his clients would receive under *Georgine*. Fairness Hearing, *supra* note 30, at 81 (Mar. 18, 1994) (testimony of Robert R. Hatten). Also in the record are the questions class counsel posed to Professor Coffee. Class counsel disputed Professor Coffee's chart, which purported to show that the inventory settlements were much higher than the negotiated averages under *Georgine*. They emphasized that the chart did not consider that the inventory settlements were made by class counsel's firms, which had high historical settlement averages with CCR. Fairness Hearing, *supra* note 30, at 236-39 (Mar. 29, 1994) (questioning of Professor Coffee by Mr.

less of the weight given the factor, its inclusion is significant because it is one of a series of provisions that put in place unfair procedures in a case where procedural fairness is of critical importance to the due process rights of the unknowing class members.

The next provision that makes recovery rights dependent on the identity of one's lawyer is the provision that explains how claims will be ordered in years when the number of claims exceeds the annual maximum. The settlement provides that claims will ordinarily be paid in the order submitted, but that where the number of claims in a compensable medical category exceeds the maximum for that year, CCR may alter the order "to ensure that a disproportionate number of the Claimants paid . . . are not represented by one attorney or firm."[317] The settlement provides an example: If in a given year the number of claims in a category exceeds the maximum by ten percent, "to the extent feasible, ten percent (10%) of the Qualifying Claims presented by each attorney or firm in that . . . [m]edical [c]ategory in that year shall not be paid until the next year."[318] A similar provision governs the order in which claimants can exit to the tort system in any year in which more claimants seek to exit than the settlement allows.[319]

These provisions determine when claimants recover not by "first in, first out" order or by relative need, but by their choice of law firm. The court stated that these provisions were included "to accommodate the concerns of plaintiffs' counsel with fewer cases" who were afraid that larger firms would be able "to control the case flow."[320] The court interpreted this as "intended to protect class members who are represented by small law firms."[321] But why should class members represented by big firms suffer because of their selection of firm any more than class members represented by small firms should suffer from a procedure that might allow big firms "to control the case flow"? Moreover, if the court was actually concerned about equity for

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Motley implying that Coffee's chart was flawed because it failed to consider that Ness, Motley's firm might receive higher than average settlements from CCR based on the firm's past record). Class counsel thus "suggested" that a significant portion of the 50-70% difference in their inventory settlements could be reconciled with *Georgine's* averages because under *Georgine* identity of counsel was a factor. This argument also appears in the settling parties' Proposed Findings of Fact, *see* Proposed Findings of Fact, *supra* note 44, at 191-92, although the court did not repeat that "fact" put forth by the settling parties. Indeed, the court's discussion of the "identity factor" diverges from that presented by the settling parties. The settling parties did not argue that the factor was of "minor significance" or that it would not "dominate" other factors. They argued that "[t]he factor . . . plainly falls within this category" of "relevant criteria generally utilized in the settlement of litigated tort cases" and as such was "reasonable." Proposed Findings of Fact, *supra* note 44, at 102.

317 Stipulation of Settlement, *supra* note 100, at 59.

318 *Id.*

319 Amendment to Stipulation of Settlement, *supra* note 99, at 7-8.

320 *Georgine*, 157 F.R.D. at 305.

321 *Id.*

clients who retained smaller players in the asbestos plaintiffs' bar, one must wonder why that concern did not surface in the court's review of the "identity of counsel" factor.

The truth is that ordering claims by choice of law firm was a provision designed to appease small law firms, not to protect the interests of their clients. Had class counsel wanted, they could have protected class members represented by small law firms with a provision that ordered recoveries in excess years based on some calculation of need and by ignoring their own interest in having an "identity of counsel" factor.

The final procedural irregularity in *Georgine* that raises serious doubt about fairness involves the settlement's approval of a dual role for class counsel as counsel to the entire class and counsel to individual claimants within the class.[322] On this matter the court again expressed insufficient concern. The court first concluded that class counsel's role in monitoring and supervising the activities of CCR "is neither unusual nor inappropriate," although no one had contended that role was either unusual or inappropriate. The court then turned to the concerns that had been raised:

> The Objectors, however, argue that this class action settlement is unique because Class Counsel will have the opportunity to represent individual class members who submit claims to the CCR for compensation under the Stipulation. The Objectors argue that this "dual role" creates an impermissible conflict of interest. The Objectors point out that in fulfilling their monitoring and supervisory duties, Class Counsel will acquire information about the workings of the claim procedure, including the settlement offers made by CCR to qualifying claimants and CCR's willingness to accept offers made by claimants. Such inside information will not be available to other claimants. In addition, the Objectors argue that Class Counsel's role in selecting arbitrators, physicians and pathologists before whom class counsel will represent individual claimants creates an impermissible conflict of interest.
>
> The Court finds that because of the "dual role" of class counsel under the terms of the Stipulation, there exists a potential for conflict. The Court also finds, however, that this conflict does not render the Stipulation unfair to the members of the class because the Court can and no doubt will exercise its power to appoint additional class counsel who can fulfill the vital monitoring and supervisory responsibilities of class counsel under Parts V.C.1.a.i, V.C.2.a.i, V.D.1, IX.D, XXIII.A, and XXVI.B of the Stipulation, and who

322 Stipulation of Settlement, *supra* note 100, at 7 ("'Claimant's Counsel' shall mean any attorney who represents a Claimant for purposes of submitting a Claim for processing under this Stipulation. Claimant's Counsel shall not mean Class Counsel unless the Claimant retains Class Counsel to represent him or her for purposes of submitting a Claim for processing under this Stipulation.").

> would not represent individual class members who submit claims for compensation under the Stipulation.[323]

The vital functions that, according to the court, can be fulfilled by additional counsel include all but one of class counsel's continuing obligations to the class specified in the settlement. The sole exception is under Part VII.B, which requires class counsel to "commence negotiations on any adjustments to the Compensation Schedule" with CCR at the beginning of the tenth year of the agreement's operation.[324] The court did not mention the appointment of additional counsel to "fulfill" that obligation. This is an interesting omission and may shed some light on what the court leaves hopelessly ambiguous: whether "additional" means Messrs. Locks, Motley, and Rice will participate in addition to other counsel or whether "fulfill" means that the "additional" counsel will discharge the listed functions to the exclusion of Messrs. Locks, Motley, and Rice and their partners.

If Messrs. Locks, Motley, and Rice will continue to have exclusive responsibility for renegotiating the compensation schedule in year ten, then they will need access to the "inside information" referred to by the court.[325] This suggests that they will jointly participate in the audit and monitoring duties with additional counsel, and perhaps in the selection of decisionmakers as well. But if that is true, the court's "solution" to the problem of the dual role is no solution. Class counsel's clients will still have a leg up on all other class members to whom class counsel have an equal duty of loyalty.

Alternatively, if the court meant that class counsel would only be involved in year ten negotiations and substitute class counsel would handle everything else, Messrs. Locks, Motley, and Rice would still need access to the inside information as year ten approached. More important, one wonders why substitute counsel, who would not handle individual claimants, were not given the task of renegotiation. Leaving this task in class counsel's hands still gives CCR claim evaluators a powerful incentive to keep class counsel particularly happy with high awards in the years preceding the renegotiation of compensation levels, thereby putting class counsel's clients in a better position than all other class members.

More telling, why didn't the court simply hold that class counsel were disqualified from representing individual claimants in the system because of the conflict? Such an order would certainly have been within the court's power.[326] Could it be that the court understood

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323 *Georgine*, 157 F.R.D. at 304 (citations omitted).

324 Stipulation of Settlement, *supra* note 100, at 51.

325 *See supra* note 323 and accompanying quote.

326 *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 332 (1986) (discussing the inherent power of courts to remedy conflicts of interest by ordering disqualification).

that an integral part of the deal struck between class counsel and CCR was that Ness, Motley and Greitzer and Locks could exploit their role as class counsel, particularly given the "identity of counsel" factor, to capture an even greater share of the asbestos-client market than in the past?

In sum, the procedures I have just discussed all make the choice of counsel a factor that determines how much money a class member will receive and when that person will receive it, again not because of that counsel's skill but merely because of that counsel's identity. To call such procedures "fair and just" distorts those words.

E. The Third Circuit's Problem

Ivy is the only precedent that specifically holds that due process can be satisfied in a class action, like *Georgine*, that involves a class composed largely of unknowing plaintiffs. However, the settlement in *Georgine* lacks the unique circumstances relied on in *Ivy* to explain how due process was met without effective notice or opt-out rights. Indeed, the unique circumstances in *Georgine* present the mirror image of the unique circumstances in *Ivy*: uneven treatment of present and future claimants, not even treatment, and substantial interests at stake for members of the class, not minimal interests. *Robins* is the next best authority, but *Georgine* lacks the protections relied on in *Robins*. Instead of procedures that ensure fair and just recovery, *Georgine* includes unfair recovery procedures that place the interests of lawyers above the interests of members of the class.

The Third Circuit's problem is, however, even greater than this summary suggests because *Ivy* pushes the envelope of due process, and *Robins* is not too far behind. To uphold *Georgine*, the Court of Appeals for the Third Circuit would have to find that due process can be satisfied with less than *Ivy* or *Robins* demanded.

The Third Circuit cannot uphold *Georgine* by claiming it is consistent with *Ivy* without ignoring the client settlements. It cannot say that the client settlements demonstrate even-handed treatment of "present and future claimants" because the district court made no such finding. Moreover, the district court's suggestion that the deals might be equivalent is unsupported by the record and, in my opinion, would have to be rejected as clearly erroneous as well as insufficient. Finally, neither *Robins* nor *Bowling* can be relied on as alternatives to *Ivy* because *Georgine* falls far short of the due process protection afforded in those cases. That leaves the Third Circuit with the option of upholding *Georgine* by rejecting *Ivy* and ignoring *Robins*.

The obstacles to such a holding are enormous. The *Georgine* court did not just fail to demand the additional safegnards *Ivy* mentioned: a court appointed guardian or even-handed treatment. It did

not just ignore the absence of the procedural protection afforded in *Robins*. It refused to demand any of the safeguards used by other courts in "ordinary" class actions: (1) disclosure in the notice that class counsel had made client settlements simultaneously with *Georgine*; (2) the presence of one counsel free of the alleged conflict; (3) the examination of the negotiating lawyers, including class counsel, under oath. Nor did the *Georgine* court suggest a creative substitute for those safegnards to protect the due process rights of class members. Instead, the *Georgine* court simply accepted that class counsel's simultaneous negotiation of different deals for their 14,000 clients was appropriate. It even went so far as to praise class counsel for their willingness to do so much for so many.[327]

F. The Inadequacy of Adequacy Review

A number of commentators have argned persuasively that notice and opt-out rights do little good in most class actions and that adequate representation is all the due process many litigants actually receive or need.[328] The evidence suggests, however, that when substantial personal injury claims are massed in a class action, class members do pay attention to notice and exercise their right to opt out.[329] I do not want to engage here in the theoretical debate about whether there are due process values that may only achieve expression through notice and opt-out rights.[330] Instead, I will discuss whether "adequate representation" or "more than adequate representation" can be given enough meaning to make those promises more than empty words.[331]

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327 *Georgine*, 157 F.R.D. at 299 ("Based upon the testimony of [the ethics experts for the settling parties], and [the court's] findings of fact, this Court finds that Class Counsel were not conflicted, and indeed acted responsibly, diligently and ethically in representing their present clients while negotiating on behalf of the *Georgine* class."). Notice the separation in that sentence between class counsel's "clients" and the "class."

328 *See, e.g.*, Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 977 (1993) (arguing that those who have been "adequately represented" should be bound by prior judgment, so long as the prior judgment was litigated, not settled); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 214 (1990) (book review) (noting that the concept of representation "is used in a number of different procedural settings to justify imposing the effects of a lawsuit on a person who had no opportunity to participate personally in the litigation and sometimes no knowledge that the suit was even pending").

329 For example, in the breast implant lawsuit, which affects approximately 200,000 women, at least 11,000 women initially opted out. David Lawder, *Dow Corning to Take Charge on Implant Suits*, REUTER BUS. REP., Jan. 20, 1995, *available in* LEXIS, Nexis Library, WIRES file.

330 For an interesting exchange of views on this topic, see Fiss, *supra* note 328; Laycock, *supra* note 216; Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029 (1993); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993).

331 While Professor Fiss champions adequate representation as the core of due process, his concept of adequacy focuses on whether the named parties' interests are suffi-

As applied now, I believe the promise of adequate representation is an empty one. *Georgine* is unique because it adopts a casual approach to adequacy and to the possibility of collusion—an approach all too common in many ordinary class actions—in a situation in which adequate representation is just about all the "process" promised the class members. But while the *Georgine* court's eagerness to find class counsel adequate is striking given the nature of the *Georgine* class—its size, the interests at stake, and the extreme vulnerability of the class members—the court's lax approach to adequacy is otherwise a familiar judicial attitude, and one that needs to change.

As others have noted, courts are too busy heaping praise on almost every class counsel that walks into a courtroom to worry much about what adequate representation entails or whether it has been provided.[332] While I have pointed out many things that make *Georgine* a unique decision, one thing about the decision is all too familiar: the court recites laudatory statements about class counsel's reputation, past experience in litigation, and prominence in the relevant subject area.[333] These statements serve thereafter as an almost irrebuttable presumption that class counsel were adequate. If "adequate represen-

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ciently aligned with the interests of absent persons whose interests will be affected by the litigation. *See* Fiss, *supra* note 328. He does not address how courts should assess the adequacy of the lawyers, whose interests are never perfectly aligned with the people they represent, whether those people are present or absent. Given the dominant role lawyers play in large-scale litigation, any due process theory with "adequacy" at its core must address what suffices as "adequate" lawyering, particularly for absent parties.

332 *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 47 (1991) ("In approving settlement, courts often engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement."). It is interesting to note that Professors Macey and Miller cite Holden v. Burlington N., Inc., 665 F. Supp. 1398, 1431 (D. Minn. 1987), as an example of this practice, because the *Georgine* court relied on *Holden* for the proposition that the simultaneous representation of competing classes does not taint the settlement. *See supra* text accompanying notes 234-43. For an example of how far a court will go to avoid criticizing class counsel, see *infra* note 355.

333 *See, e.g.*, *Georgine*, 157 F.R.D. at 293-94 (reciting the impressive credentials of class counsel, emphasizing their long experience as leaders of the asbestos plaintiffs' bar); *id.* at 294 (finding class counsel to be "highly respected for their skills and experience in asbestos litigation" and to "have the knowledge and credibility necessary to negotiate on behalf of future asbestos victims . . . ."); *id.* at 329 ("All three Class Counsel were unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar."); *id.* at 335 (describing class counsel as "extraordinarily competent and experienced" and "highly respected" and asserting that it is "clear to this Court that they intended to negotiate this settlement in compliance with the ethical rules").

For examples of other courts praising class counsel, see South Carolina Nat'l Bank v. Stone, 139 F.R.D. 325, 331 (D.S.C. 1991) ("Plaintiffs' counsel have now practiced before this court in a number of securities fraud class actions, and the court is aware from first-hand experience of their competency in this complex area of law. The court is satisfied that the plaintiffs and their class counsel will fairly and adequately protect the interests of the class."); *In re* Washington Pub. Power Supply Sys. Secs. Litig., 720 F. Supp. 1379, 1392 (D. Ariz. 1989) ("Both Class Counsel and counsel for Chemical Bank deem the settlements to be fair, reasonable, adequate and deserving of the Court's approval. Counsels' opinions

tation" is the whole content of due process, then due process is built on the courts' professed belief that experienced lawyers with good (or even middling) reputations and good (or not too terrible) records of past performance are adequate, would not "sell out" the class for some other group, and would put the class's interests above their own. Assuming courts actually have the faith in experienced lawyers that they profess to have, (something I seriously doubt),[334] is that faith enough to constitute due process?

In *Georgine* the court correctly noted that the "[o]bjectors forthrightly stated that they were not challenging the qualifications or experience of Class Counsel,"[335] but the objectors did raise serious concerns about collusion.[336] In any class action, even an ordinary one, the burden should rest with the settling parties to demonstrate the absence of collusion once any credible evidence has been introduced. Not only are they in possession of the evidence that could best refute any such allegation, but they are also the parties assigned the burden under Rule 23.[337]

At a minimum, the court in *Georgine* had to find that the evidence showed that it was more likely than not that collusion did not occur. Moreover, the court in *Georgine* should have required that the settling parties demonstrate this by clear and convincing evidence, not just because this class was composed largely of unknowing plaintiffs,[338] but because this was a settlement class action—an action filed along with a proposed settlement. As the *Georgine* court itself notes near the end of its opinion, quoting *Ace Heating & Plumbing Co. v. Crane Co.*:[339]

> The [Third Circuit] recognized that . . . where a lawyer "unofficially represents the class during settlement negotiations," [it] can result in plaintiffs' counsel being "under strong pressure to conform to the defendants' wishes." In these circumstances, where a settlement is not negotiated by a "court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to the plaintiff's class."[340]

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warrant great weight both because of their considerable familiarity with this litigation and because of their extensive experience in similar actions.").

334 Instead, I think the courts are motivated to find counsel adequate so that the courts may accept settlements and move on to other business. On the federal judiciary's interest in *Georgine*, see discussion *infra* accompanying notes 465-75.

335 *Georgine*, 157 F.R.D. at 329.

336 *See* discussion *supra* part II.

337 *See, e.g.*, International Union of Elec., Elec., Salaried, Mach., & Furniture Workers v. Unisys Corp., 858 F. Supp. 1243, 1264 (E.D.N.Y. 1994) ("the proponents [of a proposed class action settlement] have the burden of proving that . . . the settlement is not collusive but was reached after arm's length negotiations"); Trief v. Dun & Bradstreet Corp., 840 F. Supp. 277, 280 (S.D.N.Y. 1993) (same).

338 *See supra* text accompanying notes 211-18 (discussion of "adequacy plus" standard).

339 453 F.2d 30 (3d Cir. 1971).

340 *Georgine*, 157 F.R.D. at 330 (quoting *Ace*, 453 F.2d at 33) (citations omitted).

The *Georgine* court did not, however, cite *Ace* to explain the standard it would have to apply to assess the fairness of the settlement or the adequacy of representation or the settling parties' burden in refuting the objectors' evidence of collusion. Instead, it cited *Ace* to justify its conclusion that it did not matter that CCR picked class counsel and that the settlement was filed and negotiated on the same day.[341]

In *Georgine*, the court set a standard for finding collusion that virtually guarantees a finding of no collusion. Relying on the definition of collusion given in Black's Law Dictionary,[342] the court said:

> [F]or this Court to conclude that the *Georgine* settlement was the product of collusion, it would have to find that Class Counsel and the CCR defendants "sought to accomplish an improper purpose, perpetrated a fraud," and acted "secretively." Acting secretly, moreover, does not mean "out of the public eye." Intense negotiation necessarily must proceed with a limited number of actors; that does not make the negotiations collusive.[343]

There are two problems with this standard. First, it places undue emphasis on secrecy, which is not critical to the definition of collusion offered in Black's Law Dictionary.[344] The passage quoted above suggests that the absence of "secrecy" prevents a finding of collusion even if the evidence demonstrates that the settling parties sought to perpetrate a fraud. This notion is ludicrous, but seems to be how the court used the "secrecy" element upon which it placed so much emphasis. The court pointed out that "there is no evidence that class counsel or

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341 Difficult though this may be to believe, the court said:

> Thus, applying the *Ace Heating* analysis to the *Georgine* settlement, this Court concludes that the fact that CCR chose to negotiate with Messrs. Locks, Motley and Rice, who had not yet been designated as class counsel but who were publicly known to be accountable as co-lead counsel in the MDL proceedings or in other high profile cases, does not support a claim of ineffective representation or conflict of interest. *See also* Bowling v. Pfizer, 143 F.R.D. 141, 157 (S.D. Ohio 1992) (a settlement was not "flawed because settlement preceded class certification").

Id. at 330.

342 *Georgine*, 157 F.R.D. at 331 (citing Point Pleasant Canoe Rental, Inc. v. Tinicum Township, 110 F.R.D. 166, 169-70 (E.D. Pa. 1986)). The court quoted Black's Law Dictionary to define collusion:

> An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. *It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.* A secret combination, conspiracy or concert of action between two or more persons for fraudulent or deceitful purpose.

Id. (quoting BLACK'S LAW DICTIONARY 240 (5th ed. 1979)) (emphasis added).

343 *Georgine*, 157 F.R.D. at 340 (citing *Point Pleasant*, 110 F.R.D. at 169-70). The court also alluded to Bowling v. Pfizer, 143 F.R.D. 141, 156 (S.D. Ohio 1992), for the proposition that neither class counsel nor the defendants must inform other lawyers about their negotiations.

344 *See supra* note 342 (defining collusion).

CCR attempted to keep the fact of their negotiations secret."[345] But if secrecy is to be an element of collusion, surely it must be read to require only that the settling parties tried to keep secret that the client settlements were consideration for the *Georgine* settlement, which they did try to conceal.

Second, the court's standard would require evidence of criminal conduct before a court could find class counsel inadequate on the grounds of "collusion." I accept that Black's definition of collusion means that colluders are guilty of a crime. But criminal conduct cannot be the standard for disqualifying class counsel. Certainly, if due process rests solely on adequate representation, then adequate representation must mean something more than having a lawyer with some experience who did not commit a crime against the client. Indeed, even if due process also rests on notice and the opportunity to opt out, adequate representation must mean more than this, particularly given how little good notice and opt-out rights probably do in class actions that involve small stakes for individual class members.

Even if such a low standard could satisfy due process, the crime-collusion standard is impractical. This standard would almost certainly guarantee that no court ever found collusion because judges do not run around suggesting that the lawyers before them engaged in criminal conduct—even when the evidence suggests that in all likelihood the lawyers did. I can, in fact, think of nothing a court is less likely to do, with the possible exceptions of suggesting that a fellow judge engaged in criminal conduct or stopping a war.[346]

Courts routinely recite that a settlement can only be approved in the absence of collusion.[347] They rarely define what collusion is, what evidence would show its existence, or how much evidence of collusion

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345 Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 331 (E.D. Penn. 1994).

346 In earlier work, I discussed in depth how courts abandon their commitment to law in cases involving charges that lawyers have been unethical or have otherwise broken the law. *See* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1461-78 (1992) [hereinafter Koniak, *The Law*]; Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1079-91 (1993). Courts routinely find methods to excuse lawyer misconduct, to avoid enforcing sanctions against lawyers, and, most important to the present discussion, to abandon responsibility for elaborating on the law that lawyers are expected to follow. *See* Koniak, *The Law*, *supra*, at 1474-76 nn.369-72 (citing numerous examples).

347 *See, e.g.*, Priddy v. Edelman, 883 F.2d 438, 447 (6th Cir. 1989) (noting that district courts must examine the terms and the process of settlements to ensure that settlements are not the product of collusion); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987) (noting that district courts have a "fiduciary responsibility" to ensure that settlements are not collusive) (quoting *In re* Warner Communications Sec. Litig., 798 F.2d 35, 37 (2d Cir. 1986)); Ficalora v. Lockheed Cal. Co., 751 F.2d 995, 997 (9th Cir. 1985) ("Before approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties . . . ."); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) (same), *cert. denied*, 459 U.S. 1217 (1983).

must be found to justify rejecting a settlement.[348] More to the point, one must search long and hard to find any court opinion that has disapproved a class settlement on the ground that it was collusive.[349] Thus, the "absence of collusion" standard is meaningless as now applied.

G. Replacing Compliments with Content

The *Eisen* standard—which I quoted earlier[350] and which the *Georgine* court cited as well, though not in its conclusions on collusion[351]—suggests a very different approach. It requires the court to "eliminate so far as possible *the likelihood* that the litigants are involved in a collusive suit."[352] The duty to eliminate the likelihood of collusion suggests a concern with whether a suit appears to be the product of collusion, not just a concern about whether the suit is actually collusive.

The Third Circuit itself has recognized the importance of eliminating the appearance of fraud, not just the reality of fraud, in class actions. In holding that class counsel could not act also as the class's named representative, Judge Aldirsert said: "[I]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it."[353] Of course, if settlement class actions are to be allowed, the fact that something is a settlement class action cannot be taken as enough of an appearance of collusion to warrant dismissal of the action. But the court should forbid some practices that provide a great opportunity for collusion to

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348 At least one other court has cited the definition from *Black's Law Dictionary* used by the *Georgine* court, although without placing special emphasis on the "secrecy" component. *See* Point Pleasant Canoe Rental v. Tinicum Township, 110 F.R.D. 166, 169 (E.D. Pa. 1986). I have found no discussion by any court of the nature or quantity of evidence necessary to find collusion. This itself demonstrates how empty the "collusion" standard is.

349 For example, a leading treatise on class actions cites no examples. *See* NEWBERG & CONTE, *supra* note 191, ch. 15. Nonetheless, some examples exist. *See, e.g.*, Miller v. Calvin, No. 82-C-2253 (D. Colo. Dec. 20, 1984) ("[P]laintiffs' sincerity . . . [is] insufficient to expunge the taint of collusion, champerty and maintenance marring this lawsuit."). As this Article was being edited for publication, Judge Sear rejected the settlement in the Ford Bronco class action, citing the possibility of collusion. *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., 1995 U.S. Dist. LEXIS 3507 (E.D. La. Mar. 15, 1995). There are undoubtedly other examples, but I assure you from my extensive research that such opinions are extremely rare.

350 *See supra* text accompanying note 212.

351 *Georgine*, 157 F.R.D. at 326 (emphasis added) (quoting *Eisen* test in a general discussion of legal standard of adequacy).

352 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (emphasis added).

353 Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088 (3d Cir.) (quoting Lord Herschell in 2, J.B. Atlay, Victorian Chancellors 460 (1908)), *cert. denied*, 429 U.S. 830 (1976). Judge Aldisert added: "the appearance of conduct associated with institutions of the law [is] as important as the conduct itself." *Id.* The opinion states that "a class action is a special type of legal proceeding," one in which "the *appearance*, not the *fact*, of impropriety" must be eliminated. *Id.* at 1091.

occur. At present only one prophylactic rule is in place: Class counsel cannot serve as the class representative.[354]

One rule is simply not enough. Courts must have standards that reduce the possibility of collusion, not just because appearances count, but because courts are more likely to apply standards that do not require the court to say anything negative about the lawyers before them. Indeed, courts can apply these standards to disqualify class counsel and still compliment the lawyers as models of competence and integrity.[355] General standards would give the courts the cover they crave.

I could not agree more with the oft-made remark that the ethics rules cannot be mechanically applied to class actions.[356] But it does not follow from that observation that no rules should be applied or that nearly every class lawyer to appear before a court is, by virtue of some years of practice, an adequate representative.

Given that all class actions, by definition, involve multiple "clients," the ethics rules on conflict of interest cannot be applied mechanically to evaluate the conduct of class counsel. Mechanical application is not, however, the only option. Courts regularly apply the ethics rules on conflict of interest to decide ordinary disqualification motions without doing so mechanically.[357] Instead, they regularly state that a party's right to choose a lawyer and the potential disrup-

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354 *Kramer*, 534 F.2d at 1090 (disqualifying class counsel and class counsel's law partners from serving as class representatives). This rule has been criticized as empty or, at worst, counterproductive. *See, e.g.*, Macey & Miller, *supra* note 332, at 104. The courts have nonetheless held on to it. *See, e.g.*, Hoffman Elec., Inc. v. Emerson Elec. Co., 754 F. Supp. 1070, 1077 (W.D. Pa. 1991) (referring to the rule). This gives them at least one rule to point to as evidence that adequacy demands something objective.

355 Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), provides an example of how courts cannot resist complimenting class counsel even when disapproving a class settlement that appears blatantly unfair to the class. Under the settlement in *Holmes*, the eight named class representatives were to receive one-half of the back pay awarded to the class. The remainder of the class, approximately 120 people, were to share the other half. *Id.* at 1146. The Eleventh Circuit neatly avoided an actual finding of collusion, stating, "Settlements entailing disproportionately greater benefits to named parties are proper only when the totality of the circumstances combine to dispel the 'cloud of collusion which such a settlement suggests.'" *Id.* at 1148. The court continued: "Without intending any disparagement of the *eminent* class counsel in this case, we conclude that the attorney's opinion [that the settlement was fair] is an insufficient basis upon which to approve the disproportionate and facially unfair allocation of this back pay award." *Id.* at 1150 (emphasis added).

356 *See supra* note 29 (discussing how my approach is to concentrate on legal obligations, not ethical precepts, in an effort to critique the actual practices of lawyers and courts, as opposed to using ethical insights or rules in an attempt to reshape the law). For a fuller discussion of my approach to the intersection between law and ethics, see Koniak, *The Law*, *supra* note 346.

357 *See* WOLFRAM, *supra* note 326, at 332-33 (noting that courts may and do deny disqualification motions, although the lawyer has committed a violation of the ethics rules, which could be the subject of a disciplinary action).

tion to a trial must be considered in applying the ethics rules.[358] Whether to apply the rules mechanically, or at all, is a false issue. The real issue is whether the courts apply any standards to judge class counsel's "fidelity and vigor."

If the courts are unwilling to replace compliments with content in their review of adequacy, and if notice and opt-out rights are to be abandoned as futile gestures that do little good, then the courts will have to adopt meaningful substitutes to ensure due process. For example, courts could regularly appoint guardians or special masters to monitor the adequacy of representation. Courts could insist that all future claimants who have not manifested injury at the time of the class settlement be allowed to back out of the settlement, should they so choose, when they get sick. But the class action as it is developing is making class counsel one of the many indiguities visited upon someone with the ill fortune to be injured by a defendant who injures many others,[359] an indignity foisted on an unsuspecting public by courts eager to clear their dockets.[360] That is not due process of law.

If we abandon the fig leaves that we use to explain how class actions are consistent with individual dignity, we must at least hold on to the notion that due process means conformity to something that can be objectively measured. Perhaps beauty exists in the eye of the beholder; due process that is similarly subjective loses any claim to its name. Moreover, by definition, due process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process. A "fairness" hearing that appraises a settlement made outside the court's presence only as to the substantive fairness of the terms provides no more process than would be pro-

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358 *See, e.g.*, Armstrong v. McAlpin, 625 F.2d 433, 443-44 (2d Cir. 1980) (en banc) (noting that in ruling on disqualification motions courts recognize that "disqualification has an immediate adverse effect on the client by separating him from counsel of his choice" and that such motions "are often interposed for tactical reasons"; the court therefore rejected strict application of ethics rules to disqualify a former government lawyer in favor of disqualification only when conduct tends to "taint the [underlying] trial"), *vacated on other grounds*, 449 U.S. 1106 (1981); Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 430-31 (D. Del. 1986) (in ruling on a disqualification motion, court took into account the difficulty the client would have in finding new counsel in a small city that was hosting a multi-party case, the timing of the disqualification motion, and the resulting delay in the proceedings); *see also* United States v. Curcio, 680 F.2d 881, 887 n.3 (2d Cir. 1982) (no disqualification, although violation of ethics rules may have occurred); Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1350 n.15 (9th Cir. 1981) (same).

359 *See* Jones v. Barnes, 463 U.S. 745, 764 (1983) (Brennan, J., dissenting) (describing majority's holding that counsel on appeal can refuse to make nonfrivolous arguments urged by criminal defendant as turning the lawyer into "one of the many indiguities visited upon someone who has the ill fortune to run afoul of the criminal justice system").

360 *See infra* text accompanying notes 465-75 (discussing the judiciary's incentives to accept settlements like *Georgine*).

vided by a post-lynching hearing that assessed whether the dead guy really did commit the crime.[361]

If courts are to replace compliments with content, where would the courts look for standards that might fill out the concept of adequate representation and give it meaning? For a start, the courts might follow the lead set in the "limited fund" cases and limit class counsel to one class action against a defendant at a time. Almost all class actions are settled.[362] Allowing class counsel to have a pocket hidden from the court where money belonging to the class might be put is inappropriate. There is simply no way for the court to monitor attorney's fees or to ensure that the class was not ripped off when class counsel simultaneously negotiates deals on the side that the court can review in only a cursory manner, if at all. The limited fund cases are not really limited fund cases.[363] They are expressions of the courts' concern that the opportunities to cheat the class are too great when lawyers engage in parallel representation. Courts are, however, so adverse to suggesting that lawyers might actually take a little client money on the side that they hide behind the limited fund rhetoric. With due process at stake, courts will have to admit the possibility that lawyers might do wrong.

The idea expressed in some of the limited fund cases, that class counsel should be prohibited from simultaneously representing other classes against a common defendant, is similar to the concern ex-

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361 There is, however, ample precedent to suggest that in assessing class action settlements courts are accepting "fair results," whatever that means, as the test for adequate process. In the oft-quoted words of the Fifth Circuit:

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly *assume* that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir.) (emphasis added), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, *and cert denied*, 456 U.S. 1012 (1982). These words were, in fact, quoted and relied on by the *Georgine* court. *Georgine*, 157 F.R.D. at 328. *But see* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1207-11 (1995) (arguing that the courts should concentrate on how fair the results are when they assess class action settlements).

362 Available empirical evidence strongly supports the widely accepted statement in the text. An empirical study of shareholder and class action suits brought against the 190 largest publicly owned corporations as ranked by Fortune Magazine showed that 70.7% of all suits filed were settled before trial, 17% were dismissed, 4% were denied class action status, and only 4.3% were litigated to verdict. *See* Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 545 (1980); *see also* Laycock, *supra* note 216 (discussing due process standard requiring individual notice).

363 *See supra* text accompanying notes 246-51.

pressed in the federal bribery and illegal gratuity statutes, which are designed to ensure the integrity of public officials.[364] Given that a federal court must appoint class counsel and that class counsel have duties to members of the public by virtue of that appointment, it seems sensible to consult the statutes on corruption of federal officials for guidance on the standards a court might apply in assessing the propriety of class counsel receiving money, outside the class action pending before the court, from the defendant in the class action.[365] Not only do these statutes prohibit the receipt of money in exchange for an explicit promise to perform some official duty, they also prohibit the receipt of money from another who hopes for some generalized benefit from the donation or who is expressing gratitude for some past official action.[366]

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364 *See* 18 U.S.C. § 201 (1988) (Bribery of Public Officials and Witnesses).

365 Indeed, an argument could be made that these statutes provide more than guidance—that they apply to class counsel. The statutes apply to persons acting "for or on behalf of the United States" as a "public official." They are concerned not just with the reality of corruption but are also concerned with the appearance of corruption. Courts have held that these statutes apply to such "public officials" as the president of a private nonprofit corporation who was managing a contract for HUD, *see* United States v. Hinton, 683 F.2d 195 (7th Cir. 1982), *aff'd*, 465 U.S. 482 (1984), and an employee of the San Francisco Federal Reserve Bank who was obtaining bids for Federal Reserve Bank projects, *see* United States v. Hollingshead, 672 F.2d 751 (9th Cir. 1982).

> The tests applied in these cases [interpreting the federal bribery statute] focus on the degree of government involvement in the potential public official's activity and whether important federal objectives are involved. This test leaves the courts a great deal of discretion and promotes a broad interpretation of the "public official" requirement of section 201 bribery prosecutions.

Randy J. Curato et al., *Government Fraud, Waste and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1076 (1983). For my purposes, however, one need only accept that the concerns with corruption expressed in those statutes and the cases interpreting them might guide a court in assessing what constitutes "fidelity" to the class.

366 Although the bribery statute prohibits only the "corrupt" acceptance of money to perform a public duty, the gratuity statute does not require "corruption," just the receipt of money in connection with one's duties "otherwise than as provided by law":

> The bribery subsections prohibit the receipt of anything of value "*in return for* being influenced in [the] performance of any official act," while the gratuity subsections prohibit the receipt of anything of value "*for or because of* any official act performed or to be performed by him." The bribery subsections' "in return for" language contemplates a *quid pro quo* exchange. The gratuity subsections' "for or because of" language encompasses a wider range of situations.
>
> Because the official may accept a gratuity for an act he has already performed, the statute contains no requirement of an exchange or *quid pro quo*. A gift to an official for an act already performed may thus fall within the scope of this section. As stated in United States v. Evans, "specific intent is not an element of Section 201(g) . . . the gravamen of each offense, then, is not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation." For example, goodwill gifts and favors to government officials that are motivated by a donor's generalized hope of

Class counsel who simultaneously negotiate deals outside of the class action with a common defendant accept payment that might very well be motivated by the donor's generalized hope of benefit. It is almost impossible for a court to determine what the defendant gained or hoped to gain by the side settlements when reviewing a class action settlement for fairness and adequacy of counsel or when appointing class counsel to litigate a class action when those lawyers are simultaneously litigating and potentially settling other cases against the defendant. Therefore, to help ensure the integrity of class counsel and the process, courts should prohibit such simultaneous representation.[367]

But one need not resort to the criminal statutes to find support for a standard that bars class counsel from representing competing groups against a common defendant. Under bankruptcy law, a trustee may avoid any transfer of an interest of a debtor for an antecedent debt made ninety days before bankruptcy, if that transfer leaves the creditor better off.[368] There is little doubt, as I explained earlier,[369] that class counsel's clients did better outside *Georgine* than they would have done within the class, and that class counsel thereby benefitted.[370] The bankruptcy rule is justified as a prophylactic measure against fraud; I am suggesting a similar prophylactic rule for class actions.

In the same way that transfers of assets soon before bankruptcy make it too easy for potential bankrupts to avoid the protection bankruptcy law affords creditors, side settlements made by class counsel make it too easy for class counsel and the defendants to avoid the protections supposedly afforded class members by Rule 23(e) of the Federal Rules of Civil Procedure and the Due Process Clause of the

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benefit will not satisfy the requisite intent for bribery, but will probably be construed to be an illegal gratuity.

Curato et al., *supra* note 365, at 1082 (citations omitted).

367 President Kennedy explained the importance of the federal statutes aimed at preventing conflicts of interest in federal officials:

> There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.

1 PUB. PAPERS 326 (1961) (President John F. Kennedy), *reprinted in* 107 CONG. REC. 6835 (1961). The basis of effective government lies no less in public confidence in the processes of the courts. To squander that confidence and the promise of due process out of a fear of offending lawyers or out of a perceived need to do something about the backlog of cases involving mass torts is shortsighted and irresponsible.

368 11 U.S.C. § 547(b) (1988). The debtor must be insolvent for 90 days prior to the transfer, but the bankruptcy law presumes this to be true. *Id.* § 547(f).

369 *See supra* part II.C.

370 *See supra* text accompanying notes 117-18.

Constitution. Of course, a rule that allowed class counsel to represent competing groups, as long as no settlement was made for the other group in close proximity to the settlement of the class's claim, would be unworkable. Thus, to be effective, any prophylactic rule against fraudulent side deals would have to ban parallel representation against a common defendant completely.

When all is said and done, the case law on class actions provides precious little to draw on in the way of standards. More shocking, the *Georgine* court ignored the standards that do exist along with the due process concerns of *Shutts* and *Ivy*. If the case law provided more in the way of standards, we wouldn't be in this mess. The courts will have to begin to develop some standards on adequacy of representation and begin the habit of enforcing them. A due process built on faith alone cannot stand.

IV

TELLING STORIES TO THE COURT

The comment to Model Rule 3.3, "Candor Toward the Tribunal," states: "Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party."[371] However, when a class action settlement is presented to a court for approval, there may be no "opposing party." The settling parties are aligned, and there may be no objector represented at the fairness hearing. These proceedings are thus analogous to ex parte proceedings, where a lawyer's duty of candor to the court is much greater than in an ordinary adversarial proceeding.[372]

Sometimes, as in *Georgine*, there are objectors represented by counsel who appear to challenge the settlement. However, this does not transform a fairness proceeding into an ordinary adversary proceeding. Fairness hearings are not supposed to resemble full blown trials,[373] and they do not. Objectors are rarely allowed to conduct extensive discovery on the compromises made by the settling parties in their negotiations.[374] Even when the court is persuaded to allow dis-

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371 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1994).

372 *Id.* 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

373 MANUAL FOR COMPLEX LITIGATION (Second) § 30.41 at 237 (1986) (explaining that judge is not to adjudicate merits of underlying lawsuit in assessing fairness of settlement).

374 *See generally* William E. Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part II*, 23 SW. L.J. 765, 803-06 (1969) (arguing that courts do not receive adequate information about a settlement even when there are objectors because the objectors often lack sufficient information to raise or sustain challenges).

covery into the negotiation process to expose collusion or other evidence of unfairness, it is highly unlikely to order the depositions of class counsel or defendants' lawyers. Thus, objectors are routinely denied the best evidence by which to establish their position.

Although I believe there are times when a court should order the depositions of the lawyers who negotiated the settlement,[375] this section is concerned with the duties of the lawyers for settling parties in the vast majority of cases where the courts deny the objectors meaningful discovery.[376] While the presence of objectors makes the proceedings adversarial in fact, the objectors are handicapped by the limits ordinarily placed on their access to relevant evidence. When the opposing party is forced to operate largely in the dark, just as when there is no opposing party, the court must be able to rely on the lawyers who are informed and present to convey to the court "all material facts known to [them]" that are reasonably necessary for the court to reach an informed decision, "whether or not the facts are adverse."[377]

The special nature of the court's responsibility in approving settlements likewise supports imposing a greater duty of candor on lawyers for settling parties in a class action.[378] Normally, the court is expected to be a neutral umpire between the two parties. However, in approving a class settlement, the court sits as a guardian for the absent class members.[379] Class counsel also have fiduciary obligations to the class, but only if the court approves of class counsel assuming that role. Of course, a lawyer owes the guardian for his client more than an advocate's presentation of one side of the story. The guardian, like the client for whom the guardian stands in, is owed all material facts. Class counsel therefore owes the court greater candor in petitioning for approval of a settlement than an ordinary advocate normally owes,

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375 *See supra* text accompanying notes 240-42.

376 There are many sound reasons for limiting discovery in fairness hearings, including the sensitive nature of the material exchanged in the settlement negotiations, the undue delay and expense of deposing the negotiating lawyers, and the potential that routine discovery into settlement negotiations may deter settlements, unduly protract negotiations, or chill candid conversation.

377 For an interesting and somewhat parallel discussion, see Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 506-09 (1992) (discussing how prohibition on fact-bargaining in sentencing has had some significant effects).

378 *Cf.* Stephen J. Schulofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 733-78 (1980) (arguing that judicial control over pleas should be greater than judicial control over dismissals because authority of the court is at stake in sentencing decision).

379 In assessing the fairness of a settlement, the court sits "as the guardian of the interests of the absent members of the class." Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. 531, 534 (N.D. Ill. 1973).

whether or not there are objectors and whatever the scope of discovery.[380]

The lawyers for the settling parties in *Georgine* did not forthrightly put before the court all material facts known to them. The court, supposedly acting as a guardian for the class but acting instead more like an umpire, did not demand that they do so. The record is thus quite muddled on a number of matters material to the question of collusion, and the court permitted the settling parties to make alternative arguments about their conduct. The settling parties made arguments of the following form: If when we signed the client inventory settlement we intended x, then that is not unethical because of a, b, c; and, on the other hand, if we intended y, that is not unethical because of d or because the client settlements are irrelevant. Yet, the lawyers making these arguments knew what was intended because they were the ones intending whatever was intended. As explained earlier, what the client settlements were intended to accomplish was material to the court's determination.[381] This kind of advocacy is inconsistent with the duties of lawyers presenting a class settlement for court approval, and the court as guardian should not have tolerated it.

The most egregious example of the settling parties' lack of candor and the court's indifference involves the changing stories told by the settling parties to explain the "futures provisions" in the inventory settlements made for the present clients. To understand the various stories told by the settling parties and to establish that these stories concern a material matter, it is first necessary to review the alleged problems with the futures provisions. The original futures provisions stated that in the future, class counsel would not handle or file cases against CCR that did not meet certain medical criteria.[382] These provisions appeared to violate Model Rule 5.6(b): "A lawyer shall not participate in offering or making: an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."[383] This rule "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."[384]

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380 In Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979), the Fifth Circuit described how difficult it was for courts to review class action settlements: "Lacking a fully developed evidentiary record, both the trial court and the appellate court would be incapable of making the independent assessment of the facts and law required in the adjudicatory context." *Id.* at 1169. This problem further illustrates the proposition in the text.

381 *See supra* text accompanying notes 157-85.

382 The court set out the original versions of the Greitzer and Locks and Ness, Motley futures provisions in its opinion. *See Georgine*, 157 F.R.D. at 299-300.

383 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) (1994).

384 *Id.* cmt.

I am hardly one who believes that rules can be slapped on facts in some mechanical fashion to produce an answer. However, if Model Rule 5.6(b) means anything, it was violated by the inclusion in the client settlements of a promise not to file certain cases in the future. Indeed, the ABA Committee on Ethics and Professional Responsibility so held.[385]

After the ABA issued its opinion, the settling parties changed the agreements in several ways.[386] First, Ness, Motley executed new documents with CCR to memorialize the present client settlements, excising the original futures provisions, and simultaneously executing documents entitled "Settlement Agreements" that contained nothing but the new futures provisions.[387] Second, the new futures provisions asserted that class counsel believed that the minimum medical criteria for bringing suit were "fair and reasonable" because they protect "clients from being forced prematurely to litigate, or settle and release" their asbestos claims.[388]

Third, instead of promising not to represent pleural claimants in the future, class counsel agreed, "unless in the exercise of its professional judgment, given some unforeseen circumstances, it determines otherwise, to recommend" to their clients that they defer pleural claims in exchange for a tolling of the statute of limitations.[389] Fourth, class counsel remained free to sue CCR on behalf of any client who refused to accept the advice to defer filing suit. Fifth, the futures provisions were to remain in effect until *Georgine* was approved and all appeals exhausted.[390] Sixth, upon final approval of a *Georgine* settlement "which includes medical criteria substantially comparable to the criteria" in the futures provision, the futures provision "shall be superseded" by the class settlement, except as to any people who opted out of *Georgine*.[391]

In my opinion, these changes exacerbate the violation of Model Rule 5.6(b).[392] Instead of obligating counsel to send future pleural clients away free to seek unbiased advice, the new provisions seem designed to obligate counsel to advise future clients to accept CCR's offer to toll the statute of limitations in exchange for a commitment by the potential plaintiff to defer bringing suit unless and until they

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385 ABA Formal Op. 371, *supra* note 175.

386 *See Georgine*, 157 F.R.D. at 300 (quoting Greitzer and Locks settlement revisions of July 9, 1993); *id.* at 300-01 (quoting portion of Ness, Motley amended agreement of June 11, 1993).

387 *See* SP Exhibits 302A, 302B, *supra* note 114.

388 *See Georgine*, 157 F.R.D. at 300-01.

389 *Id.* (emphasis omitted).

390 *Id.*

391 *Id.*

392 *But see In re* Asbestos III, No. 92C-8888 (Circuit Ct. Kanawha County, W. Va. June 23, 1993) (holding that such futures provisions do not violate Model Rule 5.6(b)).

get a qualifying illness. And, as the settling parties readily acknowledged, clients usually take the advice of their lawyers.[393] Moreover, class counsel's assertion in the new provisions that they "believe" in the advice they will be offering suggests that class counsel would tell clients they are offering this advice because class counsel believe in it and not because class counsel signed a contract with the entity the client wants to sue. Throughout the fairness hearing, class counsel reiterated their position that these futures agreements represented their best judgment and were not promises made to get the client settlements.[394] I can only infer from this that class counsel would feel no obligation to tell future clients that they had made some form of commitment to the defendants to give this advice.

Putting aside my opinion that the amendments are worse than the original, none of the changes could reasonably be said to cure the original violation. First, segregating the futures provisions into separate settlement documents does nothing. It is clear from the Model Rule 5.6 comment that the rule prohibits all restrictions on future practice made "in connection with settling a claim."[395] It is thus irrelevant whether the provisions are *in* the client settlements. Similarly, the assertion that class counsel believe in the advice they are to give future clients is incapable of curing the Model Rule 5.6 violation. The rule makes no allowances for future restrictions that the lawyer thinks are good ideas. Of course, a lawyer is free to adopt a restriction on his future practice independently, but restrictions lose any claim to "independence" when they are written into contracts with defendants as part of settling the claims of present clients. If Model Rule 5.6(b) were held not to apply whenever a lawyer asserted that the future restriction was in the best interest of his future clients or would have been adopted independently, the rule would be gutted.

As for the change from agreeing "not to file" suit to "advising" clients not to file suit, the rule covers all restrictions on future practice, including restrictions on the advice to be given. The changes that link the new futures provisions to *Georgine* do not cure the viola-

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393 Proposed Findings of Fact, *supra* note 44, at 163 ("CCR understood that Class Counsel would recommend to clients that they defer their claims if they did not satisfy the medical criteria, and that, in CCR's experience, *clients in the normal course followed the advice of counsel.*") (emphasis added) (quoting testimony of Michael F. Rooney, Chief Operating Officer of CCR).

394 *See, e.g., id.* at 170 (provisions represent "sober, sensible, humane professional judgment" exercised for benefit of future clients). The court accepted this story. *See Georgine*, 157 F.R.D. at 302-03 (rejecting my testimony about these provisions and the testimony of Professor Roger C. Cramton because we lacked experience in "mass tort cases, class actions and asbestos litigation" and thus "[did not understand] how such a good faith commitment could reflect sensible professional judgment of lawyers with extensive experience in asbestos litigation").

395 MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) cmt. (1994).

tion; on the contrary, they provide evidence of the connection between the client settlements and the class action, contradicting the settling parties' claim that the side settlements and *Georgine* were independent.[396] The fact that the futures provisions were to remain in effect even if *Georgine* were not approved also shows that class counsel were willing to try to impose the *Georgine* terms on people even if a court found the terms unfair.

Finally, the only change that arguably eases the Model Rule 5.6 violation is the inclusion of a bunch of fudge language around counsel's duty to give the advice promised. But the fudge language seems to mean no more than that in some small number of future cases involving unforeseen circumstances counsel might not be bound to give the advice promised. With class counsel's asbestos experience, it is, however, doubtful that many "unforeseen circumstances" will crop up or that many were contemplated by the parties who wrote this language. Moreover, the settling parties admit that the fudge language was not expected to affect many, if any, cases.[397] Thus, none of the changes cured the problem with these provisions; they remain restrictions on future practice made in connection with settlements.

The Model Rule 5.6(b) violation affects the class action because it shows that class counsel were bound to support *Georgine*, court approval or not, and because it demonstrates the link between the two deals. But even more troubling than the violation are the various conflicting stories that the settling parties put forth to justify these futures provisions. Keep in mind that class counsel and the CCR lawyers from Shea & Gardner drafted and negotiated the futures provisions and thus knew the true story.[398] Yet while witness after witness proposed conflicting accounts of these provisions, the CCR lawyers and class counsel took no action to set the record straight. Here are the various stories told about these future provisions.

First, the CCR lawyers asserted—not under oath, but in a document subject to Federal Rule of Civil Procedure 11 requirements of

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396 *See supra* text accompanying note 157.

397 Proposed Findings of Fact, *supra* note 44, at 166 ("[t]he new language did not change the initial import of the futures provisions"); *see also supra* note 393.

398 While the record does not make clear whether CCR's lawyers from Shea & Gardner or Messrs. Locks, Motley and Rice took primary responsibility for drafting the futures provisions, it is clear that partners from Shea & Gardner, including Messrs. Aldock and Hanlon, were the principal negotiators for CCR, and that the negotiators for the class were Messrs. Locks, Motley and Rice. These attorneys actively participated in the questioning of witnesses at the *Georgine* fairness hearing. *See* Fairness Hearing, *supra* note 30, at 176 (Feb. 28, 1994) (testimony of Michael F. Rooney) (identifying principal negotiators for CCR and the class); *id.* at 118 (Mar. 3, 1994) (Mr. Rooney asserting that he did not negotiate the inventory settlements).

candor[399]—that the original versions of the futures provisions meant that class counsel "agreed not to file future asbestos [cases] against any CCR defendant unless the medical criteria (the same criteria [as in *Georgine*]) were satisfied."[400] They also asserted that the original versions were revised "to avoid any possible suggestion that such agreements were unenforceable."[401] The original futures provisions included no sunset provision that would cause one to believe that they would expire upon the occurrence or nonoccurrence of any event, and no mention of any such intent is made in the proffer. The modified provisions stated that they would be superseded by *Georgine* upon final court approval of the class settlement but would remain in effect as to those who had opted out of *Georgine*. The modified version states that the provision is to remain in effect "unless and until" *Georgine* is finally approved,[402] which suggests that if *Georgine* were not approved the provisions were to be considered in effect. Now the testimony.

Mr. Rooney, who signed the futures provisions on behalf of CCR, testified in a deposition that he understood that the original futures provisions were designed to restrict the kind of cases class counsel would file against CCR[403] and that they were designed to remain in effect should *Georgine* be rejected by the court.[404] This is consistent with the proffer. On the other hand, Professor Stephen Gillers testified at his deposition that the lawyers for the settling parties told him on the morning of his deposition to assume that the original versions of the futures provisions were intended to be temporary agreements to remain in effect pending the presentation of the *Georgine* settlement to the court[405] and that they were *not* intended to remain in effect should *Georgine* ultimately fail.[406] This is inconsistent with the proffer and Mr. Rooney's deposition testimony. On these assumed facts, Professor Gillers testified that the provisions did not violate

399 At the time in question, Rule 11 provided that a lawyer's signature on any paper filed in federal court represents the lawyer's warranty that, among other things, the lawyer believes the paper is well grounded in fact. Furthermore, it provided that sanctions for violating the Rule were mandatory. FED. R. CIV. P. 11 (as amended in 1983).

400 CCR Proffer, *supra* note 157, at 21.

401 *Id.* at 21-22.

402 *See* SP Exhibits 302A, 302B, 302C, 303, *supra* note 114.

403 Deposition of Michael F. Rooney at 421, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 18, 1994).

404 *Id.* at 412.

405 Deposition of Stephen Gillers at 36-41, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 25, 1994). "[A]t the meeting [this morning], I was told to assume for purposes of my opinion, that [the original futures provisions] represented a standstill arrangement between Ness, Motley and CCR, pending the final approval, should it come, of the [*Georgine*] class action settlement." *Id.* at 40.

406 *Id.* at 41 ("I was told to assume for purposes of my opinion . . . that [the original futures provision] would not . . . continue to bind Ness, Motley [if *Georgine* were not approved].").

Model Rule 5.6.[407] He further testified that the provisions would violate Model Rule 5.6 if they were designed to outlast court rejection of *Georgine*.[408]

The settling parties did not pursue the "temporary provision" story, although there is no reason to doubt that it was told to Professor Gillers by the lawyers. After all, no lawyer for the settling parties objected to his recounting this story about the provisions being temporary. More troubling, the settling parties later not only dropped the "temporary" story, they advanced its opposite. At the fairness hearing Mr. Rooney testified, consistent with his deposition testimony, that the futures provisions were designed to outlive court disapproval of *Georgine*.[409]

Professor Hazard then took the stand and was asked by CCR's lawyer to give the basis for his opinion that the futures provisions did not violate Rule 5.6. He began by stating that it was his understanding that the provisions in question cover pending or inventory cases, not future claims "that are the subject of this class action"; the CCR lawyer affirmed that his understanding was correct.[410] But it was not and is not. The terms of the futures provisions make clear that they are to govern "future cases" that are the subject of the class action. Until *Georgine* is approved on final appeal, class counsel agreed, "unless . . . given some unforeseen circumstances," that they will recommend that pleural claimants accept a tolling of the statute of limitations instead

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407 *Id.* at 41.

408 *Id.* at 56-57.

409 Fairness Hearing, *supra* note 30, at 221 (Feb. 28, 1994) (testimony of Michael F. Rooney). This testimony is consistent with the story Rooney told at this deposition, but it does not explain the interim story told to Professor Gillers. Consider too that Professor Hazard's testimony stands in complete contrast to the understanding provided to Professor Gillers that the futures provisions were intended to protect against the contingency that *Georgine* would not be approved. *Id.* at 64 (Feb. 25, 1994) (testimony of Geoffrey C. Hazard).

410 Professor Hazard testified:

> [Professor Hazard: A]s I understand it the [modified futures provisions] have to do with so-called pending or inventory cases, not as such the futures cases that are the subject of this class suit. But the suggestion is that because the settlement of the pending cases was a part of the negotiations or concurrent with the negotiations, that it is relevant to the question of the class suit. I think my understanding is correct in that respect.
>
> Now, on that understanding, I am correct that the CCR settlement agreement is an agreement about the pending cases and is not the stipulation concerning the futures class. Am I correct in that?
>
> [Ms. White of Shea & Gardner for CCR]: Yes sir, you are.
>
> [Professor Hazard]: Yes, I thought I was.
>
> Now, so my initial question is why is there any objection concerning the futures class that's based on an agreement counsel made concerning the pending cases and . . . an agreement that in the future those pending cases would be handled in a way that is indicated in this agreement . . . .

Id. at 63-64 (Feb. 25, 1994) (testimony of Geoffrey C. Hazard).

of suing.[411] In other words, class counsel and the other lawyers who signed similar futures provisions with CCR agreed to give this advice to individual class members who asked for advice on opting out. More telling, the terms of the provision make explicit that they were to govern the advice given to opt-outs after *Georgine* was approved.

Immediately before and after Professor Hazard's testimony, witnesses told a story that contradicts the story put forward through Professor Hazard that the provisions were not intended to affect the advice given class members. This next story was that the futures provisions *were* about "future cases" but were never intended to be enforceable.[412] The provisions were moral commitments and nothing more. This story was told despite the fact that the original version of the futures provisions are embedded in a contract that provides that any dispute will be subject to binding arbitration, and despite the fact that the modified version is the entire substance of a contract that ends with the following clause:

> If the validity or enforcement of any provision in this agreement is challenged in any legal proceeding, [Plaintiffs'] Counsel agrees to notify CCR of such challenge so that appropriate steps can be taken to respond to the challenge. If final judgment is rendered, by an appropriate court, with all appeals exhausted, holding the provision . . . unethical or unlawful, then the provision shall be deemed null and void . . . .[413]

Finally, the "we never intended these provisions to be enforceable" story, which was retold by the settling parties in their Proposed Findings of Fact,[414] is flatly contradicted by CCR's proffer, which stated that the provisions were modified to ensure that they would be enforceable.[415]

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411 *Georgine*, 157 F.R.D. at 301.

412 Fairness Hearing, *supra* note 30, at 138 (Feb. 22, 1994) (testimony of Lawrence Fitzpatrick):

> [Mr. Fitzpatrick]: I'm not sure that we view these futures' agreements as necessarily legally binding documents. I'm not sure that our remedy would be to sue upon them, if they were breached . . . .
> [Mr. Aldock on behalf of CCR]: If we don't view them as—as binding legal agreements, what do we view them as?
> [Fitzpatrick]: A moral commitment.
> [Aldock]: Have you every [sic] sought to enforce such an agreement?
> [Fitzpatrick]: I have not.
> [Aldock]: Has [CCR]?
> [Fitzpatrick]: Not to my knowledge.

Id. at 138 (Feb. 22, 1994) (testimony of Lawrence Fitzpatrick); *see also id.* at 220 (Feb. 28, 1994) (testimony of Michael F. Rooney) ("[W]e always viewed both versions [of the futures provisions] as a commitment, a good faith commitment by those law firms with respect to future cases.").

413 *See* SP Exhibit 302A, *supra* note 114.

414 Proposed Findings of Fact, *supra* note 44, at 166.

415 *See supra* text accompanying note 401.

In an ordinary adversary proceeding, the stories a lawyer may present through witnesses are restricted by prohibitions against knowingly presenting false testimony.[416] There is a case to be made that the settling parties violated that prohibition. Be that as it may, settlement proceedings are not ordinary adversary proceedings, and, as I have argued, a higher duty of candor should be demanded.[417] I believe that CCR's lawyers and class counsel violated Model Rule 3.3 by presenting these changing stories to the court. Any such violation should be considered evidence tending to show collusion and thus should be considered relevant to the question of whether the court should approve a particular settlement. Further, class counsel's participation in the presentation of these changing stories is directly relevant to the determination of whether the court, as guardian for the class, should allow class counsel to serve as an agent for the absent class members.[418] Although I brought this issue to the court's attention, it did not address the propriety of the settling parties' presentation of changing stories. The court simply iguored class counsel's

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416 The ethics rules prohibit lawyers in ordinary adversary proceedings from offering "evidence the lawyer knows to be false" and require lawyers who discover after the fact, but during the proceedings, that they have offered false evidence to "take reasonable remedial measures." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1994).

417 *See supra* text accompanying notes 371-80.

418 At the fairness hearing I testified about my concern with the changing stories told about the futures provisions:

> [W]hy I find the changing stories troubling is that at the heart of what's going on in this procedure, is that you're asking this Court, which sits as a guardian for the class . . . [to appoint you] as the lawyers [for this Court's ward].
>
> . . . .
>
> It is your obligation to forthrightly and clearly explain to this Court before you can expect to be appointed as counsel for this class what it is that you did. [W]hether [these agreements] were supposed to be temporary, whether they were supposed to be real agreements, whether they were supposed to . . . [cover] present or future people . . . .
>
> And if I was a guardian for [a] senile person . . . and you had signed some agreement beforehand that may affect [that person's rights] and then you came in and [said here are] five people they'll tell you all these different stories about what it mean[s] and . . . guess [which is true] . . . . I would say you're out of here. There's no way I could possibly fulfill my responsibilities to my ward when you won't tell me directly and forthrightly for the record, after changing stories, [what you did]. [I]t's wholly superseded, . . . it's the key to our whole agreement, it's designed to make sure there's something in place. It's a moral commitment. It's designed to mean nothing.
>
> Which is it?

Fairness Hearing, *supra* note 30, at 202-04 (Mar. 17, 1994) (testimony of Susan P. Koniak). The court interrupted me at this point to say that I was repeating myself "unmercifully" and to remind me of my "obligation to be professional and speak in the third person. You're not here to lecture anybody." *Id.* at 204-05. I apologized. *Id.* at 205. Class counsel moved to strike my testimony on this point, and the court denied the motion. *Id.* at 205-06.

evident lack of candor in assessing their fitness to represent the class.[419]

The legal arguments the settling parties presented to defend the futures provisions were nearly as misleading as the factual testimony. In its proffer, CCR argued that the policies beneath the ethical rules the original futures provisions allegedly violated "are not implicated by agreements in asbestos litigation limiting the nature of a plaintiff's lawyer's future representations." CCR explained:

> These agreements do not remove limited competent counsel from the marketplace, and they do not keep discovery under "wraps." Rather, these agreements further other responsible public policy aims by ensuring that claimants with significant injuries resulting from asbestos exposure are fairly compensated. The medical criteria are established to screen out those potential claimants whose injury, if any, is not sufficient to warrant compensation unless and until it progresses further.[420]

First, the statement that these provisions do not remove limited competent counsel from the marketplace is disingenuous at best. CCR was asking every plaintiff's attorney to sign such an agreement as the price of getting an inventory settlement. This practice was clearly intended to deplete the marketplace of available lawyers. Second, CCR did not mention that the ABA opinion specifically addressed futures provisions in asbestos litigation. Nor did CCR disclose that the ABA identified policies in the ethics rules that are directly implicated in this case—policies other than those mentioned by CCR in its argument.

> The rationale of Model Rule 5.6 is clear: First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. *Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is a conflict between the interests of present clients and those of potential future clients.*[421]

The settling parties did not mention the policy against "buying off" lawyers and against creating "conflict[s] of interest between present clients and future" claimants.

Later, the settling parties switched to other arguments: the original versions did not mean what they said;[422] the modified versions

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419 *Id.*

420 CCR Proffer, *supra* note 157, at 22 n.9.

421 ABA Formal Op. 371, *supra* note 175, at 4 (emphasis added).

422 Proposed Findings of Fact, *supra* note 44, at 166 (claiming original version did not require class counsel to refrain from filing certain suits against CCR, which is what it said,

were not modifications at all, but clarifications of the original;[423] Model Rule 5.6 cannot be violated without intent,[424] even though it does not include the word "knowingly," as do the ethics rules requiring intent;[425] and the ABA ethics opinion stating that futures provisions in asbestos cases are unethical is evidence that before the opinion was issued the practice was ethical.[426] The court adopted this gobbledygook, even the last argument that the ethics opinion demonstrates the opposite of what it says. Nor did the settling parties point out that the 1993 ethics opinion cited a 1968 opinion as authority.[427]

That the settling parties made such questionable legal arguments might not seem terribly egregious,[428] but when combined with the changing stories on the underlying factual matters, the strained legal arguments suggest that the settling parties were trying to hide what they had actually done. The court, for its part, seemed perfectly content to be treated in this fashion. If courts are to sit as guardians, they need to act as the law would expect a guardian to act.

V

FEASTING WHILE THE WIDOW WEEPS

Three of the named class representatives are widows: Anna Baumgartner, Nafssica Kekrides, and LaVerne Winbun. Pavlos Kekrides, Mrs. Kekrides's husband, was a named representative until his death on April 18, 1993.[429] In late July 1992, a doctor told Mrs. Kekrides that her husband was dying of mesothelioma caused by expo-

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but that counsel had made a good faith commitment to advise clients that it was wiser to defer suit but that class counsel was free to file should the client so desire).

423 *Id.*

424 *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 299 (E.D. Pa. 1994) (finding that it was not class counsel's intent to restrict their right to practice in signing the futures provisions); *id.* at 303 (citing the testimony of Professor Samuel Dash that intent is required to find a violation of Model Rule 5.6(b)).

425 The words "intent" or "intentionally" do not appear in any of the Model Rules. Instead, the distinction is made between rules that require "knowledge" as an element of a violation and those that do not. The Terminology section of the Model Rules provides that the words "knowingly," "known," and "knows" denote actual knowledge of the fact in question. *See* MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1994). None of these words is used in Model Rule 5.6, which simply forbids "offering or making" a restrictive agreement. *Id.* Rule 5.6. Compare, for example, Model Rule 3.3(a)(4) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.").

426 *Georgine*, 157 F.R.D. at 302.

427 ABA Formal Op. 371, *supra* note 175 (describing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1039 (1968), as dealing with "a similar question").

428 Although, if we draw an analogy to ex parte proceedings, the lawyer has a greater obligation to be forthright about legal arguments as well as factual statements. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 15 (1994).

429 *Georgine*, 157 F.R.D. 261-62. Mr. Baumgartner was also a named representative when *Georgine* was filed, but he died before the fairness hearing began. *Id.* at 261.

sure to asbestos.[430] Mr. Kekrides was a painter, not of pictures, but of structures.[431] Until the doctor told Mrs. Kekrides that her husband had asbestos-related cancer, she did not know what asbestos was or that her husband had ever worked around it.[432]

Spouses of people exposed to asbestos may themselves contract asbestos-related illnesses and are included in the class. Had Mr. Kekrides died in a car accident before his asbestos illness had manifested itself, Mrs. Kekrides would have been one of the unknowing members of the *Georgine* class—a person who would have ignored any notice of the *Georgine* suit because she would have had no idea that it applied to her. But Mr. Kekrides did not die in a car accident, and in July 1992, Mrs. Kekrides learned what asbestos was and what it could do. She contacted a lawyer on July 28, 1992.[433]

The lawyer referred her to Steve Wilson, a lawyer at Greitzer and Locks, who she was told specialized in asbestos litigation.[434] Greitzer and Locks mailed the Kekrideses a retainer form to sign, which they did.[435] The form stated that the Kekrideses agreed to retain Greitzer and Locks to "institute and maintain an action . . . to recover damages . . . or to effect an amicable settlement."[436] The form is dated September 8, 1992, and makes no mention of a class action.[437]

Two months later, on October 26, 1992, Greitzer and Locks and CCR settled "the entire present inventory of Greitzer and Locks's cases, consisting of 2,602 Pennsylvania cases."[438] This included seventy-nine mesothelioma cases,[439] but not Pavlos Kekrides's case. At the time of the settlement, the Kekrideses lived in Florida; but for many years earlier, and apparently when Mr. Kekrides was exposed to asbestos, the Kekrideses lived in Philadelphia.[440] And in February 1993, when Greitzer and Locks filed suit against non-CCR companies on behalf of the Kekrideses, that suit was filed in Pennsylvania state court.[441] Thus, on October 26, 1992, the Kekrideses' case could very well have been considered one of the cases in Greitzer and Locks's present inventory of Pennsylvania cases, but it was not.

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430 Deposition of Nafssica Kekrides, *supra* note 193, at 17 ("Well, the doctor made the operation for my husband July 27, 1992. He say, Mrs. Kekrides, 'Your husband have asbestos, mesothelioma, and does not have life and he need chemotherapy to see.'").

431 *Id.* at 11.

432 *Id.* at 13-14.

433 *Id.* at 17-18.

434 *Id.*

435 *Id.* at 19-20.

436 *Id.* Exhibit 1 (entitled "Power of Attorney, Contingent Fee Agreement").

437 *Id.*

438 *See* SP Exhibit 302C, *supra* note 114.

439 *Id.*

440 Deposition of Nafssica Kekrides, *supra* note 193, at 11.

441 *Id.* Exhibit 8.

Why was the Kekrideses's claim excluded from the settlement of "the entire present inventory" of Greitzer and Locks's Pennsylvania cases? CCR was willing to settle some unfiled cases.[442] Why not this one? Alternatively, in the nearly two months before October 26, 1992, why didn't Greitzer and Locks get the Kekrideses's claim in good enough shape to be filed in time to be included in the Pennsylvania inventory settlement? Did the Kekrideses insist on waiting to be included in the "better" *Georgine* settlement, even though that would mean considerable delay before they saw one dime of money from CCR? Mr. Kekrides was dying. Did the Kekrideses decide that they would be better off serving as class representatives than having their case settled in the inventory settlement? Did anyone tell them that that choice meant that they might have to sit through a deposition and answer questions on their fitness to represent the class? Did anyone tell them that the fairness hearing could be a year or so away and that Mrs. Kekrides, who might very well be a widow by then, might have to testify in open court on her adequacy to serve as a class representative? Did anyone tell them that the people included in the Pennsylvania inventory settlements might receive some part of their payment from CCR as early as April or May of 1993 and that the inventory folks were guaranteed to receive all their money no later than the end of 1996?[443]

The Kekrideses were apparently told none of these things. They were told little, if anything, about the inventory settlements that Greitzer and Locks was negotiating for its other clients.[444] Instead, they were asked to be class representatives. What did Mrs. Kekrides

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442 *See supra* note 79.

443 *See supra* note 114.

444 Mrs. Kekrides was not called to testify at the fairness hearing. She testified only in a deposition; that testimony is unclear on what, if anything, Greitzer and Locks told her in the fall of 1992 about the inventory settlements. At one point, she seems to state that Greitzer and Locks communicated to her an offer of some amount of money from the CCR defendants in September 1992, and that she rejected that offer. Deposition of Naffssica Kekrides, *supra* note 193, at 26. But it is unclear whether that offer was from the CCR defendants as opposed to some other asbestos defendant. *Id.*

It is clear that she did not see the settlement document signed by Greitzer and Locks regarding its Pennsylvania cases until the day before her deposition. *Id.* at 28. Moreover, Mr. Weingartner, the Greitzer and Locks lawyer defending her deposition, objected to questions about what she knew about the inventory settlements on the ground that her case was not filed against non-CCR defendants until February, thus implying that the Kekrideses's claim against CCR was not eligible for inclusion in the October inventory settlement.

> Q: Did you understand that a settlement had been made with Greitzer and Locks in October of 1992 to settle every single case that they had for asbestos victims pending in the State of Pennsylvania?
> Mr. Weingartner: .... Now, Fred, again you've misstated the facts. Now, Mrs. Kekrides's case [against non-CCR defendants], as I think you full well know, was not filed in Pennsylvania until February of 1993.

Id. at 28-29.

understand about this "choice" to be a class representative? She testified:

> Q [by Mr. Baron]: At the time your husband died [three months after the class action had been filed], did you know anything about what was happening in the class action case that had been filed in Philadelphia? Or did you learn that information later?
> A [by Mrs. Kekrides]: Yeah, I know from my lawyer.
> Q: What did your lawyer tell you . . . about the class action case in Philadelphia?
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> . . . .
>
> A: Yeah, I have case; my husband case, I have case for asbestos.
> Q: Yes?
> A: Because my husband died from asbestos.
> Q: Yes?
> A: And that's all.
> Q: So you understood that you had a case because your husband died from asbestos?
> A: Yes.
> Q: And that's all you really knew about the case?
> A: Yes.
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> . . . .
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> Q: Before yesterday [January 11, 1994], had you been told that there was a settlement in the class action case?
> A: Yes.
> Q: When were you told that?
> A: Two weeks before.
> Q: Two weeks ago?
> A: Uh-huh.
> Q: Before two weeks ago, did you know that there had been a settlement in the class action case?
> A: No. Two weeks ago, I know I come here in Philadelphia for today for deposition.
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> . . . .
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> Q: Were you surprised two weeks ago to learn that the class action had been settled?
> A: No, it's not surprise. I know I have case because my husband died from asbestos.
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> . . . .
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> Q: Do you know what a class action is?
> A: For the people have problem for asbestos.
> Q: When did you learn what a class action was?
> A: My son explained to me here. I have one son.
> Q: When did he explain that to you?
> A: A couple months before.
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> . . . .
>
> Q: Do you feel like you can represent people that have different types of problems than the kind of problem your husband had?

A: Yes.

Q: Why are you able to represent other people besides people that have mesothelioma?

. . . .

A: I don't feel to help people sick same thing as my husband. I don't like it.

Q: You don't like it when people get sick?

A: No.

Q: Nobody does, believe me.

A: Especially the asbestos and mesothelioma, very bad.

Q: Did anyone before two weeks ago ask you what you thought should be in the settlement agreement on the class action?

A: No.

Q: Do you know whether they ever asked your husband that, what he thought should be in the class action settlement? Do you have any information that your husband knew about the class action?

A: Yes. And my husband talked to Mr. Jim Long at my house, "Please, I want to fight for this case, because I am very sick."

Q: That was for his own case, was it not?

A: Yes.

Q: Did your husband ever instruct the lawyers to fight for other people's cases besides his own?

A: No. I don't know.

. . . .

Q: Did anyone explain to you why two different lawsuits were filed on your behalf [the class action against CCR and an individual action against non-CCR defendants]?

A: Because my husband working for a lot of different companies that made asbestos.

Q: And that's the only reason that was given to you why two different suits were filed in two different courtrooms?

A: Yes.[445]

It seems that the Kekrideses agreed to be named representatives because they thought this was the only way to get money from the CCR defendants. If there was another way, as it seems there was, it was up to the Kekrideses, not their lawyers, to forego that route (inclusion in an inventory settlement) in favor of serving as class representatives. That decision should not have been made for them, and information relevant to the decision should not have been kept from them. If Mrs. Kekrides can show damages, such as receiving less money from the *Georgine* settlement than a similarly situated inventory claimant received from CCR, then her lawyers' breach of their duty to communi-

445 *Id.* at 37-40, 42-45, 52-53.

cate with her and to allow her to make the decision on settlement might be the basis for a successful malpractice suit.[446]

The court did not directly address whether class counsel breached a duty to any of the three widows by not providing them with a choice on how to settle with CCR. The court's only reference to this question was: "There is no evidence in this record that Class Counsel themselves actually used their knowledge of the forthcoming class action suit to file premature claims to avoid the class, or to refrain from filing and settling appropriate cases in order to ensure the viability of the class representatives."[447] Professor Cramton did, however, address the treatment of the widows in his testimony, and Mr. Locks cross-examined Professor Cramton on this issue. Mr. Locks stressed that Mrs. Baumgartner and Mrs. Winbun did not become clients of Greitzer and Locks until after it had concluded its inventory settlements with CCR in the states in which their suits would have been brought.[448] We will come back to the adequacy of that response to the widow problem in a moment, but first what of the Kekrideses? The Kekrideses had been clients of Mr. Locks nearly two months before the Pennsylvania inventory cases were settled. Less than complete candor helps:

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446 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994) (stating that client has the right to make decision on whether to accept a settlement). When I raised the possibility during my deposition testimony that class counsel could be sued by Mrs. Kekrides for malpractice, Mr. Motley seemed eager to clarify that Mrs. Kekrides was a client of Greitzer and Locks, not of his firm. Deposition of Susan P. Koniak at 157-58, Georgine v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Feb. 7, 1994). Of course, she is a client of his firm too, because he jointly serves as class counsel in an action in which she serves as a named class representative. What she was told and what she was not told about that choice is also something for which Ness, Motley bears responsibility.

447 Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 329 (E.D. Pa. 1994).

448 Fairness Hearing, *supra* note 30, at 150-52 (Mar. 16, 1994) (testimony of Roger Cramton):

> Q [by Mr. Locks]: If my inventory settlement in Kentucky occurred in August of 1992, could you please tell me how I could have put Mrs. [Winbun] in that inventory settlement if she didn't become a client of our office until at least a month or two later?
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> A [by Prof. Cramton]: It would have had to have been a supplemental arrangement or amendment or supplemental agreement. There have been numbered documents or agreements that have been made in this case that have been subsequently amended.
>
> Q: Tell me one document or one fact that my Kentucky present inventory settlement was supplemented.
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> A: I know of none on that —
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> . . . .
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> Q: Now, let's go to Mrs. [Baumgartner] . . . .
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> . . . .
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> Q: And are you not also aware . . . that settlement was made of all of my Maryland cases in August of 1992 and Mrs. [Baumgartner] and her husband did not become clients of our firm until November or September of 1992?
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> A: I don't know, at this time recall the actual chronology in that case.

> Q [by Mr. Locks]: Now, you seem to talk about Mrs. Kekrides . . .
> . . . .
> Q: Did you read that deposition thoroughly?
> A [by Professor Cramton]: Yes.
> Q: Did you realize that she and her husband were class representatives because he was alive at the time the suit was filed?
> A: That's right. He retained Greitzer and Locks I think September, sometime in September of 1992 and then he died the following April.
> Q: And he was a resident of Florida, you knew that?
> A: Well, no, it wasn't clear. He was from the Philadelphia area and—well, it wasn't clear to me whether he was—I assumed that his—that—I didn't know whether he made a permanent change of residence or was merely there for—had moved there because Mr. Kekrides was sick and dying.
> Q: Did you read the class action Complaint in this proceeding?
> A: I believe I've seen it, but I did not —
> Q: Was it another picky—
> A: If his citizenship—
> Q: —detail?
> A: —or her citizenship is stated in that, it escaped me.
> Q: That's another picky detail that you didn't pay attention to, right?[449]

This was inappropriate cross-examination, given class counsel's increased duty of candor to the court in proceedings such as these.[450] Whether or not Professor Cramton could recall the facts while on the stand, Mr. Locks knew that his law firm had filed suit in Pennsylvania state court on behalf of the Kekrideses against non-CCR defendants and that his firm treated the Kekrideses's case as a Pennsylvania, not a Florida, case. Mr. Locks knew the truth of the matter, and the court was entitled to rely on his representations. Mr. Locks misled the court by suggesting that the Kekrideses's case was a Florida case, not fit for inclusion in the Pennsylvania inventory.

More important, class counsel's other response to the "widow" problem—that the inventories were closed by the time two of the three women became clients—is no response at all. In the settling parties' Proposed Findings of Fact, this is the only response given to the "widow" problem: no cases were added to the inventory settlements after each was signed.[451] Presumably, this was because CCR cut class counsel off from further settlements for their "present clients" state by state as inventory settlements were reached.[452] If this were

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449 *Id.* at 154-55.

450 *See supra* text accompanying notes 371-80.

451 *See supra* note 280.

452 This story is inconsistent with the testimony of CCR's Chief Operating Officer that CCR continued to settle cases with Ness, Motley after January 15, 1993—cases that had not

true, what happened to clients from Indiana, Illinois, Maryland, New Jersey, North Carolina, Ohio, Tennessee, or Virginia who walked into Greitzer and Locks offices on August 21, 1992, the day after inventory settlements for those states were concluded?

Greitzer and Locks would have had five months to file suit against CCR before *Georgine* was filed. To the extent that the futures provisions obliged Greitzer and Locks not to file suit, that was just as to pleural claimants. What of the August 21 client with mesothelioma? Did class counsel just sit on that person's case as part of some unspoken promise to CCR? Did class counsel explain to each of those people that they could only offer to put them in the class but not to settle their cases now, while another law firm like co-class counsel, Ness, Motley, or some other firm, might get that person in an inventory settlement and thus home with some money before Christmas of 1994?[453] Apparently not.

Mr. Locks suggested in his cross-examination of Professor Cramton that perhaps the dead Mr. Kekrides had understood a lot more about his choices than did his surviving spouse.[454] This is a dubious

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been filed before January 15, 1993, and thus were technically within the class definition. Fairness Hearing, *supra* note 30, at 117-19 (Mar. 3, 1994) (testimony of Michael F. Rooney). Such unexplained contradictions make it clear that the settling parties succeeded in obscuring the true nature of their operating relationship from the court.

453 Ness, Motley's settlements were reached after the completion of Greitzer and Locks's settlements. *Georgine*, 157 F.R.D. at 295-96. Moreover, Ness, Motley continued to settle with CCR after January 15, 1993, and even settled cases that had not been filed by that date. *See supra* note 452. Mr. Hatten also was settling with CCR after January 15, 1993. *See supra* note 78.

454 Fairness Hearing, *supra* note 30, at 155 (Mar. 16, 1994) (testimony of Roger Cramton):

> Q: In reading [Mrs. Kekrides's] deposition, did you realize or did you read that her husband knew about the class action?
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> A: I think it did mention that there was a conversation when someone came out to his house in—in—I can't remember the precise date, but there was a conversation in which he was involved when he was still alive.
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> Q: And you don't remember what other things he knew?
>
> A: I don't remember the details of it.
>
> Q: But you assumed that she and he could have been manipulated in and out of a present inventory settlement, right?
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> A: You're the one that's using the word "manipulation."

The deposition shows that Mrs. Kekrides contacted a lawyer in late July because her husband was too sick after his operation to do so. Deposition of Nafssica Kekrides, *supra* note 193, at 18. Lawyers from Greitzer and Locks then visited the Kekrideses on three other occasions: in September 1992, when they told the Kekrideses they would be filing suit; in February or March 1993, after *Georgine* was filed and settled, when they told Mrs. Kekrides and presumably her husband that they were working on the case but were not finished; and in April right before Mr. Kekrides passed away when they videotaped Mr. Kekrides's physical condition "because he was very bad." *Id.* at 22-23. On the last visit, nobody could talk to Mr. Kekrides because he was too sick. No one told Mrs. Kekrides in April 1993 that *Georgine* had been filed and settled. *Id.* at 24.

claim, given Mrs. Kekrides's deposition testimony.[455] Moreover, the deposition testimony of Mrs. Baumgartner and Mrs. Winbun demonstrates that neither was aware that Greitzer and Locks had made inventory settlements with CCR in their states before they showed up at class counsel's doorstep, that CCR was still making inventory settlements with other firms prior to January 15, 1993, or that Greitzer and Locks was no longer eligible to settle their claim with CCR apart from the class action.[456] Not one of the widows suggested in her deposition testimony that class counsel had offered to refer her to another lawyer who might be able to get her, through inclusion in an inventory settlement, either more money than she would get in *Georgine*, or the same money but at least some of it now rather than later, or even less money sooner rather than later, and without testifying as a class representative or as an individual for that matter.

But these were the clients' decisions to make, not the lawyers'. To suggest that some agreement with CCR, written or unwritten, justified not trying to get these people in inventory settlements or justified not explaining to clients what their choices were is to suggest that a conflict of interest created by an agreement with the defendants justifies less than adequate representation. This is wrong.

The inadequate representation provided to these women and their dying husbands demonstrates the problem with the representation provided to the class. The shape of the class means that certain people "lucked out" by showing up at a law firm early enough to get into an inventory settlement and that everyone else got *Georgine*. If *Georgine* is truly better, then there are over 14,000 clients out there who may have a viable claim for malpractice against class counsel, for cheating them out of *Georgine* to collect higher fees. But the evidence strongly suggests that the inventory clients did better, not worse. If so, then the class representatives may have a viable claim for malpractice against class counsel. And if the class representatives have such a

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455 *See* testimony quoted *supra* text accompanying note 445. The settling parties' Proposed Findings of Fact states: "Mr. and Mrs. Kekrides and their son—Mrs. Kekrides's first language is Greek—were informed of the nature and terms of the class action suit, and Mr. and Mrs. Kekrides agreed to serve as representative plaintiffs in support of the settlement." Proposed Findings of Fact, *supra* note 44, at 22. Nowhere is there an assertion that the Kekrideses or their son were informed about the inventory settlement of Pennsylvania cases or the fact that CCR was still making inventory settlements with other lawyers. *See also supra* note 454 (giving deals on contacts with Mr. Kekrides).

456 Deposition of LaVerne Winbun, *supra* note 193, at 34-38 (testifying to no knowledge of inventory settlements or why CCR defendants were not named in individual lawsuit filed against other asbestos defendants on her behalf); *id.* at 41 (testifying that she was not given any information by which to compare what she might receive in an inventory settlement to what she might receive under *Georgine*); *see also* Deposition of Anna Baumgartner, *supra* note 193, at 78-80 (testifying that she has never thought about whether she would accept—or presumably whether she would prefer—the money without the rigmarole of the class action).

claim, why not the rest of the class? The "widow" problem is, after all, the class problem writ small.

At least two cases have suggested that class members might maintain an action for malpractice against class counsel: *Zimmer Paper Products, Inc. v. Berger & Montague, P.C.*[457] and *Peters v. National Railroad Passenger Corp.*[458] In *Zimmer*, the court stated that a class member who seeks to challenge as malpractice the notice procedure used by class counsel that had been ordered by a district court "faces a standard at least as high as abuse of discretion."[459] On the plaintiff's second allegation, that class counsel's *implementation* of the notice was negligent, the court said:

> [I]n determining whether an attorney for a class has breached a fiduciary duty, we should afford considerable weight to the fact that he or she has done all that is generally done, all that due process requires, and all that the court ordered.
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> . . .
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> The bounds of fiduciary duty are undoubtedly not easy to define, but *certainly we must be guided by the fact that the practice here alleged to breach such duties is a customary one, and has been approved,* after careful judicial scrutiny, *not only in this case but in legions of others.*[460]

The practices in *Georgine* were, however, neither customary nor approved in "legions of cases"—not the futures provisions, not the definition of the class, not the failure of class counsel to request that the class receive notice of the simultaneous negotiation, and not the uneven-handed treatment of "presents" and "futures" by class counsel.

Moreover, unlike the notice challenges at issue in both *Zimmer* and *Peters*, class counsel's simultaneous negotiation of the two deals was performed not "after careful judicial scrutiny," but before. Class counsel also agreed, in a side deal with the defendants, to give certain class members certain advice whether or not the court approved the class settlement; this was not approved by the court beforehand. Moreover, the *Georgine* court did not exactly approve the "futures provisions."[461] Instead, it concluded that they did not adversely affect the class. But what if some class members can show otherwise? The ABA

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457 758 F.2d 86, 93-94 (3d Cir.) (recognizing cause of action by class member against class counsel for negligence in providing notice), *cert. denied*, 474 U.S. 902 (1985).

458 966 F.2d 1483, 1487 n.3 (D.C. Cir. 1992) (rejecting collateral attack on class action based on failure of notice and stating that "redress, if any, should come from those responsible for causing his harm") (citing *Zimmer*, 758 F.2d at 93-94).

459 *Zimmer*, 758 F.2d at 93.

460 *Id.* at 91 (emphasis added).

461 *Georgine*, 157 F.R.D. at 330 ("[t]his Court need not decide, however, whether or not a state bar disciplinary board would conclude that these provisions technically violated Rule 5.6, since that issue is not before this Court").

ethics committee certainly saw many ways that such provisions might adversely affect the clients of lawyers signing them.[462]

1 understand how reluctant courts would be to entertain suits for malpractice against class counsel for breach of fiduciary duties owed class members.[463] A malpractice suit is, however, another way to guarantee due process to class members. It also gives expression to individualism, a value otherwise muted by all class actions. The threat that malpractice actions might deter lawyers from serving as class counsel, and thus undermine the public good that class actions seek to achieve, seems unjustified, given the substantial fee awards garnered by class counsel. One might ask instead why class action lawyers, who stand to make so much money, should be somehow less accountable to their clients for negligent performance than every other lawyer.[464]

A more serious problem with malpractice suits against class counsel is that they would reveal the shoddiness of court review of adequacy and undermine public confidence in the class action form. But the courts can accept only so many *Georgines* before word gets out that the courts are doing nothing to check the possibility of lawyers selling out clients who have much to lose.

Nonetheless, the judiciary may not be able to resist *Georgine*'s promise of fewer asbestos cases or of similar settlements that promise

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462 *See supra* text accompanying note 421.

463 *See, e.g., Zimmer*, 758 F.2d at 91-92:

> If class counsel in this case have breached their fiduciary duties, attorneys throughout the country who have complied with court orders and a Supreme Court-approved notice procedure may well be subject to malpractice lawsuits by anyone who alleges that he or she did not receive notice of the opportunity to file a claim.

And, *id.* at 91 n.7:

> If the line is difficult for the courts to trace after the fact, it is even more difficult for counsel to draw in the course of a proceeding. This may not excuse any breach of fiduciary duty, but it does raise serious questions about the propriety of applying a malpractice penalty after the fact where counsel did everything they were then expected to do.

464 As this Article was being edited for publication, a malpractice suit was filed against a Texas law firm in connection with that firm's settlement of the tort claims of its clients. Peter Passell, *Challenges to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6. The firm had represented over 100 families who had had a family member killed or injured when 40 tons of flammable vapor were accidentally released and ignited at the Phillips Petroleum Company's Houston Chemical Complex. *Id.* According to allegations in the malpractice complaint, the law firm had little or no contact with its clients until a settlement had been worked out with Phillips. *Id.* The firm then allegedly scheduled brief meetings with the clients in which the clients were urged to take the money offered and told that the firm would not take their cases to court if the settlements were rejected. *Id.* According to those now bringing suit and supported by documents obtained in discovery, 26 of the clients who rejected the offered amounts were then offered more money. *Id.* That extra money was then deducted from the amounts offered more complaisant clients to keep the overall settlement down to the $190 million that the firm had agreed to accept from Phillips. *Id.* This conflict of interest is the heart of the malpractice claim.

to lighten court dockets. To ensure that the judge presiding at the fairness hearing had the concerns of other judges in the forefront of his mind as he considered the fairness of *Georgine*, on the first day of the fairness hearing, the settling parties presented the testimony of Dean Mary Kay Kane of the Hastings College of Law. Chief Justice Rehnquist had appointed Dean Kane to serve as the reporter for the U.S. Judicial Conference's ad hoc committee on asbestos litigation.[465] Her testimony at the fairness hearing reviewed the concerns expressed by judges at meetings of this committee.[466] In arguing against an objection that her testimony was hearsay, CCR's lawyers stated: "It's not for the truth of the matter, but the perceptions of the judges and what she heard, and she provides the texture and fabric of what was going on."[467] The judge overruled the objection, allowing testimony on the perceptions of judges to be presented.[468] In many ways, the *Georgine* hearing was something one had to see to believe.

Dean Kane testified that the judges were "very concerned" with cases "piling up . . . [and] clogging the court system." She testified that "they were concerned that not only were the courts being cluttered with criminal litigation, but now asbestos was coming in as a major piece of litigation."[469] She had been asked by the committee to draft some legislative proposals for the judges to consider recommending to the Judicial Conference,[470] which would then presumably decide whether to recommend them to the Congress. After Dean Kane drafted some legislative proposals, the judges reviewed them and "realized . . . that many of the solutions really took on the cast of something beyond just the prototypical proposals that come from the judicial conference about judicial administration. They really crossed the line into some substantive areas . . . ."[471]

The judges decided, presumably with separation of powers in mind, not to "suggest to Congress that they were indeed legislating because that was not their task, and that it would be more prudent

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465 *See* Fairness Hearing, *supra* note 30, at 147-48 (Feb. 22, 1994) (testimony of Mary Kay Kane). Dean Kane had conducted "a quick review" of an early draft of the *Georgine* settlement for the Pfizer corporation, one of the CCR defendants. *Id.* at 182-83. She testified that she spent only two hours on that review, had only one telephone conversation with Pfizer's General Counsel about the settlement, and never saw the final settlement until the fall of 1993. *Id.* Her involvement as a consultant for one of the defendants nonetheless raises questions about the credibility of her testimony that *Georgine* was the kind of solution the judiciary was seeking. *See infra* note 475.

466 Fairness Hearing, *supra* note 30, at 151-68 (Feb. 22, 1994) (testimony of Mary Kay Kane).

467 *Id.* at 151.

468 *Id.* at 152 ("The objection is overruled. It's offered for the concerns expressed as a state of mind, rather than the truth of the matter, as I understand the offer.").

469 *Id.* at 157.

470 *Id.* at 163.

471 *Id.* at 165.

instead simply to write a report . . . to be forwarded to Congress setting out the history, the kinds of problems that were posed by asbestos litigation,"[472] and to urge Congress to consider seriously adopting some legislation.[473] The judges, however, apparently thought it unlikely that Congress would make an active effort to pass comprehensive legislation. They were concerned that a comprehensive legislative solution, like the proposals drafted by Dean Kane, "as a practical matter . . . simply wasn't going to happen" in Congress.[474] Dean Kane was then allowed to testify, over objection, that the *Georgine* settlement, as described to her in a question by CCR's lawyer, did address the concerns that the federal judges expressed in the meetings she attended.[475]

So testimony was offered showing that the judiciary had its own interest in *Georgine*. Forgive me, but what kind of justice system considers the perceptions, desires, wishes, hopes, dreams, or fears of judges relevant to whether a particular settlement is fair to thousands of people exposed to a dangerous product? On the other hand, what testimony could be more telling about the true nature of *Georgine* and the judicial overreaching it involved?

The origin of modern judicial activism was the protection of the constitutional rights of minorities. These rights were systematically neglected and abused by the two mechanisms usually relied on to guarantee freedom: the majoritarian political process and the decentralized power guaranteed by federalism. If either or both of these

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472 *Id.* at 166.

473 *Id.*

474 *Id.* at 165.

475 *Id.* at 168-71. This remarkable question and answer is worth quoting verbatim, for those who find it difficult to believe my characterization of what occurred:

> Q: Dean Kane, I know you're not familiar with all aspects of the proposed settlement here, but I would ask you to assume for purposes of this question, that it sets up an administrative claims mechanism for handling future asbestos claims, that it pays claims reasonably quickly with low transaction costs and it treats similarly-situated claimants similarly, that it pays only claimants with impairment due to asbestos exposure and defers unimpaired claims and that it provides assurance that future claimants would be paid.
>
> Is that a solution that is along the lines that the judges were after as recognized by what they said to you in your presence, both the Rehnquist Committee and at the Federal Judicial Center?
>
> [The court overruled an objection by counsel for the objectors.]
>
> A: . . . Yes. In fact, I think that the factors that are mentioned, those factors are the kinds of factors that the judges were concerned about incorporating in some sort of a solution.

Id. The audacity it took to ask such a question probably made it easy to describe the settlement as one that treats similarly situated claimants similarly. Given the analysis presented in this paper, that description must, however, be taken with a grain of salt: first, because of the different treatment given similarly situated present clients, and second, because of the different treatment accorded similarly situated class members based on the identity of their counsel.

processes fail to address the concerns of asbestos victims or corporate defendants, it is not because they are somehow structured to disfavor systematically asbestos victims or corporations. If no legislative solution, national or local, is forthcoming, then this situation is no different than any other so-called "failure" of democratic process. The countermajoritarian difficulty is presented in its starkest form by this case, and all the wishes, hopes, and dreams of judges cannot make it go away.

But due process and separation of powers are mere words on paper—paper that must be cleared from the table so that dinner may begin. So we all sit down to feast: the judges who can smile as they see the beginning of the end of the asbestos backlog; the ethics experts, including myself, who were paid fat fees to disagree with one another and who ultimately shed little light; the doctors who joined their legal counterparts testifying and disagreeing and going home a little richer; the executives of twenty corporations who can brag about cash flow control, the end of asbestos anxiety, and cash payments they can meet without too much strain; the lawyers at Shea & Gardner who managed the unimaginable, lost a little of their innocence, and got paid plenty for their trouble; and, of course, class counsel who are today much richer than even they could ever have imagined they would be. Come to the feast.

And what of the class members, you ask? Everyone assures me that most of them will be all right. If they get really sick, they'll probably be paid what some, if not all, people would consider to be a fairly reasonable amount. They'll be all right as long, that is, as no one tells them too much about their lawyers—as long, that is, as no one explains in too much detail how it came to be that they cannot bring a case in court. They'll be all right. And Mrs. Kekrides? She'll probably be paid someday soon.

> Q [by Mr. Baron]: Were you happy when you found out two weeks ago for the first time that the class action had been settled?
> A [by Mrs. Kekrides]: I not happy because I lost my young husband, but, you know, I do not have a choice.
> . . . .
> Q: How much money do you have outstanding in medical bills?
> A: Right now?
> Q: Yes.
> A: I say more than $200,000.
> Q: Is that after you've paid some of them?
> A: I pay something because since they collect.
> Q: They sent the bill collector by?
> A: Yes.

> Q: If all you can get from this settlement with all twenty of these companies for your share is $250,000,[476] and you have to pay all of your medical bills, do you think that would be a fair settlement?
> A: I cannot give me more, how you going to do? I can't fight. You know what I mean?[477]

Yes. Justice is feasting while the widow weeps.[478]

AFTERWORD

Just after the foregoing article was completed, the Third Circuit issued an important opinion on settlement class actions that may spell trouble for the *Georgine* settlement on appeal. More important, it signals that some appellate judges are quite concerned with the apparent feasting during the settlement of class action suits. The case involved certain GM pick-up trucks, which the plaintiffs alleged had fuel tanks located in a place that made the trucks especially vulnerable to fuel fires in side collisions.[479]

The class included GM truck owners across the nation who had purchased the allegedly defective GM trucks over a fifteen-year period.[480] The complaint filed on behalf of the class sought, among other things, an order requiring GM to recall the trucks or pay for their repair.[481] After the complaint was filed some discovery took place, (mostly on class certification issues),[482] while the parties began exploring the possibility of settlement.[483] Their discussions bore fruit and the lawyers for the class and GM jointly presented a proposed settlement to the district court requesting that the class be certified for settlement purposes only.[484] The settlement provided that every class member would receive for each truck owned a $1,000 coupon that could be used to purchase any new GMC Truck or Chevrolet light duty truck.[485] These coupons were redeemable over a fifteen-month period, but could not be transferred freely to persons outside the class members' immediate family unless that transferee was a purchaser of the class member's used truck.[486] In lieu of the $1,000 coupon, a class

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476 The *Georgine* settlement provides compensation for mesothelioma as follows: minimum, $20,000; maximum, $200,000; negotiated average range, $37,000-60,000; extraordinary claim negotiated average, $300,000. *See supra* note 189.

477 Deposition of Nafssica Kekrides, *supra* note 193, at 40, 60.

478 WILLIAM SHAKESPEARE, THE RAPE OF LUCRECE Line 906 (Penguin Books 1971).

479 *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 777 (3d Cir. 1995) [hereinafter *In re* GM].

480 *Id.* at 777, 779.

481 *Id.* at 779.

482 *Id.* at 780.

483 *Id.*

484 *Id.*

485 *Id.*

486 *Id.*

member could elect a $500 coupon, which could be sold to any third party provided that the class member first identified that party.[487] The third party could not resell the $500 coupon or use it in combination with any other GM rebate offer. Further, the coupon could only be used to purchase GM's more expensive truck models.[488] The settlement also provided that class counsel could apply to the court for attorneys' fees and expenses to be paid by GM.[489] While GM reserved the right to object to the fee request, it did not object.[490]

After individual notice to the registered owners of 5.7 million GM trucks[491] and the recognition of objectors,[492] the district court held a brief fairness hearing[493] and subsequently issued an opinion confirming its provisional certification of the class and approving the settlement.[494] The court did not make specific findings that the class satisfied the prerequisites of Rule 23(a), but it did set forth findings of fact and conclusions of law to justify its approval of the settlement as fair, reasonable, and adequate.[495] Four days after approving the settlement, the district court approved class counsel's request for $9.5 million in attorneys' fees.[496] The Third Circuit, in an opinion written by Judge Becker, vacated the district court's orders certifying the class and approving the settlement and remanded the case "for further proceedings consistent with [its] opinion."[497]

The Third Circuit's opinion is wide-ranging and expresses many concerns about the present state of settlement class action practice. The court defined a settlement class as a "device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification."[498] Armed with this definition the court set out in exhaustive detail the many problems inherent in the settlement class action device. For example, the court alluded to the difficulties in assessing the

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487 *Id.*

488 *Id.*

489 *Id.* at 781.

490 *Id.*

491 *Id.* Publication notice was provided to class members who had not registered their ownership of the trucks with GM. Over 5,200 truck owners opted out of the settlement.

492 *Id.* Approximately 6,500 truck owners, including many fleet owners who own as many as 1,000 trucks each, objected to the settlement.

493 "A settlement fairness hearing was held on October 26, 1993 during which the objectors who submitted written briefs were permitted to speak." *Id.*

494 *Id.*

495 *Id.* at 781-82.

496 Initially the district court indicated that it did not need to review fees that GM agreed to pay. However, it later issued an "amplified order" justifying the fees as reasonable under both a lodestar and percentage-of-recovery basis. *Id.* at 782.

497 *Id.* at 822-23.

498 *Id.* at 786.

fairness of a settlement when the number of class members is uncertain.[499] This problem is exacerbated in "futures" settlement class actions like *Georgine* because the number of future claimants is always uncertain. More ominous for the proponents of *Georgine*, the court stated:

> With less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses. For example, if the court fails to define the class before settlement negotiations commence, then during the settlement approval phase the judge will have greater difficulty detecting if the parties improperly manipulated the scope of the class in order to buy the defendant's acquiescence.[500]

The improper manipulation of the class definition to benefit the defendants and class counsel is exactly what I claim went on in *Georgine*, although there was no evidence that manipulation was a problem in *GM*. Moreover the court's reference to "individual settlements" in the midst of a sentence discussing "collusion" and "buy-offs" is particularly interesting given that the case before the court did not involve individual settlements made alongside the class settlement, although *Georgine* does.

The court acknowledged that settlement class actions with self-appointed lawyers negotiating for an inchoate class provide lawyers with an incentive to jockey for position, each seeking to be the first to "cut a deal" with the defendants and thereby gain the defendants' acquiescence to the class action, settlement, and award of attorney's fees to that lawyer.[501] The court also discussed how settlement class actions risk transforming the courts into "mediation forums"[502] that dispose of cases filed "without any expectation or intention of litigation"[503]—"cases that arguably do not belong" in the courts at all.[504] The court made its only reference to *Georgine*, as a prime example of a case filed without any intention of litigation, at this point. In a footnote the court wrote: "Because the parties do not come before the court until the action has settled, some courts have even expressed concern that such cases do not present a case or controversy for Arti-

499 *Id.* at 787.

500 *Id.* (citations omitted).

501 *Id.* at 788. In a footnote the court said, "[t]hese sorts of dynamics have led some critics to accuse class action attorneys of ethical violations. While we emphasize that counsel here committed no such violations, we do not preclude the possibility that these violations could occur." *Id.* at 788 n.9.

502 *Id.* at 790.

503 *Id.*

504 *Id.*

cle III purposes. *Cf. Carlough v. Amchem Products, Inc.*"[505] *Carlough* was an early decision before *Georgine* replaced *Carlough* as the class representative of what is now known as *Georgine.* In that case the district court rejected the objectors' claim that the case did not present an Article III controversy.

Despite all the problems it saw with settlement class actions, the Third Circuit acknowledged that they were useful devices, particularly in mass tort actions.[506] The court stated that some critics underestimate the safeguards that exist to protect absent class members in settlement actions.[507] For example, the court pointed out that the judge "can still monitor the negotiation process itself to assure that both counsel and the settlement adequately vindicate the absentees' interests."[508] This is not true, however, in settlement class actions like *Georgine,* in which the action is not filed until it is settled. Thus, the statement may mean that the court will scrutinize actions like *Georgine* more closely than other settlement class actions.

There is also reason to believe that the Third Circuit will be particularly attentive to the special problems of "futures" classes. First, the court mentioned the problem of turning the courts into mediation forums.[509] Second, the court emphasized that the right to opt out helped guarantee the due process rights of absentee members in settlement class actions.[510] But, as the Second Circuit recognized, and I have argued, the right to opt out is illusory for future claimants.

The Third Circuit held that settlement class actions were cognizable under Rule 23 as long as the requisites of Rule 23 were rigorously enforced.[511] District courts must make specific findings that Rule 23's requisites have been met. The judge in *Georgine* did this with some care. However, the Third Circuit held that a court's findings must include a finding that the settlement class is a class that could be certified for litigation.[512] This requirement may deal a fatal blow to *Georgine,* all similarly shaped "futures-only" actions, and many other mass tort class actions.

Under the litigation-class standard, some mass tort class actions might be triable in federal court provided that the patterns of injuries sustained by class members are reducible to a finite and manageable

505 *Id.* at 790 n.10 (citing Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437, 1462-67 (E.D. Pa. 1993)).

506 *Id.* at 790-91.

507 *Id.* at 791.

508 *Id.*

509 *Id.* at 790.

510 *Id.* at 792. The court argued that the opt-out right was enhanced in at least one respect in settlement class actions because class members know precisely what the class action will offer them when they decide whether to stay in. *Id.*

511 *Id.* at 794.

512 *Id.* at 797-99.

number and the differences in applicable state law are similarly manageable.[513] But even if claims for personal injury from asbestos were conceded to be thus reducible and manageable, something I tend to doubt,[514] how would one go about trying a class action comprised almost entirely of future claims? The number of claimants is uncertain; the law that would apply to the claims at the time they accrued is unknowable; and the extent of future injuries of any particular type is, at best, speculative.[515] Thus, I do not see how the Third Circuit can approve *Georgine* or any similarly shaped class under the litigation-class standard *In re GM* set out. Indeed, the court acknowledged that its holding might be fatal to the resolution of many mass tort class actions.[516]

The Third Circuit's discussion of Rule 23's requirement of adequate representation also spells problems for *Georgine.* The Third Circuit said that the *GM* "class appears to fail to meet Rule 23(a)'s

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513 *Id.* at 799.

514 The Third Circuit provided only one example of a mass tort class action that might have been certifiable as a litigation class action, *In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986). *In re* GM, *supra* note 479, at 799 n.22. The court noted that in that case counsel had produced evidence to satisfy the court that the claims and defenses were reducible to four patterns. The court stated that this was a small enough number to have been amenable to trial through a series of special verdicts. *Id.* n.22. The claims involved were claims for property damage, not personal injury claims. Personal injury claims are not as easily reducible to a finite and manageable number of patterns.

515 While the *Georgine* court, unlike the *GM* district court, did discuss commonality, typicality, numerosity and the other requirements of Rule 23, the *Georgine* court did not find that the *Georgine* class was a class that could be certified for litigation purposes. Moreover, as I suggest in the text, even if the *Georgine* court had made such a finding it is unclear that that finding could withstand scrutiny on appeal.

516 *Id.* at 799.

> Certifying a class without the existence of questions common to the class (or where the class representatives' claims are not typical) perverts the class action process and converts a federal court into a mediation forum for cases that belong elsewhere, usually in state court. On the other hand, the cases that make the settlement class device appear most useful are cases presenting the most unwieldy substantive and procedural issues, i.e., those diversity cases in which plaintiffs from many states are confronted with differing defenses, differing statutes of limitations, etc.—precisely those cases that stretch the Rule to its outer-most limits.
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> This is a troublesome issue—and a close one. Many mass tort actions have this problem. The School Asbestos cases and the Breast Implant cases had it, and this case does, as well. It may initially seem difficult to envision an actual trial of these cases because of the differing defenses certain to be raised under the various bodies of governing law. While the problem may be overstated, settlement classes still serve the useful purpose of ridding the courts—state and federal—of this albatross even though the case may never have been triable in class form. But if that were the primary function of the settlement class, the federal courts would have become a mediation forum, a result inconsistent with their mission and limited resources. In sum, "a class is a class is a class," and a settlement class, if it is to qualify under Rule 23, must meet all of its requirements.

Id. at 799-800.

adequacy of representation test"[517] because the terms of the settlement created an intra-class conflict between the fleet owners (for whom the coupons were of dubious value) and individual owners of GM trucks.[518] The court found additional evidence of intra-class conflict in that the settlement included certain provisions, such as the intra-household transfer option, which were of no use to fleet owners. The court concluded that "[a]t the very least, the class should have been divided into sub-classes."[519] The *Georgine* settlement also provides benefits to some sub-groups, such as the pleural plaintiffs and lung cancer class members who cannot meet *Georgine*'s standards of proof, that are of dubious value. The *Georgine* settlement also includes provisions that are of no use to most class members, such as the provisions that make the ordering of claims or the amount of recovery dependent on the identity of counsel. The Third Circuit's opinion strongly suggests that in such situations subclasses are not discretionary, but mandatory.[520]

The Third Circuit also expressed serious concern about the possibility that "counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources."[521] The court's concern that a side deal between the defendant and class counsel tainted the *GM* settlement was based on much less evidence than was presented to the district court in *Georgine.* In *GM,* the court was concerned about a side deal based on "strong indications that simultaneous negotiations [of the class settlement and class counsel's attorneys' fees] in fact transpired," the district court's finding to the contrary notwithstanding.[522] The Third Circuit acknowledged that the United States Supreme Court in *Evans v. Jeff D.*,[523] had held that simultaneous negotiation of attorneys' fees and class settlement was

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517 *Id.* at 800.

518 *Id.* at 800-01.

519 *Id.* at 801.

520 The Third Circuit noted that the *GM* settlement did not involve a class in which some members share the prospect of a future claim with other class members who currently have such a claim, presumably distinguishing such a class from a class like that in *GM* where there were significant intra-class conflicts. *Id.* But this remark by the court did not foreclose the possibility of intra-class conflict in classes including present and future claims, particularly if those classes include members whose claims differ dramatically from one another in time and severity of injury.

521 *Id.* at 803.

522 *Id.* at 804. The Third Circuit cited one letter that suggested simultaneous negotiation of class counsel's fees and the settlement and chastised the district court for placing "dispositive weight on the parties' self-serving" denials. *Id.* In *Georgine,* no one denied that simultaneous negotiation of the present client cases occurred. However, the district court did credit the settling parties' self-serving comments, explaining that the class settlement was unaffected by the simultaneous negotiation of thousands of cases in which class counsel had a substantial financial interest.

523 475 U.S. 717, 734-38 (1986).

permissible. But according to the Third Circuit,[524] permissible does not mean unsuspicious, particularly when a defendant has acquiesced to a substantial award of attorneys' fees to class counsel[525] and "fail[ed] to disclose the amount of the award in the class notice."[526] The Third Circuit's willingness to treat the simultaneous negotiation of attorneys' fees as suspicious suggests that the court would be receptive to the approach I have suggested: a prohibition on the simultaneous negotiation of a class settlement and claims against the defendant not covered by the class settlement. At least the Third Circuit has signalled its intent to treat such simultaneous negotiations as strong evidence that the class was not adequately represented.

The Third Circuit also affirmed "the need for courts to be even more scrupulous than usual in approving settlements" negotiated before a class has been certified by a court, stating that in those cases there must be strong "indications of sustained advocacy" by lawyers who purport to represent the inchoate class.[527] In considering whether the lawyers have met this heightened standard, the district court should consider whether simultaneous negotiations occurred and whether "major causes of action or types of relief sought in the complaint [have] been omitted by the settlement."[528] In *Georgine*, the claims of some members of the class who will suffer from lung cancer were settled for zero dollars, the consortium claims of all class members were settled for zero dollars, and the claims of many class members who will not meet the asbestosis criteria were settled for zero dollars. There was simultaneous negotiation of the class claim and the present client cases. All this took place in a case involving negotiation before the action was filed. This is a problem for the proponents of *Georgine*.

In evaluating the fairness of the settlement terms, the Third Circuit held that the district court had "erred," failing to "adequately discharge its duties to safeguard the interests of the absentees," by not paying more attention to the fact that "some segments of the class are treated differently from others."[529] Here the court concentrated on poorer class members who could not afford to purchase a new truck in time to take advantage of the $1,000 coupon and on fleet owners who could not replace their entire fleet of GM trucks in fifteen months. The settlement treated those people less favorably than similarly situated class members, who happened to be rich individual owners of GM trucks. If this concerned the Third Circuit, it is difficult to

524 *In re* GM, *supra* note 479, at 804.
525 *Id.* at 803-04.
526 *Id.* at 803.
527 *Id.* at 805-06.
528 *Id.* at 806.
529 *Id.* at 808.

see how that court could accept the *Georgine* settlement, which provides less favorable terms for class members than those simultaneously negotiated by class counsel for their similarly situated present clients.

The *GM* decision is a step in the right direction.[530] It sends a strong message to the district courts that there are some limits to the use of settlement class actions, although its discursive style serves to obscure any precise understanding of what those limits are. All things being equal, the Third Circuit's rejection of the *GM* settlement dooms *Georgine*, and if accepted by other courts, dooms *Georgine*'s progeny. But all things are not equal. Rejecting *GM* cost the Third Circuit and the rest of the judiciary little; rejecting an asbestos settlement, on the other hand, would cost the judiciary much.[531] The judiciary's self-interest should not, of course, dictate the result in mass tort class actions. The reasoning in *GM* should apply equally to *Georgine*, but conflicts of interest are dangerous precisely because they cloud vision. The lawyers in *Georgine* convinced themselves they did the right thing. Will the judiciary fall prey to similar self-interested thinking, and, if so, at what cost to the integrity of that institution? Time will tell whether the feast is over or whether it has just begun.

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530 *GM* is not the only recent sign that some members of the judiciary are concerned enough about the current state of class action practice to begin to stem abuses. On March 15, 1995, a district court in Louisiana rejected a proposed settlement of multidistrict litigation involving the Ford Bronco II vehicle's alleged tendency to roll over. *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., 1995 U.S. Dist. LEXIS 3507 (E.D. La. Mar. 15, 1995). The court said "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class counsel's representation was also inadequate." *Id.* at *32. The court even suggested that the settlement, which left class counsel with the prospect of receiving substantial fees (unopposed by the defendant) and the class with no monetary relief, "could possibly be the result of collusion between the defendant and class counsel." *Id.* at *28-*29. However, like *GM*, rejecting the Ford Bronco II settlement cost the judiciary little in terms of overloaded case dockets. *See also* In the Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (granting a writ of mandamus to decertify a nationwide class brought on behalf of hemophiliacs infected by HIV by the defendants' blood products on the ground, *inter alia*, that the claims of the class were substantial and the value of the claims was not readily discernible because there had been very few trials.

531 The Seventh Circuit recently echoed this point in distinguishing its rejection of a nationwide class of hemophiliacs infected by HIV with the acceptance of nationwide class actions in asbestos suits. "The number of asbestos cases was so great as to exert a *well-nigh irresistible pressure to bend the normal rules.* No comparable pressure is exerted by the HIV-hemophilia litigation." *In re Rhone-Poulenc Rorer*, 51 F.3d at 1304 (emphasis added).