95-40635

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE ASBESTOS LITIGATION

ESTEBAN YANEZ ORTIZ, EDEE COCHRAN,
LESTER E. TAYLOR, JOHN ALLGOOD AND HENRY EVERS

Intervenors - Appellants,

v.

GERALD AHEARN, et al.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I THE DISTRICT COURT LACKED JURISDICTION TO APPROVE THE SETTLEMENT, BECAUSE THE COMPLAINT ALLEGED ONLY A FEIGNED DISPUTE AND DID NOT PRESENT THE COURT WITH A "CASE" OR "CONTROVERSY" AS REQUIRED BY ARTICLE III. 6

II. THE CLASS DOES NOT SATISFY THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(a). 15

A. The Class's "Common Interest" in Resolving the Coverage Dispute Between Fibreboard and Its Insurers Did Not Satisfy the Rule 23(a) Prerequisites of Commonality and Typicality. 15

B. Class Representatives Could Not Adequately Represent Absent Class Members With Respect to Unpled Future Claims. 20

C. Class Counsel's Divided Loyalties Rendered Them Inadequate Representatives of the Class. 22

1. Class counsel's loyalties were divided by their simultaneous duties to individual clients and to class members. 22

2. Intra-class conflicts further divided counsel's loyalties. 24

3. The ends do not justify the means. 26

III. DUE PROCESS, THE RULES ENABLING ACT, AND RULE 23 ALL FORBID MANDATORY CLASS TREATMENT OF THE INDIVIDUALIZED CLAIMS FOR DAMAGES ALLEGED HERE. 27

A. Under *Shutts,* Rule 23(b)(1)(B) May Not Constitutionally Be Applied to Individualized Claims for *In Personam* Damages. 27

B. Equitable Distribution of Fibreboard's Assets Following a Trial of the Claims Alleged Here Would Violate the Rules Enabling Act. 31

C. Neither Rule 23(b)(1)(B) Nor Its Historical Antecedents Permit Mandatory Class Certification of *In Personam* Claims. 35

CONCLUSION 39

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

Cases

Ackerman v. Kassar,
No. 91-56521,
1993 WL 326453 (9th Cir. Aug. 26, 1993) 12

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 8, 9

Albany Ins. Co. v. Bengal Marine, Inc.,
857 F.2d 250 (5th Cir. 1988) 31

ASARCO v. Kadish,
490 U.S. 605 (1989) 8, 9

Ayer v. Kemper,
48 F.2d 11 (2d Cir.),
cert. denied, 284 U.S. 639 (1931) 36

Baumgart v. Keene Bldg. Products Corp.,
666 A.2d 238 (Pa. 1995) 31

Califano v. Yamasaki,
442 U.S. 682 (1979) 35

Clarke v. Brown,
244 A.2d 514 (N.J. Super. 1968) 31

Commercial Travelers Life Ins. Co. v. Spears,
484 S.W.2d 577 (Tex. 1972) 36

Crowell v. Benson,
285 U.S. 22 (1932) 35

Daily Income Fund, Inc. v. Fox,

464 U.S. 523 (1984) 35

Dickinson v. Burnham,
197 F.2d 973 (2d Cir.),
cert. denied, 344 U.S. 875 (1952) 34

Duke Power Co. v. Carolina Envir. Study Group, Inc.,
438 U.S. 59 (1978) 10

Epstein v. MCA, Inc.,
50 F.3d 644 (9th Cir.),
cert. granted, 115 S.Ct. 2576 (1995) 21

Farmers Irrigating Ditch & Reservoir Co. v. Kane,
845 F.2d 229 (10th Cir. 1988) 37

Gardner v. New Jersey,
329 U.S. 565 (1947) 32

Georgine v. Amchem Prods., Inc.,
157 F.R.D. 246 (E. D. Pa. 1994),
appeal pending, No. 94-1925 (3d Cir.) 1

Gerdes v. Travelers Ins. Co.,
109 Misc.2d 816, 440 N.Y.S.2d 976 (N.Y. Sup. Ct. 1981) 32

Guffanti v. National Sur. Co.,
196 N.Y. 452 (1909) 35

Hartford Life Ins. Co. v. Ibs,
237 U.S. 662 (1915) 35, 36

Hayden v. Elf Atochem, N.A.,
No. 95-20924 2

In re A.H. Robins Co.,
880 F.2d 709 (4th Cir.),
cert. denied, 493 U.S. 959 (1989) 39

In re Agent Orange Prod. Liab. Litig. ("Ivy"),
996 F.2d 1425 (2d Cir. 1993),
cert. denied, 114 S. Ct. 1125 (1994) 21

In re Agent Orange Prod. Liab. Litig.,

100 F.R.D. 718 (E.D.N.Y. 1983) 30

In re Agent Orange Prod. Liab. Litig.,
818 F.2d 216 (2d Cir.),
cert. denied, 484 U.S. 926 (1987) 14, 30

In re Beef Indus. Antitrust Litig.,
607 F.2d 167 (5th Cir. 1979),
cert. denied, 452 U.S. 905 (1981) 19

In re Corrugated Container Antitrust Litig.,
643 F.2d 195 (5th Cir. 1981) 18, 26

In re Drexel Burnham Lambert Group, Inc.,
960 F.2d 285 (2d Cir. 1992),
cert. dismissed, 113 S. Ct. 1070 (1993) 32

In re Fibreboard Corp.,
893 F.2d 706 (5th Cir. 1990) 4, 40

In re General Motors Corp. Engine Interchange Litig.,
594 F.2d 1106 (7th Cir.),
cert. denied, 444 U.S. 870 (1979) 26

In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.,
55 F.3d 768 (3d Cir.),
cert. denied, 116 S. Ct. 88 (1995) 16-19

In re Manville,
982 F.2d 721 (2d Cir. 1992),
modified on rehearing, 993 F.2d 7 (1993) 32, 33

In re Manville,
993 F.2d 7 (2d Cir. 1993) 25

In re Silicone Gel Breast Implant Litig. (MDL 926),
Master File CV 92-P-1000-8 (N.D. Ala. Sept. 10, 1993) 30

In re Silicone Gel Breast Implant Prods. Liab. Litig.,
No. CV 92-P-10000-S,
1994 WL 578353 (N.D. Ala. Sept. 1, 1994) 14

Jackson v. Johns-Manville Sales Corp.,
750 F.2d 1314 (5th Cir. 1985) (en banc),
cert. denied, 478 U.S. 1022 (1986) 4

Katchen v. Landy,
382 U.S. 323 (1966) 32

Keene Corp. v. Fiorelli,
14 F.3d 726 (2d Cir. 1993) 7, 8, 13, 14, 33

Los Angeles v. Lyons,
461 U.S. 95 (1983) 10

McDonnell Douglas Corp. v. United States District Court for the Central District of Calif.,
523 F.2d 1083 (9th Cir. 1975),
cert. denied, 425 U.S. 911 (1976) 36

Moore v. Charlotte-Mecklenberg Bd. of Educ.,
402 U.S. 47 (1971) 9

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 29, 30, 36

National Super Spuds, Inc. v. New York Mercantile Exch.,
660 F.2d 9 (2d Cir. 1981) 9, 20, 21

North Am. Acceptance Corp. v. Arnall, Golden & Gregory,
593 F.2d 642 (5th Cir.),
cert. denied, 444 U.S. 956 (1979) 26

Pennsylvania Ass'n for Retarded Children v. Pennsylvania,
343 F. Supp. 279 (E.D. Pa. 1972) 9

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 27-29

Phipps v. Chicago, R.I. & P. Ry.,
284 F. 945 (8th Cir. 1922),
cert. dismissed, 262 U.S. 762 (1923) 35

Smith v. Swormstedt,
57 U.S. 288 (1853) 35, 36

State Farm Fire & Cas. Co. v. Tashire,
386 U.S. 523 (1967) 37

Supreme Council of the Royal Arcanum v. Green,

237 U.S. 531 (1915) 35

Swift & Co. v. United States,
276 U.S. 311 (1928) 12

United States v. Johnson,
319 U.S. 302 (1943) 8, 9

Weems v. McCloud,
619 F.2d 1081 (5th Cir. 1980) 35

Windham v. American Brands, Inc.,
565 F.2d 59 (4th Cir. 1977),
cert. denied, 435 U.S. 968 (1978) 32

Other Authorities

11 U.S.C. § 305(a)(1) 33

11 U.S.C. §§ 524(g) & (h) 33

28 U.S.C. § 1404 29

FED. R. CIV. P. 15(b) 7

FED. R. CIV. P. 23(b)(3) 19

Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS (3d ed. 1992) 19, 34

Charles A. Wright, Arthur R. Miller & Edward H. Cooper,
FEDERAL PRACTICE AND PROCEDURE (1984) 10

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95 COLUM. L. REV. 1343 (1995) 2, 14, 16, 17

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80 CORNELL L. REV. 858 (1995) 1, 4, 16, 34, 36

INTRODUCTION

The settling parties assert that this proceeding involves a routine class action and a settlement that resolves only common issues regarding the insurance coverage of a tort defendant. And thus, they proclaim, the class action and accompanying settlement are supported by a "longstanding historical foundation" consisting of "[h]undreds of years of antecedents in Anglo-American jurisprudence[.]" (Sett. Part. br., 51, 77). But this spin is disingenuous both in its description of the intent and effect of this proceeding and in its recitation of precedent. This is not a suit on an insurance contract, and, as the district court itself acknowledged, because of the "novelty" of this proceeding, "[i]t remains to be seen whether Rule 23 will finally be determined to be flexible enough to embrace such a case." (RE8:3). Indeed, of all the attempts to revamp the methods for compensating victims of mass torts, proceedings such as *Ahearn* and *Georgine v. Amchem Prod., Inc.*[1] represent "the most radical and controversial of all such reforms[.]" John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 990 (1995) (hereinafter "Siliciano, *Rhetoric of Crisis*").[2]

In truth, what the settling parties attempt to achieve through this action is without precedent. If this Court chooses to enact new law by upholding this settlement, tort victims unfortunate enough to be harmed *en masse* will no longer have a constitutional right to a meaningful opportunity to be heard, to a jury trial, or to representation by the lawyer of their choice. This case, if it succeeds, will swing open the doors of federal courthouses to validate private agreements prospectively redefining the substantive rights of unsuspecting people who were incapable of giving their consent and who will not even be injured for years to come.[3] Among the many radical innovations characterizing the settling parties' effort to redefine the role of federal courts are the following:

- Neither class counsel nor the representative plaintiffs *ever* intended to litigate the claims alleged in the complaint, even if settlement negotiations had fallen through.

- The defendant and its Insurers hand-picked the plaintiffs' counsel with whom they would negotiate a class "settlement" and essentially requested that those counsel initiate a sham lawsuit.

- The claims alleged in the complaint have no connection with the actual settle-

ment. The consideration extracted from the plaintiff class in return for the settlement was not simply the release of the sham claims alleged, but instead the release of unripe future personal injury claims over which no court could have asserted jurisdiction.

- Millions of potential future victims lost their rights to sue Fibreboard based on a settlement vicariously negotiated by counsel before class representatives were even identified. No party disputes that those representatives, who released the personal injury claims of absent class members, *could not have litigated* those claims consistently with Rule 23.

- Because class counsel acceded to the demand for "total peace" and fabricated a limited fund, non-opt-out class, absent and unknown class members have no opportunity to exclude themselves from a class action releasing individual claims.

- Class members' claims for future personal injuries, although not alleged in the complaint, are released at a time when class members can make no meaningful decision whether the settlement is in their best interests.

- Having convinced the district court to bind class members to a mandatory settlement on the grounds that it might one day become insolvent, Fibreboard is nonetheless allowed to walk away with all of its non-insurance assets intact and to shift the risk of an inadequate settlement to the plaintiffs.[4]

- The "settlement" was negotiated for future claimants by counsel who had conflicting loyalties to present claimants and who were seeking relief from the same limited insurance resources.

The settling parties go beyond the pretense that this proceeding constitutes business as usual for the federal courts. In addition, the settling parties confuse *Ahearn* with *Rudd* by claiming that *Ahearn* does not resolve the individual personal injury claims of class members against Fibreboard (*see, e.g.*, Sett. Part. br., 73 n., 78). Indeed, the settling parties baldly proclaim that "the Global Settlement does *not* resolve how much money individual claimants will receive; that is something that would be determined on an *individual* basis in the future **under the Trust Distribution Process**...." *Id.* at 78 (bold added). In other words, "the *settlement* does not resolve how much individual claimants will receive, silly goose; *that* will be determined under the *settlement*." But this case, unlike *Rudd*, is not about the legality of resolving Fibreboard's insurance dispute, which itself provides the Insurers "total peace." Although the settling parties would apparently now like to rewrite the class complaint to seek an equitable distribution of insurance proceeds,[5] their pleading actually seeks individual *in personam* damages against *Fibreboard* for asbestos-related "injuries," and the Global Settlement itself releases *all* present and future asbestos-related personal injury claims of class members against Fibreboard in addition to fixing the procedure through which those claims are to be liquidated. The *raison d'etre* of *Ahearn* is to extinguish the individual rights of class

members to sue Fibreboard, thereby giving Fibreboard the "total peace" it covets. Otherwise, the *Rudd* case alone is enough to avoid the risks of a Coverage Case loss.

As for their siren song that the Global Settlement is "superior" to the Trilateral Agreement because the Global avoids some of the costs inherent to gaining access to the courts, the chorus of settling parties is singing to the wrong branch of government. If Congress wished to reconfigure the entire American system for compensating tort victims, then, perhaps, it could do so.[6] *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (arguments for changing the tort system "are compelling, but they are better addressed to the representative branches"). But federal courts cannot prospectively eliminate the substantive state law rights of absent class members by mandating that they accept the terms of a "settlement" to which they did not and could not give effective consent.[7] If the Trilateral is more expensive to the class than the Global, it is *only* because exercising the constitutional right to one's day in court carries its own costs. Thus, the policy arguments made by the settling parties and the district court in elevating the Global above the Trilateral should be directed to state and federal legislative bodies who at least arguably have the power to substitute fair administrative compensation schemes for the right to sue in court.

The Global Settlement here redefines the function and authority of federal courts and eviscerates the right to individual due process. The settling parties insist that the risk of Fibreboard losing its insurance coverage demanded that class members' individual personal injury claims be resolved through a "unitary adjudication." But this ignores the reality, recognized in the class complaint itself, that those individual injury claims were not made against any common or limited fund (insurance or otherwise)--they were asserted against Fibreboard, a non-bankrupt company. The only "interest" common to all class members was in avoiding a loss of Fibreboard's insurance coverage. If class members had sought only to resolve that interest, perhaps by intervening in the Coverage Case in California state court, then their claims would indeed have required "unitary adjudication."[8]

But that was not the relief sought in this federal complaint, nor could it have been. The mere fact that class members were interested in the outcome of Fibreboard's coverage dispute did not create a justiciable federal controversy between the class and Fibreboard. But even if those claims against the Insurers could have been adjudicated by the class of potential asbestos

victims and had been included in the complaint, such claims could not support this settlement, which releases the *individual* damages claims of the class *against Fibreboard*.

Neither due process nor Rule 23 permits the settling parties to force their own private compensation system upon absent class members, and the risks imposed by Fibreboard's insurance coverage litigation do not change the law. Class members must be allowed to exercise meaningful individual control over their individual *in personam* damages claims, unless and until Fibreboard actually becomes a "common fund" by filing for bankruptcy or its functional equivalent--an unlikely result if *Rudd* is affirmed. Such meaningful control requires that class members here be afforded an unfettered right to exclude themselves from the class, if and when they develop a physical injury as a result of their exposure to asbestos. In depriving absent class members of this fundamental right of access to the courts, the Global Settlement is decidedly unfair, in addition to being inherently illegal.

Both because this settlement perverts the institutional authority of federal courts and eliminates or discounts the constitutional and state law rights of absent class members, this Court must reverse the judgment of the district court.

I THE DISTRICT COURT LACKED JURISDICTION TO APPROVE THE SETTLEMENT, BECAUSE THE COMPLAINT ALLEGED ONLY A FEIGNED DISPUTE AND DID NOT PRESENT THE COURT WITH A "CASE" OR "CONTROVERSY" AS REQUIRED BY ARTICLE III.

The district court could issue an order approving the class action settlement in this case only if the court had subject matter jurisdiction over the proceeding itself, as framed by the pleadings and, in particular, by the class action complaint (Ortiz br., 13-25). Yet, the class complaint did not properly invoke the district court's subject matter jurisdiction because the claims it asserted were feigned and therefore did not present the court with a "case" or "controversy" to decide. The claims had already been settled at the time of suit, and, more importantly, they were "transparently pretextual"[9] because neither the class plaintiffs nor class counsel ever intended to litigate them if the proposed settlement fell through.

The settling parties contend that the class action complaint that they brought to the district court on September 9, 1993 presented that court with a justiciable controversy. But the disputes cited by the settling parties appear nowhere in the class complaint, which merely

alleges garden-variety personal injury claims against *Fibreboard*. Indeed, the settling parties' brief contains no discussion at all of the claims actually asserted in the complaint. Instead, the settling parties are forced to point to disputes *other than* those alleged in the class complaint in attempting to supply the requisite controversy (*see* Sett. Part. br., 56 ("[f]or more than fifteen years the Insurers, Fibreboard and its asbestos claimants had been in extremely sharp conflict with each other"); *id*. ("'there has been nothing feigned or collusive about the *negotiations* that brought the parties to court'" (quoting FOF ¶ 1, emphasis added)); *id*. n.* ("Continental's contention that Fibreboard's assignment settlements vitiated the insurance coverage, and Fibreboard's arguments that Continental had no right to make such a claim, clearly posed very real and substantial controversies"); *id*. at 63 (the controversy in this case did not concern individual claims, but instead concerned whether, "at the time Class members did develop asbestos-related illnesses there would be a source from which they could recover damages"); *id*. at 75 (the case could have been certified for litigation purposes because "the Class complaint *could have* recited a claim . . . that Fibreboard was entitled to coverage from the Insurers" (emphasis added)).[10]

The settling parties' insistence that the existence of these extraneous disputes allowed the district court to exercise jurisdiction to approve the Global Settlement implicitly concedes the essential point made in the Ortiz appellants' opening brief: the claims for damages in the class complaint were feigned and did not properly invoke the district court's subject matter jurisdiction. The settling parties never deny that the "exposure-only" claims for damages asserted by named plaintiffs Ahearn, Dennis, and Jeep--which were the only claims for relief made in the complaint--were entirely pretextual, were never intended to be pressed against Fibreboard, and were alleged merely for the purpose of invoking the subject matter jurisdiction of the court so that it could approve the Global Settlement. But pretextual, feigned claims are not "cases" or "controversies" within the meaning of Article III. *United States v. Johnson*, 319 U.S. 302, 304 (1943) (finding no jurisdiction because case did not involve "'*honest and actual* antagonistic assertion of rights'" (citation omitted; emphasis added)); *Keene Corp. v. Fiorelli*, 14 F.3d 726, 731-32 (2d Cir. 1993) (finding no "case" or "controversy" because manufacturer's request for declaratory judgment that it was not liable to the class was "transparently pretextual" and was undermined by the manufacturer's request that the case be decer-

tified if the case could not be settled--analogous to the settling parties' request here that the case be certified "for purposes of settlement only" (JA4:1)).

Citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) and *ASARCO v. Kadish*, 490 U.S. 605 (1989), the settling parties argue that Article III's case-or-controversy requirement is met if the plaintiff seeks a ruling that will affect the "tangible legal rights" of the parties, thereby "touch[ing] the legal relations of parties having adverse legal interests" (Sett. Part. br., 56-57). The Ortiz appellants do not dispute that this abstract proposition applies to obtaining advisory opinions in declaratory judgment suits. Rather, they contend that it is not applicable in this case, because the claims upon which jurisdiction is based (the personal injury, mental distress, and medical surveillance claims in the complaint) are fabricated and fatally pretextual. There was no contention in either *Aetna* or *ASARCO* that the dispute had been feigned merely to invoke the district court's jurisdiction to effect a private settlement extinguishing wholly different claims. *Cf. National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981).[11]

After relying on authority that has nothing to do with the permissibility of filing a feigned case, the settling parties dismiss the Ortiz appellants' authorities as "totally inapposite," (Sett. Part. br., 61). Despite acknowledging that *United States v. Johnson*, 319 U.S. 302 (1943), *Moore v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 47 (1971), and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), show that "feigned suits are not justiciable," the settling parties contend, without any explanation, that "there is nothing of the sort here." (Sett. Part. br., 62). However, as in *Johnson* and *Moore*, the pretextual nature of the plaintiffs' claims in this case is clear from the pleadings and the testimony, and is not even disputed by the parties themselves. The cases explaining Article III's prohibition against feigned cases are hardly "inapposite"; rather, they require the dismissal of this action.[12]

The possibility that exposure to a toxic substance may constitute an injury-in-fact in *some* circumstances, with respect to *some* sorts of relief, (*see, e.g.*, *Duke Power Co. v. Carolina Envir. Study Group, Inc.*, 438 U.S. 59 (1978)), does not support a conclusion that the claims asserted in *this* complaint were anything more than a sham. The "exposure-only" claims for monetary damages were not legally viable in most jurisdictions. Class counsel, with

more than 50 years of collective experience litigating asbestos claims, had never once previously asserted an "exposure-only" claim for damages, and class counsel candidly admitted that they never intended to assert such claims against Fibreboard in the absence of the settlement (JA7:456-57, 687-88, 950, 1269-70, 1593). The fact that *other* litigants, in *other* contexts, *have* asserted exposure-only claims seeking *other* types of relief does not contradict the showing *in this case* that the class plaintiffs did not present the Court with a bona fide controversy.[13]

The settling parties identify three specific reasons why the concededly pretextual nature of the claims asserted does not defeat the district court's jurisdiction to approve the proposed settlement. First, they suggest that there was no *need* for a pretext to invoke the court's jurisdiction to approve a resolution of future claims, because "[t]his dispute was not over whether or not to resolve those claims now on an individual basis" but rather "was over whether at the time Class members did develop asbestos-related illnesses there would be a source from which they could recover damages[,]" (Sett. Part. br., 63). But this response is a *non sequitur*. If there was no need for the pretextual "exposure-only" injury claims in the complaint, then why did the settling parties' complaint assert *only* such claims? The obvious answer is that only through alleging a claim for monetary damages against Fibreboard could the parties attempt to bring before the court a settlement that determines class members' rights *against Fibreboard*. And, despite the settling parties' repeated protestations to the contrary, the settlement in this case (unlike the settlement in *Rudd*) releases each individual class member's claims against Fibreboard.[14] There was, then, a need for the personal injury allegations in the complaint. Without them, the class members' personal injury claims could not be settled. And the settling parties' explanation that the case was not about resolution of personal injury claims, but was instead about the creation of a fund out of which such claims could be compensated, merely confirms that the personal injury claims against Fibreboard alleged in the complaint were indeed an artifice.

The settling parties next contend, in a similar vein, that appellants' "fixation" on the pretextual nature of the claims alleged in the complaint, the operative document for purposes of assessing jurisdiction, is "entirely misplaced" because "[t]he thrust of the Complaint and the Global Settlement is to secure disputed funds now so that they stand a better chance of being available in the future," (Sett. Part. br., 65). This contention is simply false. The fourteen-

page complaint--unlike the pleadings in *Rudd*--does not seek to "secure disputed funds"; it seeks only to determine Fibreboard's liability to the named plaintiffs and similarly situated class members on the personal injury claims alleged (JA1:1-14).[15] And reference to the Global Settlement reveals the same objective. Although the Global Settlement creates a fund for compensating asbestos victims out of the proceeds of the disputed insurance coverage, its primary purpose--when compared with the Trilateral Settlement, which "secures" the same "disputed funds"--can be only to release all class members' personal injury claims against Fibreboard. The unavoidable fact is that the complaint alleges, and the Global Settlement extinguishes, personal injury claims that the named plaintiffs and class counsel did not and could not genuinely assert or litigate against Fibreboard.

For this reason, the settling parties' reliance on *Ackerman v. Kassar*, No. 91-56521, 1993 WL 326453 (9th Cir. Aug. 26, 1993), *Swift & Co. v. United States*, 276 U.S. 311 (1928), and the other cases cited in their brief at pp. 58-59, is misplaced. In each of these consent decree cases, the complaint used by the parties to invoke the subject matter jurisdiction of the court alleged a *bona fide*, genuine dispute that could have and, but for the settlement, would have, been litigated. Here, in contrast, the settling parties have never suggested that the named plaintiffs would pursue the relief they demand in the complaint. Rather, they conceded they would not.[16]

The third reason for affirming the district court's exercise of jurisdiction, the settling parties contend, is that the cases cited by the Ortiz appellants do not support the proposition that the subjective intent to litigate is relevant in determining whether a justiciable "case" or "controversy" is present. However, a plain reading of *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993), undermines the settling parties' attempt to distinguish it (Sett. Part. br., 66-67). As the settling parties point out, the asbestos manufacturer in *Keene* sued a class of present and future asbestos personal injury claimants seeking court assistance in achieving a Rule 23(b)(1)(B) settlement of its liabilities. But that settlement was *not* the *only* relief that the manufacturer requested. In an attempt to present the court with a justiciable controversy, the manufacturer in *Keene* also sought a declaratory judgment that it was not liable to any present or future asbestos claimant. 14 F.3d at 729. The court, recognizing that the real purpose of the suit was to manufacture a settlement, rejected that declaratory claim as "transparently

pretextual" and non-justiciable: "if Keene truly sought a declaratory judgment regarding its asbestos liabilities, Keene would have no reason to ask that the class be decertified in the event a settlement is not reached." 14 F.3d at 732.

Similarly, the claims in the complaint here are a "transparently pretextual" contrivance that did not present the district court with a real "case" or "controversy." As in *Keene*, if the claims alleged in the complaint were genuine, the plaintiffs would have had no reason to ask that the case be certified "for settlement purposes only." And the fact that the settlement in *Keene* had not yet been achieved does not distinguish that case from this one. Their pretextual claims aside, the class plaintiffs here and the manufacturer in *Keene* asked the court for precisely the same thing--approval of a negotiated plan for distribution of a portion of the manufacturers' available assets to present and future asbestos claimants. Neither in *Keene*, nor in this case, did the plaintiffs hinge their plea for a settlement to any *bona fide* claim of substantive right. This failure to assert a legitimate, concrete, good faith claim of right *vis-a-vis* the defendant is fatal to the district court's subject matter jurisdiction.

The settling parties threaten that application of the case or controversy requirement to federal class actions "would render Rule 23(e) a nullity." (Sett. Part. br., 60 n*). But their threat rings hollow. The Ortiz appellants do not contend that a proposed settlement of *bona fide* claims divests the court of jurisdiction to evaluate a class action settlement under Rule 23(e).[17] What they contend instead is that feigned, pretextual claims, even if alleged in a class action, present no "case" in which the class action rules may be applied. Rule 23 does not substitute for the constitutional requirement of a case or controversy for federal jurisdiction.

II. THE CLASS DOES NOT SATISFY THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(a).

A. The Class's "Common Interest" in Resolving the Coverage Dispute Between Fibreboard and Its Insurers Did Not Satisfy the Rule 23(a) Prerequisites of Commonality and Typicality.

The settling parties do not deny that the district court relied on the "common interest" of class members in the proposed settlement, rather than on the "commonality" and "typicality" of the claims alleged by the named plaintiffs against Fibreboard (Sett. Part. br., 68-75). The settling parties also tacitly concede that the claims alleged by the named plaintiffs in the

complaint do not present sufficient "questions of law or fact common to the class," and are not sufficiently "typical of the claims" of the class, to permit certification under Rule 23(a). *Id*; *compare* Ortiz br., at 42-45 (explaining that nationwide class of present and future personal injury claims is not certifiable under Rules 23(a)(2) and 23(a)(3)). The settling parties thus apparently agree that in the absence of the settlement, the claims asserted by the named plaintiffs against Fibreboard could not be certified.

Instead, the settling parties contend that the district court *did not need* to find that the claims against Fibreboard alleged in the complaint presented common questions of law or fact and were typical of those of the class. Rather, according to the settling parties, the district court only had to find (as it did) that all class members had a "common interest" in assuring that Fibreboard have adequate insurance coverage to pay future asbestos claims (Sett. Part. br., 68-69). Put another way, the settling parties contend that even though the claims alleged by the named plaintiffs could not support certification of a contested class action, the existence of the settlement itself provides the requisite commonality and typicality, and allowed the case to be certified under Rule 23(a).

However, this bootstrap approach to class certification directly conflicts with the Third Circuit's opinion in *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) ("*GM Trucks*"). Using the settlement as a means of meeting Rule 23's class certification requirements has also been condemned by the overwhelming weight of recent commentary on the issue.[18] As these authorities explain, Rule 23(a) requires that the plaintiffs' *claims* as expressed in the class complaint, not their *interests* in some more general sense, be common and typical. *GM Trucks*, 55 F.3d at 798-99 (rejecting view that commonality and typicality determination could be "based on the relative rewards to the class members [under the settlement] rather than based on the various legal claims of class members"). The commonality and typicality requirements help to assure that the class claims are cohesive and similar enough to resolve--whether by trial or by settlement--in a collective disposition. As the GM court recognized, the class action device allows judicial resolution of the rights of persons not before the court precisely *because* the prerequisites of commonality, typicality, and adequacy of representation, in addition to the other protections of Rule 23, "safeguard the due process rights of absentees." *GM Trucks*, 55 F.3d

at 796. To dilute the safeguards that allow collective disposition of absent class members' individual claims merely because both the named class representatives and the defendant agree on a remedy would effectively "read[] the commonality and typicality requirements out of the Rule,"[19] would undermine the rationale for the rule permitting class actions, and would erode public confidence in the federal courts generally and in class actions in particular.[20]

Nevertheless, the settling parties insist that the district court's findings of commonality and typicality, based exclusively on the class members' interest in the settlement, are sustainable notwithstanding *GM Trucks*. They make three arguments in this regard.

First, they contend that the language in *GM Trucks* condemning the practice of relying on a settlement to support findings of commonality and typicality is dicta. To the contrary, the Third Circuit unequivocally directed the district court to consider on remand the commonality and typicality of the claims *without reference to the settlement.* 55 F.3d at 798-800. The Third Circuit's language--"a class is a class is a class" (55 F.3d at 799)--unmistakably conveys its view that Rule 23(a) prerequisites are not relaxed merely because the named parties propose a settlement. And the Third Circuit's recognition that the "risks involved in maintaining class status" may be considered in evaluating the fairness of the settlement is not, as the settling parties contend, "inconsistent" with its holding that "settlement classes" must meet the prerequisites of Rule 23(a) (Sett. Part. br., 70). Indeed, the Third Circuit explicitly recognized that the risks of maintaining class status would not support approval of a proposed settlement if "there were insurmountable barriers to class treatment," 55 F.3d at 818--as there are here.

Second, the settling parties contend that *GM Trucks* is "simply wrong," "inconsistent with the law of this and four other Circuits," and unsupported by "the language of Rule 23." (Sett. Part. br., 71). Again, each of these contentions is demonstrably false. Taking them in reverse order, Rule 23(a) requires commonality and typicality of "claims or defenses"; it is not satisfied by common interests in a settlement, as the settling parties suggest. *GM Trucks* is not inconsistent with the law of this Circuit; no Fifth Circuit decision has ever held that determinations of commonality and typicality may be subsumed within a decision on whether the settlement is fair to class members.[21] There is no "aberration" in *GM Trucks*' rule permitting deferral of the certification determination until the final hearing on the fairness of the settlement, but nonetheless requiring that the foundations of the Rule be satisfied (*see* Sett. Part.

br., 71).[22] Settlement classes exist to permit negotiations by a court-authorized representative of the putative class to proceed despite the absence of an unconditional order of certification--*not* to dispense with the prerequisites of Rule 23. *See, e.g.*, *GM Trucks*, 55 F.3d at 792-94 (approving the use of the "provisional" or "conditional" conception of the settlement device); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (approving the use of a "temporary settlement class"); 2 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 11.27, at 11-50 (3d ed. 1992) (the "actual class ruling is deferred in these circumstances until after hearing on the settlement approval," at which time the court "applies the class action requirements to determine whether the action should be maintained as a class action").

In this connection, the settling parties' argument that "no conceivable policy reason" supports the requirement that "settlement classes . . . have to pre-qualify as litigation classes" (Sett. Part. br., 72) is unresponsive. As described above, important policy reasons (i.e., the due process rights of absent class members) *do* support the requirement that such classes qualify for class treatment under Rule 23(a). Absent class members have at least as significant a due process interest in being represented during *negotiations* by plaintiffs who have common and typical claims as they do in being adequately represented for purposes of litigation. *See GM Trucks* 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"). While settlement may affect a court's determination of whether common issues "predominate" and of whether "a class action is superior to other available methods" of resolving the controversy (FED. R. CIV. P. 23(b)(3)), the "'economi[es]' of class resolution" (Sett. Part. br., 72) do not affect and must not eviscerate the due process protections embodied in Rule 23(a).

Third, the settling parties contend that claims *not* alleged in the complaint--claims by class members against Fibreboard's Insurers for a declaratory judgment concerning the extent of the Insurers' liability to Fibreboard under the disputed insurance policies--could have been certified for litigation, and ask the Court to pretend that such a claim was actually alleged (Sett. Part. br., 75). But even if class members had properly asserted these hypothetical

claims, certification of the claims surely would not have supported the settlement of the class members' *different* claims against *Fibreboard*. *See National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981). Rather, those claims support no more than a settlement of the class members' indirect rights against the Insurers--a settlement lawfully achieved in the companion *Rudd* case. These claims, unalleged in *Ahearn*, which are the basis for a different settlement in *Rudd*, cannot support the district court's findings of commonality and typicality in *this* case.

B. Class Representatives Could Not Adequately Represent Absent Class Members With Respect to Unpled Future Claims.

The settlement's release of unripe future claims for individual personal injuries provides the most dramatic example of this action's failure to satisfy the representational requirements of Rule 23(a). Settlements reached under Rule 23 rest on the legal fiction that absent class members have consented to the agreement vicariously through the class representatives, who can adequately represent them solely because of their shared interests in resolving common and typical claims. Thus, the scope of the class representatives' authority to release claims on behalf of absent class members is necessarily limited to the claims held in common with the class. *See National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17-19 (2d Cir. 1981). Such vicarious representative authority cannot extend to claims that do not even yet exist.

The settling parties attempt to distinguish *Super Spuds* because the notice in that case failed to inform class members that their claims were being released (Sett. Part. br., 76 n*). But that distinction ignores the holding of *Super Spuds*, which rested entirely on the improper release of claims that did not arise from the facts pled in the class complaint. 660 F.2d at 18-19 (authority of class representatives limited to claims described in class complaint); *see also Epstein v. MCA, Inc.*, 50 F.3d 644, 661-65 (9th Cir.), *cert. granted*, 115 S.Ct. 2576 (1995) (authority of class representatives to settle limited to claims based on the "identical factual predicate" as the claims alleged). In both *Super Spuds* and *Epstein*, as here, the class settlements improperly released claims that went beyond the scope of the class complaint. Although in *Super Spuds* Judge Friendly also expressed concern regarding the failure of the notice to inform class members of the release of additional claims, the inadequate notice was not the

basis for the court's holding. *See* 660 F.2d at 17.

Unable to distinguish *Super Spuds* and *Epstein*, the settling parties resort to their refrain: the "need" for "unitary adjudication" of Fibreboard's insurance coverage dispute justifies the release of unpled future claims over which no court could assert jurisdiction (*see* Sett. Part. br., 76-78). However, this excuse simply does not and cannot apply to individual actions for *in personam* damages brought against a solvent defendant. Each of the cases relied on by the settling parties as demonstrative of the "[h]undreds of years of antecedents in Anglo-American jurisprudence" supporting resolution of future claims (Sett. Part. br., 77), involved either *in rem* claims resolving the proper disposition of common property or rights, or involved claims for injunctive or declaratory relief.[23]

Finally, the settling parties' contention that the "Global Settlement does *not* resolve how much money individual claimants will receive" (Sett. Part. br., 78) is at best a half truth. The entire purpose of the Global Settlement is to substitute a privately created and administered claims compensation system for class members' rights to access the courts, thereby giving Fiberboard and its Insurers their coveted "total peace." Unlike the Trilateral Agreement in *Rudd*, which truly is limited to resolving class members' "common interest" in Fibreboard's insurance coverage, the *Ahearn* settlement *releases* class members' individual claims against Fibreboard, and it provides the terms and sets the limits under which those individual claims will be liquidated.

C. Class Counsel's Divided Loyalties Rendered Them Inadequate Representatives of the Class.

1. Class counsel's loyalties were divided by their simultaneous duties to individual clients and to class members.

Denying that class members have a right to unconflicted counsel, the settling parties invite this Court to redefine the due process right to adequate representation by approving the divided loyalties of class counsel (Sett. Part. br., 125-28 (arguing settling parties should prevail "[e]ven if there were a conflict . . . .")). The settling parties contend that the exigent circumstance of an imminent Coverage Case argument before an intermediate state appellate court "absolute[ly]" compelled employment of these particular class counsel (Sett. Part. br., 116). For purposes of this contention, the settling parties start history on August 9, 1993.

Fibreboard, however, hand-picked these plaintiffs' lawyers years earlier, long before the resolution of the Coverage Case was imminent. In "late 1990 or early 1991," (*see* Sett. Part. br., 17), Fibreboard initiated negotiations for future claims with counsel who simultaneously represented competing present claimants. It was then, at the time global negotiations began, that class counsel's conflict first developed, and those counsel should have disqualified themselves *at that point*. The settling parties' philosophy condenses to the view that a defendant can choose ethically conflicted counsel for a plaintiff class, negotiate a complex settlement for years, then claim that the complexity of the ultimate settlement necessitated the original choice.

The settling parties admit that Fibreboard's preferred plaintiffs' counsel negotiated on behalf of their presently injured, individual clients while simultaneously negotiating for the class of future claimants (*see* Sett. Part. br., 17-28). The settling parties attempt to justify that concurrent representation by contending that "during the negotiations leading to the agreement in principle, the present claimants and the Class were simply not competing for the same dollars." (Sett. Part. br., 117). Yet the settling parties contend that "the disputed insurance asset liquidated by the $1.535 billion Global Settlement fund satisfies [the limited fund] concept." (Sett. Part. br., 93). Regardless of whether the insurance proceeds in fact constitute a "limited fund," throughout the negotiations, class counsel, whose loyalties and ability to render unconflicted decisions are at issue, recognized that those proceeds might be insufficient to pay all claimants in full (JA7:955 (Kazan)). The same Insurers primarily funded both settlements, and those Insurers had a limit as to the amount they were willing to pay on the policies. That class counsel initially did not know the specific amount is not determinative of whether counsel's loyalties were divided between the different groups competing for these funds. The competition for limited resources was not contingent on the existence of "some definitive fixed amount, dollars and cents, that was the absolute limit[.]" (JA7:1760). Instead, the competition existed because "as the negotiations began and continued, there was a substantial possibility that [the Insurers] would not agree to put up or would not be required by the courts to put up enough money to pay all the claims." *Id*.

The settling parties admit that class counsel's divided loyalties affected their performance on behalf of the class, but they contend that the conflict actually benefitted the class (Sett. Part. br., 119). The settling parties reason that the "ratchet[ed] up" settlement for Ness

Motley's presently injured clients placed counsel in a better position to then demand the same "inflated assignment values" as class compensation (Sett. Part. br., 119). The alleged "ratcheting," while of clear import to the Insurers, does not ameliorate the conflict. If other, unconflicted counsel had been negotiating on behalf of the class of future claimants, Messrs. Rice, Cox, Wartnick, and Kazan still would have negotiated for the best possible settlements on behalf of their presently injured clients. Once the Ness Motley settlement was consummated, those settlement values would have been available for different, unconflicted lawyers to use in extrapolating the global quantum.[24]

2. Intra-class conflicts further divided counsel's loyalties.

The settling parties also contend that the failure to subclass between sick and well individuals did not create a conflict because the overriding common interest was to avoid "the risk that Fibreboard would be unable to satisfy the claims of the vast majority of Class members" (Sett. Part. br., 122). This articulation of the common interest *proves* the conflict. Class members such as Esteban Ortiz, who are currently suffering from an asbestos-related illness, have ripe claims and could, absent the Global Settlement, obtain and execute judgments against Fibreboard. Because they would be *first in line*, the risk of insufficient funds to satisfy *later* claims is irrelevant to them. By contrast, class members who are not presently injured are concerned with preserving funds in the long run. Thus if, as the settling parties contend, the "risk that early adjudications might exhaust all resources" (*see* Sett. Part. br., 123) is the overriding interest, then the overriding interest is not common.

To evade the fact that they define the overriding class interest as a risk not shared by presently ill class members, the settling parties contend that the ripe tort claims of such class members are not "'legally enforceable rights'" (Sett. Part. br., 122). *In re Manville*, 993 F.2d 7, 9-11 (2d Cir. 1993), which dealt with a bankruptcy plan, does not support the settling parties' position. The *Manville* court did not address whether, and certainly did not deny that, claimants with ripe state tort claims against a solvent defendant have a right to seek redress in the courts. Rather, the court found that the parties to the *Manville* Chapter 11 plan did not intend to create legally enforceable rights to a FIFO (first in first out) queue articulated in the plan. The right did not exist, reasoned the *Manville* court, because such a right was not bargained for in the reorganization plan--not because tort rights to execute judgments are irrel-

evant where, as here, the defendant is a solvent corporation. 993 F.2d at 9-11.

In response to the conflict between claimants with post-1959 exposure and those with pre-1959 exposure, the settling parties point to an April 9, 1993, agreement in which CNA promised to *negotiate* for a global settlement that would, if consummated, ignore the distinction between those groups. What the parties agreed to on April 9, 1993, however, does not cure the conflicted negotiating posture which began in 1991. Moreover, the agreement provided for only a possibility of resolution, and its effect is still contingent today. If the Global Settlement and the Trilateral Agreement both fail, then CNA will not be bound by the April 9 Agreement, and the distinction between pre-1959 and post-1959 will remain critically relevant. Indeed, the renegotiated Ness Motley settlement distinguishes between pre- and post- 1959 claimants, notwithstanding that it too was reached *after* the April 9 agreement between Fibreboard and CNA (JA55:Appendix 1, Attachment H, p. 1-2). And under that agreement, post-1959 claimants would receive only an average of $3,500 each, while payments to pre-1959 claimants would average $13,000 (JA102:13; JA7:1238).

3. The ends do not justify the means.

The settling parties posit that all's well that ends well, and declare that divided loyalties, ethical problems, and conflicted duties are irrelevant as long as the final settlement is not demonstrably unfair. But they fail to recognize that rules regarding ethical duties and loyalties must be applied regardless of the results revealed by a necessarily incomplete *post hoc* review. "No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] . . . been animated by undivided loyalty to the cause of the class." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n.24 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); *see also* (JA7:1777-78 (Leubsdorf)). To escape the *Corrugated Container* Court's warning that conflicted class representation cannot ordinarily be redeemed by settlement terms, 643 F.2d at 211 n.25, the settling parties argue that the *Corrugated Container* Court only objected to conflicted *parties*--not conflicted lawyers. (Sett. Part. br., 127 n.). Their interpretation of Rule 23's adequate representation element ignores this Court's statement that, in assessing adequacy, courts "focus on the attorney, as well as the named parties . . . ." *North Am. Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir.), *cert. denied*, 444 U.S. 956 (1979) (citations omitted). Also ignored is that the

class representatives here were selected by class counsel only *after* the negotiations were complete, and it was entirely *class counsel* who acted on behalf of the class (*see* RE5:¶282 (class representatives not contacted until September 1993)). It is not the law of this Circuit to say grace over conflicts, and this case does not justify such a departure from the long-standing due process requirement that adequate representation, at a minimum, demands a lawyer's undivided loyalty to his client's interests.

III. DUE PROCESS, THE RULES ENABLING ACT, AND RULE 23 ALL FORBID MANDATORY CLASS TREATMENT OF THE INDIVIDUALIZED CLAIMS FOR DAMAGES ALLEGED HERE.

Again ignoring the allegations of the complaint, the settling parties defend the non-opt-out class action certified here with the same excuse allegedly justifying each of this action's other irregularities--the supposed need for "unitary adjudication" of the insurance coverage risk. But unlike litigants in *all* of the pre-1966 cases relied on by the settling parties, class members here do not assert claims against any type of specific property or common fund. Class members' claims are not against a bond, a ship involved in a maritime accident, a trust fund, an insurance policy, or any other specific piece of property. Nor are class members' claims alleged against a defendant in receivership or bankruptcy. In this case, class members' claims are *in personam* claims against a solvent defendant that merely faces a *risk* of insolvency dependent on the outcome of its insurance coverage dispute. If class members individually prosecuted the claims alleged in the complaint against Fibreboard and secured individual judgments, state law provides that those judgments would be enforceable *infill* immediately upon becoming final, unless and until Fibreboard declares bankruptcy or a receiver is appointed to distribute its assets. In these circumstances, due process demands that class members be given the opportunity to litigate those individual claims on an individual basis. The Rules Enabling Act demands that their claims, if taken to judgment in a federal court following trial, be paid in full. And both Rule 23 and its historical common law antecedents demand that if these *in personam* claims for individual damages are to be certified for class treatment at all, they can be certified only under Rule 23(b)(3).

A. Under *Shutts*, Rule 23(b)(1)(B) May Not Constitutionally Be Applied to Individualized Claims for *In Personam* Damages.

Contrary to the contentions of the settling parties, the constitutional opt-out requirement articulated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) cannot be evaded merely because the plaintiffs sought certification under a subdivision of Rule 23 that does not provide for the right to opt out. *Shutts* was not limited "by its own terms" to actions seeking certification under subdivision (b)(3) of Rule 23 (Sett. Part. br., 103), but instead applies "by its own terms" to *any* class action seeking to bind plaintiffs "*concerning claims wholly or predominantly for money judgments*." 472 U.S. at 812 n.3 (emphasis added). As reflected in the class complaint, this is just such a class action, despite the concerted efforts of the settling parties to paint it as something else.

Because class members here seek *in personam* money judgments against Fibreboard rather than an equitable distribution of Fibreboard's insurance policies or other assets, *Shutts* requires that they be allowed the opportunity to opt out, in order to maintain meaningful control over those individualized damages claims. Although this opt-out requirement necessarily prohibits Rule 23(b)(1)(B) from being constitutionally applied to class actions involving *in personam*, individualized claims for money damages, this does *not* mean that *Shutts* "abrogate[s] the long-established validity of mandatory class actions" or "invalidate[s]" subdivisions (b)(1) and (b)(2) of Rule 23 "*sub silentio*" (Sett. Part. br., 103). Quite to the contrary, *Shutts* left intact mandatory class actions seeking equitable distribution of commonly-held property. 472 U.S. at 812 n.3 ("we intimate no view concerning other types of class actions, such as those seeking *equitable relief*"). It is true that such equitable distribution claims often include claims for money (*see* Sett. Part. br., 109), but a mere showing of a speculative possibility of insolvency, as in this case, *does not* transform claims for damages into claims for equitable relief.

The settling parties admit that individual class members ordinarily enjoy a "typical right 'to exercise individual control'" of particularized damages claims (Sett. Part. br., 108), but they nonetheless assert that the risk of losing Fibreboard's insurance coverage "subordinate[s]" that due process right. *Id.* However, until some legal event such as a bankruptcy filing or an appointment of a receiver occurs, *in personam* claims for money damages cannot be characterized as claims for equitable distribution of assets. Until such an event occurs, class members' rights to individual control of their damages claims cannot be "subor-

dinated" simply because of the possibility that Fibreboard might one day lack sufficient assets to pay late-arriving plaintiffs.[25]

The settling parties improperly invoke *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) to support their contention that the *in personam* claims for damages in this case can properly be resolved through mandatory class treatment (Sett. Part. br., 112 and n.*). *Mullane* allowed for the release of potential claims against a trustee as part of a proceeding to settle a trust. 339 U.S. at 311-13. In light of the "vital interest of the State in bringing any issues as to its fiduciaries to a final settlement" *id.* at 313, the Court held that it would not construe the Due Process Clause in a manner that would place impossible or impractical obstacles in the way of achieving that state interest. *Id.* at 313-14. Thus, even if potential claims against the trustee for "improper management of the common trust fund," 339 U.S. at 311, could be considered "*in personam*," because those claims were derivative of *in rem* claims against the trust itself, they could be extinguished as part of the final settlement of the trust. Here, in contrast, there is no "vital interest of the State" requiring the release of class members' claims against Fibreboard, and those claims are in no way derivative of *in rem* claims requiring a final accounting. *Mullane*'s limited approval of the release of *in personam* claims in the context of an *in rem* proceeding does not apply here.

In addition to depriving class members of their constitutionally-mandated opt-out right, this proceeding also violated class members' due process rights to receive notice that can meaningfully inform them of the effect this proceeding will have on their rights. Here, because many class members are unaware of their own exposure to asbestos, and in any event cannot meaningfully assess *today* whether the settlement is in their best interests, no notice sent to exposure-only class members in this case could satisfy due process.

The settling parties point to only two non-bankruptcy decisions approving notice to "future claimants," and both of those cases involved readily identifiable class members who were aware of their membership in the class. In *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), the class was composed entirely of Vietnam veterans, all of whom knew that they were class members and almost all of whom the government could individually identify and notify. Moreover, the Second Circuit noted grave reservations as to whether certification of the Agent Orange class was appropriate at all, and expressly limited its

holding by stating that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe class certification would have been error." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Similarly, the unreported decision in *In re Silicone Gel Breast Implant Litig. (MDL 926)*, Master File CV 92-P-1000-8 (N.D. Ala. Sept. 10, 1993) involved a class in which each woman knew that she had an implant, and that the class action therefore affected her rights. Those cases stand in sharp contrast to this one, which includes in the class all who have been exposed to a nearly ubiquitous, invisible, airborne toxin, those who are related to them, as well as future spouses and persons not yet born. Many class members may not even realize that they have ever been exposed to asbestos even after being diagnosed with a catastrophic, asbestos-related disease. *See, e.g., Baumgart v. Keene Bldg. Products Corp.*, 666 A.2d 238, 240 (Pa. 1995) (victim diagnosed with mesothelioma had "repeatedly denied having been exposed to asbestos when [his doctor] questioned him on the matter."). Many whose rights will be truncated by this class action could not possibly know they belong in the class.

B. Equitable Distribution of Fibreboard's Assets Following a Trial of the Claims Alleged Here Would Violate the Rules Enabling Act.

In addition to violating due process rights of absent class members, certification of this class under Rule 23(b)(1)(B) also runs afoul of the Rules Enabling Act by contemplating a modification of class members' substantive rights. Although the settling parties correctly note that neither they nor the district court ever contemplated the possibility that this lawsuit could or would actually be litigated, (*see* Sett. Part. br., 96), Rule 23(b)(1)(B) applies outside of the "settlement class" context. Thus, whatever theory supports certification must at least be consistent with the possibility of litigation. Here, there is no practical possibility of this action being litigated, and, even if it were, it would impermissibly alter substantive rights by prorating class members' claims for damages. As noted above, if appellant Esteban Ortiz were to obtain a final judgment against Fibreboard for damages from his current asbestosis condition, state law would entitle him to execute that judgment against Fibreboard's assets, and no other member of the *Ahearn* class could interfere with his collection of that judgment *in its entirety*. "The first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of

the court for its enforcement." *Clarke v. Brown*, 244 A.2d 514, 518 (N.J. Super. 1968).[26] Although the settling parties correctly note that a bankruptcy filing by Fibreboard or the creation of an equitable receivership could transform Mr. Ortiz's *in personam* damages claim into a claim for allocation of limited assets,[27] (Sett. Part. br., 96), the Rules Enabling Act prohibits federal courts from using Rule 23(b)(1)(B) to enact a similar transformation. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (declining to certify nationwide antitrust class action, in part because "[g]eneralized or class-wide proof of damages," while making the action manageable, "would ... contravene the mandate of the Rules Enabling Act").[28]

Here, the existence of the Bankruptcy Code highlights the impermissibility of the district court's foray into the legislative role of altering substantive rights. Not only is Congress the only branch of the federal government that *could* undertake the type of alteration attempted by the district court, Congress *has already done so* through the provisions of the Bankruptcy Code. Indeed, in the Bankruptcy Reform Act of 1994, Congress *specifically* set out special provisions for insolvent defendants subject to present and future asbestos-related liabilities. *See* 11 U.S.C. §§ 524(g) & (h). Under those provisions, the debtor is required to convey a "majority of the voting shares" of the debtor to a trust created for the asbestos claimants, 11 U.S.C. § 524(g)(2)(B), and an injunction may then be issued prohibiting those claimants from filing suit against both the debtor and its insurers. *See* 11 U.S.C. § 524(g)(4)(A)(ii)(III). While bankruptcy does not prevent knowing, identified creditors from agreeing to an alternative resolution with an insolvent debtor, *see* 11 U.S.C. § 305(a)(1), that provision of the Bankruptcy Code does *not* permit federal courts to circumvent the Constitution and the Rules Enabling Act by using Rule 23 to alter prospectively the substantive rights of unknowing, unidentified, unconsenting tort claimants. And while the Bankruptcy Code specifically provides for the separate representation of future claimants and for creditors' voting rights with respect to any settlement, those protections are conspicuously absent here, where unconsenting and essentially unrepresented tort claimants have been forced to accept a private compensation scheme in return for the release of their future claims.

While the settling parties characterize the superior substantive and procedural protections of the Bankruptcy Code as an "absurdity" (Sett. Part. br., 100 n.*), this position con-

flicts not only with the views of the Second Circuit in *Keene,* 14 F.3d at 732, in *Manville*, 982 F.2d at 736 ("Rule 23 is less elaborate in its protections" than the Bankruptcy Code), and of Professor Coffee, but also with those expressed in the leading class action treatise, which states that "[t]he degree of protection provided by a bankruptcy court to all creditors is not assured if an insolvent debtor is allowed to resolve its debts outside the scrutiny of the bankruptcy courts by means of Rule 23(b)(1)(B)." 3 NEWBERGON CLASS ACTIONS § 17.15A (3d ed. Supp. 1995).[29] Other commentators agree. *See* Marcus, *Tort Reform Via Rule 23*, at 881 ("At both a substantive and procedural level, then, the contrast between the Bankruptcy Act and the class action authorization provided by Rule 23(b)(1)(B) suggests the impropriety of aggressive use of the class action rule").

The settling parties' use of the Rules Advisory Committee Notes to support their contention that Rule 23(b)(1)(B) can be applied to situations involving insolvent debtors is misleading (Sett. Part. br., 97 (citing 39 F.R.D. at 101)). In the case cited by the Rules Advisory Committee, *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952), the defendant was *not* the insolvent debtor referred to in the note, but instead was the holder of the funds fraudulently conveyed by the debtor. Nothing in the Advisory Committee's Notes even implies that Rule 23(b)(1)(B) may be used as an alternative to bankruptcy to certify claims asserted against the insolvent debtor itself.

C. Neither Rule 23(b)(1)(B) Nor Its Historical Antecedents Permit Mandatory Class Certification of *In Personam* Claims.

Ultimately, the settling parties' effort to use a mandatory class action to bind class members to the terms of their tort reform proposal depends on their so-called "plain meaning" interpretation of Rule 23(b)(1)(B) (*see* Sett. Part. br., 79-80). Under that interpretation, any time a mass tort defendant faced a possibility of insolvency in the wake of present and future mass tort liabilities, the application of Rule 23(b)(1)(B) would be appropriate. What the settling parties ignore, however, is that the effect of such a reading of the Rule would render it both unconstitutional and in violation of the Rules Enabling Act, as discussed above. But the federal rules must, of course, be interpreted consistently with the Constitution and the Rules

Enabling Act. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 544 n.2 (1984) (Stevens, J., concurring); *see also Weems v. McCloud*, 619 F.2d 1081, 1094-97 (5th Cir. 1980) (interpreting Fed. R. Civ. P. 13 in light of its effect on Georgia substantive law); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) ("[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). Moreover, this class action does not fit the mold of any of the historical antecedents to Rule 23(b)(1)(B), and instead resembles only the "spurious" class action device that preceded current Rule 23(b)(3).

None of the pre-1966 cases cited by the settling parties support imposition of a mandatory class action here. In all of those cases, while the individual claims may have been separable, they were all asserted against a common fund or a specific piece of property.[30] In contrast to the completely independent claims against Fibreboard at stake here, the claims resolved in each of those cases truly required unitary adjudication in order to establish the proper disposition of fixed assets. As then Texas Supreme Court Justice Thomas Reavley stated in rejecting mandatory class certification in another case: "[t]his is not a true class action, as would bind members of the class who do not personally intervene, since there is no joint right or common ownership at stake." *Commercial Travelers Life Ins. Co. v. Spears*, 484 S.W.2d 577, 578 (Tex. 1972); *see also Ayer v. Kemper*, 48 F.2d 11, 14 (2d Cir.), *cert. denied*, 284 U.S. 639 (1931) (rejecting mandatory certification for lack of a common fund).

The settling parties' perversion of the term "common interest" does not justify mandatory class treatment. As that term was used in cases such as *Swormstedt* and *Ibs*, it meant a common, *justiciable* interest shared by the entire class. Here, the "common interest" of class members invoked by the settling parties is their interest in Fibreboard's insurance coverage, which is clearly *not justiciable* in *this* action, and in any event was not the interest embodied in the class complaint, which sought tort relief only against *Fibreboard*. If certifiable at all, this case, which is an analog to the "spurious" class actions brought under the prior version of Rule 23, could only be brought as an opt-out class action under Rule 23(b)(3). *See McDonnell Douglas Corp. v. United States District Court for the Central District of Calif.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (noting that an expansive view of 23(b)(1)(B) improperly encroaches upon actions that more closely fit under Rule 23(b)(3));

Marcus, *Tort Reform Via Rule 23*, at 900 ("Among the recent settlements, Judge Parker's mandatory class action under Rule 23(b)(1)(B) with regard to claims against Fibreboard is the most striking instance of an aggressive pursuit of settlement in seeming indifference to class certification requirements").

Moreover, federal courts have clearly rejected use of the interpleader action, which shares the same historical antecedents as 23(b)(1)(B), to resolve a defendant's mass tort liability in one proceeding. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 535 (1967) (interpleader "cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort"); *Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229, 232 (10th Cir. 1988) (declining to allow "a tort-feasor in a multi-claim tort [to] admit liability, tender into court a minimal amount of money . . . force the claimants to prorate the amount deposited, and then obtain an order discharging him from any further liability for his tort").[31]

Turning once again to their appeal to practical necessity, the settling parties claim that the loss of the Global Settlement itself creates a "risk of impairment" justifying mandatory class treatment (Sett. Part. br., 85-88). The "unique set of circumstances," *id.* at 85, supposedly creating this "risk of impairment" distill to the claim that "massive transaction costs" will ensue if injured claimants can "pursue their own separate actions." *Id.* at 85-86. The settling parties admit that loss of the Global Settlement will not cause Fibreboard to lose its insurance recovery; affirmance of the Trilateral Agreement in *Rudd* avoids that risk. Given that Fibreboard will receive its insurance proceeds regardless of whether this class is certified, the settling parties defend mandatory certification by falling back on their senatorial criticism of the inherent costs of court proceedings, and the "superiority" of the compensation system the settlement creates for tort victims. The alleged "risk" supposedly justifying mandatory certification is nothing other than the cost of preserving class members' constitutional and statutory rights to seek relief from Fibreboard in the judicial system. But as Professor Siliciano ably articulates,

> the costs, delays, and uncertainties of mass tort litigation are not pathologies; they are instead the inevitable by-products of a system that serves multiple, competing and important public policies. Nor are such phenomena purely negative, for the spectacle of the system in action serves an important educational function. Slow and costly as it is, mass tort litigation is one very public forum in which society works out its complex and ambivalent attitudes toward technology, progress, risk, uncertainty, and responsibility.

Siliciano, *Rhetoric of Crisis*, at 1008. If a defendant's and its insurers' desire for total peace and evasion of the judicial system can create a circumstance justifying invocation of Rule 23(b)(1)(B), then every mass tort defendant will be able to solicit plaintiffs' counsel to create such a private claims system, just as Fibreboard did here, in derogation of the Constitution as well as state and federal legislative branches. "Transaction costs" are the price we pay for due process, for individual control of our own cases and damages, and for access to the courts.

Finally, the settling parties turn to the liquidated sum provided by the Global Settlement itself as providing the "limited fund" supporting mandatory class certification (Sett. Part. br., 93-94). But this proves too much for it would make Rule 23(b)'s class categories wholly elastic. If a settlement fund agreed upon by class counsel and a defendant automatically qualifies for mandatory class treatment, then class members would not have the right to opt out of *any* class action that was settled. Assuming that such negotiations were conducted at arm's-length, the district court in any (b)(3) action would merely have to find that the lawsuits had been liquidated at market value by the negotiation, and that the resulting market value constituted a "limited fund" justifying recertification of the class under Rule 23(b)(1)(B). Such a result could not have been intended by the Rule's drafters, and it certainly would not satisfy due process.[32]

CONCLUSION

The settling parties' defense of the total peace procured here at the price of due process depends entirely on their conflation of Fibreboard's coverage dispute with its Insurers, on the one hand, and Fibreboard's future liability to as-yet uninjured asbestos victims, on the other. There is no risk that Fibreboard will lose its insurance proceeds merely by this Court reversing *Ahearn*. This case does not resolve Fibreboard's insurance coverage; rather, it removes unripe, individual tort claims from the judicial system, transforming access to courts into an administrative process bought and sold by the settling parties. The settling parties' preference for their processing system over the judicial system is "better addressed to the representative branches." *Fibreboard*, 893 F.2d at 712. The judgment must be reversed.

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[1] *Georgine*, another "settlement class action" involving unaccrued, future asbestos-related personal injury claims, is currently pending appeal in the Third Circuit after being approved by the district court for the Eastern District of Pennsylvania. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E. D. Pa. 1994), *appeal pending*, No. 94-1925 (3d Cir.).

[2] *See also* Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 859 (1995) ("the class action has landed like a 600-pound gorilla in the arena of tort reform, where there has of late been increasing interest in replacing tort litigation with scheduled benefits like those provided in [the asbestos and breast implant] class action settlements") (hereinafter "Marcus, *Tort Reform Via Rule 23*").

[3] The trend has already begun. In *Hayden v. Elf Atochem, N.A.*, No. 95-20924, currently pending in this Court, the defendant and class counsel reached a mandatory class settlement binding all present and future claimants alleging injuries arising from exposure to arsenic spewed for decades by a plant in Bryan, Texas. In that case, the class originally sought relief only for property damages and medical monitoring, and the district court certified the action as an opt-out class under Rule 23(b)(3). Subsequently, during settlement negotiations, class counsel acquiesced in the demands by the defendant to include present and future personal injury claims, and to eliminate the opt-out rights of class members by recertifying the class under Rule 23(b)(2). The resulting mandatory settlement created a trust fund which must be distributed in full to class members over the next seven years, although the record reflects that class members may continue to develop disease from their arsenic exposure up to forty years into the future. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1411-13 (1995). The district court's opinion in *Hayden* cites *Ahearn* as authority for approving the settlement.

[4] Indeed, because the settlement releases *potential* personal-injury claims that might accrue over the next 30 years or more, the absolute protection of Fibreboard's non-insurance assets worked by this settlement in fact bars class members from reaching assets that exceed by many-fold the $235 million figure representing Fibreboard's non-insurance assets at the time of the settlement. Fibreboard recently announced expected revenue in excess of $1 billion for 1998. Patricia Commins, *Interview -Fibreboard On Acquisition Trail*, Reuters, Limited Newswire, November 30, 1995, *available in* LEXIS, Nexis Library, "curnws" File ("Fibreboard Corp continues to scout for acquisitions as part of its plan to boost annual revenues to at least $ 1 billion and its earnings to $ 4.00 a share by about 1998.").

[5] *See* Sett. Part. br., 65, 75 (noting that the class complaint "*could have* recited a claim for

a declaratory judgment that Fibreboard was entitled to coverage from the Insurers.") (emphasis added).

[6] As pointed out in the *amicus curiae* brief of the American Trial Lawyers' Association ("ATLA"), however, even *Congress* may lack the constitutional authority to impose upon tort victims the type of claims processing procedure created here (*see* ATLA br., 11).

[7] *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1326 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986) ("in diversity actions federal court concerns in a just judicial system cannot be used as a reason for supplanting substantive state policies"); Marcus, *Tort Reform Via Rule 23*, at 907 ("Rule 23 is not a warrant for tort reform in federal court to cure 'defects' in state tort law, and the substitution of a new compensation regime should depend on
notice and an opportunity to opt out that truly affords class members a chance to vote. Circumventing that by invoking 'equitable jurisdiction' or relying on mandatory class action treatment should not fill the void in judicial authority").

[8] Similarly, the claims for declaratory relief alleged *against* the class in *Rudd* require "unitary adjudication" and justify a mandatory defendant class action in that case. *See Amicus Curiae* br. of Esteban Y. Ortiz, *et al.* in *Continental Casualty Co. v. Rudd*, No. 95-40694.

[9] *Keene Corp. v. Fiorelli*, 14 F.3d 726, 731 (2d Cir. 1993).

[10] The settling parties suggest that even if the class plaintiffs did not adequately allege justiciable, litigable claims, this Court "need only conform the pleadings to the proofs to satisfy any such requirement." (Sett. Part. br., 75). A court may conform pleadings to the proof (generally, in order to support a judgment) when an issue, not raised by the pleadings, has been tried by express or implied consent. FED. R. CIV. P. 15(b). But the practice is unavailable in this case, in which the unalleged claim--the claim that the Insurers' policies provided Fibreboard with coverage--was not tried at all. Indeed, the very purpose of the proceeding was to *avoid* a
decision on this issue. What the settling parties request is that the Court conform what the class plaintiffs actually alleged to what they might have alleged--even though the class plaintiffs *have never* sought adjudication of these unalleged claims.

The Ortiz appellants do not dispute the existence of a coverage controversy between Fibreboard and its Insurers, and, as our *amicus curiae* brief in the *Rudd* action explains, believe that a settlement of these controversies that is binding on present and future asbestos claimants is legally permissible and in the best interests of these claimants.

[11] In *Aetna*, the Court merely found that an action by an insurer against its insured seeking a declaration of rights under an insurance contract presented a justiciable controversy, even though the plaintiff did not seek damages or an injunction, because the dispute between the parties was "definite and concrete, not hypothetical or abstract." 300 U.S. at 241. *Aetna* thus

supports jurisdiction in the California coverage litigation, but not here. In *ASARCO*, the Supreme Court held that it had Article III jurisdiction to *review* a state court decision invalidating a state statute, even though the plaintiffs/respondents would have lacked standing to challenge the statute in a federal district court, because it was beyond dispute that the petitioners were directly injured by the state court decision under review. 490 U.S. at 618. As in *Aetna*, no contention was made that the parties were not true adversaries or that the claims were feigned or pretextual. On the contrary, the Court specifically observed that the parties "remain[ed] adverse" and were not seeking an advisory opinion. *Id*. at 619.

[12] Similarly, the settling parties miss the point in invoking one of the Ortiz appellants' authorities for the proposition that "'[c]ases involving genuinely adversary interests, but lacking any dispute as to facts or remedy'" might present a case or controversy (Sett. Part. br., 59 n.* (quoting 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3530, at 320 (1984))). Our contention is that the present claims alleged in the class complaint are not "genuine" but feigned, and that the future claims settled by the parties are not ripe. Thus, this case does not involve "genuinely adversary interests," and there is no basis for the exercise of jurisdiction under Article III.

[13] In *Duke Power*, for example, the plaintiffs did not seek monetary damages but sought instead a declaration that a statute that would affect future claims was invalid. The form of relief sought is a vital factor in determining Article III justiciability. *See Los Angeles v. Lyons*, 461 U.S. 95, 103-08 (1983). There was no contention in *Duke Power* that the complaint was feigned. Unlike the plaintiffs in this case, the *Duke Power* plaintiffs actively litigated their claim against adversarial opponents in both the district court and the Supreme Court.

[14] The fact that the settlement does not actually liquidate the individual claims for specific sums is irrelevant. The settlement provides Fibreboard with a complete release from liability as to each individual class member, giving it "total peace," and the settlement redefines the parameters for liquidating each class member's claim.

[15] While the complaint mentions the on-going insurance litigation, it does not--because there would be no basis in law for doing so--demand the creation of an alternative dispute resolution mechanism to process the class members' future claims using Fibreboard's insurance proceeds.

[16] Moreover, in each of these cases, the relief afforded by the settlement or consent decree actually corresponded to the claims of present harm alleged in the complaint. Here, in contrast, the relief given to the class plaintiffs in the Global Settlement is unresponsive to the claims alleged in the complaint. The complaint alleges entitlement to monetary damages for medical monitoring and fear of future disease; the Global Settlement does not award any such damages to any class member (as the settling parties repeatedly point out), but instead provides an administrative system for compensating claims for future disease, if and when such diseases develop. The consent decree cases are additionally distinguishable because in each case, the parties sought an order affecting the rights only of the parties actually before the court, not an order affecting parties unknown, unknowable, and consequently, before the court only by way

of the class action fiction.

[17] The settling parties ridicule the Ortiz appellants' focus on "timing," calling a "litigate first, negotiate later" rule for class actions "ludicrous[.]" (Sett. Part. br., 61). On the contrary, such a rule is highly desirable: requiring plaintiffs and their counsel in a proposed class action to file suit, and to seek appointment as class representatives, before the commencement of negotiations would, in general, protect classes from collusive settlements. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1353-57 (1995). In this case, suit could have been filed (assuming that any class member wished to assert a *bona fide*, rather than pretextual, claim) when negotiations began; negotiations would have been conducted under formal, rather than informal, court supervision, and the guardian ad litem for future claimants could have been appointed in the early stages rather than after the settlement was a *fait accompli*. Moreover, the rule (which the Ortiz appellants reiterate is mandated by Article III) is not, as the settling parties imply, unworkable. The commencement of litigation of *bona fide* claims did not prevent the victims of Agent Orange and of silicone breast implants from reaching settlements with their adversaries. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). On the contrary, such an approach would have only increased the bargaining power of the class; if negotiations failed, the class plaintiffs could have continued to litigate their claims to whatever substantive result Rule 23(b)(1)(B) permits. The "litigate first, negotiate later" rule attacked by the settling parties is therefore not only mandated by Article III, but is also sound policy.

[18] *See, e.g.*, John R. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1453-1457 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 898-901 (1995); James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1014-21 (1980).

[19] Coffee, *supra* at 1456.

[20] As one commentator has lamented:

Settlement class actions are inherently unlawful because they clearly, and one is tempted to say unnecessarily, exceed the legitimate limits of adjudication. If this conclusion is correct, then continued or expanded reliance on such procedures will slowly but meaningfully decrease the public respect and esteem traditionally enjoyed by our courts, to the eventual detriment of us all.

James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1014 (1995).

[21] It is true that in *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981), this Court assumed that the fairness of a settlement may inform the determination of whether representation was adequate. But neither *GM Trucks* nor the Ortiz appellants suggest

that the fairness of a settlement is irrelevant to a district court's assessment of adequacy in a class action that *could have* met the Rule 23 requirements for litigation purposes. In *Corrugated Container* there was no contention that the case was not theoretically certifiable under Rules 23(a)(2) and 23(a)(3), as there is here. Moreover, the "law" expressed in *Corrugated Container* hardly supports the notion, advanced by the settling parties and accepted by the district court, that the mere existence of a settlement does away with the need to examine whether the claims involve "questions of law or fact common to the class" or are "typical of the claims" of the class.

[22] It is not necessarily true, as the settling parties suggest, that under *GM Trucks* the defendant must affirmatively stipulate that the class is certifiable to permit the district court to approve a class action settlement (Sett. Part. br., 74). There is no reason why a defendant that does not want to concede the propriety of certification under Rule 23 cannot remain silent on the issue, and rely on class counsel, who should be adequate representatives of the class and adequate spokespersons for the settlement, to make the requisite showing. In the event that the district court or the court of appeals disapproves the settlement, nothing would prevent the defendant from challenging certification on remand.

[23] The only exception to this rule is *In re Agent Orange Prod. Liab. Litig. ("Ivy")*, 996 F.2d 1425, 1433-37 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), which the Ortiz appellants respectfully suggest was wrongly decided because of the district court's perception that the claims for relief on the merits were extremely weak, and due to strong public policy concerns favoring relief for Vietnam veterans. But even if *Ivy* were good law, it would not support the result here (*see infra* at 30 (distinguishing Agent Orange cases as involving identifiable plaintiffs, and on the basis that the class was certified solely because of the overriding common issue of the military contractor defense)).

[24] Indeed, class counsel here in negotiating the settlement considered the plaintiffs' bar's concerns regarding overall average settlement values (RE5:57¶101).

The settling parties label Appellants' contention that Mr. Inselbuch could have represented the class "bizarre" because Inselbuch and class counsel "worked together on this matter for over four years." (Sett. Part. br., 120 n.*). Mr. Inselbuch could have been chosen four years ago. Mr. Inselbuch is distinguishable from actual class counsel because he possessed neither the power nor the duty to make decisions for clients with conflicting interests, and he also lacked final decision-making authority with respect to the class. The Ortiz appellants suggest that Inselbuch is an example of competent, unconflicted counsel who should have and could have been calling the shots.

[25] The settling parties' effort to limit *Shutts* to actions brought in state court is also unavailing. (Sett. Part. br., 113-14 n.**). First of all, their argument relates solely to the aspect of *Shutts* limiting the exercise of personal jurisdiction over class members in a distant forum, and it has nothing to do with *Shutts'* guarantee that class members with particularized damages claims should retain individual control over those claims (*see* Ortiz br., 29). Moreover, the settling parties' invocation of 28 U.S.C. § 1404 is inapposite, since that statute by its terms

allows transfer only to forums in which the action could originally have been brought, which could not include forums with which unknown plaintiff class members lack minimum contacts.

[26] In contrast, in the *in rem* context the substantive right of claimants is often considered constrained by the equitable interests of competing claimants, and therefore "a pro rata reduction of claims has often been used by courts to equitably apportion the monetary burden where the total amount of awards among a group of successful claimants exceeds the limits of the insurance policy." *Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 256 (5th Cir. 1988) (citing cases). But even in the *in rem* context, some courts have held that the first claimants to seek
the property have a right to recover in full, regardless of the equitable interests of late-arriving claimants. *See, e.g.*, *Gerdes v. Travelers Ins. Co.*, 109 Misc.2d 816, 440 N.Y.S.2d 976 (N.Y. Sup. Ct. 1981) (claimant to limited insurance policy denied right to stay arbitration proceeding of competing claimant in order to allow for equitable apportionment).

[27] *See Katchen v. Landy*, 382 U.S. 323, 336 (1966) (the bankruptcy laws "convert[] the creditor's legal claim into an equitable claim to a pro rata share of the res. . . ." (citing *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947))).

[28] In both cases relied on by the settling parties for the proposition that Rule 23(b)(1)(B) "dictate[s] that tort claimants have only the right to a fair allocation" when assets are insufficient to satisfy all claims (Sett. Part. br., 96), the underlying substantive rights of the class members were *already* limited to pro rata distribution of a *res* before the class actions were initiated. In *In re Manville*, 982 F.2d 721 (2d Cir. 1992), *modified on rehearing*, 993 F.2d 7 (1993), asbestos claimants were limited to the assets available in the Manville Trust, which had been created in the original Manville bankruptcy plan. In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), *cert. dismissed*, 113 S. Ct. 1070 (1993), class members were limited to a specific sum of money that had been set aside for their claims by the bankruptcy court as part of an enforcement action filed by the Securities and Exchange Commission. *See Manville*, 982 F.2d at 738 (noting that *Drexel* involved a "traditional limited fund," and that the class settlement was regarded by the Second Circuit as a necessary prerequisite to a successful bankruptcy reorganization).

[29] The settling parties' contention that the Ortiz appellants quote Newberg out-of-context (Sett. Part. br., 89-90 n.**), is frivolous. The entire purpose of the Newberg section is to suggest that Rule 23(b)(1)(B) is *not* appropriate as a substitute for bankruptcy. The language lifted out-of-context by the settling parties, referring to the use of 23(b)(1)(B) to avoid depletion of insufficient assets on a "first come, first served" basis, is intended to refer to situations in which the "insufficient assets" are a fixed sum of money or specific piece of property:

In the case of aggregate claims exceeding a *fixed sum of money*, a 23(b)(1)(B) class may be appropriate to avoid unfair preference of early claimants to the detriment of later claimants. In the event *an entity is insolvent*, bankruptcy law is normally the source of protection to assure a fair and orderly distribution of assets insufficient to meet claims.

3 NEWBERG ON CLASS ACTIONS § 17.15A (3d ed. Supp. 1995) (emphasis added).

[30] *See Smith v. Swormstedt*, 57 U.S. 288 (1853) (claims against a church fund); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915) (claims to a limited insurance fund); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 542 (1915) (foreign mutual benefit society fund could not be distributed in different states under different rules); *Phipps v. Chicago, R.I. & P. Ry.*, 284 F. 945 (8th Cir. 1922), *cert. dismissed*, 262 U.S. 762 (1923) (equitable restructuring of corporation); *Guffanti v. National Sur. Co.*, 196 N.Y. 452, 457-59 (1909) (claims against a
bond). The one exception to this is *Mullane*, which nonetheless does not apply here as discussed above previously, because the claims asserted there were all derivative of *in rem* claims against a trust, and their resolution was necessary to serve the "vital interest of the State in bringing any issues as to its fiduciaries to a final settlement." 339 U.S. at 313.

[31] Here, as in *Kane*, Fibreboard has tendered "a minimal amount of money" into court in return for complete resolution of its asbestos liabilities, retaining assets exceeding $235 million plus all of its future earnings. 845 F.2d at 232. Fibreboard should not be able to obtain protection from prosecution based on this measly contribution (*see Amicus Curiae* br. of Trial Lawyers for Public Justice, 15-18). The settling parties erroneously describe the possibility of Fibreboard making a contribution to the settlement as a "quixotic pursuit." (Sett. Part. br., 91). In fact, Fibreboard, in the Trilateral Agreement, already has agreed to a settlement that requires at least a potential contribution from corporate assets.

[32] The Ortiz appellants respectfully suggest that the Fourth Circuit's dicta to the contrary in *In re A.H. Robins Co.*, 880 F.2d 709, 741 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (*see* Sett. Part. br., 93), was wrong. In any event, *Robins* is inapposite because the settlement in that case was ultimately certified under Rule 23(b)(1)(A), *not* (b)(1)(B). 880 F.2d at 742.