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Representing the Unrepresented in Class Action Settlements

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REPRESENTING THE UNREPRESENTED IN CLASS ACTIONS SEEKING MONETARY RELIEF

BRIAN WOLFMAN*
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Class actions are important and useful, both to deter wrongful conduct and to provide compensation for injured plaintiffs. In complex cases, however, the existing class action structure falters. In this Article, Messrs. Wolfman and Morrison argue that in "settlement class actions" the current class action rules do not adequately protect class members whose interests do not coincide with those of the class representatives and the class attorneys. Through a survey of recent, prominent settlement class actions, the authors show that the current system does not fairly treat subgroups in a class with respect to matters as diverse as future injury, fee distribution, applicable law, and timing of payments. In response to these problems and others, Messrs. Wolfman and Morrison ultimately urge the adoption of amendments to the class action rules to handle settlement class actions. The effect of these amendments would be twofold: first, to ensure that "unrepresented" class members would be represented by counsel who would have adequate opportunity to champion their interests; and second, to allow a judge handling a settlement class action to evaluate the substantive provisions of a proposed settlement, and to impose or reject certain terms in order to assure fairness within the class, as well as between the class and defendants.

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Both authors have represented absent class members and amici in objecting to class action settlements, including many of those discussed in this Article—the CCR-asbestos settlement, the breast-implant case, the heart-valve case, and several of the recent coupon settlements involving air travel and vehicles (General Motors trucks, Ford Bronco II utility vehicles, and Ford Mustang convertibles). In addition, Mr. Morrison was counsel for the class plaintiffs in the *Goldfarb* case, discussed in Part I, and both authors have represented plaintiffs in numerous class actions involving challenges to state and federal regulatory and public benefit programs brought principally for injunctive and declaratory relief. They recognize that having worked on the cases discussed in this Article is both a plus and a minus. In one sense, they may be too close to the cases to see all of their benefits, or—in cases like the heart-valve case, where their client ultimately withdrew its objections after changes were made—to see all of their failings. On the other hand, the authors' intimate involvement with many of these cases has allowed them to provide details that are not available from the reported decisions, but are nevertheless pertinent to the problems that they have encountered.

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INTRODUCTION

The thesis of this Article is straightforward. Class actions are important and useful, both to deter wrongful conduct and to provide compensation for injured plaintiffs. They work reasonably well in simple cases. But as matters become increasingly complex, problems surface that require protection of class members whose interests do not coincide with those of the class representatives and the class attorneys. We will refer to those individuals as "unrepresented" class members, although we recognize that they are technically represented by the designated class representatives and the designated class counsel.

Our main concerns do not arise in cases that are actually litigated, although there are potential difficulties even in those situations. Rather, our concerns principally surface in "settlement class actions." As we use the term, "settlement class action" refers not simply to class actions that settle, but to cases in which the class certification issue itself is settled, usually with the defendant maintaining that the class may be certified only for settlement purposes, but not if the case is litigated.[1] In these situations, the existing controls used in class actions to assure that the unrepresented are adequately protected are not effective, and new tools are required to assure that the unrepresented do not lose substantial rights or are not prejudiced by the manner in which these settlement class actions are resolved.

In Part I of this Article, we examine simple class actions and explain the problems of representing the unrepresented and how existing provisions are designed to, and largely do, alleviate those problems. Next, in Part II, we examine several situations that illustrate the representational problems under the existing class action system and show why the current controls are not effective. Finally, in Part III, we provide a specific set of recommendations for changes in the way courts handle class actions. All of the cases we examine involve claims for payment of money, usually as the sole or primary element of relief, but sometimes as one of several claims.

[1] See Manual for Complex Litigation Third § 30.45 (1995) (explaining that settlement agreements provide for certification of classes for settlement purposes only).

I
REPRESENTATIONAL PROBLEMS IN THE "SIMPLE" CLASS ACTION

Twenty years ago, then-Federal Judge Marvin Frankel described our litigation system as an "umpireal" one, in which courts act like umpires—calling balls and strikes or deciding whether a player is out or safe—and the parties slug it out, with the umpire looking over their shoulders.[2] Under this theory, there is no need for substantive review of the fairness of litigation or settlement because all of the parties (other than minors and incompetents) are assumed able to protect themselves. This analogy is applicable where, for example, a corporation sues a third party and any money recovered goes into the corporate treasury. In such circumstances, most people would agree that little or no court supervision is necessary. In more complex litigations, however, the "umpireal" model fails to deal with special problems that arise.

A. The Shareholder Derivative Suit

Perhaps the clearest illustration of the kind of problem not addressed by the "umpireal" model is the shareholder derivative action in which a plaintiff seeks the recovery of a sum of money for the benefit of the corporation of which the plaintiff is a shareholder. Originally, provisions governing these actions were part of Rule 23 of the Federal Rules of Civil Procedure dealing with class action requirements. Since 1966, however, they have been included in the separate, but analytically similar, Rule 23.1.[3] Technically, these cases are not class actions, because any recovery will go to the corporation rather than to the individual shareholders. Each shareholder, however, benefits in proportion to that shareholder's interest in the stock of the company; and, in that sense, shareholders are a class. In derivative actions, everyone "in the class" wins, loses, or compromises on the basis of the overall outcome. Yet, even in this situation, the Rules recognize that the "class" needs special protections that would not be required in the traditional lawsuit involving only named plaintiffs and named defendants.

The problem arises in the derivative suit because the plaintiff's lawyer is paid a contingent fee, and the corporation would be tempted to buy off the lawyer in a settlement involving a large attorney's fee, under which the company—and, thus, its shareholders—would re-

[2] Marvin E. Frankel, "The Search for Truth: An Umpireal View," 123 U. Pa. L. Rev. 1031, 1033-34 (1975).

[3] Fed. R. Civ. P. 23.1.

ceive little or no benefit. The likelihood of this occurring is particularly great if the real defendant, the party from whom the recovery is sought, is a corporate insider who has close connections to the board which approves the settlement and, most importantly, the payment to the plaintiff's lawyer.

In order to avoid these problems, Rule 23.1 provides two types of protection. First, before a settlement can be finalized, notice must be given to other shareholders since, if the settlement is approved, it will preclude future derivative claims by all shareholders, not simply by the named plaintiff. Second, the court must undertake a substantive fairness determination of both the settlement and the fees, deciding whether the compromise is a fair, adequate, and reasonable one, but not whether the plaintiff has recovered everything available if the case had been tried and won. Commentators recognize that this substantive review is not perfect, because reasonableness is not a precise term with respect either to merits or to fees. But by comparing the actual recovery in settlement with the optimal potential recovery, and then taking into account the strengths and weaknesses of the various claims and defenses, the courts should be able to eliminate the worst abuses.

B. The Problem of Insuring Proportional Compensation

The next level of complexity involves a simple class action in which the class is seeking primarily monetary relief. If settlement is reached, the settlement must be divided among individual class members who may be differently situated from one another. This problem arose in *Goldfarb v. Virginia State Bar*,[4] in which the Supreme Court found that the Virginia State Bar and several local bar associations had violated the Sherman Antitrust Act through their minimum fee schedule systems and remanded the case for a determination of the damages due the class.[5] By resolving the liability issue, the Supreme Court simplified the case. It did not, however, eliminate the potential problem of properly allocating money damages within the class.

The class in *Goldfarb* included approximately 2400 homeowners in Reston, Virginia, who had purchased their homes within the period covered by the statute of limitations. Their claims were based on the fact that, because of the minimum fee schedules, the amounts that their attorneys had charged them for title examinations and title opinions for their homes had been determined by the fee schedule, not the market. That charge equaled one percent of the purchase price for the first $50,000 and a smaller percentage thereafter.

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[4] 421 U.S. 773 (1975).

[5] Id. at 792-93.

After some negotiations, defendants agreed to pay a fixed sum of money to resolve the suit, and the question then became how the money should be allocated within the class and between the class and its attorneys. The problem of determining the proper share for attorneys out of the settlement fund is like that in the shareholder derivative suit.[6] However, achieving a fair allocation of the settlement fund among the differently situated class members raised separate questions.

For example, one question that could have been asked, but was not, was why the class should be limited to Reston homeowners and not include all home buyers in Virginia—or even Northern Virginia, or simply Fairfax County, where Reston is located—so that they, too, could have the benefits of class counsel's efforts. A larger class surely would have reduced the amount recoverable by the existing class, since the ability of the defendants to pay in this situation was limited.

In this case, there was a good reason why the class was so defined: The developers in Reston, but not elsewhere, had utilized the services of a small group of attorneys for title examination work and were charged very low rates. In return, the developers inserted these attorneys' names in the contracts for the homes, which enabled these attorneys to garner most, if not all, of the business on the initial sale of the homes. Moreover, the ruling on the basic liability issue benefitted not only the class, but also, on a prospective basis, all Virginia residents, and probably everyone in the United States who needed the services of an attorney. Nonetheless, the fact that there was no "natural class" illustrates the potential difficulties of defining a class in more complicated situations.

Even within the class, there was a serious question as to how to calculate the amount of damages suffered by each member of the class. For instance, was it appropriate to assume that a uniform percentage of each fee was an overcharge, in which case all of the claimants would recover proportionately to the amount of the fees paid? In those circumstances, homeowners with inexpensive homes might have received very little or nothing, whereas others, who paid more for their homes, and hence more for their title examinations, would receive much more. On the other hand, it could be argued that the work done—examining a title and writing a brief opinion letter—was the same regardless of the purchase price, and that, therefore, the reasonable charge should be the same across the board, with anything above it unlawful. Opposing this was the argument that the attorney's higher fee for more expensive homes was justified because of the po-

[6] See supra Part I.A.

tentially greater risk if there had been a defect in the title, but that theory did not turn out to be factually defensible. Furthermore, the named plaintiffs were a husband and wife who had purchased a higher-priced home, and thus their judgment on the reasonableness of the allocation arguably might be affected by their self-interest.

In the end, it turned out that there was very little real dollar difference among the various allocation methods. In part for simplicity purposes, a percentage figure was used, and the average recovery was about $139, based on an average home price of about $40,000 for which attorneys' fees of $400 would have been payable. Thus, despite the potential complexities, the existing protections of notice to the class members and a substantive fairness review by the district court of the total amount of payment, the allocation among class members, and the plaintiffs' attorneys' fees, worked tolerably well.

C. Problems of Definition, Notice, and Allocation

On the next level of complexity, but still within the bounds of the fairly straightforward class action, would be the example of a securities class action alleging that the required securities filings included false statements or failed to disclose material facts. If we assume that the class was or could have been properly certified under Rule 23(b)(3),[7] there would appear to be three complexities not present in *Goldfarb*.

First, it would be more difficult to determine who was in and who was out of the class, especially if either the increase in the price of the stock or its ultimate decline was more or less gradual. Second, there would be much greater difficulty in providing notice to all of the class members because of changing addresses and the changing composition of the class (as people bought and sold stock);[8] as a result, there would be less assurance that interested persons would be heard regarding the fairness of the settlement. Third, the timing of the purchase and eventual sale among the class members would have much greater significance in terms of each class member's entitlement to recover than was the case in *Goldfarb*.

Despite these complexities, current class action Rules seem to be able to handle this kind of case. As to the first problem, the defendant's self-interest may be of help. On the one hand, the defendant does not want the class to be too large because a large class will dilute

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

[8] According to Census Bureau data, in recent years between 16% and 18% of Americans move each year. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States tbl. 34 at 32 (113th ed. 1993); The World Almanac 394 (1993).

each individual's potential payment. On the other hand, if the class is not sufficiently large, the litigation will not be over, and a significant number of other claims may have to be defended, despite the defendant's wishes to buy eternal peace.[9] In addition, the relatively short statutes of limitations now applicable to securities actions may help to assure that all possible class claims are filed within a brief period of time, thus sorting out the class definition, albeit with some theoretical problems. Of course, this will be possible only if all those who may be injured have already been injured so that they can make an informed choice about issues such as opting out and settlement.

Second, while notice cannot reach everyone, in cases where the parties know in advance that many class members cannot be reached individually by mail, the case law generally demands that extensive publication notice be undertaken.[10] Moreover, individual notice should be able to reach representatives within each of the various potential subclasses, or at least subcategories in the larger class, provided that the notice is widely disseminated.

The third problem—regarding the timing of the purchase of the stock—is the most significant, especially since the named plaintiffs cannot be similarly situated vis-à-vis the defendants in the same way as are all of the remaining subgroups within the class. But to the extent that timing is the determinative element in the amount that each class member is entitled to receive, general rules of recovery under applicable securities law, combined with a theory of allocation based on the timing of specific events, can resolve most, if not all, of the problems in a reasonable manner. Even though there are problems of allocation, all of the injuries have occurred, and so, once the specific events are isolated and their significance is determined, the allocation for each class member should be rather simple.

Finally, despite the greater complexity in the substantive claim, there are no particular difficulties with attorneys' fees, beyond those which are found in every one of these class actions: The plaintiffs'

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[9] See Bowling v. Pfizer, Inc., 143 F.R.D. 141, 154-55 (S.D. Ohio 1992) (rejecting objection that class action defendant's desire to be sued by claimants worldwide, rather than just by claimants in United States, was evidence of collusion with class counsel, because desire to seek "corporate peace" was in defendant's self-interest).

[10] See, e.g., In re "Agent Orange" Prods. Liab. Litig., 818 F.2d 145, 167-68, 175 (2d Cir. 1987) (concluding that letter notice along with announcements in national publications and on radio and television was adequate notice where member of class could not be located through reasonable means), cert. denied, 484 U.S. 1004 (1988); In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 311 (N.D. Ga. 1993) (concluding that where all potential class members could not be reached by mailed notice, plaintiffs had to publish notice in 67 newspapers); see also 7B Charles A. Wright et al., Federal Practice and Procedure § 1786 at 206-07 (2d ed. 1986) (discussing requirement of publication campaign to reach class members who cannot be notified individually by mail).

attorney always has a very strong incentive to settle because no fees will be received until the matter is resolved, and no fees will be received at all if the case is lost.

II

NEW PROBLEMS IN COMPLEX CLASS ACTIONS

If institutional controls for dealing with representational problems in simple class actions are in place and work tolerably well, the same cannot be said of the new class actions, many of which involve classes composed principally of persons injured or yet to be injured by defective products. In these cases, the victims are placed together in a settlement class even though, under traditional class action notions, they could not be joined if the cases were actually litigated, even in a Rule 23(b)(3) class, because of enormous factual disparities among the class members and, in nationwide cases where state substantive law applies, because of immense choice-of-law difficulties.[11] As noted at the beginning of this Article, ordinarily, the defendant's willingness to consent to a class is conditioned on there being a settlement.

Although there are many variations on the theme, this part of the Article will discuss three cases in which settlement classes were sought and granted under Rule 23(b)(3): (1) the asbestos case involving the twenty defendants that comprise the Center for Claims Resolution (CCR), *Georgine v. Amchem Products, Inc.*;[12] (2) the silicone-gel breast-implant case;[13] and (3) the nationwide class action for economic damages concerning General Motors trucks with an alleged propensity to explode in side-impact crashes.[14] The focus of this discussion will be not on the merits of these settlements, but on the rep-

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[11] See, e.g., In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300-02 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (deciding that partial grant of class certification was improper in nationwide HIV-hemophilia litigation due to differing state standards of negligence). But cf. Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (granting class certification on certain liability issues and punitive damages in litigation concerning effects of tobacco addiction on class of all nicotine-dependent U.S. residents and other smokers who have been advised of tobacco's health effects, but denying certification with respect to compensatory damages and affirmative defenses), rev'd, No. 95-30725, 1996 U.S. App. LEXIS 11815 (5th Cir. May 23, 1996).

[12] 157 F.R.D. 246 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

[13] 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] In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 846 F. Supp. 330 (E.D. Pa. 1993), rev'd, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

resentational problems created in these situations, which lead to substantive problems for the unrepresented class members.[15]

A. *The CCR-Asbestos Settlement*

In recent years, the number of asbestos personal-injury claims filed in state and federal courts has become quite large. By 1990, six percent of the new federal civil filings were asbestos related.[16] On July 29, 1991, citing an asbestos litigation crisis, the Judicial Panel on Multidistrict Litigation transferred all federal asbestos personal-injury litigation to the Honorable Charles Weiner of the Eastern District of Pennsylvania for the purpose of seeking solutions to the pending asbestos litigation.[17] After the transfer order, attempts at a global asbestos litigation settlement involving a wide array of defendants and many of the leaders of the plaintiffs' bar were made, but failed.[18]

Thereafter, in late 1991 or early 1992, a consortium of twenty companies regularly sued in asbestos litigation—known as the Center for Claims Resolution (CCR)—approached two prominent members of the plaintiffs' asbestos bar in an attempt to negotiate a settlement of all future asbestos claims against the CCR defendants.[19] These plaintiffs' attorneys and CCR struck an agreement in early 1993 under which future claims against the twenty CCR companies would be resolved, not in the tort system, but under an alternative dispute resolution system set up in the agreement and administered largely by the CCR.[20]

The settlement in the CCR case, which the district court in Philadelphia has approved,[21] presents three special problems of representation.[22] The first is: Who is in and who is out of the class? In the simple class actions discussed above and the silicone-gel breast-

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[15] Another problem of relatively recent vintage is the attempt to use Federal Rule of Civil Procedure 23(b)(1)—which does not provide class members the right to opt out—to resolve mass-tort class actions. We address this problem briefly in Appendix A to this Article.

[16] *Georgine*, 157 F.R.D. at 265.

[17] In re Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 416 (J.P.M.L. 1991).

[18] See *Georgine*, 157 F.R.D. at 266-67 (recounting history of failed settlement negotiations).

[19] Id. at 266.

[20] See id. at 267 (describing CCR's administrative role in implementing settlement agreement); see also Susan Koniak, Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1051-53 (1995) (describing process leading up to filing of *Georgine*).

[21] See *Georgine*, 157 F.R.D. at 325 (holding that settlement is "fair, adequate, and reasonable to the class").

[22] The district court's subsequent order enjoining the absent class members from maintaining any asbestos personal-injury suit against the CCR defendants in state or federal court is on appeal to the Third Circuit, while other matters are being delayed pending the

implant case discussed below, the classes include the entire universe of current and potential victims with claims against these defendants. By contrast, the class in *Georgine* was defined to include only those individuals who had *not* filed lawsuits on or before the date the class action was filed (which was also the date that the answer and class action settlement were filed).[23] Anyone who filed a claim before the prescribed date was not part of the class and thus was not limited to the alternative dispute resolution provisions in the settlement, the limitations on diseases covered, and the caps on amounts that could be paid, all of which were applicable to the settlement class.[24]

Whether these substantive limitations on the right to compensation are fair in light of other benefits of the settlement is a complicated question. But that question is overshadowed by a series of representational problems that arose because the same lawyers who represented the settlement class represented the "nonclass" plaintiffs in thousands of separate cases and settled them on different and, we believe, demonstrably more favorable terms than those available to the class members. We seriously doubt that such dual representation is permissible because we do not believe that counsel in such a situation can ever adequately explain why the class and nonclass members, who appear similarly, if not identically, situated, obtained such different deals.

1. The Problem of Dual Representation

The class counsel in *Georgine* settled approximately 14,000 of their clients' pending claims against the CCR defendants for approximately $215 million shortly before the class action settlement was

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entry of a final judgment. See Georgine v. Amchem Prods., Inc., Nos. 94-1925 et al. (3d Cir. argued Nov. 21, 1995).

[23] Since the filing of *Georgine*, two other nationwide class actions have also defined the class to exclude all individuals who had pending litigation against the defendants. See Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 517 (E.D. Tex. 1995) (defining non-opt-out class in settlement agreement with non-CCR asbestos manufacturers as "persons who have neither filed nor settled . . . claims before August 27, 1993"), appeal docketed, No. 95-40635 (5th Cir. Aug. 17, 1995); Beeman v. Shell Oil Co., No. 93-47363 (Tex. Dist. Ct. Harris County Nov. 1994) (concerning claims against manufacturers of defective plastic pipes used in houses and mobile homes). In *Beeman*, the court denied the parties' motion for preliminary approval. *Beeman*, No. 93-47363 (Tex. Dist. Ct. Harris County Feb. 16, 1995) (order denying plaintiffs' and defendants' motion for preliminary approval of settlement).

[24] In these types of class actions—brought principally to resolve state-law "claims" of plaintiffs who presently do not suffer from a compensable injury—there are also serious questions involving whether the amount-in-controversy requirement of 28 U.S.C. § 1332 (1994) and Article III's case-or-controversy requirement have been satisfied. See U.S. Const. art. III, § 2. We take up those issues in Appendix B to this Article.

presented to the court for approval on January 15, 1993.[25] A strong argument can be made that the settlement amounts for the class in *Georgine* were not comparable to either the amounts that plaintiffs generally receive or the amounts that nonclass plaintiffs who settled on the eve of *Georgine* received. We acknowledge that the settling parties and the district court disagreed with this argument,[26] but that is not our concern here.

In at least two situations, class members will receive no monetary compensation, unlike pre-January 15, 1993 settling plaintiffs who were paid damages for similar, if not identical, claims. First, some plaintiffs were individuals suffering from pleural disease, which involves asbestos-related "plaques" on the outside of the lung, but little or no physical impairment. Under the class action settlement, pleural claimants receive no cash, but only what the settling parties referred to as a "bundle of benefits," such as waiver of the statute of limitations and the right to be compensated for both a nonmalignant and malignant condition if the need should arise. However, the clients who settled by January 15, 1993, received substantial money for the identical disease.[27]

Second, the outside settlements included lung-cancer victims, who only needed to show that they were occupationally exposed to CCR asbestos and had lung cancer. However, the class members will have to demonstrate that they were exposed to CCR products in the workplace for a significant number of years and that their lung cancer was asbestos related, in general, by providing evidence of underlying asbestosis, a showing that the settling parties conceded was more diffi-

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[25] Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, Settling Parties' Exhibits 302A, 302B, 302C, & 303, Georgine v. Amchem Prods., Inc., 157 F.R.D 246 (E.D. Pa. 1994) (No. 93-0215), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996) [hereinafter *Georgine SOS*]. With respect to many of the 14,000 cases, class counsel had associated with other plaintiffs' counsel around the nation with whom their fee would be shared. Id.

[26] See *Georgine*, 157 F.R.D. at 305-11 (discussing court's conclusion that settlement was noncollusive).

[27] From its inception through January 15, 1993, CCR settled its nonmalignant claims for an average of $8143 per claim, including zero-dollar dispositions. *Georgine SOS*, supra note 25, Settling Parties' Exhibit 504. The nonmalignant category includes pleural claims of the type for which no cash payment is made under the *Georgine* settlement. Nonetheless, the settling parties maintained that the settlement represented an improvement over the present system under which claimants compensated for one disease generally released the right to "come back" and obtain relief for another future disease. If the settlement were so attractive, it is surprising that *none* of the pre-January 15, 1993 settlements for class counsel's 14,000 clients preferred the "bundle of benefits" over the money offered.

cult than what the tort system required.[28] Thus, class members who are unable to present such evidence will be denied compensation while pre-January 15th plaintiffs were paid damages for similar claims.

2. *The Problem of Future Injury*

The second representational problem in *Georgine* is that, by definition, the class representatives for the future plaintiffs did not have a claim on the date the case was filed and had no present injuries for which they were seeking compensation. Indeed, unlike the class in the breast-implant case, which included substantial numbers of current and future claimants (because the class swept in the thousands of pending cases around the nation), this was almost entirely a "futures" class when the case was filed, although the diseases of a relatively small number of class members became manifest as the case proceeded in the district court, and some relatively small number of class members were impaired at the time the case was filed (including several of the named plaintiffs).

This lack of current injury created two interrelated problems. First, the class members had no way of knowing whether they would ever need any of the benefits under the plan (and if so, which ones), or whether their injuries would be covered. As a result, they were asked to make a purely hypothetical judgment about the reasonableness of the settlement, thereby eliminating one of the checks on class counsel who had, in this case, even more so than in others, substantial financial incentives to settle with the defendants.[29]

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[28] See *Georgine SOS*, supra note 25, Settling Parties' Exhibit 300 at 26-28, 44-46 (setting forth procedures for claimants seeking compensation under lung cancer category).

[29] Those incentives were threefold. First, the Settlement Agreement provides that the court may award fees and expenses for the prosecution of the class action, which will be paid by the CCR defendants. *Georgine SOS*, supra note 25, at 92. Second, the settlement of the 14,000 pending cases for $215 million probably generated fees for class counsel, and their associated counsel, at the standard contingent rates of 33% or more. These settlements, by CCR's admission, were only entered into when CCR became reasonably certain that the class action settlement would come to fruition, *Georgine*, 157 F.R.D. at 295, thus making it reasonable to consider the settlement of the pending cases as part of class counsel's incentive for the overall deal, despite the district court's contrary finding. Id. at 296. Third, class counsel was free to represent individual claimants in the settlement's claims procedures, generally at a 25% contingent fee, *Georgine SOS*, supra note 25, at 93, and the class action notice materials noted that class counsel would be available for that purpose. Joint Motion of Settling Parties for Approval of Notice to Class, Exhibit A at 17, 23, 25-26, A-12, Exhibit B at 8, *Georgine* (No. 93-0215); cf. *Georgine*, 157 F.R.D. at 304 (discussing potential conflict of interest in serving both as class counsel and counsel for individual claimants, and indicating that court would appoint additional class counsel as future monitors of class settlement, but would *not* disqualify class counsel as counsel for individual claimants).

The second, related problem involves the illusory nature of the opt-out right for the future class members. Since the class member had no current injury, it was an extraordinary leap of faith to assume that he or she could make an informed choice about whether or not class treatment was a sensible one. If all injuries were covered, the choice would not have been as difficult. However, as noted above and described more fully below, not all injuries compensable under state law will be compensated by this settlement, and in that sense, the choice was little more than a wild gamble, with no basis to support staying in or opting out.

The problem here is made even more troubling by the fact that many of the victims did not even know that they were in the class, in contrast with the silicone-gel breast-implant case, discussed below, where the plaintiffs realize that they have been "exposed" to the product. Furthermore, the latency period for diseases related to asbestos and other environmental toxins can be extremely long, and at least some diseases—for instance, mesothelioma for asbestos victims—can result from a relatively brief exposure many years before. Although most asbestos victims worked for long periods of time in occupations where there were high levels of asbestos, others worked for brief periods of time, perhaps during a summer at a shipyard while in college, and others were exposed to asbestos wholly apart from any of their work experiences.[30] Thus, for many victims, the onset of disease is their first recognition that they were ever part of any class, as was the case for two of the class representatives in *Georgine* who never suspected, until their spouses died from asbestos-related injuries, that either they or their spouses had been exposed to asbestos.[31] For this category of persons, even if they saw a notice, they would not have any reason to believe that it applied to them. The notion that the right to opt out is a meaningful protection against arbitrary decisions by class representatives is simply inapplicable in this context.[32]

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[30] The class definition in *Georgine* included individuals who were occupationally exposed to asbestos products with respect to which CCR may bear legal liability *and* persons who lived with such individuals. *Georgine*, 157 F.R.D. at 257-58. Thus the class included individuals whose only exposure to asbestos was, for example, from the clothing of an exposed individual. Indeed, one named plaintiff's wife apparently contracted mesothelioma in that manner. Testimony of Ty Annas, Hearing Transcript at 228 (Feb. 24, 1994), *Georgine* (No. 93-0215). The class also included the spouses and other relatives of both groups, so as to cover, and then eliminate without any payment, all claims for loss of consortium.

[31] Deposition Testimony of Laverne Winbun and Nafssica Kekrides, Joint App. at 1135-37, 1150-52, *Georgine* (No. 93-0215).

[32] In *Georgine*, notification was attempted through newspaper advertisements, public-service announcements, and television spots in almost all, if not all, of the major markets and in some national magazines (such as *Parade*). An effort was made to enlist the support

A practical example that serves to demonstrate the inadequate representation of the future class members is the failure of the *Georgine* settlement to account for inflation. Simply put, in mass-tort cases in which fixed-dollar recoveries are established to pay monetary compensation, unless there is an inflation factor built into the settlement, future victims will receive far less real compensation than those who are eligible for compensation now. Under the *Georgine* settlement, the vast majority of class members who demonstrate that they have compensable illnesses will be paid through an administrative claims process according to preset monetary ranges for each type of disease.[33] Thus, for example, a claimant who contracts mesothelioma will receive anywhere from $20,000 to $200,000, but the average settlement must fall within what the settlement terms a "negotiated average value range" (NAVR), which, for mesothelioma, is between $37,000 and $60,000. This means that, in approximately ninety-eight percent of all cases, the average payment for mesothelioma cannot exceed $60,000.[34]

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of several dozen unions whose membership had been exposed occupationally to asbestos, principally by asking the unions to include small advertisements about the case in their membership newsletters. Despite this considerable effort, of the seven class representatives who were questioned during their depositions on the subject, six stated that they saw neither the print nor the electronic advertisements. Deposition Testimony of Timothy Murphy, Carlos Raver, Ty Annas, Ambrose Vogt, Nafssica Kekrides, and Laverne Winbun, Joint App. at 1127-28, 1146-47, 1184-85, 1164, 1155, & 1138-39, *Georgine* (No. 93-0215). Given the fact that asbestos and other environmental toxins often do their damage insidiously and that most *Georgine* class members were not currently injured, we suspect that for many class members who literally saw some form of the notice, it simply did not register. Cf. Schweitzer v. Reading Co., 758 F.2d 936, 943-44 (3d Cir.) (noting that, in bankruptcy case, it would be "absurd" to expect individuals exposed to asbestos who were not impaired and had no personal notice of proceedings to have filed claim to preserve future cause of action; holding that unimpaired individuals did not have "claims" that could be discharged under Bankruptcy Code), cert. denied, 474 U.S. 864 (1985).

[33] Fewer than one percent of all claimants who qualify for compensation will be permitted to seek binding arbitration or file suit in the tort system. *Georgine SOS*, supra note 25, at 67; see *Georgine*, 157 F.R.D. at 281 & n.27. In addition, there are a series of procedural and substantive restrictions on this right, not the least of which is that the plaintiff may not seek to recover punitive damages of any kind. The settling parties justified this latter restriction on the ground that, during CCR's history, no CCR defendant had been subject to a punitive damage award, a point which seems inapposite since the ability to seek punitive damages adds to a case's worth, regardless of whether the case is tried to verdict. As CCR noted in *Georgine*, over its history, CCR settled 99.8% of its cases, Response of CCR Defendants to the Order To Show Cause at 27 n.8 (Mar. 17, 1993), *Georgine* (No. 93-0215), so its verdict history does not provide much evidence with regard to punitive or compensatory damages. We note, however, that asbestos cases do account for a substantial percentage of all punitive damage awards in product liability cases. Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 38 (1992).

[34] See *Georgine*, 157 F.R.D. at 337 (showing ranges for each compensable disease). The settlement provides that between zero and three percent of all eligible mesothelioma

The objectors to the settlement argued that the top values of these ranges were themselves below recent historical CCR settlement values and were thus unfair. For present purposes, we accept the district court's implicit finding—which was urged by the settling plaintiffs—that the top end of each NAVR was consistent with historical settlements paid by CCR in approximately 130,000 prior suits. However, these amounts are frozen in place for the first ten years of the settlement regardless of increases in the cost of living. In the eleventh year, the payment ranges *may* be increased, up to twenty percent, under a provision allowing the parties to attempt to negotiate new values and to submit the question to binding arbitration if the negotiations fail.[35]

Two problems with this system are evident. First, from years two through ten of the settlement, future victims will receive, in real terms, less, and possibly far less, than present victims who recover in year one. Second, if history is any guide, the possibility of an increase in year ten does very little to deal with the problem of inflation. Even making the extremely generous assumption that the full twenty percent increase is provided in year eleven, that increase would be lower—generally much lower—than increases in the cost of living in each of the past five decades. Increases in the Consumer Price Index for all urban consumers (CPI-U) during the last five decades were as follows: 1940s—68.6%; 1950s—24.6%; 1960s—28.2%; 1970s—103.4%; and 1980s—64.4%.[36]

Moreover, since an adjustment in the compensation values can only be done after year ten, by the end of year twenty, the erosion from inflation—again, even assuming that the full twenty percent adjustment was given—could be staggering. For instance, in the twenty years prior to January 1994, when CCR began processing claims under the *Georgine* settlement, the CPI-U increased by 215.6%. Thus, there

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claims can be considered "extraordinary" for which the average award may not exceed $300,000. Id. The averages for extraordinary claims also are not adjusted for inflation.

[35] *Georgine SOS*, supra note 25, at 51-52. The settlement does not indicate, nor did the settling parties ever argue, that the possibility of an increase in the settlement compensation values was intended to deal with inflation. More likely, the increase was intended to deal with other changes in the tort system, such as the possibility that future non-CCR asbestos bankruptcies would increase the liability share of the CCR defendants.

In any event, it will be very difficult for class counsel to negotiate an increase, let alone one of 20%, because each defendant has the right to walk away from the settlement at the end of year 10 for any reason, even though the class members are bound to the settlement in perpetuity. Id. at 8, 10, 95-96.

[36] Bureau of Labor Statistics, U.S. Dep't of Labor, Consumer Price Index for All Urban Consumers (Jan. 1913-Jan. 1994).

is a real possibility that compensation values paid under *Georgine* will be of very little real value.[37]

In responding to the inflation problem, the settling parties relied almost exclusively on the testimony of a plaintiffs' asbestos personal-injury lawyer who said that his settlements did not take inflation into account.[38] But individual, or even aggregate, settlements of cases involving current injuries would generally take into account the strength of those cases and current settlement values, not the need to compensate uninjured people well into the future. Although the district court rejected the settling parties' argument,[39] it nonetheless upheld the lack of inflation adjustment, apparently because it comprised only one element of the settlement:

> [T]he CCR defendants presented no evidence . . . to rebut the Objectors' argument that a settlement agreement that settles future cases over the course of ten years should indeed contain an adjustment for inflation. . . . [A] picture perfect negotiator . . . might have insisted on and achieved an adjustment for inflation. However, the Court also finds that the absence of such an adjustment does not render the Stipulation unreasonable or unfair when viewed as a

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[37] To illustrate this problem, the following table shows the current *Georgine* maximums, in the first column, compared to those figures increased by 20%, in the second column. Columns 3, 4, 5, and 6 show the *Georgine* compensation values adjusted by 50%, 100%, 150%, and 200%. The 20% adjustment column provides a useful reference point for considering the inflation problem in *Georgine*, since 20% is the maximum adjustment that can be made for years 11 through 20 of the settlement. As noted in the text, even the 200% increase is less than the increase in the cost of living over the past two decades.

	Unadjusted	20%	50%	100%	150%	200%
Mesothelioma	60,000	72,000	90,000	120,000	150,000	180,000
Lung Cancer	30,000	36,000	45,000	60,000	75,000	90,000
Other Cancer	12,500	15,000	18,750	25,000	31,250	37,500
Nonmalignant	7,500	9,000	11,250	15,000	18,750	22,500

This general problem of inflation is exacerbated by the trend in recent years for inflation for medical care to rise at considerably higher rates than inflation generally. See Bureau of Labor Statistics, U.S. Dep't of Labor, Consumer Price Index for All Urban Consumers, U.S. City Average for "Medical Care" (Jan. 14, 1994) (showing that, in 20-year period ending in December 1993, the consumer price index for medical care rose by 415.6%). Thus, simply projecting past general inflation into the future understates the potential for inflation-driven hardship on class members because medical care, while representing only a small percentage of general inflation indices, comprises a much higher percentage of the cost of living for many people suffering from serious diseases, as would be the case for all eligible claimants in a mass-tort settlement that sought to compensate class members for serious physical injuries. See Theodore Eisenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731, 787 (1992) ("Medical costs are the major component of awards in the serious product liability cases likely to reach trial or likely to result in large pretrial settlements.").

[38] See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 278 & n.24 (E.D. Pa. 1994) (referring to testimony of Robert Hatten), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

[39] Id.

whole in light of the significant advantages presented to the class members.[40]

While the district court was correct in recognizing the ravages of inflation, it erred in failing to appreciate the representational problem. Plaintiffs' counsel did not, as the district court's opinion seems to assume, merely trade off one right of a class member for another right of that same class member (something that is standard fare in any settlement negotiation); rather, in refusing to insist on inflation protection for the future class, class counsel traded off the rights of certain class members for those of other class members. In other words, since CCR was willing to pay up to $1.3 billion to the class as a whole over the first ten years of the settlement—which was the contention accepted by the district court[41]—then the payments to presently injured class members should have been reduced to allow future claimants to obtain equivalent value through inflation-adjusted awards, if CCR were to remain within its $1.3 billion ten-year budget.[42]

3. *The Problem of Abrogation of Claims*

The final adequacy of representation issue in *Georgine* involves the decision of the settling plaintiffs' counsel to exclude certain categories of illnesses from any recovery whatsoever, even though it is undisputed that persons with such conditions presently are recovering substantial amounts in settlements or litigation in the tort system. The justification for such a decision is that there is only a certain amount of money available for compensating class members, and class counsel believe that those who are most seriously injured should receive their compensation and that other "less-deserving" victims should be denied compensation entirely. Further, the settling parties argued that certain nonmonetary benefits, such as waivers of statutes of limitations and the right to be compensated for more than one disease, justified the abrogation of claims that were concededly valid under state

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[40] Id. (citations omitted). The district court considered the impact of inflation only over the course of 10 years, even though the settlement binds class members in perpetuity. It is reasonable to believe, given the age of some class members (one class representative was only 42), and the latency period for some of the relevant diseases, that the settlement will have significant impact for as many as 30 years, at which time the lack of an inflation factor will render some of the awards virtually meaningless.

[41] See id. at 287 (describing defendants' "worst-case" assumption of $1.289 billion over first 10 years).

[42] This would have been difficult to pull off because it would have been obvious that the amounts payable to presently injured claimants were well below CCR's historical settlement values. In other words, as a practical matter, without shortchanging the future claimants, CCR would have had to put up much more than $1.3 billion for the first 10 years.

law.[43] That kind of a determination, in which one group within the class is deliberately favored over another group, raises the most serious questions of adequacy of representation.

The problem of class counsel imposing their notions of which claimants are more or less deserving is most starkly presented by the decision to exclude claims for loss of consortium in both *Georgine* and the silicone-gel breast-implant case.[44] Although such claims are recognized in most states, both settlements eliminated them entirely, even though in some cases a spouse would be able to collect significant damages, for example, where a husband had to quit his job to stay home and care for his injured wife and small children. Both district judges gave short shrift to loss-of-consortium claims in approving settlements that gave all the money to the primary victims.[45] And, not only are the spouses denied all compensation, but they are denied the right to opt out on their own, even though in many states, loss-of-consortium claimants have "independent" claims that may be asserted separately even if the spouses settle their claims.[46] Ironically, the failure to set aside even a small amount of money for loss-of-consortium claims may increase the leverage, and possibly even the legal viability, of claims by husbands (and perhaps even former husbands) to part of the settlement that the women will receive in the silicone-gel breast-implant case, on the theory that claims of spouses are merged into those of the primary victim.

This problem is of a wholly different kind than that involved in the simple class action where the decisions on who will recover, and

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[43] See, e.g., supra note 26 (discussing abrogation of class members' pleural claims).

[44] See infra Part III.B.1.

[45] See *Georgine*, 157 F.R.D. at 278 ("This Court finds that the CCR defendants' historical averages, upon which the compensation values are based, include payment for loss-of-consortium claims, and, accordingly, the compensation schedule is not unfair for this ascribed reason."); In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 WL 578353, at *11 (N.D. Ala. Sept. 1, 1994) (noting that "[s]pecial problems presented in a proposed class action such as this should be viewed as justifying the court's exercise of equitable powers in these circumstances, notwithstanding an arguable interference with the rights of a husband"). But see Bowling v. Pfizer, Inc., 143 F.R.D. 138, 140 (S.D. Ohio 1992) (interim order noting court's concern that settlement does not provide spousal benefits and instructing settling parties to report back on this and other issues); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 169-70 (S.D. Ohio 1992) (approving revised settlement that made substantial awards to spouses).

[46] See Antonios P. Tsarouhas, *Bowen v. Kil-Kare, Inc.*: The Derivative and Independent Approach to Spousal Consortium, 19 Ohio N.U. L. Rev. 987, 990-93 & n.43 (1993) (discussing case law from numerous states where rule is that loss-of-consortium plaintiffs are *not* bound by their spouses' decisions to settle or release their own claims); cf. Schafer v. American Cyanamid Co., 20 F.3d 1, 5-7 (1st Cir. 1994) (state-law claim of loss of consortium not preempted after injured child obtained a substantial judgment from Vaccine Court under National Childhood Vaccine Act, in large part because Vaccine Act provides no separate award for individuals claiming loss of consortium).

for what injuries, were based on factors, such as causation and likelihood of recovery, that are well within the bounds of the law. Here, by contrast, class counsel, in effect, decided, as a matter of policy, that the law was not right and that settlement funds should be allocated in accordance with what class counsel believed was fair, not with what the law would otherwise mandate. This is not a situation in which differences in the law, such as variations in the amounts recoverable in different jurisdictions, are leveled out or overlooked in the interest of economy and efficiency. Those kinds of concerns might apply if there were reductions in the amounts available for these other uncompensated diseases rather than, as in the CCR settlement, the elimination of such payments entirely.[47]

B. Silicone-Gel Breast Implants

During the 1970s, various companies began marketing silicone-gel-filled breast implants in the United States and thereafter abroad. Over time, the industry grew quite rapidly with about eighty-five percent of the implants done for cosmetic reasons and the rest for reconstruction following mastectomies. Approximately two million of the implants were sold, and, although many companies were involved, there were three companies with the principal responsibility for the manufacture and sale of the products. By the early 1990s, women with these implants began claiming that certain autoimmune and neurological conditions were caused by the silicone material in the implants, which leaked out of or "bled" through their shells. Numerous other implantees were harmed not from disease, but because, when the implants leaked, broke, or hardened, multiple surgeries were required to remove the implants and the silicone that had migrated about their bodies.

After a small number of suits against the manufacturers of the implants were litigated, often to quite large judgments, the Judicial Panel on Multidistrict Litigation consolidated the federal cases in Bir-

[47] There are a number of other very serious problems with the fairness of the CCR settlement, but many of them do not flow from the problems of representation that are the focus of this Article. The district court did recognize the problem of continuing supervision of the settlement by attorneys who represent individual clients (discussed infra Part II.B.5 in the context of the silicone-gel breast-implant class action) and, albeit without much discussion, required that class counsel discontinue their supervisory role for the class—which included conducting an annual audit of the claims and appointing arbitrators and medical panel members—if they were to continue to represent individual clients in the claims procedure. See *Georgine*, 157 F.R.D. at 304 (finding potential conflict of interest and noting that "the Court can and no doubt will exercise its power to appoint additional class counsel who can fulfill the vital monitoring and supervisory responsibilities of class counsel . . . and who would not represent individual class members").

mingham, Alabama. The Plaintiffs' Steering Committee—composed of trial lawyers with pending breast-implant cases and operating through a smaller negotiating committee—began settlement discussions with the defendants in an effort to achieve "global peace." Eventually, a settlement was reached in a worldwide opt-out Rule 23(b)(3) class, with the defendants agreeing to put up approximately $4.225 billion over a thirty-year period, approximately forty-five percent of which would be payable in the first three years after the settlement became final. Aside from the question of the reasonableness of the total amount of the payments, an issue which exists in every settlement, the potential conflicts among differently situated class members created a number of difficult problems in managing this settlement. Although as of October 16, 1995, the global settlement had collapsed because of insufficient funds and because Dow Corning sought protection under Chapter 11 of the Bankruptcy Code, the settlement illustrates a number of serious weaknesses in the current system.

The first condition of this settlement, which was essential to the defendants, was that it could not simply resolve all pending cases, but also had to establish a framework for resolving all future cases. The parties agreed that the settlement would run at least thirty years and that any class member could opt out, at least at the time of the settlement. In addition, in order to assure that the amount of litigation over the payments to be received by eligible class members would be minimal, a grid was constructed for five diseases, with several variations based on disease severity, along with a differential in payment based upon age, so that younger women at the time of disease onset received larger payments than older women. The principle of the grid was not seriously in debate, although, as discussed later, the specifics raised a number of questions.[48]

Various constraints determined the eventual structure of the settlement. On the one hand, the defendants were unwilling to create an open-ended liability, such as agreeing to pay all injured women in accordance with the grid. On the other hand, the plaintiffs were unwilling to accept a fixed amount of money, since, when the argument was raised, not even the total number of class members was known, let alone the number of persons with current injuries in each disease category or the number of women who would develop qualifying diseases in the future. Predictions were particularly difficult in this case because the science relating to whether diseases were caused by silicone was still largely undeveloped, and there were great differences in opinion as to causation and as to the likelihood that particular dis-

[48] See infra Part II.B.1-5.

eases would or would not recur at greater or lesser frequencies in the future, especially after the implants were removed (a procedure which would become more likely because the settlement provided for payments for explant surgery that existing medical insurance might not cover).

Because of this uncertainty, it was agreed that, in addition to the usual opt out at the time of notice of settlement, there would be a second opt out. Under this procedure, the claims administrator first would determine whether the amounts available for those persons who had current injury claims that fell within the grid would be larger than the amount provided in the initial payments made by the defendants. If so, unless the defendants made up the difference, which they had the right but not the obligation to do, class members who were not satisfied with the reduced amounts could opt out and maintain their own lawsuits, which could include claims for punitive damages. A similar right of opt out—except that the plaintiff could *not* seek punitive damages—was provided for future claimants if, in any of the thirty years in which future claims would be paid, there was insufficient money to pay those who were entitled to payment in that year under the grid.[49]

1. Allocation Problems

The first potential conflict arose because of questions about the fairness of the allocation between current claimants and future claimants. In theory, each group is entitled to recover the same grid amounts, and each has the right to opt out (although, as noted above, the future claimants were denied the right to seek punitive damages if they opted out—a separate, and significant, matter of contention). But in the real world, there are very substantial differences.

First, and most significant, as in *Georgine*, there was no inflation adjustment included in the settlement, despite the fact that the settlement class would receive payouts for thirty years. Class counsel had

[49] The right of any member of the class to opt out was never seriously in dispute in this case. Obviously, defendants wanted to keep that number as small as possible while at the same time limiting the amount of money they would have to contribute to the settlement. In theory, that would suggest that they would insist that the internal allocations be as fair as possible, so that no one would opt out because of those issues. In reality, the defendants did not press very hard on most of these issues, probably because they recognized that the district court could not disapprove internal allocations without disapproving the entire settlement, and because they figured, quite correctly as it turned out, that future claimants, most of whom did not have lawyers, would not see the allocation problems, let alone be in a position to make meaningful objections and appeal any adverse rulings. Thus, the possibility that defendants would have served as surrogates for future claimants does not appear to have materialized.

the right to make inflation adjustments, but only if there was money left over that had not been used to pay eligible claims (i.e., only if there was excess funding in any particular year—something no one deemed likely) and only if approved by the court. This inflation problem was both simpler and more complicated than its counterpart in *Georgine*. The settlement values in the breast-implant case were not described in terms of compensation ranges, but were specific amounts, depending on the disease, its severity, and the age of the claimant at onset. Thus, the loss due to inflation was very clear because the payment of the nominal grid amounts, for a claimant in year fifteen or year thirty, would be far lower, in real terms, than a payment made in year one.

However, there was one significant twist. As will be recalled, if, in any future year, the nominal amounts on the settlement grid could not be paid because there were too many eligible claimants, those claimants could opt out and sue in the tort system, albeit without the ability to collect punitive damages. But even for the purpose of this future opt out, the amounts on the grid were not adjusted for inflation, so that the right to opt out in future years would, as a practical matter, become less and less valuable. In the early years, claimants would be able to opt out only if they were unable to recover what class counsel believed to be fair compensation under the settlement grid. In future years, however, claimants would be forced to stay in the settlement if the nominal grid amounts could be paid, even though those amounts might be only a small fraction, in real terms, of the grid amounts for year one.

Further, recall that, before the future opt out took place, the defendants would be permitted to make up any shortfall, thereby preventing opt outs. This would be done by supplying the difference between what their agreed-upon obligation for that particular year would be and what it would take to pay the grid amounts to all eligible claimants for that year. In future years, because all that the defendants would have to do is make up the shortfall, which itself would not be adjusted for inflation, the defendants would have the ability to force class members to stay in the settlement and accept greatly diminished real recoveries, without any opportunity for the class members to obtain present-value recoveries in the tort system.

Second, the right to opt out in the future might be a wholly unrealistic one. Although now there are a large number of lawyers who would be ready and willing to represent seriously injured women who have diseases compensable under the grid, in fifteen or twenty years there might be no one willing or with the experience to take on such representation, particularly if there had been no lawsuits for many

years because there was adequate funding at the start, and only in the future did it become inadequate. Thus, the potentially illusory nature of the right to opt out for future claimants created an additional problem with regard to the allocation of the $4.225 billion between current and future claimants (which, as noted previously, put almost half of the payments for grid diseases in the first three years).

What made the situation particularly difficult was that the Negotiating Committee and the Steering Committee principally represented currently injured women, although some of them represented some claimants who had breast implants but either did not yet have symptoms that were compensable under the grid or did not yet have symptoms at all. Most importantly, there was no one on the Negotiating Committee who represented *only* women who did not yet have symptoms that would be compensable under the grid. What creates the problem is that, under current law, the court has no right to reallocate the agreed-upon total as between future and current claimants; its only alternatives are to disapprove the entire settlement or approve it with the unfair allocation.[50]

The third representational problem facing the plaintiffs' Negotiating Committee was which diseases should be included on the grid and which should not. As noted above, at the time of the settlement the science of silicone-gel breast implants was in a relatively early stage, and there was conflicting data, at least with respect to some of the diseases. In the face of this uncertainty, one thing was clear: The more diseases on the grid, the smaller the payment that would go to each claimant. On the other hand, if many diseases were not included, there might be a substantial number of opt outs, which would entitle the defendants to walk away from the settlement. But that possibility was clouded because many victims, even those for whom there was strong scientific evidence of causation, could not reasonably expect to opt out, for a variety of reasons, including serious time-bar defenses, particularly those concerning statutes of repose (which were waived in settlement), the inability to identify the manufacturer of the implant (also waived), and the insolvency of some of the lesser defendants (also disregarded). Thus, for them, it was either the grid or nothing. Further, the difficulty of providing meaningful notice and a meaningful right to opt out to those who might in the future contract a disease not on the grid, while not as intractable a problem as in *Georgine*, was

[50] See, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986) (noting that Rule 23(e) does not give court power, in advance of trial, to modify proposed consent decree and order its acceptance over either party's objection).

certainly a very serious problem which magnified the potential hardship of excluding certain diseases.[51]

After resolving the question of which diseases would go on the grid, the Plaintiffs' Negotiating Committee and the defendants further divided the payments by age at onset, in five-year segments, and then added levels of injury within each disease category. The number of grid slots thereby reached forty, and for each box on the grid a dollar amount was assigned. The general theory of the numbers is discernable: the earlier the onset and the more severe the symptoms, the greater the compensation. The numbers, after payment of attorneys' fees and expenses, range from $105,000 to $1.2 million. Yet there is no explanation of how the numbers or various progressions were derived. To be sure, no precise mathematical model could be employed—especially because there was so little verdict and settlement history in breast-implant cases—but the wide variations in numbers suggested a need for some kind of assurance of fairness within the class and, indeed, between the claimants who were entitled to recover.

To further complicate the matter, approximately fifty percent of the implants were sold abroad. Assuming that the physical injuries of U.S. and foreign women were substantially the same, that did not mean that identically situated persons here and abroad should recover the same amount of money. No one disputed that many foreign legal systems provide either very little likelihood of recovery or much more modest awards when recovery is permitted. Moreover, there was a significant difference of opinion as to whether foreign claimants could have sued in the United States, and, even if a forum could be held in the United States, whether awards would be less generous for non-U.S. citizens because of choice-of-law determinations.

As part of the settlement negotiations, the specific situation of the foreign claimants had to be resolved. The process was complicated by the fact that no member of the Negotiating Committee represented any, or at least more than a very small number of, foreign claimants. Even on the full sixteen-person Steering Committee, there were only one or two lawyers who represented a substantial number

[51] It could be argued that the waivers of defenses also created conflicts because they favored some class members over others. A partial answer to that charge would focus on the reasons for the waivers—eliminating very substantial costs in the claims process by simplifying the liability inquiry—a gain that would redound to the benefit of the entire class. But there was also no reason to believe that the negotiators favored those who needed waivers because there was no reason to believe that their clients were predominately, let alone entirely, in that category. That, however, is precisely the situation for the negotiators and the future claimants and hence explains why one set of distinctions can properly be assumed to be fair, while the other presumptively raises questions of unequal treatment.

of foreign victims. Whether that representational void substantially affected the outcome of the negotiations can only be surmised, but the fact remains that, when the settlement was submitted to the court, the solution to the foreign-claimants problem was that there was a cap on the total amount of money that could be paid to foreign victims equal to three percent of the total settlement. It is undisputed that that percentage had no specific rationale to support it, let alone that it constituted a measured judgment concerning the allocation of total likely recovery as between the foreign and U.S. residents. Rather, it appears to be a number that the Steering Committee believed would not be so great as to cause domestic claimants to object, and would be sufficiently large to encourage at least some foreign claimants to stay in.[52]

While dealing with foreign claimants is difficult, issues of internal allocation become even more complicated as to future claimants. First, the Plaintiffs' Steering Committee insisted on including a provision which would permit additional diseases to be added to the grid, after a thorough scientific review and with court approval. However, there was no provision allowing diseases to be removed, regardless of how conclusive the scientific evidence was that the particular disease was unrelated to silicone-gel breast implants. The effect of this one-way street is to create a risk that future claimants will have to share their funds with a larger group, but with no possibility of the group ever becoming smaller, even if those whose diseases were removed from the grid were given the right to opt out.

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[52] The approach taken in the breast-implant litigation is rather different from that taken in the heart-valve settlement. With respect to the modest payments to resolve the claims of current nonphysical injuries resulting from defective heart valves, all class members—foreign and U.S.—were entitled to the same payment. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 149 (S.D. Ohio 1992). The same was true for reoperation benefits for the explant of high-risk valves and other medical benefits under the settlement. Id.

The only distinction drawn between U.S. and non-U.S. class members was for valve fractures, a tragic event which results in death two-thirds of the time and serious injuries in most of the other cases. There, if U.S. class members' valves fractured, they automatically were entitled to between $500,000 and $2 million depending on their age, number of dependents, lost wages, and other factors, but could opt for binding arbitration or the tort system. For foreign claimants, in addition to the same arbitration and tort options, the settlement guaranteed minimum recoveries—$200,000 in common-law and other developed countries and $50,000 in the developing world—and appointed a Foreign Fracture Panel of foreign law experts to canvass tort settlements in the various countries of the world and to set compensation rates in four groupings of countries, subject to court approval. Id. at 150. There was no overall percentage cap for foreign claimants so that, at least in theory, the difference in recovery for foreign and domestic claimants was roughly based on differences in tort systems. Although the breast-implant settlement also contemplated a separate foreign grid, the three percent cap would prevent, as a practical matter, achieving what was achieved in the heart-valve case, unless most foreign claimants opted out.

Second, those women whose current diseases were not on the grid at the time of the settlement could at least make an informed choice about whether they wanted to opt out and take their chances in court. They might have difficulty proving their cases, but it was better than nothing since the grid would absolutely preclude them, no matter how strong the scientific evidence concerning their diseases was at that time. Their only reason to stay in, aside from some modest medical payments and the possibility of a small payment for pain and suffering for nongrid diseases, was that they might become very unlucky and develop a disease that was on the grid, and be compensated in that way.

Two diseases fell prominently into this noncompensatory category: cancer allegedly caused by silicone gel, and breast cancer that was masked from effective mammography by the presence of an implant. There were reasons given for not including these two diseases on the grid, some having to do with the difficulty of showing a causal connection and others having to do with the size of the payments that an inclusion of that disease would require from the available settlement fund. As to cancer alleged to be caused by silicone gel, at present there is not a great deal of evidence that such a causal connection exists.[53] Thus, although it was possible that cancer might be added to the grid in the future, that seemed highly unlikely since cancer, particularly breast cancer, is so widespread that, in a settlement where causation is completely eliminated, if cancer were placed on the grid, it would result in many class members being compensated even where there was no connection between cancer and the implant.

With respect to the breast-cancer masking issue, it seems certain that the Committee's decision not to include this disease on the grid is final, since there is already good evidence that breast-cancer masking is a serious problem with the implants.[54] The problem of possible overcompensation, given the "no causation" nature of this settlement, could have been dealt with to some degree by requiring medical evidence of breast cancer, one or more negative mammograms, and a doctor's statement that, in fact, the woman had already contracted breast cancer or a precancerous condition that otherwise would have

[53] However, the Food and Drug Administration believed that there was enough evidence of a possible connection that, in 1991, the agency required manufacturers to provide data on cancer causation in their applications for any future approval of the devices. 56 Fed. Reg. 14,620, 14,624 (1991) (to be codified at 21 C.F.R. 878) ("After review of all available information, the agency continues to believe that carcinogenicity is a potential risk that must be assessed . . . .").

[54] Affidavit of Sidney M. Wolfe, M.D., submitted by Public Citizen as amicus curiae (June 14, 1994), In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-1000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

been visible on a mammogram at the time of the negative mammogram.[55] Since breast-cancer masking will never be compensated under the present settlement, we think it clear that masking claims should not have been precluded by the settlement; that is, class members—whether or not they opt out—should be free to pursue such claims in court. At the very least, a class member should have the right to pursue these claims through a subsequent opt out if she contracts breast cancer.

In sum, for the current claimants, i.e., those with cancer thought to be caused by silicone or masked by the implant, the choice to opt out was not an easy one, but at least the options were clear. On the other hand, for those women who did not have any current symptoms (cancer or otherwise), the exclusion of those diseases from the grid placed them in a situation where, if they stayed in and contracted cancer, they could no longer elect to opt out, *and* the grid would not pay for their illnesses. Of course, the only rationale that could lead a future claimant to opt out now would be if she believed that she would *not* get a disease on the grid, but might get a disease that was not on the grid, and wanted to guard against that possibility. Surely, no one would consider the right to opt out in that situation meaningful or the choice to get out a rational one, yet that is, in effect, the choice that future claimants were given when they were given the right to opt out.

2. *Problems of Fee Distribution*

In addition to these questions of internal allocations among claimants, there is a very important issue relating to attorneys' fees that is unique in this type of litigation and quite different from the ordinary fee problems that exist in every class action. The fact that this class action is one of the largest on record, involving large numbers of attorneys, many of whom claim to have created some portion of the common fund, would make the fee determination difficult under any circumstances. Moreover, if fees for creating the fund are sought as a percentage of the $4.225 billion recovery, which appears

[55] Another complication is that the negative mammogram might well have been the fault of the mammographer, since the quality of mammography varies widely from practitioner to practitioner. Cf. Gerald K. Kuester & Sidney M. Wolfe, M.D., HRG Report on Screening Mammography and Ranking of Eleven Metro Washington Area Facilities (Public Citizen Health Research Group, Washington, D.C.), July 1991, at 17-26 (ranking quality of mammographers in Washington, D.C. area). See generally Mammography Quality Standards Act, 21 C.F.R. § 900 (1995) (accreditation and quality standards for mammography facilities).

required by Eleventh Circuit precedent,[56] a change up or down of even one-tenth of one percent amounts to $4,225,000, making very small percentage adjustments very significant.

The matter becomes much more difficult because there are not only the fees of class counsel to consider, but also fees claimed by attorneys for individual members of the class. The latter does not arise in most class actions as victims are not usually individually represented, generally because the amounts of money to be received are so small or because demonstrating the entitlement to the funds does not require a lawyer's assistance. Here, by contrast, the grid amounts originally ranged from $200,000 to $2 million (before attorneys' fees). Since most of the women who are current claimants are represented by counsel, the question to be faced is how to assure reasonable, but not excessive, compensation for representation of individual clients.

Several factors complicate the calculation of reasonable fees. First, many personal injury lawyers do not maintain time records, and thus any effort to award fees on a time basis for individual cases involving current injuries, particularly those that arose before the multidistrict litigation (MDL) transfer order, would have met with massive resistance and perhaps created serious unfairness, if not a large number of opt outs. Second, there were substantial differences in the risks assumed for representation, depending on when the lawyer took on the case. Many class members had their own lawsuits filed several years before the MDL case was even opened, while others signed up clients either when the settlement was preliminarily announced in September 1993, or at various times thereafter, including in early March 1994, when the settlement was tentatively presented to the court for approval. Third, much of the work that was done prior to or during the MDL, even by individual lawyers, was not applicable just to a single case, but helped all of the clients involved. Thus, reviewing depositions, analyzing medical testimony, and attending court hearings, to name just a few, would appear to be useful to all of the lawyers' clients, whether in the class or outside of it.[57]

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[56] See Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991) (vacating district court's method of calculating attorneys' fees and ordering fees based on percentage of common fund award).

[57] Many of the lawyers for the Plaintiffs' Steering Committee did extremely valuable work on medical and other liability issues that is available to other plaintiffs and their lawyers. For instance, several million documents are available at low cost on CD-ROM, which saves other lawyers and their clients hundreds, if not thousands, of hours in discovery, not to mention storage space and out-of-pocket costs associated with obtaining the information. Several years prior to the MDL, Public Citizen's Health Research Group—a part of Public Citizen, where the authors are employed—established a clearinghouse of breast-implant documents, which were made available to plaintiffs' lawyers at a modest

Some law firms represent several thousand claimants, while other firms represent only a handful. Furthermore, some counsel who represent individual women have done a substantial amount of work for them, even though their injuries do not show up on the grid, although they may be entitled to some modest payments from the other ancillary funds created under the settlement. Should these lawyers receive nothing for their work on those cases, on the theory that that is what contingency litigation is about, or is there some other principle that ought to apply? The problem is further complicated because there are both large class fees and large fees based on individual contracts with victims, and because some of the same lawyers did both class and individual work, some did only one, and some only the other.

Judge Pointer took a number of promising steps in an effort to solve these problems, but, given the current status of the settlement, it is impossible to evaluate how successful they would have been. First, he modified the original grid, and some of the other payment funds, to set aside a maximum amount for all attorneys' fees and administrative expenses equal to approximately twenty-four percent of the total amount of the settlement. As a result, the grid amounts were *net* of any claim for attorneys' fees and costs and were represented to be such in the class notice. Judge Pointer's assertion of jurisdiction over the fees of individual counsel, as well as class counsel, was appropriate to protect against overreaching, and his creation of a twenty-four percent maximum was a step in the right direction, although there is no basis for determining at this time whether that figure was too generous to counsel or about right.[58]

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cost, and held meetings of plaintiffs' lawyers to provide updates on medical developments. The Health Research Group had done the same with respect to the heart valve at issue in Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992), as well as for several other problem drugs and medical devices.

[58] This seems to us to be a far better approach than what occurred in *Georgine*, where the Settlement Agreement itself stated that fees would not exceed 25% (with the fees in a very small number of high-end "extraordinary" claims limited to between 20% and 25%), *Georgine SOS*, supra note 25, at 93, but gave the district court no ability to rein in excessive fees in individual cases. In some cases—for instance, where exposure to CCR products is in serious dispute—substantial work may be necessary, whereas in other situations, a 25% fee will be excessive. For instance, in many mesothelioma cases, submitting medical records and filling out the claim form will be all that is necessary, allowing the attorney to pocket 25% of the $20,000 to $200,000 payment range for very little work. In our view, it is no answer that even higher percentage fees are charged in the tort system. First, for some asbestos-related diseases where medical causation is a serious issue in the tort system, that issue was waived in *Georgine*. Second, overreaching in the tort system is no reason for the court not to exercise its fiduciary responsibilities under Rule 23(e).

In the heart-valve litigation, neither the court nor the settlement agreement addressed the issue of fees for individual claims. The settlement agreement provided that class members who suffered valve fractures were entitled, upon submission of proof that the fracture

Judge Pointer also established a committee of attorneys, plus an activist from one of the victims' rights groups, to prepare recommendations on how to handle attorneys'-fees matters. As part of its work, this committee had planned to survey attorneys for the class and for individual class members as to the nature of the work performed, the types of cases they have, their fee arrangements, and the like. At least temporarily, the committee's efforts to gather information have been put on the back burner, but perhaps only until other issues can be resolved. Whether it will be possible to go ahead without this information, or whether the information will be obtained at a later date, is yet to be determined. At this stage, no concrete solutions to these difficult fee issues have been proposed, let alone resolved.

3. *Problems of Applicable Law*

Another issue that surfaced at the fairness hearing points out the inherent difficulty in trying to resolve cases like this on a nationwide basis. During the course of settlement negotiations, it was no secret to either side that the applicable law was not uniform throughout the United States and that, in the tort system, some victims might receive more money than others would because of which law was applicable. On the other hand, there was very little experience in litigated breast-implant cases at the time the settlement was struck, and it would have been difficult to craft meaningful distinctions among class members on the basis of differences in applicable law, let alone to assign monetary values to those distinctions. The settlement ultimately reached did not make any such distinctions (other than for foreign claimants), and that decision seems sensible, not only because there was not much data upon which to make that decision, but because any other outcome would have produced considerable complexity with no clear countervailing benefit.[59]

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occurred, to immediate payment of compensation (ranging from $500,000 to $2 million for U.S. claimants, depending upon number of dependents, lost wages, etc.). See supra note 52. In our view, the settlement agreement should have made clear that no percentage fees may be charged against this award, since no contingency exists, and that class counsel will represent class members at no charge to them (although class counsel would be entitled to a small fee for this service as part of his overall fee from the common fund). If the class members desire separate representation to secure payment under the settlement, they are free to obtain it, but even there the lawyer should be permitted to charge only a reasonable hourly fee. Because no controls of this type are in place, we are concerned that serious overcharging may occur.

[59] In *Georgine*, one of the factors that may be taken into account in determining the amount of the award to each eligible claimant within the settlement ranges is the location of the forum in which a suit could have been maintained by a class member, a position that seems appropriate in light of CCR's long settlement history and supporting data for every jurisdiction. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 267-77 (E.D. Pa. 1994),

But notions of uniformity appear to have been abandoned when various insurance companies raised the issue of subrogation in connection with the settlement. These companies claimed that, under the applicable law, the amounts that the class members would receive under the grid would be, in part, compensation for medical expenses (although there is no internal designation of what the payments were for or how they were calculated). According to the insurers, at least some portion ought to be paid to them since they had paid, and would be called upon to pay, various class members' medical expenses over the years. The insurers did not identify specific women, let alone specific amounts for which insurance payments had been made, but, rather like the settlement itself, treated the matter on a classwide basis and asked that the court determine that they were entitled to some subrogation.

One of the responses made by class counsel was that the laws of each of the states on subrogation were quite different and that there was no basis for the insurance companies, subsequently joined by the federal government on behalf of medicare, medicaid, and other programs, and by some states raising similar claims, to be entitled to any money from the settlement fund. Instead, according to class counsel, the insurance companies and governments should raise any claims in individual actions in the location where their insureds reside.

Aside from the inconsistency of both defending and attacking nationwide treatment for the class, class counsel's decision to oppose the insurers on that ground raises serious issues of fairness among the class members. While class members with potentially small amounts owed to insurers would no doubt be happy to keep every penny that the grid would allow them, on the theory that, as a practical matter, the insurance companies would leave them alone, that might not be true for a woman whose insurance company had paid $100,000 on her behalf and then writes her after the settlement check arrives, demanding payment and/or threatening to cut off future benefits. For that person, dealing with the issue as part of the settlement, particularly if there were an opportunity to resolve the issue for substantially less than the full amount of payments, would seem quite attractive and yet was foreclosed by a decision of class counsel. Furthermore, ignoring

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vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

Although, as noted, we believe the breast-implant settlement did not err in avoiding distinctions based on applicable law, where there are clear differences that would have a substantial effect on the relief to be accorded certain class members in a nationwide class action, the court is required, in our view, to consider those differences before approving the settlement. See infra Part III.B.2.c.

the subrogation issue at settlement will almost surely make life more difficult for women who do not have lawyers and thus must deal with the insurance companies on their own at some time in the future. At the very least, class counsel's strategy raises substantial issues about adequacy of representation because of the different situations of the various members of the class.[60]

4. Problems of Timing of Payments

Another problem arises from the portion of the agreement which makes the defendants' payments keyed to the date when the approval of the settlement is final and no longer subject to appeal. Under the settlement, that date is the trigger date for the first substantial payment for compensation to class members and, equally important, each subsequent annual payment is keyed to the original payment date. Thus, the further in the future that first payment is made, the further will be each payment down the line. This is obviously in the financial interest of the defendants, but what makes it so inappropriate is that it acts as a hammer to be used against class members who ask for additional time to prepare for the settlement hearing, or to consider appealing from adverse rulings on the approval of the merits of the settlement.

Of course, defendants should be entitled to insist that no money be paid out under the settlement until there is no further chance for appeal, but that does not mean that courts should permit settlements without any accrual of interest from the time that the settlement has been agreed upon, or some other fixed date, until the first payment is due. There can be little doubt, based upon our experience in cases of this kind, that the reason that plaintiffs' counsel agreed to this condition is because they are more interested in the settlement being approved than they are in fairness to all class members.

5. Problems of Administering the Settlement

A final area where issues of fairness and representation persist involves the continuing administration of the settlement after all appeals are rendered and the money becomes payable. In a case like

[60] Avoidance of the subrogation issue, at least for now, is also somewhat at odds with the way in which the court dealt with the fees issue. As noted earlier, originally the grid amounts were higher, with the expectation that fees would be deducted from that amount. However, the court, acting on its own, reduced the grid amounts by 25% across the board, allowing the class to be notified that the grid amounts were net recoveries (subject only to the potential for a ratcheting down and further opt out). If, however, there are valid subrogation claims, which there surely are in some cases, then the grid amounts are not necessarily net recoveries.

this, there inevitably will be questions, aside from the addition or subtraction of compensable diseases, that must be decided. It obviously makes sense to have persons familiar with the process participate in an advisory role to the court as long as the claims process is ongoing. But a potential conflict of interest arises if those members of the ongoing Steering Committee continue to have clients of their own who are seeking money from the fund. Thus, for example, if the question is whether a disease should be added, can lawyers whose clients have that disease fairly pass on that request? And can they possibly fairly represent people who would like to have a disease added when it is in the interest of their clients not to have further additions to the grid? This and other questions, such as those relating to ongoing matters involving attorneys' fees, should be resolved only by lawyers who can adequately represent all of the class members, without any favoritism towards those whom they also represent in an individual capacity.

C. The GM-Truck Class Action

This national class action grew out of a series of statewide and regional class actions that were transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation in late February 1993.[61] Plaintiffs were owners of General Motors (GM) trucks that were prone to explosion in side-impact collisions because the gas tank was mounted outside the frame of the vehicle. Plaintiffs claimed economic damages for the alleged diminished value of their vehicles and argued that GM should repair the vehicles or pay to correct the alleged safety defect. The settlement was much less complex than those in the asbestos and breast-implant cases, as the class included only currently injured people, and it did not involve the settlement of personal-injury cases, which were specifically excluded from the settlement.[62] However, this case provides a good example of a relatively recent settlement class action phenomenon, in which Rule

[61] The MDL settlement, which comprised truck owners in every state but Texas, was approved by the district court, but was reversed and remanded by the Third Circuit. In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 846 F. Supp. 330 (E.D. Pa. 1993), rev'd, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995). An identical settlement, applicable only to Texans, was approved by a state trial court in Texas, but reversed by the Texas Court of Appeals. Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. Ct. App. 1994). The Texas Supreme Court recently affirmed the Texas Court of Appeals decision, General Motors Corp. v. Bloyed, No. 94-0777, 1996 WL 51180 (Tex. Feb. 9, 1996), principally on the grounds that there was no notice to class members of the amount of attorneys' fees. Id. at *8. The Texas Supreme Court remanded the case to take up several other issues on which the Court provided guidance. Id. at *9-*12.

[62] *In re General Motors*, 846 F. Supp. at 333.

23(b)(3) cases settle for items other than cash—particularly coupons for the purchase of additional products made by the defendant—thereby raising the question whether large segments of the class are releasing their claims without obtaining any value.

The GM-truck case settled shortly after it was sent to Philadelphia, with the defendant agreeing to class certification, but only for the purposes of settlement and specifically contending that the class could not be certified for litigation, as in the asbestos and breast-implant cases. The settlement provided that each class member could, upon request, receive a $1000 certificate to purchase another GM truck or van within a fifteen-month period.[63] Alternatively, the class member, after obtaining the $1000 certificate, could trade it in for a $500 certificate, for use during the same redemption period, if the class member designated, in a notarized statement, a specific third party to be named on the certificate. The $500 certificate could be used only by the third party named on it to purchase a full-sized GM truck, but not the less expensive trucks or vans for which the $1000 certificate could be used, and came with a host of other restrictions, including that the ubiquitous GM rebates and financing incentives—almost all of which exceeded $500—could not be used in tandem with the certificate.[64]

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[63] The class member would not be sent the $1000 certificate, but rather would have to fill out a form and send it to GM which then would send the certificate to the class member. Objectors' marketing experts opined that this procedure would greatly diminish the number of class members who would ultimately redeem certificates, and would effectively reduce the redemption period from the nominal 15-month period to about one year. Declaration of Jack Gillis ¶ 10, Joint App. at 1888, In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 767 (3d Cir.) (No. 94-1207), cert. denied, 116 S. Ct. 88 (1995).

In addition to the representation problems discussed in the text, the GM settlement also presents the question of whether it is appropriate, under any circumstance, for courts to approve settlements in which the relief granted is linked to the purchase of the defendant's product, and which thus appear to involve the court in marketing that product. Cf. *Bloyed*, 881 S.W.2d at 431 (rejecting Texas GM settlement, among other reasons, on ground that defendant would receive marketing windfall and would suffer no detriment); *In re General Motors*, 55 F.3d at 808 (agreeing with Texas appellate court's characterization of settlement in *Bloyed*).

[64] Supplemental Declaration of Jack Gillis ¶ 2, Joint App. at 1895-97, *In re General Motors* (No. 94-1207); see *In re General Motors*, 55 F.3d at 809 (GM's rebates can "completely erode[ ]" value of certificate, leaving class member "no better off than the general public"). The Certificate Clearing Corporation—a national clearinghouse that creates secondary markets for truly transferable certificates and has handled certificates in several other national class actions—refused to handle the certificates on the ground that the encumbrances to transfer were so great that a secondary market could not be created. Affidavit of Stephen Schoenfeld, Joint App. at 1931-36, *In re General Motors* (No. 94-1207); see *In re General Motors*, 55 F.3d at 809 ("[T]he one-time transfer restriction also precludes the development of a market-making clearing house mechanism."); In Camera, 16

This settlement raised a serious representational problem because the relief obtained in the settlement was not sought in the complaint and could not have been obtained if the case had been litigated to judgment. Thus, because the settlement did not provide the relief ordinarily granted in a Rule 23(b)(3) class action—money damages, which are of equal value to all class members—it raises the question whether the relief which is granted will be available, as a practical matter, to all, or even most, members of the class.

As it turned out, according to the marketing expert hired by *class counsel*, because of the high cost of purchasing a vehicle, the short redemption period, and the restrictions on transfer, *more than half of the class* would obtain no value at all from the settlement.[65] Importantly, the fact that less than half of the class would obtain anything from the settlement bore no relation to the strength or weakness of that class member's claim and, as the Third Circuit pointed out, was a by-product of the fact that the settlement disadvantaged poorer members of the class who could not afford to purchase a new vehicle.[66]

By contrast, in some settlements, class members are excluded from the class definition because their claims are very weak or nonexistent.[67] Thus, in *Georgine*, class members whose claims were time-barred at the time of the filing of the class action complaint will not recover under the settlement.[68] And, in both *Georgine* and the

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Class Action Rep. 369, 485 (1993) ("Without such market-makers, most potential coupons sellers will have no buyers.").

[65] The expert concluded, based on a marketing survey he had conducted of current GM-truck owners, that 46% to 49% of the class members would gain some value from the certificate, *In re General Motors*, 55 F.3d at 807, either by using it themselves or by transferring it to others, a conclusion adopted by the district court, but severely questioned by the Third Circuit. See id. at 807-10. Shortly after the settling parties' expert provided his opinion to the district court, one part of his opinion—that 13% to 16% of the class would transfer the coupon to relatives who would, in turn, use the coupon—proved seriously in error. The settlement agreement required class members to state, by a certain date, that they wanted to transfer the certificate to relatives outside of their households, and only 0.8% of the class did so. Of course, it is possible that some class members would want to make intrahousehold transfers to family members. However, on the generous assumption that the 0.8% figure would double because of intrahousehold transfers, objectors' marketing experts estimated conservatively that the original estimate was at least 800% to 900% overstated, a conclusion that the settling parties did not counter. See Supplemental Declaration of Jack Gillis ¶¶ 6-7, Joint App. at 1898-99, *In re General Motors* (No. 94-1207).

[66] *In re General Motors*, 55 F.3d at 808.

[67] See, e.g., Skelton v. General Motors Corp., 661 F. Supp. 1368, 1396 (N.D. Ill. 1987), aff'd in part and rev'd in part on other grounds, 860 F.2d 250 (7th Cir. 1988), cert. denied, 493 U.S. 810 (1989) (in settlement providing payment of unreimbursed transmission repair costs, vehicle owners whose first transmission repair was 50,000 miles after first use were excluded from class, presumably on ground that transmission failure after that point could not be fairly attributed to defendant's conduct).

[68] *Georgine SOS*, supra note 25, at 49-50.

breast-implant case, class members who do not contract compensable illnesses in the future, may not, of course, receive awards under those settlements' disease compensation programs. As indicated previously, we have grave reservations, especially in *Georgine*, about the exclusion of certain illnesses from compensation, but our point, for present purposes, is that the *Georgine* and the breast-implant settlements profess to condition the relief and the amount thereof on the satisfaction of purportedly objective criteria. In the GM case, however, the settlement assumed that all class members were injured equally, but paid a benefit that cannot be shared equally, and indeed one which most class members could not partake in at all. It is as if the settlement provided monetary relief of, say, $500 to half the class, and then picked the "deserving" class members by the turn of a roulette wheel, or, more accurately, by the toss of a set of dice loaded against poorer class members.

There is one other aspect of the GM settlement that raises a serious representational problem. About forty percent of the vehicles were the property of fleet owners, i.e., businesses and particularly governments that owned many trucks. Numerous state, city, and county governments, including Pennsylvania, New York, and New York City, objected to the settlement, making essentially two arguments.[69] First, several governmental units, including New York, which owned more than 1200 GM trucks, argued that they stood to get nothing from the settlement because, under competitive bidding requirements, they would not be able to use the certificates at all, making cash the only appropriate remedy. The district court acknowledged this argument and did not counter it, noting only that, if the governmental objectors' lawyers were clever, they ought to be able to figure a way around the competitive bidding rules.[70]

Second, some governments argued that the short redemption period particularly prejudiced them because they could not possibly use a reasonable number of their certificates during that time period. They argued that they had purchased large fleets of trucks and, thus, whatever injury had been suffered by the class should be calculated in rough proportion to the number of trucks owned. This argument had some force since it seemed clear that, had the settlement been for cash, say $200 in cash instead of a $1000 certificate, the governmental

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[69] Several governments did, however, appear as amici in the Third Circuit urging approval of the settlement.

[70] In re General Motors Corp. Pickup Fuel Tank Prods. Liab. Litig., 846 F. Supp. 330, 340-41 (E.D. Pa. 1993) ("The court is confident that ingenious counsel will be able to structure bidding requirements so that the governmental entities can take full advantage of the certificates."), rev'd, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

units would have received $200 for each vehicle that they owned. Here, the settling parties agreed that, since the Pennsylvania Department of Transportation owned 1700 GM trucks, it had the right to request 1700 certificates, but there was little question that the state would not be able to purchase a significant number of vehicles over the redemption period.[71]

In remanding the case to the district court for further consideration, the Third Circuit apparently agreed with the governmental objectors on both scores. First, it stated that the problem of using the coupons in governmental competitive bidding processes could well make the coupons useless to some public agencies and that the district court's dismissal of this argument was "far too cavalier."[72] Second, the court of appeals noted that the short redemption period and the barriers to transfer of the coupon were particularly harsh on the fleet owners who, by virtue of the large number of vehicles owned, had the strongest claims.[73]

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[71] The district court rejected this argument on the ground that the governments were no different than individual class members who could not afford a new truck, maintaining that the fleet owners could try to sell the $500 certificates to third parties under the settlement's certificate transfer procedures. Id.

[72] *In re General Motors*, 55 F.3d at 808-09 (citing, e.g., The Louisiana Public Bid Law, La. Rev. Stat. Ann. § 38:2212(A)(1)(a) (West 1989)).

[73] Id. at 800-01, 809 (discussing inadequacy of representation for fleet owners and individual owners within class). While the Third Circuit's decision is heartening, it is unclear whether it will be adopted elsewhere. The authors are currently involved in opposing another nationwide vehicle class action involving 1984-1986 Ford Mustang convertibles in which the plaintiffs allege that defectively designed side door panels cause the vehicles to suffer from water leakage into the passenger compartment, excessive wind noise, chipping paint, and a risk of personal injuries in certain collisions. Moreover, the settlement did not propose to fix the vehicles even though Ford had produced a repair kit that it first installed on the 1987 model and which Ford dealers will install for $600 on the 1984-1986 models. Notice of Class Action and Proposed Settlement at 1-2 (Jan. 20, 1995), Dale v. Ford Motor Co., No. 661492 (Cal. Super. Ct. Orange County); cf. *In re General Motors*, 55 F.3d at 811 (existence of viable repair contested). The case was resolved for a $400 *nontransferable* coupon, good for only one year, toward the purchase of a new Ford. The trial court approved the settlement over objections similar to those made in *In re General Motors*. Dale v. Ford Motor Co., No. 661492 (Cal. Super. Ct. Orange County Apr. 14, 1995). An appeal is pending. Dale v. Ford Motor Co., No. G01795 (Cal. Ct. App. filed June 13, 1995). See generally Barry Meier, Fistfuls of Coupons—Millions for Class-Action Lawyers, Scrip for Plaintiffs, N.Y. Times, May 26, 1995, at D1, D5 (quoting attorneys for Chrysler Corporation to effect that coupon settlements involve "soft money" that does not negatively affect "the bottom line," and describing Chrysler settlement involving $400 nontransferable coupon toward purchase of new vehicle in which only about one percent of class redeemed coupon); Wash. Post, Oct. 14, 1995, at H2 (describing tentative settlement involving $1.275 billion in coupons, good toward purchase of new or used Toyota, to settle class action claiming that Toyota dealers overcharged customers).

III
PROPOSED SOLUTIONS

A. Suggested Procedures To Lessen Representation Problems

1. Separate Representation for Future and Other Class Members

In order to avoid some of the representational problems currently faced by future class members, we believe that the Rules should be amended to make clear that the original counsel who brought the action may not ordinarily represent both presently injured and yet-to-be-injured class members. Counsel involved in negotiating a class action settlement should be required to report to the court as soon as they anticipate the possibility of a settlement that contemplates binding future class members. At that point, the court should appoint separate counsel to represent future class members. That person or persons should be someone who represents no presently injured claimants.

It might be argued that this Rule would bar the very persons competent to represent the future clients—those with experience representing individuals who have been injured by the product. However, we believe that this concern is overblown. First, the principal objective would be to appoint someone who is experienced both in class actions and in personal-injury litigation, and who has the breadth and determination to research the relevant factual issues. In *Georgine*, after class counsel was found by the district court to be laboring under a potential conflict by representing both the class and individual claimants in the ongoing administration of the approved settlement, class counsel moved the court to appoint as representative of the class an experienced personal-injury lawyer who was not presently involved in asbestos litigation, and thus who had no pending cases against the CCR defendants. Class counsel represented to the court that this new counsel was up to the task of monitoring the complex *Georgine* claims procedure. We do not doubt counsel's assertion in that regard, and assume that this same person could have represented the future class members during the negotiation process.

Second, nothing would prevent separate counsel from hiring consultants and medical experts for the purpose of determining suitable relief for future class members.[74] In short, we believe that the courts should be able to find many suitable unconflicted attorneys to represent a "futures" class.

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[74] Cf. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 160 (S.D. Ohio 1992) (objectors' concern that class counsel had no experience in heart-valve cases was alleviated by class counsel's retention of additional counsel with such experience).

Moreover, while perfection may not be obtainable, appointment of a "futures" representative who is not representing presently injured clients, even if he or she is lacking experience in some respects, is far preferable to one all-purpose class counsel who simply cannot be all things to all people. As noted earlier, the "futures" classes in *Georgine* and the breast-implant case should have had attorneys to argue that some of the money should be set aside to pay for inflation,[75] hardly an argument that would require the skills of a trial lawyer intimately familiar with medical issues in the asbestos or breast-implant cases.

As we discuss below, the court should also undertake a substantive review to protect the future class.[76] However, the appointment of counsel dedicated to representing future class members will, in itself, go a long way to correcting the worst abuses. Such counsel would not, as occurred in the breast-implant case, have agreed to a thirty-year settlement without some type of built-in inflation factor. Similarly, a "futures" representative would take a very different view on notice issues—especially in environmental toxin cases where notice to "futures" is by its nature futile in some circumstances—than would counsel who represent presently injured clients who, by definition, have notice, if not of the action, at least of their injuries and their exposure to the product. In addition, counsel for future class members might insist on a viable back-end opt out, such as that available in the heart-valve settlement, where future class members are given an opportunity, if their valves fracture, to choose among fixed payments, binding arbitration, or the tort system.[77] Moreover, such counsel might argue that certain future class members, who are particularly susceptible to problems of notice, such as mesothelioma victims whose illnesses can arise based on brief exposures in the distant past, are entitled to back-end and other rights that other future class members would not have.[78]

The need for appointment of separate representatives at an early point in the process is not limited to the problem of future class members, although that situation is perhaps the most obvious. As soon as plaintiffs' counsel anticipate the possibility of a settlement that may

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[75] See supra text accompanying notes 33-42.

[76] See infra text accompanying notes 122-27.

[77] See *Bowling*, 143 F.R.D. at 150 (summarizing rights retained by class members under settlement).

[78] There are, of course, situations where one "futures" representative might not be sufficient. If, as may be the case with mesothelioma claimants, circumstances vary dramatically among future class members, a "futures" representative may be necessary for each "futures" subgroup.

adversely affect distinct subgroups in the class, they should inform the court, which would then appoint separate representatives for such subgroups. Perhaps the clearest example other than that of the "futures" is that of the foreign claimants in the breast-implant case, whose interest in the overall fund was capped at three percent, but who had no representation on the Negotiating Committee, which was comprised of lawyers who represented domestic claimants. Similarly, in *Georgine*, since class counsel was aware that class members suffering from pleural disease would be treated differently than historically had been the case, having themselves just settled hundreds, if not thousands, of pleural cases for cash prior to the settlement,[79] separate representation for the pleural claimants would appear to have been necessary.

The need for a separate class representative—particularly in cases involving future claims—highlights one of the problems with class actions that are settled prior to the filing of the complaint. As was the case in both *Georgine* and *Ahearn v. Fibreboard Corp.*,[80] an asbestos settlement class action for which certification was sought under the non-opt-out provisions of Rule 23(b)(1)(B),[81] one set of plaintiffs' counsel, purporting to represent all presently injured class members and all future class members, agreed to a settlement and then immediately thereafter submitted the settlement for the court's approval upon the filing of the complaint. In *Georgine*, the court did not appoint additional class counsel, nor did it take any other procedural steps to protect the rights of the future class members in the settlement negotiation process or during the process leading up to the fairness hearing.[82]

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[79] See supra note 27 and accompanying text.

[80] 162 F.R.D. 505 (E.D. Tex. 1995), appeal docketed, No. 95-40635 (5th Cir. Aug. 17, 1995).

[81] See Appendix A to this Article concerning the use of Rule 23(b)(1)(B) in mass-tort settlements.

[82] The district court in *Georgine* did, of course, find that the settlement was fair to the "futures." Objectors argued that class counsel should be removed on the ground, among others, that they could not represent both present and future class members. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 296 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996). Similarly, 37 academics who teach and write in the area of legal ethics submitted an amicus brief, arguing, among other things, that the district court should not approve any settlement before the court appointed separate counsel for those class members who had not yet suffered an injury. Amicus Brief at 2-4, *Georgine*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215). The motion to allow the filing of that brief was denied by the district court, *Georgine*, No. 93-0215 (E.D. Pa. Apr. 11, 1994) (order denying motion of certain law teachers to submit amicus brief), as was a subsequent motion to reconsider. *Georgine*, No. 93-0215 (E.D. Pa. May 10, 1994) (order denying motion to reconsider).

In *Ahearn*, after the complaint and settlement were filed, the court did appoint a guardian ad litem to represent the future class members. Although not ideal—since the future claimants' representative was not a participant in the already-completed bargaining—this appointment was better than no separate representation at all. In theory, at least, the guardian ad litem was free to recommend rejection of the proposed settlement or modification of its terms to better protect future class members. Better still would be a requirement that future class members always have separate representation during the original settlement negotiation process. Assuming that the simultaneous filing of a complaint and proposed settlement is proper in some situations,[83] in those cases the court should immediately inquire as to whether there was separate unconflicted representation for the future class members. If not, the court should appoint such counsel and send the parties back to the bargaining table.

2. *Preliminary Hearing*

In some of the settlement class actions in which we have participated, the preliminary hearing is little more than a formality, even though that is when the court conditionally certifies the settlement class, makes a preliminary evaluation of the proposed settlement's fairness, appoints class counsel, and approves a notice plan pursuant to Rules 23(c) and (e). For the purposes of this Article, we consider the term "preliminary hearing" to mean the process by which the court makes these threshold determinations, even though we realize that the court may decide these issues in stages, through multiple hearings, or without any in-person hearing at all.

We note at the outset that preliminary proceedings did take place in two of the three actions discussed in Part II. In *Georgine*, there were, in essence, two preliminary hearings. First, Judge Charles Weiner, in a one-page order, preliminarily certified the class and appointed the two attorneys who had negotiated the settlement as class counsel, subject to the appointment of additional counsel at a later date.[84] This was done without any input from the objectors or affected interest groups, or from attorneys who may have objected to the appointment of class counsel. Later, however, the issues of preliminary fairness and the content and plan for dissemination of the notice were the subject of serious in-depth briefing, argument, and debate among many of the affected parties and interest groups before

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[83] See Appendix B to this Article.

[84] Carlough v. Amchem Prods., Inc., No. 93-0215 (E.D. Pa. Jan. 29, 1993) (class certification order).

Judge Lowell Reed, who had been appointed by Judge Weiner to handle matters leading up to and including the fairness hearing.[85]

The breast-implant settlement was the subject of a significant amount of public debate prior to the preliminary hearing. A Statement of Principles—which was a detailed explanation of the proposed settlement—negotiated by the Plaintiffs' Negotiating Committee, was circulated among many lawyers, victims' groups, potential class members, and others, as well as discussed in the media, in the months prior to the formal announcement and filing of the proposed settlement.[86] Thereafter, the formal appointment of counsel, the finalization of the proposed settlement, and the form and procedures for distribution of the notice took place in an informal preliminary hearing held in chambers, to which the representatives of various interest groups were invited.

In the GM-truck case, however, the preliminary "hearing," as far as the record reveals, consisted of a motion to certify a settlement class and dissemination of the notice to between five and six million class members, as a result of a process in which the only participants were plaintiffs' counsel and defendants' counsel, but no likely objectors or interest groups.[87] A similar scenario occurred in *In re Ford Motor Co. Bronco II Products Liability Litigation*,[88] where about 700,000 owners of utility vehicles sought economic damage or a repair, on the ground that the vehicles' allegedly defective design made them prone to deadly rollover accidents. Shortly after various putative class actions were transferred to the district court in New Orleans by the Judicial Panel on Multidistrict Litigation, a settlement was struck. The court then certified a settlement class, appointed the plaintiffs' counsel who had agreed to the settlement as class counsel, and permitted the notice to be sent to hundreds of thousands of class members, without any on-the-record preliminary hearing or express determination of preliminary fairness.[89]

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[85] Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993).

[86] Statement of Principles, In re Silicone Gel Breast Implant Prods. Liab. Litig. (on file with authors).

[87] See supra Part II.C.

[88] In re Ford Motor Co. Bronco II Prods. Liab. Litig., No. MDL-991 Section "G," 1995 U.S. Dist. LEXIS 3507 (E.D. La. Mar. 15, 1995) [hereinafter *Bronco II*] (order denying approval of proposed settlement).

[89] The *Bronco II* settlement proposed to provide class members with a warning label, owner's manual supplement, and a video describing how to drive utility vehicles safely, id. at *2, which largely tracked a warning already required by federal regulation for all utility vehicles. See 49 C.F.R. § 575.105 (1994) (requiring disclosure statement in Owner's Manual and prominently displayed warning label). The district court rejected the settlement, among other reasons, on the grounds that it provided "effectively zero" in terms of what was sought in the complaint, *Bronco II*, No. MDL-991 Section "G," 1995 U.S. Dist. LEXIS

In our view, certain preliminary-hearing requirements ought to be formalized to achieve what the courts in *Georgine* and the breast-implant cases achieved, at least in part, on an ad hoc basis. In the settlement class context, formal notification to the class members will not have taken place at the time that the court determines to conditionally certify the case for settlement purposes. Nevertheless, the settling parties should be required to notify persons and interest groups that the settling parties would reasonably understand to have an interest in the proceedings that a tentative settlement has been reached, that a preliminary hearing will be scheduled, and that certain issues will be considered at the hearing. This should usually include notifying state attorneys general, perhaps through a representative group, such as the National Association of Attorneys General. Sometimes the states have a direct legal interest in the settlements, such as those involving motor vehicles which state agencies purchase in large quantities;[90] in other cases, they may wish to exercise their responsibilities as amici to protect their citizens.

Thus, in *Georgine*, the settling plaintiffs should have informed members of the MDL Plaintiffs' Steering Committee and other interested plaintiffs' asbestos lawyers and asbestos victims' groups of the proposed settlement and the date for a preliminary hearing, prior to the initial class certification and appointment of counsel.[91] As noted, such notification should include advocacy groups that would be expected to take an interest in the subject matter of the settlement. At least one such group—Command Trust Network, a support and advocacy group of women with breast implants—did take part in the formal breast-implant settlement proceedings and helped shape the form of notice, the objection and hearing schedules, and other procedural matters. In *General Motors*, for example, counsel for the settling plaintiffs would probably now agree that it was a mistake not to have included the states in early settlement discussions or, at least, to have involved them prior to preliminary approval. Similarly, if interested groups had been contacted in the *Bronco II* case, the inadequate notice procedures may well have been avoided.[92]

3507, at *19, that the warnings provided little more than what Ford was already required to provide by law, id. at *19-*20, and that Ford's failure to oppose class counsel's "exorbitant" $4-million fee request was evidence of possible collusion between class counsel and Ford. Id. at *24-*29.

[90] See, e.g., supra text accompanying notes 69-73.

[91] The class counsel in *Georgine* actually had discussions with attorneys for other asbestos victims, thus enabling other affected parties to take part in the litigation at a relatively early date.

[92] In *Bronco II*, the settling parties maintained that notice of the settlement could be sent to the addresses maintained by the state motor vehicle registration agencies and that

In addition, the preliminary hearing is the place where the court makes a preliminary determination of fairness. At bottom, this means that the court should do at least two things. First, it must assure itself that certain class members, whose claims would be barred by the proposed settlement, are not being given a zero recovery. An obvious example of this is the loss-of-consortium claimants in the breast-implant case and *Georgine*, who obtain no recovery for themselves.[93] If the court finds this type of inequity, and the settling parties provide no adequate justification, the court should be obliged to send the parties back to the bargaining table. Second, even where all class members receive some potential benefit, the court should question at this point whether the settlement contains any obvious allocation problems, such as the three percent cap for foreign claimants in the breast-implant case, which the settling parties later conceded was arbitrary and had no relationship to the strength of the foreigners' claims or the expected number of foreign claimants.[94]

The preliminary hearing is also the appropriate time for the settling parties to disclose, or begin to disclose, the specific facts and evidence they intend to rely on in support of their claim that the settlement is fair. While the settling parties need not at that time produce the actual documentary evidence on which they intend to rely in every case, the court should be given the power to demand production of such evidence and the names of the experts the settling parties intend to rely on in support of their fairness claim. This could include providing support for any factual assertions that counsel have made in their memorandum filed with the court to support the plan to disseminate the notice. At the very least, the court should require at this time that the settling parties submit a general explanation for the various allocations among the various subgroupings that make up the class, which will allow the court and any objectors to question the wisdom of the settlement and prevent dissemination of notice in cases where serious problems become evident. For example, in the *Bronco II* case,

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this would reach 95% of the current owners of the vehicle. However, information derived from a survey conducted by plaintiffs' expert after notification took place indicated that over half of the class did not receive notice, probably because of inadequacies in the state registration records. This problem could have been alleviated, in large part, through widespread publication notice, which has been employed by the courts when a large segment of the class cannot be located individually. See, e.g., sources cited supra note 10. In the *Bronco II* case, the Center for Auto Safety—which later became involved as an objector—could have assisted the court in its notice efforts, since the Center was aware of the problems associated with relying solely on state registration records through its work on vehicle recalls.

93 See supra text accompanying notes 44-46.

94 See supra note 52 and accompanying text (discussing treatment of foreign claimants in breast-implant and heart-valve litigations).

since the class plaintiffs settled for warning stickers, rather than cash or even coupons, counsel should have disclosed what, if any, research and expert opinions they had obtained that demonstrated these warnings had value to the class members, i.e., that the warnings would be heeded, and, if heeded, that injuries would be avoided and lives saved.

The purpose of such preliminary disclosures would be three-fold. First, even in cases where there is little or no organized opposition to the settlement, the court is under a duty to consider the fairness of the settlement, and it cannot do so rationally without the type of information discussed above. Second, in cases where there is organized opposition, objectors are greatly hampered if they must file objections, as we have often had to do, in a factual vacuum. Third, this disclosure requirement might reduce or even eliminate the need for discovery concerning the settlement terms during the period after the notice and leading up to the fairness hearing, an issue we take up in the next section.

Finally, since the preliminary hearing is where the court first certifies the class, the court should consider the question of class definition at that time. As noted above, in several recent cases—most notably *Georgine*—the courts have been asked to exclude from the class individuals who have cases pending on the date that the class action was filed,[95] despite the fact that the excluded individuals are otherwise similarly situated to the class members. This raises two related concerns. First, the exclusion of the pending cases suggests that the settling parties have attempted to buy off opposition to the class by not offending counsel who represent individuals in pending cases that might otherwise be preempted by the class action. Second, similar pending lawsuits may involve class counsel themselves, as was the case in *Georgine*, where class counsel excluded thousands of their own pending cases from the class definition, and then settled them on the eve of the filing of the class action.[96]

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[95] See supra note 23 and accompanying text.

[96] The other two class actions that defined the class to exclude pending cases—*Ahearn* and *Beeman*—also involved situations where at least some of class counsel had litigation pending against the defendant. Of course, even if pending cases were not excluded from the class, the class members with pending cases could still opt out of the settlement if they were included in the class. But that additional step is not a meaningless formality. Asking that claimants with pending cases opt out should encourage, if not ensure, that the class member who is represented in a pending action is consulted by his or her attorney and makes a decision as to whether the class settlement provides a better deal. In the breast-implant case, which did *not* exclude pending cases, many women with pending cases chose not to opt out, but to take the class settlement. By contrast, in *Georgine*, individuals with pending cases did not have this choice, having been excluded from the class action by the class definition. For a detailed analysis of the problems associated with excluding from the class cases pending on the filing date, see Koniak, supra note 20, at 1057-64.

In our view, where the action seeks to define the class by excluding litigation pending on the date the complaint is filed or as of some other arbitrary cutoff date, apparently unrelated to the defendant's conduct or applicable law, the court should insist that there be a substantive reason for this exclusion.[97] It is possible that a dramatic change in applicable law or some other similar circumstance would serve to differentiate the pending cases from the claims asserted by the class. Otherwise, if the proposed settlement is a good deal for those without pending cases, it ought to be a good deal for everyone else as well. Thus, we propose the following Rule:

> In any action certified under Rule 23(c)(1) for the purposes of settlement only, the court shall include as members of the class, subject to the opt-out right of Rule 23(c)(2), all individuals who have pending actions against the defendant in a state or federal court concerning the same or substantially similar conduct alleged in the class action complaint, unless the party or parties seeking class certification can demonstrate on the record that the individuals for whom such exclusion is sought are so dissimilarly situated from the other class members such that their exclusion from the class is appropriate under the circumstances.

3. *Discovery and Timing of Objections and Fairness Hearing*

As indicated in the prior Section, we believe that information concerning the justification for the settlement terms and the factual basis for any assertions made by counsel concerning the strengths or weaknesses of the case ought to be made available to the court and objecting parties by the settling parties. For the reasons previously given, we believe it will often be useful if this information is disclosed when the settlement is first presented to the court. But if such disclosures are not made then, or are otherwise incomplete, objecting parties ought to be able to obtain the remainder of the relevant evidence shortly after the notice is sent out.

We recognize that the case law suggests that the discovery Rules ought not to apply fully to settlement proceedings under Rule 23(e), on the ground that full discovery would eliminate the efficiency gained by the settlement itself and would enmesh the court in conducting the very pretrial and trial proceedings that the settlement was intended to avoid.[98] We believe that this position overstates the case for two re-

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[97] For example, in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), discussed supra Part I.B, the cutoff date was defined by reference to the statute of limitations.

[98] See, e.g., Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 684 (7th Cir. 1987) ("The temptation to convert a settlement hearing into a full trial on the merits must be resisted.").

lated reasons. First, in the complex class actions that we have discussed, including particularly the mass-tort settlements that devise alternative dispute resolution mechanisms, the class action settlement eliminates not simply *one* trial on the merits, but potential pretrial discovery and trial in thousands, if not tens of thousands, of cases. The fact that there might be the need for considerable discovery and an in-depth settlement hearing hardly puts a dent in the overall efficiencies gained by approval of these complex settlements.[99] In some cases, objectors will be able to provide their own evidence on the legal strengths and weaknesses of the plaintiffs' claims. However, much of the factual evidence can only come from the settling parties. For instance, in mass-tort cases providing monetary relief for personal injuries, the settling parties ought to be required to come forward, as they did in part in *Georgine*, with historical data concerning prior settlements.[100]

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[99] The fairness hearing in *Georgine* involved 18 days of testimony and a day of closing arguments, in addition to preliminary hearings on the jurisdictional questions and on discovery disputes, plus more than 30 depositions and the submission of other disclosures from the settling parties and objectors. On the other hand, in the breast-implant case, there was very little formal discovery regarding the settlement and the fairness hearing was only three days long, involving very brief presentations by the settling parties and objectors and no testimony. The GM-truck fairness hearing was less than one day; the heart-valve fairness hearing totalled four days; and the *Bronco II* hearing was just a few hours.

[100] In the *Bronco II* case, the settling parties argued that the underlying claim concerning the vehicle's rollover propensity was weak, noting that all but one of the half dozen personal-injury cases that had been tried ended in defendants' verdicts. However, objectors represented by the authors herein sought discovery of the settlements of hundreds of other personal-injury cases which press reports indicated were substantial. The court denied that request, *Bronco II*, No. MDL-991 Section "G," 1994 U.S. Dist. LEXIS 15867, at *14 (E.D. La. Oct. 28, 1994) (order denying, in part, objecting settlement class members' request to conduct further discovery) (finding that "track record" of settlements was already before court), but after the objectors moved for consideration, the court reversed itself at the fairness hearing and ordered production of the information within 48 hours. *Bronco II*, No. MDL-991 Section "G," 1994 U.S. Dist. LEXIS 16118, at *3-*4 (E.D. La. Nov. 8, 1994) (order granting, on partial reconsideration, objecting settlement class members' request to conduct further discovery) (finding that, although amounts of jury verdicts were before court, settlement amounts were not). Defendant Ford then moved for a protective order and submitted the settlement data in camera. The court did not ultimately demand the public release of each individual settlement agreement, but, in its opinion rejecting the settlement, it did make public the aggregate settlement data (the total number of claims, the number of claims broken down by the type of injury alleged, the range of settlements in dollar amounts, and the total dollar value of the settlements). The court agreed with the objectors that the defendant's prior settlements were relevant to the strength or weakness of the underlying claims in the class action, noting that the substantial settlements reached, averaging over $330,000 and ranging to more than $4 million in individual cases, *Bronco II*, No. MDL-991 Section "G," 1995 U.S. Dist. LEXIS 3507, at *17 (E.D. La. Mar. 15, 1995) (order denying approval of proposed settlement), was evidence of the inadequacy of the class settlement. Id. at *32.

Further, in cases such as the heart-valve and GM situations, where class counsel took little or no formal discovery, objectors ought to be able to take discovery on the extent of the investigation done by plaintiffs' counsel, as that will not necessarily be apparent from the court docket. Since that is a factor that courts take into account in reviewing the adequacy of class action settlements, it is a proper topic for discovery.[101]

Second, frequently the discovery sought will not concern the strength or weakness of the claims that would be litigated if the case went to trial, but rather justification for the settlement terms themselves, especially where relief other than money damages to the class is included. Thus, it would have been entirely appropriate in the heart-valve case to take discovery on whether it was possible to develop, in the relatively near future, a diagnostic device for noninvasive detection of heart-valve fractures, since the settlement sets aside tens of millions of dollars to perform research on that topic, among others.[102] Similarly, in determining both whether the settlement terms were fair and whether counsel had represented the class adequately, it would have been appropriate to discover all evidence, including expert opinions, as to the degree to which class members would be likely to utilize the coupons during the redemption period in the GM case.

Although in many of our cases we have been able to obtain some discovery, there has been a significant problem as to timing. Because the settling parties have not had to disclose the factual bases or justifications for the settlement, and because they typically provide evidentiary support for the settlement terms only *after* the objectors have attacked the proposed settlement, objectors have been left scrambling, on the eve of the fairness hearing, to take discovery and respond for the first time to the settling parties' defense of the settlement.

In the GM-truck case, for instance, objections were due a little more than a month after notice reached the class members, leaving inadequate time for discovery. Class counsel filed papers in support of the proposed settlement, but without *any* evidentiary basis for the settlement, i.e., the degree to which class members would be able to use the coupons or the likelihood that a secondary market in the coupons would develop. Thereafter, objectors responded with affidavits from marketing and other experts as to the likely redemption rate for the coupons and on the secondary-market issue, among other issues.

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[101] See 2 Herbert Newberg & Alba Conte, Newberg on Class Actions § 11.41, at 11-91 (3d ed. 1992); see also In re General Motors Corp. Pick-Up Truck Fuel Prods. Liab. Litig., 55 F.3d 768, 814 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

[102] Bowling v. Pfizer, Inc., 143 F.R.D. 141, 148-49 (S.D. Ohio 1992).

Then, in a filing made just eight days prior to the fairness hearing, and served on counsel for the objectors just a few business days before the hearing, class counsel responded for the first time with evidentiary support for the settlement, involving many extensive affidavits and documents, including a postsettlement marketing survey of truck owners conducted by an expert whose affidavit and survey results were presented to the court. This was hardly appropriate if one takes seriously the oft-repeated notion that the burden of showing the fairness of a proposed class action settlement rests squarely on its proponents.[103]

Similarly, in the *Bronco II* litigation, notice was given by mail to vehicle owners less than one month prior to the date by which objections were due, and counsel for objectors learned of the settlement about a week later. The notice provided that all objectors were required to present all evidentiary materials in support of those objections by the due date. However, objectors were not served with the settling parties' supporting memoranda until one week prior to the objection date, and those memoranda were not accompanied by any evidentiary support. Thereafter, objectors sought discovery which was allowed in part, but the answers were largely objections on privilege and relevance grounds and were served on the objectors on the Saturday prior to the hearing scheduled for the following Tuesday. Moreover, as in the GM case, only *after* objectors filed their evidence, including expert affidavits and documentary materials, did the settling parties come forth for the first time with their expert evidence and factual bases for the settlement. These were served on the objectors approximately one week prior to the fairness hearing, with the settling parties maintaining that no further response from objectors was permissible. The court did, however, permit further response by the settling parties and objectors after the fairness hearing.

In the Mustang-convertible coupon settlement,[104] the court did not provide a period for discovery, and counsel for the settling parties refused to provide the objectors with any information, including a copy of the settlement agreement and the complaint, prior to the date objections were due. Thus, objectors were required to piece together their objections without the pertinent information.[105] Nevertheless, the court apparently saw no problem with this and approved the set-

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[103] See, e.g., 2 Newberg & Conte, supra note 101, § 11.42, at 11-94 to -95; id. at 2S-61 (Supp. 1995).

[104] See supra note 73.

[105] Declaration of Allison M. Zieve ¶¶ 2-4, Memorandum in Opposition to Proposed Settlement and Proposed Fees and Expenses (Apr. 14, 1995), Dale v. Ford Motor Co., No. 661492 (Cal. Super. Ct. Orange County Apr. 14, 1995) (class counsel instructed associate

tlement after a fairness hearing lasting less than thirty minutes, at which the settling parties provided no evidentiary support for the settlement.[106]

The fundamental problem with these cases is that Rule 23 and common practice appear to permit what we have encountered, or at least do not forbid it. In addition to the preliminary disclosure requirements set out in the prior section of this Article, Rule 23(e) should be amended to allow proper discovery and full presentation of evidence by expressly permitting a period of preparation and discovery of not less than sixty days after the notice and opt-out period has ended. During that time, the settling parties must come forward with their papers in support of the settlement, including not only the legal justifications for the settlement, but also the specific factual evidence—including affidavits, documents, and the like—upon which they intend to rely. In *Georgine*, discovery took place *during* the notice and opt-out period, because objectors—principally asbestos personal-injury attorneys—had already known of the proposed settlement for many months. Generally, however, since the principal purpose of the notice is to apprise the class members of the settlement and to allow them to object, time for discovery should be allowed *after* the notice period has concluded.[107] At the close of this discovery period, consistent with their burden to demonstrate the settlement's fairness, the settling parties should be required to come forward with their evidentiary support for the settlement.[108] Thereafter, a period of not less than forty-five days should be allowed for the submission of

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not to send out any documents and refused to send out complaint on ground that it was "work product").

[106] By contrast, timing in *Georgine* and the breast-implant case was not an impediment to the proper presentation of objections, as the court gave potential objectors adequate time to prepare their objections and required the settling parties, through discovery or otherwise, to disclose their justifications for the settlement terms. Although we have several serious disagreements with the court's determinations on what was discoverable in *Georgine*, which are not relevant here, the methodical approach taken on jurisdictional, preliminary fairness, discovery, and the fairness hearing itself, succeeded in preventing the type of sandbagging that occurred in the actions described in the text.

[107] The authors herein represented objectors in the *General Motors* and *Bronco II* actions, but they knew nothing of the settlements until they received copies of the notice from one of their clients, the Center for Auto Safety. Indeed, the Center itself, which had been working for years on the underlying product defect issues with respect to both vehicles, did not learn of the settlements until shortly before objections were due.

[108] In the GM case, for instance, this would have included the survey of truck owners that was sprung on the objectors just prior to the fairness hearing and that served as the main support for the district court's finding of fairness. See In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 846 F. Supp. 330, 338-39 (E.D. Pa. 1993), rev'd, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

formal objections, responses by the settling parties, and replies prior to the fairness hearing.[109]

B. Substantive Changes To Assure Fairness

1. Authority of Court To Impose or Reject Certain Terms

The basic protections currently afforded unrepresented class members by the Federal Rules of Civil Procedure are largely procedural. Under current law, judges do not have the power to reject some portions of a settlement while accepting others, nor may they impose terms on the parties. After the fairness hearing, they are forced into an up-or-down decision on whether the settlement should be approved. Despite this, there are at least some judges who are prepared to threaten to reject the settlement unless the parties make certain changes, which the parties sometimes accept, at least in part.[110]

This all-or-nothing approach for settlements in class actions is sensible where the only issue is whether the amount that the defendants have agreed to pay the plaintiff class is reasonable. In such a case, all of the class members are similarly situated or, if not, there is a relatively simple way of providing proportional relief to the class members.[111] The principal problem in the complex tort litigations discussed above is that all members are not similarly situated, and there are serious fairness issues regarding the internal allocation of funds among the different groups within the class. The total settlement amount may be within reason, but the internal allocations are not.

In order to deal with this problem, we propose that district judges be given the power to make certain reallocation decisions, described below, in order to assure fairness within the class, as well as between

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[109] The proper time for exercise of the opt-out right is beyond the scope of this Article. We note, however, that there is an argument that, because class members are typically asked to opt out at the end of the notice period, which is the same time that objections are due, the opt-out decision comes prior to the point where class members have a fair opportunity to evaluate the arguments on both sides of the settlement. For this reason, it may be better to allow the opt out to be exercised at some later point down the road, such as 30 days before the fairness hearing, or within a short period thereafter, prior to the time that the court has issued its ruling. This would have the additional advantage of lending some symmetry to the process, since courts, in our experience, almost always let class members opt back in after the fairness hearing and/or court approval of the settlement.

[110] This was done in the heart-valve settlement class action, where the court issued an interim order, pointing out particular areas of concern, Bowling v. Pfizer, Inc., 143 F.R.D. 138, 139-41 (S.D. Ohio 1992) (continuing fairness hearing pending report of parties as to "ambiguities in" and "concerns with" proposed settlement expressed by court), and later approved the settlement which had been amended to include some, if not all, of the court's "suggestions." Bowling v. Pfizer, Inc., 143 F.R.D. 141, 170 (S.D. Ohio 1992) (approving settlement as "good deal for class members").

[111] See supra Part I.B (discussing allocation of relief in *Goldfarb*).

the class and defendants. In one respect, courts already do this since class counsel fees are determined by the court, and, depending on the court's fee determination, the amount allocated to the class, as opposed to its lawyers, is somewhat within the control of the court, at least in cases where the fee is to be paid from the common fund created for the class's benefit. It is essential that the courts make that allocation because of the obvious concern with adequacy of representation of the unrepresented portion of the class vis-à-vis the interest of the class counsel. In our view, the same concerns about adequacy of representation should entitle the court to make other internal allocation decisions as well.[112]

Several examples in the silicone-gel breast-implant and asbestos cases illustrate the need for internal reallocations which could be done without altering the settlement as a whole. Consider the issue of claims for loss of consortium which were eliminated as part of the settlements in both cases.[113] In our view it is never proper to eliminate the viable claims of certain class members as the price of paying for other viable claims of other class members, and therefore the courts should have refused to approve either settlement. The difficulty is that loss-of-consortium claims are a small part of the total claims, yet the judge, under current law, is placed in a take-it-or-leave-it situation for the settlement as a whole. In our view, giving the district judge the right to make modest adjustments within the basic confines of the settlement is far preferable to the present inflexible rule.

If trial judges were given authority to reallocate funds among the members of the class, in most cases it would not be necessary for the court itself to do the reallocation. Take, for instance, setting the figure for loss-of-consortium claims: The court could simply direct the plaintiffs either to make internal reallocations or to obtain additional funds from the defendant to reasonably compensate the loss-of-consortium claimants. In each case, the question then would be whether the amounts that the parties provided were reasonable under the circumstances. Indeed, in most of these cases, the loss-of-consortium claims would not be very great compared to the overall fund, although there would be some claimants for whom the claim would be substantial, such as a husband who had to give up a lucrative job in order to take

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[112] We hope that there will be less need for reallocations if, as we suggest above, the Plaintiffs' Negotiating Committee adequately represents the principal divergent interests in the class. But, for instance, one representative out of five for foreign claimants would not have assured a different outcome for foreign claimants in the breast-implant case, since that person could easily be outvoted. Hence, the need for court supervision of the internal allocation decisions would continue.

[113] See supra text accompanying notes 44-46.

care of his wife who was immobilized due to a silicone-gel breast implant. In those cases, it would be necessary either to provide for adequate compensation for the truly seriously injured spouse, or at least to give that spouse the right to opt out separately from the primary victim, instead of joining the two together as the settlement now provides.

A second example involves the issue of inflation. With a fixed pot of money, it is clear that there is an intraclass conflict on how the money is divided between present (or near-present) and future claimants.[114] The court should not be permitted to order the defendant to pay additional amounts of money so that the amounts paid would be the same from year to year in real dollar terms. But the court would, under our approach, have the authority to direct the parties to cure the existing inequity, which might include adjustments in the amounts paid to both present and future claimants to take into account the effect of inflation, or at least to make the future claimants opt out on a real dollar (reduced face amount) basis.

The grid used in the breast-implant case[115] also creates internal allocation problems, even for current claimants. Aside from issues about whether some diseases that are not on the grid should be on the grid (and vice versa), some observers believe that some dollar recoveries are too high, whereas others are too low. There also appear to be some internal conflicts regarding the rationality of the various steps on the grid as they relate to the level of severity and the age of onset. Assuming that a court found any of these differentiations to be without an evidentiary or logical basis, it should not be faced with an either/or choice of approving or disapproving the settlement, but should be allowed to correct the grid or at least direct the parties to make the grid more rational.

Then there are the problems of the foreign claimants. The three percent cap included by the plaintiffs has been conceded to have no reasonable basis in its relationship to the number of foreign versus domestic claims or the total amount of recovery to which foreign claimants would be entitled.[116] The court should have been permitted to eliminate the cap and to direct the parties to come up with some other system. This might have included an alternative grid for foreign claimants, which is already contemplated under the settlement, but without a percentage cap, such as one similar to that used in the heart-

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114 See, e.g., discussion supra text accompanying notes 33-42.

115 See supra Part II.B.

116 See supra text accompanying note 52.

valve litigation.[117] Such a foreign-claimant grid would take into account the fact that the legal systems and typical recoveries in foreign countries differ from those in the United States and, indeed, differ from each other. But whatever the numbers may be, the three percent cap was not rational, and the court should have had the power to direct its elimination.

If these internal adjustments had been made in the breast-implant case, the defendants' obligations might have appeared to have been unchanged. However, changes in the internal allocation might have caused some people to stay in the case and others to opt out. But even if there were some negative effects on defendants from any or all of these changes, they would be quite minimal, particularly given the size of the overall settlement. Moreover, if judges could only make reallocations where there was absolutely no effect on the defendants, the plaintiffs could use the excuse that defendants might have to pay a small additional amount, if certain contingencies arise, to avoid all internal changes that would benefit the unrepresented class members. Accordingly, we propose that Rule 23 be amended to permit the court to disapprove portions of a settlement agreement and to require other provisions to be included, provided that the adjustments result in "no substantial change in the obligations of the defendant."[118]

In addition, the court should be entitled to change the obligations of the defendants if there are conditions in an overall reasonable settlement that nonetheless favor the defendants in a manner that is fundamentally unfair, in part because plaintiffs' counsel had their own reasons for going along with them, despite the best interests of the class. One particular condition that illustrates the problem, present in the silicone-gel breast-implant case, relates to the question of the timing of the defendants' payments into the settlement fund, in particular the condition that the payments do not start until all appeals from the

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[117] See supra note 52 (discussing treatment of foreign claimants in heart-valve litigation).

[118] A separate question arises as to whether, if the court makes such changes, an additional notice and opportunity to opt out would have to be provided. In our view, that would depend on the significance of the changes to the adversely affected groups. Thus, if a loss-of-consortium payment to a small number of class members were required, the reduction for the rest of the class might be insignificant. Other changes might require another opportunity for opt out for at least those who were seriously disadvantaged by the internal reallocation. Moreover, rather than risk the wrath of other class members who already claim "entitlement" to their allocations, a defendant would be free to add money to the overall fund and to smooth out allocation problems in that manner. This is precisely what occurred in the heart-valve case, where the settling parties did not touch the $80-million medical-consultation fund for principal claimants' fear claims, but simply added another $10 million for the spousal claimants. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 149, 170 (S.D. Ohio 1992) (noting and approving spousal claimant addition).

fairness determination are concluded.[119] We recognize that a defendant has a legitimate interest in seeing that whatever money is paid during the settlement process is not spent (except for agreed-upon matters such as notice and claims administration), and that it does not pay money into court without receiving "credit" for the interest earned prior to final judgment against its total obligation.

On the other hand, the class as a whole wants the money paid as soon as possible and with interest. Furthermore, the court and the members of the class, in evaluating whether a settlement is reasonable, need to know with some degree of certainty the dates that all payments will be made so that there can be a calculation, even on a discounted basis, of the actual value of the settlement. This is particularly true in cases in which there is a substantial delay between the time of the settlement agreement and the starting payment date. And when, as in the silicone-gel breast-implant case, the payments span thirty years, the initial delay means a delay in every future payment, which can substantially reduce the present value of the settlement.

As a result of these tensions, plaintiffs try to get the money paid in (but agree not to pay it out) as soon as possible (which does not create any potential conflict with the class). However, in a number of cases, such as the breast-implant case, they also agree not to require payment in until all rights of appeal have expired. This latter condition creates a very substantial incentive for plaintiffs' counsel (and to a considerable extent the district judge) to cut short the time before the fairness hearing, because every day delayed is a day the money does not come into the plaintiffs' bank account and start to earn interest for the class. Moreover, it operates to create the possibility of improper coercion regarding an appeal in two separate respects. On the one hand, unscrupulous lawyers can demand substantial benefits for themselves and their clients by agreeing to abandon their appeal. On the other hand, those who oppose the settlement on principle, often because of internal allocation questions, can be subject to severe criticism from other victims—as can their lawyers—because they are "holding up" the settlement and "costing" the class hundreds or perhaps thousands of dollars a day, if not more.

Tying the payments to dates when no further appeals are pending, without requiring prepayment of interest, should be eliminated by Rule or court decision. If there is no time certain for all payments, interest must accrue from the date on which the settlement agreement is filed, or some other date reasonably close to that, at whatever reasonable rate can be agreed upon, or in the absence of agreement, at

[119] See supra Part II.B.4.

the judgment rate payable in civil litigation generally.[120] Under such a system, if more time is needed to permit absent class members to participate meaningfully in the fairness hearing, or for the court to conduct the hearing and render its decision, including making any necessary reallocations, it will not result in interest lost for the benefit of the class. Similarly, while an appeal will delay the payment to class members, it will not result in lost interest. Most important from the perspective of both the court and the class members, a date certain in the payment plan increases the ability of all concerned to make a meaningful assessment of the actual value of the settlement, unlike at present when no one knows when the first or subsequent payments will be made.

The authority to correct the timing problems for payments by the defendant is one illustration of the power that courts should have to say "no" without jeopardizing the entire settlement. There may be others, although we have not identified any that are sufficiently serious to warrant a specific prohibition. For the present, we suggest only that the courts be on the lookout for similar provisions and urge the parties to modify them. And the best time to identify such problems and attempt to deal with them is after the parties have reached a tentative settlement, but before notice goes out to the class informing them of the settlement terms.

2. *Substantive Protection for Subgroups Within the Class*

As discussed earlier,[121] the appointment of separate representatives for future class members and other class members falling in distinct subgroups will go a long way toward ensuring fair outcomes. Moreover, in the preceding Section, we argued that the court should be given the power to reallocate funds within the settlement provided that the overall exposure for the defendant remains approximately the same. This, too, would allow the court to protect some of the subgroups within the class that were treated unfairly by the settling parties. In addition, we believe that the Rule should be changed to require the court to undertake a substantive evaluation of the settlement's fairness to subgroup members, particularly those with potential future claims.

It might be argued that courts are already under such an implicit duty under Rule 23(e). To be sure, Rule 23(e) provides that the dismissal and compromise of class actions must be approved by the court and that notice of such dismissal or settlement be given to class mem-

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[120] See 28 U.S.C. § 1961 (1994).

[121] See supra Part III.A.1.

bers. However, no standards for evaluating a proposed settlement are provided in the Rule, and the "universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable."[122] Appellate courts have laid down various factors to be considered in evaluating whether a class settlement should be approved,[123] but the factors themselves are vague and unclear and often there is little guidance on which factors, if any, are more important than the others, or which can be ignored in certain circumstances.[124]

Further, the use of these factors is almost always accompanied by the admonition that settlements come to the court with a presumption of fairness and are favored by the law.[125] Finally, neither the Rule nor any of the tests for settlement approval appears to have considered the special problems posed by settlement class actions, the inclusion in settlements of future claimants who are not currently entitled to relief, or settlements where the relief agreed upon was not of the type sought in the complaint.[126] Thus, as we now explain, we suggest that certain substantive protections be provided under Rule 23(e).

a. Protection for Future Claimants. In order that the court be required to focus on the particular problems of future class members, we suggest that Rule 23(e) be amended to provide:

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[122] See, e.g., Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983).

[123] See, e.g., Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982) (listing six factors that "should be considered" in evaluating settlement proposals); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (listing nine factors relevant to decision whether to approve settlement).

[124] For instance, in approving the GM-truck settlement, both the district court and the court of appeals reviewed the factors laid down by the Third Circuit in *Girsh*. When it came to whether the defendant "could withstand a greater judgment"—a factor which would seem to work against approval with a defendant like GM—the district court noted that GM could withstand a greater judgment, but then stated, without further explanation, that this factor neither favored nor disfavored the settlement, In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 846 F. Supp. 330, 337 (E.D. Pa. 1993), a holding that, surprisingly, the court of appeals did not disturb. In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995); see also, e.g., Stoetzner v. United States Steel Corp., 897 F.2d 115, 118 (3d Cir. 1990) (declining to apply all nine *Girsh* "proposed settlement" factors, noting that some were "inapposite" where settlement occurred after case had been tried to judgment).

[125] See 2 Newberg & Conte, supra note 101, § 11.41, at 11-88 & n.224 (noting "initial presumption of fairness" of proposed class settlement).

[126] But see, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (requiring "clearer showing of a settlement's . . . adequacy" where settlement was reached prior to court certifying class), cert. denied, 464 U.S. 818 (1983); Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 681 (7th Cir. 1987) (same); cf. *In re General Motors*, 55 F.3d at 792-800 (settlement classes are permissible, but trial court ultimately must find that Rule 23 prerequisites for litigation class have been met). Accord General Motors Corp. v. Bloyed, No. 94-0777, 1996 WL 51180 (Tex. Feb. 9, 1996).

> In considering any proposed settlement under this Rule in which some class members would only be entitled to relief if certain events occur in the future, the court shall determine whether, for such class members, other or additional relief is required to assure that the settlement is fair to those class members.

Under this formulation, the court would not be required to reject a settlement, such as those reached in the breast-implant case or in *Georgine*. However, in such cases, courts would be required to consider whether, for instance, the claims for medical monitoring in *Georgine*, which might not have been of any benefit to currently injured class members, were properly abrogated for future class members who might well have benefitted from such relief. The court might ultimately conclude that the other benefits for future class members warranted the abrogation of the medical-monitoring claims, but it could not avoid the issue.[127]

In cases involving payment of monetary relief to individuals harmed in the future, inflation is of such obvious concern to future claimants that it should be specifically addressed in every settlement class action. We propose the following Rule:

> In cases providing monetary relief for class members who will suffer injuries in the future, the court may not approve a settlement that does not make periodic adjustments to take into account increases in the cost of living, both generally and with respect to subcomponents of the cost of living for the type of costs for which the monetary relief is provided, unless the settling parties show, and the court finds, that there is good cause why such periodic adjustments should not be made.

This Rule would establish a presumption in favor of a cost-of-living adjustment that would be difficult to overcome. Mere speculation that tort awards would not keep pace with inflation in the future, that "tort reform" was in the offing, or that a substantial portion of the "futures" class might be subject to statutes of limitations defenses not applicable to presently injured class members, would not suffice. The settling parties would need to present hard evidence that all or sub-

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127 We note that a fund was created in the breast-implant case to provide limited medical monitoring and to pay for explantation of existing implants. In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 WL 578353, at *2 (N.D. Ala. Sept. 1, 1994). Similarly, in the heart-valve case, if a medical device is developed that will provide noninvasive diagnosis of valves that are prone to deadly fractures, the settlement will pay the unreimbursed costs of such diagnosis. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 149 (S.D. Ohio 1992). The heart-valve settlement also sets aside funds to conduct research to develop that type of medical device and to pay for surgery to replace fracture-prone valves with safer heart valves. Id.

stantially all members of the "futures" class almost certainly would be facing these difficulties in order to avoid an inflation adjustment.

b. Protecting Against the Elimination of Viable Claims. As noted previously, in this new breed of class action settlement, certain class members who, under applicable law, would have a substantial opportunity to obtain recovery are provided no relief. Included in this category are certain lung-cancer sufferers and the pleural claimants in *Georgine*,[128] and the two categories of breast-cancer victims in the breast-implant case discussed above.[129] In our view, the Rules should require the court to reject settlements which provide no compensation for claimants who are giving up potentially viable claims, unless the court finds that the settlement provides benefits to those claimants that are comparable to those claims being abrogated.

In *Georgine*, the court did make this finding of equivalence, but in certain respects it is plainly suspect. For instance, pleural claimants who are of advanced age, and therefore extremely unlikely to contract more advanced asbestos-related illnesses, but who currently have pleural claims that have considerable value under state law, cannot reasonably be seen to be gaining equivalent, if any, value from the settlement's waiver of statutes of limitations and its "reentry" rights.[130] In the breast-implant case, the district court did not address the abrogation of the cancer or breast-cancer masking claims at all. Elimination of such claims for no value would not survive a Rule of the type that we propose. Finally, the complete elimination of loss-of-consortium claims—which are the *only* claims of large segments of the *Georgine* and breast-implant class—could not be achieved under our proposal.[131]

c. Dealing with Differences in Applicable Law. The Rules should also require the court to examine whether there are differences among applicable laws, such that class members from one state or groups of states would be unfairly advantaged or disadvantaged.[132]

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128 See supra text accompanying notes 27-28.

129 See supra text accompanying note 53.

130 Reentry rights refer to the fact that, under the *Georgine* settlement, a claimant can recover once for a nonmalignant disease and again for a malignancy, assuming that the claimant has met the medical criteria of the settlement in both instances. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 284 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

131 Some of these allocation problems could be resolved by giving the court authority to reallocate funds within the overall settlement fund, as we suggest supra Part III.B.1.

132 Cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-23 (1985) (in multistate class action, due process forbids application of forum state's law to class members who have no significant connection with that state).

Georgine purports to get at this problem, as we have noted before, by allowing the claims adjudicator to take into account differences in applicable law or at least settlement history from different jurisdictions.[133] That settlement also deals, appropriately in our view, with problems concerning applicable statutes of limitations and repose by barring any claims that would have been time barred when the class action complaint was filed.[134]

However, most of the other nationwide class actions discussed above wholly ignored differences in applicable law. This was perhaps understandable in the breast-implant case, where there was virtually no track record upon which to base such determinations and where it was far from clear that any differences in applicable law would have made a substantial difference to individual class members. That being the case, there was a good argument that the reduction in cost to all class members of avoiding such issues justified the across-the-board approach for all U.S. claimants. In the heart-valve case, however, there was strong evidence that class members able to take advantage of California law were in a much better position than all other class members with respect to their claims based on fear that their heart valves would fracture.[135]

In the *Bronco II* case, class counsel themselves, in explaining to the MDL judge why they had filed their fee application in Alabama state court, rather than the federal court, argued strenuously that they had sought an Alabama forum as well as a federal forum because the subclass of Alabama vehicle owners had a much stronger case than the other class members because of special provisions of Alabama law. Nevertheless, Alabamans were accorded no additional relief.[136]

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133 *Georgine SOS*, supra note 25, at 57.

134 Id. at 49.

135 The defendants were successful in 27 cases in obtaining rulings that plaintiffs with working valves could not recover for their fear that the valve might someday fracture. Bowling v. Pfizer, Inc., 143 F.R.D. 141, 162 (S.D. Ohio 1992). However, in California, the Court of Appeal had held that plaintiffs could recover on those claims if they could prove that the defendant had fraudulently marketed the valve by covering up its propensity to fracture. Khan v. Shiley, 266 Cal. Rptr. 106, 112 (4th Dist. 1990). While the district court in *Bowling* correctly noted that proving liability under this theory might be difficult, *Bowling*, 143 F.R.D. at 164, the California precedent surely made the claims of class members who would be able to rely on California law much stronger than those of other class members. Indeed, shortly after the class settlement was approved, hundreds of plaintiffs who had opted out won settlements of their fear claims that greatly outstripped what the settlement afforded the class members. See, e.g., $31-Million Settlement May Be in Works on Shiley Heart Valve, L.A. Times (Orange County ed.), Oct. 17, 1992, at D1. Those outside settlements provided significantly greater relief to Californians than to either non-California U.S. residents or to foreigners.

136 It is useful to provide a little more background to the unusual fee issue in the *Bronco II* case: The settling parties agreed simultaneously to two identical nationwide class actions

In our view, the question of applicable law and how it affects disparate groups among the class is different, and more difficult, than the questions presented in the two prior Sections of this Article regarding future class members and the problem of eliminating viable claims. Applicable law is difficult to discern, is often in a state of flux, and the differences among various state laws may affect some, but not all, theories of the plaintiffs' recovery or the applicable defenses (e.g., where one of the plaintiffs' claims is based on federal law). Further, there is little likelihood that, in the national class actions that we have addressed, the issue of which law is applicable will cause class counsel deliberately to sell out one group of clients for another. Indeed, it is noteworthy that, where differences in applicable law have been overlooked, the result is that everybody in the class gets the same thing, not that some of the class gets nothing. Thus, unlike the zero-recovery and future class member problems discussed above, the courts should review nationwide settlements with an eye toward the problems posed by differences in applicable law, but only disapprove such settlements if, as in the heart-valve settlement example, there is a clear problem.

Similarly, before scuttling any settlement on the basis of differences in applicable law, the court should be clear not only on the differences in legal position among class members, but also that the differences in applicable law have a substantial effect on the class. For instance, a settlement that protects class members in a few states that have statutes of repose is not worth "correcting," especially if "overpaying" those class members costs the remainder of the class only a relatively few dollars per person and it is not certain whether class members residing in statute-of-repose states could sue elsewhere. On the other hand, if, as in the heart-valve example, the residents of one state lost substantial benefits by, in effect, providing relief to the rest

involving the same plaintiffs' counsel, one in Alabama state court and one in federal district court in New Orleans, where, as noted earlier, several class actions had been consolidated by the Judicial Panel on Multidistrict Litigation. Without providing any explanation as to why two settlements were necessary or even arguably beneficial to the class, the settlement agreement provided that the agreement would be void if either settlement did not obtain final court approval. The *only* difference between the two proceedings was that the fees would be sought only in Alabama, thus circumventing the federal court's approval for work done before it. In the Alabama court, class counsel sought an award of $4 million in a one-page fee application, accompanied by less than 10 pages of affidavits explaining counsel's background, but without any time or expense records or any explanation of how the $4 million request was calculated. The defendant, Ford Motor Company, did not object to the award, although it retained the right to do so in the settlement agreement, see *Bronco II*, No. MDL-991 Section "G," 1995 U.S. Dist. LEXIS 3507, at *27-*28 (E.D. La. Mar. 15, 1995) (order denying approval of proposed settlement), and class counsel defended the fee request, in part, on the ground that since the defendant was paying, the class was not harmed thereby. See also Alison Frankel, Brake on Ford Fee, Am. Law., Mar. 1995, at 19 (discussing debate between parties over appropriate fee for class counsel).

of the world, the court should not approve the settlement unless the inequalities are corrected or substantially reduced.[137]

3. *Protecting Class Members in Cases Providing Nonmonetary Relief*

We now turn to the question posed by Rule 23(b)(3) class settlements that provide nonmonetary relief of the type that ordinarily could not be awarded by a court or jury in litigation. In our view, settlements that propose to provide nonmonetary relief should be a warning signal to the court that certain segments of the class may be left out in the cold. The question in those cases—for instance, in the GM-truck coupon settlement discussed above[138]—is whether, as a practical matter, the settlement will be able to provide relief to all or substantially all of the class members whose claims are being precluded by the judgment.

Before approving any settlement, the court should apply the following test:

> In reviewing a settlement in an action certified under Rule 23(b)(3), if the settlement does not provide the opportunity for each class member to obtain monetary relief, the court shall determine

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[137] One area in which there are substantial differences in applicable law is punitive damages. Some states never allow them, while others allow them only in very limited circumstances, and still others are quite generous. Some states have stringent burdens of proof, while others have caps, calculated in different ways. Although punitive damages are infrequently awarded, and the awards often reduced, the possibility of a large award certainly carries some weight in settling some individual cases. See David G. Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 366-70 (1994) (reviewing various permutations). Thus, because awards in mass-tort settlements do not take into account the effect that punitive damages might have had on different segments of the class, it might be argued that some claimants are being improperly forced to give up a valuable right for the benefit of the class as a whole.

There are several possible responses, none of them definitive. For example, the right to opt out will, at least for current claimants, give some comfort that the trade-off is not fundamentally unfair. Moreover, in some cases, the opportunity for substantial punitive damages may be small, either because the conduct was not egregious, or the defendant is not rich and/or able to stand many such awards. In other cases, simply because the states of residence of some of the plaintiffs do not permit punitive damages awards, does not necessarily mean that the settlement is subsidizing those plaintiffs, if the state where the manufacturer is headquartered, or the product was made, is favorable toward punitive damages, and the courts in that state would apply its law on the issue in all cases brought there. If class counsel are among those who often seek and obtain punitive damages, and yet are willing to give them up for all or most of their clients, that might suggest that the deal struck on punitive damages is not unreasonable.

For these reasons and perhaps others, there may be fewer real differences among class members regarding punitive damages than would appear to be the case at first blush. On the other hand, if there are real differences, and they are substantial, the courts should carefully scrutinize any settlement in which some class members with genuine claims for punitive damages give them up for the benefit of other members of the class.

[138] See supra text accompanying notes 63-64.

> whether, as a practical matter, the nonmonetary relief accorded in the settlement provides all or substantially all of the class members a realistic opportunity to obtain valuable relief.

This test would not rule out settlements such as the breast-implant and *Georgine* settlements, in which cash is available to class members when and if they suffer compensable harms.[139] Similarly, this test would be met in the heart-valve settlement, where all class members are entitled to modest monetary relief on an equal basis, and certain diagnostic and medical care are available to all class members whenever certain medical conditions arise.[140] And, even in the airline antitrust coupon case, where the court approved a coupon settlement which allowed class members to apply coupons to future air transportation with any of the major domestic airlines, the court would not have had to invalidate the settlement simply because the relief was nonmonetary. In that case, the coupons were likely to be useful to all class members, since to be a class member, one had to have flown three times through certain "hub" airports utilized by the defendants. Moreover, the redemption period was three to four years; the coupons could be applied to tickets costing as little as $50; the coupons could be used on discount flights; and the coupons could be handled by travel agents, all factors indicating that there was no serious impediment to use of coupons by class members. It was thus clear that, over the redemption period, virtually all the class members would have a realistic opportunity to use at least some, if not all, of their coupons.[141]

Neither the GM-truck settlement nor the Mustang-convertible settlement, however, would survive this test because a significant number of class members, indeed a majority of the class, would not be willing or able to purchase the product over the relevant redemption period, as the settling parties conceded in *General Motors*. On the other hand, a settlement that provides a combination of coupons and cash, or a coupon with some reasonable cash redemption value, might pass muster. In short, our proposed Rule requires the court to apply

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139 As noted earlier, even in those cases, the court must be vigilant in making sure that the settlement does not redefine the notion of compensable harm to eliminate viable claims of class members, as occurred for the pleural, loss-of-consortium, and many lung-cancer claimants in *Georgine*. See supra Part II.B.1, II.B.3.

140 Bowling v. Pfizer, Inc., 143 F.R.D. 141, 149 (S.D. Ohio 1992).

141 But see In Camera, supra note 64, at 485-90 (surveying many coupon settlements and maintaining that in-depth review of evidence in airline antitrust settlement demonstrated that settling parties had vastly overestimated likely redemption rates); cf. Anthony Faiola, In Settling with Airlines, There's No Free Ride—Coupons for Travelers, $16 Million for Lawyers, Wash. Post, Mar. 20, 1995, at A10 (describing view, including that of federal judge who approved settlement, that airline antitrust settlement provided large benefit to plaintiffs' lawyers and very little benefit to class members).

special scrutiny where the relief provided in the settlement is not the type of valuable, fungible relief provided when Rule 23(b)(3) cases are litigated to judgment.[142]

C. *Attorneys' Fees*

Before turning to the special problem of the attorneys' fees in billion-dollar cases, with large amounts payable to individual claimants (like the silicone-gel breast-implant case), we have two preliminary suggestions. There is much current debate about whether the lodestar or the percentage-of-the-fund approach, or some combination of the two, should be followed in damage class actions. In our view, the outcome of that debate as applied to the typical class action ought to have little or no bearing on resolving fees issues when there are huge settlements. Because of the hundreds of thousands of dollars at stake with every minute change in the percentage chosen, if a percentage-of-recovery calculation is made, it is essential that it be backed up by a lodestar determination to assure that class counsel's fee is not excessive. For instance, if the percentage approach translated to a $500 per hour rate for attorney time (which could properly be explained as a reasonable hourly rate, including a multiplier), such a fee might be entirely appropriate. But if that same calculation translated to $1500 per hour, a reduction in the percentage would be necessary.[143]

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[142] In a recently approved class settlement involving Mercedes-Benz cars alleged to have steering-column vibration problems, class members are given *freely transferable* coupons, ranging in value from $2400 to $5700, to be used over a four-year redemption period to reduce the purchase price of a new Mercedes or for use in making the down payment. Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1303 (D.N.J. 1995). The coupons may be used on top of any other Mercedes promotion, rebate, or incentive. Further, Mercedes must use every certificate for the benefit of customers, if not for class members, then for donation to charitable or educational institutions designated by plaintiffs' counsel, thus giving the defendant every incentive to encourage certificate use. And most significantly, after three years (i.e., one year before the coupon expires), every class member who has yet to use the certificate has the unqualified right to exchange the certificate for one-half of its face value *in cash*, simply by sending the certificate to the defendant with a request to cash it in. Notice of Pendency of Class Action, Proposed Settlement of Class Action and Settlement Hearing ¶ 14(a) (face value of certificates), ¶¶ 15-16 (redemption procedures), ¶ 17 (can be used over and above any promotion, rebate, etc.), ¶ 19 (redemption for cash), ¶ 20 (free transferability), ¶ 21 (use of all certificates for customers), Weiss v. Mercedes-Benz of N. Am., Inc., No. 93-96 (D.N.J. filed Jan. 17, 1995).

[143] A recent positive trend in the case law is to allow the district courts discretion, in common-fund cases, to use either a lodestar or percentage-of-the-fund approach, and using a lodestar as a cross-check or backup even where the court prefers the percentage method. See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295 (9th Cir. 1994) (district court did not abuse its discretion in using lodestar; fees awarded must be reasonable under circumstances); Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516-17 (6th Cir. 1993) (same); In re Domestic Air, 148 F.R.D. 297, 357 (N.D. Ga.

Second, we continue to be disturbed by class actions in which the attorneys' fees are paid separately and directly by the defendant, instead of out of the class settlement fund. These cases are often advertised as being better for the class, since "all of the money goes to the class, and the defendant, not the class, pays the attorneys' fees."[144] Anyone familiar with the most rudimentary principles of economics knows that that sounds better than it is because the money always comes out of the class, whether directly or indirectly. In those cases where the defendant makes the direct payment, it has made at least a mental calculation of the total amount to be paid and then simply allocated a portion to the class and the rest to the plaintiff's attorneys' fees.[145] But because of the separateness of the payments, it is at least arguable that the class members have no standing to object to the amount of fees since, if the court decides that the defendant has to pay less than the plaintiffs' lawyers seek, the defendant gets to keep the difference rather than having it go to the class. Although we are not convinced that standing is lacking, there is surely far less incentive for absent class members to fight excessive counsel fees where the defendant, not the class, saves the money when an excessive request is pared down. Similarly, the court has a reduced incentive to supervise fees, since the money saved will not revert to the class.

For all these reasons, the class action Rules should treat direct payments of fees from the defendant to the plaintiffs' lawyers as payments into the common fund. In addition, if the defendant does not

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1973) (awarding fees according to percentage-of-the-fund approach while using lodestar approach to verify reasonableness of award); General Motors Corp. v. Bloyed, No. 94-0777, 1996 WL 51180, at *12 (Tex. Feb. 6, 1996) (finding that trial court, on remand, should test $1500 hourly fee using lodestar approach).

144 As the Notice in the *Bronco II* case advertised: "This [fee] amount would be paid solely by Ford and would not reduce, directly or indirectly, any of the Settlement's benefits to Settlement Class members." Notice of Pendency of Class Action, Proposed Settlement and Hearing at 2, *Bronco II*, No. MDL-991 Section "G" (E.D. La.).

145 See Bloyed v. General Motors Corp., 881 S.W.2d 422, 435-36 (Tex. Ct. App. 1994) ("Any settlement represents a total value figure that one party is willing to pay to end the controversy. Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay, and as such, they have a direct effect on the net amount that will ultimately be paid to the litigants."), writ granted, 38 Tex. Sup. Ct. J. 275 (1995), aff'd, General Motors Corp. v. Bloyed, No. 94-0777, 1996 WL 51180 (Tex. Feb. 9, 1996); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 820 (3d Cir.) (rejecting class counsel's position that objectors did not have standing to challenge fee award on ground that defendant agreed to pay fee as "patently meritless," because the agreement "is, for practical purposes, a constructive common fund"), cert. denied, 116 S. Ct. 88 (1985); see also, e.g., Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 520 (1st Cir. 1991) (stating that where there is no common fund and fees are to be paid pursuant to "clear sailing" agreement district court should ordinarily exercise its equity jurisdiction and entertain application).

oppose a fee below a certain amount, any fee award "saved" by a successful challenge to the award, or a sua sponte court reduction, should go to the class and not the defendant.[146] For example, assume that, as in *Bronco II*, class counsel requested $4 million and the defendant did not oppose. If, as a result of class members' objections, the court reduced the total award to $1 million, then that amount would be paid by the defendant to class counsel, and $3 million would be paid by the defendant into the class fund for the benefit of the class. Similarly, if the defendant had argued in that situation that a proper award was $2 million, and the court nevertheless agreed with the objectors that $1 million was more appropriate, only $2 million would be paid to the class and the defendant would enjoy $1 million in "savings."

Turning to the fee issues in the large, complex cases, one difficult problem relates to fees for those who opt out or who settle or obtain a judgment after a case has been referred to the multidistrict panel, but before a class settlement has been reached. It is obvious that, in the silicone-gel breast-implant case, work of enormous value to all claimants was done by class counsel and the other members of the Steering Committee who, among other things, created a depository for documents and depositions and prepared countless pleadings and legal memoranda. The beneficiaries are not limited to members of the class, but include those who settled or won a verdict along the way, as well as those who chose to opt out of the settlement.

Under the MDL Rules, there appears to be some basis for making reasonable fee assessments against successful counsel in individual cases that are resolved while the MDL case is pending, with payment withheld by the defendant and made into the MDL coffers to be used for the common good.[147] However, that authority should be made explicit in the statute or Rules.

The problem becomes somewhat more complicated after the individual claimants have opted out of a certified class. On the same theory that applies to pending cases, the federal courts arguably possess the power to order attorneys who receive fees in federal cases to pay a reasonable amount into the common fund, but the power is less clear over plaintiffs who opt out and go into state court. In our view, since the benefits enjoyed by opt-out plaintiffs are derived from the work of the class counsel, the statute should make clear that those attorneys

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[146] This change would also resolve all doubts about the standing of class members to object to class counsel's fee requests.

[147] See In re Silicone Gel Breast Implant Prods. Liab. Litig., No. MDL-926 (N.D. Ala. July 23, 1993) (order no. 13).

(or their clients) may be assessed in some reasonable amount from the recoveries in their individual cases under a common-benefit rationale.

The final fee problem in cases like the breast-implant case is how to deal with fees for counsel who represent individual claimants. As noted earlier, there are three categories of plaintiffs' lawyers: those who did virtually no work on behalf of the class, those who did virtually no work on behalf of individuals but did substantial work on behalf of the class, and those who did substantial amounts of both individual and class work. To make matters more complicated, there are variations within each group based upon such factors as the number of clients that an individual may have had (some lawyers had fewer than a dozen, while other firms had several thousand); the time at which the clients were signed up in relation to the degree of certainty of settlement; and whether some of their clients who were within the class had no monetary recovery or recovered only relatively modest amounts, such as for the costs of medical monitoring or implant explantation. The problem is further complicated by the fact that, for counsel for future claimants, to the extent that fees are based on the amounts of the recovery, it may be years, if ever, before they earn any fees at all.[148]

As noted earlier, in the breast-implant case, Judge Pointer dealt with this issue in three ways.[149] First, he exercised the power, properly in our view, to supervise the fees for individual attorneys who represent members of the class and who are seeking fees for that work, rather than for common benefit work, even if they are seeking fees from the amount allocated to the client under the grid. The court in *Georgine*, on the other hand, did not, but should have, exercised authority over the fees in individual cases. Second, Judge Pointer set aside approximately twenty-four percent of the entire fund to be used for both claims administration and attorneys' fees.

Finally, he appointed an Advisory Committee to set up a plan and obtain information from attorneys with respect to fees. Assuming that the plan is set up so that there are reasonable attorneys'-fees guidelines, the problem is that the judge cannot possibly decide all of the attorneys'-fees matters even at this stage, leaving aside the obvious fact that he will not be sitting for the entire thirty-plus years of the settlement. The number of fee requests will be staggering and, equally important, unless the court acts to appoint someone, there will

148 Another complication is the issue of expenses, particularly, what can be charged individual clients out of their recovery, what can be charged to the common fund, and what the lawyer must absorb.

149 See supra Part II.B.2.

be nobody to present the other side when shady fee practices arise or excessive requests are made.

Thus, for lawyers seeking fees for work on individual claims, a mechanism needs to be devised to assure both the availability of an adjudicator, other than the class action judge, and a court-appointed institutional adversary who will oppose fee requests when necessary, with the savings reverting back to the class as a whole. To relieve the court of this ongoing burden, the court should have the power to appoint a special master to decide individual attorneys' fee claims, with review by the court on an abuse-of-discretion basis only. This person would review time and expense records and other relevant materials and arguments made by counsel concerning their fee requests. Forms should be developed to streamline the process, which would call for all pertinent information relating to fee requests.

To assist the special master, the court should also appoint a fund trustee who would, on an ongoing basis, review, comment on, and oppose individual fee requests, much the way the United States Trustees act pursuant to 11 U.S.C. § 330, to protect the interests of creditors and others in bankruptcies by their obligation to guard against excessive fees by persons performing services for the bankrupt party. This person's sole duty in the class action would be to protect the common fund for the benefit of claimants. The individual would not be bound to oppose all fee requests, but would review them and oppose those deemed excessive or improperly supported and thus a threat to the common fund.

With respect to fees sought by the Plaintiffs' Negotiating Committee and others on the Steering Committee for the creation and maintenance of the settlement fund, the court should also appoint counsel to represent the unrepresented. This person would not have an ongoing role as would the court-designated trustee on individual fee claims, but would nevertheless play an important function in seeing that class counsel's fees do not get out of hand.

CONCLUSION

Class actions are important devices for assuring compensation for victims of widespread wrongdoing and for deterring such conduct in the future. The new breed of class action—dealing with product-liability claims, and future as well as present claimants—raises a host of new problems in protecting the unrepresented class members. We believe that the suggestions made in this Article will improve the process and help assure that mass justice does not unjustly submerge the interests of some, for the benefit of others, without legitimate reasons for doing so.

APPENDIX A

The Use of Rule 23(b)(1) Class Actions Brought Principally To Resolve Damage Claims

As noted in the body of this Article, a relatively recent phenomenon that requires attention is the attempt by settling parties to use Rule 23(b)(1)—which does not provide class members the opportunity to opt out—to resolve mass-tort class actions. This attempt is made even though the complaint asserts claims principally or exclusively for money damages of the kind thought to come under Rule 23(b)(3) (if they are eligible for class treatment at all), which requires that class members be given the opportunity to opt out.[150]

In *In re A.H. Robins Co.*,[151] the district court certified for settlement purposes a class that had asserted claims against Aetna, the insurer of the tortfeasor, A.H. Robins, in part on the ground that Aetna was directly liable to the class as a co-conspirator with Robins in its campaign to hide the dangers of the Dalkon Shield intrauterine device from the class. Although Aetna did not, and could not, claim that it was a limited fund (i.e., that the claims against it, if realized, were greater than its assets), the district court certified the class under Rule 23(b)(1), without deciding whether the certification was under subdivision (A) or (B) of that Rule and, indeed, with little analysis of any kind.[152]

The Fourth Circuit affirmed the class certification, specifically relying on Rule 23(b)(1)(A),[153] which provides that class actions may be maintained where, in addition to satisfying the requirements of Rule 23(a),

> the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.[154]

To be sure, read literally, certification might be proper in virtually any case to avoid "inconsistent or varying adjudications." However, we doubt that awards of damages in differing amounts in different jurisdictions "establish incompatible standards of conduct" in the sense meant by the Rule's drafters. After all, the drafters took pains to note

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150 See Fed. R. Civ. P. 23(c)(2) (requiring notice and opportunity to opt out in cases certified under subsection (b)(3)).

151 No. 85-01307-R (E.D. Va. Apr. 12, 1988) (order granting class certification), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

152 Id.

153 Id. at 747.

154 Fed. R. Civ. P. 23(b)(1)(A).

their doubt that even Rule 23(b)(3)—which requires individual notice and opt-out rights—would permit class treatment for "mass disasters";[155] it is very unlikely that they would, at the same time, have allowed subsection (b)(3) to be swallowed up, and its protections eliminated, by subsection (b)(1)(A), at least in the settlement context.[156] On this score, the Rules Committee may want to revisit Rule 23(b)(1)(A) to reaffirm its narrow application to the types of litigation referred to in the 1966 Advisory Committee Notes (e.g., to preempt judgments in numerous actions to abate the same nuisance).[157] Other than this modest suggestion, we do not consider this Rule elsewhere in this Article.

In a few instances, class action settlements have sought to take advantage of Rule 23(b)(1)(B), which applies where

> the prosecution of separate actions . . . would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.[158]

The threshold question is whether this part of the Rule could ever apply where the defendant maintains that its liabilities, including its contingent liabilities from a mass tort, are greater than its assets. The contrary position is that the Rule was intended to apply to situations where the object of the litigation—a trust fund, insurance contract, or some other res—was the limited fund, and the only resort for a defendant whose coffers might not suffice to meet the demands of numerous individual tort claims is the shelter provided by the bankruptcy laws or perhaps the federal interpleader act, 28 U.S.C. § 1335.

Even more problematic is the issue raised by the pending asbestos Rule 23(b)(1)(B) class action, *Ahearn v. Fibreboard Corp.*,[159] a mass-tort action, like *Georgine*,[160] in which the settlement was agreed to and then filed in federal court. In *Ahearn*, the settling parties made two distinct but related arguments. First, they argued that the settlement proceeds themselves could constitute a limited fund under Rule

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155 Fed. R. Civ. P. Rule 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

156 See, e.g., In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987) (expansive view of Rule 23(b)(1) improper encroachment on Rule 23(b)(3)); McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975) (same).

157 Fed. R. Civ. P. Rule 23 advisory committee's note, 39 F.R.D. at 100.

158 Fed. R. Civ. P. 23(b)(1)(B).

159 162 F.R.D. 505 (E.D. Tex. 1995), appeal docketed, No. 95-40635 (5th Cir. Aug. 17, 1995).

160 157 F.R.D. 246 (E.D. Pa. 1994), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

23(b)(1)(B). Second, they maintained that, absent (b)(1)(B) certification, "the prosecution of separate actions" by individual class members against the defendant would "impair" the other class members' "ability to protect their interests" against the defendant, whose assets were concededly insufficient to pay all claims made by future asbestos claimants. In the settlement, the defendant put up less than five percent of its net worth, but the settling parties deemed this sufficient because of a parallel settlement between the defendant and its insurers that freed nearly $1.5 billion for future asbestos plaintiffs. The district court in *Ahearn* approved the settlement, noting that the terms of Rule 23(b)(1)(B) do not require a "limited fund," and basically adopting the settling parties' second argument that, without the settlement, the class members' interests in obtaining future compensation would be impaired.

In our view, the settlement itself cannot constitute a limited fund under Rule 23(b)(1)(B), lest *any* settlement be sufficient to invoke subsection (b)(1)(B) and override the other parts of the Rule. Nor do we believe that a defendant can invoke Rule 23(b)(1)(B) in the mass-tort context unless, at the very least, it is willing to put up a very considerable percentage, if not substantially all, of its assets (i.e., some sort of alternative to bankruptcy). Further, serious constitutional problems are posed by using Rule 23(b)(1)(B) as an end-run around the opt-out provisions of the Rule.[161] Although we do not treat this problem further in this Article, the Rules Committee should revisit Rule 23(b)(1)(B) to clarify its scope.

[161] See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-13 & n.3 (1985) (due process requires that absent class members be given notice and opportunity to opt out, at least in class actions seeking to bind known plaintiffs concerning claims wholly or predominately for money damages).

APPENDIX B

The Amount-in-Controversy and Case-or-Controversy Requirements

The complaint in *Georgine* asserted that the uninjured class members wanted medical monitoring, plus payments for emotional distress and for the risk that they might become ill in the future. However, as the settling parties conceded, the future class members did not actually want such relief, and the settlement provided no such relief but rather provided an alternative dispute resolution system for future asbestos personal injury claims. This discordance between the complaint and the settlement agreement raises two related problems.

First, the complaint asserted only state-law causes of action and invoked jurisdiction solely on the basis of diversity. However, it is difficult to maintain that each class representative and each absent class member pled, in good faith, claims for more than $50,000 in controversy as required for diversity jurisdiction under 28 U.S.C. § 1332, when, in fact, the plaintiffs sought no current monetary relief at all.[162] In our view, assuming that some uses of diversity jurisdiction are worth retaining, this problem should be resolved through an amendment to the diversity statute that would permit, in certain types of cases involving large numbers of plaintiffs asserting the same general injury, aggregation of claims to meet a particular threshold. For example, the statute might overrule *Zahn* for all cases in which at least 500 persons, including absent class members, assert good-faith claims of at least $10 million in total recovery (average claim, $20,000). Under this formulation, *Georgine* might well survive an amount-in-controversy challenge (quite apart from other legal obstacles to its

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[162] See Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (in class action based on diversity jurisdiction, in which certification is sought under Rule 23(b)(3), each named plaintiff and each absent class member must have more than $50,000 in controversy); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (to dismiss for failure to have requisite amount in controversy, it must appear to be "legal certainty" that good-faith claims are for less than jurisdictional amount).

The Fifth Circuit has held that *Zahn* was overruled by the Judicial Improvements Act of 1990, codified at 28 U.S.C. § 1367 (1994), which the court found to allow supplemental jurisdiction over unnamed plaintiffs who do not meet the $50,000 jurisdictional minimum. In re Abbott Lab., 51 F.3d 524 (5th Cir. 1995). We believe this decision is wrong in light of Congress' clearly expressed intent to the contrary, see H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6875. Although the great majority of courts that have addressed this question have adopted this view, see *Abbott Lab.*, 51 F.3d at 528 n.8 (listing cases), the Seventh Circuit has recently adopted the Fifth Circuit's position, albeit not in a class action. Stromberg Metal Works, Inc. v. Press Mechanical, Inc., No. 95-2760, 1996 WL 70273 (7th Cir. Feb. 20, 1996). Regardless of its merits, the *Abbott Laboratories* holding is inapposite in a case like *Georgine* where not even a single named plaintiff's claims met the amount-in-controversy requirement.

survival), since some relatively small number of "nonfutures" class members suffered from compensable illnesses at the time the complaint was filed. We see no policy justification for allowing thousands of individual $75,000 tort suits in the federal courts, while disallowing a class action that could resolve the same number of similar suits each worth $40,000. Nevertheless, under the current regime, the failure of the plaintiffs in *Georgine* to have a good-faith intention to seek any present recovery raises a serious and, in our view, fatal amount-in-controversy problem.[163]

A second, more difficult problem is the general question whether a case brought to resolve future "injuries," with no serious intention of litigating the claims asserted in the complaint, and no nexus between those claims and the future relief that might be afforded class members if they fall ill, is a justiciable "case" or "controversy" under Article III.[164] This problem might be overcome if, in fact, the class was afforded substantial present-day relief of the type sought in the complaint, assuming that such relief could plausibly be awarded under current law. In this manner, the court would be assured that the complaint was not merely a subterfuge for the imposition by court order of a private agreement where nothing was presently in dispute.[165]

This problem is more difficult than the § 1332 problem, not only because it cannot be fixed by Congress, but also because it underscores why "futures" class actions have a tendency to be unfair to the future-class members. Those class members, as explained in more detail in the body of the Article, may not know that they are members of

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[163] We acknowledge that, in other mass-tort cases, the courts have rejected amount-in-controversy challenges based on *Zahn*. See, e.g., In re A.H. Robins Co., 880 F.2d 709, 723-25 (4th Cir.) (declining to dismiss class action due to lack of "legal certainty" that plaintiffs failed to meet jurisdictional amount), cert. denied, 493 U.S. 959 (1989); Payton v. Abbott Lab., 83 F.R.D. 382, 395 (D. Mass. 1979) (same), vacated on other grounds, 100 F.R.D 336 (D. Mass. 1983). While we doubt that those decisions are true to *Zahn*—to which there appears to be considerable, and perhaps understandable, hostility—*Georgine* presents a different situation than those cases for two related reasons. First, there is no relationship between what the future plaintiffs requested in their complaint (e.g., medical monitoring and fear-based damages) and what they got (an alternative dispute resolution system to adjudicate unripe injury claims), thus drawing into serious question the good-faith nature of the allegations of the complaint. Second, as a factual matter, all the named "futures" plaintiffs who testified at deposition or trial specifically disavowed that they had any intention to seek damages at the time the complaint was filed, which also suggested that their claims of more than $50,000 in controversy were not genuine at the time they were made.

[164] U.S. Const. art. III. § 2; cf. National Super Spuds, Inc. v. New York Mercantile Exch., 660 F.2d 9, 17-18 & n.7 (2d Cir. 1981) (class action settlement may not release claims not asserted in complaint unless both claims in complaint and unpleaded claims are based on same facts).

[165] See Keene Corp. v. Fiorelli, 14 F.3d 726, 730-33 (2d Cir. 1993) (discussing Article III "case and controversy" requirement as necessitating adjudication of litigants' legal rights in actual controversy).

the class, cannot know whether they will become injured in the future, and thus can have no idea what their circumstances will be if they do become injured, all factors making it more likely that they will be shortchanged by the settlement terms and less likely that their opt-out rights will be meaningful. These indicia of unfairness that exist when the courts require class members to take action of one kind or another regarding their unripe claims, also run counter, not coincidentally in our view, to the constitutional policy against the adjudication of "'conjectural' or 'hypothetical'" cases.[166]

[166] Allen v. Wright, 468 U.S. 737, 750-52 (1984) (discussing constitutional component of standing doctrine as requiring "distinct and palpable" inquiry (quoting Los Angeles v. Lyons, 461 U.S 95, 101-02 (1983))).